TO EXAMINE THE IMPACT AND EFFECTIVENESS OF THE VOTING RIGHTS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

OCTOBER 18, 2005

Serial No. 109–70

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TO EXAMINE THE IMPACT AND EFFECTIVENESS OF THE VOTING RIGHTS ACT

TUESDAY, OCTOBER 18, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:30 p.m., in Room 2141, Rayburn House Office Building, the Honorable Steve Chabot (Chair of the Subcommittee) presiding.

Mr. CHABOT. The Committee will come to order.

We would like to thank everyone for being here today. This is the Subcommittee on the Constitution. I am Steve Chabot, the Chairman of the Committee. We are going to be having a series of hearings over the next 2 weeks. This is the first of eight and will be probably be followed up by additional hearings before this Committee on the Voting Rights Act after that.

This is the first of a series of hearings that the Subcommittee will hold examining the Voting Rights Act, also known as the VRA. It has been 25 years since Congress last extended the number of the temporary provisions of the VRA. Six provisions will expire in 2007, including sections 4, 5, 6, 7, 8 and 203.

These hearings will examine the impact of the Voting Rights Act over the last several decades and its continued role in protecting minority voting rights.

I would also like to add that as Chairman, I will make sure that these hearings are as thorough and as exhaustive as they have been in the past. I make that commitment because there is no right more fundamental than the right to participate in our democratic form of Government.

The ability of our citizens to cast a ballot for their preferred candidate ensures that every voice is heard, most importantly, the right to vote safeguards our freedoms and all other rights enshrined in the Constitution. The sacredness of the right to vote is reflected in the protection afforded by the 15th amendment which States "the right of citizens of the United States to vote shall not be denied or or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

For too many of our fellow citizens in our history, this has not always been the case. Our country has had a troubled history of invidious and disparate treatment in the most fundamental process of a democracy, namely voting.

The VRA pushed back against this history and challenged racial discrimination from a number of different angles. These hearings

have taken on even greater importance in light of the impact that past proceedings of have had on judicial review of the Voting Rights Act. Beginning with the Supreme Court's decision in *South Carolina v. Katzenbach* in 1966, *Oregon v. Mitchell* in 1970, and later in the *City of Rome v. the United States* in the 1980's, the Supreme Court has consistently upheld the constitutionality of the Voting Rights Act based on the record established by Congress.

Acknowledging the broad power of Congress to remedy racial discrimination under section 2 of the 15th amendment and the appropriateness of the Voting Rights Act in remedying that discrimination, the Supreme Court in *Katzenbach* held that "as against the reserve power of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination." This was clearly a legitimate response to the problem for which there is ample precedent under other constitutional provisions.

In the *Oregon* case, the Supreme Court held that "in enacting the literacy ban, Congress had before it a long history of the discriminatory use of literacy tests to disenfranchise voters on account of race and statistics which demonstrate that voter registration and voter participation are consistently greater in States without literacy tests."

Finally in the City of Rome case, the Supreme Court upheld the continued use of the Voting Rights Act's temporary provisions finding that "in considering the 1975 extension, Congress gave careful consideration to the propriety of readopting section 5's preclearance requirement."

The VRA has become one of the most visible symbols of our Nation's progress toward becoming an integrated democracy. Its success is reflected in record numbers of African Americans, Asian American, Hispanics, Native Americans and Native Alaskans registering and turning out to vote and in the diversity of our local, State and Federal governments. In his March 15, 1965 address to Congress, President Lyndon B. Johnson stated "the Constitution says that no person shall be kept from voting because of his race or color. We have all sworn an oath before God to support and defend the Constitution. We must now act in obedience to that oath."

We, as elected officials, must continue to uphold that duty and ensure that the protections guaranteed in the Constitution are afforded to all citizens.

We look forward to hearing from our distinguished panel this afternoon.

And before I yield to the gentleman from New York, we generally would have all the witnesses testify and then we would question them. We are going to go a little bit outside that today because one of our distinguished panel, former Secretary Kemp has a plane to catch a little later and Mayor Morial is also still en route. So we are going to try to accommodate both of those gentlemen. And at this time, I will yield to Mr. Nadler for the purpose of making an opening statement.

Mr. NADLER. Thank you, Mr. Chairman. Mr. Chairman I want to welcome our distinguished panel of witnesses and also thank you and Chairman Sensenbrenner for beginning the process of reauthorizing the Voting Rights Act. Although the sections requiring re-

authorization do not sunset until 2007, it is not too early to begin consideration.

The right to vote, the right to have a meaningful vote is fundamental to our system of Government and to our freedoms. Sadly, for much of this Nation's history that principle was honored in the breach. Indeed, much of the history of our country can be seen as successive efforts to extend to all Americans the promise of the principles on which our Nation was founded and we did not really begin to approach that until the Voting Rights Act was passed in 1965 and began to be implemented a year or so later.

In that long march to freedom, the Voting Rights Act has played a central role. No one can deny that the act and its amendments has been instrumental in protecting and expanding the right to vote. As we consider reauthorization, we will need to examine not whether the act is still needed, but what, if any, modifications might be appropriate.

That is why these hearings are so important.

The Supreme Court has made clear that Congress, in enacting legislation, needs to make a clear record supporting its actions.

I must add at this point, since the Supreme Court has constituted itself and these questions a super legislature especially when it comes to protecting individual rights against the actions of the States. We have all been elected to public office and so we are all intimately familiar with the workings of the electoral process. I represent parts of two counties covered by section 5's preclearance requirements, Manhattan and Brooklyn; that is, New York and Kings Counties. Our city is also home to main language minorities who also need the protections of the act. As the home to many new Americans, our board of elections must work with multiple language minorities who need assistance to be able to exercise their right to vote.

My experience has shown that the act is still needed and that to the extent that the right to vote is safer now than it was 40 years ago, it is because the act is on the books and is working. I look forward to hearing from those who have been on the front lines from around the country to hear their stories and their analyses of the Nation's current needs.

The Voting Rights Act is not simply a benefit to the disenfranchised, although they are its primary beneficiaries, but to all of society. We are all better off when every citizen has the real right to participate freely in the democratic process. As we try allegedly to bring democracy to Iraq, I hope we can all work together to ensure that our precious liberty is protected and enhanced at home. I thank you, Mr. Chairman. I look forward to the testimony of our witnesses. I yield back.

Mr. CHABOT. Thank you very much and all Members will have the opportunity to offer an opening statement if they chose to do so, but we will wait until we have heard from Secretary Kemp. And it is the practice of this Committee, Secretary Kemp, to swear all the witnesses. So if you wouldn't mind rising. We will wait for the mayor to come for you all to be sworn in as well.

And if you would please right your right hand.

[Witness sworn.]

Mr. CHABOT. Witness notes in the affirmative. And we welcome you here this afternoon. And you will be our first witness. And if I could give you a very brief introduction. Secretary Kemp has had a very distinguished career, first as a professional athlete; later as a Member of Congress, and also member of the cabinet; and now in the private sector where he currently serves on a number of Boards and lectures extensively on economic growth, free markets, free trade and tax simplification. From 1993 through 2004, Secretary Kemp served as co-director of the public policy institute, Empower America.

Prior to his work in the private sector, Secretary Kemp served in both the executive and legislative branches of Government. From 1971 until 1989, he represented the Buffalo and Western New York district in the House of Representatives. Subsequently, he was Secretary under President, former President Bush, as Secretary for Housing and Urban Development. That was from 1989 to 1993. In 1996, he was nominated to be the Republican Party's candidate for vice-president of the United States.

Secretary Kemp also finds time to time on various charities and boards, including serving as the vice chair of the NFL charities. Secretary Kemp, we are very honored to have you here today and your recognized for 5 minutes.

STATEMENT OF THE HONORABLE JACK KEMP, FORMER MEMBER OF CONGRESS, FORMER SECRETARY OF HOUSING AND URBAN DEVELOPMENT, FOUNDER AND CHAIRMAN OF KEMP PARTNERS

Mr. KEMP. Thank you, Mr. Chairman, Ranking Member, to all my old friends and colleagues, it is a pleasure to be back. I want to start where I finished my testimony. You all have a copy of it.

I said if we are to be American, America, that is, to be that shining city on the hill as an example to the world of liberal democracy and equality of opportunity, let us start by recommitting ourselves to forging bipartisan solutions to the Nation's continuing civil rights challenges and problems, including this which we are talking about today, reauthorizing the special provisions of the Voting Rights Act. I want to be on the side of history, I wasn't there, Jerry, if you don't mind me saying that, on the front lines of the civil rights movement. I was playing professional football. But I am here today to testify on behalf of this important legislation and those sections which guarantee social justice and equality of opportunity.

Let me say, it is a particular pleasure to be with Ann Marie Tallman, the President and General Counsel of the Mexican American Legal Defense and Education Fund, my old friend Joe Rogers, former Lieutenant Governor of Colorado, and, of course, Marc Morial, the new Chair and President of the Urban League, with whom I have been working on a Committee of Dennis Hastert, Speaker Hastert's called Saving America's Cities with Richard Daley, Anthony Williams, Marc Morial among others.

The most fundamental right, as you said, Mr. Chairman, of our democratic system of Government, is the right of people to participate in the political process. As you mentioned, the 15th amendment ensures the right of every American citizen, regardless of

race, color or previous condition of servitude as it was enumerated in the 15th amendment, to vote and participate in the electoral process.

As we have seen in previous elections, some local governments have actively, and in some cases, very aggressively, attempted to disenfranchise African American and people of color and other minority voters. To quote Chairman Sensenbrenner," while we have made progress and curtailed injustices, thanks to the Voting Rights Act, our work is not yet complete. "We cannot let," he said, "the discriminatory practices of the past resurface to threaten future gains. The Voting Rights Act must exist" and exist, and I agree with his statement, Mr. Chairman, "in its current form."

Of all the civil rights legislation that the Nation has enacted over the past 4 decades, the Voting Rights Act of 1965 is arguably the most important, other than maybe the Emancipation Proclamation. Yes, every major piece of civil rights legislation has helped eliminate injustices such as discrimination in education, employment, and what I faced at HUD in housing.

As Chief Justice Roberts recently said in his testimony before the Senate Judiciary Committee last month, the right to vote is fundamental because it is protective of every other right we have as citizens.

That is why, in my opinion, Mr. Chairman, it is important that the Congress renew all three provisions that are set to expire as mentioned by Congressman Nadler: Section 5, which requires Federal preapproval for proposed changes in voting and election procedures in areas with a history of discrimination, section 203 which requires some jurisdictions to provide assistance in other languages to voters who are not literate or fluent in English and the portion of section 6 and 9 of the act which authorized the Federal Government to send Federal election examiners and observers to certain jurisdictions covered by section 5, where there is evidence of attempts to intimidate people of color and other minority voters.

In my opinion, Mr. Chair, if section 5 is not extended, I am pleased to be here with Wade Henderson of the Leadership Council on Civil Rights, an old friend of mine from my congressional days and days at HUD, Wade has been a champion of making sure that this is done in a bipartisan basis. And he and his staff have made it very clear to me that if section 5 is not extended, if covered jurisdictions will not have to submit their voting changes to the Department of Justice, thereby the loss of Federal authority to control voting procedures could enable local governments to easily discriminate against minorities voters.

For example, some areas have challenged minority black districts which changed elected positions to appointed and then transformed district elections to at-large elections. These measures are proven to weaken, in my opinion, the strength of minorities and are the main cause for our joint concern.

Just close with this thought, Mr. Chairman, it was a Republican President, U.S. Grant, who sent Federal troops to enforce the Voting Rights Act of the 15th amendment in the early years of his Administration. It was President Eisenhower who sent Federal troops to enforce educational opportunity, *Brown v. School Board,* and I believe Lyndon Johnson deserved tremendous credit for his—not

only his putting Voting Rights Act up in 1965, but to those Americans who did stand on the front lines, walked across Edmund Pettis Bridge, suffered dogs biting at them, snarling dogs, billyclubs and the violence that occurred over the Edmund Pettis Bridge on that first March led by our dear friend John Lewis.

So renewing the Voting Rights Act is a way for us to renew our vows, to make what you said is America's promise, that every American will have confidence that his or her vote not only can occur, but actually counts. Thank you.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Kemp follows:]

PREPARED STATEMENT OF THE HONORABLE JACK KEMP

Just forty years ago, on a bridge outside Selma, Alabama, civil rights leaders and activists, led by Hosea Williams of SCLC, Reverend Fred Shuttlesworth, Ruby Sales and others, took to the streets in a peaceful protest for Voting Rights for African Americans. As they crossed the Edmund Pettus Bridge on the way to Montgomery, they were met with clubs, snarling dogs and violence. They were beaten and many severely injured, including a young SNCC activist named John Lewis, now Congressman Lewis of Atlanta, GA. But the activists did not march in vain.

Five days later, President Johnson announced to a joint session of Congress that he would bring them an effective voting rights bill. Echoing the spiritual anthem of the civil rights movement, Johnson told the chamber that "We Shall Overcome." A few months later, working with a bi-partisan group of members of Congress, Johnson made good on his promise and on August 6, 1965 signed into law the Voting Rights Act, hailed by many as perhaps the most effective and important civil rights law ever enacted since the Emancipation Proclamation.

The most fundamental right of our democratic system of government is the right of citizens to participate in the political process. The Fifteenth amendment ensures the right of every American citizen, regardless of race, color, or "previous condition of servitude" to vote and participate in the electoral process. However, as we have seen in previous elections, some local governments have actively and in some cases aggressively attempted to disenfranchise African American and minority voters.

To quote Chairman Sensenbrenner, "while we have made progress and curtailed injustices thanks to the Voting Rights Act, our work is not complete. We cannot let discriminatory practices of the past resurface to threaten future gains. The Voting Rights Act must exist—and exist in its current form."

This year, all who care about social justice and equal opportunity in America share one over riding goal: that Congress needs to renew the provisions of the Voting Rights Act which are coming up for reauthorization next year and which ensure that our nation's government reflects the views, the values, and, most importantly, the votes of the people it serves.

Of all the civil rights legislation that the nation has enacted over the past four decades, the Voting Rights Act of 1965 is arguably the most important. Yes, every major piece of civil rights legislation has helped to eliminate injustices such as discrimination in education, employment, and housing. But it is the Voting Rights Act that empowers Americans to take action against injustices by electing those who pledge to eliminate it and removing those who perpetuate it. As Chief Justice Roberts said in his testimony before the Senate Judiciary Committee last month, the right to vote is fundamental, because it is protective of every other right we have as citizens.

African Americans in the South were prevented from voting by a battery of tactics—poll taxes, literacy tests that were for blacks only, and the crudest forms of intimidation. From the Southwest to some urban areas in the Northeast and Midwest, Latinos were discouraged from voting by subtler but also effective techniques that exploited the vulnerabilities of low-income newcomers, for whom English was a second language. Both groups were also the targets of districting designed to dilute their ability to elect officials of their own choosing—a fundamental freedom that all too many Americans take for granted.

That is why it is so important that the Congress renew all three provisions that are set to expire: Section 5, which requires a federal approval for proposed changes in voting or election procedures in areas with a history of discrimination; Section 203, which requires some jurisdictions to provide assistance in other languages to voters who are not literate or fluent in English; and the portions of Sections 6–9

of the Act which authorize the federal government to send federal election examiners and observers to certain jurisdictions covered by Section 5, where there is evidence of attempts to intimidate minority voters at the polls.

The Voting Rights Act was reauthorized in 1970 and 1975. In both of these reauthorizations Congress heard extensive testimony concerning the ways in which voting electorates were manipulated through gerrymandering, annexations, adoption of at-large elections and other structural changes to prevent newly-registered black voters from effectively using the ballot. Congress also heard extensive testimony about voting discrimination that had been suffered by Hispanic, Asian and Native American citizens and the 1975 amendments added protections from voting discrimination for minority-language citizens.

In 1982, in an effort shepherded by Chairman Sensenbrenner, the act was amended and section 5 was reauthorized through 2007. Congress also adopted a new standard, which went into effect in 1985, providing how jurisdictions could terminate (or "bail out" from) coverage under the special provisions of Section 4. Furthermore, after extensive hearings, Congress decided that Section 2 should be amended to prohibit vote dilution without a requirement of proof of discriminatory purpose.

If Section 5 is not extended, the covered jurisdictions will not have to submit voting changes to the Department of Justice. Thereby, the loss of federal authority to control voting procedures could enable local governments to more easily discriminate against minority voters. For example, some areas challenge majority-black districts, change elected positions to appointive and transform district elections to at-large elections. These measures have proven to weaken the strength of minorities and are the main cause for concern.

Even now, forty years after the Voting Rights Act was passed by Congress, there are communities across the country where these provisions are still necessary. For example, the Department of Justice recently objected to a proposed annexation by the Town of North in Orangeburg County, South Carolina, because they concluded that the town did not provide equal access to the annexation process for white and black persons. In its September 16, 2003, objection letter, the Department stated that "race appears to be an overriding factor in how the town responds to annexation requests."

In August 2002, DOJ objected to a proposal by the City of Freeport in Brazoria County, Texas, to return to using an at-large system of electing members to its city council, after Hispanic voters succeeded in electing their candidates of choice utilizing a court-ordered single member district system. A return to at-large council elections, DOJ concluded, "would result in a retrogression of the ability of minorities to exercise the electoral franchise that they enjoy currently."

And despite requirements under Section 203 of the Voting Rights Act, no bilingual assistance was made available to Vietnamese voters in Harris County, Texas, until the Department of Justice and local activists intervened.

Renew the Voting Rights Act and these problems won't disappear. But more Americans will have confidence that their votes really do count.

If we are to be that "shining city on a hill," as an example of liberal democracy and equality of opportunity let us start by recommitting ourselves to forging bipartisan solutions to the nation's continuing civil rights problems—including reauthorizing the special provisions of the Voting Rights Act. Let's carry on the historically important work that remains to become a "more perfect union" with equal justice and a government of, by and for the people.

Mr. KEMP. That may be the first time I have ever been on time in my congressional career.

Mr. CHABOT. We are impressed. And normally we would take the testimony here, but again we are going to question Mr. Secretary at this time. And I recognize for myself for 5 minutes for that purpose. Secretary Kemp, what has been the direct and indirect impact of the Voting Rights Act on minority voting rights over the last 40 years, both in covered jurisdictions and in noncovered jurisdictions in your opinion?

Mr. KEMP. Well, I am sure that Marc Morial and Ann Marie Tallman, and of course, my old friend Joe Rogers can better address that issue. But for instance, the town of North in Orangeburg County, South Carolina, concluded that the town did not provide equal access to the annexation process for both white and black voters. So in September 16th, 2003, in an objection letter, the De-

partment of Justice had to state that race has appeared to be an overriding factor in how the town was responding to annexation requests.

There are instances where section 5 would be applicable to problems and challenges like that. So in my opinion, that speaks volumes to the necessity—I am not blaming everything on Orangeburg, South Carolina, or picking on the south.

There are many places in the North where there are problems, or in the West.

So in my opinion, unless we can come up with a better way of doing it, I think section 5 should be extended.

Mr. CHABOT. Thank you. Now some individuals have suggested that the Voting Rights Act has outlived its usefulness. And is it—we have only seen it for 40 years thus far, and obviously there were hundreds of years of discrimination that has taken place in this country.

What is your view relative to those that do—their point of view is, that as it has outlived its usefulness, it clearly served a useful purpose during that time, people have voted in fairly significant numbers that weren't voting before, it shouldn't be reauthorized. What is your opinion relative to that?

Mr. KEMP. Well, I think the testimony you will hear today will strongly object to that predisposition, number one.

Number 2, I would suggest—and again, I will mention the South and there has been tremendous progress. And I know there are States and cities and areas of the country that are as bad as some of the problems that occurred. But I would ask them to go with John Lewis and the Republican co-chair of the annual pilgrimage to Selma, Alabama and Montgomery and Birmingham, and find out from the people who were on the front lines what it was like then 40 years ago and what it is like today, and without prejudging anyone or anybody's motives, I can't imagine us saying that 40 years is enough, we have created nirvana, at least democratically speaking, and we don't need it. I think we do need it.

I am glad that Joe Rogers, a Republican, and Jack Kemp, a Republican, are here with distinguished men and women of color and minority status to say, emphatically and emotionally, actually, that all of my background, all of my life has been but a preparation for coming before this Committee and suggesting we have got to right these wrongs and make sure that this democracy truly can provide an example to the Middle East, to Africa, to Latin America, to Asia and the rest of the world. So, I think this is a wonderful attempt to, if it need be, modify it, tweak it, but don't ever lose this Voting Rights Act and its importance to the American people.

Mr. CHABOT. Thank you very much, and in the interests of time constraints here, I am going to yield back the balance of my time recognize the gentleman from New York for 5 minutes.

Mr. NADLER. Thank you. Mr. Secretary, a couple questions. Number one, it has been observed that the United States is pretty unique among democratic countries—or many of our States pretty unique among democratic countries—restrict some of them for life the right to vote for former felons, and that this is a greatly racially disparate impact and, in fact, large segments in some areas of the black population and some other populations are denied the

franchise. Do you think that the Federal Government, through modification of the Voting Rights Act, should control this or view this as a improper restriction of the franchise and should clamp down on it?

Mr. KEMP. My answer is unambiguously yes. It is a restriction. It needs to be modified. My wife is on the Board of Prison Fellowship, has been on there for 15 years. This weekend we are going to a retreat with prison fellowship Democrats, Republicans, black, white, brown. There are many people behind bars who have been incarcerated who have served their time and——

Mr. NADLER. They are not behind bars anymore.

Mr. KEMP. Should, I think, be given a chance to vote in our democratic process. Obviously, there have to be restrictions, but this panel has been convened for that exact purpose to find out what are the modifications that could be made that would bring social justice to the justice system. So I would say yes. They should be able to vote under proper restrictions.

Mr. NADLER. I certainly agree with you. Some of our States, New York, for instance says that if you're sentenced to 5 to 10 years, you are released 6 years, you are on probation for 4, when the total sentence is over then you get your vote back.

Some States bar you from voting for life.

Mr. KEMP. Yes, life.

Mr. NADLER. I agree with you. I think that is wholly undemocratic and we ought to deal with that in this bill.

My second question is, the preclearance provisions of section 5, they extend to jurisdictions mostly but not entirely in the South. Well, I am told you have to catch a plane right now, so I will ask somebody else the question.

Mr. KEMP. There are jurisdictions I think outside of the South.

Mr. NADLER. Yes, outside the South. My own district, Manhattan and Brooklyn. The question I wanted to say is where it is based on a history prior to 1965 of either actively restricting the right to vote or a combination of illiteracy tests—of having literacy tests, and under 50 percent of eligibles being enrolled at that time and therefore the presumption that you were using a literacy test.

Now, do you think that we are to look at either restricting where the act is applied or perhaps broadening it, should a test be more modern than 40 years old? Are there perhaps districts that ought to be subject to preclearance today that aren't?

Mr. KEMP. If you're asking me, my answer would be, Congressman, that would be one of the purposes of these hearings, to find out whether it should be ubiquitous, should it be part of the whole country? Or should it be restricted to those——

Mr. NADLER. That has been suggested. But the objection to that is it would so dilute the effect of the Justice Department oversight that it wouldn't be effective.

Mr. KEMP. Yes. Well, when I went to the Civil Rights museum in Selma, Alabama there is a display of what type of questions Alabamans were asked prior to the Voting Rights Act. How many bubbles in a bar of soap? I mean, things were used, and are still being used to a certain degree, in other jurisdictions.

Mr. NADLER. I am sure we still need this. My question is, should we look at perhaps modifying where it is to add or subtract that, and if so, on what basis?

Mr. KEMP. That is up to the wisdom of some other Committee. I don't have the answer to that. It may be that it should be more broadly applied.

Mr. NADLER. It may be. My next question I will ask Ms. Tallman. There was an article in the *New Republic* a couple weeks ago, I forget by whom, in which they said essentially—I just want your reaction to the essential recommendation of that article—and that article said that the preclearance as a practical matter, because in the areas where you need preclearance—even moving a voting booth across the Street has to be precleared.

As a practical matter, the only act when they say—they get a list of 600 voting booths being moved, and they send it to out to the local civil rights organizations and they say any problem? And they only really look into it if someone says, yeah, there is a problem. Otherwise it is trivial and they only give automatic exemption. I don't know whether that is true. But my question is, would it be a good idea or a bad idea to say that if preclearances, should have automatic preclearance except where someone making a complaint, that everything that is changed should be sent out to everybody, and if the Justice Department—if anybody says, hey, wait a minute, there may be a problem, then you should have a preclearance requirement, otherwise, after a certain period of time, it should go into effect automatically so as to remove trivia from the burden here, so they can concentrate on real abuses.

What do you think of that suggestion?

Mr. CHABOT. The gentleman's time has expired, but you can answer.

Ms. TALLMAN. Actually, the polling place changes is pretty significant—can be very significant to voters that have been voting for 40 years in the same location. So what appears on its face—potentially on its face—to be perceived as a small change and ought to have automatic preclearance, would actually defeat the purpose of section 5.

Section 5 requires that jurisdiction——

Mr. NADLER. You have to understand my question. Could I have an additional minute?

Mr. CHABOT. Yes, the Chair, however, would encourage the Members to direct the questions to Mr. Kemp because those folks haven't——

Mr. NADLER. I fully recognize that these can be extremely—a voting booth change can be extremely important or it can be trivial, either one. I mean the question is since many of these things can be trivial, and since you want the Justice Department to spend its resources where they are not, where there is a possibility, does it make sense not to have automatic clearance, that wasn't the suggestion. The suggestion was that if no one either *sua sponte* the Justice Department by itself or somebody, some civil rights organization says that one we ought to look at, that that would go through, or is that a bad idea for some reason?

Ms. TALLMAN. A section 5 jurisdiction has had a history of discrimination. A section 5 jurisdiction has not used the bailout provi-

sion under the Voting Rights Act. A section 5 jurisdiction is a jurisdiction who ought to be scrutinized with regard to any changes in voting patterns or practices. So I would argue that section 5 is pretty clear.

Mr. NADLER. That is a bad idea. I appreciate that. Thank you very much.

Mr. CHABOT. The gentleman's time has expired. Gentleman from Michigan is recognized for a short period of time to make a statement.

Mr. CONYERS. Thank you, Mr. Chairman. I couldn't let this opportunity to go by. Here we are at this historic hearing, beginning again to re-examine the importance of extending the Voting Rights Act and improving it where necessary. And our first witness is the former Member of Congress from New York, Jack Kemp, with whom I may be the only one here that has served with him during his period in the Congress. And I am very proud of the statement that he has made today.

As usual, he is leading Republicans and Americans alike to join in with us at this extremely auspicious beginning of a series of hearings of how we continue moving America forward on its most important document, the provision for voting, for everybody, to have it counted, and to have it be encouraged.

Mr. KEMP. Thank you.

Mr. CONYERS. It is good to see you again, Secretary Kemp, and I am glad that you started us off in the way that you have.

Mr. KEMP. Thank you.

Mr. CHABOT. Thank you. The gentleman's time has expired. The gentleman from Arizona, Mr. Franks, is recognized for 5 minutes. And again, we would encourage for the Members on both sides to direct questions to Secretary Kemp.

Mr. FRANKS. Thank you, Mr. Chairman, and thank you Mr. Secretary, for being here. A lot of us feel like we are standing on your shoulders. That is not to suggest that you're old or anything like that.

Mr. KEMP. 70.

Mr. FRANKS. We should all like to carry 70 as well as you do, sir.

Mr. KEMP. Thank you.

Mr. FRANKS. Mr. Secretary, 40 years ago, some of the barriers that prevented minorities from participating in the political process were things like literacy tests and white primaries and poll taxes, and I know some of the things have changed to some degree, but what do you think are the primary and most egregious mechanisms that prevent minorities from actually participating today?

Mr. KEMP. Well, one thing that I wanted to mention after the support that I have alluded to for section 5 is section 203, which requires jurisdictions to provide assistance in other languages to voters who are not literate or fluent in English. Let's face it, you can go to Los Angeles County where I grew up and there is probably 60 to 75 different languages spoken from Vietnamese to Korean to Chinese to Russian to Persian, and clearly, people do not need Federal assistance if the jurisdiction is not providing them with access to voting lists and the information that they deserve as American citizens.

Probably very controversial because you know we are somewhat xenophobic about people from outside our borders. It is too bad because there are a lot of people that need help. And I think it should be given. That is one of the biggest barriers to making this democratic experiment work—for all people, that is.

Mr. FRANKS. I think it goes without saying that a lot of people who are citizens of this country still have not mastered the language in every way so you make a good point.

Secretary Kemp, you wrote an opinion, an op ed piece that was published last August. And it recognized the 40th anniversary of the Voting Rights Act and you described the impact that it has had in those 40 years. And of course, you advocated for the renewal of the act.

And what could we do to improve or make better the act for the next 25 years if you were writing it yourself?

Mr. KEMP. Oh, wow, I am no longer a legislator.

I appreciate my friend John Conyers's comments about the friendship that we developed many years ago, even though we differed on some issues, he was the one that came to me and said, Jack, Dr. King's "I Have a Dream" speech is right down your alley and Dan Lungren and Jack Kemp were basically the cosponsors in the Republican party of the King holiday. I felt very proud about that, John, then, and I do so today.

I think really think the hearings, Congressmen, are going to bring out areas that could be changed or reformed or modified or made progress on.

I think—I personally believe that someone who has been incarcerated—and let's face it, that does impact people of color a lot more than anyone else, unfortunately and tragically. I think they should be allowed to vote if they perform and meet the standards that we would hold them to as New York does, as Jerry Nadler pointed out.

My hope would be that that would be an area that could be improved upon. Perhaps section 5 can be improved upon by a careful—I use the word tweaking, reforming, and I will leave it to my expert friend Marc Morial and Ann Marie Tallman and Joe Rogers to take it further.

I would also suggest that you listen to Wade Henderson and his leadership conference because I think Wade, probably as far as I am concerned, is the expert. I hope I am not putting too much pressure on him. But he understands the need for bipartisanship and that was—I think, John, that is what we really need today more than anything else. This may be a place where we can rise above color and race and ethnicity and political divisions in our country and make a statement that would bring hope to the American people that we can work together for the greater good.

Mr. FRANKS. Well, Mr. Secretary, you were one of the few former Members that were here the last time this was reenacted, and I think this says a great deal for your commitment to human freedom and the American ideal, and I appreciate all that you have done.

Mr. KEMP. I like what the Chairman said, and I like what Chairman Sensenbrenner said to the NAACP convention a few weeks

ago. It was really a powerful statement. If it's all right with you, Mr. Chairman, I have to catch a plane. I apologize.

Mr. CHABOT. Do any other Members have a very quick question they would like to ask? Are you okay?

Quick question for Secretary Kemp? Anybody on this side that has something pressing?

Yes, Mr. Scott. If you could make it relatively quick.

Mr. SCOTT. This will be fairly quick, and thank you, Mr. Secretary and thank you Mr. Chairman.

One of the problems with eliminating the preclearance provision is people get an advantage by cheating because by the time you remedy it, you have had the opportunity to serve, and if you ever remedied it, you would be running as an incumbent. Now you have run for public office as an incumbent and against incumbents.

What are the advantages in running as an incumbent?

Mr. KEMP. That is a good question.

To be brutally honest, Congressman Scott, I never even thought about it when I was running. I didn't. It really impacted me emotionally and intellectually when I went to HUD and began to see the problems of urban America from a firsthand existential experience. And then the trip I took with John Lewis down to Selma, Montgomery and Birmingham for the first time several years ago on the civil rights pilgrimage. And I remember vowing at that time I was going to be a voice for some who are voiceless. And so I don't have a great answer to your question.

Mr. SCOTT. My question, though, is just the politics of running for election. It is a lot easier to run if you're the incumbent.

Mr. KEMP. Absolutely.

Mr. SCOTT. Could you say a little bit about that? Because we are trying to establish a record. If you run as an incumbent, you have an advantage.

Mr. KEMP. Mmh hmm.

Mr. SCOTT. And if you have cheated and jury-rigged the election in a discriminatory fashion and got elected and then they finally fixed it, and after they fixed it, you get to run for re-election as an incumbent, an advantage you should have not have been able to get. And if there was preclearance, you never would have gotten. And just to set the record straight, we don't want people to have the advantage not only of serving illegally, but when we finally fix it, if the plaintiffs can afford the lawsuit to get it right, we don't want people who have cheated to benefit from their cheating by having the advantage of running then subsequentlyas an incumbent. So can you say a word about whether or not there are advantages in running as an incumbent?

Mr. KEMP. I totally agree with your statement. I was in the Congress from New York's 41st district. It ended up New York's 36th district after lost population. And I was redistricted several times, mostly by Democratic legislatures.

And, frankly, they just decided they weren't going to beat me so they gave me a very Republican district. I started out in a Democratic district. And I must admit I did everything I could to make sure I could run again. But I do understand what you're saying. I agree with it unambiguously, and I applaud your concern for that issue of the advantage incumbency gets. But every one of us knows

deep in our hearts that we love the advantage. We love the advantage.

We use it to every benefit of our own, but I agree with your statement and I appreciate it.

I am going to jump, Mr. Chairman, if you don't have any questions.

Mr. CHABOT. One more minute. Mr. Feeney. I thought you had a question.

Mr. FEENEY. Well, I don't, but the Secretary is a good friend, and we are very grateful for your presence here. We want to make sure you catch your plane.

Mr. KEMP. Thank you. I appreciate that.

Mr. CHABOT. Thank you very much, Secretary Kemp, we appreciate your time here this afternoon. And I would like to at this time introduce the rest of the panel.

Our next witness will be the very honorable Marc H. Morial, current President and CEO of the National Urban League. Prior to joining the National Urban League in May 2003, Mr. Morial served from 1994 until 2002 as Mayor of New Orleans.

He also served as President of the U.S. Conference of Mayors, where he developed and advocated a national urban policy, his area of expertise.

Mayor Morial, I know that my colleagues join me in keeping in our thoughts and in our prayers the folks in New Orleans right now, and I know it hits you particularly hard, having represented that city for such a long time. So, we appreciate you being here this afternoon.

And our third witness will be Ann Marie Tallman, President and General Counsel of the Mexican American Legal Defense and Educational Fund. Prior to joining the group, Ms. Tallman specialized in the area of public finance law for the Denver law firm of—help me with the pronunciation——

Ms. TALLMAN. Kutak Rock.

Mr. CHABOT. In 1993, Ms. Tallman was appointed as Deputy Director of Planning and Community Development Agency in the city and county of Denver. In this capacity, Ms. Tallman was responsible for advising the Mayor on housing and community development matters. And we welcome you here this afternoon, Ms. Tallman.

Our fourth and final witness is the former Lieutenant Governor of Colorado, the Honorable Joe Rogers.

Lieutenant Governor Rogers currently serves as Commissioner on the National Voting Rights Commission, a bipartisan panel of academics, civil rights leaders and governmental and policy officials charged with examining the effectiveness of the Voting Rights Act in the past 25 years.

Since early this year, the National Voting Rights commission has held a series of hearings nationwide examining the prevalence of discrimination in voting since 1982. The Commission anticipates releasing their report in January 2006. Prior to serving on the Commission, Lieutenant Governor Rogers served as Colorado's Lieutenant Governor and had the distinction of being the youngest serving lieutenant in our Nation's history, and only the fourth Afri-

can American in the country to be elected as a State's number 2 elected official.

In addition to his work on the Commission, Lieutenant Governor Rogers spends his time lecturing and engaging in motivational speaking. We welcome you here this afternoon, Lieutenant Governor Rogers.

And for those who have not testified before the Committee, before, you probably know that we have a 5-minute rule where each of you gets to testify for 5 minutes, and we are able to ask questions for 5 minutes. And we have a lighting system there which you probably have seen. The yellow light will come on when you have 1 minute to wrap up. When the red light comes on if you could conclude at about that time or shortly thereafter if at all possible.

And we also—it is the practice of the Committee to swear in all witnesses and we had already sworn in Secretary Kemp, so if the 3 of you would mind raising your right hand and please stand.

[Witnesses sworn.]

Mr. CHABOT. All the witnesses have indicated in the affirmative, and we welcome all three again this afternoon and we will begin with you, Mayor Morial.

STATEMENT OF THE HONORABLE MARC MORIAL, PRESIDENT AND CEO, NATIONAL URBAN LEAGUE

Mr. MORIAL. Thank you very much, Chairman Chabot—in Louisiana, we would say Chabot—and Representative Nadler and Members of the Subcommittee. Let me thank you as I begin for the support of the Congress in appropriating money to assist with the recovery in New Orleans. I appreciate it. And certainly urge your continued support.

Today, I have the opportunity to share with you my thoughts on the 1965 Voting Rights Act and the enormously positive impact it has had on this Nation. I am gratified to know of your strong support for the reauthorization of the Voting Rights Act and appreciate your leadership on this very important subject. The importance of the Voting Rights Act and its necessity cannot be overemphasized.

We have learned through experience what a difference the vote make to us. In 1964, the year before President Johnson signed the act into law, there were only 300 African American elected officials in this Nation. Today, there are more than 9,100 black elected officials in this Nation, including a record for the Republic of 43 serving in both Houses of the Congress of the United States this term.

As you know, before I took the helm of the National Urban League, I was an elected official in Louisiana, proudly serving in its State Senate and later serving two terms as Mayor of the City of New Orleans. I followed in the foot steps of my late father, Ernest "Dutch" Morial who served as the first African American mayor of New Orleans.

Importantly, he served when he was elected in 1967 as the first African American elected official in Louisiana in 1967 since at that time the days of reconstruction. So Louisiana went almost 100 years despite having almost a one third African American population with zero elected officials until the passage of the Voting Rights Act in 1965.

It is unlikely that either he nor I nor many of the Members who serve in this Congress or the many African Americans who serve in State legislatures, particularly in the south, but across the Nation, would have been able to serve their cities, their States and this Nation without the passage of the Voting Rights Act.

Let me be clear. Expanding the opportunity to vote in America goes far beyond simply ensuring that minority voters have a voice or that African American politicians get elected. The Voting Rights Act, I believe, has enhanced the lives of all Americans, not just black Americans, not just Americans of color.

By opening up the political process, the Voting Rights Act has made available a broader pool of political talent, greatly improving the quality of representation for all Americans and all voters.

Just as important, the Voting Rights Act has been instrumental in moving America closer to its true promise, and thus has significantly benefited every single American regardless of race, color, economic status, national origin or political party.

I have heard it suggested that the Voting Rights Act, or certain key provisions, need not be reauthorized because its very success has rendered it obsolete. Indeed, not only is this a fallacy, but the opposite is true. I urge you in the strongest possible terms not to fall for that. The Voting Rights Act must be reauthorized because it is an important piece of legislation that works.

The great strides that we have taken in the last 40 years have been possible precisely and only because the Voting Rights Act has been in place.

Unfortunately, while this Nation has made great progress in the last 40 years in this area, we certainly aren't where we need to be or where we want to be.

Across this Nation, African Americans and other minorities continue to face obstacles to exercising their full voting rights. That is why Congress must reauthorize the act and its special provisions including the section 5 preclearance requirement.

I have a special interest in and history with preclearance provisions because of the long, tragic and documented history of discriminatory voting practices in my home State, Louisiana. It is one of those States required by section 5 to obtain preclearance for any proposed change in our election laws or procedures.

This provision, section 5, has been critical in the curtailment of voting rights abuses over the past 40 years. In fact, a bipartisan congressional report in 1982 warned that without this section, discrimination would appear overnight. And I believe that this is still true today.

For example—and I think this is important—since 1965, not one single Louisiana State House of Representatives redistricting plan as initially submitted to the Justice Department for review, has been precleared. Not a single one. In other words, in the last 40 years, every single State House redistricting plan adopted immediately after the census and submitted for preclearance in Louisiana has been found both by Republican and Democratic Attorneys General to abridge the right to vote on account of race or color or membership in language in a minority group.

In case after case, the efforts of the civil rights division of DOJ and minority voter advocates prompted Louisiana to withdraw its

original plan and restore districts where African Americans had an opportunity to elect a candidate of choice.

There are, indeed, many African Americans elected officials in Louisiana. It is clear that attempts to undermine minority voting power in Louisiana continue to show its face from time to time in the present day.

Without preclearance, these and other discriminatory voting plans would, without a doubt, be put into place not only in Louisiana, but throughout the country. And we as a Nation would take a giant step backward.

We have come far, as I have said, because of the Voting Rights Act and the enforcement of section 5. Five gives full transparency to voting procedures. It deters State officials from proposing discriminatory voting changes, and the preclearance process also educates State officials in what the Voting Rights Act requires and how to formulate nondiscriminatory policies and redistricting plans.

I am gratified at the degree of support on both sides of the aisle for reauthorization of the Voting Rights Act. And I think this is a moment in history when true bipartisanship can be a beacon of hope and a beacon of light and a high point for this Nation. I urge you to recognize a continued need for preclearance and other provisions that are so necessary for the progress we must make as a Nation. And I thank you for your attention and I will take your questions.

Mr. CHABOT. Thank you very much, Mayor Morial. I appreciate your statement.

[The prepared statement of Mr. Morial follows:]

PREPARED STATEMENT OF THE HONORABLE MARC MORIAL

I appreciate having the opportunity to share with you my thoughts on the 1965 Voting Rights Act and the enormously positive impact it has had our nation. I am very gratified to know of your strong support for reauthorization of the Voting Rights Act and appreciate your leadership on this important issue of our time.

The importance and necessity of the Voting Rights Act cannot be over-emphasized. We have learned through experience what a difference the vote makes to us. In 1964, the year before President Johnson signed the Act into law, there were only 300 African American elected officials in the entire country. Today, there are more than 9,100 black elected officials, including 43 members of Congress.

As you know, before I took the helm of the National Urban League, I was an elected official in Louisiana—first in the state legislature and then as a two-term mayor of New Orleans. I followed in the footsteps of my father, Ernest "Dutch" Morial, who was the first African American to serve as Mayor of New Orleans. I saw first-hand the tremendous impact that the 1965 Voting Rights Act on my state, for without it, it is unlikely that either one of us would have been able to serve the city and state we loved so much.

Let me be clear: expanding the opportunity to vote in America goes far beyond simply ensuring that minority voters have a voice or that African American politicians get elected. The Voting Rights Act has enhanced the lives of all Americans, not just black Americans, not just minorities. By opening up the political process, the Voting Rights Act has made available a broader pool of political talent, greatly improving the quality of representation for all voters. Just as important, the Voting Rights Act has been instrumental in moving America closer to its true promise and, thus, has significantly benefited every single American, regardless of their race, economic status, national origin or political party.

I've heard it suggested that the Voting Rights Act—or certain key provisions—need not be reauthorized because its very success has rendered it obsolete. This is a fallacy—and I urge you in the strongest possible terms not to fall for it. The Voting Rights Act must be reauthorized BECAUSE it works!

The great strides we've taken in the last 40 years have been possible precisely and only because the Voting Rights Act has been in place. Unfortunately, while our nation has made great progress in the last forty years in the area of voting rights, we're not yet where we need to be. Across the country, African Americans and other minorities continue to face obstacles to exercising their full voting rights. That is why it is Congress must reauthorize the Voting Rights Act and its special provisions, including the Section 5 pre-clearance requirement.

I have a special interest in and history with the pre-clearance provisions. Because of our long, tragic, and documented history of discriminatory voting practices, Louisiana is one of the states required by Section 5 of the Voting Rights Act to obtain pre-clearance for any proposed changes in our election laws or procedures. This Section 5 requirement has been critical in the curtailment of voting rights abuses in the last 40 years. In fact, a bipartisan Congressional report in 1982 warned that without this section, discrimination would reappear "overnight." That is still true today.

For example, since 1965, not one Louisiana State House of Representatives redistricting plan as initially submitted to the Justice Department for review has been pre-cleared. In other words, in the last 40 years, every single State House redistricting plan adopted immediately after the Census and submitted for preclearance in Louisiana has been found, both by Republican and Democratic Attorneys General, to abridge the right to vote on account of race or color or membership in a language minority group.

In case after case, the efforts of the Civil Rights Division of the U.S. Department of Justice and minority voter advocates prompted Louisiana to withdraw its original plan and restore a district where African Americans had an opportunity to elect a candidate of choice. While there are indeed many African American elected officials in Louisiana, it is clear that attempts to undermine minority voting power in Louisiana continue to the present day.

Without the pre-clearance requirement, these and other blatantly discriminatory voting plans would—without a doubt—be put into place throughout the country and we would take a giant step backward.

We have come as far as we have precisely because of the existence and enforcement of Section 5. Section 5 gives full transparency to voting procedures that would otherwise be too complex, technical, or hidden for the public to discover. It also deters state officials from proposing some discriminatory voting changes in the first place. They now take extra care to involve minority communities in policy-making, under threat of Section 5 complaints. The Section 5 pre-clearance process also educates state officials in what the VRA requires and how to formulate non-discriminatory policies.

I am gratified at the degree of support—on both sides of the aisle—for the reauthorization of the Voting Rights Act. I urge you to also recognize the continued need for pre-clearance and other special provisions that are so necessary for the continued progress we must make as a nation.

Thank you for your attention. I will be happy to take your questions.

Mr. CHABOT. I also have a statement that I have been presented here, the Rainbow Push Coalition, it was because we only have four witnesses available on the panel, we can't accommodate another witness. But we would like to put the statement in the record and without objection that statement will be submitted for the record.

[The information referred to is printed in the Appendix.]

Ms. Tallman, you're recognized for 5 minutes at this time. Thank you.

STATEMENT OF ANN MARIE TALLMAN, PRESIDENT AND GENERAL COUNSEL, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

Ms. TALLMAN. Thank you, Mr. Chairman, Members of the Subcommittee. Thank you for the invitation to testify regarding the reauthorization of the temporary provisions of the Voting Rights Act. I am Ann Marie Tallman, President and General Counsel of the Mexican American Legal Defense and Educational Fund.

We are a nonpartisan organization that protects the civil rights, including the voting rights, of over 40 million Latinos living in the United States.

America's leadership recognized at home and abroad is defined by our democracy. Our democracy is a Government in which the sovereign power resides in and is exercised by the citizenry through representative Government. Simply put, democracy and the right to vote are our country's competitive advantage.

Our democracy works best when we have confidence that when we exercise our franchised rights, we will be free from harassment, unnecessary scrutiny, discrimination, or artificial barriers that may be placed in our way to dissuade us or to discourage us from exercising our most fundamental right that preserves all other rights.

In 1965, Congress passed, and President Johnson signed into law, the Voting Rights Act to bring us closer to freedom in the United States. Of course, the act, by itself, failed to eliminate persistent discriminatory voting schemes. It required vigorous enforcement not only by the United States Department of Justice, but by organizations like MALDEF to make the promise a reality.

The Voting Rights Act has done more for any other law to ensure that we, as a Nation, progress beyond the discriminatory election laws that have marred our democratic processes. Although important gains have been made, the VRA remains a necessary tool for protecting voting rights.

Two VRA components are especially important to the Latino community, section 5 and the language minority provisions. The impact of section 5 encountering discriminatory election laws cannot be overemphasized.

Section 5 has prevented voting discrimination against Latinos as well as African Americans and has fostered the unprecedented Latino political participation that we see today at all levels of American Government.

Section 5 prevents covered jurisdictions from changing the rules of the game to disadvantaged minority voters.

By invalidating discriminatory election laws before they are put into place, section 5 removes the need for minority voters to bring costly litigation to protect their voting rights.

A recent section 5 challenge bought by MALDEF in Texas demonstrates how section 5 preserves the voting rights of Latinos. In 2001 where Latinos had reached one-third of the State's total population, Texas proposed a redistricting plan for its State House of representatives that minimized Latino voters influence in State elections. Because the plan added only one new Latino majority district and eliminated 4 such districts, the United States Department of Justice concluded that it was retrogressive and blocked its implementation.

As a direct result of the DOJ's section 5 action, Texas kept the four Latino majority districts that has afforded Latino voters the opportunity to elect their candidate of choice. Had section 5 not been in effect, these districts would not have likely existed.

MALDEF seeks the reauthorization of section 5 for the next 25 years with language clarification, regarding Congress's intent to prohibit intentionally discriminatory voting changes.

Currently, 4.3 million voting age citizens are limited English proficient. Section 203 allows that these citizens can cast informed and effective ballots and is implemented in a very cost-effective basis. If Congress does not reauthorize the language minority provisions of the VRA, Latino and limited English proficient Asian Americans and Native American citizens will be unable to vote.

A recent challenge brought by MALDEF in Illinois, demonstrates the continued need for the language minority provisions. In 2002, Cooke County purchased a voting system that did not adequately inform Spanish voters, Spanish speaking voters. MALDEF challenged the system, obtained a consent decree for more Spanish speaking poll workers, new training and monitoring.

This would not have been possible without section 203.

MALDEF seeks reauthorization of the language minority provisions with an adjustment to the coverage formula to section 203 to include jurisdictions between 7,500 and 10,000 language minority citizens.

We have worked for over 37 years to ensure that Latinos' voting rights are protected. On behalf of MALDEF and other civil rights organizations that work every day to protect the voting rights of minorities in this country, I urge Congress to reauthorize the Voting Rights Act to reflect the original intent of these critical provisions.

[The prepared statement of Ms. Tallman follows:]

PREPARED STATEMENT OF ANN MARIE TALLMAN

Mr. Chairman and Members of the Subcommittee, thank you for the invitation to testify regarding the reauthorization of the temporary provisions of the Voting Rights Act (VRA). I am Ann Marie Tallman, President and General Counsel of MALDEF, the Mexican American Legal Defense and Educational Fund. We are a nonpartisan organization that protects the civil rights of the over 40 million Latinos living in the United States.

Since our founding in 1968, MALDEF has challenged voting laws that deny Latinos an equal opportunity to participate in the political process. In *Garza v. Smith* in 1970, MALDEF won a ruling that permitted illiterate persons, many of whom were Latino, to receive assistance in casting ballots. MALDEF also frequently sought the elimination of at-large elections that deprived Latino voters of their ability to elect their candidates of their choice. Our first successful single member district lawsuit, *White v. Regester* in 1973, resulted in the election of three Latinos and one African American to the Texas State Legislature and laid the legal groundwork for the present interpretation of Section 2 of the VRA.

In 1976, following the enactment of the language minority provisions of the VRA and the extension of Section 5 to the Southwest, MALDEF successfully challenged a Texas law that would have had a devastating effect on Latino voting power by requiring the annual re-registration of all voters. MALDEF also pressured the city of San Antonio to change from at-large to single member districts. In the next election, a record 29 Latino candidates filed and an unprecedented five Latinos were elected to the ten-member San Antonio City Council.

The Voting Rights Act is widely considered one of the most effective pieces of civil rights legislation in American history. It has helped to usher in an era in which Latinos and other minority groups are generally better able to register, vote, and elect their candidates of choice. Prior to 1965, many Latinos, especially in the Southwest, were excluded from full political participation by poll taxes, exclusionary primaries, intimidation by voting officials, and language barriers. Latino votes were also routinely diluted through the use of mechanisms like at-large voting and numbered place election systems. The Voting Rights Act has done more than any other piece of legislation to ensure that we as a nation progress beyond the discriminatory election laws that have marred our democratic processes. Despite these important gains, however, the VRA remains a necessary tool for effectively protecting the voting rights of Latinos and other minority groups.

The focus of my testimony today will be upon two areas of paramount concern to millions of Latino voters in the United States: Section 5 and the language minority provisions Section 203 and 4(f)(4).

The impact of Section 5 in countering discriminatory election laws cannot be overemphasized. This provision of the VRA, which affects almost as many Latinos as it does African Americans, has been essential in stimulating the unprecedented Latino political participation that we see today at all levels of American government. Section 5 prevents covered jurisdictions from 'changing the rules of game' to disadvantage minority voters before these voters can seek redress for the deprivation of their voting rights. Section 5's effectiveness in protecting minority voting rights lies in its shifting the burden of proof from the minority voters who have historically been subject to discriminatory practices to the covered jurisdictions seeking to change their election systems. By invalidating discriminatory election laws before they are put in place, Section 5 removes the need for minority voters to continually bring costly litigation to ensure that their voting rights are protected.

A recent case brought by MALDEF in Texas demonstrates how Section 5 works to preserve the voting rights of Latinos. In 2001, when Latinos had reached one-third of the State's total population, Texas proposed a redistricting plan for its House of Representatives that minimized Latino voters' impact in three districts and completely eliminated a fourth Latino-majority district. Because the plan added only one new Latino-majority district and eliminated four such districts, the U.S. Justice Department concluded that it was retrogressive and blocked its implementation under Section 5. As a direct result of DOJ's Section 5 intervention, the current Texas House redistricting plan maintains the four Latino-majority districts that were dismantled and contains a total of thirty-five districts that afford Latino voters the opportunity to elect their candidate of choice. If Section 5 were not in effect, these districts would likely not exist.

MALDEF seeks reauthorization of Section 5 with language clarifying Congress's intent to prohibit intentionally discriminatory voting changes as well as to preserve 'ability to elect' as the touchstone of Section 5 review.

Also of great importance to Latino voters are the language minority provisions contained within Sections 203 and 4(f)(4). Currently, 4.3 million Latino voting age citizens are limited English proficient. If Congress does not reauthorize the language minority provisions of the VRA, these Latino citizens will be unable to effectively exercise the franchise.

A recent challenge brought by MALDEF in Illinois demonstrates the continuing need for the language minority provisions. In 2002, Cook County, Illinois purchased a voting system that used punch-cards with "voter error notification" capabilities that was incapable of notifying Spanish-speaking voters of problems with their ballots. This voting system, combined with the county's failure to provide Spanish-speaking poll workers, left many Latino voters unable to cast effective ballots. MALDEF challenged the county's voting system under the bilingual assistance provisions of the Voting Rights Act and negotiated a consent decree on behalf of Latino voters in which the county agreed to increase the number of Spanish speaking poll workers and implement new training, monitoring, and hotline procedures. This protection of Latinos' ability to cast an effective ballot would not have been possible without Section 203 of the VRA.

MALDEF seeks reauthorization of the language minority provisions with an adjustment to the coverage formula of Section 203 to include jurisdictions containing between 7,500 and 10,000 language minority citizens.

MALDEF has worked for 37 years to ensure that Latinos' voting rights are protected. Section 5 and the language minority provisions of the VRA have been and continue to be our greatest tools. On behalf of MALDEF and other organizations that work to protect minority voting rights, I urge Congress reauthorize the Voting Rights Act to reflect the original intent of its crucial provisions.

Mr. CHABOT. Thank you very much. I appreciate your testimony this afternoon.

And Lieutenant Governor Rogers, you are recognized for 5 minutes.

STATEMENT OF JOE ROGERS, FORMER LIEUTENANT GOVERNOR OF COLORADO

Mr. ROGERS. Thank you so much, Mr. Chairman. It is good to be with you. We are delighted to join you as Members of the Subcommittee. Thank you kindly for having us here today.

It was good to see Congressman Watt in particular at our hearing that just took place this past week, as a matter of fact, so it is a delight to join you. We're honored to join you in particular in my capacity as the former Lieutenant Governor of Colorado, and I'm pleased to serve on the National Commission on the Voting Rights Act.

It is an honor to be before this distinguished Subcommittee as it conducts its first hearing related to reauthorization of this seminal piece of legislation. Indeed, major provisions of which are due to expire in 2007.

I am here to discuss the work of the National Commission on the Voting Rights Act. The Lawyers' Committee For Civil Rights Under Law indeed created the National Commission on the Voting Rights Act on behalf of the civil rights community creating indeed this nonpartisan national commission.

The National Commission is comprised of eight leaders whose represent our Nation's diversity. The Honorable Charles Mathias, former United States Senator from Maryland, is the Honorary Chair. And Bill Lann Lee, the former Assistant Attorney General for civil rights, indeed serves as Chairman of our commission. The other commissioners are the Honorable John Buchanan, former United States Congressman from Alabama; Chandler Davidson, the scholar and editor of one of the seminal works on voting rights in the United States; indeed Delores Huerta, cofounder of the United Farm Workers of America; Elsie Meeks, the first Native American Member of the United States Congress; and Charles Ogletree, the Harvard Law School professor and noted civil rights advocate; and yours truly.

In January of 2006, the National Commission will release its formal report detailing indeed the existence of discrimination in voting since 1982, the last time there was a comprehensive reauthorization of the Voting Rights Act. To date, the National Commission has held nine of ten planned field hearings throughout the United States. We have heard from approximately 100 elected officials, election officials, voting rights attorneys, experts in voting cases, community leaders and concerned citizens who indeed have testified regarding their experiences relating to voting discrimination.

The commission's report will contain information from the hearings as well as include extensive research culled from many sources, including findings, reports, testimony from court cases and enforcement records of the Department of Justice. The report will not advocate any particular legislative action. Instead, the purpose of the report is to detail the facts that will inform your debate and the debate throughout the United States regarding reauthorization.

Because the commission's research is continuing, it would be premature for me to detail the commission's findings. Nonetheless, I would like to identify a few trends that have emerged from our hearings which are discussed in greater detail in my formal written statement which you all have.

First, the problem of discrimination in voting appears to be significant, and it affects virtually every region of the country. In stating this, it is important for me to note that compared to 1965, Mr. Chairman, there has been significant progress in our great Nation regarding race and voting, and indeed a decrease in blatantly racist

or bigoted activity as it relates to voting in the United States. Nonetheless, whether the impetus is bigotry or simply plain old power or the idea of enhancing power at the expense in particular of minority voters—this sometimes occurs—official discrimination in voting remains a problem in the United States.

Second, in many areas of the country, voting continues to be racially polarized. By that we simply mean, it is a circumstance where white voters will simply only vote for white candidates and, frankly, in circumstances where minority voters will only vote for minority candidates. One consequence of racially polarized voting is that minority voters cannot elect candidates of choice or preference perhaps if it is by race or ethnicity. That simply may not be an option unless there is a majority or near majority of the electorate. Moreover, when racially polarized voting exists, a desired electoral result can be obtained by simply changing the voting procedure or practice that harms minority voters.

Third, application of the minority language provisions frequently result in increased participation of minority language voters and an increased ability of such voters to elect candidates of their choice.

Fourth, the Federal mandate of section 203 enables election administrators throughout the country to provide needed minority language assistance without political interference. In a soon-to-be-released comprehensive survey of section 203, indeed, it is noted that 71 percent of election administrators throughout the country support reauthorization of section 203.

Fifth, the existence of section 2 does not obviate the need for section 5 as some have suggested. Section 5 prevents discriminatory procedures from being implemented at little or no cost to minority voters and civil rights advocates. In contrast to section 2, litigation is complicated, often time consuming and frankly plain resource intensive.

When the commission's report is complete, this commission indeed is ready, willing and perfectly able to provide the report to this Judiciary Committee and frankly to discuss its contents fully with you. And we would welcome the opportunity to come back before this commission with the formal findings indeed.

Thank you so much for this chance today.

[The prepared statement of Mr. Rogers follows:]

PREPARED STATEMENT OF JOE ROGERS

Testimony of Joe Rogers
Before the Judiciary's Committee Subcommittee on the Constitution
United States House of Representatives
October 18, 2005

Good afternoon, Mr. Chairman and members of the Subcommittee. My name is Joe Rogers. I am the former lieutenant governor of Colorado and currently serve on the National Commission on the Voting Rights Act. It is my pleasure and privilege to be before this distinguished subcommittee as it conducts the first hearing relating to the reauthorization of Voting Rights Act provisions scheduled to expire in 2007. I am pleased to be back on Capitol Hill where I spent several years serving as counsel to Colorado's former United States Senator, Hank Brown, who served on the Senate's Judiciary, Budget and Foreign Relations Committees.

I am here today to discuss the work of the National Commission on the Voting Rights Act. Before doing so, I wanted to provide some background on the Act and reauthorization. Forty years ago, in the face of great social turmoil, the Congress enacted legislation that made the promise of the right to vote under the 15th Amendment of the U.S. Constitution a reality, ninety five years after the Amendment's passage. This legislation, the Voting Rights Act, is generally considered to be the most effective piece of civil rights legislation ever passed by the Congress. The Act, with its combination of permanent and temporary provisions, has enabled tens of millions of minority voters to fully exercise their right to participate in the political process and elect candidates of their choice. Since 1965, Congress has reauthorized the Voting Rights Act in 1970, 1975, 1982, and 1992. With each reauthorization, Congress has expanded the Act's scope to confront emerging issues of voting discrimination that emerged from the Congressional hearing.

The expiring provisions which we are examining today include some of the core provisions of the Act. In addition to the coverage formula for some of the temporary provisions that is set forth in Section 4 of the Act, three substantive provisions will expire in 2007 if not reauthorized. *First*, Section 5 of the Act requires certain states, counties, and townships with a history of discrimination against minority voters to obtain approval or "preclearance" from the United States Department of Justice or the United States District Court in Washington, D.C. before they make any change affecting voting. These changes include, but are not limited to, redistrictings, changes to methods of election, polling place changes, and annexations. Jurisdictions covered by Section 5 must prove that the changes do not have the purpose or effect of denying or abridging the right to vote on account of race, color, or membership in a language minority. In recent years, the Supreme Court has limited the scope of Section 5 to voting changes that have the purpose or effect of worsening the position of minority voters. *Second*, Section 203 of the Act requires that language assistance be provided in jurisdictions or reservations where 5% or a total of 10,000 of the voting age citizens have limited-English proficiency and speak a particular minority language. Four language groups are covered by Section 203: American Indian, Asian, Alaskan Native, and Spanish. Covered jurisdictions must provide language assistance at all stages of the electoral process. As of 2002, a total of 466 local jurisdictions across 31 states are covered by these provisions. *Third*, Sections 6(b), 7, 8, 9, and 13(a) of the Act authorize the Attorney General to certify the appointment of a federal examiner to jurisdictions covered by Section 5's preclearance provisions on good cause and/or to send a federal observer to any jurisdiction where a federal examiner has been assigned. Since 1966, 25,000 federal observers have been deployed in approximately 1,000 elections.

Joe Rogers
October 18, 2005

The Lawyers' Committee for Civil Rights Under Law -- acting on behalf of the civil rights community-- created the non-partisan National Commission on the Voting Rights Act to document the record of enforcement of these provisions and the state of discrimination in voting during the past 23 years. The National Commission is comprised of eight advocates, academics, legislators, advocates and civil rights leaders who represent the diversity that is such an important part of our nation. The Honorary Chair of the Commission is the Honorable Charles Mathias, former Republican U.S. Senator from Maryland and the Commission Chair is Bill Lann Lee, former Assistant Attorney General for Civil Rights. The other commissioners are: the Honorable John Buchanan, former Congressman from Alabama; Chandler Davidson, scholar and co-editor of one of the seminal works on the Voting Rights Act; Dolores Huerta, co-founder of the United Farm Workers of America; Elsie Meeks, first Native American member of the United States Commission on Civil Rights; Charles Ogletree, Harvard law professor and civil rights advocate; and me. The Commission has two primary tasks: first, to conduct field hearings across the country to gather testimony relating to voting rights, and second, to write a comprehensive report detailing the existence of discrimination in voting since 1982, the last time there was a comprehensive reauthorization of the Voting Rights Act.

To date, the National Commission has held nine of ten planned hearings. It has held regional hearings in Montgomery, Alabama (March 11, 2005); Phoenix, Arizona (April 7, 2005); New York, New York (June 14, 2005); Minneapolis, Minnesota (July 22, 2005); Orlando, Florida (August 4, 2005); Los Angeles, California (September 27, 2005); and Washington, DC (October 14, 2005). The National Commission has also held state hearings in Americus, Georgia (August 2, 2004) and Rapid City, South Dakota (September 9, 2005). There will also be a state hearing in Jackson, Mississippi on October 29, 2005. We have heard from approximately 100

witnesses, who range from elected officials, election officials, voting rights attorneys and social science experts, community leaders, and concerned citizens who have testified about their experiences related to discrimination in voting.

The Commission's report will contain information from the hearings and extensive research culled from many sources including findings, reports and testimony from court cases and the Department of Justice enforcement record. The report's analysis will be quantitative and qualitative. The report will utilize maps to show graphically where there has been discrimination in the last twenty-three years. The report will not advocate for any particular legislative action. Instead, the purpose of the report is to detail the facts that will inform the debate concerning reauthorization.

At the request of the Judiciary Committee's staff, we have provided transcripts and testimony from the National Commission's hearings to the Judiciary Committee and we will provide all of the transcripts and testimony when the hearings are complete.

The reason an examination of the factual record is so important is that in order for Congress to reauthorize the Voting Rights Act in a manner consistent with recent Supreme Court rulings, Congress must have before it a record of discrimination in voting that is "congruent and proportional" to the remedies provided in the Voting Rights Act. Congress always has met this requirement in past reauthorizations of the Act. In fact, in recent cases where the Supreme Court has found that Congress exceeded its authority in enacting remedial legislation that went beyond the record supporting such legislation, the Court has cited the enactment and reauthorizations of the Voting Rights Act as the prime example where Congress developed a record of discrimination that necessitated a legislative remedy. As previous Congresses that have examined the Act, we certainly hope and expect that this Congress will engage in the same type

of careful examination, and we are extremely pleased that the House Judiciary Committee has taken its charge seriously based on the number and scope of the hearings it has scheduled.

Because one National Commission hearing remains and the report is months away from completion, it would be premature for me to detail the Commission's findings. Nonetheless, I would like to identify a few trends that have emerged from the hearings:

First, the testimony (and supporting documents) and the factual record of objections and cases filed under the Act reveal that the problem of discrimination in voting is significant and affects virtually every region of the country. In stating this, it is important to note that compared to 1965 there has been progress in regard to race and voting. Indeed, there has been a decrease in blatant racist activity as it relates to voting. Nonetheless, there are a significant number of state actors who in an effort to maintain or enhance their power have taken actions that clearly discriminate against minority voters. Plainly, whether the impetus is bigotry or power the end result – discrimination against minority voters—is the same.

Though minority participation has increased dramatically since the enactment of the Act, there are a number of devices that our witnesses have identified that have been used to negate the effect of increased minority voter participation. These devices include: changing from single member to at large districts, manipulating district lines to either pack or fragment minority voters, moving polling places, and selectively annexing or deannexing property to affect the racial demographics of a jurisdiction.

Second, in many areas of the country, voting continues to be racially polarized – most whites vote for different candidates than most minority voters. In the last decade, federal court cases involving statewide redistricting plans in Georgia, Louisiana, South Carolina, South Dakota and Texas have found that racially polarized voting exists in their states. This is

consistent with the testimony of witnesses who have discussed the existence of racially polarized voting. For example, Professor Richard Engstrom, one of the leading experts in the field, testified that his analysis shows that race still forms a demographic division in politics. Since the 2000 census, he conducted studies of racially polarized voting in several states. He found that racially polarized voting played a role in all levels of office from governor to the school board. This overwhelming pattern of racially polarized voting means that minority voters usually cannot elect candidates of choice unless they are a majority or near majority of the electorate. Professor Engstrom found this phenomenon prevalent in Alabama, Florida, Georgia, Mississippi and North Carolina. Because of racially polarized voting, a new voting procedure that harms minority voters is likely to achieve the electoral result desired by state actors who make the change.

Third, application of the minority language provisions frequently results in increased participation of minority language voters and a dramatic impact on the ability of such voters to elect candidates of their choice. Here are two of the several examples we have heard during the hearings. Although the City of Lawrence, MA had been covered by Section 203 since 1984, the jurisdiction had done little to comply with the law until the Department of Justice filed suit against the City in 1998. When the suit was filed, there was only one Latino elected to the City Council in its history. The lawsuit was settled in 1999 and one of the key provisions of the settlement was that the City was required to hire a Spanish-language elections coordinator. In the first election after the settlement, three Latinos were elected to the nine-member City Council and today four Latinos sit on the nine-member City Council. This increased electoral power has led to more responsive city government with the city hiring its first Latino police chief and school superintendent after the filing of the lawsuit. In Harris County, Texas, the County did not fulfill its obligations under Section 203 to provide language assistance to its Vietnamese voters.

After an agreement with the Department of Justice in 2003, the County provided the required assistance: bilingual poll workers and properly translated materials. In November 2004, voters in Harris County elected Hubert Vo, the first Vietnamese member of the Texas state legislature, by a handful of votes.

Fourth, the federal mandate of Section 203 enables election administrators to provide needed minority language assistance without political influence. In a soon to be released comprehensive survey of Section 203 covered jurisdictions by professors and students at Arizona State University, 71% of election administrators who responded to the question supported reauthorization of Section 203. Several election administrators have testified that because of the federal mandate, they are able to provide language assistance that otherwise might not be provided as a result of cost or policy issues raised by the elected governing body. The ASU survey also found that 46% of respondents stated that they incurred no additional expense in providing language assistance.

Fifth, the existence of Section 2 does not obviate the need for Section 5. There are several critical differences between Section 5 and Section 2. As the Supreme Court held in 1966 and Congress has stated in subsequent reauthorizations of the Act, Section 5 shifts the advantage of time and inertia from jurisdictions to minority voters. At little or no cost to minority voters and their advocates, voting changes that violate Section 5 are never implemented. In contrast, to establish a Section 2 violation, minority voters must hire a lawyer and experts and file an expensive lawsuit that may take several years to resolve. For example, in early 2001, the Department of Justice and private plaintiffs filed a lawsuit alleging that the method for electing the County Council for Charleston, South Carolina violated Section 2. The plaintiffs prevailed and three black preferred candidates (all of whom were African American) were elected in the

first election under single-member districts in 2004. The county spent over $2 million defending the lawsuit and has been ordered to pay the plaintiffs $700,000 in attorneys' fees. The Department of Justice also expended substantial resources. In 2003, after the federal district court had found in plaintiffs' favor, the South Carolina General Assembly passed a law which changed the method of electing the Charleston County School Board to that used by the County Council. The Department of Justice objected to this change under Section 5, thus preventing a second lawsuit that would have taken several years and cost millions of dollars.

In addition, Section 5 blocks jurisdictions from making last minute voting changes that harm minority voters. In months preceding the 2004 primary election, the Criminal District Attorney of Waller County, Texas threatened students at Prairie View A&M University, which has a 90% African American student body, with felony prosecution if they voted. The Prairie View A & M University NAACP filed a lawsuit against him that was settled shortly thereafter. Five days after the lawsuit was filed, and a month before the March 2004 primary election, the Waller County Commissioners' Court, the county governing body, voted to decrease the number of hours of early voting at the polling place where the students voted from 17 hours to 6 hours. This was particularly discriminatory because the students were on spring break on the date of the primary. A second lawsuit was filed on the ground that the Commissioners' Court had not sought Section 5 preclearance for this last minute change. Within a week after the Section 5 enforcement action was filed, the Commissioners' Court restored the number of early voting hours. A total of 346 students voted during the restored early voting period and a student running for Commissioners' Court prevailed in his primary by less than 40 votes.

The Commission's report will go into much greater detail about the issues discussed above and a multitude of other issues. The Commission will be working very hard over the next

couple of months to detail as complete a record as possible of the current state of racial discrimination in voting. When the report is complete, the Commission is ready, willing, and able to provide the report to the Judiciary Committee and discuss its contents if the Judiciary Committee or the Subcommittee on the Constitution so desires.

Thank you for inviting me to testify at today's hearing.

Mr. CHABOT. Thank you very much, Lieutenant Governor Rogers.

And now the Committee Members will have 5 minutes to ask questions, and I yield myself 5 minutes for that purpose.

Okay. I'll ask each of the witnesses this question, and you can answer it any way you see fit.

What has been the direct and indirect impact in your view of the Voting Rights Act on minority voting rights over the last 40 years? And if you could, if you could answer that with respect to both covered and noncovered jurisdictions if you so choose.

So we will begin with you, Mayor Morial.

Mr. MORIAL. I stated in my testimony the increase in the number of African-American elected officials. But maybe because everyone on the panel is an elected official, frankly, before 1965, even though there was a small number of African-American voters in New Orleans and in Louisiana, very few candidates for public office even bothered to campaign in black communities, show up in black communities, pay attention to the very existence of African-American communities. And therefore, it was very visible, you could ride through neighborhoods and look at public improvements, the conditions of playgrounds, the conditions of streets and the great disparities that existed.

The Voting Rights Act, which gave a greater voice to African-American communities in the south, forced, quite frankly, even in cases where white candidates were running against each other, it made the African-American voter a very significant player in the electoral process. And so it isn't just a case of African-Americans getting elected to public office, although I think that is a highlight. It is also the way in which majority candidates have responded to the African-American community, realizing that because they are full and complete participants in the democratic process, you have to campaign to them, you have to pay attention to them. And that's a real sort of on-the-ground effect.

It also translates into in the process of governing, to those communities being paid attention to when public benefits, public improvements are, in fact, doled out by a city council, by a State legislature, by a mayor or by a governor. So those are some real, I think, impacts beyond—you know, the existence of African-American elected officials is important. But, really, the true impact is the power of the voter to have his issues heard, his voice represented in the deliberative process and in the law-making process and in the executive process in our cities, States and at the national level.

Mr. CHABOT. Thank you very much.

Ms. Tallman, did you want to respond?

Ms. TALLMAN. Yes, thank you, Mr. Chairman.

There have been significant improvements in the political participation of Latinos as a result of the Voting Rights Act. In 1982, for example, there were nine Hispanic Members of Congress. Today, there are 25. There are also two Latino U.S. senators. There are also approximately 5,000 Latino elected officials at the State and local level.

We believe that those strides would not have been made had the voting rights section 5, section 203 been in existence. We have made good strides in language provisions where the 5 percent of

the voting population in a jurisdiction that has special language requirements, where voting materials are provided to those individuals so that they understand the ballot and are able to exercise their right to vote. I think that those strides have been very good in enhancing and improving our democracy and ensuring that every single individual who is a citizen can actually exercise their right to vote.

So I think the Voting Rights Act has had profound implications for not only us being a better representative form of Government as a country with the increased number of Latinos, African-Americans and people of color in jurisdictions at the State and local level and at the national level, but I also think that it has done a great thing in opening the dialogue on issues that impact all communities, which is very important and critical in our country.

Mr. Chabot. Thank you very much.

And Lieutenant Governor Rogers?

Mr. ROGERS. Mr. Chairman, when you were asking the question, the first thought that came to mind, frankly I was 1 year old, I had just turned one when this act was passed in 1965. I am 41 years old today. I think about the circumstances in terms of the life of my own family, sir. I know that you have worked hard to run for office, and you have done good things for many years. My grandfather ran for public office in 1960 in Omaha, Nebraska. In 1960, the sum total of African-Americans elected in the United States was right around 200 or so elected officials in America. When my grandfather ran for office, he ran for the school board in Omaha, Nebraska. It would have made him the highest elected official in the State of Nebraska.

When my grandfather ran in that election, his campaign theme was: Democracy is for everyone. I have never forgotten that, and I have kept his campaign card throughout the years as, frankly, a source of personal inspiration in terms of my own life.

I remember that, and I remember his life. He lost that election in 1960. Ten years later, in 1970, he was elected to serve the school board in Omaha, Nebraska. Change took place in America as a result of the sea of change that occurred right here in this body.

I know that you all deal with multiple pieces of legislation. You all deal with multiple issues, and you all know as well as I do, your staffs will be tugging on you to deal with 500 things throughout the course of this day and so many things to come. But this act, over the course of the last 40 years, as your statement indicated, has been seminal in its impact and remarkable in its scope. It shifted us as a country. It opened up new possibilities for people. Because what it simply said is, this fundamental right, this right to vote, to cast your ballot for the person who you hope will represent your interest in whatever capacity—whether they are the local city council person or a State legislature or in any capacity, perhaps in this august body of Congress—that frankly individual votes count and make a difference.

So when I look at the provisions of this act, it is real, and it is substantive. When I look at the provisions regarding preclearance in section 203, it is clear that the Federal Government just didn't say, you have the right to vote. That was arguably implicit in the 15th amendment. It was implicit in the 14th amendment. But what

the Congress of the United States said was, we will enforce this right to vote, and preclearance gives you the ability to help enforce the provisions of the act. And certainly with section 203, Mr. Chairman, it is absolutely clear in terms of the data that we have received throughout the country that it has led to a remarkable increase in terms of the number of language minorities that participate in this process.

Many of you all campaign in bilingual languages. You campaign in Spanish. Some of you all might send out something. If you were in Louisiana, you might send out something in the French language or otherwise. We are all seeking to appeal to voters, and why not appeal to them in the language where they are? This has enabled that to happen.

Mr. CHABOT. Thank you very much.

My time has expired.

The gentleman from New York, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman.

Let me start by asking the witnesses the first question I asked Secretary Kemp. It has been observed that a number of States in the union greatly restrict the right to vote of former felons. Some of them, some States—Florida, for example, is one that comes to mind—for life. This has a racially disparate impact. Starting with Mayor Morial and Ms. Tallman.

Mr. FEENEY. Will the gentleman yield?

Mr. NADLER. Yes.

Mr. FEENEY. In fairness to Florida, there is a process——

Mr. NADLER. Reclaiming my time. I know, a process that never works. Except for Chuck Colson.

Do you believe that it would be useful in terms of fairness in voting for the Voting Rights Act as we extend it to be amended to put some sort of control on this to say that ex-felons, once they have served their turn or X number of years after they served their term, must have their right to vote restored?

Mr. MORIAL. Congressman Nadler, I'm glad you raised that. The answer without question is, yes. Let me see if I can state the principle here. The idea here is that a person who has in fact served their time, paid their dues, ought not be permanently restricted. They should not have a lifetime sentence, in effect, or a long sentence in terms of removing their constitutional rights.

If you put it on another level, would we ever think of restricting a person's right to speak, right to exercise their religion, any other of the enumerated constitutional rights for life because they were convicted of a felony? My view would be, and I think it is our position at the National Urban League, that a national standard which provides an opportunity for those who have paid their dues to society—let's emphasize that for the record—completed their prison term, completed their period of parole, ought to have the right to vote again. It is important, certainly, to giving them a chance to reintegrate back into society and to feel that they are going to be a full part of society.

Mr. NADLER. Thank you. I would add, it is important, if we're going to call ourselves a democracy, that everybody have the right to vote.

Ms. Tallman?

Ms. TALLMAN. Representative, we applaud Congress' leadership role in ensuring the right to vote for minorities in the United States. It has been a very important leadership role that Congress has filled, and as a result, there are millions of people in this country whose lives are better for it.

One of the issues that still remains to be addressed is allowing those that have served their time, as Marc Morial has stated, to be able to fully reenter into society and to be able to exercise the right to vote. By voting, and participating in the voting process, people are more likely to engage in other civic endeavors. And so there are real benefits to voting and to having ex-felons vote. So we believe that it is certainly something that Congress could demonstrate.

Mr. NADLER. Thank you.

Lieutenant Governor Rogers.

Mr. ROGERS. Congressman Nadler, I can't take a position on behalf of the commission. We have not——

Mr. NADLER. On behalf of yourself. What do you think of it?

Mr. ROGERS. I differ, frankly, from my colleagues to some extent on this issue. And I think in terms of States, individual States have policies that, you know, have varied in terms of what happens to felons and the right to vote. And the Supreme Court has upheld the ability of individual States to deal with this issue. And I can only tell you, in having governed a State, I believe that determination should be left in many respects to Colorado.

Mr. NADLER. Do you think a State should have a right to say to someone who is 17 when they committed a felony, has served 3 or 4 years in jail, when they are 77 should not be allowed to vote? Or is that a fundamental right—such a fundamental violation of civil rights that Congress should say to a State that you can't do that.

Mr. ROGERS. The Supreme Court has held that it is not——

Mr. NADLER. No, no, Supreme Court has said it is a matter of constitutional law. We don't have to have the Voting Rights Act at all as a matter of constitutional law. The question is, we have chosen to have the Voting Rights Act. Should we choose to say to a State that you're State's right does not extend to depriving a person of the franchise for life because he committed a crime 30 years ago?

Mr. ROGERS. I tend to think in this area, to some extent, a State should have the ability to decide this issue and certainly when your dealing with people who obviously committed these crimes and otherwise, that that policy in many respects should be left up to the individual States to handle. You are talking about, obviously, there are a number of complexities that are involved to some extent in this issue, and it has varied by State in terms of how it is applied. And I am an advocate of the ability and the right of the States in their own sovereignty.

Mr. NADLER. Could I have one additional minute?

Mr. CHABOT. The gentleman is recognized for 1 additional minute.

Mr. NADLER. I would pose the following question, first to Lieutenant Governor Rogers, in this order.

Mr. CHABOT. As long as they can answer.

Mr. NADLER. Wait a minute. Doing it as quickly as possible. Don't you think that the fact is, as we have observed, that perhaps one of the largest ways, one of the easiest—not easiest, one of the major ways of disenfranchising disproportionate numbers of people of color, et cetera, is by lifetime prohibitions on the right to vote for ex-felons? Isn't that the way it is used today in certain States?

Mr. ROGERS. Please forgive me, but I would not agree with that, Congressman. Let me tell you why, if I may. The assumption that you are making is that you have such a substantial number of minorities, for example African-Americans or Latinos, that are engaged in felonious conduct——

Mr. NADLER. Or that are arrested and convicted in a disproportionate number.

Mr. ROGERS. The assumption—please forgive me—is that it is such a significant number that it has a dramatic impact on the people as a whole, when we find in reality is that it is not that. You don't have African-Americans that are overwhelmingly in prison. You don't have Latinos that are overwhelmingly in prison. You are still talking about a significant minority within our peoples as a whole.

Ms. TALLMAN. There are many flaws in the criminal justice system as it relates to racial discrimination and racial profiling. As a result, oftentimes there are individuals that are convicted of crimes that are innocent, and there are individuals that are convicted of crimes and sentenced to tougher standards because of their race or ethnicity.

We believe that disenfranchising permanently individuals who have served their time is bad for democracy, and as a result, we would suggest that Congress look at the issue.

Mr. MORIAL. I would offer this. I think if you looked at the practices and laws of all 50 States, you would find the most restrictive provisions for the most part with respect to the voting rights of those who have been convicted of a felony in the very same States that are covered by section 5 and the very same States that have large minority populations.

On the other hand, you would see the least restrictive provisions in those States with small minority populations and in States that are not covered by the section 5 of the Voting Rights Act for the most part.

The second point I would make, if you looked at the genesis of many of these provisions that restrict the right of convicted felons to vote, they have their genesis in the post-Reconstruction backlash which occurred in the South. So if you look at facts, the facts are going to paint a picture in terms of what the—some suggest what maybe the motivation of some of these provisions have been, they were disenfranchisement provisions.

And I applaud you for raising this issue, but I think it is so important to keep the perspective that we are talking about people who have already served their time. It could be for something such as theft of an automobile. It could be a felony of a white collar nature.

Mr. NADLER. Or smoking marijuana.

Mr. MORIAL. It could be smoking marijuana. It could be something that is treated as a felony and therefore restrictive. I appreciate your raising it.

Mr. CHABOT. The Chair would note that the gentleman's 1 minute expired 3 minutes and 6 seconds ago.

Mr. NADLER. Appreciate the forbearance of the Chair.

Mr. CHABOT. The gentleman from Arizona, Mr. Franks, is recognized for 5 minutes.

Mr. FRANKS. Mr. Chairman, I have no questions at this time.

Mr. CHABOT. The gentleman from Michigan, Mr. Conyers, is recognized for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

Just so that Mr. Rogers will sleep more comfortably in his bed at night, the bill that we have introduced which deals with ex-felon voting deals only with voting in Federal elections. So they don't try to tell the States what to do, and obviously, the States can't interfere. And that's the way we get around the discussion that has been raised here.

Mr. Chairman, Mr. David Scott of Georgia has joined us and obviously not a Member of the Committee, but his interest is overriding in this matter. And I just wanted you to know that he was present and that he is very welcome to the Committee.

Mr. CHABOT. I share your sentiments, and Mr. Scott is a very distinguished Member of the House. And we welcome him with open arms at our meeting, and we appreciate his caring enough to be here today.

Thank you very much for being here, Mr. Scott.

Mr. CONYERS. Now, the witnesses have been significantly in agreement today, which argues well for the first hearing and what we have got to go through to get this measure through as quickly as we can. Even though it is 2007, we still need to get this measure out before this 109th session expires. And so that is why there are a number of hearings that have been set up, some two, sometimes three in a week, to get us moving along.

We have talked a lot about the South, but as has been pointed out, New York has areas that are covered by the Voter Rights Act of 1965. In Michigan, I have two townships in two different counties that are covered by the Voter Rights Act. And so wherever there are problems existing, that's where we go to deal with them. And it is very clear that this problem is not over, as every witness has testified to.

And I think is that is very important. I wanted to raise the question that seems important to me, that even over and above the protection of this cornerstone of democracy, the right to vote and have your vote counted, are there other benefits that derive to the American system of democracy by having a Voter Rights Act extended, by having it strengthened wherever necessary, by having the expired provisions covered again? And I'd like to throw that open for the examination of anybody that would like to talk with me about it.

Ms. TALLMAN. Thank you so much, Representative, I applaud your leadership in the voting rights arena and the civil rights arena, sir. You're very well regarded, not only in the African-American community among civil rights advocates but the Latino com-

munity applauds all the work that you have done, so thank you very much for your leadership.

I think that one of the most important aspects of the Voting Rights Act is providing voters the confidence in voting. A democracy works when people, when they go to the voting booth, they will be free from harassment. They will not be targeted. They will not be discriminated against. They will be able to bring a relative or friend with them if they have limited English proficiency, if they are disabled, if they need assistance in the voting booth.

We are willing to protect freedoms in new democracies that are emerging around the world. We need to protect our democracy at home. And giving people the confidence in voting that they must have to know that democracy works has been a critical component of the Voting Rights Act.

Mr. CONYERS. Thank you.

Mr. MORIAL. I think I would just add on a general basis, and I think we have enumerated specifics, but I think one of the key things is for our practices to reflect our principles, for the idea that democracy and the universality of suffrage is made real by that. The nation today has been involved in efforts to, quote, promote democracy abroad. Some of those efforts have been efforts to ensure that ethnic or religious minorities in countries a long way away from here have the right to freely participate without intimidation in the franchise.

We have to be consistent, and being consistent means ensuring that the same practices and the same principles are followed here in the United States.

Mr. ROGERS. Absolutely. And Congressman, I echo those sentiments as expressed frankly by Marc. Clearly, the Voting Rights Act sets a standard. It sets a standard for the United States in terms of our ability to participate in this notion of democracy, this remarkable gift of democracy. And it helps to clearly espouse that in many respects throughout the world as we seek to do so throughout the world.

So is it seminal it its scope? Is it broad in its range? Is it key to the fundamental element of who we are? I think clearly, as we have indeed received testimony across the United States, the answer to that question seems to be overwhelmingly yes.

Mr. CONYERS. I thank all of you because we have uncovered, particularly in this Committee, innumerable instances in voting in which people have been discouraged, misdirected, given improper information, sometimes from the electoral system locally itself. And as you said, you cannot believe in democracy if you are not being encouraged to choose who is going to govern.

And so I thank all the witnesses, Mr. Chairman.

Mr. CHABOT. Thank you. The gentleman's time has expired. Before recognizing the gentleman from Florida for his 5 minutes, the gentleman from Arizona who had yielded back his time I think wants to take a minute to make a statement. So I recognize him at this time.

Mr. FRANKS. Thank you, Mr. Chairman.

And in all respect to the panelists and the Members here, we have talked almost to the extent that we have redirected the focus of the hearing today on some of the ex-felon disenfranchisement.

And the Voting Rights Act doesn't really address that at all. And I am hoping that the panel will address some of the issues that affect those law-abiding citizens who are indeed being disenfranchised in their voting, and I think that is something to maintain our focus upon.

Mr. CHABOT. I thank the gentleman.

The gentleman from Florida is recognized for 5 minutes.

Mr. FEENEY. Thank you, Mr. Chairman.

I think that the gentleman from Arizona's comments are right. I hate to get totally sidetracked on voting rights issues on the question of whether or not the problem with American democracy is too few convicted felons are determining the outcome of elections.

I will tell you that, with respect to the constitutional issues here, remember, *Katzenbach* was very narrowly decided, and its determination was, this is an extraordinary exercise of the congressional power, dictating to the States based on the 15th amendment, which mentions race, color or former condition of servitude. Unless there is a direct tie to race, color or former condition of servitude, there may no longer be a foundation for Congress to overwhelm and dictate to the States.

And I would say that, in fairness to Florida, my friend from New York said that the application never works. Well, that is just not true. We have streamlined the process. And it is true we don't have automatic restoration when your sentence is over, but among other things, we ask for restitution, evidence of rehabilitation. The notion that a violent rapist ought to have his rights fully restored while his victim still has medical bills unpaid offends some Floridians, and that, I think, is something that policymakers in the State can decide.

I was really interested, Mr. Rogers, in some of the findings that your commission has found. And I'm sorry that a lot of the questioning hasn't been directed to that, because, remember, in the *Gingles* test, in order to legitimately make a section 2 claim—we haven't asked questions, but you did a good job going over it—there has to be some findings. We have to find that we have compact and significant numbers of minorities in an area that are underrepresented when it comes to redistricting or opportunities to select candidates of their choice. We also have to find that there are cohesive voting patterns among the minorities if they had an opportunity. And finally, the third prong of that test is that there is significant cohesion among the traditional voting patterns of the majority, where minorities are denied their opportunity.

And that, I think, is the most important thing that has been said all day in terms of the importance of the current rationale for any Voting Rights Act whatsoever. And I would ask you to elaborate on that and, to the extent that there is time, the other two panelists. But I think that is the most important thing has been said, and I would ask you, as you make that case that the Voting Rights Act is still relevant and apparently you have heard testimony that we have not heard yet, because this is our first hearing—this is wonderful stuff, and this is what we ought to be focusing on. We have got at least two Supreme Court justices that, based on the equal protection amendment, you have Thomas and Scalia saying that race-based district drawing is always inappropriate. That was a

fair and reasonable rational position. We need to counteract that if we are going to have a fair and reasonable rationale for continuing or extending the Voting Rights Act. We have at least two justices that think that it is inappropriate.

Sandra Day O'Conner, who tends to be a swing vote on all these issues—we have had a court of one until it is redone on things like the Voting Rights Act and redistricting, and O'Connor is the court. She decides, as the swing vote, virtually every meaningful case that has been decided in the last 15 years. And O'Connor said in a separate issue, but related issue—remember the Michigan law school preferences case—she said she wants to get to a color-blind society and has condemned the Balkanization of America. And she has said perhaps in 25 years we can get rid of race-based districts.

So the debate is between, on the one hand, people who think we ought to have permanent race-based voting processes and districts; on the other hand, people like Scalia and Thomas and Abigail Thernstrom, who said we should never do it; and people like O'Connor and the rest of us who think we need to remedy problems when they occur.

I hope we will get the details of the evidence that you have collected because that is what we need to be focused on in my view here. Let's get back to section 2 and section 5. I wish I had an hour to go into the rationale and the basis and the meaning of that. But Mr. Rogers, if you would address that question.

Mr. ROGERS. Absolutely. Thank you, Congressman, for your thoughts on the same. It is absolutely clear. You are dealing with reauthorization as it relates to two provisions, section 5 and section 203. And those are the provisions that come up for reauthorization this coming year. The Supreme Court has made it very clear—and when I think about the standard I'm reflecting on the *City of Boerne v. Flores* opinion, in which the court essentially cited Congress and Congress' example of finding a factual basis for essentially invoking legislation as being key to its constitutionality.

And in this case here, your establishment of the factual record, looking at the patterns or practices as they exist or you might find they do not exist throughout the United States is frankly the most important determination following this legislative body. Ultimately, the Supreme Court will deal with the management of these cases. What we have clearly seen throughout the United States is, with respect to section 5, which comes up for reauthorization, since 1982, literally the Department of Justice has had over 600 submissions that have been objected to involving some 2,000 individual objections. And that's just simply since 1982 as it relates to congressional districts throughout United States as a whole. Not to mention the private cases, for example, that have been filed throughout the United States dealing with the provisions of section 2, section 5, section 203, for example, by the Department of Justice.

The factual record in and of itself over the course of the last 23 years and what we are finding in terms of our determinations—and again, I don't want to be too premature—indicates that there are still remaining significant problems. The most fascinating thing about this, Congressman, is the nature of the problem in and of itself is being articulated. It is kind of different in the way it is being articulated today. As you well know, Congressman Conyers,

in that era, the movement the country was in a different mode. There were different ways that people talked about issues and problems in our society. That was a different language at the time.

Even though the language may have changed here in the year 2005, the reality is that we are still seeing, unfortunately, practices being engaged. So it is done under a different name. It's done under a different label with, for example, what it is, is a movement from district-based elections to at-large elections on whims. It's the elimination wholeheartedly of elected positions saying that we are not going to have the elected office anymore. This often takes place at the local level in principal part as we are finding around the country, and it varies.

For example, testimony that we heard, what was going on in Chicago, for example, or what we heard that was taking place in California in Los Angeles, those are not classically southern cities. Frankly, what we heard, Mr. Nadler, about New York and heard about issues related to problems related to voting or the testimony that we received there, all of those issues were of deep concern.

The factual basis—and we're delighted to provide this information to the Committee—we believe will give you some information upon which you can say we ought to move forward on reauthorization or we ought not to move forward, but at the very least you will have the facts upon which to make a decision.

Mr. CHABOT. Thank you.

The gentleman's time has expired.

The gentleman from Virginia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT OF VIRGINIA. Thank you, Mr. Chairman.

I want to thank our witnesses. They have contributed a great deal to our proceedings. And I wanted to start my questioning by asking Ms. Tallman, focusing on the preclearance provision, some have suggested that since section 2 is sitting up there, why do you need section 5? Can you—if the legislature passes an illegal plan, what are the costs involved in a section 5 denial of preclearance compared to a lawsuit under section 2?

Ms. TALLMAN. The costs by minority voters to hire a private attorney under section 2, which is the permanent section that allows for a private right of action when there has been discrimination in voting, the costs associated with hiring private attorneys can run in the millions of dollars. There are very significant fact-based findings, facts that need to be gathered as opposed to section 5 preclearance in jurisdictions where there has been traditional discrimination or a history of discrimination, where there have been ongoing suits, litigation brought within those jurisdictions because of changes in voting practices that have been viewed, have been discriminatory; where nonprofit organizations, civil rights organizations can work on behalf of minority voters who, having identified discriminatory practices, raise those practices, it can be brought then under consideration by the Department of Justice, which I think provides a very good basis in which those that have suffered discrimination have a course of action.

Mr. SCOTT OF VIRGINIA. Well, you mentioned the cost of gathering all of these facts. If you don't know whether a plan is discriminatory or not until you have gotten all the facts, who has the

burden of proof under section 5? Who has the burden of proof under section 2?

Ms. TALLMAN. Under section 5, the burden of proof is with the jurisdiction. So the jurisdiction that is engaged, under section 5, where they are a section 5 jurisdiction who is trying to change voting patterns and practices has that burden.

Mr. SCOTT OF VIRGINIA. And the cost of getting all the facts to prove the case is therefore on the jurisdiction?

Ms. TALLMAN. No, Congressman, there is a significant cost that also takes place with regard to a section 5 preclearance action that is brought by civil rights organizations on behalf of voters to the Department of Justice or by voters who hire a private attorney to the Department of Justice. There are still significant costs.

Mr. SCOTT OF VIRGINIA. But that cost, compared to a section 2 cost—can you compare the cost of getting a plan thrown out under section 5 by a civil rights organization protecting the rights of the minorities compared to the costs of defeating the plan under section 2?

Ms. TALLMAN. We will be happy to submit, as the testimony continues over the next several months, in working with other civil rights organizations, to be able to provide a comparative analysis for the Members of the Committee so that they can determine the differential and the costs.

Mr. SCOTT OF VIRGINIA. If you are under section 2, is the plan generally implemented and the perpetrators of the fraud, do they get to enjoy the fruits of their fraud while the case is going on if you are under section 2?

Ms. TALLMAN. Under section 2, there is a claim that has been brought by the Attorney General or of a State or there is a private right of action——

Mr. SCOTT OF VIRGINIA. If there is a change, if there is a change and you are trying to defeat it under section 2.

Ms. TALLMAN. Right.

Mr. SCOTT OF VIRGINIA. The plan has been implemented.

Ms. TALLMAN. Yes, sir.

Mr. SCOTT OF VIRGINIA. And the people who have perpetrated the fraud get to enjoy the fruits of their fraud while the litigation goes on, as opposed to section 5 where you never get to enjoy the fruits of your fraud to begin with because you can't get it precleared.

Ms. TALLMAN. Yes, sir. There is a difference between 2 and 5 where, in 5, if there is discrimination, it doesn't—there is no opportunity for it to be put into place. Yes, that is correct, sir.

Mr. SCOTT OF VIRGINIA. Mayor Morial, you have run for public office. You have run as an incumbent and not as an incumbent. Can you state some of the advantages that there are running as an incumbent?

Mr. MORIAL. Obviously, there are many advantages that an incumbent has. One is the ability to raise money. Two is already established name recognition. Three is a network of relationships. The fourth one can be something that cuts both ways, and that is, you have a record.

Mr. SCOTT OF VIRGINIA. But the fact, the idea——

Mr. CHABOT. The gentleman's time has expired, but we will give the gentleman an additional minute.

Mr. SCOTT OF VIRGINIA. Thank you. The idea is, if you were under section 2 and someone is enjoying all of these benefits even if you win under section 2, you are now facing an incumbent.

Mr. MORIAL. I think your point is so instructive and so incisive that section 5 prevents in effect the discriminator from continuing—from being able to benefit. Because you're right. And there are probably a number of instances where people had to run in a newly created district, but because they were running as an incumbent and they had money and they had name recognition and they had relationships, even in a district that they could not have been elected in originally, they have a significant advantage.

And I think anyone who has run for public office knows what I'm talking about. And I think it could be clearly documented and demonstrated by eminent political scientists, pollsters and others who you might invite before this Committee.

Mr. SCOTT OF VIRGINIA. Thank you, Mr. Chairman.

Mr. CHABOT. The gentleman's time has expired. The gentleman from North Carolina, Mr. Watt, is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. I may not take 5 minutes. But let me start by asking unanimous consent to submit an opening statement that I had prepared for the record. And by asking unanimous consent to submit Representative Linda Sánchez's opening statement record.

Mr. CHABOT. I'm sorry, I was otherwise engaged there. Would the gentleman repeat his request?

Mr. WATT. I was asking unanimous consent to submit my opening statement and Representative Linda Sánchez's opening statement.

Mr. CHABOT. Without objection, so ordered. I apologize to the gentleman for not listening intently when he was speaking, as I usually do.

Mr. WATT. Listen intently, because I wanted to associate myself with some of the remarks that Mr. Feeney made, which is so unusual in this Committee.

And the Members on my side may have some dismay about this. But I agree with Mr. Feeney that we should try to restrict ourselves to the provisions that we ought to be trying to reauthorize or put into the Voting Rights Act. And, while I am a very strong supporter and cosponsor of the felon disenfranchisement legislation that has been introduced by Mr. Conyers, my support of that does not lead me to conclude that we should try to put it into the Voting Rights Act.

Mr. CONYERS. Would the gentleman yield?

Mr. WATT. Yes.

Mr. CONYERS. I merely wanted to associate myself with that, which is why we introduced it in separate legislation.

Mr. WATT. Right. I just want to be clear to the Members of the Committee that what we are engaged in here is so important as a basic constitutional proposition that we should limit ourselves to what we are here to try to deal with. I, in another context, will be as strong a supporter of legislation to set a national standard, to the extent that we can constitutionally, for felon re-enfranchise-

ment as anybody on this Committee, but I think that is a subject for a different day.

Having said that, I would like to spend the rest of my time not on the substance of the Voting Rights Act, but to basically lay a foundation that, if it has not already been laid, for the introduction at some point of the entire record that the Voting Rights Act commission is developing and of the Voting Rights Act commission's findings into our record.

I think this is so important that, despite the fact that I am elated that Chairman Sensenbrenner has agreed to hold 8, 10, 12, hearings, that the more hearings are being conducted by the more different sources all over the country and the more exhaustive we can make the record for support of the Voting Rights Act, the more likely it is that we will meet the constitutional standard that the Supreme Court has articulated that Mr. Feeney has made reference to.

So I would like to ask Lieutenant Governor Rogers just to give us a description of where and how often and how methodical the commission is being in its process of developing a record. Because at some point, Mr. Chairman and Members of the Committee, I should say up front that it will be my intention to try to put the entire record that they are developing into our legislative record and make it a part of what we are doing.

So if you could just give us as exhaustive—I've run out of time, but they will let you answer the question as long as you want to answer the question. Give us as exhaustive a description of what you are doing and how your commission is doing it as you can so that we get a full appreciation of what the Voting Rights Act commission is doing.

Mr. CHABOT. The gentleman's time has expired. The gentleman was not going to use his complete 5 minutes and has skillfully acquired additional time for the witness to answer the question.

Mr. WATT. It takes a lot of time for me to agree with Mr. Feeney. Sometimes that is not as easy. I have to couch it and so make sure that everybody understands exactly what I am saying.

Mr. CHABOT. Duly noted.

Mr. ROGERS. Thank you, Mr. Watt, so much. I wanted to make sure, if I could, to detail with you exactly what has happened. Over the course of the past years, there essentially have been a series of what are ten hearings that have been held throughout the United States. They were all public hearings. Of the ten hearings, seven of them are individual State hearings that have been held. The seven individual hearings outside of the three—excuse me, I don't want to be confusing. Ten total hearings. Of the ten, three are State hearings. Seven of them have been regional hearings throughout the entire country where we literally brought in States from—representatives from each individual State have either submitted direct testimony that they provided personally or they provided written testimony or they agreed to provide documents, for example, to the commission.

The commission will be responsible for formally writing its report based upon its assessment of all of the information received. The information we're taking into account in terms of the factual record here include the Department of Justice's objections, DOJ enforce-

ment actions, DOJ observer coverage, DOJ settlement agreements, court opinions and litigation under the Voting Rights Act that includes both State and Federal cases, expert reports on litigation under the Voting Rights Act, studies and reports by civil rights organizations throughout the United States, testimony at hearings by voting rights practitioners and social scientists throughout the country, settlement agreements from cases brought regarding voting rights practitioners throughout the United States as a whole.

So we are making some effort to be as broad as possible to cover every range of thought as it relates to voting rights but not just the thought but the facts. What are the facts as they establish conduct as it has occurred throughout the United States? In particular, our reference point has been since 1982. We did not want you to simply have to dwell on the past or just to dwell 40 years in context but to really look at the substance of what has happened from 1982 forward.

We would hope that we would be able to note, Mr. Watt, significant progress that has occurred in the country. Because there is no doubt, as we have been throughout the United States, there have been as I mentioned earlier great progress that has occurred in the country. But at the same time, the facts do indicate significant problems that remain.

And so, in detail, forgive me for being too much in detail, I didn't mean to do that. We're making every effort to be as exhaustive as possible and would like to provide that full report to the Committee along with all supporting documentation.

Mr. WATT. Can I ask one elaborating question?

Mr. CHABOT. Without objection.

Mr. WATT. Just to be clear about whether you are stacking the deck or not stacking the deck. Are you also at each——

Mr. CHABOT. Mr. Watt before you go on, I think——

Mr. MORIAL. I've got to run.

Mr. CHABOT. We would like to thank you, Mayor Morial.

If he could be excused.

We want to thank you.

Mr. WATT. He has covered every base that I anticipated that he would cover, and I appreciate it.

Mr. MORIAL. Thank you, Mr. Chairman.

Thank you all, thank you. See you.

Mr. CHABOT. We appreciate your testimony.

Mr. WATT. At every one of these hearings, are you providing a public opportunity for people, not the cast of witnesses who have been preselected, to express themselves also?

Mr. ROGERS. Please forgive me for not making that reference. That is probably the most important consideration. Forgive me for not referencing that. At every one of our hearings, we have a public testimony portion. At each one of these hearings, there have been press releases issued in each of the individual communities asking members of the public to come, whether you are, frankly, for this act, against the act. We haven't been focused on policy advocates necessarily. What we have asked for is people who provide facts, can you give us documented facts as they relate to either the existence or nonexistence of discrimination as it relates to voting?

And to some extent, this begs—if I could open up a little bit of a can as it relates to Mr. Nadler's remarks regarding whether or not some jurisdictions, for example, ought to be able to opt out of or block or be taken out of the provisions of section 5, for example. There is no doubt that there is some debate in the United States about whether or not all jurisdictions should still remain under the provisions thereof, and that may well be the subject of your consideration.

But at the very least, what we will seek to do is to provide you with the facts upon which you can make those determinations, and public testimony is critical in that regard.

Mr. CHABOT. The gentleman's time has expired.

Mr. WATT. Could I ask unanimous consent to allow Mr. David Scott to ask at least some questions? He is not a Member of our Committee.

Mr. CHABOT. We generally don't do that. I will make an exception in this case since Mr. Scott has been here this whole afternoon. I would also like to recognize the presence a little while ago of Congresswoman Maxine Waters from California who was also here.

Generally, we don't unless somebody yields that. We will make an exception and yield to the gentleman for 3 minutes. But we don't want to make this, set a precedent of doing this on either side. We don't like to break the rules.

Mr. SCOTT OF GEORGIA. Mr. Chairman, let me thank you for your graciousness and kindness in granting me the opportunity, having not been on the Committee. I really, really appreciate that, and I certainly appreciate the Ranking Member, Congressman Conyers, for inviting me and allowing me to participate in this. Thank you very much, and I realize that it is an effort and want you to know how much I appreciate it.

And thank you, Chairman Watt, for your generosity as well.

I believe that this is a very, very tricky, tricky time for the participation, particularly of African-Americans, in the political process. And there is no greater example of that than what is happening in my State right now. We have a glaring example of two things: one, why it is tricky; two, why we desperately need the Voting Rights Act reauthorized in all of its parts. And that is, this law that was recently passed in Georgia requiring a government-sponsored, sanctioned and approved voter ID before one can vote. And it only applies if you go to the polls. It doesn't matter if you are absentee; you don't need that.

If there ever was a glaring impediment to those who are elderly, those who are poor, those who have a habit—and it is very important to make this a part of the record, because within the African-American community, it is sacrosanct to go and exercise your vote because it took us so much and had to go through such a struggle to get it, that many will still go and will vote and not use the absentee.

With that in mind, I also want to say, the other side that makes this so tricky is that it went through preclearance and was precleared, but I am very happy to announce today that just a few hours ago, a Federal judge did institute a preliminary injunction

blocking the application of this very, very significant deterrent to voting.

And therein lies the trickiness of what I am talking about and why we need it and why we need every recourse. I wanted to get your all's opinion on that and plus the point that there are six sections that will be up for renewal, plus section 203. Much has been said here on basically section 5. I want to get your opinions, do you not conclude that all of each of these sections needs to be reauthorized? If not, why?

And what are your thoughts on this requirement of the voter ID?

Ms. TALLMAN. Congressman, MALDEF was very actively involved in Georgia with the Black Caucus of the State in trying to oppose the legislation in Georgia. We are actually also involved in the preclearance efforts. So we are very aware of the potential chilling effect on voting that that particular piece of legislation has.

Regarding section 203, the language provisions of the Voting Rights Act are very important to the Latino community, to the Asian American community as well as the Native American community. And in the Latino community alone, there are 4.3 million voting-age citizens that are limited English proficient. Without section 203 of the Voting Rights Act, those individuals would be unlikely to vote. So we believe that, to Congressman Watt's point and the Congress from Florida, that there is much to focus on with regard to voting rights reauthorization; that we should not dilute the voting rights reauthorization debate on these very critical and important sections, section 5, section 203 and other language provisions, with a discussion around felony re-enfranchisement. But that is something of consideration when looking at the area of voting that certainly Congress is taking a lead on, and we applaud that lead.

But we do believe very firmly that 203 does need to be reauthorized because it would have very limited—it would have huge impacts on limited English proficient citizens necessary this country.

Mr. ROGERS. Thank you, Mr. Scott. The provisions you may be referencing are, sections 6, 8, 9 and 13, have essentially to do with the ability of the Department of Justice to send observers in or otherwise engage the mechanism of enforcement related to section 5 or to section 203. Those provisions are important, and I know they are not as—they won't be talked about on the same level of significance, but they represent part of the substantive tools in terms of the ability to really move forward in terms of section 5 as well as section 203.

Mr. SCOTT OF GEORGIA. The only point—and I will conclude with this—that is the point I am saying, that everybody here is saying, that it will be reauthorized. But if we don't take those other sections and just dwell on 5 and we happen to not authorize those others, it will have a diluting and weakening effect as well.

Mr. ROGERS. Mr. Scott, that point is well made. There is no doubt, in terms of the legislation, if you looked at the key to the Voting Rights Act in substance, again what it effectively does is takes the 14th amendment and 15th amendment, and it makes it real. Congress essentially said, these provisions have been in place for years, but we're going to enact legislation that will help make the substance of the 14th and the 15th amendment a reality for

people in the United States. And you gave it the teeth, if you will, the teeth of the provisions are in section 5 and certainly section 203 to the extent that it allows language minority voters access to the polls in new ways.

Mr. CHABOT. The gentleman's time has expired.

I would note that Ms. Tallman nodded her head noting in the affirmative as well to the question.

I would also ask that, without objection, all Members have 5 legislative days to commit additional materials for the hearing record.

I would also note that we have another hearing on the Voting Rights Act coming up in 2 days, on Thursday. It is at 10 o'clock in the morning, and we have at least one or two more next week. And we will have eight all together through November 3, and there will in all likelihood be more to come.

If there is no further business to come before the Committee, I thank the witnesses for their excellent testimony this afternoon. And at this point, we're adjourned.

[Whereupon, at 4:32 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION

The importance of the Voting Rights Act is amply demonstrated by its historical bipartisan support in Congress. The commitment of Chairman Sensenbrenner, in particular, extends back to his support of reauthorization of the Act in 1982. He has evidenced his continuing commitment in speeches before the NAACP and the Congressional Black Caucus and, moreover, has agreed to a robust schedule of hearings to support our current reauthorization efforts. I whole heartedly salute his historical commitment to the Voting Rights Act and look forward to working with him on strengthening and reauthorizing the Act.

When the Voting Rights Act passed in 1965, I was one of six (6) African-American, five (5) Latino, and four (4) Asian-American Members of Congress. The civil rights era was in full bloom, with sit-ins and marches across the South in response to the massive resistance to the call for equal rights. Brave Americans of different races, ethnicities, and religions risked their lives to stand up for political equality.

The pursuit of equal voting rights was most dramatically displayed on the Edmund Pettus Bridge in Selma, Alabama on March 7, 1965, a day that would come to be known as "Bloody Sunday." On this day, nonviolent civil rights marchers, like John Lewis, were beaten, brutalized, and demeaned. The news media brought home to all Americans the horror and violence that propped the system of segregation, forcing us to a decision point about our nation's democratic ideals. Without sacrifice by countless individuals in Selma and across the South, the struggle for equality could never have been achieved, and this legislation would have failed in Congress.

Eight days after Bloody Sunday, President Lyndon B. Johnson called for a comprehensive and effective voting rights bill. He would sign that bill into law and the Voting Rights Act would come to stand as a tribute to the countless Americans who fought for voting rights for all Americans.

Today, as we commence the process of reauthorizing the Voting Rights Act, its importance to opening the political process to all Americans is beyond doubt or challenge.

As the Act has evolved over the last 40 years, it has been expanded and refined to protect language minority citizens through the 1975 amendments, and disabled Americans through the 1982 amendments. Where we had anemic voter registration and turnout in many Southern states, such as Mississippi, with just 6 % of African Americans registered to vote compared to 70% White voter registration; today, 62% of all African Americans and 69% of all Whites are registered to vote.

Where we had a handful of minority Members of Congress in 1965, today we can count 43 African-American, 29 Latino, 8 Asian-American, and 1 Native American in the U.S. House and Senate. And the federal government itself is merely the tip of the of the iceberg. Across the nation, the number of people of color elected to federal, state, and local offices has increased tremendously in the last forty years, opening the political process to every American. It is not an overstatement to call the Voting Rights Act the keystone of our nation's array of civil rights statutes.

While there is much to celebrate over the last 40 years, we have not yet reached the point where the special provisions of the Act should be allowed to lapse, as some might have you believe. Witnesses will bring us testimony over the next several weeks and months from around the country, detailing the continuing barriers to equal voting rights faced by people of color, language minorities, and the disabled.

It is these modern day challenges, along with the continuing historical barriers, that require us to ensure the continuing vitality of the Voting Rights Act. The reauthorization process is an opportunity to take stock of where we are and, if necessary,

to make adjustments that will protect and strengthen the Act, just as we have done in the past.

I trust that, as a Committee, we will work collectively to protect the vitality of the Act. I am also pleased that we will be joined in this process by civil rights groups like the Lawyers' Committee, LCCR, NAACP, ACLU, the Legal Defense Fund, MALDEF, People For the American Way, the National Council of La Raza, the Native American Rights Fund, the National Asian Pacific American Legal Consortium, and many others who support our important work in this area.

The Voting Rights Act is one of the nation's most important civil rights victories. It memorializes those who marched, struggled, and even died to secure the right to vote for all Americans. Through hearings and other dialogue, we will establish a detailed record supporting reauthorization. We owe a deliberative and thoughtful process to those who risked so much in the fight for equal rights. While we must applaud the substantial progress which has been made in the area of voting rights, we must also continue our efforts to protect the rights of every American voter.

PREPARED STATEMENT OF THE HONORABLE MELVIN L. WATT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION

Mr. Chairman, thank you for convening this first in a series of very important hearings on the reauthorization of the Voting Rights Act of 1965. Several months ago, the Chairman of the Full Judiciary Committee, Jim Sensenbrenner and I began a discussion that continues to this day. Recognizing that several provisions of the Voting Rights Act were due to expire in 2007, the Chairman and I fully agreed that extensive hearings should be held to sustain any constitutional challenge that may come. On September 23, 2005, at my annual Congressional Black Caucus Voting Rights Braintrust, Chairman Sensenbrenner announced this series of hearings. He noted that, "[t]his bipartisan effort should educate Members about the complex nuances of the Voting Rights Act and build a solid legislative record towards our goal of a long-term Voting Rights Act extension."

I share the goal of extending the Voting Rights Act and also believe that the Act should be strengthened to ensure that Congress's intent in protecting the voting rights of all Americans is fully realized. In the 40 years since its passage, the Voting Rights Act has come to be regarded as one of the most effective civil rights laws in our Nation's history. The Act has safeguarded the right of millions of minorities to have their votes counted and therefore, their voices heard. The gains in African American, Latino, Asian and Native American elected officials is but one indication of the success of the Act. Prior to passage of the Voting Rights Act, there were fewer than 300 African Americans in public office in all the southern states. This figure rose to 2,400 by 1980, and stands at more than 9,100 today.

The trends in increased voter registration may also be attributed to some degree to the existence of the Voting Rights Act. These gains are a testament to the effectiveness of the Act as well as to its continued necessity. But the success of the Voting Rights Act is not cause for its demise. When something works you run with it not away from it! Not to extend and strengthen the Voting Rights Act would be a blow to democracy.

Very briefly, let me just say that each of the expiring provisions of the Voting Rights Act serve a vitally important and unique purpose: Section 5 requires those jurisdictions with an ongoing record of discrimination to "pre-clear" any voting changes to ensure that those changes will not disenfranchise racial, ethnic, and language minority voters. Jurisdictions covered by Section 5 may "bail-out" from coverage by demonstrating compliance with the Voting Rights Act and that they facilitate equal opportunity at the ballot box.

Section 203 requires bilingual voting assistance for language minority communities in jurisdictions that have a significant population of language minority groups, evidence of severe language barriers, high rates of illiteracy, or depressed voter registration or turnout. Section 203 extends to American citizens with limited English proficiency who pay taxes, serve in the military and embrace all of the other obligations of citizenship, equal and meaningful access to the benefits of the ballot box.

Other expiring provisions of the Voting Rights Act help ensure that voters are free from discrimination on election day. The federal examiner and observer provisions are key when effectively utilized by the Department of Justice. Examiners may prepare and maintain lists of eligible voters and receive complaints by phone, while observers are assigned to monitor elections in specific jurisdictions that are suspected of discriminatory activity. This federal presence also serves a deterrent effect dis-

couraging those who might otherwise treat minority voters with hostility and intimidation.

Based upon a record of evidence demonstrating how gerrymandering, annexations, at-large election policies and other political machinations have been employed to disfranchise minority voters, Congress has voted three times to extend § 5 coverage: in 1970 (for five years), 1975 (for seven years) and 1982 (for 25 years). Notwithstanding the considerable progress in minority voting rights and office holding in recent times, I expect that we will see a similar record compiled throughout these hearings substantiating the continuing need for the Voting Rights Act and its expiring provisions. Moreover, we must act to strengthen and expand the Voting Rights Act by addressing restrictive Supreme Court decisions and providing for adequate resources to litigate cases seeking compliance with the Act.

Mr. Chairman, I am pleased that we are conducting these hearings. I welcome and look forward to the testimony of our distinguished panel of witnesses, and yield back the balance of my time.

PREPARED STATEMENT OF THE HONORABLE LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Thank you, Chairman Chabot and Ranking Member Nadler for convening this hearing, "To Examine the Impact and Effectiveness of the Voting Rights Act."

In my opinion and the opinion of many leaders in the civil rights community, the Voting Rights Act has had a tremendous impact on the voting rights of all minority groups, including Latinos.

The Voting Rights Act is one of the most successful and exercised civil rights laws in American history, and this landmark legislation has effectively given all Americans political power and voter enfranchisement.

For Latinos and other communities suffering from long histories of discrimination and disenfranchisement, the Voting Rights Act has been key to gaining equality and fairness in the electoral process.

Before the Voting Rights Act was passed in 1965, literacy tests, poll taxes and intentionally discriminatory mechanisms were used to keep Latinos and other minorities from the polls.

Today, many of the advancements and achievement of Latinos in our democracy are a direct result of the Voting Rights Act.

Several current Members of the Congressional Hispanic Caucus would not be in the House of Representatives today without the Voting Rights Act.

Members such as Congressmen Ed Pastor of Arizona and José Serrano of New York have districts that were drawn as a direct result of the Voting Rights Act.

This vital statute also opened the door to empower individuals like Willie Velazquez, whose mission in life was to register Hispanic Americans.

Today, we all know that his slogan "Su voto es su voz" ('Your vote is your voice') continues to resonate in our community today.

The positive impact the Voting Rights Act has had on all Latinos is evident.

For instance, when the VRA was enacted in 1965, about two-and-a-half million Latinos were registered to vote. Today there are 9.3 million Latinos registered to vote.

In the past three decades, Latino registration has quadrupled, while our participation in elections has tripled.

In the 1976 presidential election, about 2 million ballots were cast by Hispanic Americans and in 2004 that number climbed to a record 7.5 million.

In 1974, there were about 1,200 Latino elected officials. Today there are 6,000.

I am proud that my sister and I are two of those 6,000 Latino elected officials, the first sisters ever elected to the United States Congress.

While we have come a long way from the widespread use of such blatant tactics as literacy tests to deny Latinos of their voting rights, more subtle efforts persist.

For example, in 1988 the Orange County Republican Party hired uniformed security guards to be posted at polling places in heavily Latino precincts. The guards, wearing blue uniforms and badges, were removed from polling places after the chief deputy secretary of state said their presence was an "unlawful intimidation of voters." The next year, the Orange County GOP paid $400,000 to settle a lawsuit stemming from their voter intimidation program.

Many communities still rely on the Voting Rights Act to maintain full participation in local, state, and federal elections.

I my home state of California in 2004, 26 out of 58 counties are covered by the language minority provisions of the Voting Rights Act. Within those 26 counties, there are 26 Hispanic communities, 6 Chinese communities, 3 Filipino and Viet-

namese communities, and two American Indian communities where language minorities are covered by the Voting Rights Act.

These protections allow millions of voters to make their voices heard on Election Day.

California is also one of ten states with overlapping coverage under Section 203 and Section 5, two of the most important provisions of the Voting Rights Act for language minorities.

Section 5 has prevented jurisdictions from redrawing district lines or otherwise amending election procedures in a way that discriminates against Latino voters by requiring those jurisdictions to get pre-clearance of any changes in electoral practices from the Department of Justice.

Section 203 is vitally important to Latinos because it requires certain jurisdictions to provide bilingual assistance to language minority citizens at all stages of the voting process.

As the U.S. House of Representatives begins reauthorizing the Voting Rights Act, we must recognize that Section 5 and Section 203 are not mutually exclusive.

These two sections have worked together to protect Latinos and must be reauthorized together to permanently preserve voting rights for Latinos and all language minority groups.

As the Judiciary Committee, the House, and the Senate, work to reauthorize the VRA, we must ensure that Section 5, Section 203, and all of the expiring provisions are not only reauthorized, but strengthened to preserve and cultivate total participation in the voting process.

Voting is the one way that every American citizen is able to directly participate in our democracy. The Voting Rights Act is invaluable in preserving equal participation for all Americans in our government. This legislation must be reauthorized.

I look forward to the testimony of the Subcommittee's distinguished panel of witnesses. I am positive their testimony will begin the process of establishing a thorough Congressional record in support of reauthorizing the Voting Rights Act.

PREPARED STATEMENT OF THE RAINBOW PUSH COALITION ON REAUTHORIZATION OF THE VOTING RIGHTS ACT, SUBMITTED BY MR. CHABOT DURING THE HEARING, AT THE REQUEST OF MR. CONYERS

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STATEMENT OF THE RAINBOW PUSH COALITION ON REAUTHORIZATION OF THE VOTING RIGHTS ACT

The Rainbow PUSH Coalition supports reauthorization of the special provisions of the Voting Rights Act to assure that all Americans enjoy the unfettered right to vote. The Rainbow PUSH Coalition is pleased that the Congress, under the leadership of Congressman Sensenbrenner, has scheduled hearings which will establish a clear record for the continued vitality of Section V. The Rainbow PUSH Coalition is also appreciative of the efforts of Congressman John Conyers, ranking member on the House Judiciary Committee, for his leadership here in Washington and across the nation on this vital issue.

Emanating from the tens of thousands who demonstrated on August 6, in Atlanta, the voice of the people has been heard. There is now a broad consensus that there will be a reauthorized Voting Rights Act. Now, we get down to the serious business of fashioning the contours of the Act, assuring that it is not diluted and that it is fully enforced.

Today, The Rainbow PUSH Coalition focuses on the undiluted reauthorization of Section V of the Voting Rights Act fully cognizant that its pre-clearance provision was designed to ward off new and unimagined threats to the right to vote. Today, unfortunately, in Georgia, and in other covered jurisdictions, there is a new wave of threats unimagined at the time the Voting Rights Act was initially adopted.

The right to vote precedes, preserves and protects all other rights. Therefore it is of the utmost importance that we preserve, protect and if necessary, expand the provisions of the Voting Rights Act, set to expire in 2007 unless reauthorized by the Congress.

According to Rev. Jesse L. Jackson, President and Founder of the Rainbow PUSH Coalition, "as a child my father told me a story that always made him sad. He talked about the pride he felt defending democracy in France against the Nazi war machine. He and thousands like him held out hope that their bravery on the battlefield would translate to full citizenship at home. It was not to be. Returning to Greenville by train he was forced to sit behind Nazi prisoners of war in Jim Crow cars. It was a blow that permanently damaged his spirit and inspired me to work for change. Similarly, Joe Louis was man enough to defend America's dignity by

Rev. Jesse L. Jackson, Sr., *Founder & President*
Martin L. King, *Chairman* • Rev. Dr. Joan Brown Campbell, *Vice Chairman*
Rev. James T. Meeks, *Executive Vice President* • Sen. Cleo Fields, *General Counsel*
Kenneth G. Roberts, *Chief Operations Officer*
www.rainbowpush.org

defeating the symbol of supposed Aryan superiority, but he could not exercise the basic privilege of American citizenship in rural Georgia where he was born.

But, thanks be to God, who moved in the lives of countless nameless, faceless souls, black and white, change did come. Forty years ago, after the bloody march in Selma, Congress passed and LBJ signed the historic Voting Rights Act striking down centuries of voter discrimination against Blacks and people of color. But today, we have entered a new era of mean-spirited attack on civil rights, workers rights and the poor. The Rainbow PUSH Coalition intends to assure that the will of the people is not thwarted by undemocratic attempts to undermine or weaken the Voting Rights Act and its enforcement provisions. The Voting Rights Act changed our entire nation for the better, casting the United States as a global example of democracy.

In the 40 years since the Voting Rights Act was passed, African Americans in public office have soared from 300 in 1964 to more than 9100 today. From three members of Congress to 43 today. More than 6,000 have been elected and appointed nationwide, 27 who now serve in Congress. Asian Americans, Latino and Hispanic Americans, and Native Americans historically shut out of the political process have also moved toward full political participation and empowerment.

Key provisions of the Voting Rights Act must be reauthorized before they expire in 2007: Section 5 contains the "pre-clearance" provisions of the VRA – requiring jurisdictions in all or part of 16 states under the VRA to prove to the Department of Justice that a voting change does NOT have a discriminatory purpose of effect on minority voters, BEFORE that change can be implemented. Examples are plans for redistricting, annexation, at-large elections, re-registration requirements, polling place changes, and new rules for candidate qualifying.

There is one telling example that new schemes and devices are still being crafted and employed to hinder the right to vote in the covered jurisdictions. The Georgia Voter Identification law, popularly known in Georgia as the Voter Suppression Bill, demonstrates that, regardless of the outcome of the pending litigation, and in spite of the fact that the legislation has been pre-cleared under Section V, that the pre-clearance requirement is still critically necessary to assuring that no retrogression in the ability of citizens to elect representatives of their choice occurs.

The Georgia voter suppression act requires a government issued photo identification card be presented each time a voter appears at the polls. This is true no matter how long the voter has been registered or how many other forms of identification the voter has. It also applies universally,

disregarding the fact that the voter has not attempted to impersonate another voter, and that no one has attempted to impersonate the voter. This law passed over impassioned objection by the minority during the 2004 term when Republicans gained control of the Georgia legislature for the first time in more than 100 years. Former President Jimmy Carter termed it an "abomination."

The Voting Rights Act prohibits the implementation of devices that have the purpose or effect of inhibiting voting. As a consequence of the outcry against the voter suppression law, Governor Perdue instituted a mobile voter identification bus. According to Janice L. Mathis, "our Atlanta staff wrote to the Governor seeking permission for the bus to visit the historic, mostly black, Atlanta University Center to issue identification cards. After receiving no reply, they contacted the Motor Vehicle Unit directly and learned that the mobile van would be parked at Turner Field, about a mile from the campuses. Approximately 20 African American AUC students traveled to Turner Field in a group to get the appropriate identification cards. The published price of the cards - $10.00 – was hiked to $20.00 without notice to the public. The students' school identification cards, drivers licenses and voter identification cards were insufficient proof, according to DMV to authorize issuance of the new photo id cards. Finally, students who had the $20 and were able to prove their Georgia residency to the satisfaction of officials were required to surrender their home state drivers licenses in exchange for a Georgia ID that did not entitle them to drive in Georgia or in any other state."

It is not surprising that none of the Atlanta University students was issued a photo identification by the state of Georgia. It is fully understood that the purpose of the law is to suppress the vote of assumed liberals and progressives, and has little if anything to do with identifying those unqualified to vote. If the purpose were to identify valid voters, then absentee balloters would also have to present identification.

There is also a sad continuation of extreme racial polarization in voting that, left untended, threatens the ability of African Americans to elect representatives of their choice. Jim Wooten, a columnist with the Atlanta Constitution, the most widely read paper in the state, stated his opposition to reauthorization of the Voting Rights Act early on, indicating that proponents of reauthorization merely sought to use the debate to enfranchise felons, a claim that has no basis in fact and which I have heard no advocate make.

The second example arises of out South Carolina. Until February, 2004 a third of South Carolina's 46 counties did not recognize the Martin Luther King federal holiday, including the most prosperous county, Greenville. Trial court judges in South Carolina are elected by the state legislature. In

the 2005 session , not a single black judge was elected in a state that is more than 30% black, despite several highly qualified candidates. If the legislature, despite ominous warnings from the State's Chief Justice, that the administration of justice requires a more diverse bench, cannot see its way to appoint even one black judge, the prospect of non-biased electoral regulation is not good.

Another example comes from the realm of voter registration. During the Fall leading up to the 2004 elections, many groups were conducting voter registration drives. In a six-week period, the Citizenship Education Fund registered more than 4000 voters in Georgia and South Carolina. In order to assure that the applications were genuine, staff examined each one of them and placed approximately 400 phone calls to the newly registered voters. At no time was there an attempt to ascertain or influence the voter's political affiliation. Volunteers were stationed at public places, such as Wal-mart Stores, which were freely available to the public. It is a mistaken notion that voter registration activities are undertaken by progressive groups with a wink and a nod toward non partisanship. The majority need not be afraid that these drives will confer disproportionate advantage to progressive candidates. My observations, over the past 30 years, has been that registration activists seldom attempt

Finally, the Rainbow PUSH Coalition urges members of the majority to temper their natural desire for political victory with respect for this nation's long struggle for universal suffrage. Women have had the right to vote for less than a century. Blacks, for only four decades. The majority must resist the sinister temptation to weaken the Voting Rights Act for political advantage. The Constitution stands for the proposition that citizens, whatever their socioeconomic status, level of education or income, or color, are less citizens of the United States. If the majority is to maintain political control in the South, in particular, it must be based upon ideas, efficiency in governing and ability to communicate with voters. The majority must not allow the fear of loss of political control drive it to stack the deck by weakening section V. We are all guaranteed the right to liberty. Liberty is more than freedom. Liberty is freedom informed by enlightenment. A person is free to do whatever they want. Liberty requires respect for the rights of others.

PREPARED STATEMENT OF HAZEL DUKES, PRESIDENT, NEW YORK STATE CONFERENCE OF NAACP BRANCHES, BEFORE THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, JUNE 14, 2005

THE IMPACT OF THE VOTING RIGHTS ACT ON AFRICAN-AMERICANS IN NEW YORK STATE

PRESENTED BY
HAZEL N. DUKES
PRESIDENT
THE NEW YORK STATE CONFERENCE OF NAACP BRANCHES

BEFORE
THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT

JUNE 14, 2005

"THE RIGHT OF CITIZENS OF THE UNITED STATES TO VOTE SHALL NOT BE DENIED OR ABRIDGED BY THE UNITED STATES OR BY ANY STATE ON ACCOUNT OF RACE, COLOR, OR PREVIOUS CONDITION OF SERVITUDE.

THE CONGRESS SHALL HAVE THE POWER TO ENFORCE THIS ARTICLE BY APPROPRIATE LEGISLATION"

THIS, THE FIFTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS PASSED AND RATIFIED IN 1878. HOWEVER, IN EVERY NATIONAL ELECTION SINCE THEN, AFRICAN-AMERICAN VOTERS HAVE FACED THE DETERMINED EFFORTS OF WHITE AMERICANS TO DENY THEM THIS PRECIOUS RIGHT OF CITIZENSHIP. NO MEASURE OF VIOLENCE OR INTIMIDATION WAS TOO EXTREME THAT WAS USED TO DENY AFRICAN-AMERICANS THEIR RIGHT TO VOTE. NEITHER WERE THE SO CALLED "QUALIFYING" TESTS THEY USED, TOO RIDICULOUS. WHO KNOWS HOW MANY BUBBLES ARE IN A BAR OF SOAP?

DURING THIS ERA OF TERROR AND PERSECUTION OF AFRICAN-AMERICANS WHO SOUGHT TO EXERCISE THEIR CITIZENSHIP RIGHTS, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE WAS ESTABLISHED IN 1909. SINCE THAT TIME, THE NAACP HAS FOUGHT IN THE COURTS AND COMMUNITIES ALL ACROSS THIS LAND TO SECURE VOTING RIGHTS FOR OUR PEOPLE.

THE BALLOT TODAY IS STAINED BY BLOOD OF NAACP HEROES LIKE MEDGAR EVERS AND MANY OTHERS WHO WERE KILLED BY WHITE RACISTS WHO REFUSED TO SHARE THE POWER OF THE BALLOT WITH AFRICAN-AMERICANS. INDEED, REGISTERING TO VOTE WAS HAZARDOUS TO YOUR LIFE IF YOU WERE A NEGRO! IN 1965, CONGRESS FINALLY ADDRESSED THIS PERSISTENT DISENFRANCHISEMENT OF AFRICAN-AMERICANS BY ENACTING THE VOTING RIGHTS ACT. SOME ARGUE THAT NO OTHER LEGISLATION BEFORE OR SINCE HAS HAD THE IMPACT AND SIGNIFICANCE OF THE VOTING RIGHTS ACT OF 1965. THE POLITICAL LANDSCAPE OF AMERICA WAS DRAMATICALLY RE-ALIGNED. THE RESULTING REDISTRIBUTION OF POLITICAL POWER BROUGHT AFRICAN-AMERICANS TO CITY, STATE AND NATIONAL LEGISLATIVE, EXECUTIVE AND JUDICIAL POSITIONS IN PLACES ALL OVER THE NATION. AND, IN THOSE POSITIONS, AFRICAN-AMERICANS WERE ABLE TO MAKE ECONOMIC DECISIONS THAT BENEFITTED THEIR COMMUNITIES. FOR THE FIRST TIME IN OUR NATION'S HISTORY, THE COLD, EXCLUSIVE CLAMMY HOLD OF WHITE RACISM ON THE THROTTLES OF POWER WERE LOOSENED, AND AFRICAN-AMERICANS WERE FINALLY ABLE TO GET A GRIP!

- THERE ARE NOW 43 AFRICAN-AMERICAN MEMBERS OF CONGRESS
- THERE ARE NOW 24 AFRICAN-AMERICAN MEMBERS OF THE NEW YORK STATE LEGISLATURE

- THERE ARE 135 AFRICAN-AMERICAN JUDGES IN NEW YORK STATE
- THERE ARE TWO NEW STATE LEGISLATIVE SEATS CREATED IN PRIMARILY AFRICAN-AMERICAN COMMUNITIES IN LONG ISLAND, NEW YORK

BUT FOR EVERY STEP FORWARD INTO THE POLITICAL AND ECONOMIC POWER CIRCLES MADE BY AFRICAN-AMERICANS, THE REACTIONARY WHITE POWER BROKERS ARE BUSY DEVELOPING NEW TACTICS AND MODERNIZING OLD ONES TO TAKE BACK THE POLITICAL POWER OF THE BALLOT THAT THE VOTING RIGHTS ACT PRODUCED FOR AFRICAN-AMERICANS. I WILL ADDRESS JUST THREE AREAS.

VOTER INTIMIDATION IN RECENT ELECTIONS HAS BEEN BOTH BLATANT AND SUBTLE. FOR EXAMPLE, HERE IN NEW YORK CITY, WHITE OFF DUTY POLICE OFFICERS WITH GUNS IN VIEW BLANKETED POLLING SITES IN BLACK COMMUNITIES DURING THE 1993 MAYORAL ELECTION IN AN EFFORT TO DISCOURAGE BLACK VOTERS FROM CASTING THEIR BALLOT IN THE RE-ELECTION OF DAVID DINKINS.

VOTER ACCESS WAS SEVERELY INHIBITED IN 2000 BY REDUCING THE NUMBER OF VOTING MACHINED AND USING OLDER MACHINES THAT BROKE DOWN AND WHICH WERE NOT REPAIRED IN A TIMELY WAY IN

BLACK POLLING SITES. THIS WAS PURPOSEFULLY DONE TO OPPRESS THE BLACK VOTE IN THE GORE/BUSH PRESIDENTIAL ELECTION. MANY AFRICAN-AMERICANS WHO REGISTERED TO VOTE IN PUBLIC AGENCIES, SUCH AS MOTOR VEHICLES, SOCIAL SECURITY AND PUBLIC ASSISTANCE OFFICES, NAMES WERE NOT FORWARDED TO THE LOCAL BOARD OF ELECTIONS IN A TIMELY MANNER; SO THAT THESE VOTERS WERE NOT ABLE TO GO INTO THE VOTING BOOTHS ON ELECTION DAY. AND, MANY WERE NOT ABLE TO USE A PAPER BALLOT EITHER.

FELONY DISENFRANCHISEMENT KEEPS MILLIONS OF AFRICAN-AMERICANS FROM VOTING BECAUSE THEY ARE IN PRISON OR ON PAROLE. FOR SOME, THERE IS A LIFETIME BAN ON THEIR RIGHT TO VOTE, EVEN AFTER RELEASE FROM PRISON. HERE IN NEW YORK, THERE IS PENDING BEFORE THE 2ND CIRCUIT A LAWSUIT BROUGHT UNDER THE VOTING RIGHTS ACT CLAIMING THAT NEW YORK'S FELON DISINFRANCHISMENT LAW IS AN ARBITRARY VOTER QUALIFICATION THAT RESULTS IN THE DENIAL AND ABRIDGEMENT OF THE RIGHT OF A CITIZEN OF THE UNITED STATES TO VOTE; AND , WHICH HAS A DISPARATE IMPACT ON THOSE DENIED THEIR RIGHT TO VOTE AND THEIR COMMUNITIES FROM WHICH THEY COME. FELON DISENFRANCHISEMENT LAWS DIFFER FROM STATE TO STATE. MAIN AND VERMONT PERMIT FELONS TO VOTE FROM PRISON; HOWEVER THE

NUMBER OF AFRICAN-AMERICANS IN BOTH THESE STATES COMBINED IS SO SMALL AS TO BE LESS THAN THOSE IN THE VILLAGE OF HARLEM. BUT IN SOME STATES, FELONS ARE DENIED THEIR RIGHT TO VOTE FOR LIFE.

THE RE-AUTHORIZATION OF THE VOTING RIGHTS ACT IS ESSENTIAL TO ADDRESS THE NEW AND ENTRENCHED RESISTANCE TO FULL AND FREE ACCESS TO THE POWER OF THE BALLOT FOR ALL AMERICANS. IT TOOK A CONSTITUTIONAL AMENDMENT IN 1870 AND THE VOTING RIGHTS ACT OF 1965 TO "BRING US THUS FAR ON OUR WAY." WE MUST ALWAYS REMEMBER AND REMIND OTHERS THAT THE BALLOT IS STAINED WITH THE "BLOOD OF MANY MARTYRS." IN THE WORDS OF FREDERICK DOUGLAS, "POWER CONCEDES NOTHING WITHOUT A DEMAND. IT NEVER HAS AND NEVER WILL." THE RIGHT TO VOTE IS THE MOST POWERFUL COMPONENT OF OUR DEMOCRATIC NATION; AND, IT MUST BE FULLY AND FREELY AVAILABLE TO ALL ADULT CITIZENS WITHOUT REGARD TO RACE, COLOR OR PRIOR CONDITIONS OF SERVITUDE.

THANK YOU.

PREPARED STATEMENT OF JOSEPH D. RICH BEFORE THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, JUNE 14, 2005

Statement of Joseph D. Rich Before
The National Commission on the Voting Rights Act
June 14, 2005

My name is Joe Rich and last month I became Director of the Housing and Community Development Project at the Lawyers' Committee for Civil Rights Under Law. Previously, I worked in the Department of Justice's Civil Rights Division for my entire 36+ year legal career. From 1999 until April, 2005 I was Acting Chief and then Chief of the Division's Voting Section. My testimony today in no way is intended to reflect the views of the Department of Justice. Rather, based on my experience enforcing the voting rights act, it reflects my general views of the special provisions of the Voting Rights Act that are due to expire in 2007.

My long career enforcing civil rights laws has contributed to my perspective on the Voting Rights Act. In addition to my having enforced the Act during the last six years, I have had extensive experience enforcing the Civil Rights Act of 1964 and the Fair Housing Act. There is little question in my mind that the Voting Rights Act has been the most important and most successful civil rights law ever passed, and, indeed, one of the most important pieces of social legislation in the country's history. Voting is our most basic civil right and the positive impact the Voting Rights Act has had on the voting opportunities of minority voters cannot be overstated. The clearest demonstration of this is a statistical comparison between (1) the numbers and percentages of minority voters registered to vote prior to the Act's passage with similar numbers today, and (2) the number of elected officials who are minorities is a stark demonstration of this fact. I have attached some statistics showing these comparisons to the end of the written testimony I have submitted.

Today, nearly forty years after passage of the Act, the landscape has changed. The blatant discrimination in the south that gave rise to the Act has been substantially reduced. Yet, the more subtle forms of discriminating against minority voters which replaced the invidious pre-act discrimination linger on – not only in the southern states, but also in many states outside the south -- with continuing adverse effects on the right to vote free from discrimination. My experience has been that the non-permanent provisions of the Voting Rights Act which are scheduled to expire in 2007 – Section 5; the authority of the attorney general to assign federal observers to elections in Section 5 covered jurisdictions pursuant to Sections 6 and 8; and the language assistance provisions in Section 203 – remain crucial to address this continuing discrimination.

I. Section 5

The importance of Section 5 in ensuring equal voting rights is evident from the fact that close to one-half of the resources of the Civil Rights Division's Voting Section are devoted to review of voting changes submitted for preclearance. Each year the Section receives over 4,000 submissions from covered jurisdictions containing close to 20,000 voting changes. Each of these changes is carefully reviewed pursuant to a process that has been established through regulations to determine whether the jurisdiction has

demonstrated that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or because of membership in a language minority.

The number of times that the Attorney General objects to voting change is very small – less than one percent of the Section 5 submissions are objected to. But that is not a good indicator of the importance of Section 5. Rather, the most important impact of Section 5 is its deterrent effect on discriminatory voting changes. Jurisdictions, particularly local jurisdictions, that are required to get preclearance must always be aware of Justice Department review. Because the Department has built a tradition of excellence and meticulousness in its Section 5 review process, jurisdictions will think long and hard before passing laws with discriminatory impact or purpose.

During my tenure in the Voting Section, I often heard examples of this deterrent effect, e.g. careful consideration of discriminatory impact of a voting change during the legislative process, and minority elected officials reminding white officials of the need for justice department review of laws under consideration. Similarly, on many occasions the department has deterred potential voting changes with discriminatory impact or purpose by sending letters seeking further information – letters which usually signal department concern with the law under review. These letters often result in abandonment of, or changes in, the proposed law in order to remove any discriminatory impact or purpose. An analysis of the impact of these letters reveals the deterrent effect. In the period from 1982 through January 2004 there were 501 changes withdrawn after receipt of what are known as "more information" letters.

In sum, since the Voting Rights Act was passed, Section 5 has been probably its most important and effective provision. The continuing deterrent effect of this provision is central to the Act's goal of equal voting opportunity.

One other comment about Section 5. The scope of this provision was significantly reduced by the Supreme Court's 2000 decision in Reno v. Bossier Parish School Board, a decision that essentially eliminates the intent prong of Section 5. A majority of the department's objections during the 1990's were based on this intent prong and this decision has significantly narrowed the ability to object to and deter discriminatory when compared to the pre-Bossier Parish standard. Because of this it has had an adverse impact on Section 5's deterrent effect. It is truly anomalous to me that a voting change which intentionally discriminates against minority voters in a manner that violates the constitution is not objectionable unless it has "retrogressive purpose."

II. Federal observers

The role federal examiners in assisting minority voters in registering to vote has been virtually eliminated since the early days of the voting rights act and is probably no longer necessary. However, the ability of the attorney general to assign federal observers to monitor elections pursuant to Section 8 of the Act in jurisdictions to which federal examiners have been appointed remains a crucial provision. For, like Section 5, the

presence of federal observers serves as an important deterrent – in this case to discriminatory actions during an election.

As is the case for Section 5, the Civil Rights Division has developed very careful procedures for determining when to recommend to the attorney general that federal observers be sent to cover an election. The most important factor is evidence of potential voting rights act violations which arise most often in elections pitting minority candidates against white candidates, resulting in increased racial or ethnic tensions. The federal observers, who are employees of the Office of Personnel Management, are carefully trained to observe elections in a neutral manner and report any voting irregularities to their supervisors, who work closely with Voting Section attorneys. Where appropriate and after consultation with Section management, Voting Section attorneys will take steps to resolve the irregularities with election officials or use the information for more formal legal action.

This federal presence at elections consistently has had a calming effect during highly-charged elections in which there have been allegations of possible Voting Rights Act violations and has helped deter discriminatory acts. On several occasions it has been important to an enforcement action. A good example of this is the presence of federal observers at elections held in Passaic County, New Jersey. The county was under a consent decree which required specific actions to bring the county into compliance with Section 203 of the Act [which I discuss further below]. The consent decree also authorized the Attorney General to send federal observers to elections. On the basis of information gathered by federal observers at several elections, the Department took legal action to ensure full implementation of Passaic's court-mandated language assistance program.

The need for the Attorney General's continued authority to send federal observers to elections is clear from the increase monitoring activity in recent years. Not only has the department increased its use of federal observers, but also has started monitoring elections with department employees where it does not have authority to place federal observers. For example, in the 2004 general election, the Department dispatched 840 federal observers to 27 jurisdictions and send monitors to 58 other jurisdictions.

III. Section 203

Section 203, the oral and written language assistance provision of the Voting Rights Act, has become increasingly important. Originally passed in 1975 and renewed in 1992, the need for this provision has never been greater than now because of the increasing numbers of limited-English proficient citizens in the United States.

To be able to understand the ballot and the voting process is crucial to the right to vote and if a citizen is limited in his or her English language skills, it is absolutely necessary that voting officials provide appropriate assistance. The need is reflected in the significant increase in enforcement of Section 203 by the Voting Section in recent years and continued vigilant enforcement of this provision is crucial in addressing this problem.

The Passaic case noted above exemplifies the importance of this provision. After entry of the consent decree and the resulting increased assistance offered limited English proficient voters, voters in Passaic elected an Hispanic mayor for the first time.

The increased enforcement of Section 203 by the department in recent years has also resulted in a growing awareness of this problem by election officials. At this point it is clear to me that there is a need to increase this enforcement and awareness.

IV. Conclusion

My work in the Civil Rights Division's Voting Section brought home to me how important the non-permanent provisions of the Voting Rights Act have been in ensuring the right to vote free of discrimination. Indeed, well over half of the section's resources are devoted to enforcement of them. While Section 2 provides basic protections against discrimination, the special provisions have been, and continue to be, equally important in the effort to fight and deter voting discrimination.

ATTACHMENT TO STATEMENTOF JOSEPH D. RICH

Numbers and percentages of minority voters registered to vote prior to VRA passage

Source: H.R. No. 94-196 at 6 (1975)

Percent of blacks registered Pre-VRA
Alabama: 19.3
Georgia: 27.4
Louisiana: 31.6
Mississippi: 6.7
North Carolina: 46.8
South Carolina: 37.3
Virginia: 38.3
Total in 7 covered southern states: 29.3

Source: H.R. No. 94-196 at 22 (1975)

Percent of Hispanics registered in 1972 (nationwide): 44.4%
Percent of Hispanics registered in 1974 (nationwide): 34.9%

Numbers and percentages of minority voters registered to vote after VRA

Source: H.R. No. 94-196 at 6 (1975)

Percent of blacks registered Post-VRA (It did not give an exact date, but I assume it is immediately post-VRA)

Alabama: 51.6
Georgia: 52.2
Louisiana: 58.9
Mississippi: 59.8
North Carolina: 51.3
South Carolina: 51.2
Virginia: 55.6
Total in 7 covered states: 52.1

Percent of blacks registered in 1971-1972

Alabama: 57.1
Georgia: 67.8
Louisiana: 59.1
Mississippi: 62.2
North Carolina: 46.3
South Carolina: 48

Virginia: 54
Total in 7 covered southern states: 56.6
Source: H.R. No. 97-227 at 7 (1981)

By 1981 the number of Hispanics registered in TX (first covered in 1975) increased by 2/3

Source: 2004 census data

Minority registration (nationwide)
Black: 16,035 (64.4% total population/68.7% citizen population)
Asian: 3,247 (34.9% total population/51.8% citizen population)
Hispanic: 9,308 (34.3% total population/57.9% citizen population)

Percent of blacks registered in 2004 in original 7 covered Southern states
Alabama: 72.9
Georgia: 64.2
Louisiana: 71.1
Mississippi: 76.1
North Carolina: 70.4
South Carolina: 71.1
Virginia: 57.4

Number of minority elected officials prior to VRA

Source: H.R. No. 94-196 at 7 (1975)

1965: 72 blacks served as elected officials in 11 Southern states (included 7 covered states)

Number of minority elected officials after VRA

Source: H.R. No. 94-196 at 7 (1975)

1974: 963 blacks served as elected officials in 7 covered states

Source: Joint Center for Political and Economic Studies, Black Elected Officials: A Statistical Summary (2001)

Black elected officials: 9,101 (2001 – nationwide, all levels) (43 in Congress); 6,179 (2001 – South, all levels)

Source: H.R. No. 97-227 at 7 (1981)

In Texas and other Southwestern areas first covered in 1975 the number of Hispanic elected officials increased by 30% between 1976 and 1980

Source: Arian Campo-Flores and Howard Fineman, *A Latin Power Surge*, available at www.msnbc.com/id/79319/site/newsweek/print/1/displaymode/1098

Hispanic elected officials: 6000 (2005 – nationwide, all levels) (27 in Congress)

PREPARED STATEMENT OF DOLORES WATSON, MEMBER, LONG ISLAND ACORN, BEFORE THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, JUNE 14, 2005

Testimony of Dolores Watson
Member, Long Island ACORN
Hempstead, New York
June 14, 2005

Hello, my name is Dolores Watson, and I am an ACORN member from the Village of Hempstead, Long Island. I am here today representing our members on Long Island. I have been an ACORN member for 5 years, and have lived in Hempstead for 10 years. I am the president of my tenant association, a Democratic Committeeperson, and a member of the Working Families Party.

I'm speaking today to tell you about the problems we have had in Nassau and Suffolk Counties on Long Island so you know how important it is to reauthorize these parts of the Voting Rights Act.

When Mayor Garner ran for election in Hempstead in March 2001, the management of HUD senior citizen buildings told tenants that if they didn't vote for Mayor Garner they would lose their apartments. At 260 Clinton, a senior HUD Building, the management put up flyers saying that HUD was coming out to inspect their apartments on Election Day, and if they weren't home to let the HUD inspectors in, they would risk losing their apartments. ACORN was organizing in that building then and so the management was worried about people voting against Garner. We complained to the management and put out another flyer to tenants saying that management was just trying to scare them and that they couldn't take away their apartments. Management called a meeting with the tenants two nights before Election Day to say they were sorry and that they would change the day for the HUD inspections, but then on Election Day they still stood out front telling people that if you don't vote for Garner you'll lose your apartment. Also during that election, workers inside the polls were asking people if they were Democrat or Republican, and this was a general election, not a primary. They asked me and I got very angry and told them they couldn't ask people that. Poll inspectors were turning people away if they didn't tell them what party they belonged to.

This past November, they had long lines even in the morning when I went to vote, because the pollworkers were confused about which machine they should be telling people to vote on. They had three machines and they usually only just have one. The pollworkers were sending people away and telling them to vote at Kennedy Park, and then the people at Kennedy Park were sending them back over to the middle school. When people were turned away from voting, I told them they should challenge that and ask for a provisional ballot, but once they've been hassled, they won't go back.

VOTING IN PENNSYLVANIA

ON THE 21ST CENTURY

DISCRIMINATION IN VOTING BASED ON NATIONAL ORIGIN/ANCESTRY AND MINORITY LANGUAGE

NATIONAL COMMISSION ON

THE VOTING RIGHTS ACT

NORTHEAST REGION HEARING

JUNE 14, 2005

OUTLINE BY

CARLOS A. ZAYAS, J.D.

VOTING IN PENNSYLVANIA ON THE 21ST CENTURY

DISCRIMINATION IN VOTING BASED ON NATIONAL ORIGIN/ANCESTRY AND MINORITY LANGUAGE

Introduction:

For the past six years I had been centered in a struggle for civil rights and voting rights in Pennsylvania, especially in the region known as the Pennsylvania Dutch Country (Berks County and surrounding counties). My approach to the voting issues is nonpartisan, based on the fact that I don't have any political affiliation. My ultimate goal is to improve the voting process, to advance the public interest in a real election reform.

The input I pretend to provide to the National Commission on the Voting Rights Act will portray or summarize some of the issues that our community confronted. Special emphasis will be made or focus on the findings and outcomes of the investigation made by the Civil Rights Division, Voting Section from the United States Department of Justice in the city of Reading, Pennsylvania from 2001 to 2003.

The election practices and procedures in Berks County, Pennsylvania resulted in the issuance of a preliminary injunction and latter a permanent injunction by a federal judge. Those decisions are cited as **U.S. v. Berks County, PA. 250 F. Supp. 2d 525 (E.D. Pa. 2003) and 277 F. Supp. 2d 570 (E.D. Pa. 2003).**

In summary, the court founded that Berks County "use of English-only election process violated § 4(e) of Voting Rights Act by conditioning right to vote for county's sizeable Puerto Rican community, many of whom attended schools in Puerto Rico, on ability to read, write and understand English..." They denied information and assistance necessary for those citizens to participate in the election process.

Another of the initial findings was that "English-only election process violated § 208 of Voting Rights Act by failing to ensure that limited -English proficient voters of Puerto Rican descent who were unable to read ballot received voting assistance at polling place from assistors of their choice."

The Federal District Court also decided that "English-only election process violated § 2 of Voting Rights Act by failing to provide language assistance to limited-English proficient voters of Puerto Rican descent who were unable to read ballot and by failing to appoint minority poll workers." The Court emphasized on "evidence that election officials permitted poll workers to openly express hostility to Hispanic voters; that

"Hispanic voters were treated differently and discriminated against at polling places, and Hispanic residents in county were severely underrepresented as poll workers."

As Judge Baylson pointed in the opinion of the preliminary injunction: "At the heart of this case is Section 4(e) of the Voting Rights Act, 42 U.S.C. § 1973b(e), an act of Congress which mandates protection of the voting rights of non-English speaking United States citizens. A substantial portion of the citizens of Berks County, particularly the City of Reading were born in Puerto Rico and educated in Spanish-speaking schools... Congress mandated protection of their right to vote in a language other than English if they are illiterate in English."

I. Berks County, PA election practices

A. Hostile and disparate treatment of Hispanic and Spanish-speaking voters

Poll workers turned away Hispanic voters because they could not understand their names, or refused to deal with Hispanic Surnames.

Poll workers made hostile statements about Hispanic voters; others made discriminatory statements concerning Hispanics.

Poll workers placed burdens on Hispanic voters that are not imposed on Anglo voters, like demanded photo identification.

Poll workers required only Hispanic voters to verify their addresses.

Hispanic voters stated that this hostile attitude and rude treatment makes them uncomfortable and intimidated in the polling place, and discourages them from voting.

B. Lack of Bilingual Poll workers

There is a need to recruit, appoint, train, or maintain a pool of Hispanic poll workers or poll workers with Spanish-language skills. There was approximately 3 percent of poll workers in Reading precincts with Spanish surnames, compared to a voting age population that is over 30 percent Hispanic.

C. Lack of Bilingual Materials

This has severe impact on limited-English proficient voters. Many are unable to read these English only materials.

D. Denial of Assistor of Choice

Due to the lack of bilingual materials and assistance available at the polling places, many voters attempt to bring bilingual friends or family members to the polling places to assist them, but poll workers have not permitted voters to bring their assistors of choice with them.

E. County Officials' Knowledge and refusal to remedy

II. ISSUES

A. **Section 4(e)**

Congress declared that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

Berks County knowingly conducted English-only elections and fails to provide limited-English proficient United States citizens of Puerto Rican descent with election information and assistance necessary for their effective participation in the electoral process.

B. **Section 208**

Berks County violated this section by failing to ensure that voters who are unable to read the ballot receive voting assistance at the polling place from assistors of their choice.

C. **Section 2**

This section of the VRA (42 U.S.C. § 1973, states:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees...set forth in section 1973...

(b) A violation of the previous subsection is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election ...are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than others members of the electorate to participate in the political process and to elect representatives of their choice.

Based in the totality of circumstances, Berks County election policies and practices has denied limited-English proficient Hispanic voters the opportunity to participate effectively in the electoral process on an equal basis with other members of the electorate.

As cited in Thornburg v. Gingles, 478 U.S. 30 (1986), the critical question in section 2 claim is whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.

Section 2 had been brought to challenge election officials' failure to provide language assistance as well as failure to appoint minority poll workers. Had been established that lack of minority poll workers also is a serious impediment to Hispanic voters gaining equal access to the electoral process.

D. **The public Interest**

The Court found that ordering Berks County to conduct elections in compliance with the VRA so that all citizens may participate equally in the electoral process serves the public interest.

III. Relief and ORDER

A. Berks County elections must comply with the Voting Rights Act of 1965 as amended, specifically Sections 2, 4(e) and 208 and the guarantees of the Fourteenth and Fifteenth Amendments to the US Constitution.

B. OPM authorized to appoint Federal examiners

C. Berks County shall provide in English and Spanish all written election-related materials.

D. Bilingual poll officials or interpreters in precincts with at least 5% of Hispanic voters

E. County required to use all practicable means to recruit, engage as temporary County employees, and train persons to serve as bilingual poll officials or interpreter in all elections in the City of Reading, PA

F. Bilingual poll officials or interpreters shall be present in all designated polling places for the standard time.

G. Ensure voters are permitted to have assistance in voting, by a person of their choice.

H. Maintain at least 2 dedicated telephone lines for use on Election Day answered in the Spanish language by a trained bilingual employee throughout the day while polls are open. All polling places within the City of Reading should have posted the information describing the availability of telephone assistance.

I. County shall publicize in Spanish and English prior to the election the availability of bilingual election materials, interpreters at the polling places, Spanish language telephone assistance, and the right of voters to bring their assistor of choice.

J. Training of all poll officials and making them aware of their obligation to comply with all applicable provisions of VRA.

K. Bilingual Coordinator shall be trained in all aspects of the election process at least 3 months prior to any election.

L. The Coordinator and the Director of Elections shall meet with representatives of the Hispanic Community at least one month prior to each election.

M. Coordinator shall investigate all allegations of poll worker hostility toward Hispanic and/or Spanish speaking voter and report the results to the Director of Elections and the counsel of record for the United States.

N. At least 10 days previous to any election, County Elections Services Office shall provide to counsel of US all information about location polling places and poll officials, including identification of bilingual; a copy of most recent voter registration list, a set of all written materials to be provided to voters and documents pertaining to the hiring and training of bilingual poll officials

Conclusion:

Despite some improvements in Berks County election practices and procedures, there are many areas that need improvement. Lack of consistency in pool of polling

places officials, the uncertainty about how Berks County deal with the position of Bilingual coordinator and the need to improve communication and education using the media and Spanish newspapers remain areas of concern.

The need to remain enforcing the Voting Rights Act provisions of the law and maintain tracking compliance with the Court Order are the only safeguard to assure compliance. The matter of compliance didn't depend on whom or which political party is in control. The experience for us in Berks County is that the work of voting rights advocates/activists and not the political machines of the political parties are the ones that are improving compliance with Voting Rights Act and other applicable legislation.

Other issues still demanding attention for inproving the voting rights are:

1. A reform of the redistricting process with legislation creating a nonpartisan redistricting commission.

2. Amendment of the Ballot Access laws to improve fair competition and participation in the electoral process.

3. A new legislation "Nonpartisan Judiciary Election Act" which improve the system of elections for the Judiciary.

PREPARED STATEMENT OF THE HONORABLE WILLIAM LACY CLAY, MEMBER OF CONGRESS, SUBMITTED TO THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, JULY 20, 2005

Wm. LACY CLAY
1ST DISTRICT, MISSOURI

COMMITTEES
FINANCIAL SERVICES
GOVERNMENT REFORM
Ranking Member,
SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY, INTERGOVERNMENTAL RELATIONS AND THE CENSUS

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July 20, 2005

Lawyers Committee for Civil Rights Under Law
1401 New York Ave., NW, Suite 400
Washington, D.C. 20005

Dear National Commissioners on the Voting Rights Act:

I am writing this letter to convey my strong support for the Voting Rights Act that was enacted in 1965. Since 1965 the Voting Rights Act has been essential in ensuring that all citizens regardless of race, age, ethnicity and language skills are guaranteed the right to vote. Not only are citizens assured the right to vote by this act, but they are guaranteed that their vote will be counted fairly and accurately. Some may argue that we have come a long way since 1965. They may claim that racial injustice and discrimination are no longer condoned as they once were and that those dark and disgraceful years of American history are over. These same people might believe that no citizen in America is kept from exercising his or her right to vote by fraud, discrimination, through misleading information or unreasonable laws, but they are wrong. Voter disenfranchisement continues to be a national problem.

In light of the 2000 elections in Florida, it is absurd to argue that fraud does not exist in our electoral system. When thousands of voters were turned away from voting booths because of their race and their political affiliations and numerous ballots thrown out because they favored one candidate over another, how can we claim that there is no discrimination in the voting process? I believe history will reveal that more should have been done to investigate these claims and bring to justice those persons or groups responsible for the election improprieties.

Florida is not the only state that had a break down in the voting process. Numerous Missouri voters experienced a similar turmoil. I was quite disheartened by some of the events that took place in Missouri during the 2000 elections. I found it disturbing that St. Louis election officials routinely violated state and federal law in the implementation of Missouri Statute Section 115.195. This statute specifically limits the use of the inactive voter list. It states that the inactive voter designation can only be used to determine the number of ballots to be printed, to compute the proportional costs of elections or to facilitate mailing information to registered voters. The law does not give election officials authority to purge the names of inactive voters from the election rolls. It is meant to ensure that voter's rights are protected and not denied because the voter has relocated or the U.S. Postal Service has failed to update its records. St. Louis City and County violated this law by keeping records differentiating between active and inactive

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voters and then denying those identified as inactive voters from voting when they came to the polls.

Another issue of great concern that undermines voting rights is the use of provisional ballots. I firmly believe that provisional ballots are detrimental to our democracy. A federal judge in Missouri ruled that the state is not required to count provisional ballots if they were cast outside the voter's own precinct. After the 2004 elections, there were reports that poll workers failed to distribute provisional ballots and that many did not understand the legal issues surrounding these ballots. Clearly, the provisional ballot law is confusing; it lends itself to interpretation by ill informed election officials and must be eliminated. Missouri voters should not be turned away at the polls because of a misinterpretation of law.

Due to the numerous failings that still plague the election process, I strongly believe that the Voting Rights Act is vital to ensure that every citizen has the opportunity to vote and that each vote is counted. According to the Department of Justice, the Voting Rights Act has been called the single most effective piece of civil rights legislation ever passed by Congress. In Mississippi the difference in voting registration rates between blacks and whites went from numbers as high as 63.3% to 6.3%. In Louisiana, this number went from 48.9% to -2.0%. This is nothing short of a testament to the effectiveness of this act. Although we have come a long way since the days of Jim Crow and the Grandfather Clause, we must realize that there will always be individuals and groups who will try to manipulate the voting process in order to advance their own agenda. We must protect this constitutional right that so many have struggled and died for. We must ensure that the Voting Rights Act is reauthorized.

Sincerely,

Wm. Lacy Clay

Wm. Lacy Clay
Member of Congress

TESTIMONY OF GWEN CARR
To
The National Commission on the Voting Rights Act
Friday July 22
Minneapolis Minnesota

Introduction:

Ske N'on! My name is Gwen Carr, I am from the Cayuga Nation of NewYork, Heron Clan. I work and reside in Madison Wisconsin and I am the founder of the Wisconsin American Indian Caucus , a statewide voter education and empowerment project . I am here today in support of the renewal of the Provisions of the VRA and to talk a bit about voting and American Indians in Wisconsin and the United States.

General Overview of Voting in Indian Country:

The struggle of American Indians to gain the right to vote has been a long and arduous journey. It is important to understand the context in which American Indian people have fought for the right of citizenship, and for the right to vote in America.

The historical genocidal and racist policies of the United States government over the past 200 plus years have found Indians caught between tribal membership and the denial of citizenship, assimilation policies that included everything from wardship to allotment based citizenship, from removal from traditional lands, to removal from reservations to urban areas. Indians were only finally declared citizens in 1924, and the last American Indians granted the right to vote in 1948 in Arizona. The existence of racism in American Indian voting issues cannot be determined to be something of the past. As recently as earlier this year, tribes and tribal members have had to seek legal redress to right the discrimination and barriers to voting in many areas of the country. It has not only been a federal *Indian Problem* in regards to voting. Many states, such as South Dakota, Washington, Arizona and New Mexico have created local legislative barriers to the Voting Rights act in the form of redistricting, voter dilution among others. The only remedy for American Indians and the only means by which we can exert our right to vote has been the Voting Act of 1965. Section 2 which bans voting practices that result in the denial or abridgment of the right to vote on account of race, color or membership in a language minority and Section 4 and 201 which abolish tests and devices for voting are the bulwarks that stand between Indians being able to freely participate in the electoral process and the forces which would destroy it.

Wisconsin Indians:

Wisconsin is the home to eleven federally recognized tribes and Native Americans make up approximately 69,386 or 1.3 percent of the total state population.[1] While the overall statewide percentage is small, there are dense concentrations of the Native American population. For instance, in the case of the Menominee Nation, the entire reservation is a county. There are also significant Indian populations in Milwaukee and Green Bay. These eleven federally recognized tribes form the nucleus of Wisconsin Indian tribal communities. These tribes share little in the way of common native language, material culture, and economic livelihood, yet parallels exist in their historical experiences with invading European powers, loss of land, American governmental policy, and experiments in home rule. Every tribe in Wisconsin, for example, has felt the disastrous brunt of physical removal. Some tribes were removed from Wisconsin, while the Brothertown, StockbridgeMunsee, and Oneida Indians were moved here from places in the east.

Wisconsin Indian tribes were subject to deleterious nineteenth-century land cession treaties in which they lost virtually all of their traditional homelands to make way for incoming Wisconsin settlers. Non-Indian entrepreneurs and settlers forced thousands of Winnebago [now known as Ho-Chunk], Potawatomi, Chippewa, Menominee, Sac and Fox, and Santee Sioux Indians to clear the land and make way for statehood. The U.S. government established reservations with the intent to subjugate the scattered remains of the once-powerful nations of native peoples. This action further opened their ceded lands to exploitation and their cultures to the federal policy of assimilation, with its purpose to sever the native people's unique propensity to the land-mother earth.

Wisconsin is, in a sense, a national model for federal Indian policy experimentation, as every trial-and-error initiative was attempted here. Failed federal government experiments in reservation land allotment, annuity payments, timber removal, off-reservation boarding schools, relocation, and termination only added to the woes of the tribes.
The success of Wisconsin tribes in creating environs of political and economic sustenance is due in large part to their perseverance in maintaining traditional values and tribal heritage. Tribal goals of self-determination and political sovereignty are being realized through constitutional representative governance, legislative and rule-making powers, law enhancement, and judicial resolution of conflict. Tribes retain governing powers, human service and education responsibility, as well as economic leadership, stewardship for the land, and natural resources.***

***WI Indian Treaties and Tribal Sovereignty, Wisconsin DPI

These powers are guaranteed through treaties (unique court-affirmed legal agreements) with the United States government. In fact, a government-to-government relationship exists between the eleven tribes of Wisconsin and the United States of America. This relationship forms the basis of a "trust" to further the interests of the Wisconsin tribes by protecting their property assets and guaranteeing a future for tribal culture. Wisconsin Indian tribes will accomplish their goals of self-determination and sociopolitical viability only if they nourish their heritage; preserve their tribal languages; maintain their spirituality, customs, and values (which well-served their ancestors through generations of hardship), and maintain an adequate land base for the future generations to follow.

Elections in Wisconsin Indian Communities:

The 2004 American Indian Coordinated Campaign put approximately $65,000 into the state of Wisconsin's Indian GOTV program. The campaign brought approximately twenty-five field organizers into the state to specifically work on each reservation. In addition to these organizers, the campaign identified and employed a number of GOTV coordinators on each reservation. Many of the GOTV people working on the reservations had previous experience in campaigns, participated in the Wisconsin American Indian Caucus, and/or had attended a Native Vote political training. The campaign made efforts to pair up experienced organizers with less experienced people to create a pool of organizers for upcoming elections. Most of the reservation coordinators were aware of the outside field organizers arrival and purpose and worked well with them in creating walk lists, phone banks and the voter GOTV card program.

The **Wisconsin American Indian Vote Campaign** pursued multiple avenues to ensure turnout on the reservations. The campaign worked with many of the tribes in obtaining information to create a statewide American Indian voter file. Menominee Nation had all their members on a voter file and utilized it for literature distribution, phone banking, and GOTV activities. The campaign media efforts included earned media in the local urban Indian community newspapers in Milwaukee, an ad share program for reservation and statewide Indian newspapers, and made available free, non-partisan GOTV ads for tribal radio stations. Education outreach was extensive and included presentations to young first time and potential voters at on and off reservation schools and the distribution of down ticket Indian literature at gatherings, including pow-wows, rallies and other public events. Finally, GOTV materials were made available for tribal efforts to distribute which included t-shirts, posters, and buttons. As a result of these efforts, the American Indian Coordinated Campaign played a key role in mobilizing Native American voters in the state.**

Results

Statewide Wisconsin Voter Turnout, 2000-2004[2]

Election Year	VAP	Turnout	Turnout as % of VAP
2000	3,994,919	2,598,607	65.06%
2002	3,994,919	1,775,349	44.44%
2004	3,990,696[3]	2,997,007	75.13%

Throughout the state, overall voter participation for Native Americans/Alaska Natives residing on reservations increased. Some of the reservations saw an increase in voter turnout of 162 percent in the general election from 2000 to 2004..**

VRA Section retirement and its impact on American Indian voting rights:

The Preclearance Section up for renewal in the Voting Rights Act has a particular impact on American Indian communites in Wisconsin and nationwide. For instance the (1) the Section 5 "preclearance" provisions which require jurisdictions in all or part of sixteen states to submit voting changes to the United States Department of Justice ("DOJ") or the United States District Court for the District of Columbia for preclearance approval before they can be implemented; In Indian Country, there have been numerous redistricting laws enacted that specifically are designed to disenfranchise native voters, by breaking up their communities in more than one district hence diluting their vote and making it impossible for Indian people to elect their choice of candidate. Such is the case in South Dakota where Indians recently won a court case on July 14 , 2005 which granted an injunction against the state of South Dakota for violating the preclearance section or the VRA. In Wisconsin we have had numerous bills introduced in the state legislature that have tried to disenfranchise Indians as well as non Indian minority groups by redistricting. Even tho Wisconsin isn't one of the states which is named and required to comply with that Section of the VRA; without it in place on a national level there would be no protection against more of the same kind of legislation.

Section 203 minority language provisions which require more than 450 counties and townships to provide language assistance to voters with limited-English proficiency

[2] Wisconsin Secretary of State and U.S. Census. Data on total registered voters and voter turnout information for 1996 was not available at time of publication.
[3] U.S. Census, 2003 estimated.
** First American Education Project, Russ Lehman, Managing Director; Project Director, Native Vote 2004 Report; Senior Researcher/Co-Author Alyssa Macy, Center for Civic Participation

The issue of bilingual voting material;s is an essential one for many Tribal communities. When I worked with Navajo in AZ and NM, it was essential for educational and informational purposes that voting materials were in the Navajo language. The Navajo nation has over 225,000 members, over the largest land mass that include four states, with over 100 Chapter Houses. which can be characterized as wards or precincts . The common language choice is not English. Having the Minority language provisions are essential to overcoming the barriers to voting in minority language communities.

The examiner and observer provisions:

In 2004 the National Congress of American Indians and the DC Native American Bar Association conducted a nationwide voter election protection project that coordinated and provided outreach and support for American Indian communities including Wisconsin as a means to combat voter suppression and discrimination. This project worked with local Indian lawyers and others to provide local communities with the knowledge of their voting rights within the state and document any incidences of voter fraud or discrimination. While Wisconsin had less incidents than other states, this project was vital in informing Native communities of their rights. The observers sent into Wisconsin and other states not only helped support Indian people at the polls but also sent a message to the larger community that Indian people were not going to be subject to harassment or any other form of suppression. Without the Examiner and Observer provision of the VRA, Indian people could again be without the knowledge and tools they need in order to fully exercise their right to vote.

Reports of discrimination in voting experienced by minority voters or impediments To elect the candidates of their choice.in Wisconsins Indian Communities:

While the well organized *on the ground* voter turn out programs run by Native people in Wisconsin and the existence of same day of voter registration and vote casting certainly make the voting process less cumbersome for Indian voters, there are still serious impediments to voting in some Indian communities. Most of the occurrences of voter intimidation or suppression occurred with either new young voters or early voters.

Examples:

1. Early and first time voters who reside in Red Spring, which is outside the Menominee reservation and in neighboring Shawano County but is comprised of a significant Indian population were told they could not vote in Red Spring and had to go to Neopit or Kashena on the reservation.

2. Red Spring town clerk told early voters that they could vote at her house and to meet her at 5PM . 50 Menominee and Stockbridge voters were driven to her house. She never showed up. Finally after waiting 3 hours outside she arrived home and told them shed never made that statement.

3. Shawano High school students who were of voting age were told by school officials that Indians cannot vote in Shawano County under any circumstances.

4. Menominee tribal members were requested by Red Springs town clerk to identify in writing ALL known Indians who resided in Middle Village which is in Shawano County before they would be allowed to vote.

Thank you for the opportunity to speak here today.

PREPARED STATEMENT OF CAROL JUNEAU BEFORE THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, JULY 22, 2005

Midwest Regional Hearing of the National Commission on Voting Rights

Date: July 22, 2005

Testimony of Carol C. Juneau, Representative, HD 16
Member of the Mandan and Hidatsa Tribes
Blackfeet Reservation
Box 55, Browning, Montana 59417

Issue: Voting issues, Voting Rights for minority voters since 1982.

My name is Carol Juneau and I currently serve as a Montana State Representative, for HD 16. The Blackfeet Indian Reservation makes up the majority of my House District. I am an enrolled member of the Mandan and Hidatsa Tribes of North Dakota. I have been active in the political empowerment of Indian people for many years.

I was a plaintiff in the Old Person v Cooney, later called Old Person v Brown, Voting rights case that was filed after the 1992 Redistricting Process. We spent many years on this and it became moot after the 2003 Redistricting Plan was approved for Montana. I won't spend time on this case but would like to encourage this Commission on Voting Rights to review the issues raised in this case of the dilution of the Indian vote in Montana.
Also, I want to ask the Commission to include for the record the report that was recently completed by Dr. Janine Pease for Yale University on Voting Rights in Indian Country called "Lessons From the Past, Prospects for the Future: Honoring the Fortieth Anniversary of the Voting Rights Act of 1965." This is a comprehensive report on the history of voting rights for Indian people, what some of the barriers are, and how the Voting Rights act protects American Indian Voter, highlights voting rights cases in Indian Country, and other issues. Dr. Pease outlines many issues that should be considered in this study of voting rights for American Indians.

Montana has a long history of voting rights activities such as voter registration drives, voter education projects, and get out the vote drives throughout the seven Indian reservations in Montana. We also have a history of voting rights litigation that has helped move us forward. Also, the recent redistricting of Montana after the 2000 census, the Montana State Legislature has created the opportunity for eight (8) American Indians serving – 6 in the House and 2 in the Senate. We expect to have nine (9) in the 2007 Session.
The issue of proportional representation for American Indians in state legislatures as well as county, city, school boards and other local government systems needs to be addressed by this Commission. Although we may be equitably represented in the Montana State legislature, Indian people are far from equitably represented in county

government systems, school boards, city governments, and all those other policy making bodies that make the decisions that impact all people in the state, including tribal communities. This lack of equity in representation of these decision making bodies lead to inequities in employment opportunities and services.

The progress that has been made in Montana has not been without challenges or without the very hard committed work of many people who had to dance through the hoops placed in front of them by the County Clerk and Recorders as well as by laws passed by the State Legislature on voting procedures.

Most recently the State's Redistricting Process of 2003 faced a number of challenges before it was actually implemented. The Republican majority in the Montana House and Senate introduced a number of bills that were designed to set up barriers asking that the plan be redone. Those of us who were advocating for the Plan as presented by the Redistricting and Reapportionment Committee were kept very busy getting to bill hearings. All of these hearings would be a matter of public record if information is needed. Another bill invalidated the plan and urged the Secretary of State not to accept the plan, and he did not. Instead he went to Court and said the plan was unconstitutional. He lost and the State was required to accept the Redistricting Plan.

Just recently in Blaine County in Montana, which includes the Fort Belknap Reservation, another election legal challenge was filed and won by the Indian people of that community. For 80 years there had never been an Indian County Commissioner elected. An election was held with a new district created on the Reservation area and an Indian was elected.
In preparing for this testimony I asked a number of people in Montana to share some of their stories and information that might help you in your work. Following is their testimony:
From Dr. Janine Pease, Crow Indian Educator and Voting Right Activist
Billings MT
pease@rocky.edu

There are several ways that American Indian voters experience discriminatory practices in the voting process. Following are four areas that pertain to virtually every reservation in Montana, from my experience in voter registration and education over the past twenty years.
1 - The rural locations on reservation render American Indians at the mercy of the county clerks, for electors must accurately place their residence location in "section, township and range." This is hypertechnical voter registration cards. In Bighorn County, it is our experience that the lack of addressing in our county places our potential registrants at risk. They will often get "tossed" if the location is not specific. When we do voter registration drives, we gather all the cards prior to their submission to be sure and place the locations so as to specify the section township and range.

2 - Montana has had a purge process that removes registered voters from the voter lists if the voter does not cast a vote in the general election when the U.S. President is up for election. This process eliminates many registered voters. For our registration processes, this means a repetitious investment of time and energy. The impact of the voter purging primarily impacts first time and young voters, who are the most difficult to register and whose voting habits are hardly developed.

3. American Indian voters in Montana experience the highest level of discrimination in the voting process in the established methods of election schemes. The election schemes in Montana are at-large systems. Most Indian voters are unaware that the election schemes dilute their strength, and make it nearly impossible to elect school board members, county commissions, water board commissioners, city mayors, and more. American Indian voters desperately need the chance for representation. Services provided by cities, counties, water board, and the state of Montana are all controlled by these elected officers. Until American Indian people have a clear path to representation, many of these governmental entities will continue their practices that in Montana tend to exclude American Indians.

4. American Indian voters need to have American Indian judges at the polls. Montana county clerk contact and train election judges, usually through the local county committees of the democrats and republicans. The nomination of judges needs to include American Indian nominees, so that American Indian voters can rely on a familiar face AND the provision of voter information in the tribal language. For our tribal elders, having an election judge who can explain the voting process in the American Indian languages, is a necessity.

From Gail Small, Northern Cheyenne Reservation
Gailsmall001@aol.com

Bilingual (Cheyenne and English) speaking people are still needed at the polls here and it is never a priority despite us pointing it out over the years. I believe there are some racial connotations to this issue not being addressed on our Reservations--i.e. in the cities like San Francisco the ballots are translated into numerous languages and they have folks at the polls there who speak these languages to assist the voters. On our Reservations, we are dealing with a disenfranchised population who are already hesitant to vote due to backlash--and they have none or maybe one person who can speak the tribal language at the polls. This backlash is especially prevalent today in the county clerk and recorder offices when Cheyennes go to get their automobiles registered and face the covert and sometimes overt hostility due to us getting our license plates at reduced fees because of our residence on the Reservation and tribal sovereignty.

During the 2004 election, we had a hard time with the bilingual issue in Lame Deer. I had to have my mother go into the poll booths with some elders to help them vote--and this was when she was voting herself--no telling how many Cheyennes did not have bilingual assistance that election day. This is very important also for interpreting and explaining the numerous ballot initiatives that folks had to vote for--I had to explain these to my mother and then she helped explain them to the tribal elders in Cheyenne who were waiting in line to vote--issues like the medical marijuana, the coal bed methane county zoning vote--these are complex issues not easliy interpreted into Cheyenne language.

Anita Big Springs, Flathead Reservation
Anita_Bigspring@skc.edu

This is what Get out the Vote Flathead Reservation encountered in the most recent election in 2004:

Smudged Voter Cards. Voter Cards were sent out and ink smudged by the precinct number/district

Remarks from the Lake County Election Admin Assistant when we took electors in to due change of addresses: "Oh, You moved again, we can't keep up with you." (from Marion Siedentopf, Admin Assistant, Election Office)

Sending a Kootenai Elder on a wild goose chase to vote: The elder went to Dayton to vote and was told she had to vote in Polson. She went to Polson to Vote and Polson told her to vote in Dayton. (I called Kathie Newgard, Lake County Election Administrator, her reply was "That was my fault Anita, she should be voting in Polson and I sent her out a new card this morning". This was on said on Election Day. No election judge offered the elder to vote provisional in Dayton. A total of 50 miles or more for the elder to get the run around.

Talking down to a Kootenai Male Elder and treating him like he was in kindergarten. This man is a Veteran of War and is the War Dance Chief for the Kootenai Community and is also the community "grave digger" who is held in high esteem in the Kootenai Culture. Him and his family dig graves by hand. To be treated like he has no sense is totally outrageous!

Election Judges I.D. discrimination and not following voting protocol. Not asking their friends or relatives or community people for I.D.'s and letting them vote. When an Indian went to vote who had been voting in the same precinct for 30 years, he was asked to produce an I.D.

Sending an Indian to vote in three different precincts because the voter card was

wrong, which was not the electors fault. (this is a tough one and needs lengthy explanation).

Not having anyone who can speak Native Language as Election Judges to help the Kootenai/Salish People Vote.

Not recruiting the minority to serve as Election Judges.

Late Voter Registration Lists. When we asked for the list, it was hard to set a time when they would be ready from the election administrators. Answering in only one word sentences from the Lake County Election Administrator.

The Chief Election Judges do not have enough training in the Voting Rights Act. Provisional Balloting Spoiled Ballots Collecting Absentee Ballots at precincts, etc. .

Our Indian Representative running for office and her name was not on the absentee ballots that had been sent out. She had to request the absentee ballots be spoiled and had to ask for a new ballot send out.

Election Administrators giving out voter registration cards or absentee ballot requests to a minimum. (Like about 20 voter registrations in a pile and maybe 10 absentee requests). Telling us that they do not like the ones downloaded from the Net or in the phone books because it does not fit in their little card board voter card box and it creates more work. They had their own voter registration cards printed with the Lake County Address. We had to use these ones first.

Polling places: A precinct who only had 42 non-Indian voters as registered voters who have their own polling place. A district where there is 282 registered voters with the Indian minority who have to travel 60 miles to vote.

Election Administrators following the law on "mismarked" ballots! It is the big one with the 7 Ballots, I disputed. There were not only the 7 ballots I disputed, but in district court another
70 Ballots were brought up. A total of 77 Ballots that should have been thrown out. I disputed only 7 Ballots. Duncan Scott (Jore's lawyer) brought up the other 70 ballots in his argument.

I guess following the law to the "T". If an election administrator has to "speculate" than the ballot should be thrown. You have seen personally how they were being counted in Lake County. Stickies over the ballot mark, etc. Plain ole' sloppy ballot counting to me.

PREPARED STATEMENT OF STEPHEN LAUDIG, ATTORNEY, SUBMITTED TO THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, JULY 22, 2005

STATEMENT OF STEPHEN LAUDIG

Greetings and thank you for asking me to assist in this venture.

My name is Steve Laudig.

BACKGROUND

I am an attorney. I have practiced in Indianapolis for 27 years and now split my time between practicing law and being a graduate student in political science in the Political Science Department of the University of Hawaii.

By way of a separate document I am providing my current vitae and contact information.

I am admitted to practice before the U.S. Supreme Court; the Seventh Circuit; and the state courts of Indiana and Hawaii. I have been a death penalty qualified public defender and have tried a death penalty to verdict and participated in several others.

I was the Marion County, which includes Indianapolis, Democratic Party Chairman from 1997 until 2001. Personally I have been the Democratic nominee for a few public offices. I have had much more success as a litigator than a candidate. As part of my political activity I have registered voters and carried people in stretchers to vote when they didn't get their absentee ballots in time.

I belong to the following organizations: Hawai'i Bar Association; Hawai'i Association of Criminal Defense Lawyers; Native Hawaiian Bar Association. I have previously been a member of the Indiana Public Defender Council; Indiana Association of Criminal Defense Lawyers (Charter Member); Marion County Criminal Defense Bar Association (Founder and Charter Member); National Association of Criminal Defense Lawyers; American Trial Lawyers Association.

I currently edit the Hawaiian Journal of Law and Politics. **http://www2.hawaii.edu/~hslp/index.html**. I am a member of the Hawaiian Society of Law and Politics.

POINT OF VIEW

I should probably put my particular points of view and predispositions up front so no one is left guessing about my particular "biases." My approach to the responsibilities of political action have first been, what is the best for the least powerful in society and that no political party has a monopoly on serving this interest.

It seems to me that the matter of "race and color" in the United States isn't simply the most important problem facing the many cultures present in the society of the United States, in many ways "it" is the "only" problem. Being such a large problem that it manifests in many different aspects of the culture. Since it manifests so many different ways there must be many solutions.

"It" is a "radical" problem in the sense that it is a problem of the root of American society and culture. One of the better solutions for this problem of the root, has been the Voting Rights Act since, when it is enforced, it results in making our increasingly threatened democracy more representative and, in my opinion, better able to resist what appears to a growing appetite in some currently very powerful political groupings present in the United States for messianic totalitarianism.

My experience in Indianapolis during the last three decades of the 20th centuries and the first half of the first decade of the 21st century leads me to conclude that the local Democratic Party is vastly more open to variety and is virtually free of any displays of racial or ethnic

prejudice. Is prejudice present in the hearts of Democrats in Indianapolis. I imagine so, but you couldn't prove it by what you see. It doesn't show much in the Democratic coalition and that's important. Racially integrating political leadership tends to suppress it's manifestations even further. The less it shows the less it can be learned.

I'd like to relate one story as to why I say this. When I was the County Chairman I would call precinct committeepersons around town just to chat and find out what was going on in the neighborhoods. Some years ago I was speaking to a retired white working class committeeperson in an aging formerly completely white working-class part of town. He had been a committeeman since the 1960's. He was a retired "union man" but not necessarily politically progressive nor racially tolerant but neither was he a hater. More of a bit of a contrarian than anything in the sense that he didn't appreciate anyone acting like they thought they were better than anyone else. When it came to local politics he was a "Blue Dog" Democrat. But, I would not be surprised if he voted for Wallace in 68 in light of Wallace's tirades against hippies, the Supreme Court, and big government, and his ennobling of the white working class. Reagan once and most certainly Perot in 1992. Each time for the same reasons. He has an emotional, rather than intellectual, understanding of class politics. But it was a deeply felt understanding. Anyway, I called him to find out how his neighborhood was adjusting to the sudden influx of Hispanics into the neighborhood he had lived in all his life. It is a neighborhood of old and inexpensive housing and was a bit of a magnet for new arrivals. I wanted to gauge racial and ethnic reactions and see if we needed to do some Spanish language training for voter registration. We talked about people we knew and then I asked him about the changes and he said something like "Yeah, there's a lot of those [expletive deleted] Mexicans moving in." So, I asked him how he felt about that and he

said something like he didn't really "care for it" but that he'd "get used to it." When I asked "How so"? He said he didn't have much choice since his favorite grand-daughter "just married one."

My point is that a lot of the local Democrats are very tolerant and the ones that aren't very tolerant are tolerant enough to become more tolerant. This is a sharp contrast with the local Republican leadership that seems to go out of their way to belittle most of the few African-Americans that are active. They seem especially insensitive to African-American women.

This apparent intolerance is a rather recent development in local Marion County Republican circles. Please keep in mind that my comments here are to the local political scene, not state or national.

As recently as the late 1970's and 1980's it had always seemed to be a priority of local Republican leadership. Republican Mayor [now U.S. Senator] Lugar, and Republican Mayor Hudnut vigorously, and seemingly genuinely, engaged the political interests of the African-American population in Indianapolis. Mayor Hudnut would regularly receive nearly 1/3rd of the African-American vote. No Republican mayoral candidate since him has reached the high single digits. After Mayor Hudnut left the local Republican party seems to have written off the African-American vote. This seems both a shame and foolish politically. If you write-off one-fourth of the voters, it means that you have to get a supermajority of the remaining 75% to win and there's always about 15% of the electorate that votes based upon the style of your campaign, as opposed to what issues you campaign upon and these voters will not vote for someone who appears intolerant. In a county like Marion where the party strength is about even, it is a ticket to political obscurity. Coke doesn't write off 25% of all consumers to Pepsi. It seems self-defeating for a

political party to do so. But it seems that the remaining local Republican leadership is hooked into an "ahistorical" political ideology that refuses to take into account the persistent effects through time of past racism. The ideology doesn't allow them to even admit that discrimination is real and thus they are lost in a parallel political physics reality where past causes [racial segregation in housing; racial discrimination in employment; segregated schools] have no present effects.

It is my personal opinion that the litigation that I've been involved with has opened doors and made the "class picture" of those elected look much more like the "class picture" of those doing the voting than before the litigation. Having integrated elected political leadership means that a Julia Carson [U.S. House of Representatives, 7th District Indiana] an African-American daughter of a domestic elected in a "minority-minority" district with enthusiastic white support can help to explain to those who will listen what it means to be discriminated against and she comes to the podium with the credibility of an elected U.S. Member of the House of Representatives. I am proud of the fact that she was one of the plaintiffs in my first VRA case, Carson v. Hudnut, described below. She was a State Representative at the time.

I have been either lead or co-counsel in the following voting rights act cases with the following results for increased minority participation. Lest there be any concern about me being completely biased I should tell you that the local Democratic party "leadership" never helped the litigation in any formal way and only a couple of office holders took the chance and publicly supported any of the suits.

A few words on the structure of the electoral and political structure of Marion County. Marion County is a 20 mile by 20 mile square in the middle of the state. It is divided into nine

townships in a "tic-tac-toe" fashion with three up and three over. The townships are the same geographical size but the population varies from "Center" township, which is the old urban middle of the "tic-tac-toe" with more than 200,000 to a nearly rural township of 20,000. There is township government in Marion County. In 1971 Indianapolis and Marion County were consolidated "electorally" in the sense that the suburban population was added to elections for mayor and the old "county" council and the old "city" council were consolidated into a "city-county" council. The intent and effects of this "consolidation" are discussed later.

Baird v. Indianapolis: Filed 1987. Indianapolis has a 29 member city-county council. Twenty five members are elected from districts and four at-large. In 1987, I filed a suit challenging both the districts and the at-larges on racial and partisan discriminatory grounds. At the time the suit was filed the Council was 23-6 Republican even though the baseline Republican vote in the city was only 52% overall.

After spending three years and a half a million dollars the Republican-controlled council settled with us by agreeing to redraw the districts but forced us to trial on the at-larges. The judge wasn't persuaded enough as to the discriminatory effects of the at-large district [especially since the new districts increased the African-American districts from 4 to 7] and we were unable to tip that over. Prior to the litigation [before 1987] there were four African Americans elected from twenty five districts. Beginning with the redistricting caused by the litigation [1991] there were immediately seven African American districts electing six African Americans. In one district, a non-African American councilor was the candidate of choice of African American political leadership and African American voters. There are now eight African-American district councilors including two [one Republican and one Democrat] elected from white majority

districts. There is also one African American majority district that continues to elect a non African-American as its council member.

The Republicans, who refused to modify the at-large district election, are now probably regretting it since Democrats have won all four at-larges the last two times.
The council is now 15-14 Democratic and without the at-larges it would be 14-11 Republican. This is rather poignant evidence of the inherently discriminatory nature of at-large district which uses the primitive winner-take-all voting method.

The at-larges now "over-represent" the African-American community since Marion County is about 28-30% African American but 75% of the At-large members on the council are African-American. This is up from none before.

The current [2005] Council president is African-American as was the immediate past council president.

Dickinson v. State Election Board: Filed 1990. Voting Rights Act litigation on behalf of African-American citizens in Indiana to end racially discriminatory multi-member districts in state legislature. Prior to the litigation the Indiana house was a mix of single member and multi-member districts. It was not an accident that multi-member districts were used in areas with significant African-American population while single member districts were used in all white areas.

Shortly before we were to try the case the General Assembly redrew the Indiana House districts and ended the multi-member districts. Prior to this litigation [before 1990] there had been two African-Americans [Summers and Crawford] elected from the five, three-member districts, in Marion County. The partisan makeup of Marion County districts was 12-3

Republican. After the litigation [1992] there was an immediate jump to four African-American majority districts electing three African-Americans and one white. Beginning in 2002 there are five African-American districts electing four African-Americans. One districts has continued to elect the same non-African-American candidate it has since prior to 1982. The partisan makeup now is 8-7 Democratic.

Hines v. Marion County Election Board: Filed 1991. Voting Rights Act litigation on behalf of African-American citizens in Marion County to end racially discriminatory at-large districts in township board elections. Township boards are the legislative branch of township government that in Marion County are involved with emergency poor relief and, with one township excepted, fire protection. Under the old system, there was a three member board for each of nine townships in Marion County and out of 9 boards or 27 members there were two African-Americans. The partisan make up was 24-3 Republican. We prevailed and the at-large districts were abandoned in favor of seven single member districts for each township. Beginning immediately after the litigation [1996] there were twelve 12 out of 63 seats held by African-Americans. Now [2005] there are 17 out of 63 held by African-Americans and 23 of 63 held by Democrats. Democrats controlled 1 of 9 Boards, now they control 4 of 9.

Carson v. Hudnut: 1987 Voting Rights Act litigation on behalf of African-American citizens in Indianapolis to end racially discriminatory boundaries for precincts. Under the old system African American neighborhoods had very populous precincts and correspondingly fewer precinct committeepersons. We prevailed and the precincts were redrawn. In Indiana each precinct is entitled to a precinct committeeperson and a vice-committeeperson. In presidential year primaries the elections for committeeperson [but not the vice who is appointed] is held. The

person holds office for four years. If there is no candidate the county chairman may appoint a committeeperson. All duly elected, or appointed, committeepersons and vice committeepersons convene every four years and elect the county party central committee consisting of the county chairman, vice-chair, secretary and treasurer. If there is a vacancy in a non-judicial elected office the committeepersons of the party that held the office convene to fill the vacancy. For example, if the State Representative is a Democrat and resigns or passes away the Democratic precinct committeepersons of that district convene and elect the successor. Subsequently [1989] precincts were made more equal in population and there was an increase in African American political strength in selecting party leadership and slating candidates for office which mitigates the discriminatory effects of a slating fee.

Although I haven't examined the U.S. census numbers for all precincts recently, in preparing this affidavit I discovered that Marion County Precinct Ward 7- precinct number 6 has a population of 23, while Marion County Precinct Pike Township, Precinct number 13, has a population of 4,253.

I have not examined whether there has developed a racial tilt but clearly there are equal protection problems in electoral districts with such a great difference in population.

Anderson v. Indiana State Election Board: Filed 1991. Voting Rights Act challenge to racially discriminatory elections to Marion County Small Claims Court. We prevailed and several legal procedural practices relating to landlord tenant litigation that were objectionable were ended, particularly a venue change which made it possible for inner city landlords to move eviction proceedings to suburban courts with no mass transit access which had led to high levels of default evictions. Additionally prior to the litigation there were no African American small

claims court Judges out of nine. After the litigation [2002] there was one African-American Small Claims court judge and two others must have the support of African American voters to be elected. Prior to the litigation there was 1 Democrat out of 9 judges. Now there are three. It is highly likely that next year there could be 6 with one or more of the 3 new ones being an African American.

Bradley v. Work: 1991 we attempted to end the appointment of Judges in Lake County [Gary] and replace it with elections just like all the majority white counties in Indiana. Prior to 1967 Lake County had elected its judges just like all other counties in Indiana. The change to appointments had been done in response to Richard Hatcher being elected mayor of Gary in 1967 and had been adopted to thwart Lake County African American voters from having influence in electing judges. Sadly, the Chief Justice of the Indiana Supreme Court Randall Shepherd intervened and opposed us on this and devoted several hundreds of thousands of taxpayer dollars in funding the defense and we were not successful. One particularly nasty aspect of this litigation is that after the Plaintiffs lost, the Intervening Defendants at the instigation of Indiana Supreme Court Justice Randall Shepherd sought fees against me personally in a "SLAPP" style proceeding.

The published opinions related to these cases are:

Baird, et al., v. City of Indianapolis, 976 F.2d 357 (7th Cir. 1992)

Dickinson v. Indiana State Election Board, 933 F.2d 497 (7th Cir. 1991)

Bradley v. Work, 797 F. Supp. 694 (S.D. Ind. 1992)

CURRENT LITIGATION:

I am presently representing African Americans in a challenge to districting and an at large district in Lawrence Indiana which is a suburb of Indianapolis inside Marion County.

According to the United States Census for 2000, the population of Lawrence is 39,216. Of these, 30,586 (77.99%) are white, and 6,195 (15.79%) are African-American. The remaining are other races or multiple races. Of the voting age population of 27,625, there are 22,167 (80.24%) that are white and 3888 (14.07%) are African-American. The remaining are other races or multiple races.

Lawrence has six single member districts and one three member at-large district. No African-American has ever been elected to the Lawrence Council, or any other Lawrence City office since the establishment of Lawrence as distinct political entity. No African-American has ever been nominated to be a candidate for the Council in the Republican primary for the Council. Rarely, perhaps only twice, has an African-Americans ever been nominated in the Democratic primary to be a candidate for the Council.

INDIANA'S HISTORY ON RACIAL MATTERS

What follows is a summary of factual submissions made in the cases noted above and it comes from the sources noted. Additionally it is based upon a report by expert witness I have used, Dr. Leonard Moore, of McGill University, author of Citizen Klansman.

Indiana and Marion County have a history of discrimination touching upon the rights of minorities to participate in the political process. Indiana has a long record of official discrimination against its African-American citizens.

Indiana was a "free" not a "slave" state prior to the Civil War. The 1851 Indiana Constitution Article 13 prohibited African-Americans from coming into Indiana and provided for penalties for persons who encouraged their entry. See, The Negro in Indiana Before 1900: A Study of A Minority, Emma Lou Thornbrough, Indianapolis, (1961) at 82 ("The Negro in Indiana"). Article 13 passed in Marion County by a vote of 2,505 - 308. See, The Negro in Indiana at 82. Although Article 13 was declared null by the Indiana Supreme Court in 1866, it was not formally removed until 1881. See, The Negro in Indiana at 206, 250. At the end of the Civil War Indiana's African-American solders were legally ineligible to return to Indiana because of Article 13. See, The Negro in Indiana at 231. In 1856, the Indiana Supreme Court in Barkshire v. State, 7 Ind. 389 (1856), held that it was the public policy of Indiana to remove those Negroes already present in Indiana by urging colonization in Africa and held that a male Negro resident of Indiana who married a Negro woman who came into Indiana after the adoption of Article 13 was subject to a fine. See, The Negro in Indiana at 73.

In 1860, Indiana's public schools were exclusively reserved for whites due to the failure of the state to provide of the education of Negro children. See, The Negro in Indiana at 162. Anti-minority hatreds and discrimination were not only restricted to African-Americans during this period of time. See, Bryant v. Whitcomb, 419 F.Supp. 1290 (S.D. Ind. 1970) at 1292, fn. 1. By 1865, Indiana was the only northern state to retain laws against Negro testimony. U.S. Senator Thomas Hendricks, from Indianapolis, voted against the Thirteenth Amendment in the U.S. Senate in 1865. See, The Negro in Indiana at 204. In 1866, Governor Oliver P. Morton gave a speech against Negro suffrage. See, The Negro in Indiana at 241-243. In 1869, Governor Conrad Baker gave a speech opposing Negro suffrage in Indianapolis. See, The Negro in Indiana

at 241-243. The 1868 platform of the Indiana Democratic Party opposed Negro suffrage. See, The Negro in Indiana at 241-243. For many years, Indiana was the only northern state east of the Mississippi to retain laws against interracial marriages. See, The Negro in Indiana at 394. That law remained on the books until it was finally repealed in 1965. See, West's Indiana Law Encyclopedia, Marriage §14.

In 1875, two Negro ministers were arrested in Indianapolis for performing marriages contrary to the Indiana law against racially mixed marriages. See, The Negro in Indiana at 263. At least 20 Negroes were lynched in Indiana from 1865 to 1903. See, The Negro in Indiana at 276.

In the 1890's, discrimination against Negroes increased. In 1892, after Republicans had become able to elect their candidates without Negro voters, the Republican Party Chairman in Indianapolis said Negroes were a detriment to the Republican Party and expressed repugnance at white and Negro party workers mingling. He delayed opening the county headquarters because he did not want any "lazy coons" hanging around the place. See, The Negro in Indiana at 308. In 1896, the Republican Party in Indiana began a long period of control of state government during which their margin of victories was large enough that they no longer sought Negro votes. In Indiana, as well as in the South, there was a "lily white" movement within the Republican Party. See, The Negro in Indiana at 315. In 1899, a bill passed the Indiana Senate (but died in the House) which would have made it a felony for an African-American man to live with a white woman. See, The Negro in Indiana at 265, 270.

In the 1920's, Indiana, along with Illinois, and Ohio, contributed well over five hundred thousand (500,000) Knights of the Ku Klux Klan and taken together represented the heaviest

concentration of Klan strength in the United States. See, The Klan in the City, Jackson, Oxford University Press (1967) at 90. From 1922 to 1925, Indianapolis was the unrivaled bastion of the Invisible Empire. See, The Klan in the City at 144. From 1922 to 1925, Indianapolis was the base of operations of the legendary D.C. Stephenson and the headquarters of the powerful Realm of Indiana and the home of the largest Klan. See, The Klan in the City at 144. In 1924, the "Invisible Empire" became visible by winning control of the Marion County Republican organization by electing George Coffin as county chairman over the mayor's candidate. See, The Klan in the City at 152. In 1925, the Klan elected both a mayor of Indianapolis and a school board. See, The Klan in the City at 158. Gary, Indiana, with a total population of 55,000, had a Klan membership estimated at 10,000 men. See, The Klan in the City at 239. The politically dominant Gary Republican party "was the party of the Ku Klux Klan, and several mayors and city councilmen were either members of the Klan or nominated and elected with Klan support." See, Steel City, Gary, Indiana 1906-1950, Betten, Holmes & Meier Publishing, New York, (1986) at 64. In 1925, the Klan in Gary elected Floyd Williams mayor. He was an undertaker "with no political experience." Five of the fifteen Gary council members, the ones elected at large, were Klan candidates. See, A History of Gary, Indiana: 1930-1940, Richard J. Meister, Doctoral Dissertation, Department of History, Notre Dame, (January 1966) at 43.

During the 1920's, Gary Negroes began to show increasing independence politically by winning their first elections --they had just elected a council member from their own ranks. The white political response was a proposal that Gary should switch to a "city manager" form of local government. This proposed electoral reform is later paralleled by the adoption of Unigov in 1969.

Rising African-American political power triggers what is labeled "reform" but which in actuality is the incumbent powers attempt to thwart a group's rising political power from becoming effective. It's a mid-game rules change to prevent political success. It is "not a coincidence that Unigov was conceived after the election of Mayor Richard G. Hatcher in Gary." Indianapolis whites did not want to see African-Americans begin to be able to influence governance. See, The Indianapolis Busing Case, Indiana and the United States Constitution, Indianapolis, (1983) at 74.

A recent [2005] example is Indiana Senate Enrolled Act No. 483 which the Republicans [as soon as they had all three branches of Indiana government] enacted. It is the most onerous voter identification legislation in the country. It amends IC 3-5-2-40.5 and is presently being litigated in U.S.D.C. Southern District of Indiana under case name Crawford v. Marion County Election Board, Cause Number 1:05-cv-00804-SEB-VSS.

I am not extremely familiar with the litigation but it seems to have been brought only on 1983 grounds and not VRA grounds and perhaps bears monitoring.

In Gary, in the 1920's, Negroes were becoming a balance of power group in local Gary politics and their gains would be wiped out by a city manager system. A leading representative for the city manager group was a Klan member. See, A History of the Black Community of Gary, Indiana: 1906-1940, Elizabeth Balanoff, Univ. of Chicago, Doctoral Dissertation, Department of History, (1974) "Black Gary, 1906-1940" at 322-323. During the late 1920's, African-Americans began defecting from the Republican Party because of the close alliance of that party with the Ku Klux Klan.

The trend continued during the years of the Great Depression and the New Deal until a revolution had occurred in Negro voting habits. A group that had been solidly Republican for generations became almost as solidly Democratic. See, The Negro in Indiana, at 395. By the elections of 1934 and 1936, the mass movement of African-Americans into the Democratic Party was complete.

On the whole Democrats, nationally and in Indiana, were more consistent in their support of effective legislation against racial discrimination than were Republicans and this accounted for the Negro exodus to the Democratic Party. See, Since Emancipation, A Short History of the Indiana Negroes, Emma Lou Thornbrough, Indiana Division American Negro Emancipation Centennial Authority, Indianapolis (1963) at 39. ("Since Emancipation").

Even with this support, African-Americans were excluded from governmental participation at all levels. For example, from 1897 to 1933, no Negro sat in the Indiana State Legislature. See, Since Emancipation, at 395.

They were also kept from voting. For example, in November 1932, the Federal District Attorney in Northern Indiana had to sue the Lake County Election Board to provide voting machines in African-American precincts and a federal judge ordered it. Black Gary, 1906-1940 at 359. There was renewal of African-Americans' protest about school segregation present at Froebel High School in 1931. Id. at 275. Litigation to end segregation was brought, but the Indiana Supreme Court upheld segregated schools in Gary, in its November 1931 term. State ex rel. Cheek v. Wirt, 203 Ind. 121 (Ind. 1931).

Indianapolis school authorities had lobbied for years against the adoption of anti-segregation legislation. See, The Indianapolis Busing Case, at 71. African-Americans in Indiana

were excluded from public dining places. In 1920, the Indiana Court of Appeals held that an ice cream parlor was not an "eating place" within the meaning of the 1914 Civil Rights Act and that refusal to serve Negroes was not a violation. Chochos v. Burden, 74 Ind. App. 242, 128 N.E. 696 (Ind. App. 1920). African-Americans were racially segregated in the parts of town they could live in.

In 1926, the Indianapolis City Council enacted a zoning ordinance which declared that it was "advisable to foster the separation of the white and Negro residential communities" in the interest of "public peace, good order and the general welfare" and that the ordinance required written consent of the majority of persons of the opposite race to approve the sale of residential property to a member of another race. It required written consent of the majority of persons of the opposite race to approve the sale of residential property to a member of another race. Private racially restrictive covenants were frequently used in Indianapolis until the 1948 U.S. Supreme Court decision striking them down. See, Since Emancipation at 24.

Actions from nearly a century ago have effects and consequences now. There are still many parts of Indianapolis that are highly racially segregated. But in an interesting way. According to the 1990 U.S. Census out of 868 precincts there were 110 precincts with 100% white population. But there were no precincts with 100% African-American population. According to the 2000 U.S. Census, out of 914 populated precincts there were 32 that were 100% white and another 50 or so with only "1" African-American and again none that were "100%" African-American. As recently as this summer there have been violent race based incidents. The phenomenon seems to never end. The July 4, 2005, Indianapolis Star headline read "Suspects have violent pasts. Racial intolerance, crime not new for 3 of 4 charged in arson."

This was a story on burning out African-Americans who were moving to the neighborhood. [http://www.indystar.com/apps/pbcs.dll/article?AID=/20050704/NEWS01/507040377/1006/SPORTS03].

Thirteen years ago the same sort of incident occurred in the Ravenswood neighborhood of Indianapolis's Northside. Funny you never read stories about African-Americans "burning" white families out that are moving into the neighborhood.

In 1947, a bill prohibiting racially separate schools failed to pass the Indiana Legislature. See, Since Emancipation at 43. In Indianapolis, until the early 1960's, there was an unwritten rule that no realtor would sell a house to a Negro unless there were already two Negro families on the block. Negroes in Indianapolis continued to be excluded from real estate boards until the 1960's. See, Since Emancipation at 25. Indianapolis was the only large northern city in 1948 to have a policy of racially segregated public schools. See, Since Emancipation at 59.

Between 1950 and 1960, the percentage of Negroes in Indianapolis increased from 15% to 20%. Although the suburban population of Indianapolis increased from 125,000 to 220,000, the number of African-Americans in the Indianapolis suburbs only increased from 1,100 to 2,000. See, Since Emancipation at 27. According to the 1960 Census Beech Grove had one Negro out of almost 10,000 residents. Speedway, a town of comparable size to Beech Grove, had three. See, Since Emancipation at 21.

As late as 1964, neither Broad Ripple High School nor Northwestern High School enrolled a single African-American student, while there was not a single white student at Attucks High School. See, The Indianapolis Busing Case at 72. African-American legislators were not welcome at downtown hotels or private clubs and could not dine at downtown restaurants before

the mid-1950's. African-Americans were not welcome at the Claypool Hotel until 1955 when it lifted its race ban after the Congress of Industrial Organizations threatened to cancel a scheduled convention there unless African-American union members were permitted to stay in the hotel. Downtown Indianapolis did not approach full integration until the 1960's, after a public accommodations bill became law in 1961. See, The Centennial History of the Indiana General Assembly, 1816-1978, Walsh, Indiana Historical Society, Indianapolis (1988) at 586-587.

In 1969 --the same year that Unigov was passed-- legislation (House Bill 1006) was enacted making disannexation from Gary much more possible by lowering the petition requirements from 50% of the population to 10% of the population was passed by the Senate. See, Indiana Acts 1969, P.L. 239, §606. At the same time that disannexation from African-American-controlled Gary was made easier, the Indiana General Assembly revised the 1959 Town Incorporation and Annexation Act. See, Indiana Acts 1959, P.L. 240. This statute, which had only been on the books for ten (10) years, required that the common council of any second class city, viz. Gary, be obtained if "any part of the area [was] sought to be annexed by" a newly-formed town. See, Indiana Acts 1959, P.L. 240, §14. The amendment thus deleted the requirement that the Gary city council approve annexations being attempted by Merrillville.

Until 1972, Marion County elected all of its members of the Indiana House of Representatives, at-large, from a countywide district. See, Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971). In 1981, the Indiana Legislature passed a redistricting law with "grotesque gerrymandering" and "unusual shapes" drawn intentionally to deprive Democratic voters, of which African-Americans are a significant component, of electoral power. See, Bandemer v. Davis, 603 F.Supp. 1479, 1488 (S.D. Ind. 1984), rev'd on other grounds, 478

U.S. 109 (1986) at 178-183 (Powell, J., joined by Stevens, J., concurring in part and dissenting in part). The 1981 plan used multi-member districts to encompass and dilute the voting power of virtually all African-Americans in Indiana. Single-member districts were used for the white population Indiana.

In 1990, a group of African-Americans filed Dickinson v. Indiana State Election Board, Southern District of Indiana, Indianapolis Division, 90-435 C which alleged that the 1981 Indiana House districting violated §2. The 1981 redistricting plan, like its predecessor, created five (5) three-member House districts in Marion County, which were successfully challenged as discriminatory against African-American voters. Dickinson v. Indiana State Election Board, 933 F.2d 497 (7th Cir. 1991) (Reversing Trial Court's dismissal of complaint.)

In 1991, as a direct result of Dickinson litigation, the Indiana House of Representatives ended the practice of using multimember districts only in areas with politically significant African-American populations and in 1992 for the first time in the history of Indiana African-American residents of Marion County were permitted to select members to the Indiana House of Representatives in single-member districts.

During the same period the Unigov was adopted in the face of rising African-American political power in Indianapolis, the manner of electing judges in Allen, Lake, Marion, St. Joseph and Vanderburgh Counties -- each of which has politically significant African-American populations -- was changed by the Republican-controlled General Assembly at the request of the local white power structures of those communities. Each change made it more difficult for African-Americans to affect the election of judges in those counties. Prior to 1967, all counties had direct, popular partisan elections for Superior Court judges. After 1973, no county with a

politically significant African-American population had direct popular partisan elections for Superior Court judges. Four (4) out of every five (5) African-Americans in Indiana vote for their Superior Court judges in a different kind of election than three (3) out of four (4) whites. Counties with politically significant African-American populations are to have electoral systems that make it more difficult for minorities to nominate and elect judges.

In 2005 the Republicans, once they had captured the governorship, the Senate and the House attempted to remove judges from elections but only in counties where African-Americans have rising influence. House Bill 1703.

In 1968, some African-American citizens filed a suit contending that Indianapolis Public School officials were intentionally operating a segregated school system. In 1969, the General Assembly adopted "Unigov", (I.C. 36-3-1-1 et seq.) which "consolidated" government in Marion County. It became effective January 1, 1970. Unigov "consolidated" the county and the city for purposes of electing a city county council and a "mayor". Four cities--Beech Grove, Lawrence, Southport and Speedway; and eleven school districts-- Beech Grove City, Decatur Township, Franklin Township, Lawrence Township, Perry Township, Pike Township, Southport, Speedway, Warren Township, Washington Township and Wayne Township were excluded from being incorporated into Indianapolis and the Indianapolis Public Schools for improper reasons related to race and/or party politics. In 1971, the federal district court held that Unigov perpetuated racial segregation, in an opinion subsequently affirmed by the Seventh Circuit, United States v. Board of School Commissioners, 332 F.Supp. 655 (S.D. Ind. 1971), aff'd. 474 F.2d 81 (7th Cir. 1973), cert. den. 413 U.S. 920 (1973); 368 F.Supp. 1191 (S.D. Ind. 1973), aff'd. 503 F.2d 68 (7th Cir. 1974), cert. den. 421 U.S. 929 (1975); 419 F.Supp. 180, 183 (S.D. Ind.

1975), aff'd. 541 F.2d 1211 (7th Cir. 1976), vac. on other grounds and remanded 429 U.S. 1068 (1978), decision on remand 456 F.Supp. 183 (S.D. Ind. 1978), aff'd. 637 F.2d 1101 (7th Cir. 1980), cert. den. 440 U.S. 838 (1980). These decisions held that the Indianapolis Public Schools Corporation was guilty of de jure racial segregation. The Court also found that the adoption of Unigov by the General Assembly in 1969 was intended to have a racially discriminatory effect. The Court found that, after the Brown v. Board of Education decision in 1954, Indianapolis Public Schools continued policies that perpetuated and increased segregation by the drawing and changing of school district boundaries. It also found that the Indianapolis Housing Authority was complicit in keeping schools racially segregated. In 1973, this District held that the de jure segregation of the Indianapolis Public Schools was to be imputed to the State of Indiana because of the General Assembly's enactment of Unigov. 368 F.Supp. 1191 (S.D. Ind. 1973), rev'd in part, aff'd in part 503 F.2d 68 (7th Cir. 1974), cert. den. 421 U.S. 929 (1975). In its August 1975 opinion, the District Court declared: "When the General Assembly expressly eliminated the school system from consideration under Unigov, it . . . inhibited desegregation." 419 F.Supp. 180, 183 (S.D. Ind. 1975).

Township, and excluded cities' public school districts were intentionally excluded from the Unigov 'unification' in order to perpetuate a long-standing racially discriminatory public education system which was part of a de jure racial segregation scheme by the State of Indiana; the City of Indianapolis; and, the County of Marion, which had intentionally operated a racially segregated school system through 1971 and which remains subject to a court-ordered remedy. Unigov "consolidated" political aspects of the county in a way that left white-controlled electoral and political structures intact. For example, township schools were not consolidated, township

governments were not consolidated, and the all white cities of Beech Grove, Lawrence, Southport and Speedway, and their all white school districts, were not consolidated. It appears that the only structures that were "consolidated" were those which African-American voters were posed to influence, or control, politically. Unigov was intentionally constructed in a way that greatly limited the political influence of African-American voters. African-Americans were totally excluded from the process of creating Unigov. Professors Owen and Willbern, concluded that in several instances that Unigov was, to a significant degree, driven by both partisan and racial politics, and that it's final form was shaped by these considerations (See, Governing Metropolitan Indianapolis, University of California Press, Berkeley, (1985)).

The predecessor to the Unigov task force met regularly and worked on the draft proposals for Unigov over nearly a two-year period before one Democratic businessperson and one African-American public relations person "were added to the group to give some balance to the previously all-white Republican committee." See, Governing Metropolitan Indianapolis at 55. Then Mayor of Indianapolis Richard Lugar, who lobbied extensively for the adoption of Unigov, said "I'll be candid. I know this is good for the Republicans. That is how I sold it to the legislators statewide." See, Governing Metropolitan Indianapolis at 173.

Republican Party chairperson Keith Bulen boasted that Unigov was his "greatest coup" which added substance to the charges of a political takeover. See, Governing Metropolitan Indianapolis at 173. Owen and Willbern concluded that given the results of the elections after Unigov was adopted it became "rather obvious that the Unigov consolidation design has proven itself as a workable political strategy. It has accomplished its basic goal, which was to displace the Democrats from city hall and take command of Indianapolis city government with all the

privileges, patronage, and partisan benefits that go along with such political control." See, Governing Metropolitan Indianapolis at 176 quoting Robert V. Kirch, "Unigov Stratagem Revisited: 1979 Indianapolis Election." Indiana Academy of Social Sciences, Proceedings, 3rd ser. 15:106 (1980). Owen and Willburn concluded that "political advantage was a part of the Unigov strategy." See, Governing Metropolitan Indianapolis at 176. Race was a significant factor even if not the only factor involved in the creation of Unigov in the form it took. It has been judicially established that the intent behind excluding the townships and the excluded cities from consolidation was race. The politicians who wanted unification concluded that "any attempt to change the school system would endanger the proposal."Consequently, the 11 independent school systems were untouched." See, Governing Metropolitan Indianapolis at 72. Similarly the "nine townships were untouched, thus avoiding or at least muting, opposition from the elective township trustees." See, Governing Metropolitan Indianapolis at 72. "The largest suburban municipalities were excluded from the territorial jurisdiction and tax base of the consolidate city-county . . . [to] help mollify the potentially most effective suburban opposition." See, Governing Metropolitan Indianapolis at 73. The African-American community opposed Unigov "on the ground that it would dilute the black vote." See, Governing Metropolitan Indianapolis at 94. The African-American community fought "Unigov on different terms [than the white suburban community which fought] it on terms of integration . . . [blacks fought] it more on a political basis. . . [suburban whites'] reason for fighting Unigov [was] that it opens up housing to blacks in [their] area." See, Governing Metropolitan Indianapolis at 95.

As one knowledgeable observer pointed out "the relationship of the schools to the Unigov plan was a volatile issue that needed to be handled cautiously [by saying] `to have

included schools in Unigov would have raised the specter of racial integration . . . and would have meant instant death for the plan." See, Governing Metropolitan Indianapolis at 98. Owen and Willbern noted that although "the school officials were in fact deliberately cooperating with the mayor in order to keep the schools out of Unigov, a public statement would have unnecessarily raised the ire of those who preferred to have the schools included. At the same time, those who were opposed to the schools inclusion were tacitly reminded that the schools would not be affected by Unigov." See, Governing Metropolitan Indianapolis at 99. This leaves no doubt that Unigov's final form that includes maintaining the City of Lawrence, as a separate political entity, was in fact finally shaped by considerations of race.

The discriminatory effect of the final form was noted by Owen and Willbern in that if "the old city had continued . . . blacks would have still been a minority, but they were developing a good deal of political leverage, especially in the old city's normally victorious Democratic Party. This advantage was reduced when Unigov extended the boundaries countywide. . . . The [1980] proportion of blacks countywide [was] at about the level it reached 20 to 25 years [prior to Unigov] and black leaders see this as a significant setback." See, Governing Metropolitan Indianapolis at 180. This perception was joined in by Ebony magazine that noted at the time of Unigov's passage that "black political power had been diluted by Unigov. See, "Cities for Blacks," Ebony, February 1978, pp 95, 101. Owen and Willbern endorsed the findings of William Schreiber who concluded that Unigov "had an adverse effect on the influence of blacks and especially on their influence wielded through the once-dominant Democratic Party. Finally, consolidation dilute[d] minority group, especially black, voting power . . . whether . . . as a side

effect or primary purpose is difficult to determine, although there is cogent evidence that it [was] the latter." See, Governing Metropolitan Indianapolis at 198.

Unigov was constructed in a way that would greatly limit the political influence of African-American voters and contained important provisions clearly tied to prevailing racial concerns. These provisions centered on the local government institutions that would not be consolidated into the new government. The townships and the excluded cities were excluded from incorporation on account of race or color. Lawrence would have been dissolved and its functions absorbed into the new city/county government if not for the politics of race.

In 1987, a group of African-Americans filed Mason v. Hudnut, Southern District of Indiana, Indianapolis Division, IP-87-37-C challenging the manner in which precincts in Marion County were created alleging that the precincts concentrated African-American voters into very populous precincts thereby diminishing, by packing, the effectiveness of African-American votes in both major political parties. The case was settled and precincts were redrawn. As a direct result of Mason, election reform was accomplished and in 1992 the political precincts were redrawn in a way to create more equally populous precincts.

In 1992, a group of Marion County African-Americans filed Hines v. Marion County Election Board, Southern District of Indiana, Indianapolis Division, IP-92-1727-C and Warren v. Washington Township Board, Southern District of Indiana, Indianapolis Division, IP-92-1479-C, which challenged the manner in which members of the Township Boards were elected. Board members were elected at-large from the township as a whole with no subdistrict residency requirements. As a direct result of the litigation, election reform was enacted by the legislature, and in 1996 members of the township boards will be elected from seven (7) single-member

districts rather than three (3) members at-large from the township. (See Entry of 27 September 1995 in Hines v. Marion County Election Board).

Between 1971 and 1994 there were modifications of single-member Marion County-Indianapolis City-County Council district boundaries to assure white domination of special taxing districts, called Special Service District Councils, that control police and fire services, and prevented black "council members from obtaining a working majority on the Special Service District Councils." Between 1971 and 1994 the State of Indiana modified the membership requirements for participation on the Special Service District Councils to assure white domination and prevent African-American "council members from obtaining a working majority on the Special Service District Councils." In 1971, 1975, and 1981 Indianapolis African-Americans could have constituted effective voting majorities in six (6) City County Council districts.

In 1971, 1975, and 1981, after the enactment of Unigov, the City-County Council enacted racially discriminatory districting ordinances for the City-County Council which packed African-Americans into four (4) City-County Council districts and "cracked" the balance of the African-American population into districts where they constituted sizable, but ineffective, voting minorities. Indianapolis African-Americans could have constituted effective voting majorities in six (6) districts. In 1987, a group of African-Americans filed Murray v. Hudnut, later renamed Baird v. Indianapolis, Southern District of Indiana, Indianapolis Division, IP-87-111 C which alleged that the 1981 Council redistricting violated §2. In 1990, the City County Council entered into a consent decree in the Baird case in which it agreed to redistrict one year and one election earlier than Indiana law required. The Federal District court held that it "could almost take

judicial notice of the fact of such discrimination. Indeed, the evidence on this point admitted at the hearing went largely unrebutted." The Court also observed that the 1981 districting scheme which provided for only four (4) African-American majority districts would have "been subject to very serious Voting Rights Act challenges." (Baird, Entry of April 25, 1991, at 24).

Thus, in 1991, for the first time in the history of Indiana, African-American residents of Marion County were permitted to elect members of the City County Council from non-discriminatory single-member districts. These districts came about only as a result of litigation.

Unigov "consolidated" political aspects of the county in a way which left the white controlled governmental structures intact. Unigov "consolidated" political aspects of the county in a way which demolished governmental structures that were African-American controlled or that were significantly influenced by African-Americans. In the recent past, the Indianapolis Police Department would park patrol cars outside polling places on election day in an attempt to intimidate and suppress Black voter turnout. Election recounts have targeted inner city precincts and had the effect to intimidate minority voters and minority precinct workers.

There has never been a Republican nominee for a countywide executive or administrative office in Marion County who was an African-American in Marion County. The Republican Party has never slated an African-American for a Small Claims Court Judgeship in Marion County.

Democratic Party has only twice nominated an African-American for a Small Claims Court Judgeship in Marion County. Marion County Democrats and Marion County Republicans rarely nominate an African-American to be their candidate in a white single-member district. With only one exception, the only time Republicans will nominate and African-American for a

major office is if the Republican has little or no chance of winning. [See, Evan Bayh v. Marvin Scott, U.S. Senate 2004]

There has been a lack of proportional representation in electing City County Councilors from districts. There has historically been a lack of proportional representation has occurred in electing the General Assembly delegation in Marion County that has only recently been remedied. Prior to 1999 there has never been a candidate of choice of African-American voters elected at-large candidate to the City-County Council. There is only one African-American Township Assessor out of nine. There is are two African-American Township Trustees out of nine.

No African-American has ever been elected to the Beech Grove City Council. No African-American has ever been elected Beech Grove City Mayor. No African-American has ever been elected Beech Grove City Clerk Treasurer. No African-American has ever been elected to an office of Beech Grove City government. No African-American has ever been elected to the Speedway City Council. No African-American has ever been elected Speedway City Mayor. No African-American has ever been elected to an office of Speedway City government. No African-American has ever been elected to the Southport City Council. No African-American has ever been elected Southport City Mayor. No African-American has ever been elected to an office of Southport City government.

The following township governments do not employ African-Americans in numbers equal to their percentage of their population in the township.

a. Decatur Township;
b. Franklin Township;
c. Lawrence Township;
d. Perry Township;

e. Pike Township;
f. Warren Township;
g. Washington Township;
h. Wayne Township.

The following excluded city governments do not employ African-Americans in numbers equal to their percentage of their population in the township: Beech Grove, Lawrence, Southport, Speedway. These cities and the townships in Marion County would have been dissolved and their functions absorbed into the new city/county government if not for the politics of race. Taken together as a whole, township governments in Marion County do not employ African-Americans in numbers equal to their percentage of their population in the county.

The white political majority in Indiana and Marion County has a history of using voting devices to dilute the voting efficacy of ethnic, and racial, minorities dating back to 1849. See, Bryant v. Whitcomb, cited above at 1292, fn. 1.

Both major political parties in Marion County have candidate slating processes which includes fees and which historically have been closed to African-Americans, especially the Republican slating process. This slating fee affects the African-American community more than the majority white community from seeking or obtaining a party's endorsement. The effect is that African-American candidates are selected by white political leadership.

For example, the Republican party has never nominated an African-American for a countywide executive or administrative office. The Republican Party in the City of Lawrence has never slated or nominated an African-American to a city elective office.

In the first Unigov election [1971] John Neff, the Democratic nominee, used a "white picket fence" campaign in an attempt to appeal to white suburban Republicans by clearly

implying his opposition to school desegregation. Richard Lugar was his opponent who had been instrumental in excluding the township schools from consolidation under Unigov.

The exclusion was undoubtedly based, at least partly, upon his 1966 experience in which he, as a member of the Indianapolis Public School Board, had proposed that the eleven school districts of Indianapolis and Marion County be consolidated. The public reaction was so overwhelmingly negative and hostile that Lugar withdrew his proposal having learned at minimal expense the depth of sentiment in metropolitan Indianapolis for the segregationist racial status quo. See, The Indianapolis Experience: The Anatomy of a Desegregation Case, 9 Indiana Law Review 897 (1976) at 930 fn. 195.

In 1990, the white Republican candidate for sheriff, Joseph McAtee, made special targeted mailings of campaign literature naming his African-American opponent, something candidates rarely do unless naming their opponent works to their advantage and including a photograph, black and white and grainy.

In 1992, the Republican candidate for Attorney General, Timothy Bookwalter, a white male, drove around small town Indiana with a full color standup photograph of his African-American female opponent in a clearly race baiting campaign.

Lack of proportional representation has occurred not only on the Small Claims Court benches, but also on all Township Boards; the City-County Council of the City of Indianapolis and the County of Marion; the Indiana General Assembly generally; and the Marion County delegation specifically; and the City of Lawrence and all other elective offices in Marion County. Prior to 2002 there was only one (1) African-American Township Constable.

Except for the County Sheriff in 2002, in which the Democratic candidate, an African-American who was extraordinarily popular and a much-honored U.S. Marshal who had handled an extremely well reported foreclosure action that had a potential for tragedy in a very skilled way, beat the extraordinarily unpopular white Republican candidate, who only a year later lost a mayor's race in which he was the incumbent, no African-American has ever been elected to a county-wide administrative or executive office such as mayor, treasurer, auditor, prosecutor, clerk, recorder, assessor or coroner.

Local governments in Marion County, especially excluded city and township governments, are singularly non-responsive and show a significant historical, and contemporary, disparity in the distribution of all types of governmental services by race in Indianapolis.

African-American areas of Indianapolis receive inferior city services such as street and sidewalk cleaning, street and sidewalk repair, fire protection, police protection, flood control, and storm sewers. The almost complete inability of African-Americans to obtain employment with township governments is further evidence of systematic racial discrimination. For example, as recently as 1998 neither Washington nor Lawrence Township employed any African-Americans in their administrative offices (out of 19 and 9 employees, respectively). As of 1996, the Lawrence Township Fire Department had only three African-American employees out of 84, and the Washington Township Fire Department has only three African-Americans out of 130 employees. See, "Stipulation of Lawrence and Washington Townships Regarding Administrative and Fire Department Employees. Thus, out of an aggregate employment in the two townships of 242 employees, 6 employees (less than 3%) are African-Americans, despite the fact that the African-American population in those townships is nearly 25% of the total population. African-

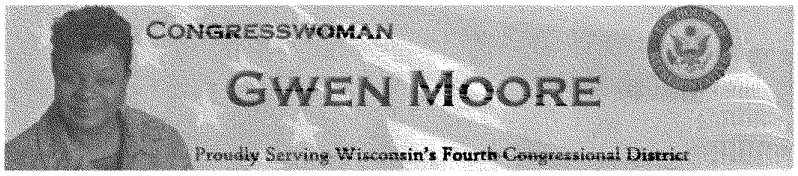
Americans continue to suffer from the legacy of official and private racial discrimination, which contributes to their lack of equal access to the political processes within township government in Marion County. Both the Indianapolis Police Department and the Indianapolis Fire Department operate under an affirmative action decree.

It is only due to litigation that any of the racially and partisan-discriminatory electoral structures in Marion County have been changed. But for the Voting Rights Act none of the advances would have occurred. The plantation would still exist.

Thank you for providing me the opportunity to present this.

Steve Laudig

PREPARED STATEMENT OF THE HONORABLE GWEN MOORE, MEMBER OF CONGRESS, BEFORE THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, JULY 22, 2005



The Honorable Gwen Moore (WI-04)
Testimony for the National Commission on the Voting Rights Act
Midwest Regional Hearing
Friday, July 22, 2005

I would like to extend warm greetings to the National Commission members, esteemed panelists and attending guests of the National Commission on the Voting Rights Act Midwest Regional Hearing. I apologize that I am not able to attend in person, since I must remain in Washington, DC today as Congress is in session.

I'd first like to commend the Lawyers Committee for Civil Rights Under Law and the other leading civil rights organizations that created the National Commission on the Voting Rights Act. Since the last reauthorization of the Voting Rights Act in 1982, the tactics used to disenfranchise minority voters has sunk to a new and disgraceful level.

Milwaukee has the largest number of African-Americans in the state of Wisconsin, which has been a swing vote state, especially in the 2000 and 2004 presidential elections. The state has been the breeding ground for new tricks to effectively disenfranchise African-Americans, who are a critical and decisive voting bloc there.

Prior to 2000, a Wisconsin state statute enabled election inspectors to challenge electors by asking them questions that had nothing to do with their eligibility to vote. In the 1996 Milwaukee mayoral race, when an African-American county sheriff challenged the white incumbent, the election inspectors, under the mayor's authority, resurrected these archaic statutes to challenge black voters. Inspectors were asking questions like "Do you plan to file an income tax in this ward?"; "Are you married?"; or "Do you live with your parents?" They were using a state statute as a means to justify asking these condescending and belittling questions. With Considering Milwaukee's high unemployment rate among African-Americans, these questions, many of which directly or indirectly related to economic status, were clearly designed to suppress the vote. As people answered "no" to some of these questions, they were given the false perception that they were not eligible to vote. An election protection organization secured an injunction on election day to stop this clear voter

suppression strategy. Subsequently, as a State Senator, I authored legislation to revise the statue to specifically state what kind of questions could be asked of electors.

In the 2004 election, with George Bush having lost the state by 5,000 votes in 2000, there were all types of flyers targeted to black voters with misinformation designed to discourage them from voting in Milwaukee, which comprises most of my congressional district. For example, there was a flyer distributed by a fictitious group called the "Milwaukee Black Voter League." As Chairman Julian Bond mentioned in his speech during the NAACP's national convention in Milwaukee in July 2005, this flyer told black citizens they couldn't vote for President if they'd already voted in an election that year. Of course, there had been a strong outpouring of votes for the mayoral race earlier that year. The flyer also told black citizens that a traffic violation made them ineligible to vote; that conviction for anything by anyone in a voter's family made the voter ineligible, and that violating any of these restrictions would result in a prison term and the seizure of their children.

There was also another flyer mailed that included extremely racist remarks toward black supporters of Senator Feingold. As a tasteless tactic of psychological warfare, the pejorative "N" word chided African American voters for their previous allegiance to the Democratic pol. Yet another flyer urged black voters to vote by noon with the confusing implication that voting was not possible after noon.

Such tactics create a divisive and polarizing environment. Racial tensions in Milwaukee drew national attention as partisan combatants vied for the decisive African American vote. Hundreds of thousands of dollars were spent on radio messages to inflame African Americans about Teresa Heinz's claim that she was African. The woman was born and raised in Mozambique, but of course the ads neglected to mention that because their point was to create resentment that would discourage them from even bothering to vote.

Another tactic we need to monitor closely is the potential requirement of voters to present a photo ID like a valid driver's license at the polls. In the minority communities of Wisconsin, there are a disproportionate number of people who either don't have licenses or whose licenses are suspended or revoked. John Pawasarat from the University of Wisconsin – Milwaukee's Employment and Training Institute conducted a first time study of the driver's license status in Wisconsin by race/ethnicity, sex and geography. The study found that 78% of young African-American males between the ages of 18-24 and 66% of young African-American women do not have a valid driver's license. Fifty-seven percent of young Hispanic men and 63% young Hispanic women also do not have valid driving licenses. We have to make sure that this circumstance, which again relates more to economic status and the failure to pay fines rather than for traffic point violations, is not used as another method to disenfranchise minority voters.

We need to track and expose these tactics for what they are in order to continue to prove to the American majority that we are not living up to the true meaning of democracy. Every vote is not being considered. Every vote is not being counted. Here we are in 2005, and 40 years later underhanded tactics are still being taken to suppress the black vote, which further justifies the need for the Voting Rights Act.

The most memorable disenfranchisement of minority voters during the 2004 election occurred right here in the Midwest region in Ohio. A recent report found that 28 percent of all Ohio voters and 52 percent of black voters said they experienced problems in voting.

While we review provisions of the Voting Rights Act that are set to expire in 2007, it is vital to evaluate our recommendations and their constitutional impact. During the NAACP Convention, Rev. Jesse Jackson noted that it is important for us not to fight to make provisions of the Voting Rights Act permanent. If Congress is forced to go back and renew parts of the Act periodically, then we always have the opportunity to review and improve these provisions based on the new underhanded tactics that might have arisen since the last renewal.

I am a strong supporter and advocate of voting rights. As a cosponsor of H.R. 939 – the Count Every Vote Act, I am in support of requiring a voter-verified paper record, allowing citizens to register to vote on Election Day (Wisconsin has same day registration, but there is no national standard), improving security measures of voting machines and requiring that there be at least one voting machine at every polling station that meets the needs of disabled and language minority voters. I am in support of requiring states to act in a uniform and transparent manner when purging voters from state registration lists and establishing guidelines to provide for the prosecution of those who engage in deceptive practices to keep people from voting. As a cosponsor of the Democracy Day Act, I am also in support of making Election Day a legal public holiday.

Because I have experienced the deceitful tactics used to undermine the black vote —
Because I have witnessed the destruction and racial polarization these tactics create —
Because I am passionately believe in the true power of democracy —
I will continue to do all that I can to protect the voting rights of every American.

I look forward to reviewing the final report of the National Commission on the Voting Rights Act and again commend the Commission for its great work.

PREPARED STATEMENT OF THE HONORABLE BARACK OBAMA, SENATOR, SUBMITTED TO THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, JULY 22, 2005

SENATOR BARACK OBAMA

STATEMENT FOR THE RECORD

NATIONAL COMMISSION ON THE VOTING RIGHTS ACT

MIDWEST REGIONAL HEARING

JULY 22, 2005

As the nation approaches the 40th anniversary of the signing of the Voting Rights Act by President Lyndon Johnson, it is time for the nation to look back and see how far we have come and at the same time recognize how far we have to go in our efforts to ensure every citizen the right to vote.

It is remarkable to look back and think, just 40 years ago people like me were routinely prevented from exercising their most fundamental right as citizens – the right to vote. I think about a woman I met on the campaign trail last year. She decided to come to shake my hand and take a photograph. She is a wonderful woman. She was not asking for anything. I was grateful that she took time to come by. It was an unexceptional moment except for the fact that she was born in 1894. Her name is Marguerite Lewis, an African-American woman who had been born in Louisiana, born in the shadow of slavery, born at a time when lynchings were commonplace, born at a time when African Americans and women could not vote. Yet, over the course of decades she had participated in broadening our democracy and ensuring that, in fact, at some point, if not herself, then her children, her grandchildren, and her great-grandchildren would be in a position in which they could, too, call themselves citizens of the United States and make certain that this Government works not just on behalf of the mighty and the powerful but also on behalf of people like her.

The very fact that Marguerite Lewis, and so many people like her – and like me – are able to exercise the right to vote is in large part due to the Voting Rights Act and its implementation. So, on the 40th anniversary of this monumental legislation, I hope we all pause to appreciate what has been accomplished because of this law and why this Act must be reauthorized.

At the same time, none of us can deny that the last two Presidential elections have had too many problems to say that there is nothing left for the Voting Rights Act to do – that we don't need to reauthorize this law. When too many voters stand in long lines for hours, when too many voters cast votes on machines that jam or malfunction or suck the votes without a trace, when too many voters try to register to vote only to discover that their names don't appear on the roles or that partisan political interests and those that serve them have worked hard to throw up every barrier to recognize them as lawful, when too many voters will know that there are different elections for different parts of the country and that these differences turn shamefully on differences of wealth or of race, when too many voters have to contend with State officials, servants of the public, who

put partisan or personal political interests ahead of the public in administering our elections – in these circumstances, we have an obligation to fix the problem. So we must ask ourselves, what can we do to ensure that the nation's laws, and the Voting Rights Act, help fix these problems. I hope these hearings help us answer that question.

I am so pleased that so many brilliant minds have joined in the regional hearings to evaluate the issues surrounding voting and the Voting Rights Act, including my former colleague and good friend Judson Minor. I look forward to working with all of you to reauthorize the Voting Rights Act and ensure that the nation's voting rights are strengthened and protected in the years to come.

PREPARED STATEMENT OF MARK RITCHIE, PRESIDENT, INSTITUTE FOR AGRICULTURE AND TRADE POLICY, BEFORE THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, JULY 22, 2005

Testimony Before the Midwest Regional Hearing National Commission on the Voting Rights Act

Mark Ritchie, President, Institute for Agriculture and Trade Policy

My name is Mark Ritchie and I live and work here in Minnesota, serving as the President of the Institute for Agriculture and Trade Policy. For the last two years I had the privilege of heading up National Voice, a non-partisan coalition of community, faith, and business organizations that organized the NOVEMBER 2 voter registration and Get Out the Vote campaign that operated in about two dozen states around the country.

Thank you for this opportunity to provide testimony at this very Midwest regional hearing of the National Commission on the Voting Rights Act. On behalf of those of us from Minnesota and throughout the Midwestern region I want to express our appreciation for your efforts to hear from concerned people from all across this nation.

Here in Minnesota, over 300 voter registration groups created the Minnesota Participation Project, pulling together a wide diversity of grassroots and community groups into an effective, non-partisan statewide voter mobilization effort. I am very proud of what we accomplished here in Minnesota and nationwide - with over 5 million new voters registered by the organizations that participated in coordinated efforts.

In the course of this work we became more fully aware of the many challenges that still remain to the full achievement of voting rights here in the US. Although we celebrate the 40th anniversary of the signing of the Voting Rights Act, there is still much to be done. Perhaps we can take some comfort in recent statements by the Chairman of the House Judiciary Committee who seems to understand what is at stake. In a recent speech to the National Association for the Advancement of Colored People's (NAACP) Convention in Milwaukee, Chairman Sensenbrenner summarized the challenges ahead in this way:

"Our democratic system of government has as its most fundamental right the right of its citizens to participate in the political process. Adopted 135 years ago, the Fifteenth Amendment ensures that no American citizen's right to vote can be denied or abridged by the United States or a State on account of race, color, or previous condition of servitude. As far too many here know and have experienced, some government entities have not only been unfaithful to the rights and protections afforded by the Constitution, but have aggressively - and sometimes violently - tried to disenfranchise African-American and other minority voters."

From my perspective, his statement is accurate. Some government entities have not only been unfaithful to the Constitution they've used violence, harassment and intimidation to deny access to the polls to minority voters. This past year we were reminded of the murders of three young men doing voter registration 35 years ago in Mississippi. And while we may no longer be witnessing murder as a tactic to stop citizens from exercising their right to vote, we are seeing an upswing in subtler voter intimidation tactics. We need to stop intimidation in its tracks so that we never have voter registration volunteers murdered or threatened again.

to make voting instructions available in all common languages and additional provisions to help voters obtain assistance if their inability to read, speak or understand English is a barrier to exercising voting rights. Our commitment to the equal opportunity to participate in the political process demands nothing less.

The language issues remind us that we need to both re-authorize Section 5 and also to renew our commitment to full access to voting rights by reauthorizing the provisions of Section 203 to ensure that all citizens have available to them the kinds of assistance needed to ensure their full participation, regardless of their English proficiency.

Section 203 of the Voting Rights Act has become a very important protection to our most vulnerable Americans. When a group of citizens cannot participate in our elections for whatever reason, it undermines the foundation of our democracy. Since 1975, section 203 has afforded many new Americans the ability to partake in our democratic process, empowering them to make America their new home by electing their representative of choice. Today, there are over 450 jurisdictions mandated by section 203 to provide in language voting materials to at least one of the following community: American Indian, Asian American, Alaskan Native, and Spanish-heritage citizens.

Although Minnesota is not currently covered by Section 203, Minnesota has a growing population of immigrants and refugees who are looking to make this state their new homes. In the twin city area, there are over 45, 000 Hmong Americans (according to the 2000 US Census), many of them are U.S. citizens, many of them will become active citizens in a few years. As in many other communities across the U.S. we are relying on Section 203 to afford the same protection of their voting rights in the near future. The lack of language access should not prohibit any American from voting.

Furthermore, we need to renew the expiring provisions of the Voting Rights Act. It should be pointed out that two recent 5-to-4 decisions of the U.S. Supreme Court have, unfortunately, thrown the legal standard to be applied in the preclearance process into some doubt. When Congress convenes to consider the reauthorization of Section 5, it should fix these new ambiguities with clear legislation.

When jurisdictions subject to Section 5 submit proposed changes to their election laws to the attorney general or D.C. District Court for preclearance, they are required to show proof that the proposed changes do not make minority voters worse off. This standard was long understood to prohibit jurisdictions from implementing both purposefully discriminatory voting changes and those with a discriminatory (or "retrogressive") effect But, in 1999, the Supreme Court issued a decision that effectively eliminated the "purpose" part of this test. This decision, in Reno v. Bossier Parish Sch. Bd. (2000), dramatically reduced the power of Section 5.

Despite the plain language of Section 5 and the strong evidence that the school board in Bossier Parrish was acting with an unconstitutional intent to discriminate against black voters, the Supreme Court found no basis for an objection under Section 5.

forced to stand in long lines, as was the case in too many voting places last November, is one of the most effective ways to deny voting rights.

Today we should give thanks to those who came before us and who had the courage to admit, like President Johnson, that government has a responsibility to ensure a well-functioning democracy. Renewal of the Voting Rights Act and ensuring full political participation by all voters should not be partisan issues.

After all, the four previous extensions of the Voting Rights Act received strong bi-partisan support and were signed into law by four Republican Presidents, including Ronald Reagan who called the right to vote "the crown jewel" of American democracy.

Fulfilling our commitment to build a healthy and well-functioning democracy requires going beyond simply re-authorizing the Voting Rights Act. We must also be prepared to address myriad and new 21st century challenges here in Minnesota and around the nation.

To summarize my recommendations regarding expiration of those crucial sections of the Voting Rights Act that will expire in 2007, I believe Congress should:

1. Re-enact the Section 5 pre-clearance requirements for 25 years, consistent with the time period adopted with the 1982 extension. These provisions directly impact nine states with a documented history of discriminatory voting practices and local jurisdictions in seven others by requiring them to submit planned changes in their election laws or procedures to the U.S. Department of Justice or the District Court in Washington, D.C. for pre-approval.
2. Renew Section 203 for 25 years so that new citizens and other Americans who are limited in their ability to speak English can continue to receive assistance when voting. These provisions currently impact 466 local jurisdictions across 31 states.
3. Renew Sections 6-9, which authorize the attorney general to appoint election monitors and poll watchers.
4. Provide for the recovery of expert fees in voting rights litigation.
5. Enact language that restores the original intent of Congress as expressed in the 1982 reauthorization and repairs the damage done by two narrowly decided U.S. Supreme Court decisions which fundamentally weaken the administration of Section 5: *Reno v. Bossier Parish Sch. Bd.* (2000) and *Georgia v. Ashcroft* (2003).

Thank you again for this opportunity to provide testimony and for your excellent work to ensure that the Voting Rights Act is both re-authorized and renewed. I look forward to reading the final report of this Commission and on celebrating both the 40th anniversary of the original enactment of this historic law but also the introduction and safe passage of a stronger and forward-looking Voting Rights Act.

July 21, 2005, Minneapolis, Minnesota
Mark Ritchie, President, Institute for Agriculture and Trade Policy (mritchie@iatp.org)

PREPARED STATEMENT OF ELONA STREET-STEWART, CHAIR, ST. PAUL BOARD OF EDUCATION, BEFORE THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, JULY 22, 2005

Voting Rights Act of 1965 Reauthorization Hearing
Elona Street-Stewart - July 22, 2005

Thank you for the opportunity to present today. My name is Elona Street-Stewart and I am Chair of the St Paul Board of Education. In addition, I am program staff for Racial Ethnic Ministries and Community Empowerment for the Synod of Lakes and Prairies, a middle governing judicatory of the Presbyterian Church USA. My service area is WI, MN, IA, NE, SD, ND, and the northeast corner of Montana – the Ft Peck Indian Reservation. I travel this area from east to west, north and south and engage in community relationships of small and large proportions, particularly with American Indian, historic racial ethnic, and immigrant/refugee groups.

Key sections of the Voting Rights Act of 1965 are set to expire in 2007. As a high school student I experienced the passage of the VRA as cause for celebration within the African American community and civil rights organizations across the nation. It now appears that 135 years after the 15th Amendment to the US Constitution and 40 years since the passage of the VRA, the right to vote is not secure for those communities of people recognized by our nation's courts to have suffered discriminatory actions prior to 1965, such as racially motivated violations and voting irregularities.

The results of the 1990 and 2000 Census brought a realignment of voting districts through a congressional redistricting process. For the first time, significant numbers of African American and Latino officials were elected from new districts where there were sizable populations of people of color. However, since then the numbers have not been sustained or increased nor have elections produced a horizontal widening of the diversity of candidates and elected representatives. The reassigned residents as citizens are not significantly aware or solicited for strategic planning or comparative analysis of the impact of the changes in district geographical dimensions, economic transitions or demographic variances.

There are likely to be changes of 2-3 justices on the Supreme Court over the next few years. Since the Court has not always found in favor of minority voting rights, it is important to address these issue legislatively in order to accomplish fair and equitable protection to America's right to vote by its citizens. This should protect the rights of American Indians, people of color, those in poverty or injunctive relief to eligible individuals previously convicted of a criminal offense unless such person is serving a felony sentence in a correctional institute or facility at the time of the election.

I offer a description of an incident that happened on the Red Lake Nation in 2004 as follows:

Although there were several attempts to suppress the Native American vote in Minnesota in 2004, what happened in Red Lake was the most blatant. The Red Lake Nations is the only closed Indian Reservation in Minnesota and in theory anyone who is not a Red Lake tribal member should get permission from the tribe before coming onto their reservation. On Election Day that did not happen and several party sponsored challengers showed up on the reservation before the polls opened. There are four voting precincts on the Red Lake Reservation. The Ponemah precinct is were the major issues occurred. A Republican challenger showed up in Ponemah, first he started questioning and intimidating the election judges, he then started to intimidate the voters by arbitrarily challenging individuals who were standing in line to vote. Some potential voters left the precinct because of this challengers antics. The Red Lake Tribal Police Department was called to observe the situation. However, this challenger's behavior worsened once the officers arrived. He continued to disrupt the voting process and eventually the Tribal Officers were forced to remove him from the precinct and escort him to the reservations border.

A few things to note: 1. According to one election judge up until this election no challenger had ever showed in Red Lake during an election, 2. Red Lake is the only area in the state where all of the election judges are native (and nearly the entire voting population is Native), 3. Some of the challengers that showed up in Red Lake were from out-of-state)according to one of the election judges, the challenger at Ponemah was a lobbyist from DC), 4. The other two challengers (one republican and one Democrat) that showed up in Red Lake only observed and did not disrupt the voting process (the challenger at Ponemah as Republican). This incident made the national news (CNN). Louann Crow was the Red Lake tribal member and election judge who testified in the Senate.

PREPARED STATEMENT OF ALICE TREGAY BEFORE THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, JULY 22, 2005

TESTIMONY OF ALICE TREGAY – REAUTHORIZATION OF THE VOTING RIGHTS ACT

As a member of the Rainbow/PUSH Coalition, an organization founded by the Reverend Jesse Jackson aimed at social change and justice for all Americans, I have experienced firsthand the problems facing many African-Americans in seeking to exercise their right to vote. These problems often cannot be solved by organizations such as Rainbow/PUSH alone, as we need the laws of the federal government to offer protection to Americans seeking to vote for the officials of their choice. Without legislation such as the Voting Rights Act, we cannot ensure justice and equality for all Americans in the exercise of their Constitutional rights. The problems concerning districting of the wards in Chicago and barriers to voting access in Chicago illustrate how important the Voting Rights Act is to preserving African-Americans' right to vote.

Redistricting

The City of Chicago has had more than its share of problems concerning mapping of voting wards. The city is broken down into various wards, and each ward elects an "alderman," which aldermen collectively serve as an equivalent to a city council. In the mid-1980s, a suit was brought against the City of Chicago regarding the alderman wards, as African-Americans in Chicago's wards were not being adequately represented. Due to the lack of majority African-American wards, it was very difficult to elect African-American aldermen, or even to elect the candidate of the African-American population's choice.

The federal court in Illinois ordered that the city's wards be remapped to create a larger number of African-American majority wards. The maps were redrawn in 1985, creating 2 majority black wards, for a total of 19 African-American wards. As a result, *both* African-Americans and Latinos were more fairly represented in Chicago's aldermen wards – two additional African-American aldermen and two Latino aldermen were elected in special elections. One of these Latino aldermen is now an Illinois United States Congressman, Congressman Gutierrez.

Although the 1985 Chicago redistricting resulted in a fairer representation of minorities in Chicago elections, the population has changed, and the wards in Chicago have again been mapped in a manner that results in an unequal and unfair representation of African-Americans. The wards are oddly drawn in a manner that "packed" too many African-Americans into wards. Certain Chicago wards contain almost 95% African-Americans, even though a ward need only be about 65% African-American to ensure that the African-American population of that ward be able to elect the candidate of their choice. Rather than "packing" large numbers of African-Americans into a single ward, the ward maps could be and should be re-drawn to include a greater number of wards for greater minority representation. This has not been done, seemingly to prevent a greater number of African-American and Latino aldermen from being elected to office. The local government does not seem willing to fix this problem, as the incumbent aldermen are more likely to maintain their position under the present ward maps. Federal action and

protection is needed in order to ensure fair and equal representation of all of Chicago's residents, and to remove the obstacles that are posed to minority candidates under the current districting scheme.

Barriers to Voting

In both the 2000 and 2004 elections, the voting status of many African-Americans in Chicago was challenged, and many African-Americans lost their votes in these elections. This group faced challenges to registration – the voting registration form was difficult for many to fill out completely, and the forms were rejected if they were not filled out completely and accurately– as well as challenges to their right to go to the polls and cast votes. Many African-Americans are wrongly removed from the voting rolls, purportedly because they no longer live at the address that is listed on their voting registration, despite having lived in the same house for many years.

As noted in an October 2004 article in *The Chicago Reporter*, "In the March [2004] primary, 13,424 voters in majority black wards who were incorrectly challenged took the extra steps at the polls to restore their voting status, compare with 3,745 voters in majority white wards and 2,006 in majority Latino wards. Those who did not have enough identification either had to go home to get it or used provisional ballots." Rupa Shenoy, *A Challenging Election*, THE CHICAGO REPORTER, Oct., 2004, *available at* <http://www.chicagoreporter.com/2004/10-2004/vote/vote1.htm>.

An example of how African-Americans are disenfranchised due to sloppy, incorrect, or inappropriate application of voting laws or procedures concerns a resident of Chicago named Joelle, who told me of her plight in the hopes of preserving her vote. Joelle has lived in her Chicago home for many, many years. In both the 2000 and 2004 elections Joelle went to her polling place to cast her vote, as she had done many times before. However, in *both* 2000 and 2004, she was told at the polling place that she was not on the voting rolls and was not entitled to vote. Although this seemed impossible to her, as she had not moved, her polling place had not moved, and she was an active voter for many years, Joelle responded that she would then cast a provisional ballot in 2004. After the election, she was told by the Board of Elections that her provisional ballot was not counted. No reason was given.

In the 2000 presidential elections, many Chicagoans' votes were lost or subject to "falloff." Of the 1,027,627 votes cast in Chicago, only 9555,261 were counted – this was a loss of 72,366 votes (7.04% of the votes cast). *See* STATEMENT BY LANCE GOUGH, EXECUTIVE DIRECTOR BOARD OF ELECTION COMMISSIONERS FOR THE CITY OF CHICAGO, *available at* <www.eac.gov/docs/ June%203%20Punch%20Card%20-%20Lance%20Gough.doc>. Many, if not most, of these lost votes were cast by African-Americans.

The Voting Rights Act is essential to protect the rights of minority voters, and as demonstrated by the problems faced by African-American voters in Chicago, is still as necessary today as it was years ago. Problems in access to voting still exist for many

minorities, and the Voting Rights Act provides a means to address the barriers faced by many minority voters or would-be voters. I urge our lawmakers to reauthorize the provisions of the Voting Rights Act.

PREPARED STATEMENT OF IHSAN ALI ALKHATIB, BOARD PRESIDENT, ARAB-AMERICAN ANTI-DISCRIMINATION COMMITTEE, BEFORE THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, JULY 22, 2005

Statement of Ihsan Ali Alkhatib
Board President
Arab-American Anti- Discrimination Committee
Detroit Chapter

Before the
National Commission on the Voting Rights Act
July 22, 2005

Introduction:

Good afternoon. My name is Ihsan Ali Alkhatib. I am and an attorney in private practice and the President of the Detroit Chapter of the American- Arab Anti-Discrimination Committee (ADC). I live in Dearborn, Michigan, which is a suburb of Detroit. Greater Detroit has the largest concentration of Arab Americans in the United States.

I appear before you on behalf of the ADC-MI Regional Director, Mr. Imad Hamad, who unfortunately was unable to appear due to a previous commitment. As I'm sure many of you are familiar with, the ADC was founded in 1980 by U.S. Senator James Abourezk, and is the largest Arab American grassroots civil rights organization, which welcomes people of all backgrounds, faiths and ethnicities as members. It has members in all 50 states, and it's national headquarter is based out of Washington, D.C.

Arab Americans suffer from Discrimination:

Arab Americans, as a minority, face discrimination. However, the irony is that Federal law does not consider Arab Americans as a minority. In fact, we are considered White when actually we face the discrimination that Black and other non-white communities face. Furthermore, this discrimination intensified in the aftermath of the September 11 terrorist attack on the US.

In the year following the terrorist attacks on September 1, 2001, the following hate crimes and discrimination were documented by ADC[1]:

- There were over 700 violent incidents reported targeting Arab Americans, or those perceived to be Arab Americans, Arabs and Muslims in the first nine weeks following the attacks. Unfortunately, this included several murders.
- There were 165 violent incidents from January 1-October 11, 2002, which was a significant increase over most years in the past decade.
- There were over 80 cases of illegal and discriminatory removal of passengers from aircraft after boarding. These incidences actually occurred before the aircraft took off, and was based on the passenger's perceived ethnicity.

[1] Report on Hate Crimes and Discrimination Against Arab Americans: The Post-September 11 Backlash September 11, 2001-October 11, 2002

- There were over 800 cases of employment discrimination against Arab Americans, which was approximately a four-fold increase over previous annual rates.
- And lastly, there were numerous incidents of denial of service, discriminatory service and housing discrimination.

Having said that, I speak before you regarding the fundamental right to vote.

The Preamble of the Constitution of the United States reads:

> "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

The American form of government is a system of dual sovereignty- the federal government and the state governments are sovereign. However, ultimate sovereignty is in the American people. Voting is how the people of the United States exercise this sovereignty.

The right to vote is guaranteed in the Fourteenth and Fifteenth Amendments of the US Constitution. However, despite the lofty promises of the Declaration of Independence and our Constitution, our reality in this country is that belief in noble ideals has coexisted with unconscionable practices of discrimination. When it comes to the right to vote, it has been a struggle to enable minorities to exercise this right. To deal with this reality, Congress passed the landmark 1965 Voting Rights Act to provide the tools necessary to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments of the US Constitution. In fact, it was President Lyndon Johnson, on signing the Voting Rights Act on August 6, 1965, that stated:

> "The Act flows from a clear and simple wrong. Its only purpose is to right that wrong. Millions of Americans are denied the right to vote because of their color. This law will ensure them the right to vote."

I would like to present an example of voting discrimination that occurred in the city of Hamtramck:

As I stated previously, even before the September 11th attacks, Arab Americans and those perceived to be Arab Americans were subject to discrimination. An example of discrimination occurred in Hamtramck, Michigan, in 1999.

Hamtramck is a small town in Wayne County, Michigan. The Hamtramck Chamber of Commerce describes the city as follows:

> "Hamtramck has been a destination and become home for many immigrants to the United States for most of this century. Originally established in 1798 as the

township of Hamtramck, in what was then part of the Northwest Territory, Hamtramck was organized as a village in 1901. While a quiet farming town at the turn of the century, the population soared during 1910-20, when it was the fastest-growing community in the nation, spurred by the booming automobile industry. Thousands of immigrants, mostly of Polish and other European descent, settled here. Today, immigrants from all over the world continue to settle in Hamtramck, enriching our community with their cultures and customs."[2]

The incident that resulted in the involvement of the US Department of Justice in November 1999 is rooted in the fact that immigrants "from all over the world" came after the immigrants from Polish and European descent. The increasing numbers of non-European, non- Polish immigrants had an effect on the city of Hamtramck. In a democracy, demographic change translates into political power. A few members of the established community wanted to make sure that the demographic change does not translate into a sharing of political power with new comers "who are not like us."

On November 2, 1999, Hamtramck held a general election for the municipal offices of mayor, city council and city clerk. There were a number of dark-skinned citizens of Hamtramck wanting to vote, but were harassed by individuals that wanted to keep the election "pure."

Under Michigan law, political parties and citizen groups have the right to designate "challengers." M.C.L. Section 168.730. "Challenges" are individuals who have the right under Michigan election laws to observe the electoral process and challenge the eligibility of a person to vote. The challenger must have good reason to believe the individual is not a registered voter. MCL Section 168.733.

In October of 1999, a group called "Citizens for a Better Hamtramck" ("CBH") registered with the City Clerk of Hamtramck to provide "challengers" for the November 1999 general election. CBH stated in its registration, the goal was keeping the election "pure." Also during that same election, another group called the Committee to Re-elect Mayor Zych (the Zych Committee), registered to provide their own "challengers."

In Michigan, a challenger may contest a voters' eligibility on the ground of citizenship, age and/or residency. At the November election of 1999, more than forty voters in Hamtramck were challenged by CBH on the ground of their "citizenship." The challenged voters had dark skin and distinctly Arab/Muslim names such as Mohamed, Ahmed, and Ali. Although a number of the challenged dark-skinned voters produced US passports as proof of citizenship, which is conclusive evidence of citizenship, members of CBH were not satisfied, and the election inspectors required citizenship oaths as a prerequisite to voting. No white voters were challenged for citizenship and required to make an oath before being allowed to vote. The City did not prevent the challenges on the basis of color and surname from continuing. Moreover, the chairperson of one election precinct directed election inspectors to the effect that anyone who "looks Arab" must show a driver's license and voter registration card.

[2] www.hamtramck.com

The Attorney General of the US filed action against the city of Hamtramck for violating Sections 2 and 12 (d) of the Voting Rights Act of 1965.[3] This action resulted in the following actions:

1. The city was to establish a training program to train election officials and private citizens regarding the proper grounds for election challenges;
2. The city was to train election officials to remove challengers who appeared to be discriminating against voters based on their race, color or ethnicity;
3. The city was to provide notices in English, Arabic, and Bengali to inform voters regarding these procedures;
4. And lastly, the city was to provide bilingual workers on election day.

According to Imad Hamad, ADC-MI Regional Director, "the involvement of the Department of Justice was most welcome and restored the community's faith in the system. It reassured them that their right to vote is backed by the enforcement power of the United States." According to Mr. Hamad, the Department of Justice made sure to involve community organizations in the process.

Wayne County criminally prosecuted those who were harassing the voters on the basis of a Michigan common law. Community activist, and Wayne County lead attorney, Mr. Abed Hamoud, stated that the decision to criminally prosecute the harassers was not an easy routine decision. In fact, Wayne County prosecutor at the time, John O'Hair, wanted to send a strong message that the county would not tolerate such actions. To Mr. Hamoud's recollection, it was the only prosecution of its kind under an obscure Michigan common law section.

In Conclusion, despite more than four decades passing since the enactment of the Voting Rights Act, discrimination is still a reality of American life. The following provisions of the Voting Rights Act are scheduled to expire in 2007:

1. Section 5 preclearance provisions,
2. Section 203 bilingual ballot access protections,
3. and the examiner and observer provisions that authorize the Department of Justice to appoint an examiner or observers to any jurisdiction covered by Section 5.

We urge that these provisions be expanded in scope to include areas with concentrations of Arab Americans. Our experience tells us that discrimination is still a reality of American life. We urge that the expiring provisions are expanded, strengthened and made permanent. As our regional director Imad Hamad always states " rights are nice to have but the key is enforcement. All the rights in the world are worthless unless there is a strong serious enforcement mechanism behind them."

I thank you for allowing me the time to come before you.

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[3] The United States of America v. City of Hamtramck, Case # 00-73541

PREPARED STATEMENT OF BRADFORD BROWN BEFORE THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, AUGUST 4, 2005

Consideration of Miami-Dade County Florida for Inclusion in the Extension of the Voting Rights Bill

Bradford E. Brown
Aug 4, 2005
Florida Regional Hearing
National Commission on the Voting Rights Act
Orlando, Florida

Few locations have been identified in the national conscience with voter rights obstructions as Miami-Dade County Florida. The travesty of the 2000 election, the debacle of the 2002 primary and the immense effort on the part of watch dog organizations in the 2004 election is overwhelming... The 2000 election resulted in hearings in Miami of the U.S. Commission on Civil Rights (at which I testified) and their subsequent report, the U.S. Justice Department entering into a consent decree with Miami-Dade County concerning the treatment of Haitian Creole speaking voters, and a suit by the NAACP and supporting organizations against Miami-Dade County also resulting in a consent decree. The later was signed too late to impact the 2002 mid term and gubernatorial elections.

Since that time a new threat to Black voting empowerment has occurred. In the 1990s a voting rights suit was filed in Federal Court and a court decision rendered and then upheld by the 11th Circuit, which declared that at large elections to the Miami-Dade County Commission deprived minority voters of their right to representation. Now, there is a referendum to go before the voters to amend the County Charter to remove the executive powers of that Commission and give them to the County Mayor. A simple example of that impact will suffice for illustration of this impact. There are over 100 Advisory Boards and Committees in Miami-Dade County ranging from the Community Relations Board to the Hospital Trust. The mayor would be the sole selector of all of these positions. This removes the ability of the current 4 Black out of 13 total Commissioners to ensure that their constituents have a voice. Currently there are efforts to adjust the Commission numbers and boundaries to enable Haitian American and non-Cuban Hispanic representation and the strong mayor would greatly dilute that impact as the County manager would become essentially a staff assistant to the Mayor and no longer report to the Commissioners. The mayor rather than the County Manager would have the power to hire, supervise and remove all Department Heads.

To understand how this situation came to be, a little history is necessary. Through much of its history Miami-Dade County was predominantly an old south area despite the presence of tourism in some sections. Segregation was the law and custom. The Klu Klux Klan rode to discourage Black voting, including a major effort in 1939. With this background one might wonder why it did not meet the criteria for inclusion under Section 5 of the Voting Rights Act I in the first place.

In the years following World War II, Miami boomed with persons moving to Miami, many of whom had served part of the War there. Tourism expanded as the middle class grew more affluent. Union conventions came to Miami as did national television shows like Jackie Gleason. Black entertainers began to appear on Miami-Beach although they could not stay overnight there. With the rise of the 1960s civil rights movement, Miami powers that be decided that if it followed the example of the Birminghams of the south their growing tourism industry could be greatly damaged. As a result a County Community Relations Board was established and desegregation tokenism was quickly agreed to, although not without a few bumps and disruptions. The civil eruptions in the Black communities of Miami came in the 1980s much later than in other areas.

However the Anglo hegemony that ruled Miami in the 1950s and 1960s is gone. The Cuban refuges began arriving in the 1960s and after a hiatus in the 1970s exploded again in the 1980s and continues to this day. More recently immigration of non-Cuban Hispanics has increased. Today the approximate population is 40% Cuban Americans and the remainder divided approximately equally between non-Cuban Hispanics, Blacks and Anglos. The Black population has shifted, and now has large Caribbean components from both Haiti and the English speaking islands.

When the single member district suit was filed Anglos still had a controlling vote. Now there are two

Anglo, 4 Black and 7 Cuban Commissioners. Both of the mayors elected under the current executive mayor system have been Cuban Americans. The residential segregation in Miami is such that the western half of the county is very heavily Hispanic and tends to vote Republican while the Black population is primarily in the eastern part just back for the water. Within those areas the Haitian population is concentrated in the more northeasterly portion.

Highlights of the consent decrees agreed to by Miami-Dade County following the 2000 election are instructive. The County agreed to an equitable distribution of laptop computers amongst polling places. This arose because the telephone access to check on registrations so individuals could be directed to the correct polling place was essentially non-functional while the Hispanic dominated western areas all had laptops with immediate access! The consent decrees go into significant detail in addressing this issue

Another agreement stated that a duly qualified official shall be stationed at the end of the line at poll closing time so that every voter in line at that time would be given the opportunity to vote. The closure of polling places in 2000 arbitrarily eliminated persons who had been in line prior to the closing time. This problem of persons being in line took place in predominantly Black precincts as the increase in registrants and turn outs brought numbers that the elections department was unprepared to handle. The lack of the laptops contributed to this. In the Hispanic areas they prepared for increases due to increases in persons becoming citizens etc but not in the Black areas. The problem was exacerbated because of the failure to provide assistance in Creole and the prevention of persons taking someone into the polling place to assist them.

The Elections Department also agreed not to place signs stating that a photo ID was required to vote. Photo IDs have been shown nationwide to be less frequently held by Black voters, particularly those who are low income, and Miami is noted as one of the poorest cities in the country.

In addition equitable staffing and equipping of polling places was stipulated.

An outreach and education effort was also agreed to, and in 2004 that did take place. However it was not done fully in the manner I believe the consent decree called for, namely a specific effort involving the NAACP (named in the decree) and others to request specific input as per the decree, into any proposed changes.

Also not fully carried out in our opinion, were the efforts to contact persons who file incomplete registration forms and those who had been wrongly removed from the voting lists by the State of Florida in 2000 under the ruse of removing only ex-felons.

These examples indicate clearly the differential treatment of Black voters by the Miami-Dade County election operations. This consent decree ends May 15 2005.

The consent decree with the U.S. Department of Justice was based on allegations that Creole speaking voters at several precincts were denied assistance from persons of their choice and that oftentimes the poll workers providing assistance did not speak Haitian Creole. Even where persons were allowed to bring someone to assist them that person was limited to being allowed to explain the sample ballot and not allowed into the polling booth. There are nine pages of specific agreements to address this issue. The decree ends on December 31, 2005. An issue of concern in the termination is the spreading out of the increasing Haitian population and the increasing number of individuals becoming citizens as the decree focuses on "Haitian" precincts. The number of precincts with increasing Haitian voters is growing.

Of course it is recognized that the consent decrees make no stipulation of guilt.

Since 2000 the Miami-Election Reform Coalitions (MERC) was founded, which includes the Miami-Dade NAACP. It continues to work today. The 2000 primary was a debacle as the new machines failed, (worse in heavily Black areas). This likely cost former Attorney General Janet Reno the Democratic nomination for governor. As a result the County Commission took away all but the specifically legal requirements of

the Director of the Elections Department and put the County Manager in charge. And directed him to use whatever County resources were necessary for the November 2002 general election. MERC was very much involved in this effort. In addition a significant election protection effort was carried out on Election Day primarily by the NAACP and People for the American Way (PFAW).

The County Manager removed the director of elections and hired a replacement approved by the County Commission. In the run up to the election MERC was very active, directly working with both the Elections Department and the County Commission. In the 2004 election there was a massive election protection effort run jointly by the NAACP and PFAW. Other groups also had monitoring activities. Teams of lawyers were poised to act immediately on any violations. The U.S. Department of Justice also monitored their consent decree and stood ready to go to other polls if problems were brought to them by the election protection workers. As a result things generally went smoothly on Election Day, but there were issues in the early voting. Early voting resulted in extremely long lines and these seemed to be the worst in Black areas, although precise data are not available. At one early voting site in a predominantly Haitian area, spurious challenges were made concerning persons giving assistance to voters and this held up voting so long that numerous persons left before voting. The Justice Department when contacted, resolved this with Miami-Dade's Election Department and the problem did not re-occur. Nevertheless there were enough issues that the County Manager has since removed the Director of the Elections Department and replaced her with the approval of the County Commission. It should be noted that in most Florida counties the Supervisor of Elections is an elected official but in Miami our single member district commission assures that the Department Director can be held to be responsible to all areas.

What of the future? MERC has been successful but how long can we rely strictly on citizen volunteers? The NAACP has been the member of the coalition with the greatest political clout, but the NAACP participates less in MERC's week to week work due to the press of other issues such as educational equity, economic development and police behavior. The NAACP weighs in particularly when issues need to be brought before the County Commission. The tremendous Election Protection effort in Miami, with volunteers coming in from all over the country, especially lawyers, is not sustainable given country wide demands.

Now the County is faced with a referendum that will destroy the executive power of the County Commission. History has shown that left alone as it was in 2000, the Elections Department will concentrate its resources on the majority (Hispanic primarily Cuban) areas to the detriment of minority Black voting precincts, particularly Haitian precincts. It has also shown that thanks to the presence of single member districts and the power of four Black Commissioners this emphasis can be shifted to better perform for minority areas if there is citizen pressure and continual vigilance. However citizens would be even more effective if the Justice Department were an ongoing presence as would occur if Miami-Dade was added to the counties covered under any extension the expiring provisions of the Voting Rights Act. We in the Miami-Dade NAACP believe that if we were currently covered by pre-clearance the obvious diluting of Black voting power provided by the single member districts ordered by the Federal Courts after a finding of discrimination, could compel the Justice Department to intervene. In the worst case scenario where the referendum passes, there would be even more need for the Justice Department to pre-clear future changes. Having the Mayor elected county wide, where Black voters are a distinct minority, would remove any significant influence of Black voters (the polarized voting in the first executive mayors race where a strong Black candidate was defeated by a solid Cuban vote supports this). The new strong mayor would not have the checks and balances of the Commission as does the current executive mayor, and the new mayor would hire fire and supervise the Director of the Elections Department. Human nature and history makes it obvious over time that the emphasis of the Elections Department would be in providing efficient service to the majority and not in protecting the rights of Black voters.

PREPARED STATEMENT OF MARLON PRIMES BEFORE THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, AUGUST 4, 2005

2004 ELECTION PRESENTATION

I. INTRODUCTION

My name is Marlon Primes, and I am an attorney and the Vice President for Sections and Divisions of the National Bar Association ("NBA"). I was born in Akron, Ohio, and I have practiced law in Cleveland for the past thirteen (13) years. I previously served as the president of the Norman S. Bar Association, which the NBA affiliate chapter in Cleveland, Ohio.

During the 2004 presidential election, I volunteered for the Election Protection Program ("EPP") and consequently passed out voter information outside of voting precincts in several inner-city communities in Greater Cleveland on November 2, 2004. Today, I would like to briefly testify in my personal capacity about some of my observations regarding provisional ballots and election challengers.

II. PROVISIONAL BALLOTS

At 6:00 a.m. on November 2, 2004, I arrived at an EPP station in East Cleveland, Ohio, to receive final instructions and to find out the location of my assignment. I was initially told to report to a precinct in an inner-city neighborhood on Cleveland's Eastside. Later in the morning, I was reassigned to work in East Cleveland, which is a predominately African-American suburb of Cleveland that is also one of the poorest communities in Ohio.

I served as a volunteer worker for EPP until about 5:00 p.m. During my lunch break, I voted in my precinct in Cleveland Heights, where I have lived for the past twelve (12) years and which has a large middle-class, African-American population.

Although my personal observations are limited to the precincts where I volunteered and voted, EPP supervisors frequently came by and monitored my EPP location and shared anecdotes about other local precincts. Moreover, I used my cell phone to frequently call local EPP headquarters, where I received updates about election day issues that arose.

From 6:15 a.m. - 9:30 a.m., the precinct that I was assigned to had a large voter turnout, as did some of the other inner-city precincts staffed by EEP volunteers. Many of us observed and received reports of a substantial number of provisional ballots being cast in East Cleveland and poor African-American neighborhoods in the City of Cleveland. This ultimately presented a number of problems because Ohio guidelines indicated that provisional ballots that were cast in the wrong precinct would not be counted.

Although it may seem fundamental that every voter should know their correct precinct, many of my fellow EPP volunteers and I soon recognized that this is not as clear as it would appear. During the course of the day, we learned that many of the inner-voters were renters that moved several times since the last presidential election cycle and truly did not know where to vote. Also, many residents were assigned different voting precincts as a result of redistricting.

Questions from voters revealed these facts throughout the day and enabled EPP volunteers and I to understand why the number of provisional ballots in the inner-city was so much higher than those in other areas.

III. CHALLENGERS

While serving as an EPP volunteer, I learned of the presence of election challengers that were sitting at tables near the voting booths with county election workers. In fact, in Cleveland

Heights, there were several challengers present. When I relayed this fact to a white attorney I was working on a case with, he indicated that he lived in a white, affluent suburb and that he nor any of his white friends ever saw a challenger present at their respective voting locations.

IV. RECOMMENDATIONS

A. Given the transience of some minority voters, examine whether provisional ballots should be counted when they are cast in the correct county, as oppose to the correct precinct.

B. Examine how new computer technology can be utilized to immediately verify registration of prospective voters.

B. Study the impact of challengers at voting booths and how they are assigned.

1 NATIONAL COMMISSION
2 ON THE VOTING RIGHTS ACT
3 LAWYERS' COMMITTEE
4 FOR CIVIL RIGHTS UNDER LAW
5 IN RE: Southern Regional Hearing
6
7 PROCEEDINGS taken before the Lawyers' Committee for Civil Rights Under
8 Law, in the above-referenced matter, on March 11, 2005, commencing at
9 9:20 a.m., in the Sanctuary of the Freewill Missionary Baptist Church,
10 1724 Hill Street, Montgomery, Alabama, before Tiffany Blevins Beasley,
11 Judicial Reporter and Notary Public in and for the State of Alabama at
12 Large.
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14
15
16 BEFORE LAWYERS' COMMITTEE
17 COMMISSIONERS:
18 Commission Chair Bill Lann Lee
19 Commissioner John Buchanan
20 Commissioner Chandler Davidson
21 Commissioner Elsie Meeks
22 Guest Commissioner Denise Majette
23 Guest Commissioner Derryn Moten
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4 P R O C E E D I N G S
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6 PASTOR NETTLES: First of all, we want to thank you-all for coming
7 and sharing. We, the pastor and members of Freewill Baptist Church,
8 are just honored to have you here in our midst. And we're certainly
9 grateful to each of you, and we just pray that your stay is most
10 comfortable while you're here. Let us pray.
11 (Opening prayer.)
12 PASTOR NETTLES: I'm sorry. At this time, I'd like to introduce to
13 you a member of the Commission staff, Jon Greenbaum. Jon is Executive
14 Director of the National Commission on the Voting Rights Act and
15 Director of the Voting Rights Project of the Lawyers' Committee for
16 Civil Rights Under Law. As director of the Voting Rights Project, Mr.
17 Greenbaum is responsible for the Lawyers' Committee efforts to secure
18 racial justice and equal access to the electoral process for all
19 voters. At this time, I'd like to present to you Jon Greenbaum.
20 MR. GREENBAUM: Thank you, Pastor Nettles. Good morning, everyone.
21 (Audience response.)
22 MR. GREENBAUM: On behalf of the civil rights community, the
23 Lawyers' Committee for Civil Rights Under Law created and organized
24 the National Commission on the Voting Rights Act. We are lucky to have
25 such a wonderful group of commissioners as well as panelists today.
26 And at this time, I want to turn it over to the chair of the National
27 Commission on the Voting Rights Act, Bill Lann Lee.
28 MR. LEE: Thank you, Jon. First, on behalf of the Commission, I'd
29 like to express our happiness to be here at Freewill Missionary
30 Baptist Church. This is a church that was created in the 1960s in the
31 historic district of west Montgomery, Alabama. And we thank you,
32 Reverend Nettles, for welcoming us to this wonderful sanctuary. And
33 Freewill -- I'd just like to say that Freewill is not just a very
34 impressive physical site; it is a vibrant church that fosters
35 evangelical Biblical teaching, strong family involvement, community
36 partnerships, and life-changing ministries. My name is Bill Lann Lee.
37 I am a lawyer and a lifelong civil rights lawyer, and I'm also a
38 former assistant attorney general for civil rights. I'd like to thank
39 you for joining us for the first regional hearing of the National
40 Commission on the Voting Rights Act during this 40th anniversary
41 commemoration of the Selma to Montgomery March. It is fitting that we
42 begin our examination of the Voting Rights Act during this jubilee
43 commemoration of the march from Selma to Montgomery, because it is
44 that march which led to the passage of the Voting Rights Act.
45 President Lyndon Johnson sent the Voting Rights Act to Congress just
46 two weeks after Bloody Sunday and when the determination of Alabama's
47 African-Americans to gain access to the ballot was met with such
48 shocking violence. Bloody Sunday wakened the conscience of the nation
49 to the struggles of African-Americans to the most basic right in a
50 democracy: the right to vote.
51 Alabama was at the forefront of this movement as civil rights leaders
52 sought to enfranchise African-Americans in response to the horrific

bombings of the Sixteenth Street Baptist Church. That bombing killed four girls: Denise McNair, Cynthia Wesley, Carole Robertson, and Addie Mae Collins. It is in their memory and the memory of Johnny - of Jimmie Lee Jackson, whose death spurred the original march from Selma to Montgomery, that we are here to examine what is often cited as one of the most important pieces of legislation passed by Congress. The Voting Rights Act was signed into law in 1965 by President Johnson. The Voting Rights Act bans literacy -- literacy tests and poll taxes that had been used to deny blacks the right to vote and to speak in the political process; outlaws intimidation; authorizes federal monitors and observers; and creates various mechanisms to protect voting rights of racial and the language minorities.

Some of the acts and provisions are permanent, such as Section 2, which is the general non-discrimination provision. I want to note specifically that what you may have heard -- what you may have misheard, which is that the Voting Rights Act somehow goes out of existence; that is not true. The right of African-Americans to vote is guaranteed by the 15th Amendment and is permanent. However, there are some special provisions of the Voting Rights Act that will expire in 2007 unless they are reauthorized by Congress. In 2007, three major protections of the Voting Rights Act will expire unless Congress acts to reauthorize. First, Section 5 of the Act requires certain states, counties, and townships with history of discrimination against minority voters to obtain approval or preclearance from the United States Department of Justice or the United States District Court in Washington, DC, before they can make any voting changes, including redistrictings, changes to methods of election, and polling place changes. These jurisdictions must prove that the changes do not have a purpose or effect of denying or abridging the right to vote on account of race, color, or membership to a language minority. Second, Section 203 of the Act requires that bilingual language assistance be provided in communities with a significant number of voting-age citizens who are limited English proficient. Four language groups are covered by Section 203: American Indians, Asian-Americans, Alaskan Natives, and those of Spanish heritage. Covered jurisdictions must provide language assistance at all stages of the electoral process. As of 2002, a total of 466 local jurisdictions across 31 states are covered by these provisions. Third, Sections 6(b), 7(b), 9, and 13(a) of the Act authorize the attorney general to appoint a federal examiner to jurisdictions covered by Section 5's preclearance provisions of good cause or to send the federal observer to any jurisdiction where a federal examiner has been assigned. Federal observers have been deployed every year from 1966 to the present, except for 1973, and about 25,000 observers have been deployed in 1,000 elections. From the initial passage of the Voting Rights Act in 1965, Congress has relied on an extensive documented history of discrimination in voting to justify the need for the special remedies of the Act and to ensure that these remedies are proportional to the problems the Act seeks to cure. The United States Supreme Court has made it clear that reauthorization of the expiring provisions of the Voting Rights Act must be supported by a record of discrimination in voting since the last comprehensive reauthorization in 1982. The non-partisan National

1 Commission of the Voting Rights Act was created by the Lawyers'
2 Committee for Civil Rights Under Law on behalf of the civil rights
3 community. The National Commission was created because, as I've noted,
4 some important parts of the Voting Rights Act will expire in 2007. To
5 reauthorize and satisfy constitutional standards, Congress will need
6 to find an ongoing record of racial discrimination in voting.
7 The National Commission is comprised of seven distinguished
8 advocates, academics, legislators, and civil rights leaders who
9 represent diversity that's such an important part of our nation. We
10 are also fortunate to have two regional guest commissioners to join us
11 today. In a few minutes, you will hear from each of the national
12 commissioners as well as the guest commissioners. However, let me say
13 that the Commission has two primary tasks: First, to conduct regional
14 hearings, such as this one, across this country to gather testimony
15 relating to voting rights and to provide information regarding the
16 Voting Rights Act; and, second, to write a comprehensive report
17 detailing the existence of discrimination in voting since 1982. The
18 Commission's report will be based on several sources, including facts
19 compiled from the Commission's hearings, United States Department of
20 Justice enforcement records, court opinions, and other sources. The
21 report will be used to educate the public, advocates, and policymakers
22 about the record of racial discrimination in voting.
23 The purpose of today's hearing is twofold: First, to gather
24 information from citizens, government officials, leading
25 practitioners, and academics about their experiences relating to
26 voting rights issues; and, second, to -- to educate local residents
27 about issues related to reauthorization. The first panel will provide
28 historic overview of the Voting Rights Act in the South. We will then
29 hear from leading voting rights practitioners in this region, academic
30 experts, members of the community, and government officials in the
31 second and third panels. Each panelist will provide a five to 10
32 minute presentation. After all the members of the panel have spoken,
33 the Commission will address questions to the panelists. And we look
34 forward to a vigorous dialogue. We encourage members of the public who
35 are here today to share their voting rights experiences in our fourth
36 and final panel of the day. If you are interested, please speak with a
37 staff member in the classroom, which can be reached through that door
38 on the right.
39 I would now like to introduce the other members of the National
40 Commission who will each make a brief opening statement.
41 Unfortunately, three commissioners are not able to make this hearing,
42 the Honorable Charles Mathias, Former Senator from Maryland -- that's
43 actually Charles Mathias; I'm sorry -- former Senator from Maryland,
44 who is the Honorary Chair of the Commission; Delores Huerta, the
45 Cofounder of the United Farm Workers of America; and Charles Ogletree,
46 Professor of Law and Vice-Dean of Clinical Programs at the Harvard Law
47 School. In their place, we have two guest commissioners, who I will
48 introduce after the national commissioners. Commissioner John Buchanan
49 represented Birmingham, Alabama, in the House of Representatives for
50 16 years. He is an ordained Baptist minister; has served churches in
51 Alabama, Tennessee, Virginia, and Washington, DC. Commissioner
52 Buchanan, would you like to say a few words?

1 MR. BUCHANAN: Thank you, Mr. Chairman. Although I was in the
2 Congress, I'll try to make it a few words. I -- it is a privilege to
3 be a part of this Commission and this function of the Lawyers' --
4 Lawyers' Committee. I am not a lawyer. I'm a Baptist preacher. I'm a
5 Baptist preacher who lost his mind and ran for the Congress. And not
6 only did I lose my mind and run for Congress, as I go from sublime to
7 ridiculous, as far as some members of my congregation -- which I
8 resigned from -- but I'm a Republican member of the Congress, as is
9 Charles Mathias, our Honorary Chair. They ran out of distinguished
10 members of Congress, and people like me, who are Republicans and are
11 right on all of the issues; they had to reach down to get me to run.
12 But to be -- when I was 21 years of age, I had just graduated from
13 Howard College -- now is Samford University -- in Birmingham, Alabama.
14 And at that point, 21 was the voting age. You couldn't vote until you
15 were 21. I went to the Jefferson County courthouse; I saw a group of
16 black Americans gathered around a table pouring over a thick tome. I
17 picked up a copy and started leafing through it. And you would have
18 needed a master's degree in history or political science, or maybe
19 both, to be able to answer the questions about that tome. It was the
20 literacy test. I went up to registrar. I said, sir, I just graduated
21 from college, and I don't think I can pass this test. He said, who was
22 the first president of the United States? I said, George Washington.
23 He said, you just passed the test; pay your poll tax; I'll register
24 you. That's how it was in Birmingham, Alabama, when I registered to
25 vote.
26 I had been a fan and a -- Abraham Lincoln had been my hero for
27 many years, from boyhood up, and so like all the black folk who were
28 Republicans, I was an Abraham Lincoln Republican. But I got an early
29 lesson in the need for this legislation. My first year in Congress was
30 1965. A sophomore Democrat from Atlanta and a freshman Republican from
31 Birmingham were spearheading an investigation of the Ku Klux Klan at
32 that point, and the things we discovered reminded me that our problem
33 was not confined to the deep south states but to many other places as
34 well. The largest Klan state was Indiana, for example. So when the
35 Voting Rights Bill came along, I followed my leader, Gerry Ford, who
36 throughout all the Great Society proposals offered constructive
37 Republican alternative proposals to each one. And on voting rights, he
38 and I cosponsored -- tried to get the judicial committee and the
39 Congress to pass legislation that covered more completely and more
40 thoroughly all the states, not just the southern states. Now, any
41 rational voting rights act would have to zero in on the south because
42 we were the heart of the problem; no question. But -- so I started off
43 as concerned about its applying primarily -- and some of its major
44 provisions, Section 5, 2 -- to -- for example, to states like Alabama,
45 Mississippi, and other selected states.
46 I want to begin by saying I'm so glad I was wrong -- I'm going to
47 ask our distinguished panelists later on to tell me why I was wrong.
48 We needed it -- the medicine the most and had a great problem -- if I
49 had been a lawyer, I might have known that -- applying it well. It had
50 spread throughout the whole country. By 1970 and 1975, I wouldn't have
51 voted for the Voting Rights Act if it applied only to my own
52 constituents, 35 percent of whom were black Americans. The most

1 productive change for the south; the most healthy change for the south
2 there ever was came out of the Voting Rights Act. We had states-rights
3 Democrats in Congress headed by white supremacy for the right, the
4 official Democratic ballot in Alabama. The symbol was not the donkey
5 but the white rooster. And that wing had control in the Democratic
6 Party until the Voting Rights Act, after which the Democratic Party in
7 Alabama began to become more as the Democratic Party is throughout the
8 United States in most places.
9 So this is the best thing that ever happened to Southerners,
10 black and white. The Civil Rights Movement, I think, was born in
11 churches like this. I believe it was born in the Christian church, in
12 black churches of the deep south. Many others joined in. But another
13 group of people who did a great deal of (inaudible) about were young
14 lawyers, like some who remain crusaders for this after they were no
15 longer quite as young. But I was thrilled to see young lawyers in this
16 group who are carrying on the fight. We need the Voting Rights Act. We
17 must have its provisions continued. And if the elections in 2000 and
18 2004 didn't make people understand we still have
19 problems with voting and people getting their votes counted, they need
20 to look again and think again. We need this Act. I'm so pleased to
21 have a small part toward it's reenactment and full - and
22 strengthening, if possible. Thank you, Mr. Chairman.
23 MR. LEE: Thank you for that too modest statement.
24 MR. BUCHANAN: Too long too.
25 MR. LEE: I think it was just right. Commissioner Chandler Davidson is
26 Professor Emeritus of Sociology and Political Science at Rice
27 University. Dr. Davidson is co-editor of Quiet Revolution in the
28 South, a definitive work on the impact of the Voting Rights Act in the
29 south. Doctor Davidson has served as an expert in numerous cases in
30 voting rights and is a renowned scholar in the field. Commissioner
31 Davidson.
32 DR. DAVIDSON: Thank you. I'm honored to be here today. At its heart,
33 the Voting Rights Act is a powerful government sanction of means to
34 prevent voting discrimination against racial and ethnic minorities.
35 Put differently, it was conceived as a means to prevent the second
36 reconstruction from the suffering and fate of the first
37 reconstruction. The latter half of the 19th century, the hard-won
38 right of most African-American males to vote was gradually taken away
39 after approximately 30 years. We are now 40 years beyond passage of
40 the Voting Rights Act. Should it be allowed to expire? To answer this
41 question, I am interested in hearing testimony about the existence, or
42 absence, if that is the case, of any form whatsoever of voting
43 discrimination against minorities, including minority vote dilution
44 through redistricting; voter intimidation through such mechanisms as
45 race-based challenges of voters at the polls; sudden changes of
46 polling sites; false information given to potential voters regarding
47 time and place of voting or voter qualifications; illegal purging of
48 voters' names from registration lists; use of racial or ethnic code
49 words in campaigns to stir up prejudice against candidates; activities
50 on the part of election officials, party officials, or others that
51 could have the effect of intimidating or discouraging potential
52 minority voters. In short, any activity or arrangement by officials or

1 others that appears to have a purpose or effect of infringing on the
2 voting rights of potential minority voters or minority candidates.
3 Your testimony regarding these questions today will play an important
4 role in helping Congress decide whether the temporary features of the
5 Voting Rights Act of 1965 should be extended beyond - beyond 2007.
6 MR. LEE: Thank you, Commissioner Davidson. I would now
7 like to introduce Commissioner Elsie Meeks. She is the first Native
8 American member of the United States Commission on Civil Rights, which
9 she has served for six years. She is also the Executive Director of
10 the First Nations Oweesta Corporation, and an enrolled member of the
11 Oglala Lakota Tribe. Elsie, if I mangled the pronunciation --
12 incorrectly - or anyone else's --
13 MS. MEEKS: Mangled words that nearly everyone mangles. Oglala Lakota
14 Tribe. I am so happy to be serving on this Commission. I was just
15 sitting here thinking a little bit ago what a strange situation this
16 is. In fact, I've found myself in situations for the past six years.
17 Coming from Pine Ridge, South Dakota, which is one of the -- includes
18 one of the two counties in South Dakota that's covered by Section 5,
19 we really didn't even understand the importance of voting. That's how
20 far removed we were from even thinking about this. And then after I
21 got elected to -- appointed to the Commission by then Majority Leader
22 Senator Tom Daschle, I really did come to understand how important. Of
23 course, through the Commission, we held a lot of hearings and
24 briefings, mainly in the 2000 election. Then published a very good
25 report. And we've held lots of briefings since then. I mentioned that
26 in South Dakota -- I'm from Pine Ridge - and in the 2000 election, I
27 think this is one -- or 2002 election, this was one of our really
28 first experiences at seeing what voting could do. And I don't know if
29 any of you know of Senator Tom - Tim Johnson's race. He was behind by
30 2500 votes, and the last precinct in was Pine Ridge. And he ended up
31 winning by 524. So that really, I think, caused us to understand in
32 great detail how important this was. And after -- and since that time,
33 our -- before Senator Tim Johnson's race, the turnout had been about
34 14 percent. And in the last race, it was something like 48 percent. So
35 we had gained a great deal. The ACLU has been really active in South
36 Dakota in the last few years and has won several lawsuits because of
37 voter packing issues and districting issues. So I am very happy to be
38 a part of this commission. And I think that this is such an important
39 issue, and we do need this to be reauthorized, and I look forward to
40 hearing from you and participating in this.
41 MR. LEE: Thank you, Commissioner Meeks.
42 Guest Commissioner Denise Majette is an attorney in Atlanta,
43 Georgia. She is a former member of Congress. She was elected to
44 Congress as Representative to the Fourth Congressional District in
45 2002, and she was the Democratic nominee for the United States Senate
46 in 2004.
47 MS. MAJETTE: Thank you.
48 MR. LEE: Welcome.
49 MS. MAJETTE: Thank you. Good morning. I'm honored to be a part of
50 this historic commission hearing, and I thank Barbara Arnwine, who is
51 my fellow Duke Law School alum, and the Executive Director of the
52 Lawyers' Committee, as well as Jon Greenbaum and the members of the

1 Commission, for having me be a part of this historic proceeding. Today
2 we will receive testimony from men and women who have been more than
3 conquerors; men and woman who have given so much of themselves in the
4 cause of justice, freedom, and equality across this country, but
5 especially here in the south. We are a grateful nation and a better
6 nation for the work that they have done. We are thankful for the
7 sacrifices of so many civil rights leaders, including Dr. Martin
8 Luther King, Dr. Joseph Lowery, Dr. Dorothy Height, Fannie Lou Hamer,
9 and Congressman John Lewis, with whom I served in the 108th Congress.
10 They and so many others were on the front lines and allow us to be
11 here in this position today. We owe a debt of gratitude to these
12 courageous warriors. And we are indebted to the lawyers who so wisely
13 crafted legal arguments, and to the judges who upheld their oath to
14 interpret the laws providing equal justice for the poor, for people of
15 color, and to all men, women, and children. They fought for justice
16 and placed their careers, their families, and their very lives in
17 harms way. The brave men and women like these inspired me at the age
18 of 13 in 1968, a young black girl in Brooklyn, New York, to decide to
19 become a lawyer. They made it possible for me to pursue that dream at
20 Yale College and Duke University School of Law in the 1970s. And then
21 to go on to practice law at Legal Aid in Winston-Salem, North
22 Carolina. And it was there that I experienced in an up-close and
23 personal way the challenges of southern life for those who had been so
24 long denied the right to freely exercise that most sacred franchise,
25 the right to vote. The Voting Rights Act made it possible for me, an
26 African-American woman, to be elected as a judge to the state court in
27 the Stone Mountain Judicial Circuit in Georgia, and then to be elected
28 to the United States Congress representing Stone Mountain of Georgia
29 in 2002. And just last year to be elected as the Democratic nominee to
30 the United States Senate from the state of Georgia. So great is the
31 power of the ballot.
32 Doctor King addressed the issue of ballot power in his May 17th,
33 1957, speech, "Give Us the Ballot," as he commemorated the third
34 anniversary of Brown versus The Board of Education. He understood and
35 we have seen that great and awesome power at work. It is the power of
36 the ballot that enables us to elect men and women who understand our
37 beliefs, who shape public policy, and who will implement court
38 decisions that embrace those among us who have been left out of the
39 American dream. And so our charge here today is clear: To assess the
40 progress that has been made and to help determine where we go from
41 here.
42 This hearing and the ones that will follow will help
43 Congress have a clear record, a clear road map, as they determine what
44 the next step will be in considering the reauthorization of the Voting
45 Rights Act. As a nation, we have come a mighty long way. But there is
46 yet still a long way to go. The work of the Commission through these
47 hearings will serve to light the path ahead. Thank you.
48 MR. LEE: Thank you. Guest Commissioner Derryn Moten is the Associate
49 Professor of Humanities at Alabama State University. Doctor Moten has
50 presented programs on the Civil Rights Movement with the Montgomery
51 and Tuscaloosa public libraries and is a board member of the Alabama
52 Writers' Forum. Welcome.

1 DR. MOTEN: Thank you. Good morning. It is a personal pleasure of mine
2 to be selected to serve as a guest commissioner here. In 1865 Alabama
3 was a principal character in America's morality play about race and
4 freedom, and in 1965, Alabama played her role again. The events of
5 that year and this place determined, in the words of Fannie Lou Hamer,
6 whether America was America; whether America, a' la, Alabama, was the
7 land of the free and the home of the brave. The women, men, and
8 children who helped bring about the Voting Rights Act believed, as
9 Commissioner Charles Oglethorpe's colleague, Harvard Professor Lani
10 Guinier, has written, that democracy demands the ability to
11 participate.
12 On a personal level, I realized the importance of voting at a
13 very early age, when my mother was among the legions of other blacks
14 in my hometown of Gary, Indiana, who helped elect the first black
15 mayor of our city, Richard Gordon Hatcher. Thank you very much.
16 MR. LEE: Thank you, Professor Moten. Before we begin, I need to make
17 some acknowledgements. First, again, I'd like to thank the Freewill
18 Missionary Baptist Church for their wonderful hospitality. I want to
19 think our distinguished group of panelists. They are, in fact, some of
20 the leading voting rights lawyers, academics, and advocates. I want to
21 thank the Lawyers' Committee for Civil Rights Under Law for
22 establishing the National Commission. I want to thank the national
23 cosponsors: The Leadership Conference on Civil Rights, the NAACP
24 National Voter Fund, the National Asian Pacific American Legal
25 Consortium, and the National Conference of American Indians. I also
26 want to thank the regional cosponsors: The Southern Christian
27 Leadership Conference, the National Voting Rights Museum, the Southern
28 Regional Council, 21st Century Youth, the African-American Human
29 Rights Foundation Center for Democratic Renewal, N'COBRA Southern
30 Region, and the People's Agenda. I also want to thank the law firms:
31 Ballard, Spahr, Andrews & Ingersoll, LLP; Bingham, McCutchen, LLP; and
32 Skadden, Arps, Slate, Meagher, Folm, LLP, for helping to staff the
33 Commission. Most of all, I want to thank everybody in the audience for
34 attending today's session. We're now ready to begin with our first
35 panel, which is the panel about history.
36 We have two panelists, and I'll just introduce both of them to
37 start with. Doctor Gwendolyn Patton is the Program Field Director for
38 the Southern Rainbow Education Project, a coalition devoted to
39 grassroots activism. Doctor Patton has travelled extensively
40 throughout the United States to organize and work on behalf of voting
41 rights and other issues of equality and freedom. But she is
42 particularly a historian and archivist of the Civil Rights Movement in
43 the state of Alabama. We welcome you, Doctor Patton.
44 DR. PATTON: Thank you so much.
45 MR. LEE: Vernon Burton is Professor of History and Sociology at the
46 University of Illinois. Professor Burton has written and testified
47 extensively about the issue of racial discrimination in voting. I'll
48 also say he is one of the most renowned scholars in the field and
49 quite a gentleman as well. And so if we could begin (inaudible) Dr.
50 Patton.
51 DR. PATTON: Yes. I'd just like to say first of all, thank you for
52 asking me. I probably will be a little eclectic in my remarks. I have

1 a tremendous responsibility. I'm the coordinator for the Montgomery
2 leg of our 40th anniversary.
3 Gentle ladies and gentlemen, I want to say a special hello to
4 Honorable John Buchanan. He was a Republican when it was not safe to
5 be a Republican in the south. And we do recognize that. I just hope
6 you'll be able to have some influence to revamp at least a part of
7 that Republican Party to the principles and the ideals of Abraham
8 Lincoln, because they have really ventured far, far away. As has been
9 stated by the Commissioners, voting is about power. And let us be very
10 clear about that. And what do we mean by power?I was a member of the
11 Student Nonviolent Coordinating Committee, and my grandmother's home
12 was the freedom house for the leaders of the Southern Christian
13 Leadership Conference. And when we looked across Alabama, particularly
14 in the Black Belt, where you had 80 percent, 90 percent black
15 citizens, and they had absolutely no power, I mean no power even over
16 their lives -- and at that point when we first embarked on this
17 mission in a contemporary way -- because the Voting Rights Movement in
18 Alabama began way back in a consistent way in the 1920s, in a very
19 consistent, very organized way. And I invite you to come and visit the
20 archives of which I have responsibility of the Honorable Rufus A.
21 Lewis, who saved every piece of paper from the mid-'30s until his
22 passing. He passed at age 93.
23 And so there has always been a thrust. The murder of Jimmie Lee
24 Jackson, I think was the straw that really broke the Jim Crow --
25 political Jim-Crow back. And we said, enough is enough. Many young
26 people -- I'm 63 years old. Many young people when I was a teenager
27 played real school. We didn't play, play school. When I was 12, 13
28 years old -- and I probably will cry -- we helped with the literacy
29 test. We had citizenship schools. Jefferson County's literacy test was
30 horrendous. It was the worst in the state. You had to know the duties
31 of the secretary of state in Alabama. In Montgomery, it was less
32 arduous, but not really something that should have been in the place
33 in the first place. You had to know how many US representatives, what
34 were their duties and functions; the Senate, you had to know about the
35 state legislative process. And we worked very, very hard and long to
36 help our people learn how to fill out that literacy test. And we talk
37 about college professors with master's who could get the answers
38 correct, all right. And the registrar was always recalcitrant, mean.
39 And, of course, they had a people. And when they would check and see
40 that you had all of the answers correct, they will ask a question, how
41 many bubbles are in a bar of soap, or how many seeds are in a
42 watermelon? So it was just absolutely humiliating. When somebody
43 finally got registered, we would have parties in the community to
44 celebrate. And that might be maybe one or two times a year. So -- and
45 I don't think, given the current political climate if -- if we don't
46 maintain it, I am convinced that there will be a variation of those
47 same kinds of barriers. Going back to my original thesis, it's about
48 power; it's about people collectively having control of their own
49 lives and their own governance. In 1965 and '66, we weren't interested
50 in running for President or even US Congress. I'm glad we got to that
51 point. We were concerned about who was the coroner, where a young
52 black man normally could be murdered in jail, and the coroner or the

1 medical examiner would say, by his own hands; we were concerned with
2 running for sheriff so that people like Jim Clark in Dallas County
3 during that period and his posse and his extra legal arm of the KKK
4 without their hoods would just massacre us at will. And there was no,
5 no restraint. They go to court, and they're found not guilty. We were
6 concerned about the school boards so that our children could have a
7 sensitive policy-making body. Because we had to go to county training
8 schools; we didn't go to regular schools. We didn't go to school in
9 the Black Belt, in the rural, until October. All of the other kids,
10 white kids, could go to school in September, but our children had to
11 pick the cotton. That was cotton picking time. And then they were let
12 out of school in March. We didn't have a spring break. We were forced
13 out of school almost for a month because it was cotton planting time.
14 And how children could folly during the summer, our children couldn't
15 do that because they had to hoe and chop the cotton. Forty years is
16 not that long ago. And I just think that we have to keep these
17 provisions intact. And I'll talk about that later. I want to say that
18 the Voting Rights Movement was not for black people only. When we got
19 rid of the poll tax, poor white folks could vote. There was a whole
20 thing about who was a 100 and 400. 100-whites were poor whites; they
21 got paid weekly. Professional whites were called 400s because they got
22 paid monthly. These are the kinds of anecdotes, the kind of maugres
23 and customs that we knew about. The poll tax also freed up white
24 women, because white women had to do what their husbands -- vote the
25 way their husbands say vote. And if not, the poll tax simply wouldn't
26 be paid. So the voting rights struggle, and which is continuing, was
27 not for black people only. It was about our -- I think I used
28 somebody's -- heard somebody say participatory democracy. Someone
29 mentioned Fannie Lou Hamer, and I had the privilege of working with
30 Fannie Lou and -- Fannie Lou and the Mississippi Freedom Democratic
31 Party challenge, which was so insulted. And I think Ms. Hamer said, we
32 didn't all ride up here on a broke-down bus just for five of us to sit
33 down; we's all tired. But what that struggle did was open up the
34 Democratic Party. I am convinced the formula to get delegates, not
35 just black inclusion in the whole process, but women -- you know, we
36 have a formula; we've got -- I've been to Democratic conventions, and
37 -- so there's a formula; your delegation has to have this type of
38 composition. And that has factored all the way down to the local
39 executive committees of the Democratic Party. So that's important in
40 terms of our struggle. You talked about negative campaign. That's
41 almost -- I mean, that just goes without question. There are always
42 code words. And unfortunately I'd like to say that the Republicans
43 have taken over where the Dixiecrats were in the '40s:Symbols, images.
44 Here in Alabama, for instance -- I've talked about this often -- and I
45 don't know what to do about it, Judge -- but the star of Jefferson
46 Davis is on the steps -- the top steps of our State Capitol. Jefferson
47 Davis, we all know who he was. And governors of today, when they take
48 the oath, they stand on that star. What is that saying? What is that
49 saying? Lastly, before I talk about the importance of saving and why,
50 our struggle for the right to vote, which it also includes for our
51 right for our votes to be counted, was not simply about passive
52 participation in the political process. It was also about active

1 participation in the process. And with all of this money in the
2 political process now, this private and PAC money, that is a new civil
3 rights issue, because it excludes and eliminates, particularly black
4 people, to even think about getting into the process. I've known
5 grassroots local candidates who put down a set of signs today and then
6 at night go pick up those signs because they can't buy more signs to
7 put in another neighborhood the next day. Humiliating.
8 I think our government, because of all of this money, has become
9 some kind of hybrid plutocracy or oligarchy or something. Money is the
10 new barrier. It's a civil rights issue as well. I don't know if this
11 commission can handle that or if it's in your purview, but that issue
12 has to be taken up. Section 5 is important. I wish it were a law and
13 not a provision. We still have instances of polling places being
14 relocated and nobody knows where they are. We have issues of people
15 having to re-identify, whatever that is. We have issues, that you vote
16 at this poll on a certain date and you vote for a certain kind of
17 election, then you vote at another poll -- at another poll on another
18 election. A lot of our people, particularly in the rural, which might
19 be rather large because of the land -- you know, Lowndes County has,
20 you know, a small population, but trying to travel from Fort Deposit
21 to White Hall, I might as well fly to New York because of the mass of
22 the land, the expanse. And so we must maintain Section 5. The federal
23 government has to be -- or the district court has to be informed
24 before any changes can be made. We all know about -- we don't have to
25 talk about districting and redistricting and diluting the vote. Money
26 dilutes the vote too. But we all know about those issues and how --
27 you know, we come from a generation of -- Judge Buchanan, who was it?
28 Was it -- I think it was Judge Varner in Tuskegee, Macon County, the
29 gerrymandering case, you know, where they gerrymandered all of the 80
30 percent of black folks in Macon County completely out of a political
31 district. We still have a variation, the cynicism, because it's all
32 about power. And we have to be very clear on that. And I wish white
33 people in general -- and I don't want to over-generalize -- would
34 understand that shared power is a wonderful thing, that you don't need
35 to have all of the power.
36 I tell my students, if you're the only A in class, you're going
37 to go crazy, because you'll have no one to talk to; there's no one on
38 your level. And likewise, with people with all of the money, all of
39 the power, they're crazy, as far as I'm concerned. Look at Enron and
40 its impact and how it has infected our political process. We must keep
41 Section 5. Alabama is getting a growing, growing Spanish Mexican, to
42 be more particular, here in Montgomery, population. And they're moving
43 in the black community, many of them. And I'm working on -- make
44 certain that we can have that kind of mutual respect for one another,
45 especially our cultures. They need to be a part of the political
46 process. So Section 203 must maintain. Mexicans, or people of Spanish
47 heritage, are no longer simply located on the west coast or in New
48 York City. They're all over the country, the midwest, and in the
49 south, and in Florida. To appoint the federal examiner, which goes
50 back to Section 5, I think that has to stay in place because it
51 reminds me, when President Johnson signed the Voting Rights Act into
52 law August 6th, 1965, also the same day that Hiroshima or Hiroshima

1 was bombed -- I see all kinds of connections -- we had to send for
2 federal registrars. Because how did we expect -- there was no
3 expectation -- that the existing registrars would register black
4 people? And I visit the archives, and I can show you letters where
5 ordinary citizens wrote to Washington asking for federal registrars to
6 come here to observe our elections. And I see federal registrars as
7 the federal examiner. And I think we still need them, of course, where
8 there's evidence, you know, affidavits, proof, in those areas. We
9 still have instances in the south where the poll -- what do you call -
10 - the box? What do you call it, Judge? Where you put your votes in the
11 box, disappears; ends up in somebody's home. I'm talking about recent.
12 I'm not talking about in the '60s. Can't find -- whatever the box is,
13 if you have paper ballots. We need to have federal registrars to make
14 certain they examine the ballot. I am convinced if the ballots in
15 Florida had been examined -- and we have the technology; we could do
16 it -- because I'm convinced a lot of those ballots were already pre-
17 perforated, and so if you vote for another candidate, then that ballot
18 becomes, what? Invalid. So we need federal examiners and the extension
19 of that to make certain that the ballot is valid. Ladies and
20 gentlemen, this is my testimony. I would be willing to entertain
21 questions, but please give me the opportunity to leave at this moment
22 so I can handle the rest of my responsibilities for the 40th
23 anniversary, and I will return later.
24 MR. LEE: Well, why don't we, to meet the requirements, ask some
25 questions for now. If I may start. You gave some examples of, I think,
26 the lost -- the ballot box that ended up in someone's house and
27 redistricting and changes of polling places and that occurred
28 recently. I wonder if you could just as much as you can give some more
29 specificity about when those things occurred. Are we talking about
30 things that happened in the 1990s --
31 DR. PATTON: Yes.
32 MR. LEE: -- 2000s? If you could, just sort of tell us which
33 counties maybe.
34 DR. PATTON: Oh, the Black Belt counties in particular: Greene
35 County, Hale County. I can give you some real evidence because it's in
36 my archives. I have a whole folder called voter irregularities, which
37 is evidence. I just didn't have time to collect that. But I'd be more
38 than happy. During the Jesse Jackson campaign, oh, my goodness the
39 voting irregularities were rampant, and that's where much of my
40 evidence is. And that can occur again. I think that happened because
41 Jesse was black.
42 MR. LEE: Well, Dr. Patton, why don't we expedite this by, if you
43 could make available your folder on voting irregularities, we will
44 keep the record open.
45 DR. PATTON: Okay. I will provide that. I talked with one of your
46 associates and said that I would provide that. And I would like to say
47 that the archives is housed at Trenholm State Technical College, which
48 I think is the correct repository, though I have a wonderful
49 relationship with the State archives, because it's these kids who go
50 to this community college, if you will, whose grandparents and great-
51 grandparents, poor people, were the foot soldiers of the Movement. And
52 they just revere the fact that they have an archives. And we are the

1 only college in the whole entire state, two-year college system, which
2 has an archives. But I'd be more than happy to provide that data for
3 you, even this afternoon if someone would join me and go right around
4 the corner and copy it.
5 MR. LEE: Thank you, Dr. Patton. Any questions for Dr. Patton?
6 MR. BUCHANAN: I just wanted to second yours, Mr. Chairman, and
7 thank Dr. Patton for her kind words. And also for your testimony. I
8 heard Joyce Hughes say some years ago that what we need to do in this
9 country is make a promise on paper the Constitution and the Bill of
10 Rights become realities in the world for all Americans. And that job
11 has to be re-fought every generation. I'm so glad you made plain that
12 these problems do continue and we have to do what's necessary to fight
13 them now. Thank you.
14 MR. LEE: Professor?
15 DR. MOTEN: Doctor Patton, you mentioned some of the challenges or
16 irregularities in the rural areas. As you and I both know, most of
17 this state is rural, and there are a lot of challenges regarding
18 voting in those rural areas. Could you speak a little more about those
19 challenges, particularly like, for example, with absentee ballots?
20 DR. PATTON: Yes. Thank you. They don't ever make it a lot of
21 times, you know, to be counted at all. And then when black people --
22 sirs, gentle ladies, we had a horrendous case down here, when black
23 people assist other folk, infirmed folk, with the ballot -- with the
24 voting process, the absentee ballot, we had people watching -- what do
25 you call, the legal apparatus -- I don't want to call his name from
26 Mobile, but I'll leave that alone, the state prosecutor -- I mean,
27 yeah, yeah, in the attorney general's office or something, brought
28 charges, filed charges against voter activists in Marion County and
29 Greene County. And they were simply assisting elderly people with the
30 right to vote. They were found not guilty in Marion County and also
31 Dallas County by the appeals. Greene County and Hale County is
32 somewhat complicated, but I can get you that data. Yes, we are
33 hampered very much by the absentee ballot process. Either assisting
34 our own people or if they get down to where they're to be counted,
35 they are not counted. If that brings any light to what you're. . .
36 DR. MOTEN: Thank you.
37 MR. LEE: Commissioner Meeks.
38 MS. MEEKS: Thank you for your comments. I really appreciated
39 hearing the history. You mentioned in Section 203, in this bilingual.
40 Has -- has there been any progress on providing bilingual ballots or
41 bilingual information? Has it reached that stage where that needs to
42 happen?
43 DR. PATTON: That needs to happen. And we also need to have, what
44 we used to call -- we had citizenship schools. That's where we learned
45 how to fill out the literacy test. But we also had what we called
46 political education, you know, so you can understand the political
47 process. I don't think that's existing in Alabama. I know not in
48 Montgomery, in terms of our new residents. You know, I talk with them.
49 We go to the same washeteria. I go there on purpose. I speak a little
50 bit of Spanish to make them feel comfortable. And I think they really
51 feel like they're not -- they shouldn't even be a part of our
52 political process. And something should be done so that they can be

1 independent so they don't become what black folks used to be in the
2 '20s and the '30s, where you had a few blacks -- by the way, you know
3 we couldn't even vote in the primary. It was called a white only
4 primary, okay. Always happened in May. And then you had this hand --
5 I'm trying to make a parallel, a possible analogy, with our new
6 friends, citizens -- you had a handful of blacks, and the white leader
7 would pay the HNIC, because that's really what that person was, to
8 deliver the little handful of block black votes to that particular
9 candidate. Remember that? Outrageous. And then they would get some
10 little favor. If we don't have real civic political education for our
11 newly-arrived friends of Spanish background, that can happen again.
12 And I don't think we need to have a repeat of that.
13 MR. LEE: Dr. Davidson.
14 DR. DAVIDSON: Doctor Patton, thank you for your testimony, your
15 moving testimony. From somebody who was only around during the large
16 work from the '60s onward -- and I'm very pleased to hear that you're
17 going to make your archives available to this commission, which would
18 be a big help to us. As you know, the kind of information that one
19 gets about voting discrimination is often word of mouth, and sometimes
20 it makes it into newspapers and constitutes a printed record, and I
21 wonder if you can give us any sense of how often -- I know this is a
22 rather difficult question to answer. But just off the top of your
23 head, estimate how often these voting problems, these instances of
24 voting discrimination, make it into local newspapers, say, in the
25 Black Belt counties.
26 DR. PATTON: Well, we have the Greene County Democrat, which is a
27 black owned that's very good in capturing. Let me also be very
28 specific and clear. Where you are in a majority -- I'm talking about
29 now in the urban areas -- where there is a majority of blacks -- and
30 because county commissioners -- and we've gotten that resolved in
31 terms of composition -- appoint people who work in the polls -- not
32 poll watchers, but you know, the official poll workers -- and, like,
33 in my precinct, they're all black; there are no problems there; we all
34 know each other and so forth. But in those areas where it's a mixed
35 population, you might find -- and I can only just say by hearsay
36 because I don't have any record of that -- how they might have been
37 intimidated. You know, particularly -- I'm just going to have to call
38 names -- in the areas where the Christian Coalition has a stronghold.
39 And, you know, the abortion thing gets all up in there and -- all
40 kinds of things get up in there that can intimidate black voters,
41 particularly if they're a minority in that particular district. So
42 that's where we need to look. Another place -- and help me, Derryn. I
43 want to say Clanton, where we have proportional representation. A
44 certain kind of -- I can provide you the book on that -- a certain
45 kind of voting process, cumulative voting, so that black people can
46 have some little say in the governance. Because black people in
47 Clanton -- Chilton County, they are the minority in terms of numbers.
48 And so that's a positive. But it took a struggle for us to get there.
49 But that's a positive, and perhaps a way out when we're dealing with
50 black folks, as well as other people of color, as the minority, so
51 that they can have some say-so. Otherwise -- and, of course, we had it

1 precleared, to have that kind of a cumulative voting process. I don't
2 know if that helps.
3 MR. LEE: Thank you, Doctor Patton, for your time, and thank you
4 for your willingness to -- to make yourself available to the staff,
5 and also those archives. Thank you for that wonderful eloquent
6 testimony.
7 DR. PATTON: Thank you.
8 MR. LEE: Our second speaker on the historical panel is a very
9 (inaudible). I am introducing Professor Burton. I somehow left out
10 that he is the Associate Director for Humanities of Social Sciences of
11 the National Center for Supercomputing Applications. Professor Burton
12 is a native of Georgia. Welcome, Professor Burton.
13 DR. BURTON: Thank you. When Dr. Patton said that 40 years wasn't
14 so along ago, I think it's something we need to remember when we're
15 thinking about the Voting Rights Act. Not only it was just 40 years
16 ago when this march across the Pettus Bridge finally brought people
17 here about this time -- which I think it's so appropriate to hold this
18 commission. But 40 years ago there are people who go to the polls
19 today who knew they were threatened when they went 40 years ago, who
20 were a group of voters who are still alive and voting who risked their
21 jobs, and often their lives, to go vote. So I think that's something
22 to remember when you think about renewal of the Voting Rights Act.
23 There was a period of time in America when people, a whole group, was
24 discouraged in the most horrific ways from exercising what we think is
25 central to a democracy. In 1957 Martin Luther King, Jr., making a
26 connection between the vote and America's sin of slavery, declared
27 that the right to vote was a moral issue: So long as I do not firmly
28 and irrevocably possess the right to vote, I do not possess myself.
29 Two things that modernized the American south: Air conditioning and
30 the Voting Rights Act. It's almost a disgrace. I think that Americans
31 understand better how air conditioning works than they do how the
32 Voting Rights Act works. I think we can say that we're proud that we
33 have such good science education, but we need better civics education,
34 better history education, and better political education, something as
35 important as the Voting Rights Act. I think we have just not let the
36 public know as historians how effective this extraordinary piece of
37 legislation has been; what it's done to change America for the better.
38 The Civil Rights Movement changed the way blacks and whites and
39 eventually other minorities and whites interacted in America. While
40 there have been all sorts of studies, particularly recently of Brown
41 v. Board, even studies of the 1964 Civil Rights Act, there's not been
42 that same sort of systematic study of the Voting Rights Act. We have
43 this wonderful book that Chandler Davidson helped edit, Quiet
44 Revolution in the South, and I would encourage everybody to look to
45 see how effective the voting rights has been and see how -- where it
46 has not been applied, how ineffective, when people are, in fact, still
47 racially-block voting, which I'll get to in a minute, which has not
48 decreased over the years, but, in fact, seems to be going up again;
49 where whites generally vote only for whites most -- most times. And
50 where we've had at-large elections in small communities and towns, how
51 -- where there have not been anything but at-large, how very few
52 minorities are represented in those communities. I think one reason,

1 though, that there hasn't been the sort of study of the Voting Rights
2 Act that we need is because, as opposed to other federal public
3 policy, there's no agency that oversees the Voting Rights Act
4 legislation. The Voting Division of the Justice Department oversees
5 district target under the 1965 Act -- and we hope that they will
6 continue; I certainly think they need to. But, otherwise, the history
7 of the Voting Rights Act has been in various court decisions handed
8 down across the United States since 1965. Several sections of the
9 Voting Rights Act are pertinent to its success. Section 5 of the law
10 outlawed voter qualification tests, specifically literacy, educational
11 achievement, and character tests. This section did not cover the whole
12 nation, but only areas selected by the famed automatic trigger, that
13 is areas of the south, based on past discrimination. Congress was
14 willing to acknowledge the racism of whites only in the states of the
15 Confederacy. Section 2 also applied to target areas of the south;
16 required Justice Department approval as a preclearance for any change
17 in voting procedures.
18 Congress renewed all the provisions of the Voting Rights Act in
19 1970, and in 1975 -- amended it in 1975 to include Section 203
20 provision to protect language minorities such as Asian, Hispanic, and
21 Native American voters. In the renewal of 1982, the Voting Rights Act
22 extended beyond the original targeted areas. Renewal also included the
23 powerful amendment of Section 2. The Act now prohibits electoral
24 policies whose purpose or result diluted minority voting strength. The
25 Voting Rights Act is one of the most successful civil rights statutes
26 ever enacted by the United States Congress. The Act sought to remedy
27 the failure to fulfill the promise the Reconstruction amendments of
28 full and equal citizenships for voters of color. The effects of the
29 Voting Rights Act are dramatic. The Voting Rights Act eradicated, and
30 in some cases overnight, a multitude of discriminatory practices that
31 had the purpose and effect of disenfranchising voters of color.
32 Literacy tests were suspended, as was local legislation, that was on
33 its face race neutral but had a racially-discriminatory impact. At-
34 large elections, full slate laws, numbered place rule, redistricting,
35 gerrymandering. After the passionate testimony of someone who lived
36 through this, the emotion that she had, I think is what we need. It
37 can't replace -- it's a litany of the story that I'm telling as a
38 historian. But I think it's a story that does need to be told.
39 Citizens of color, particularly African-Americans, were able to
40 register and vote; racist demagoguery ceased or at least developed
41 less offense code words. I was just an expert witness a year or so ago
42 in the Texas Congressional redistricting, the second one. And I was
43 amazed to find how overt some racial appeals and close to the
44 demagoguery still existed at least in Texas. Most states have become
45 more careful with the code words and the kind of thing that were done,
46 but it's still there. And, in fact, I brought both court orders that
47 I've been involved in and expert witness reports from Texas to South
48 Carolina where we echoed -- and recently the very things that Dr.
49 Patton was telling about in Alabama. So it's not isolated to one
50 state, but across the south again and again and again. Some of these
51 have been listed in -- by judges in court orders. And we're not
52 talking about before the Voting Rights Act or even 1980, but the 1990s

1 and 2000s where these sorts of things can be documented, from poll
2 watchers, who make it hard for people, to the actual official person
3 working at the booth, to all the sorts of things we talked about, are
4 still there; the reasons we need the Voting Rights Act to be renewed.
5 Enforcing the Voting Rights Act in conjunction would require one
6 person, one vote reapportionment, led to single-member districts that
7 allowed African-Americans in particular the opportunity to elect
8 candidates of their choice in the south, usually African-Americans.
9 The first two African-American representatives elected to the US
10 Congress after redistrict under the Voting Rights Act were Andrew
11 Young from Atlanta and Barbara Jordan from Houston, obviously urban
12 areas. Though the benefits of the Voting Rights Act have (inaudible)
13 primarily to voters of color, the Voting Rights Act has had a salutary
14 effect that cannot be measured in terms of registered voters and
15 elected officials. The Voting Rights Act is contributed from the
16 expansive understanding of representation and meaningful participation
17 in democratic politics and has done so in a manner that transcends
18 race. Moreover, the Voting Rights Act forces more discussion about
19 voting dispute and political participation more generally. And the
20 only example I know of where the have-nots triumphed over the haves,
21 minority plans invoking the voting rights won in the courtroom since
22 1965, opened the American political system to more people. Forty years
23 and several reauthorizations later, the Act remains one of the
24 nation's premiere vehicles for advancing the cause of racial fairness
25 in the electoral arena. From about 1980, because of the Voting Rights
26 Act, in most instances, new plans for county, city council, school
27 boards, state House, Congressional redistrict, allowed for more
28 minority representation. And I can't help but worry, indeed as an
29 expert witnesses, as I mentioned, for African-Americans, NAACP, in
30 fact, and Latinos, LULAC, in this 2003 Texas Congressional
31 redistricting case, Sessions v. Perry, which is now back on remand to
32 the Supreme Court; I was witness to the ruling by the three-panel
33 court that it was all right to disadvantage minorities as long as it
34 was for political partisan purposes rather than for racial reasons.
35 Now, to me, that's turning the Voting Rights Act on its head.
36 Opposition to the Voting Rights Act is complicated and influx. Some
37 whites who would never deny African-Americans the right to vote are
38 willing to deny single-member districts, which provide an opportunity
39 for African-Americans or minorities to elect candidates of their
40 choice. White politicians will often lament, they are perfectly able
41 to represent minorities in the Legislature; yet they've failed to
42 grasp that a minority would be equally capable of representing them.
43 We were speaking last night: You hear about black-influenced
44 districts, but has anyone ever heard anyone talk about a white-
45 influenced district? The way we think about whiteness and white in
46 America. Instead of understanding how the Voting Rights Act has opened
47 the political system of minorities, many supporters of racial equality
48 today mistakenly blame the Voting Rights Act to the demise of the
49 Democratic Party and the rise of the conservative party, Republican
50 Party, in the south. Because two things are -- happen at the same time
51 does not mean that one causes the other. In 2007, Sections 5 and 203
52 of the Act are scheduled for expiration or renewal. Some observers now

1 contend that the south and other covered jurisdictions have changed so
2 much in the intervening decade that the remedy is no longer justified.
3 Congress will need to address these questions. Hearings, which many
4 witnesses will testify, will play a critical role in determining
5 whether the special provisions of the Voting Rights Act are extended
6 in their present form, revised so as to provide continuing protection
7 for minority rights are effectively gutted. This hearing is a grand
8 opportunity to point out the historical development of the Voting
9 Rights Act so citizens make informed judgments, which is, after all,
10 an instructive tool. Let me just conclude by saying, at the time when
11 the rest of the world is looking to the United States for how
12 democracy works, when South Africa, and Africa, Libya say, let's do
13 like the United States has done; let's create districts that have been
14 made possible by the Voting Rights Act; to think about not renewing
15 the Voting Rights Act just seems unconscionable to me as a world
16 leader. Try to imagine a world, in fact -- or particularly the United
17 States, where we don't have Section 5. Just about a month ago, I was
18 contacted by the NAACP. Thomasville, North Carolina, which is not
19 covered, one of the districts covered, areas in North Carolina, was
20 forced to go -- and went to a mixed plan, the single-member district,
21 where no African-Americans have been elected before. So they had five
22 districts, two mixed plans, and now they've had a referendum to go
23 back to all at-large, where it's been successful. Black candidates
24 have been elected in the at-large -- two at-large seats, but they're
25 not black candidates of choice by the black community. Which is
26 another thing we have to look at, the complexities of, why do you need
27 the Voting Rights Act?
28 These were black Republicans who the black community did not
29 support, but whites did. We just finished a case about two years ago
30 in Charleston, South Carolina, example, after example, which I brought
31 with me, the court order. But after this case, which went all the way
32 to the Supreme Court -- the county has gone to districts -- the school
33 board, after African-Americans get elected, they decided to change the
34 method of elections and take away powers from them. All of these are
35 good reasons why we need to have Section 5. Section 5 just does not
36 look at, in fact, the preclearance, but it's supposed to deal with
37 people changing polling places, times of elections, these things that
38 affect the real lives of people. As Dr. Patton said, the lives of
39 who's going to be your coroner; who's going to make those decisions at
40 the local level. We are moving into a multicultural world in the
41 south. I grew up in the town of Ninety Six, South Carolina. I still
42 consider it home. For 31 years, I've taught history at Illinois, but
43 home has always been Ninety Six, South Carolina, to me. When I left
44 Ninety Six, there were only two things people did; they worked in the
45 cotton mill or the farm. And I used to get mad at the university -- I
46 said, I want to come home. My mother would say, what are you going to
47 do? I said, well, I'll farm. She'd say, well, nobody else has made a
48 living at it, and nobody else is able to do it anymore. I said, well,
49 I'll work at the cotton mill. The cotton mills are all closed now. So
50 the largest employer is Fujifilm, Japanese. And we have a Japanese
51 presence now in Ninety Six, South Carolina. The nearest city -- which
52 isn't that large; the county seat is Greenwood -- five years ago more

1 than one-fifth of the city's population was Hispanic. There were no
2 Hispanics there when I left to go off to graduate school at Princeton
3 in 1969. Now a fifth -- more than a fifth by now -- of the city
4 population is Hispanic. This brings a whole new element into the way
5 we deal with racial block voting. I brought evidence from South
6 Carolina that showed racial block voting has continued. It's in a
7 court order, in their latest 2000 redistricting. I have a quote, if we
8 get to it. But what I really wanted to talk about just briefly -- and
9 then I'll end and let's do it with questions. So much of
10 redistricting, people have focused on state redistricting. This is
11 what makes the headlines. This is where people see the Voting Rights
12 Act. What we need to think about are those communities like Ninety
13 Six, South Carolina, that I grew up in, a small town, that when it
14 went with the Voting Rights Act to districts, elected African-
15 Americans so that even then with a 10 percent population, an African-
16 American who had shown how good a citizen and leader that he was could
17 be elected mayor in this town. I think of Edgefield County, South
18 Carolina, where I was involved in court case after court case. What
19 the Voting Right has done is open up the resources of the entire
20 community so that people on the school board, so that people on -- who
21 are commissioners, let alone county council, the whole community is
22 represented. And the communities are better, and it's working. This is
23 what's amazing, that people are thinking about doing away with
24 something that is working. You can point to specific examples of the
25 difference that the Voting Rights Act has made. That's probably a good
26 place for me to stop. I can go on forever. I'm used to doing a 50-
27 minute lecture, and I apologize for that. But I have brought --
28 thinking I was going to do this in another context -- as I said, a lot
29 of examples from cases that I've been involved in if people want to
30 hear about them, or we can hear about them later, or perhaps the
31 history. I'm going to give the lectures at the University of
32 Washington in May, science lectures. And I chose to do the Voting
33 Rights Act because I believe this is something we need to know about.
34 It will be published as a book, and I hope there will be a book that
35 will -- the public can understand how important this piece of
36 legislation is to democracy, the heart of what America is all about
37 has been and continues to be and needs to continue to be part of what
38 makes American democracy work and be the envy of the rest of the
39 world.
40 MR. LEE: Well, thank you, Professor Burton, for that insightful
41 testimony. I was wondering if you could address an issue that's come
42 up many times, which is there are now so many minority elected
43 officials in the south. Is the extension of the Voting Rights Act
44 needed? Because we've gone way beyond the two black -- first black
45 House of Representatives.
46 DR. BURTON: Absolutely it's needed. And why have we gotten those?
47 And those have gone on, as people in Georgia have like (inaudible) be
48 elected only were able to do so after they had shown their ability
49 when they were elected under districts that had been challenged or
50 made to be challenged under the Voting Rights Act. That's why I gave
51 the example of both Charleston and Thomasville, North Carolina.
52 Thomasville can only try to do this because it's not covered by

1 Section 5, I would assume. Now, I don't know. I'm not going to speak
2 for the Justice Department. But certainly I would look very suspicious
3 at a place that under a court challenge had gone to districts, or a
4 mixed plan, and then suddenly has been successful in electing a black
5 representative. Again, about a fifth of the population there in their
6 one district has decided now to go at-large. The other big issue I
7 think is, in fact, candidates of choice, who, in fact, the African-
8 American community is voting for. Certainly in Charleston what we saw
9 was the claim, well, we are electing at-large and African-American,
10 but it was not the candidate of choice of the black community; the
11 black Republican was the choice of the white community. It's not
12 about, in fact, the color of the representative, but is it the
13 candidate of choice? And then again when I said, as you see the real
14 multicultural south -- there have been Native Americans and still are
15 in the south -- but this real movement of Hispanics into the south has
16 really complicated things, and there's an Asian population coming in
17 the cities. And I particularly think it's important for rural areas.
18 To see how Charleston, in the court case we did there where I was an
19 expert, continue again and again to try to stop from going to
20 districts, where African-Americans would have an opportunity to elect
21 candidates of choice, in every possible way was amazing. And then -- I
22 brought some of the documentation -- we aren't talking about before
23 the Voting Rights Act; we're talking about elections 2000. We're
24 talking about elections where all the things that Dr. Patton talked
25 about were happening in different places in the south. In the 2000
26 election, just as everyone read about Florida, but exactly the same
27 thing happened in Hampton County, South Carolina. In this last
28 election, it cannot be coincidence, it seems to me, that both in Texas
29 at predominantly black school and South Carolina predominantly black
30 school that police are there, and students were discouraged from
31 voting and poll watchers. These things are happening now. If you don't
32 have a Voting Rights Act, who's going to be reporting to these?
33 Particularly, as you said, Alabama is rural. Though almost every place
34 is urbanizing, people live out in the country away, and you need to
35 have this Act, I think. I think it's very important. Why would you not
36 want it when it's been so successful?
37 MR. LEE: Commissioner Elsie Meeks.
38 MS. MEEKS: In fact, that was sort of the question that I wanted
39 to ask. You know, when we look at the real important events, at the
40 symbolic importance of the voting in Afghanistan and Iraq, I mean,
41 what could be the negative impact of reauthorizing these provisions?
42 DR. BURTON: Well, I think it sends a message -- I think it sends
43 a message to the world about our inclusiveness, our belief in
44 everyone's vote having an equal impact -- or an equal opportunity,
45 would be the best way, I think, to say it.
46 MS. MEEKS: So but what would be the negative impact of
47 reauthorizing?
48 DR. BURTON: I don't see a negative impact of reauthorization. I
49 see a negative impact of not -
50 MS. MEEKS: Well, yeah, I agree with that but. . .

1 DR. BURTON: I mean, it seems to me it could only send a positive
2 message, that we care about inclusiveness in the democratic process;
3 that people should have a voice and an opportunity.
4 MR. LEE: Commissioner Majette.
5 MS. MAJETTE: Thank you. And thank you, Dr. Burton, for your
6 testimony. I'd like to follow up on comments that you made, as well as
7 a reference that Dr. Patton made, about the -- this -- the problem of
8 the disappearing ballot box and to find out if you have any
9 information about the allegations that were made in the last
10 Congressional primary regarding Representative Ciro Rodriguez. And
11 there were some allegations that one of the ballot boxes disappeared.
12 And then when those votes were found, they actually put his opponent
13 up, and I believe there was a court proceeding regarding that. But
14 those kinds of instances and the ones that you have made reference to,
15 can you just elaborate a little bit more about how the reauthorization
16 would help?
17 DR. BURTON: Well, this very past election, the 2004 election,
18 showed an African-American candidate in Texas for county commissioner
19 in Caplan (phonetic) County winning, but they later said the computer
20 made a mistake in one of the races and took a couple of hundred votes
21 away from her, and she lost by a handful of votes. It's another
22 example, I think, of the kinds of things -- this is Texas.
23 MS. MAJETTE: Yes. As well as Representative Rodriguez is from
24 Texas.
25 DR. BURTON: Right. So -- and I must say I was amazed when I did
26 the expert witness work for LULAC and the NAACP for the 2000
27 redistricting. It was an amazing list. I have a little sort of summary
28 here, and it's also -- I think I have already sent -- you know, there
29 were transcripts of hearing the Texas NAACP had in 2001 and 2003 in
30 Houston, Texarkana, and Fort Worth, where they detailed many examples
31 of problems with voting encountered by minority systems. There they
32 had illegal use of mailboxes in Fort Worth, where intimidating
33 articles were included in an African-American newspaper threatening to
34 have people arrested if they illegally voted. They stationed police
35 cars outside of polling places in Fort Worth and off-duty officers
36 after this threat had been made in a newspaper from there; the late
37 change of polling places; dropping individuals from poll lists without
38 cause; not allowing individuals to file challenge ballots.
39 Particularly, I remember something that happened in Fort Bend County.
40 And one of the worst things documented in several places was actually
41 a hate crime in Wharton, where a female campaign staff treasurer for a
42 black candidate for sheriff had her home burned down. And her husband,
43 a former county commissioner, were actually inside and got only
44 because the dog was barking. And she had just received threatening
45 calls saying what would happen to her if she did not get -- and we
46 won't use the N word -- sign out of her yard. So, I mean, this is the
47 kind of things that -- you know, sort of, when I went to do the Texas
48 Congressional redistricting, the totality of the circumstances; I
49 certainly had not expected to find that. These same sorts of things --
50 this is actually from a judge's order in the Charleston case, where I
51 was one of the expert witnesses in Charleston, South Carolina. And I
52 brought this for the Commission to have. Starting on Page 31, it goes

1 through a list of things. There's a lot more. There's a lot more in
2 the trial testimony and other things, and my expert witness reports
3 and others. But these are the ones that were indisputable; that a
4 judge just took down. But -- people making it hard for African-
5 Americans to vote. Officials. Not the poll watchers, but officials. I
6 also, just this last election, was the expert witness on the Ohio and
7 the Florida poll challenges, things there. And -- which is similar,
8 that is, the political challenges that come. But this document,
9 officials appointed by the State to, in fact, or the County, to
10 collect the ballots and things are making it very hard and -- again
11 and again appointed in the 2000 elections. Many going on to be head of
12 the election commission, or some -- so I have this to enter into the
13 testimony for you. Because I said, this is -- a judge has accepted
14 these, and I can give you lots of other examples. Still, cards being
15 mailed out warning people of -- you know, if you come and you change
16 your address or things, you could be liable for a crime and arrested.
17 And as I said, when you put this in the context of what Dr. Patton
18 said about 40 years is not so long ago, when people -- not just an
19 idle threat. That may not mean much to most of us who grew up --
20 particularly when you're white voting. But what does that mean to
21 people who were threatened 40 years ago, when people in most
22 communities when I used to do these -- I don't know if there's a
23 county I haven't done in South Carolina probably -- but I would go out
24 and talk to them; they could tell stories of people, what had happened
25 to someone. And these were truly heroes. It's not just the heroes who
26 marched across that bridge down here; though they're truly some of my
27 great heroes. But these were heroes who tried to register to vote
28 before the Voting Rights Act. We don't know how many are -- you know,
29 literally were killed because of that. But people were. So I think
30 historically -- I want to reemphasize, 40 years is not such a long
31 time ago when you place these -- what might seem like, well, a mild
32 threat, if you put it in the context of what had happened -- and you
33 remember, Reverend Buchanan, exactly what I'm talking about, the kind
34 of memories, the collective memories that people have. That's why I
35 think the Voting Rights Act is so crucial, and why I think
36 particularly you need to have Section 5 for preclearance for all these
37 changes. And if you think about -- and this is just on the south. We
38 could talk a lot about California. But when you think about this new
39 Hispanic population and Asian population, particularly the Hispanic
40 population, coming into the south, then the language amendment -- if
41 we believe in democracy, as I do, and why I love this country, is when
42 we try to live up to those ideals. And that's what the Voting Rights
43 Act has -- at least made us try to do better. And it just seems
44 unconscionable to me to not renew. I think to take away Section 5 and
45 the preclearance is like having the fox guard the hen house, is the
46 best analogy I've heard. You're saying to people, you know, you have
47 open reigns, so you'll have a lot more cases like Thomasville, which
48 says, we're past this now, and we don't need districts. But what we
49 find is with racial block voting -- let me just -- let me just -- this
50 comes from the judge's decree in South Carolina. And this is not the
51 Charleston case; this is the redistricting. (As read:) In this case
52 the parties were presented substantial evidence that this disturbing

1 fact has seen little change in the last decade. Voting in South
2 Carolina continues to be racially polarized to a very high degree. In
3 all regions of the state and in both primary elections and general
4 elections, statewide black citizens generally are a highly politically
5 cohesive group than whites engaged in significant white block voting.
6 Indeed this fact is not seriously in dispute.
7 If we didn't have block voting, we wouldn't need, I guess, the
8 Voting Rights Act for that part of it. But history is showing us
9 currently that we do have racial block voting. And it continues. And
10 it's strong. There was a period as a historian -- we never really talk
11 -- but I think about the '70s and early 80s, particularly with the
12 Democratic Party; it was almost a slating process, a good time in a
13 way, that said, we need to have more minority representatives. And I
14 think there was an attempt to be more inclusive. The amazing thing
15 that's happened lately, I think, is throughout the south, that sort of
16 attempt is even going away. So in some ways, I think we're going back
17 to a worse situation in terms of people reaching out to be inclusive.
18 Part of it is, again, we focus so much on Congressional and state
19 redistricting and not the small communities where it's made the
20 difference for people to become part of the community, real citizens,
21 and part of the political process.
22 MR. LEE: Thank you, Professor Burton. What was the year of that
23 district court decision that you were reading from?
24 DR. BURTON: It is March 6, 2003. I brought a copy for you.
25 MR. LEE: Thank you. You know, I'd just like to say generally that
26 you have provided many documents to the Commission, and we look
27 forward to receiving them and keep the record open, you know, to
28 receive more, because you've been a gold mine of information. DR.
29 BURTON: Thank you for this opportunity.
30 MR. LEE: Reverend, would you like to ask a question?
31 MR. BUCHANAN: Just one thing. You and Dr. Patton have both given
32 highly informative and eloquent testimony of why we need Section 5 and
33 the Voting Rights Act in 2005 now. But I still am troubled about the
34 whole state of Florida, the state of Ohio, the places where we had
35 massive irregularities that may have had a big influence on the
36 outcome of the election in 2004, and in Florida's case 2000 -- 2000
37 and 2004; maybe the whole ball game. If you have anysuggestions about
38 what we can do about that, either now or for the record, I'd
39 appreciate it.
40 DR. BURTON: Well, I'm a historian. My family would be a lot
41 happier and have a lot more money if I were a prophet about what to
42 do. So I'm not very good at looking forward. But what I find very
43 interesting as a historian, you know, most of these techniques of
44 disfranchisement, of discouragement, the south actually borrowed from
45 the north -- mainly they didn't need them before because blacks didn't
46 vote, and it was a -- very much a class society. But I think what's
47 happened is many areas in the north have learned how effective some of
48 these disfranchising and diluting of particular votes have been, and
49 they are being used very successfully in other places. This moving of
50 polls and closing and giving out a ballot -- this happened in
51 Missouri. You know, it -- it just seems to me, how can this happen in
52 an election in America in a democracy that you know how many people

1 are there, are registered to vote, and you don't have enough time to
2 get them voted? You don't have enough ballots or -- mentioned ballots
3 being lost and things? All of this is evidence to me why we need to
4 have the Voting Rights -- these things are happening when we have a
5 Voting Rights Act. This is when people say it's not needed. What would
6 happen -- that's why I keep going back to things I do see happening,
7 where they aren't -- what would happen if we didn't have something to
8 cover these irregularities? It's very hard now. In this Charleston
9 County court case that I was just quoting from, it was extraordinary
10 extensive -- when you think -- one of the things -- that the burden
11 falls on these plaintiffs. In almost all of these cases, these small
12 communities, the plaintiffs have had to come up with some way to do
13 this, that is, the minority community, where usually there isn't the
14 resources, where the government was being sued has to do it. And
15 unless the Justice Department or the ACLU or -- the NAACP does not
16 have that much money. But when they can put some money behind it, as
17 it -- become almost a chance for success for these communities. What
18 has been amazing is how well they have done and how much they have
19 won, given, as I've said, they are the have-nots. That's very unusual
20 in American history, and it's because of the Voting Rights Act and
21 renewing the Voting Rights Act.
22 MR. LEE: That's a good way to end. Thank you, Professor. At this
23 time, we'll take a short break to set up for the next panel. (Brief
24 recess taken.)
25 MR. LEE: Okay. We're ready now to begin our second panel. And
26 we'll begin with the Honorable Frank Jackson. Frank Jackson was
27 elected mayor of Prairie View, Texas, in 2004, after serving on the
28 city council for 12 years and as county commissioner of Waller County
29 for eight years. Mayor Jackson has worked in higher education
30 administration at Prairie View A&M and is himself a graduate. I'm very
31 interested to hear, Mayor Jackson, about the situation in Prairie
32 View.
33 MR. JACKSON: Well, first of all, giving all praises and honor to
34 God, I am extremely honored and deeply humbled to have been invited to
35 come and address this distinguished panel, this commission. I bring
36 you greetings from the beautiful city of Prairie View, Texas, home of
37 Prairie View A&M University. And there's 4,410 residents, 3,200 of
38 which are students at Prairie View. We are located in the Brazos River
39 Valley. The Brazos River stretches from the northwest out of the
40 foothills of the Rocky Mountains and flows into the Gulf of Mexico.
41 There are Native Americans in the -- that first inhabited that valley;
42 called it the Arms of God, so I bring you greetings from the Arms of
43 God. It was also the place where the first Anglo settlement was
44 located, about 25 miles to the southwest of where Prairie View is
45 currently located. It was the headquarters of Stephen F. Austin, who
46 was the father of Texas. He had the dubious distinction of also being
47 the father of slavery in Texas. Stephen F. Austin lobbied the Mexican
48 Government and told them that he needed the negro slave in order to
49 wrestle the bounty from the earth to make Texas a productive
50 enterprise. He said, without the negro, Texas would fail. So he sent
51 out a message to the original settlers, the Old 300, as they were
52 called, and he told them -- said, for each negro slave that you bring

1 into Texas, he would give them an additional 80 acres of land. A
2 gentleman out of Alabama named Jared Ellison Groce brought 110 slaves
3 into that Brazos River Valley. All total, Groce received over 44,000
4 acres of land just for showing up in to Texas. Jared Ellison Groce was
5 the first one to arm the militia of African troops to help exterminate
6 the Karankawa Indians, the people of that valley. Jared Ellison Groce
7 was the first true planter in Texas. In my opinion, he was the one
8 that really formed the Revolution. He was the one that brought Sam
9 Houston into Texas. Waller County is -- where Prairie View is located
10 is named after Jared Ellison Groce's nephew, Edwin Waller. Prairie
11 View A&M University resides on the old Alta Vista Plantation, which
12 was one of five owned by Jared Ellison Groce's great nephew, name
13 Jared Ellison Kirby. Prairie View is two and a half miles from the
14 Leindo Plantation, which is still there. It belonged to Jared Ellison
15 Groce's son, Leonard Waller Groce. So the Groce family help power
16 swaying that valley. It's interesting to note that the first signers
17 of the Declaration of Independence of Texas was Edwin Waller. Edwin
18 Waller was also chosen by the President of the Republic of Texas,
19 Mirabeau Lamar, to find a location for the new capital of Texas,
20 because the old capital, which is 25 miles to the northwest of where
21 Prairie View sits now, was called Old Washington on the Brazos. He
22 located the current city of Austin. That site was his choice, and he
23 became the first mayor of Austin.
24 The other thing Edwin Waller did, he was the first one to sign
25 the Articles of Succession from the Union. So the Confederacy in Texas
26 was born in that Brazos River Valley, was born right there in the Arms
27 of God. And I have to give you that background so you understand our
28 current situation. There in the Brazos River Valley, we have
29 Confederate prisoner of war camps for Union prisoners, within two and
30 a half miles from where Prairie View sits now. It was also the
31 training camp for the calvary and for the infantry for the south. Camp
32 Abare (phonetic) and Camp Groce were also located there. When the
33 Civil War ended, the last three-star Confederate general still in the
34 field of battle, still fighting, was a general by the name of Edmond
35 Kirby Smith. He was kin to the Kirbys that were kin to the Groces that
36 was there. And his headquarters was at his cousin's plantation called
37 Alta Vista, which is now Prairie View. That's where he kept his wife
38 and his children. And when you go to Waller County and go to the
39 Waller County courthouse, on the north lawn, there's a marker that
40 says Confederate States of America. And when the war ended, that's
41 where they read the orders dismissing the Confederate troops. And when
42 they left there, they left there kind of angry. And something
43 interesting happened. Dr. George -
44 MR. LEE: Mayor Jackson, I wonder -- I think we understand now the
45 context of the Arms of God. I wonder if you could bring us forward.
46 MR. JACKSON: Bring you forward. When the -
47 MR. LEE: Quite interesting, the Prairie View situation.
48 MR. JACKSON: Well, in 1972 the students at Prairie View tried to
49 register to vote and the then democratic elections administrator
50 denied them that right. That battle was fought out and was eventually
51 decided in the '78 court decision that allowed them the right to vote.
52 Again, in 1992 we had 19 people indicted by the district -- assistant

1 district attorney at that time McKeg (phonetic) in order to say that
2 they were voting illegally. One of the interesting things about that
3 '92 case is where they said a lot of students had registered twice; a
4 lot of students had voted in other elections. Like in Beaumont, where
5 we had a young man named Moore, I think it was Carl Moore Jr. His
6 father was senior. He had voted in Beaumont, but nobody bothered to go
7 and check the records to make sure that it was senior that had voted
8 rather than junior. Also the students marched on the Waller County
9 courthouse in '92 and fought that -- those indictments, and
10 eventually, they won out. But the old guard didn't go away. Again,
11 they came back in 2004. And the district attorney then, Oliver
12 Kitzman, wrote a letter to the local press and was really challenging
13 the students as being legal residents of the county. Again, the
14 students mobilized and marched -- about 7,000 people marched well over
15 seven miles from the campus of Prairie View to the Waller County
16 courthouse. And, again, when they walked in that valley, they really
17 sent a message that they would not be intimidated. Again, those
18 students turned out and registered to vote. But they were also
19 fighting for a place to vote on campus, being one of the largest
20 voting blocks. They were denied access to vote there on that campus.
21 They still had to go to a place on the far perimeter of the campus,
22 the community center, in order to vote. So I guess a long story short
23 is that we're dealing with a cultural situation in Waller County. We
24 know public policy can change, but cultures are slow to change. And
25 even if you just glance at Prairie View's history, you know that
26 that's where the experiment really took place. And how do you now
27 transition a people from being slaves, into the -- what was dictated
28 by the new industrial economy; how do you move them from slaves to
29 being wage earners? And it was worked out that -- and one of the
30 things that came up earlier is that -- when African-Americans left
31 office in Texas during the Reconstruction Era around 1899, from 1899
32 to 1966, when Barbara Jordan was elected, the highest ranking state
33 official in Texas was the principal, slash, president of Prairie View.
34 And I'm going to close with this last remark, is that during the times
35 when they established those land grant institutions throughout the
36 south in order to use education as their technique for social control,
37 Texas A&M University was established in that Brazos River Valley for
38 white males. It remained for white males from 1876 up until 1963.
39 Prairie View was established for black males, and eventually it
40 admitted women in 1879, became the first state-supported institution
41 to admit a female. And during that time, they looked for a president
42 of both of those universities, because Prairie View -- the president
43 at A&M was always the president of Prairie View. They offered the
44 presidency to Jefferson Davis, who respectfully declined. But he said,
45 I've got a man out of Mississippi I know well named Thomas Garthright
46 (phonetic). So he sent Thomas Garthright. And he said, well, you need
47 a black man for -- for Prairie View, so he brought L. W. Minor. So you
48 can see the Confederacy kind of retrenched to Texas. And so we're
49 dealing with something that's deeply entrenched. So that section of
50 the Voting Rights Act that affords us some protection is severely
51 needed, because the culture has not just moved. And the new phenomenon
52 now is the Hispanic in migration into territories that they once

1 owned. And so there's a gap between the education levels of those that
2 are now the majority and those that are going to soon be the majority.
3 But that gap is more -- when you're talking about closing it and
4 making sure that the new people can handle the economy of Texas, I
5 think the culture has given a backlash to that, because they feel
6 threatened. They see that they will be mutated into something else
7 with this new majority. So you've still got some safeguards that need
8 to be in place.
9 MR. BUCHANAN: Thank you. Beautiful testimony.
10 MR. LEE: Mr. Davidson.
11 DR. DAVIDSON: I have three questions for you. The first one is,
12 what percentage of Waller County is African-American? MR. JACKSON:
13 Well, based on the current census, we're probably roughly about 26
14 percent, somewhere like that.
15 DR. DAVIDSON: So a significant percentage there -
16 MR. JACKSON: Yes.
17 DR. DAVIDSON: -- that can certainly change election outcomes. The
18 second question is -- first of all, I guess, I have a good friend and
19 former student named Dalzinia Sams (phonetic), an African-American
20 woman whose dad was named Arista Sams (phonetic), who played a very
21 important role in -
22 MR. JACKSON: Yes.
23 DR. DAVIDSON: -- securing the vote for African-American students
24 there at Prairie View in 1972. Did you have the privilege of knowing
25 Mr. -
26 MR. JACKSON: I served with Mayor Sams on the city council for
27 many years, so I know him well, and I know his daughters and his wife,
28 Ms. Ann Sams.
29 DR. DAVIDSON: Third question, do you feel that the Voting Rights
30 Act had an impact on getting the situation taken care of, the most
31 recent situation that you were describing to us, whereby African-
32 American students again were at first prevented from voting?
33 MR. JACKSON: It provides us with some necessary safeguards,
34 because if it was not for that looking-over-the-shoulder, somebody
35 watching the process, then we would have been at the mercy of the
36 powers that still advocate states rights. Even though they're now
37 Republicans, they still are tied into the old ideology of the south.
38 It's very well entrenched.
39 DR. DAVIDSON: Thank you.
40 MR. LEE: Thank you, Mayor Jackson. At this point, I'd like to
41 acknowledge the presence of the individuals who have been marching
42 this week from Selma to Montgomery for the 40th anniversary. And a
43 banner has just gone up with SCLC's name on it and the 40th
44 anniversary march, so we welcome you marchers. MR. LEE: Our next
45 witness is Dr. Richard Engstrom. Dr. Engstrom is a Research Professor
46 of Political Science and is now Professor of Africana Studies at the
47 University of New Orleans. Doctor Engstrom has published extensively
48 on election systems and minority rights and has been testifying as an
49 expert in voting rights cases since the 1970s. And so we welcome you,
50 Professor Engstrom.
51 DR. ENGSTROM: Thank you.

1 MR. LEE: And I understand you're going to focus on polarized
2 voting.
3 DR. ENGSTROM: Yes. Again it is for me as well a privilege to be
4 invited to talk with you today. And I am going to deal with racially-
5 polarized voting, because it's a central concept when we deal with
6 Section 5 of the Voting Rights Act, which will be up for renewal, as
7 well as Section 2. Both those provisions contain protections against
8 what we call racial vote dilution or minority vote dilution. When we
9 talk about dilution, we're referring to what we often refer to as a
10 second generation type of discrimination. The first generation was
11 disfranchisement. But once people get the right to vote, we face
12 additional impediments and hurdles in their ability to convert that
13 vote into the election of representatives of their choice. Actually,
14 this has been borrowed from educational re -- research on educational
15 discrimination, where the first generation was simply segregation and
16 not even being allowed in the schoolhouse door; then the next was,
17 you're in the school, but now you're tracked into particular areas;
18 disciplinary policies are different. We have the same thing with
19 voting rights. First generation was disfranchisement; second
20 generation then we discovered dilution, which is a systematic
21 impediment in terms of the ability to convert voting strength into the
22 election of representatives of choice.
23 MR. LEE: Dr. Engstrom, we have a situation where we don't have
24 enough microphones, so if you could speak up as much as you can -
25 DR. ENGSTROM: Okay.
26 MR. LEE: I think the audience will appreciate it.
27 DR. ENGSTROM: All right. And so central to these protections, of
28 course, is, as Vernon Burton was saying earlier today, racially-
29 polarized voting. Now, if voting isn't racially-polarized, we no
30 longer need these protections, as Vernon said. If we don't have
31 divisions along racial lines in our candidate preferences, then we
32 don't need to be concerned about election systems that dilute the
33 voting strength of minority groups in those arrangements. But
34 unfortunately, it still is racially polarized, and when voting is
35 racially polarized, then how we structure elections can have a very
36 critical impact on the ability to convert that voting strength into
37 people you want to represent you in government. Vernon mentioned some
38 of the things, but just quickly, whether we have elections at-large or
39 by multimember districts or by single-member districts can matter
40 greatly. Whether when we look at those districts we have one district
41 (inaudible) versus another, and which one gets chosen can affect the
42 opportunity to elect candidates of choice greatly. Today I want to
43 tell you race remains the central demographic division in American
44 policies. Don't trust me; read the literature. Read the recent books
45 on southern politics. Race is still the major demographic division in
46 southern politics and, indeed, politics across the country. And
47 racially-polarized voting persists. I know this because I study it.
48 Since the nineteen -- since, excuse me, the 2000 census, I have worked
49 in seven different states in which I've conducted studies of racially-
50 polarized voting, or at least what it takes to elect minority choice
51 representatives. I have today for you an illustration of the tables
52 from one of the cases I worked, which was the Section 5 preclearance

1 case involving the State of Louisiana and its initial plan that it
2 attempted to implement the first time in terms of state representative
3 districts. I -- there are copies I know. Whether you have them or
4 they've been distributed or not, I'm not aware. But, anyway, this was
5 part of my report in the case of Louisiana versus The United States,
6 and this was, again, the new plan after the nineteen -- 2000 census.
7 There are four tables. Well, the report concerns four areas of the
8 state in which particular districting arrangements were at issue. All
9 right. They covered different parts of the state. We're not talking
10 about only one part of Louisiana, but different geographical areas.
11 There are four tables. Table 1 concerns racially-polarized voting in
12 the state House elections at issue or at least three of the districts
13 at issue. Table 2 concerns racially-polarized voting in, quote,
14 exogamous, unquote, elections. I apologize for that, but that's the
15 jargon. Basically, all that means is, in elections to other offices
16 than the office at issue in the litigation. In other words, elections
17 not involving the state House of Representative, but lots of other
18 offices. And we'll get to that in a minute. Table 3 and 4 do the same
19 thing for an additional district. I apologize. I no longer remember
20 why one district came in a little later. But it's essentially the same
21 as Tables 1 and 2 but for a district -- different districts. All
22 right. Those elections studied in that handout, or in those tables,
23 are over the lifetime of the previous redistricting plan, all right,
24 from the plan adopted at the 1990 census, up to when Louisiana was
25 adopting a new plan based on the 2000 census. They cover elections
26 from 1991 to 2002. We're not talking history here. All right. These
27 elections come up through the latest round, 1999, when the Legislature
28 was elected again, and some other elections incurring -- occurring in
29 2001, 2002. Now, note in the tables there are three different
30 estimates of racial divisions in candidate preferences for each
31 election. Now, my colleagues ask me what I do when I go into court.
32 And I say, I document racially-polarized voting. And my colleagues
33 say, well, doesn't everybody already know that voting is racially
34 polarized in this country? And I say, well, in court, you have to
35 prove it, and you have to prove it over and over and over again. And
36 then you even have to defend it because of statistical arguments about
37 the estimation procedures and things. I'm not going to get into that.
38 But what I'm going to say is the reason there are three estimates for
39 every election in this report is because we look at it every which way
40 we can. All right. We do two procedures approved by the Supreme Court
41 in Thornburg vs. Gingles; we do another procedure that is developed
42 and developed specifically for this purpose since Thornburg versus
43 Gingles, and, indeed, were available -- or where they can be done, we
44 will even use exit poles as additional evidence of the candidate
45 divisions. The estimation procedures typically reenforce each other.
46 You can look through those tables, and you can see occasionally there
47 may be some differences that have meaning, but, basically, in almost
48 all, they're going to be pretty close to each other, and certainly
49 have no difference in terms of who's the candidate of choice of
50 African-American voters and non-African-American voters. In that table
51 for Louisiana, there are 90 separate election analyses. And that means

1 roughly 270 estimates. Almost every election analysis in those tables
2 show racially-polarized voting in that election. Almost every one.
3 There are a few exceptions, usually when African-Americans
4 themselves may not be supportive of the African-American candidate.
5 But generally that's not the case. Rarely is that the case. And
6 normally, then, other voters don't share that preference. Now, does it
7 matter where the Louisiana -- we're looking at, as I've said. It
8 doesn't matter really what office we're looking at either when we look
9 at these elections. As I said, the -- the elections at issue, the
10 office at issue were seats in the state House of Representatives. But
11 you'll see through the tables that it doesn't matter; you'll find
12 racially-polarized voting when it comes to votes for governor; you'll
13 find racially-polarized voting -- excuse me -- when it comes to votes
14 for mayor; you'll find it when it comes to votes for public -- state
15 public service commissioners; when it comes to votes for state
16 Senator; when it comes to votes for people running for the state board
17 of elementary and secondary education; when it comes to people voting
18 for district attorney; constable; recorder of mortgages; register of
19 conveyances; and numerous judicial offices. There are elections in
20 there for the state court of appeals, district court, civil court,
21 criminal court, juvenile court, and traffic court. It doesn't matter
22 what office is at issue; it doesn't matter whether it's high profile
23 or low profile; it doesn't matter whether it's top of the ballot or
24 down on the ballot. Time, place, and office do not matter. What we
25 find consistently in almost every instance is that voting in those
26 elections in Louisiana show -- reflect racially-polarized preferences
27 on the part of the voters. Now, there's nothing unique about
28 Louisiana. There's nothing unique about the set of tables I've given
29 you. There's nothing especially more dramatic about this evidence than
30 what one finds in other states. As I mentioned, I've worked in six
31 other states since the 2000 census. I've worked for plaintiffs and
32 defendants; I've worked for civil rights organizations; I've worked
33 for states; I've worked for the US Department of Justice. My testimony
34 doesn't vary depending on who I work for in the sense of what I find
35 is what I'm going to talk about and what I'm going to testify to. I
36 want to just quickly point out some other states. One state I did not
37 work in, in which we've already had testimony about, is South
38 Carolina. Vernon Burton this morning read from you -- read from a
39 court decision talking about racially-polarizing voting in South
40 Carolina. Let me add Georgia. I was the Department of Justice's expert
41 witness to do the voting analysis portion in the case Georgia versus
42 Ashcroft. A lot of people here will -- will know what that case is.
43 Now, the deal -- the Department of Justice lost that case on the
44 ultimate question of preclearance. But they did not lose on the
45 question of whether there's racially-polarized voting in Georgia. The
46 trial court held that they found -- there's a holding of finding of
47 fact -- that voting is racially polarized in those areas that were at
48 issue, and that's -- that determination, that finding, was not
49 overturned on appeal. It was in no way disturbed by the Supreme Court
50 when they overruled the trial court that had agreed with the
51 Department of Justice. I've worked in the state of Florida; I've
52 worked in the state of Alabama; I just finished a deposition in the

1 state of North Carolina. And I can tell you that I was the state of
2 North Carolina's expert when it came to racially-polarized voting in
3 the Shaw case, the Shaw versus Reno litigation. And racially-polarized
4 voting was found in North Carolina at that time. Given my more recent
5 experience, which concerns the southeastern portion of the state,
6 racially-polarized voting is still -- it persists in North Carolina. I
7 also have done work in Texas involving Hispanics as the group at
8 issue. And not in the south, but I've done work showing polarized
9 voting when it comes to Native American preferences and other people's
10 preferences. So -- and I want to say I also did some work in
11 Mississippi. I didn't do racially-polarized voting there, but during
12 the process of adopting their plan, I did serve as a consultant to the
13 state and documented the need for majority African-American districts
14 in order to elect African-Americans to the Legislature in the state of
15 Mississippi. And I'm happy to say that it was the first time since the
16 Voting Rights Act was adopted that Mississippi gained preclearance for
17 the first plan it adopted for the new legislative lines, again, in the
18 history. So I want to say racially-polarized voting is a persistent
19 thing in the American south. I wish I could say it was a thing of the
20 past, but it isn't. And, therefore, Section 5 of the Voting Rights
21 Act, unfortunately, needs to be extended. As long as we have racially-
22 polarized voting, we need the protections that Section 5 provides and
23 also the protections that Section 2 provide. The Voting Rights Act
24 continues to be needed because the basic problem when it comes to
25 dilution, racially-polarized voting persists throughout the south.
26 MR. LEE: My colleagues on the Commission admonished me that we're
27 going to change the ground rules a bit. We're going to listen to all
28 the testimony first and then come up with some questions. But at this
29 point, I'd like to acknowledge Charles Steele, Jr., President and CEO
30 of the Southern Christian Leadership Conference. Mr. Steele. Mr.
31 Steele, we're going to provide some time for you to say a few words
32 later, but do you want to just say something now briefly?
33 MR. STEELE: Well, you can tell that I'm a former elected
34 official. I saw a microphone; I began to walk. I served in the Alabama
35 State Legislature for the first black since Reconstruction for ten
36 years. And I resigned in the latter part of August to take on full-
37 time representation for SCLC and currently president and CEO. Also was
38 one of the first black city council persons elected in the City of
39 Tuscaloosa. I would just like to greet you; say I'm happy to be here.
40 We've been marching since actually Sunday from Selma to Montgomery.
41 And at some given point, I'd just like to give you the root causes why
42 we have discriminatory practices within the system that we're
43 currently experiencing in terms of voting rights, and hopefully to
44 implement for the future things that we can do for SCLC in working
45 with you to eradicate those concerns. I just left Israel, and going
46 throughout the world, the same type of concerns, to eradicate racism
47 from our system. That's the root cause. I'll pause at this point.
48 MR. LEE: Thank you very much. We're going to provide time right
49 after lunch for --
50 MR. STEELE: Well, in case I don't come back, let me just say
51 this, because I do have some other things. Let me say this to you.
52 MR. LEE: Oh, sure. Of course.

1 MR. STEELE: Let's deal with the real issue. And the real issue is
2 racism. Let's not skate and skirt around this thing. I'm tired of
3 playing ticktacktoe with an issue that is serious. There's racism in
4 this country. A hundred years ago, the issue with black folks was
5 racism; 50 years, the issue was racism; 2005, the issue is racism, and
6 that's what we have. You can't expect a system that enslaves you to
7 save you. Thank you very much.
8 MR. LEE: We turn now from the very compelling and striking
9 testimony of Dr. Engstrom about the persistence of race-polarized
10 voting to testimony of Victor Landa. He's going to focus on the
11 Section 203. Victor Landa is the Central Region Director of the
12 Southwest Voter Registration Education Project, which in 2004
13 registered 100,000 new Latino voters to 16 states. Mr. Landa has
14 worked in Spanish and English media, print and broadcast media, for 22
15 years. Welcome, Mr. Landa.
16 MR. LANDA: Thank you very much. Distinguished members of the
17 Commission, ladies and gentlemen, good morning. Buenos dias. My name
18 is Victor Landa. I'm the central region director of the Southwest
19 Voter Registration Education Project. In this capacity, I'm
20 responsible for our operations in Texas, Colorado, and New Mexico. On
21 behalf of the Southwest Voter Registration Education Project, I want
22 to thank the Lawyers' Committee for Civil Rights Under Law for putting
23 together this series of timely and much-needed forums and for inviting
24 my organization to participate in this hearing.
25 The Southwest Voter Registration Education Project is a national
26 nonprofit nonpartisan organization committed solely to the political
27 empowerment of Latino communities through voter registration, voter
28 education, as well as voter participation. Southwest Voter was
29 established in 1974 by the late Willie Velasquez to encourage civic
30 and political participation in Latino and other underrepresented
31 communities. And since its inception, Southwest Voter has registered
32 over 2. 2 million Latino voters throughout the southwest and Florida.
33 I'd like to speak to you this morning directly with regards to Section
34 203 and Sections 6 through 9 of the Voting Rights Act and how these
35 come to bear on the voting experience of Latinos in Texas. The purpose
36 of Section 203, as you well know, is to provide non-English-speaking
37 citizens with the same information and opportunities to participate in
38 the electoral process as the general electorate. In our work,
39 specifically in the 2004 election cycle in Texas, Southwest Voter
40 Registration Education Project found that election materials in
41 Spanish, from registration cards to ballots, were essential. In the
42 months leading up to the general election in November of 2004,
43 Southwest Voter registered close to 20,000 new Latino voters across
44 Texas, many of whom are not fluent in English. This was a record
45 breaking year for us in or 30 year history, and it's a fact, that we
46 could not have enjoyed this level of success were itnot for bilingual
47 registration cards. We find that older citizens and new immigrants
48 feel more at ease, more secure, when the process is in a language that
49 they have mastered. I've found that citizens who prefer Spanish
50 registration cards do so because they feel more connected to the
51 process. They also feel they trust the process more when they fully
52 understand it. Many older citizens, new citizens, and first-time

1 voters whose primary language is Spanish would not have registered to
2 vote if not for the access to registration cards in Spanish. Without
3 materials in Spanish, those citizens whose eagerness and ambition to
4 participate in the electoral process would compel them to register
5 even using a form with registration instructions they did not
6 understand, would run the risk of making errors on the registration
7 card that could prevent them from voting if those errors made them
8 wrongly appear ineligible.
9 Without materials in Spanish, many citizens not fluent in English
10 would find the process too difficult to navigate and would not vote or
11 would not necessarily vote in the way that they had intended. As an
12 anecdote, I offer the case of an 86-year-old woman who answered her
13 door and told one of our volunteers that she believed that she was too
14 old to vote. She was assured in Spanish that there was no age limit to
15 voting -- the voting process, and she happily registered. This woman
16 spoke limited English and would not have been able to understand our
17 volunteer's explanation if it were not in Spanish. Then there's the
18 case of a 46-year-old construction worker who I approached after
19 Sunday mass, where he and his family were celebrating the baptism of a
20 newborn nephew. When he saw that there were Spanish registration cards
21 available, he went back into the church to bring out 12 members of his
22 extended family, all citizens, who stood in line to register, and told
23 us that if it were not for the Spanish registration cards, they would
24 not have registered, and, of course, they would not have voted.
25 Section 203 of the Voting Rights Act should be reauthorized to protect
26 the voting rights of Spanish-speaking and Spanish/English bilingual
27 voters. Bilingual materials are not a mere preference; they are not
28 just a convenience; they are a necessity because they insure the
29 franchise.
30 Now, a concern to us as well is the preservation of Sections 6
31 through 9 of the Voting Rights Act. These sections authorize the
32 federal government to send federal election examiners and observers to
33 specific jurisdictions and polling places where they are deemed
34 necessary. They also allow for federal registration in jurisdictions
35 that discriminate in registration and at the polls. It was our
36 experience in the 2004 election cycle in Texas that there exists what
37 can only be described as strategic efforts to exclude certain citizens
38 from voter registration. In one county in south Texas, some of our
39 Spanish-speaking volunteers were denied the eligibility to be
40 deputized as registrars. Now, in Texas only a deputized registrar can
41 register voters in the field. Some officials who are empowered by law
42 to deputize registrars deliberately set obstacles to deputization for
43 people who may have belonged to an opposing political party. One of
44 our volunteers was stripped of his deputized registrar privileges
45 because he turned in a registration card with a numerical
46 transposition. His team of volunteers was also denied deputization
47 privileges on similar flimsy technical merits. On one occasion, a
48 volunteer was told by an authorized person in the elections office to
49 change a date on the registration card. And as soon as that date was
50 changed, her deputized registrar privileges were taken from her.
51 Sadly, I can elaborate not further, because the volunteers in question
52 fear retribution and have asked that names and locations not be

1 mentioned. It's noteworthy to say that all of our volunteers who were
2 denied or were stripped of their deputization privileges were fully
3 eligible to be sworn in as deputy registrars.
4 Texas officials have been arbitrary and discriminatory in their
5 refusal to deputize our Spanish-speaking volunteers. In addition, in
6 San Antonio, Texas, our field volunteers were denied access as
7 registrars to naturalization ceremonies. Part of our strategy across
8 the country is to go to naturalization ceremonies, where newly-sworn
9 citizens are eager to register to vote, in order to become full-
10 fledged participants in the political process of their adopted
11 country. In October of 2004, when our volunteers approached the
12 immigration official in charge of the ceremony in San Antonio, they
13 were told that the local registrar was coordinating the voter
14 registration effort. The office of the county elections administrator
15 then told us that official county personnel were covering the voter
16 registration tasks and that there was no need for our help. But when
17 time came for the ceremony, there was, in fact, no one registering new
18 citizens at the time of their naturalization. We know this because our
19 volunteers did, in fact, attend the ceremony, but as private citizens,
20 not as voter registrars. And they were witnesses to the lack of voter
21 registration at the ceremony. Our efforts to file an official
22 complaint with the United States Citizenship Immigration Service, with
23 the county elections administrator, and with the persons in charge of
24 the ceremony venue, as well as our request to the same agencies and
25 persons in San Antonio to be present at subsequent naturalization
26 ceremony -- ceremonies bore no fruit. The effort to exclude certain
27 voters in Texas from participating in the electoral process has
28 reached the State Legislature.
29 Representatives Betty Brown and Jim Jackson have introduced in
30 committee House Bill 516, relating to requiring proof of citizenship
31 at the time a person registers to vote. The bill states that a person
32 would have to provide a copy of proof of citizenship in order to
33 register to vote; a driver's license or a Social Security card would
34 not work. To be permitted to register to vote, a new voter would have
35 to provide a birth certificate, a passport, or naturalization
36 documents. The most common forms of identification that you and I
37 carry would not be enough to register to vote. This bill carries the
38 stated intent of fighting voter fraud, but what it actually does is
39 set greater obstacles for the registration of new voters, and a
40 substantial portion of new voters in Texas are Latin voters.
41 The way the law presently reads, a person who wants to register
42 to vote must provide proof of identification and can provide that
43 information when he goes to cast a ballot in the first federal
44 election after he registers. Now, this new law, if enacted, would
45 place the stricter transaction of proof of citizenship at th moment of
46 registration. This change, while making it more inconvenient for all
47 Texans to register to vote, would adversely and disproportionately
48 affect new Latino voters in Texas because most new Latinos in Texas
49 are registered in on-site registration drives, in places where they
50 shop; where they gather; worship; and celebrate; places where people
51 don't carry birth certificates or passports or naturalization papers.
52 This law would be another in a series of obstacle for Latinos who have

1 a historically tenuous relationship with voter registration, going
2 back just one or two generations, to a time, for example, when
3 eligible voters were required to pay a poll tax.
4 Ladies and gentlemen, Sections 203, as well as Sections 6 through
5 9 of the Voting Rights Act, must be reauthorized to prevent exactly
6 the harms they were originally drafted to redress, because these harms
7 persist, and in their persistence, they erode Latinos' rights and
8 privileges as citizens of this country. Our experience is a reminder
9 that federal protection of voter registration continues to be
10 necessary because there continues to be a population against whose
11 voting rights registration restricting strategies continue to be used.
12 Latino voting rights in Texas are not protected by simply observing
13 the polls on election days to be sure that registered voters are
14 allowed to vote. We need the legal provisions in the Voting Rights Act
15 that ensure that those who work to register Latino voters in Texas
16 have the chance and the necessary Spanish language materials to do so
17 and that all eligible Latinos voting age have a meaningful opportunity
18 to register so that they can vote. The acts of obstruction I have
19 described speak as well to the need to reauthorize Section 5 of the
20 Voting Rights Act. The requirement to preclear changes in voting
21 practices or procedures based on evidence, that the proposed change
22 does not have the purpose and will not have the effect of denying or
23 abridging the right to vote on account of race, color, membership in a
24 language minority group. It's a weapon we must not lose. Section 5 is,
25 in effect, our first line of defense against preferences of the kind
26 that I have outlined this afternoon, which limit, obstruct, and also
27 deny the right of suffrage to language minorities in the state of
28 Texas. Again, I thank you for the opportunity to appear and speak
29 before you, and I thank you for your attention. Muchas gracias.
30 MR. LEE: Thank you, Mr. Landa. Now we're going to hear from Raoul
31 Cunningham, who is the President of the Louisville, Kentucky, branch
32 of the NAACP. Mr. Cunningham has also served as a National Deputy
33 Director of the NAACP Voter Empowering Program, as well as Region 3
34 Coordinator and the Kentucky State Coordinator of the NAACP. Welcome,
35 Mr. Cunningham.
36 MR. CUNNINGHAM: Thank you, Mr. Chairman. Let me express my
37 appreciation to the Commission and to the Lawyers' Committee for
38 inviting me to participate with you. In my letter of invitation, they
39 asked me to discuss discrimination faced by the voters of Kentucky
40 since 1982. If I may, there are three specific cases or instances that
41 I would like to discuss with you. First, in the 2000 general
42 elections, the voters of Louisville and Jefferson County passed a
43 referendum merging the City of Louisville and the unincorporated areas
44 of the county. This act passed by vote of 158,000 to a 134,000.
45 Interesting aspect of this merger is that the 92 small cities in the
46 county were not included. African-Americans voted 83 percent against
47 the referendum. At the time of the vote, African-Americans were 33
48 percent of the city and 18. 9 percent of the county, and composed 33
49 percent of the Board of Alderman, and 25 percent of the physical
50 court, which is our legislative body in Kentucky. Prior to this, the
51 general assembly had passed enabling legislation which passed the
52 referendum on the ballot and stated that the University of Louisville

1 Geography Professor, Dr. Bill Dakan, would draw the 26 districts for
2 the new government. The enabling legislation also stated that
3 Jefferson Physical Court had to approve the districts drawn by Dakan
4 without alterations or amendments. A one-man show.
5 During the campaign, the proponents and Dakan of merger had
6 promised that there would be -- six of the 26 districts would be
7 majority black districts. However, the plan as drawn by Dakan diluted
8 minority voting strength because it failed to create the effective
9 voting age minorities -- majorities -- I'm sorry -- in Districts 2 and
10 District 3. Several alternative plans submitted to Dakan by the NAACP
11 clearly demonstrated that it was possible to create majorities of
12 voting age African-Americans sufficient to provide the citizens of
13 those districts with a reasonable opportunity to elect their
14 candidates of choice, as required by the Voting Rights Act. Today the
15 plan drawn by Dakan is in place.
16 Second scenario -- oh, in the area of redistricting, two months
17 before the 2002 session of the general assembly convened, the NAACP
18 unveiled a redistricting plan that showed how the Legislature could
19 draw three majority black districts in Louisville instead of two and
20 create an influenced district in Jefferson County as well as Christian
21 County in the west. On the second day of the session, January the
22 10th, the proposals were -- were submitted to the leaderships of both
23 houses. We also testified before both committees. The House passed
24 this version of redistricting, which was House Bill 1, without
25 including the recommendations of the NAACP. During the debate on the
26 Free Conference Committee Report to House Bill 1, the speaker pro tem
27 assured the House that a third African-American district in Jefferson
28 County had been created. The House and the Senate, within an hour
29 after that declaration, passed the bill, and the governor affixed his
30 signature that same afternoon. The problem with that is that there was
31 no third African-American district in Jefferson County, and the other
32 two districts had been greatly diluted. Prior to 2002, the 42nd
33 district had 71. 2 percent black voting age population, and the 43rd
34 district had 61. 8 black -- black voting age population. Under the
35 House Bill 1 that we -- that now is in effect, the 41st, which was to
36 have been the new majority black district, has 47. 6 black voting age
37 population. The 42nd has 52. 6 black voting age population, and the
38 43rd has 54. 1 black voting age population.
39 The third -- the third circumstance is that on October the 3rd --
40 I'm sorry, October the 15th, 2003, the chairman of the Louisville
41 Jefferson County Republican Party filed a list of 59 persons to serve
42 as challengers in 59 predominantly African-American precincts with the
43 Jefferson County Board of Elections. In July of 2003, a Republican
44 recruiting flyer entitled "Gubernatorial Election Integrity Call to
45 Arms" was circulated, that stated, in the past three elections, the
46 NAACP and the A. Philip Randolph Institute had, quote, targeted poor
47 black voters, end of quote, and encouraged them to, quote, commit
48 fraud, end of quote. The flyer also attempted to raise money for the
49 GOP. The Republican Party had asked the FBI to come in and
50 investigate. They did, and found no illegal election activities or
51 election fraud related to the Get Out the Vote campaigns of the NAACP
52 or the A. Philip Randolph Institute. According to Kentucky election

1 laws, a report of precinct election officials stating, any
2 irregularities must be filed immediately after each election. A
3 careful check of each report was made for the previous years and found
4 no irregularities reported in any of the challenged precincts. The
5 Republican chairman defended the challenge of plan by stating that
6 precincts were chosen at random. When the civil rights community found
7 it amazing, how all the randomly-selected precincts, with the
8 exception of four in Newburg area, were in the west end of Louisville
9 and fell into a perfectly tight contiguous pattern. Even the four in
10 Newburg, which is an African-American suburb of Louisville, fell into
11 a tight contiguous pattern. We also found it more amazing that of 483
12 precincts in the county, no predominantly white precinct was randomly
13 selected. Kentucky election law states that each of the two major
14 political parties shall pay -- shall place two election officials in
15 each precinct. In 2001 and 2002, the Republican Party failed to -- to
16 fill a complete slate of election officials. Two days after filing the
17 challenges, the GOP still had not filled 33 election precinct
18 officials.
19 On election day, there were actually 18 challenges that were
20 placed in African-American precincts. Others had been reassigned to
21 serve as election officials, and some had failed to take the mandatory
22 training. Voter turnout that election in 2003 in predominantly black
23 precincts was nearly identical to the previous year's election, while
24 voting in the white majority precincts fell 7 percent. The only
25 precincts that saw higher voter turnout in 2003 were 21 precincts that
26 were among the 59 precincts targeted by the GOP challengers. That was
27 an attempt to intimidate African-American voters. And what was so
28 interesting about this, Mr. Chairman, Kentucky is not a covered state.
29 Basically, we had not had problems of intimidation since the 1800s. We
30 found it very interesting that it would then -- and would come about
31 in 2003. The first two cases that we discussed with you brings to mind
32 what can happen in states that are not covered by Section 5.
33 Unfortunately -- and having been involved in 1965, when the Voting
34 Rights Act was passed, as a student, I guess I felt some pride that my
35 state didn't have to be covered. But that same feeling comes and bites
36 you 40 years later, when you realize that discrimination and
37 intimidation still exist; new patterns and new opportunities have been
38 seized by those who had not tried to intimidate or challenge in the
39 past. Thank you, again, for the opportunity to appear before you and
40 appreciate it. Thank you.
41 MR. LEE: Thank you for that testimony. Commissioner Moten.
42 DR. MOTEN: Doctor Engstrom -- excuse me -- at the risk of
43 sounding naive -- and I agree with what Former Senator Steele had to
44 say -- does your empirical studies bear out his pronouncement, that
45 is, or his conclusion -- in other words, I'm asking you -- the
46 question that I'm putting to you is that if -- if racial-polarized
47 voting or racial-polarized preferences equals racial prejudice.
48 DR. ENGSTROM: I would certainly agree with him, that it does.
49 Now, having said that, I will say the evidence in court does not
50 require proof of causation, only proof of the differences. So we don't
51 do analyses that go into causation. Now, often defendant's expert
52 witnesses, albeit working the other -- you know, in opposition, they

1 will attempt to employ some type of causal analysis. But I think they
2 have -- in my experience are easily rebuttable every time that I have
3 seen it. What they often do is simply insert other variables that in
4 turn relate to race and say, well, look, these variables that relate
5 to race have a more proximate impact on the racial divisions and the
6 vote; therefore, it's these variables, not race. And it's simply an
7 effort to cleanse divisions in voting of their racial content and
8 racial importance. But the analysis we do, do not get into the reasons
9 for the causes of the racial divisions. But I have looked at too many,
10 too much evidence, for too long a time, in too many places to say
11 that, you know, I don't believe that's a reflection of racism. I do
12 believe that it is.
13 MR. LEE: Your point is that you believe Congress should take into
14 account these consistent studies about racial-polarized voting today
15 in deciding if a 40-year old statute should be extended; isn't that
16 your point?
17 DR. ENGSTROM: Yes. I think the problems -- the -- in terms of
18 vote dilution, you know, and the problem of racially-polarized voting,
19 is still an important impediment today. And 40 years ago, when the Act
20 was initially passed, there was more interest in disfranchisement,
21 because that was the first generation of discrimination. It was --
22 once disfranchisement was largely overcome -- I'm not going to say
23 completely, but many of the barriers have been eliminated -- and the
24 voting strength began to be there, that then we discovered there's
25 simply a second generation of discrimination. Just like in education.
26 You know, we face a new set of barriers that say, okay, you've got the
27 right to vote; now try to elect your representatives of choice.
28 MR. LEE: Well, I noticed the same thing that Commissioner Moten
29 noticed, which is that you and Mr. Steele were actually saying the
30 same thing. I notice it's -- also Mayor Jackson -- Jackson was saying
31 the same thing, starting -- reminding us of the earliest days of the
32 Texas Republic and testifying about presently. I must say personally
33 it's very sobering testimony. Did you want to follow up some more?
34 DR. MOTEN: No. Not at this time.
35 DR. DAVIDSON: Could I follow up his question? MR. LEE: Sure.
36 Commissioner Davidson.
37 DR. DAVIDSON: And just push it a step further, Dr. Engstrom. It
38 seems to me that even though you don't have to show that racially-
39 polarized voting is the result of racial prejudice in these cases,
40 nonetheless the force of your statistics are stronger if that is the
41 case. And wouldn't some people come back and say -- talking about
42 variables that are introduced in the courtroom here to -- to confound
43 your testimony, wouldn't some people say, well, this is not -- this
44 racially-polarized voting is not so much an expression of racial
45 animus as it simply is partisan differences? DR. ENGSTROM: That is
46 often one of the explanations now. And let's face it, it's extremely
47 difficult to disentangle race and partisanship in the American south
48 today. The studies I mentioned earlier about the new books on southern
49 politics, they all acknowledge that race is the major demographic
50 variable distinguishing between party choice. So if you put a variable
51 in that distinguishes -- that is in turn related to race and said,

1 well, no, see; it's party choice, I don't believe you can wash the
2 racial content of that from it.
3 There are numerous variables. I mean, they get as -- as I would say,
4 silly as which friends and neighbors vote. Well, look at the
5 precincts. Black candidates are being supported by the people who live
6 closer to them. White candidates are being supported by the people who
7 live closer to them. Well, why is there that geographical pattern? We
8 know why. It's racial discrimination in the housing market. In many
9 ways in the past, formal; informal today. And all of these things.
10 Race is -- excuse me, party is now a frequent explanation for the
11 divisions. As if it's just party; it has nothing to do with race.
12 Well, we know there has been white flight to the Republican Party. We
13 know that has occurred. And I just don't think you -- it's -- that you
14 can disentangle it. And, statistically, it can be very difficult to
15 disentangle causality between things or among things that are
16 themselves related to each other.
17 DR. DAVIDSON: Thank you.
18 MR. LEE: Commissioner Meeks.
19 MS. MEEKS: My question was, sort of, similar. When you were
20 giving your testimony -- it was a little frustrating -- a little
21 frustrating, and, you know, the question that kept coming, well, how
22 do we overcome this, and then the question, that it is about racism,
23 which is not an easy thing to overcome. You can't legislate that. But
24 if this happens, gerrymandering, all that sort of thing, on -- and
25 it's allowed on the grounds that it's just not focused on race, and
26 that's acceptable -- like in Texas, we heard Vernon Burton talk about
27 that. But the effect is that race or minority group is (inaudible), I
28 mean, shouldn't -- this is maybe naive on my part. Shouldn't we be
29 talking about how we strengthen the Voting Rights Act instead of just
30 reauthorizing it?
31 DR. ENGSTROM: If you could structure the issue as to how to
32 strengthen it, I would be thrilled, because I think you're right. But
33 I'm afraid the issue is going to be defending the Act and showing that
34 its contemporary -- its contemporary importance is still there. And
35 you say some of these things are not easy to overcome, and that's
36 certainly true. But there are some things that can be changed almost
37 overnight, and those are election systems. You can change them by
38 legislation; you can change them by court order; you can prevent them
39 through preclearance. And that's why the Act is so important. It deals
40 with something that we can change. And, unfortunately, Section 5 is
41 more prophylactic. It is against retrogression. You can still have
42 Section 2 violations that -- under the law that no longer impact
43 Section 5 determinations. But at least that's a very, very important
44 preventative. It's not as strong as it used to be. Supreme Court has
45 handed down decisions in the late '90s in which they've changed the
46 way in which the law was interpreted, or at least it could be
47 expressed a different view as to the way the law was interpreted,
48 making even Section 5 preclearance a more difficult thing to deny. So
49 I wish we -- I wish we could focus on what needs to be done still; see
50 glass as half-full or half-empty? Well, you know, I like to say we've
51 got great improvement; we've come a long way. But we still have a long
52 way to go.

1 MR. LEE: Commissioner Buchanan is ready to ask a question.
2 MR. BUCHANAN: Yes, indeed. I would say the President who signed
3 the Voting Rights Act of 1965 once correctly said, politics is the art
4 of the possible. But then he went on to prove a great many more things
5 were possible than people had dreamed of. The gentleman from Kentucky,
6 Mr. Cunningham, has made a -- also laid out a very clear case of
7 problems in a state that is not covered by Section 5. I really wonder,
8 is there a way we can strengthen, as well as -- without losing what we
9 have, because we can't lose what we've got. I agree that's the highest
10 priority. Is there a way that we can strengthen that, or shall we just
11 (inaudible).
12 DR. ENGSTROM: Well, unfortunately, ways to strengthen the Act, I
13 mean, suggestions are often ways to dismember it, like making Section
14 5 nationwide in preclearance. I understand that --
15 DR. DAVIDSON: Can you speak up a little louder, please?
16 DR. ENGSTROM: It's -- sometimes the proposals to strengthen it
17 are, in fact, proposals to dismember it. And I'm talking about
18 proposals to go nationwide in terms of preclearance, not -- as we've
19 just heard, Kentucky is not precleared; perhaps -- it's not a covered
20 jurisdiction; perhaps it should be. I'm not saying we're capturing
21 everything. But Mr. Lee has worked with the Justice Department in the
22 Voting Rights Section, and he knows the massive amount of work
23 preclearance decisions have to take. Every voting change has to be
24 sent for preclearance from -- from a public jurisdiction. If precinct
25 lines are changed -- and that's not a trivial thing, necessarily.
26 Precinct lines can be changed for racial purposes. If polling --
27 polling booths, polling stations, are relocated, they're supposed to
28 be precleared. It doesn't always happen in the late rush in elections
29 and things, but they can be things that are extremely important. I
30 have to admit my mind has not been on how to go forward and
31 strengthen. But I will admit a couple of things: In my experience as
32 an expert witness in studying voting rights -- and this begins in the
33 '70s, I am amazed at how resilient and imaginative civil rights,
34 voting rights workers, and politicians can be. I've learned a lot
35 about how political scientists think in boxes, and we don't get out of
36 the textbook enough. I'll give you two quick instances. When the City
37 of Mobile versus -- versus Baldwin case came down, I was ready to put
38 my tail under my behind and go home; I thought it was all over. And I
39 went to a conference in Atlanta, and people -- the ambition, the
40 strength, the creativity was there. And, by gosh, in 1982, there were
41 important revisions in the Act. I will say another thing: When it
42 comes to remedy for dilution, politicians are far more imaginative and
43 creative than political scientists. We think in boxes. And I have been
44 in situations where you think, well, this is really going to be
45 difficult to implement. And politicians can sit at a table and say,
46 now, what do you want, what do you want, and what do you want?
47 Oh,we can give everybody what they want. It's amazing. So I don't --
48 you know, I don't say that more imaginative, creative people can't
49 come forward with -- or an approach to -- on how to improve the Act.
50 I've not been think -- I've been thinking more defensively, I must
51 admit.

1 MR. LEE: Well, I'd like first to ask a question of the two
2 gentlemen from Texas. And the gentleman from Kentucky, which is --
3 Texas, you're covered, and Kentucky you're not with Section 5
4 coverage. You know, how -- what kind of benefit has Section 5 coverage
5 meant in Prairie View and in Southwest registration efforts? I mean,
6 in Kentucky, if you had been covered, would you have had more
7 procedures in place and how -- what difference has Section -- I mean,
8 you know, this is a pretty interesting panel, because you can ask this
9 question. Does Section 5 make a difference?
10 MR. LANDA: It makes a great difference. There was an instance in
11 an election in San Antonio, Texas, where early voting places were
12 changed in the west side and south side of San Antonio that's
13 predominantly Latino. Voting -- early voting places were taken from
14 there and put in the other parts of town. The reasoning for this was
15 that more people vote in the other parts of town than they do on the
16 south side and the west side. Well, what happened is that they didn't
17 preclear it, so it was very easy to stop it before it even happened,
18 while it was still in the planning stages -- or I think it might have
19 happened one or two days, and it was immediately taken back. So, yeah,
20 it's very useful; it's very practical.
21 MR. LEE: Mr. Mayor.
22 MR. JACKSON: Yes. One of the things that led to the 1992
23 indictments that -- prior to the drawing of the lines --
24 MR. LEE: Of the students?
25 MR. JACKSON: Of the students, yes. The campus of Prairie View was
26 divided into three of the four commissioners' precincts. They were
27 gerrymandered. And when a student would move from one dormitory across
28 the street to a new dormitory, they were in a new voting precinct. So
29 the law said that if you registered to vote and your card was mailed
30 to your old address, they couldn't forward it to your new address;
31 they would send the cards back, so then the kids would be dropped from
32 the rolls. But to an 18-year-old first time to vote, they were
33 registered to vote. So when they show up at the polls, they'd sign the
34 challenge affidavit and say that they were registered, and then when
35 they didn't see the names on the list, they said, well, you voted
36 illegally, and then they got indicted. I mean, so it's -- so the Act
37 helped protect communities like Prairie View. The tactic that was used
38 this last election was that they went after the elections
39 administrators in those cities. Three of the four major cities in
40 Waller County now have black mayors. But in two of those cities, we
41 all experienced indictments of our elections administrator. In Prairie
42 View we had -- our elections administrator was indicted, and in
43 Brookshire, where they had a black major, his elections administrator
44 was indicted; then they indicted the mayor on some reasons far removed
45 from voting. They claimed he stole a tractor. Now, he was cleared. But
46 it tainted those communities with, you know, what's going on down
47 there? So the tactic now is moving us into the courts. We've spent a
48 lot of time and money fighting this. If it hadn't been for
49 organizations that came to our assistant, you know, like the lawyers
50 group, we'd have been hung out to dry. Because you've got to have
51 money to get into the court system and actually defend yourself. So

1 with this oversight, you know, this preclearance, that help us,
2 because it gives us some safeguards because we're open to attack.
3 MR. LEE: Mr. Cunningham.
4 MR. CUNNINGHAM: In the case of Kentucky, I think two of the
5 instances that I cited could have been different had Kentucky had to
6 preclear, or if it had been a covered jurisdiction. I think also in
7 the -- in looking back over the Legislature, Kentucky has never given
8 African-Americans in the state an opportunity to elect candidates of
9 choice across the board across the state. They have packed us; they
10 have cracked us. I think that if it had to -- if we were a Section 5,
11 or covered by Section 5, they would have had to present such a
12 proposal that would have been looked at by another -- by the Justice
13 Department. I think in the case of the merger, it would have been the
14 same thing, with those two districts not having sufficient numbers
15 where African-Americans could elect a candidate of choice. So, yes, I
16 think it would have had a great impact on noncovered states and these
17 African-American communities in terms of the ability to elect
18 candidates. MR. LEE: Well, I would like to thank this panel for its
19 testimony. This has been extraordinarily helpful. We'll now adjourn
20 for lunch. (Lunch recess taken.)
21 MR. LEE: The National Commission on the Voting Rights Act is now
22 back in session. We're ready to begin our third panel. And I'd like to
23 welcome the Honorable Bobby Singleton.
24 MR. SINGLETON: Thank you.
25 MR. LEE: Senator Singleton was elected to the House -- to the
26 Alabama Senate in January 2005. Congratulations.
27 MR. SINGLETON: Thank you, sir.
28 MR. LEE: And from 2002 to 2005, Senator Singleton served in the
29 Alabama House of Representatives. Senator Singleton represents
30 Alabama's Black Belt --
31 MR. SINGLETON: Yes.
32 MR. LEE: -- which we've heard so much today. Senator.
33 MR. SINGLETON: Thank you. Good afternoon. And thanks for having
34 me here at this panel today. To all of you who are here, welcome to
35 the great state of Alabama, and I hope you're enjoying our beautiful
36 weather while you're here. But we're here on more important notes
37 today. Back in 1984, I was a candidate for city council in the city of
38 Greensboro in a city that was 63 percent African-Americans but no
39 black elected officials. We were still running on an at-large system.
40 And in 1984, I lost that election by 50 votes. Upon losing that
41 election, I filed a contest, and that contest was moved from the
42 state's courts to the federal courts, and it was put in a group of
43 cases called the Dillard versus The United States. And under the
44 Dillard versus The United States, we got our one man, one vote single-
45 voting districts. And because we were 63 percent African-Americans, we
46 were given three majority black districts and two majority white
47 districts. In 1992 because of -- between 1984 and 1988, the courts did
48 not allow us to have an election. We were in lame duck. From 1988 to
49 1992, a special master was sent into Greensboro, Alabama, to help us
50 to design a map that would meet the preclearance of Section 5 of the
51 Voting Rights Act. As we drafted those districts, we saw in 1992 the
52 first African-Americans to be elected in the 100 year history of the

1 City of Greensboro. In 1992, we put three African-Americans on the
2 city council. Though I was not one of them, I was just one of the
3 persons who was behind the scene. I was the campaign manager for all
4 three of those members in their -- in their campaigns. We, for the
5 first time in 1997, experienced our first African-American mayor. And
6 that all became of -- because of what we had done in 1992 for the
7 first time to elect African-Americans to the city council. Even though
8 the mayor had to run on an at-large system, at-large voting for the
9 mayor was much different from 1984 and 1992 simply because now blacks
10 were then divided into districts, understood the boundaries, and were
11 registering to vote. We registered more than 85 percent of the voting
12 age population in Greensboro, Alabama, and that's how we were able to
13 achieve those goals. In 1992 we also experienced other problems with
14 the Voting Rights Act. We had at that time still white minorities in
15 that -- in that community, who were still in control of the electoral
16 process, holding the doors, closing the doors on African-American
17 voters before the vote -- before the voting hours were over. I
18 experienced that by having to go to jail because I was able to snatch
19 the door open and allow people who was coming from the local fish
20 plant, to whom they did not want to come in, that would have made a
21 difference in the electoral votes on that particular day. I was
22 incarcerated but yet later set free. We've experienced that in the
23 city of Greensboro many of many of times over and over again, and even
24 in the county of Hale, where Greensboro is the county seat. We look at
25 this -- these changing -- in terms of the voting hours, we have had to
26 make challenges to the Department of Justice many of times for voting
27 rights because we needed to bring in monitors because of electoral
28 process, because of intimidation of black voters going to the poll
29 electing majority leaders in the city of Greensboro. We have also
30 experienced numerous of letters that have been written to the
31 Department of Justice, to the city -- to the attorney general's office
32 here in the state of Alabama, and we've also done some prior
33 testimonies before the Department of Justice and asked them to bring
34 down monitors to help monitor elections. With the monitors at -- at
35 the electoral process, we experienced from going from -- from 20
36 percent African-American elected officials in the County of Hale to 80
37 percent, where we was able to take over the school boards in terms of
38 one man, one vote; we were able to take over the county commissioners;
39 we were able to get a majority with most of the cities in the area;
40 and we were able to elect a black circuit judge; black circuit clerk;
41 myself as a state representative; and other black county
42 commissioners. (Brief interruption.) (Off-the-record discussion.)
43 MR. SINGLETON: But in all seriousness, we feel that the extension
44 of the Voting Rights Act is -- is proper and what is right, especially
45 Section 5. We've had more experience in the Black Belt of Alabama
46 under Section 5. More and more African-Americans in the Black Belt
47 have been incarcerated for voter fraud, has come from the Black Belt
48 of the United States across the state of Alabama. Right now, there are
49 voting fraud allegations being carried out in my home county of Hale
50 just because of my past election, where African-Americans have used
51 the absentee ballot process and now it's as if only African-Americans
52 used the process for fraud. We train our people very thoroughly under

1 law. The state of Alabama gives us 13 reasons why you can use absentee
2 ballots. Because of higher employment in most of the counties across
3 the Black Belt, a lot of our people have to work 40 miles to go to
4 work, and that is a good reason to vote absentee, because they are
5 going to be out of the county on that particular date. Right now, we
6 were under investigation; we've had several members of our community
7 be locked up and in prison, such as Mr. Aaron Evans, who was just
8 released in 2002 for allegation of voting fraud. And that is because
9 of the system in terms of whites who don't want to give up the power,
10 continue to do investigation on black elected officials. Just as of
11 today, one of my city councilmen in the city of Greensboro has been
12 targeted for food stamp fraud. Years ago when she was a young woman
13 growing up was on food stamp; now they want to bring back a case on
14 that, simply because she's a member of the city council. Trying to
15 dilute that power and the voting strength of African-Americans in that
16 community. So those are some of the things that we have experienced in
17 terms of that -- we're also looking at right now the city -- the
18 county of Hale now moving into reapportionment. We have not
19 reapportioned since the 2000 census, and we are now drawing maps right
20 now trying to make sure that we get some fairness, where they are
21 still trying to make sure that the boundary lines does not reflect the
22 majority of the county. So our county has grown more than 15 percent
23 over in the last two years of African-Americans coming into that
24 particular county simply because there have been some increase of jobs
25 moving in. But we're beginning to see where white minority are now
26 trying to dictate how those lines are going to be drawn, and we will
27 make sure that we continue to hold that majority. Thank you very much.
28 MR. LEE: Thank you for your testimony, Senator Singleton. The
29 next witness is James Blacksher. James Blacksher is a civil rights
30 lawyer here -- well, not here -- in Birmingham, Alabama. And he has
31 served as counsel of record in over 90 reported cases mainly in voting
32 rights. He was a witness in the hearings before Congress on the
33 extension of the Voting Rights Act in 1981 and 1993. I would just say
34 on a personal note, when I started as a civil rights lawyer in 1974,
35 James Blacksher was already legendary in his courage and skill. Mr.
36 Blacksher.
37 MR. BLACKSHER: Thank you, Mr. Lee.
38 MR. LEE: I would like to thank you on behalf of the panel for
39 your written statements. And we have that written statement. And you
40 can feel free to elaborate on it.
41 MR. BLACKSHER: Right. And because it's a written statement, I'm
42 going to read a little of it, but mostly skim the rest of it, because
43 you'll have the material in the record. I have to take my glasses off
44 to read now.
45 MR. LEE: I have to put mine on to read.
46 MR. BLACKSHER: Thank you for giving me the opportunity to testify
47 about why it's critically important to the equal rights of African-
48 Americans and the emerging Latino and Asian-American communities in
49 Alabama for Sections 5 and 203 of the Voting Rights Act to be
50 reauthorized and strengthened in 2007. There's no doubt in the minds
51 of every fair-minded observer that if Section 5 is not reauthorized,
52 the state of Alabama and many of its political subdivisions will

1 attempt rapidly to reverse or to undermine the gains African-Americans
2 have made under the Voting Rights Act in the last few decades. And the
3 reason is that in Alabama's political culture, if the Congress of the
4 United States were to tell the white majority that it is no longer
5 legally prohibited, that they are no longer legally prohibited from
6 making changes that roll back and completely submerge the political
7 and electoral influence of African-Americans, it would send the signal
8 that maximization of the majority's power, the principle that
9 dominated Alabama politics from 1819, when it became a state, to at
10 least the passage of the 1982 Voting Rights Act, that that principle
11 has been revalidated and restored. Now, this is not necessarily a
12 matter of racial discrimination in the eyes of most of us white
13 Alabamians; rather as Historian J. Mills Thornton testified in open
14 court in a case in Birmingham back in 1990, in traditional Alabama
15 politics, the purpose of white supremacy, quote, as those whites who
16 held this idea would have understood it, is to preserve civilization
17 in the Republic. They understand themselves to be fighting to preserve
18 the essence of the Republic. Now, I have given in my written statement
19 three sets of examples of -- of evidence that shows what would happen
20 if the legal requirement of preclearance under Section 5 of the Voting
21 Rights Act were removed. The first set of evidence I cite to is the
22 continued pattern of severe, extreme, even growing racially-polarized
23 voting in elections in Alabama.
24 I second everything Dr. Engstrom said this morning; and, in fact,
25 I have attached as an exhibit a report, an expert report, that Dr.
26 Engstrom prepared for us in a case pending in Dillard versus Chilton
27 County, in which he analyzes the election returns in November 2004 in
28 Chilton County, coming up with examples of extreme racially-polarized
29 voting that are as severe as anything that we've probably seen. And
30 when he first -- when Dick first called me about this report -- Dick,
31 you remember this? He said -- he said, do you look -- he said, look at
32 the scatter plot. Said, look at the scatter plot. Have you ever seen a
33 scatter plot like this? And if you look at Page 6 of Exhibit A, which
34 is Dr. Engstrom's report, you see this diagram, this -- what he called
35 a scatter plot, which plots the -- on one axis, the vote per -- vote
36 per voter, and on the horizontal axis, African-American percentage.
37 And as you see -- as you go -- as the percent African-American voter
38 in the precinct increases -- in this case, only to 45 percent -- it's
39 like a straight line, a straight-line graph, showing the vote per
40 voter going up. And that -- that's a reflection of the racially-
41 polarized voting in Chilton County. The black candidate, Commissioner
42 Bobby Agee, who has been elected under the cumulative voting system
43 that Chilton County agreed to in 1988, has been elected since -- in
44 every election since 1988, as the sole black member on a seven member
45 commission. He received in two thousand -- in the 2004 general
46 election between 5.2 and 5.6 votes per voter. This is a cumulative
47 voting system. And if I have to stop and explain cumulative voting,
48 we'll get diverted. But each voter gets to cast seven votes any way he
49 or she wishes. All seven votes for one person, or one for -- you know,
50 that sort of thing. Commissioner Agee got 5.2 to 5.6 votes for every
51 black voter. He got 0.1 to 0.2 votes for every white voter. And he
52 would have come in last in the election had their -- had their only

1 been whites voting in the election, whereas he came in second because
2 of the cumulative voting scheme, the top seven voters being elected. I
3 then go on to cite judicial decisions in my written statement, recent
4 judicial decisions, that cite to continuing patterns of racially-
5 polarized voting in Alabama. The next set of data that I refer to are
6 primarily situations that show how the state of Alabama is prepared to
7 go backwards if there is no longer a legal requirement that they avoid
8 retrogression in the influence of African-American voters. And the
9 first one that I cite to is actually a recent decision by a federal
10 court in 2005, actually, involving our challenge to Alabama's property
11 tax system. The constitutional provisions in Alabama's -- the
12 provisions in Alabama's State Constitution of 1901, as has been
13 amended all the way up to 1978, are there to prevent local and state
14 governments from raising property taxes. And the key to these
15 provisions is the electoral power of blacks. The federal court found
16 that these provisions were placed there because of the fear of white
17 landowners, that once they were politically empowered, blacks
18 particularly in majority black counties like Hale County, would
19 exercise that power to raise taxes on the property of whites. And
20 these provisions were able to be placed in the Constitution all the
21 way -- for a whole century, from, as I say nineteen -- actually, from
22 1875 to 1978, the last Lid Bill in the last George Wallace
23 Administration, with the argument that whites should not be taxed to
24 pay for the education of blacks. Now, the connection with the Voting
25 Rights Act is clear: The only way -- well, for example, in 2003, the
26 Republican governor of this state tried to get some of these
27 constitutional provisions amended, and it was defeated. The only
28 counties who voted for the changes were the majority black counties,
29 including Hale County and some of the Black Belt counties. Then I go
30 on to cite -- and I'm skimming here a little bit, because each one of
31 these deserves more attention than I'm giving it in my oral statement.
32 But I then go on to point to the -- the importance in the
33 redistricting process that we just experienced post-2000 census in
34 Alabama. For the first time in the history of this state, the Alabama
35 Legislature in 2001 was able to enact statutes that redrew the state
36 House and Senate districts, the state Congressional districts, and the
37 state board of education districts; got those statutes precleared by
38 the Department of Justice and were able to -- we were able to defend
39 those districts in a series of collateral attacks that were brought in
40 federal and state courts against those districts. And they stand to
41 this time. And the point I want to make here is that what made that
42 legislative process successful was the -- the requirement of Section
43 5, that there be no retrogression in the electoral strength of blacks.
44 That was at the top of the list of the legislative guidelines for
45 redistricting. And I attached as Exhibit B a copy of those guidelines.
46 And those legal requirements gave African-American legislators the
47 leverage they needed to negotiate districts, plans, in both houses,
48 that won majorities, and there were -- not only to preserve black
49 electoral influence in past scrutiny in the Department of Justice, but
50 also to be defended in federal court against Shaw claims and other
51 types of claims, like the one, by the way, that just succeeded in
52 Georgia. We beat that claim in a 2002 case in Mobile. I will quickly

1 in my discussion here by pointing to the third -- the third category
2 of evidence that I give are various cases that we have had to bring in
3 the last five or six years, at least two examples of cases where the
4 State of Alabama would not submit for preclearance changes that --
5 that do affect voting. And we had to bring three-judge court actions
6 in order to get them to submit them for preclearance, including, by
7 the way, one state statute that -- talking about absentee ballots,
8 Senator, the statute back in 1998 -- remember? You must remember this.
9 The Legislature passed a law that said that absentee ballots could not
10 be sent to a post office box; that it could only be sent to a
11 residence address. And, of course, most -- many, many rural residents
12 in the Black Belt don't have delivery to their homes -
13 MR. SINGLETON: Right.
14 MR. BLACKSHER: -- and it would have prevented them from getting
15 that. We managed to get that knocked down by a three-judge court
16 ruling. Thank you very much.
17 MR. LEE: Thank you, Mr. Blacksher. We're going to hear testimony
18 of all the witnesses on this panel before we circle back and get
19 questions from the commissioners. Helen Butler is our next witness.
20 Ms. Butler is the Voter Empowerment Coordinator for the Georgia
21 Coalition for the People's Agenda. Welcome, Ms. Butler.
22 MS. BUTLER: Thank you very much, and thank you for conducting
23 these hearings to ensure that all citizens' right to vote is
24 protected. I guess my role here today is talk about voting and the
25 Voting Rights Act from a practical prospective, in that having local
26 jurisdictions be responsible for implementation of the Act and being
27 responsible for ensuring that voting rights are protected, sometimes
28 it is misused. The coalition, by the way, is headed by Dr. Joseph
29 Lowery, our convener. It's comprised of all of the civil rights, human
30 rights, peace, justice; you name it -- women's groups, that come
31 together to focus on issues such as voting through voter empowerment
32 initiatives. And, of course, we've registered since 2000 over 200,000
33 voters in the state of Georgia. That -- and that's minority voters,
34 because we have over a half-million, unregistered voters in the state
35 of Georgia.
36 But my task here, as I said, is to talk about why we feel the
37 Voting Rights Act should be reauthorized from the prospective of the
38 actual practical implementation of the Voting Rights Act. A lot of the
39 discretionary powers invested in local election boards sometimes
40 prohibits voters rights being protected. And I want to address some of
41 those practices, because without the Voting Rights Act, especially the
42 Section 5 preclearance and the part -- for language minorities, we
43 would not have their rights protected. In Georgia, for instance,
44 there's a law that says that you can become a deputy register; that
45 you can actually collect the voter registration forms; you could take
46 them in to the registrar's office to ensure that the registrations got
47 implemented. Well, they're -- in my particular county -- I live in
48 Morgan County -- and the local elections official took it upon herself
49 to say that she was not going to allow a deputy registrar to be held -
50 - to conduct voter registration in Morgan County. We pressed her on
51 that issue and gave her the law, and finally she said, well, one of
52 the discretionary powers that I have is to say when that registration

1 should occur, because there's a certification process to that. So she
2 said, after each voter registration drive, I'm going to make sure that
3 you come back and get re-certified each time you wanted to do a voter
4 registration drive, which certainly prohibits people from becoming
5 registered voters. While in other cities in the state of Georgia, once
6 you're certified, you have that certification for at least a year.
7 Again, the discretionary power of local election officials certainly
8 can impact voting rights. The other part, in 2000, I want to address,
9 our secretary of state is very progressive, but still she has limited
10 authority for the actual implementation. And if you look at Georgia's
11 record for voting, we were worse than the Florida situation. We had
12 94,000 votes that did not get counted, all because of long lines;
13 because of polling places being changed; because of police barricades
14 being put up at voting precincts to check for driver's licenses while
15 people are going to vote. So there are things that were in place, that
16 if you leave it to the discretion of the local jurisdictions, then we
17 certainly wouldn't have the right to vote. There's another instance of
18 that. In the College Park precinct, not only is the polling location
19 in a police precinct, but there is also -- and for municipal
20 elections, you have to go from one precinct to another in order to get
21 your vote cast, again, making it difficult for people's rights to be
22 exercised to vote. This time, in 2004, we talked about provisional
23 ballots, where the local elections officials took it upon themselves
24 to say that, I'm not going to let you vote; you can't exercise a
25 provisional ballot.
26 In Chatham County there were 30 Savannah State University
27 students who were denied the right to vote because they weren't given
28 a provisional ballot. They showed up; their name wasn't on the active
29 or inactive list, as it was required to be, and so they were denied
30 that right, and they didn't check it with the state office. So there
31 are things that are in place that the local jurisdictions can do to
32 really prohibit the right to vote. Another thing in Savannah, I worked
33 with the young students there with the Voices Project this past
34 election cycle. We had a lot of people who were from Haiti, who did
35 not have the proficiency in the English language and requested
36 assistance. The local chair of the state -- of the county election
37 board wanted to exercise his right and say that our election
38 protection people could not assist those voters. And we had to get a
39 legal injunction to make sure that those people could assist them.
40 They wanted to invoke the 155th campaign rule, when, in fact, in the
41 law, you can assist any voters as long as they request your
42 assistance. So we had to invoke that and get legal assistance to make
43 sure that happened. So those are kinds of things that are done to
44 prohibit people from voting and exercising their rights. The other
45 thing I'll note, Laughlin McDonald is going to talk about the
46 redistricting process, so I'm not going to talk about that -- and we
47 had several lawyers to address redistricting. But certainly that is an
48 issue that we want to keep in mind. Currently, there's legislation
49 that is before the state that would say under HAVA, as you know, there
50 are 17 pieces of identification that voters can use to actually go and
51 vote. There is a Georgia legislation bill that is being introduced
52 that is saying that you have to have a state-issued ID only to be able

1 to vote. Again, this is -- will prohibit people from exercising their
2 rights, especially for African-Americans or the Latino communities,
3 who do not always have that piece of ID, and it was just another means
4 of making sure that they do not exercise their rights to vote. And I
5 don't want to go over my time. I just -- I will entertain questions
6 about the practical side. But I do want to say that we feel the Voting
7 Rights Act should be reauthorized. And I don't usually quote any
8 particular candidate, but Reagan said, voting is the crown jewel of
9 American liberty. And the way to protect that crown jewel is through
10 reauthorization of the Voting Rights Act.
11 MR. LEE: Thank you, Ms. Butler. Thank you for your testimony. We
12 will next hear from Anita Earls. Ms. Earls is the Director of Advocacy
13 at the University of North Carolina Center for Civil Rights. Ms. Earls
14 also was Deputy Assistant Attorney General of the Civil Rights
15 Division of the United States Department of Justice. Among other
16 sections, she supervised the Voting section. Ms. Earls before that,
17 was a very skilled voting rights lawyer in North Carolina. Ms. Earls.
18 MS. EARLS: Thank you. Good afternoon. I'm very honored to have a
19 chance to talk with you this afternoon, and I really appreciate the
20 time that you are putting into this effort, and I thank the Lawyers'
21 Committee for inviting me.
22 MR. LEE: I also need to thank you for your written statement,
23 which we have. And so you can assume that we have that, and you can do
24 what Mr. Blacksher did.
25 MS. EARLS: I actually do have a written statement and some
26 attachments that I'm going to present; briefly highlight some of the
27 current issues that we're facing in North Carolina; and then talk a
28 little bit about the Justice Department enforcement rule and how
29 Section 5 and Section 203 are crucial to their efforts. But let me
30 start by talking about current issues that raise problems of racial
31 discrimination in voting in North Carolina. And it first deals with
32 the question of provisional ballots. After HAVA was passed, North
33 Carolina passed a statute indicating that they would count provisional
34 ballots that were cast outside a voter's precinct as long as the voter
35 was voting in the county in which they were registered. A ballot cast
36 out of precinct may not count for all of the items on that ballot
37 because -- it would only count for the things that the voter was
38 actually eligible to vote for. But that was the state law, and that's
39 what the state board elections told voters; that's what election
40 protection workers and other nonprofit groups, the League of Women
41 Voters. Throughout North Carolina, we were training voters, that if
42 for some reason they couldn't get to their precinct on election day
43 and they had to cast a ballot in a different precinct, that out-of-
44 precinct ballot would count. That was the law in North Carolina prior
45 to the election. After the election, two unsuccessful candidates
46 brought litigation in state court challenging that under on state
47 constitutional and statutory grounds. And on February 4th in 2005, the
48 state Supreme Court ruled in James v. Bartlett that on the statutory
49 grounds, that that was not correct; that those ballots would be thrown
50 out. An Advocacy group did an analysis of the estimated 11,400 out-of-
51 precinct provisional ballots cast in the election. And we found that
52 while black voters were 18.6 percent of the electorate state-wide,

1 they cast 36.4 percent of the out-of-precinct ballots. From our point
2 of view, Section 5 should prevent invalidating these ballots. Now, the
3 Legislature -- after the Supreme Court decision, the Legislature
4 passed a law verifying its intent, hoping to nullify the effect of the
5 Supreme Court decision. The litigation is still pending. But I think
6 that this highlights how it's important to have a non-retrogression
7 principle in place. And we think that certainly a change affecting
8 voting that disproportionately invalidates the votes of black voters
9 has got to be retrogressive and not permissible under Section 5.
10 But it also highlights how socioeconomic status and others factor
11 affect the ability of black voters to participate. And we saw this
12 same kind of disparity in the impact on minority voters with regard to
13 punch card ballots in Florida in 2000 and in various other places
14 around the country. That's a current issue where the -- where Section
15 5, we think, will be crucial to protecting the votes of black voters
16 in the states.
17 Another issue is more innate to North Carolina. There is a
18 situation under state law where, without Section 5, a large number of
19 state legislative districts that currently elect black elected
20 officials will not -- will not stay in place. And let me explain the
21 situation. In 2004 the -- the state Supreme Court decided that the
22 state statute -- the state constitution provision requiring that
23 legislative districts be drawn from whole counties, must be put into a
24 place -- put into place except where there are Voting Rights Act
25 implications. So the state legislative plan was redrawn. Where there
26 were Section 5 counties or Section 2 potential litigation, the
27 districts could combine a couple of counties; they could cross county
28 lines. They were more irregular in shape -- but where there were no
29 Section 2 or Section 5 issues, the counties have to follow -- the
30 legislative districts have to follow county lines. At the same time --
31 or right around the same time, 2004, the Fourth Circuit decided in a
32 case Hall versus Virginia, that Section 2 of the Voting Rights Act
33 cannot be interpreted to permit influence district claims, making
34 there be a bright -- 50 percent bright-line standard for the first
35 threshold of Gingles in order to establish a Section 2 violation. So
36 what this means is that without the non-retrogression requirement in
37 place, the only place in North Carolina where you can draw or protect
38 minority district is where you can have a 50 percent majority voting
39 population. If you look in front of you, there is a chart which has
40 the blue lines on it. This -- this is from an affidavit that was
41 recently submitted in litigation. It's compiled by the state of North
42 Carolina. What it shows -- the first chart shows a ranking of state
43 House districts by total black population. The second column is by
44 black voting population. The third column is by black Democratic
45 registration. The blue lines highlight districts that have elected
46 African-American candidates in the 2004 election. So if you look down
47 the middle column at black voting age population, you see that pretty
48 soon you get to 49.97 percent. All of those districts below that line
49 could not be drawn under the whole county provision and the current
50 interpretation of Section 2 in North Carolina. So the concern is that
51 without Section 5 non-retrogression requirement in place, 12 of the 19
52 districts that have elected African-Americans would be in jeopardy in

1 North Carolina. Also I provided for the record, evidence of the
2 continuing need for minority representation. Carey Haney (phonetic),
3 who is a PhD at Duke, has done an expert report, and I've given you
4 his deposition. He found two significant findings in a study of the
5 North Carolina Legislature. He looked at the representation of black
6 interests, and he found that there was an unequivocal connection
7 between a descriptive (inaudible) of African-Americans in the
8 Legislature and the substance of representation of black interests.
9 African-American legislators were more likely to introduce bills
10 prohibiting racial discrimination; twice as many African-Americans
11 introduced such bills than did non-black legislators. He controlled
12 for the -- whether the district was majority black or not, a variety
13 of other factors, and then found this very clear connection. His
14 second finding was that there is significant racial prejudice in the
15 views of the colleagues about the effectiveness of African-American
16 legislators, that is to say surveys of all the legislators about who's
17 most effective and surveys of lobbyists about who's most effective
18 controlled for all sorts of other factors. Race came out as a
19 determining factor and -- and African-American legislators were,
20 across the board, viewed as less effective than their colleagues. And
21 one other suggestion is that we need strong enforcement of the Voting
22 Rights Act and Section 5 until these blue lines are dispersed randomly
23 along this three-page chart of North Carolina's legislative districts
24 and Carey Haney's findings are no longer true.
25 Let me just say something briefly about the extent of African-
26 Americans elected to other offices in North Carolina today. As a
27 result of the November '04 elections, we do not have an African-
28 American serving in an elected seat for statewide office other than
29 court of appeals judges. There has only been one African-American
30 elected to a non-judicial state seat statewide since 1982. That was
31 Ralph Campbell, who won for state auditor in 1996 and 2000. He ran
32 again in 2004 and was defeated in a state that is 22 percent, with no
33 African-American currently on the state Supreme Court. I think that
34 earlier panels talked about the efforts to dismantle majority black
35 districts at the local level. Let me just say that I am aware of at
36 least four such instances in North Carolina. Montgomery County,
37 Thomasville, two motions that have been filed in court to overturn
38 court orders establishing single-member districts, and there are moves
39 in Beaufort County and Columbus County. The second part of
40 retrogression standards should be (inaudible) where it applies. Of the
41 four I mentioned, only two are covered by Section 5, only if the
42 federal court orders are reviewed. It is my understanding that if a
43 federal court order is implementing a local jurisdiction's plan, it
44 will be reviewed under Section 5. If it's a court order that's the
45 result of the Court's own findings of fact, it's not reviewed. So it's
46 not automatic that federal court orders would be reviewed. But the
47 point is that there's an effort underway to get rid of the court
48 orders that were established to create opportunities for black voters,
49 and Section 5 retrogression standard is a bar against that. Let me
50 move to the question of Department of Justice enforcement. Section 5
51 review makes a huge difference. And we can't count that simply by the
52 number of objections. Below the surface, what you don't see are all

1 the times that the Justice Department writes letters requesting more
2 information on a submission, and as a result of that, the jurisdiction
3 changes its plans and brings them in compliance; you don't see the
4 times that -- it doesn't even have to rise to the level of a written
5 letter for more information. They get a submission; they make phone
6 calls; make inquiries; the jurisdiction says, oh, you're right; you
7 can fix that; they change what they're planning to do.
8 In a lot of ways, the Section 5 Unit and the Voting section
9 provides technical assistance to jurisdictions to help them run their
10 elections and structure their elections systems in a way that's fair
11 to minorities. That should be something that we are proud of. That
12 should be something that we protect. There's no need -- there's no
13 reason why the need for that has gone away. And that's something
14 that's hard to quantify because you don't -- there's no written letter
15 necessarily that you can see on the Web site, but that's a lot of the
16 work of the section and a valuable contribution that they're making. I
17 also want to highlight the importance of federal observers, because
18 they have the power to actually enter polling places. I think the
19 experience of a lot of us who do the election protection work is that
20 posting volunteers outside a polling place helps, but it doesn't get
21 you where you need to be. You can't go in and face to face talk to
22 election officials; you can't observe what's going to. You really --
23 your hands are tied in a lot of ways. DOJ exercises its authority
24 sparingly. Only roughly 157 jurisdictions -- and these are all local
25 jurisdictions -- have been certified for examiners. It's an important
26 power, and it's one that they have demonstrated they use judiciously;
27 it's one that they need to continue to have. And then finally, Section
28 203, is in many states the only way to protect the right to political
29 participation for limited English proficient citizens. So in
30 conclusion, let me say that I have a lot of ideas about how Section 5
31 can be vastly improved. But without a doubt, the conditions that made
32 it necessary still exist.
33 MR. LEE: Thank you, Ms. Earls, for that testimony. Our next
34 witness is Leslie Lobos. Ms. Lobos is Staff Attorney at the Atlanta,
35 Georgia, office of the Mexican-American Legal Defense and Educational
36 Fund. Several witnesses today have mentioned increasing Latino
37 population in the south, and I guess it's a sign of that, that MALDEF
38 has an Atlanta office. Welcome, Ms. Lobos.
39 MS. LOBOS: Thank you very much. And thank you for the pastor.
40 It's an honor to be here today. I'm going to talk to you a little bit
41 about some of the issues that we see in these last elections, but
42 specifically about the bilingual provisions in the Voting Rights Act
43 and also about the role of federal examiners and poll watchers in
44 helping us protect our communities' right to vote. First I want to
45 talk a little bit about some of the preelection issues that we see
46 when it comes to intimidation. I'm going to give you two examples that
47 we saw in Georgia in two counties. One was Long County during the July
48 2004 pre -- preliminary. Three gentlemen who were running for office
49 went into the board of elections and challenged two-thirds of the
50 Latino registered voters, specifically asking for people who were
51 self-identified as Hispanic and challenged their registrations. As a
52 result of that, MALDEF -- we got notice of it after the hearing had

1 been set. And as a result, only six Latinos voted in that election.
2 Then it was repeated in Atkinson County, Georgia. We were notified a
3 little bit earlier so that we were able to get other national
4 organizations -- the Lawyers' Committee was very active, and the
5 Department of Justice also helped. But in that situation, three
6 gentlemen who -- individual citizens went in and challenged 80 percent
7 of the Latino registered voters, and their basis was challenging their
8 citizenship. And there was a hearing held. At that hearing, the county
9 held correctly that challenging voters solely on the basis of their
10 race and ethnicity in this case prevented them from actually being
11 able to go through with the hearing, and 93 of those challenges were
12 dropped. But it still had quite an effect in intimidating our
13 community from fully exercising that right to vote. Similarly here in
14 North Carolina in Alamance County, a sheriff took it upon himself to
15 get a sample list of Latino voters and then announce in front of the
16 board of commissioners and said, I'm going to go door to door knocking
17 on people's houses and ask -- and see proof of their citizenship.
18 Again, another way that our community is being intimated from
19 exercising their right to vote. Again, the Department of Justice and
20 other local and national organizations were involved. And the sheriff
21 pulled back and didn't actually go through with the door-to-door
22 knocking. But it also had a chilling effect on the perception of our
23 ability to exercise that right. These bilingual provisions, although
24 they didn't -- they don't apply in these three counties I have
25 mentioned, in the counties that do have them, they provide something,
26 I think, that words can't even quantify. But being a daughter of an
27 immigrant and being an immigrant myself, I can use the example of my
28 mother. She says, every time I go to vote, I just get so nervous, and
29 having the ability to have it in your own language provides something
30 that allows you to fully exercise and enjoy this ability to vote. I
31 also want to talk a little bit about some of the issues that we found
32 during these last elections, 2004. Specifically, we saw in several
33 states, including here in the south, in Maryland, and also Texas,
34 where the Section 203 did apply and there weren't -- it wasn't being
35 fully exercised. There weren't bilingual poll workers or all the
36 materials were not in Spanish the way they should have been, or in the
37 other languages; Vietnamese specifically. We also saw issues with the
38 provisional ballots. I think several people have mentioned that today,
39 and we saw -- we were part of the national coalition -- we had an 800-
40 number, where people could call in and have questions, and I think
41 that was one of the largest issues that we saw, where people weren't
42 informed of their ability to use the provisional ballot and were
43 either turned away without given that information, or for those people
44 who requested to use it, were denied that ability. So these are issues
45 that are continuing. They are ways of intimidating our community from
46 exercising it, and this Voting Rights Act helps to protect it.
47 Equally, at -- these kinds of activities of national organizations,
48 local community organizations educating our community, that helps. But
49 the Voting Rights Act is something that is invaluable to the
50 protection. I also want to talk just a little bit -- a few more
51 problems and issues that we saw. We still -- we are still seeing in
52 some -- in some areas -- and I'm going to talk specifically about one

1 county in Maryland, Montgomery County, when they qualified for Section
2 203 for the first time. In the primaries it was their very first time.
3 I think it was inadequate training, and so there was lots of issues
4 where the poll workers themselves were not informed of the fact that
5 Section 203 required it, and it wasn't being provided as something as
6 a complement, but it was something that was required under the law. We
7 were alerted about that and were able to work with the elections
8 officials. And by the next voting period, people were able to come in,
9 and there was provisions -- everything, you know, was bilingual. There
10 were poll -- bilingual poll workers in every section where there was
11 Latino -- large Latino community. And so we were able to see how, when
12 it's done correctly, applied correctly, it actually makes a
13 difference. People came out and were appreciative of the opportunity.
14 And so I think that if we train our poll workers correctly, and if we
15 train our community correctly, I think that we can continue to enforce
16 our ability to -- and to vote and fully exercise that right, which is
17 so important to all of us. I thank you for this opportunity, and I'll
18 answer any questions.
19 MR. LEE: Thank you for your testimony, Ms. Lobos. Our last
20 speaker on this panel is the patient Laughlin McDonald. Mr. McDonald
21 is the Director of the Southern Regional Office and the Voting Rights
22 Project of the American Civil Liberties Union, also located in
23 Atlanta. Mr. McDonald has litigated numerous key voting rights cases,
24 not only in the south, but in other regions of the country. He's
25 authored several books on civil rights, and he, like Mr. Blacksher,
26 was a witness before Congress during the Voting Rights Act extension
27 hearings in 1982. Mr. McDonald, thank you and welcome.
28 MR. MCDONALD: Thank you very much for the invitation to be here,
29 which I'm very pleased to accept. I brought some documents with me,
30 three documents which I'd like to leave with the Commission. The first
31 is an eight-page statement called "The Voting Rights Act: What It Has
32 Meant and What Does Say?" And it discusses the prior extensions of the
33 Voting Rights Act and the kind and evidence that Congress considered.
34 I mean, we know that there was a lot of opposition by the white
35 politicians in the south to the Voting Rights Act and to its
36 extension. Lester Maddox, who was Governor of my fine state of
37 Georgia, was one of those who testified in 1970. And one can almost
38 not believe that someone would say this, but our governor said it --
39 this is a quote: The Voting Rights Act is an outrageous piece of
40 legislation. It is illegal, unconstitutional, and ungodly, and un-
41 American, and a wrong against the good people in this country, and
42 phooey on anything that says otherwise. Well, ironically, I think it
43 probably was Lester Maddox's testimony that convinced Congress that
44 they absolutely had to extend the Voting Rights Act of 1970. Then
45 again, in 1982 (inaudible) testified and there were others who
46 testified against the extension in 1982, and one of them was another
47 Georgian Freeman Ledman (phonetic), Former Assistant Attorney General
48 of Georgia, and to read his testimony, and proudly recalls that he had
49 argued on behalf of Georgia in South Carolina versus Katzenbach that
50 the Voting Rights Act was unconstitutional. And then (inaudible) and
51 disparaging the Civil Rights Movement, he said, the Voting Rights Act
52 had been passed in 1965 to appease the surging mob in the street and

1 that Section 5 should be allowed to expire because there is no longer
2 any justification for it at all. Well, that's not just ancient
3 history. In 2003 -- this is more detailed in my paper. In 2003 the
4 State of Georgia filed the brief in the Supreme Court of the United
5 States in Georgia versus Ashcroft, and the brief really is quite
6 remarkable -- there may be other adjectives that you would want to use
7 other than remarkable -- but just outrageous. But in any event, they
8 argued that the retrogression standard in Section 5 should be
9 abolished. It also said that racial minorities, the very group for
10 whom the Voting Rights Act was passed, should never be allowed to
11 participate in the Section 5 preclearance process. And then it argued
12 that, consistent with Section 5, the State of Georgia should be
13 allowed to abolish all of its majority black districts. Now, if that
14 were the standard that was adopted, we would have very few, if any,
15 minorities in the state legislature. Fortunately, the Supreme Court
16 rejected those arguments, but I think the brief raises the question,
17 are the interests of minority voters adequately protected today by a
18 state such as Georgia, which advocates repeal of the retrogression
19 standard, the abolition of majority/minority districts, and the
20 exclusion of minorities from Section 5 preclearance? The answer is
21 surely, no, unless the southern fox should be now left to guard the
22 voting rights hen house. I think that this brief filed just a year or
23 so ago really underscores the need to continue the protections
24 afforded by Section 5. The second document which I would like to read
25 with you is a request for a judicial notice, which we'll filed
26 yesterday in one of our cases in South Carolina, challenging the at-
27 large method of electing the school board in Lexington and Saluda
28 counties. The request is a compilation of statutes and Constitutional
29 provisions dealing with race, and also a compilation of reported
30 decisions dealing with racial issues and also dealing with voting
31 rights issues. And many of the cases that are cited in here were ones
32 that have been decided since 1982 in the last extension to the Voting
33 Rights Act. And I'd like particularly to draw your attention to two of
34 the -- the last of the cases here. One is Smith versus Beasley,
35 decided in 1996. And the three-judge court there found that, quote, in
36 South Carolina voting has been and still is polarized by race; this
37 voting pattern is general throughout the state. Now, this is not
38 (inaudible) Mr. Engstrom, but the learned court, a three-judge court,
39 making these findings. And there was no appeal in that case. More
40 recently in Colleton County Council versus McConnell, decided in 2002,
41 the three-judge court made similar findings, that, quote, voting in
42 South Carolina continues to be racially-polarized to a very high
43 degree in all regions of the state and in both primary and general
44 elections. I think it's clear from these two opinions that race is
45 still dynamic in the political process. The persistent wide-spread
46 patterns of racial block voting found by the Courts underscores the
47 need to continue Section 5 and, indeed, to strengthen it. And the
48 Court in the Colleton County, by the way -- and I think that that
49 decision, which was written by Judge Traft (phonetic), who is on the
50 Fourth Circuit, Circuit Court, is perhaps the best court ordered
51 redistricting decision that we have. And there the Court indicated
52 that it had to follow, not only the Section 2 racial fairness

1 standards, Voting Rights Act, but that it also had to apply Section 5
2 retrogression standards to avoid any diminution of the ability of the
3 minority voters to elect candidates of their choice. And the court
4 opinion does that, underscoring yet again that Section 5 exerts its
5 influence in many places including in court orders. And then I would
6 like to give you two Georgia House and Senate bills and a resolution
7 containing the standards that the State should adhere to in
8 redistricting. And all of these provide at the outset that, quote, all
9 districts shall comply with the United States Constitution and the
10 Voting Rights Act of 1965. And I think that these bills and
11 resolutions rebut the arguments that are sometimes put forward by even
12 professed friends of equal voting rights, that we don't need Section 5
13 anymore because the Department of Justice doesn't enforce it and
14 because the courts have, you know, vitiated its impact. It is clear
15 from the kind of standards for redistricting adopted by the Georgia
16 Legislature that Section 5 continues to have a very strong deterrent
17 effect, and the State has only yesterday enacted a new Congressional
18 redistricting plan -- and I haven't had a chance to analyze it, but I
19 have looked at four or five plans -- proposals that were floating
20 around, and every single one of them avoided any retrogression in the
21 majority black Congressional district. So, I mean, to say that Section
22 5 is vitiated hasn't -- (inaudible) of the Georgia Legislature. And
23 let me just find the finish line responding to a chat that Jon and I
24 had before the session started, and that is, there's plenty of voting
25 rights litigation that has taken place in Tennessee as well. As you
26 know, there are, sort of, two major principal concentrations of black
27 population in that state. One in the so-called rural west Tennessee
28 counties to the west, Memphis and others; and then there's a big
29 concentration of black population in Chattanooga, which if you know
30 your history, you know it was under the sway of the Union forces
31 during the Civil War and was a big refugee center for blacks. And
32 there remains there a very substantial black population. So there's
33 been voting rights litigation in Chattanooga and voting rights
34 litigation in rural west Tennessee. And in all of that litigation, the
35 Courts made the same kinds of findings that courts have made in
36 Alabama and Mississippi and South Carolina and in Georgia, about the
37 presence of racial block voting, about a history of discrimination
38 against blacks. So, I mean, obviously, I tip my hand here; I am a big
39 proponent of extending the protections of the Voting Rights Act, and I
40 think you also need to find ways to strengthen them to try to address
41 some of these Supreme Court decisions, which I think have undercut the
42 effectiveness.
43 MR. LEE: Thank you. Now we're going to open to questions from the
44 commissioners. Commissioner Meeks.
45 MS. MEEKS: Well, it goes back to the question I asked of the
46 earlier panel, because several of you have litigated voting rights
47 cases. You know, again -- I mean, and we still -- I mean, I -- Section
48 5 certainly has helped. But there is still great polarization, along
49 with gerrymandering. Is there ways that you feel that we can
50 strengthen that way? And I'll defer to whoever can answer this
51 question, because I think if anybody has the answer, that would be
52 great.

1 MR. BLACKSHER: The question is, how do we reduce the racial
2 polarization?
3 MS. MEEKS: How to strengthen Section 5.
4 MR. BLACKSHER: How to strengthen Section 5. Well, obviously, the
5 two big items -- maybe I should give it to Anita -- to fix Bossier
6 Parish 2, that is the requirement of proof of intent to retrogress,
7 not just intention of discrimination of any variety; and -- and to fix
8 -- fix Beer. I mean, I see no reason why the -- I'm sorry, I guess it
9 would Bossier 1 that said that Section 2 -- Section 2 is not grounds
10 for denying preclearance, a Section 2 violation. But, I mean, I see no
11 reason why the Section 4 provisions regarding coverage should not be
12 extended to places like Jefferson County, Kentucky, or many of the
13 other jurisdictions around the state where there have been -- Dade
14 County, Florida, excuse me. I mean you could -- the list -- the list
15 goes on. This is not a southern phenomenon. And there are so many
16 jurisdictions that need additional protection. I think the
17 retrogression standard itself needs to be rethought. But, again, I'm
18 just throwing out ways that we ought to be thinking about
19 strengthening -- making it -- making it more of a clear instrument,
20 sending a clearer message, that the right to vote needs to be
21 protected in practice and not just in lip service, and that it is --
22 it is -- it is a serious -- it is a serious problem in this country.
23 And there seems to me, if you look at the national press, to be some
24 sort of a growing wave that there are serious problems. You read
25 articles and editorials every day about this. But this is -- this is a
26 major complement of it.
27 MS. EARLS: If I may, I think James hit the high point, in one
28 sense, we're saying, we want the standard we had in 1982, before
29 Bossier Parish, before Georgia v. Ashcroft. And there are some people
30 thinking about logical ways to make coverage relevant to the places
31 where we see problems today, in addition to the places that are
32 currently covered. I would just add one thing that really -- apart
33 from what Mr. McLaughlin said, but also comes from my experience when
34 I was at the Justice Department and seeing the impact or the fact that
35 in the Section 5 review process, when a submission is submitted to the
36 Justice Department as opposed to when it goes through the DC District
37 Court, the voters who are affected by the change, black voters who
38 feel that the change is retrogressive, can submit comments to the
39 Department. But if the Department preclears and says, this is not
40 retrogressive, there's no further review that can be had. It's sort of
41 like, if they -- if they find that it's -- if they issue an objection,
42 jurisdiction ultimately can go to court and litigate that. But black
43 voters can't go to court and litigate whether the Department got it
44 right on retrogression. So I would add a private right of action or
45 right of appeal for voters so that this issue of retrogression can be
46 determined in an adversarial setting, in a judicial setting, if voters
47 feel that the Department didn't get it right.
48 MR. LEE: Chandler Davidson.
49 DR. DAVIDSON: I have two questions, and one is addressed to
50 Senator Singleton, but I would be happy if any of the other panelists
51 has anything to add on it. You mentioned vote fraud charges, which are
52 a common tool of minority vote suppression, a claim being that

1 African-Americans are sometimes -- the code word here is Democrats --
2 are more likely to engage in vote fraud. And as Mr. Cunningham
3 testified this morning, those kinds of charges are then used to
4 challenge and obstruct voting in minority precincts. And I have tried
5 to follow some of these charges up the last year or so. But it's -- I
6 found it to be more or less a matter of looking for needles in
7 haystacks here. And I'm wondering if, in your experience, there has
8 been any records kept of these kinds of charges that have been brought
9 against black voters or black officials in the -- in the Black Belt in
10 these years that could be part of a -- of an archive or file that
11 would provide a little bit more systemic evidence of this kind of
12 behavior?
13 MR. SINGLETON: Well, there are. In most of our district courts,
14 in terms of where these cases are taken, we don't have stenographers
15 in a lot of our district courts in the state of Alabama. It's only
16 upon request or whether or not the plaintiff or the defendant can
17 afford to have a stenographer there. So we're lacking a lot. And there
18 have been some lawsuits filed on behalf of being able to have
19 stenographers in district court. And a lot of our cases, if they are
20 not appealed to circuit court or to the court of appeals, they're not
21 there, so a lot of them are being tried on the district court level,
22 on the state court level. Those that are from the federal court level
23 and the US District Court here for the Middle District under the
24 Dillard cases, or those others that were here, in the federal courts,
25 we have records of those. We had in the 1980s -- we called it the
26 Greene County Five and -- and the Marion Three in Perry County,
27 Alabama, consisting of Mr. Albert Turner, Senior, and his wife and
28 others. Those have been documented. Those in the state courts are a
29 little harder to track, but we can find, you know, assemblage of
30 evidence for that, and we can compile some of that information. I can
31 get some of it to you in the counties to which I know there have been
32 trials in the past five years.
33 DR. DAVIDSON: Thank you. That would be very helpful. Anyone else
34 care to address that issue? (No response.)
35 DR. DAVIDSON: And this is addressed specifically to Ms. Earls,
36 and it has to do with her claim about the fact that -- I believe I am
37 correct here -- and I'm quoting her as saying, that no African-
38 American in North Carolina has held statewide office since 1982?
39 MS. EARLS: No -- no one currently serves. And the only African-
40 American elected statewide -- I just took '82 as the cutoff point --
41 the only person to serve is Ralph Campbell, who was elected state
42 auditor.
43 DR. DAVIDSON: Is it the case that there have been many African-
44 American candidates for statewide office, or is this just a reflection
45 of the fact that very few have run.
46 MS. EARLS: Yes, I can. There have been several very well-
47 supported campaigns for statewide office who -- you know, not the
48 least of which Harvey Gantt 1990 and 1996 campaigns, but also for
49 other -- they are called council of state, but other statewide
50 elections. I don't think any have run for governor. But, yes, there
51 have definitely been candidates.

1 DR. DAVIDSON: It would be fairly easy to identify strong African-
2 American candidates for statewide office between 1982 and 2004 for
3 somebody who's familiar with North Carolina politics?
4 MS. EARLS: Well, absolutely. And Professor Engstrom did that up
5 until 1995, I believe, in his expert report in the Shaw versus Hunt
6 case, which is a part of the appendix from the Supreme Court record.
7 And he -- so he got, not only the races, but the polarized-voting
8 data.
9 MR. LEE: Commissioner Buchanan.
10 MR. BUCHANAN: Like Commissioner Meeks, I want to thank you for
11 the ways you have clarified how the Act might be, not only extended,
12 but strengthened. And any rationale you have to add to that -- the
13 idea that might be incorporated in legislation, I think would be
14 extremely helpful, in addition to what you've said you can supply. It
15 seems to me that the covered jurisdictions of the state who were whole
16 or in part covered by Section 5 were covered because they had a very
17 clear track record that no rational person could argue with, and,
18 therefore, should have been included into evidence to indicate
19 (inaudible) that continuing to be the case. But we have heard and have
20 seen in 2000, 2004 and other elections, a very clear case in other
21 jurisdictions, it seems to me, at this point in history. So it would
22 seem to me (inaudible) the purpose of the original Act to take a look
23 at recent history and who is doing what now in the near recent past
24 that might make them likely subjects. Then I want to thank personally
25 -- as a lifelong Republican, I want thank Counsel Blacksher and the
26 Senator for something. Counsel, you mentioned the lingering concern of
27 Republican Governor of Alabama Bob Riley's attempt to amend the
28 Constitution to reform our property tax law. And -- and he was
29 clobbered at the poll. He was clobbered by his own Republican Party
30 and others for that effort. Now, Senator, I expect without the Voting
31 Rights Act, you might have really had a hard time -- had a very hard -
32 - becoming Senator in the Alabama State Senate.
33 MR. SINGLETON: Yes.
34 MR. BUCHANAN: And those majority black counties, without the
35 Voting Rights Act, would probably be majority black in population
36 only.
37 MR. SINGLETON: Yes.
38 MR. BUCHANAN: And so I want to think you and the people of the
39 black majority counties for being the best Republicans in the state of
40 Alabama.
41 MR. SINGLETON: Thank you very much.
42 MR. BUCHANAN: Because if you are the governor who is trying to
43 practice fiscal responsibility, which is a traditional Republican
44 value, and still valued by those of us who remain to be traditional
45 Republicans. You're also a pretty good Democrat because one has to
46 assume that a state that is not burdened down with debt and in the
47 soup, and being brought into the black, and in condition to serve the
48 people and lead their nation, is somewhat greater value to the people
49 than a state that is in the red and in the soup, like Alabama has
50 been.
51 MR. SINGLETON: Yes.
52 MR. BUCHANAN: Thank you.

1 MR. LEE: Commissioner Majette.
2 MS. MAJETTE: Thank you. I would like to thank all of the members
3 of this panel for being here, and it's a point of personal privilege
4 to give a special thank you to Ms. Butler and Ms. Lobos and Mr.
5 McDonald. You represent Georgia extremely well. But I have a question
6 about the reauthorization, specifically with regard to Section 5. And
7 I'll address the question to Mr. McDonald and anyone else who can jump
8 in as well, Ms. Earls, perhaps. But under the laws as if stands now,
9 redistricting traditionally has taken place every ten years after the
10 census has been taken. But we've seen in recent years that there have
11 been these attempts between census to redistrict. We had that in
12 Georgia, Texas, and other places. If the -- if Section 5 is not
13 reauthorized, wouldn't that allow states that are no longer covered to
14 make -- would you -- in your opinion, would that encourage some states
15 to look at doing redistricting more frequently than the ten-year
16 period? And what impact do you think that might have on the ability to
17 maintain or to increase the numbers of minority members of -- members
18 of Congress, members of state Houses, and state Legislatures?
19 MR. MCDONALD: Well, I think that partisan gerrymandering has just
20 gone to new heights. In 1986 the Supreme Court in Davidson versus
21 Banderman (phonetic) said that partisan gerrymandering was
22 justiciable, that is that the federal courts could examine it. But the
23 standard that they set for finding partisan gerrymandering was whether
24 or not the voting power of the particular group were, quote,
25 systematically degraded. And there's not been a single case, not a
26 single reported defendant, that has ever set aside a redistricting
27 plan on the grounds that it was a partisan gerrymandering. And in the
28 two cases that have been most recently up before the US Supreme Court,
29 the Jubilier case and then the appeal in Georgia versus Ashcroft, or
30 in the Texas case, the Courts have basically left partisan
31 gerrymandering where it was. Theoretically possible, but a dead letter
32 law. And we see it going on everywhere. And I don't really know how
33 one can stop that unless the Legislature does something about it. The
34 Supreme Court apparently is not going to intervene. There are some
35 states, South Dakota, where Commissioner Meeks is from, that prohibit
36 redistricting more than once a decade, and the same is true in
37 Montana. Not only do they prohibit redistricting more than once in a
38 decade, but they take it out of the hands of the Legislature and put
39 it in the hands of this commission, and they set standards for
40 redistricting, hold hearings, and then the commission files its plan
41 with the secretary of state and goes out of existence. I think that
42 the state should clearly consider passing laws or constitutional
43 amendments that limit redistricting to once in a decade. That would
44 solve some of the problems. But as things currently exist, one of the
45 positive things is that when states like Georgia do churn the process,
46 when the Republicans get the upper hand, they're going to do it the
47 Democrats because the Democrats did it to them when they had the upper
48 hand, at least one of the things that protects the interest of
49 minority voters is Section 5. And if we are going to continue to have
50 this kind of churning process, if the legislatures aren't going to
51 exercise any constraint, it just underscores the need for Section 5
52 and federal oversight.

1 MR. BLACKSHER: Could I add something to pick up on something that
2 McLaughlin is talking about? There is a -- I think one of the biggest
3 -- and I don't know why I didn't think of this before when we were
4 talking about strengthening the Section 5 -- there is -- there's a big
5 problem in Judge Higginbotham's majority opinion in -- what is it --
6 Sessions versus Perry, the Texas Congressional redistricting case --
7 in which he rejected the arguments that Texas' mid-decade
8 Congressional redistricting plan violated Section 5 -- violated
9 Section 2, as well as -- by the time it got to court, it had already
10 been precleared by the Justice Department. And the argument that Judge
11 Higginbotham accepts is that if the Legislature gerrymanders for
12 political reasons that -- predominately over racial reasons -- that
13 is, if the Latinos and African-Americans in Texas get caught up in
14 partisan politics, then somehow the Voting Rights Act doesn't apply.
15 Now, that is to me a serious emerging danger that needs to be
16 addressed legislatively, that even -- the law ought to be clear. That
17 even if there are strong partisan motives behind any particular voting
18 rights or election law, that if it does disadvantage protected
19 minorities, it violates the law, and it can't stand. Partisan politics
20 has to yield to the historical problem of vote dilution against racial
21 and ethnic minorities in this country. It's as simple as that.
22 MR. LEE: Commissioner Moten.
23 DR. MOTEN: Attorney Blacksher and Senator Singleton's comments
24 and the discussion about what state measures might be considered or
25 taken raises -- or strikes me and raises a question for me, and that
26 is, for you, Senator, particularly with respect to the efforts to
27 intimidate voters, is there anything legislatively that you can do or
28 that the Alabama Legislature can do to augment the Voting Rights Act
29 with respect to, you know, some of the blatant examples that I heard
30 you give about voter intimidation?
31 MR. SINGLETON: Yeah. There have been some attempts to do that,
32 but we're still in the south. And there have been a lot of filibuster
33 in terms of election laws here in the state of Alabama. We went
34 through HAVA trying to make sure that we could put some provisions in
35 HAVA in terms of a strengthening. Right now, our secretary of state,
36 being the chief voting electoral officer in the state, does not have
37 enforcement laws to be able to try to help enforce that. The attorney
38 general right now does not have enforcement laws, or they try to put
39 it back on each constitutional provision. But what we're looking at is
40 that we're having that fight here in the old south still, when we come
41 up for election laws, trying to strengthen them to make sure that we
42 at least look at the strength of the provisions of Section 5 to make
43 sure that there's adequate protection for voting rights for the
44 citizens of the state of Alabama. Again, we are met with a lot of
45 resistance.
46 DR. MOTEN: Attorney, do you have any suggestions?
47 MR. BLACKSHER: As Senator Singleton knows -- and I think as you
48 know, Professor -- the problem -- we're talking about generations, in
49 an earlier panel, of the Voting Rights Act, about first getting the
50 franchise, and then having to deal with election structures that
51 dilute black voting strength. We're in a generation now that I think
52 Lani Guinier has called third generation, where you've got African-

1 Americans, Latinos, other protected minorities in office. And then the
2 question becomes, once they get in office, how -- how do they -- how
3 do they develop the ability to promote a legislative agenda such as
4 this? And the fact is that in Alabama -- and I think most every place
5 else in the south, even a place like -- even a state like Alabama that
6 has black proportional representation in both houses of the State
7 Legislature, the black caucus -- well, first of all, is never
8 completely united on most issues, and that's not surprising because
9 they're politicians too. And -- and we know that that's going to be
10 difficult. But there are issues that come up. Like last week, when
11 there was a -- a unanimous vote by the black caucus to boycott Auburn
12 athletics until certain employment problems were cleared up over
13 there. Well, that stirred up a big hornets nest with their fellow
14 Democrats, if you will, the white Democrats. The problem is that the
15 black legislators, even when they're united to block legislation for
16 the passing, but it's very difficult for them to get --
17 MR. SINGLETON: Passed.
18 MR. BLACKSHER: -- a positive agenda through that directly and
19 openly concerns the interests of the -- of African-Americans. And that
20 in itself is a clear sign of why we still need the protections of the
21 Voting Rights Act. And until we can talk openly and legislate
22 affirmatively in the south and for even outside the south on some of
23 these issues, then the circumstance that the Voting Rights Act is --
24 was put there to address continues, and those protections are needed.
25 DR. MOTEN: Thank you.
26 MS. MAJETTE: Can I just follow up?
27 MR. LEE: Sure.
28 MS. MAJETTE: On that -- on that issue, Mr. Blacksher, would you -
29 - would you say that that also applies to -- to women as a minority in
30 terms of particularly in the legislative arena, that we're not just
31 talking about racial minorities, but we're also talking about women
32 who are elected to -- to office at the state level or the federal
33 level not being able to -- as you put it, to move an agenda or to be
34 able to have that kind of influence because of their minority status
35 in that capacity? So would the -- would the strengthening of Section 5
36 affect the ability of women to be able to move their agenda as well?
37 MR. BLACKSHER: Well, as a matter of law, the Voting Rights Act
38 does not address the problems or does not create a category of women
39 as a protected minority group.
40 MS. MAJETTE: But if you look at it in the practical -- in the
41 practical aspect.
42 MR. BLACKSHER: The practical aspects are similar in terms of the
43 way the legislative dynamic works, that's true. But in terms of why
44 you would need -- and I think this is important, because there --
45 whether you think of women as a minority group -- there are many
46 minority interests that are oppressed or at least subordinated in the
47 political processes all over the country, and they deserve a fair
48 shake. But the only reason we have a Voting Rights Act is because we
49 live in the United States of America, which has a particular history,
50 that the only major western democracy that was founded on slavery to
51 begin with. And it's that history that the Voting Rights Act
52 addresses, and we shouldn't forget that the particular -- the

1 particular evil, if you will, that the Voting Rights Act is intended
2 to address are the vestiges of slavery and segregation. And those are
3 the -- those are the reasons why we need -- the Voting Rights Act is
4 not like some sort of a universal platonic law that should apply
5 across the board everywhere in every place. It is an artifact of our
6 history, and it addresses a very specific historic problem. Now, the
7 problems of Native Americans, of Latinos, of Asians, of other
8 minorities who are protected groups have built on that through
9 legislative action. And it would be -- it would be up to women's
10 groups to -- to put together some sort of a legislative agenda that
11 addressed in a coherent way their problems. And so far, I don't -- I
12 don't know anything about how that's developed.
13 MS. MAJETTE: Thank you.
14 MR. LEE: I just wanted to ask one or two questions, and then
15 Chandler Davidson wants to ask a few.
16 Ms. Earls, I wonder if you could expand upon your comments about
17 the Section 5 Unit of the Justice Department and the Civil Rights
18 Division, functioning as a -- I think you used the term "technical
19 assistance." How do you quantify or document that -- that phenomenon?
20 I ask this because during your testimony, I recalled that during my
21 time in the Department there were actually several jurisdictions who -
22 - who requested of the Department that observers be sent to monitor
23 their elections. The Senator spoke about monitors. And it struck me at
24 the time as rather remarkable that a jurisdiction would actually ask
25 for monitoring. But at this point in preparing a report, how do we
26 document that phenomenon? How do we quantify? And how do you --
27 MS. EARLS: Well, two ways come to mind. One, there's probably
28 some sort of -- possibly some sort of public records request that
29 would -- would -- that you could get from the Department information
30 about, possibly contacts that they've had with jurisdictions. I don't
31 know how much of it is public information. I mean, a lot of this is
32 just in the personal experience of the career attorneys that have been
33 there over the years, and, you know, know how often they get calls
34 from jurisdictions wanting assistance. So I'm not -- that would be one
35 way to approach it. And the other way would be to go to the elections
36 officials themselves and find out from them, you know, how helpful has
37 the Department been to them. And I think that some would be candid to
38 say, yes, they've been helpful. Beyond that, I think it's -- it's not
39 as formal as the submission objection letter process, so it's hard to
40 get at. But -- and also I suppose people who have -- were in the
41 Department and left, perhaps, could talk about their experiences.
42 MR. LEE: Since we have -- thank you. Actually, those are good
43 ideas. Since we have lawyers who practice in the area, have practiced
44 for so many years, it would be of help to the Commission to -- to get
45 your ideas as to testimony in cases or court records. That would be
46 helpful to the Commission. And I wonder, what do you think, Mr.
47 McDonald, about how that could be accomplished?
48 MR. MCDONALD: Well, we do plan to do a comprehensive report, and
49 it will really build in part on this kind of thing, the request of
50 judicial notice, because we've got all of the documents in a big box,
51 so we don't have to go out and do the research to figure out what the
52 cases were. But we will do a major document, which will discuss in

1 detail all of the lawsuits and the Section 5 problems that we know
2 about since 1982, and we'll, of course, make that available to the
3 Commission as a work in progress.
4 MR. LEE: You'll be addressing both 203 and --
5 MR. MCDONALD: Our office has really had very little experience in
6 Section 203, so we don't really have very much to say about that. But
7 we've done a lot of work in recent years in Indian country, and that
8 would be a major part of what we've done. I was telling Commissioner
9 Meeks that I have written an article which has just been published by
10 the American Indian Law Review about the recent voting rights
11 litigation in South Dakota, and I'll certainly make that available to
12 the Commission.
13 MR. LEE: How about you, Mr. Blacksher? Would it be possible to
14 get some help from you identifying testimony and reports in your
15 cases?
16 MR. BLACKSHER: Yes. But I think -- I actually think there are
17 several professors -- maybe some of them who are here now and in some
18 groups -- perhaps Marcia could tell us -- that are working on
19 precisely these projects. I know each of these organizations -- I
20 think -- I think there will be a fairly comprehensive summary of just
21 about everything useful that's been in the case law, as well as, I
22 think, there are already studies under way, I think, maybe people like
23 Peyton McCrary are involved in, in gathering some of the information
24 that Anita was just talking about with respect to matters that never
25 surfaced in the preclearance process.
26 MR. MCDONALD: Could I just add, that part of the problem is that
27 a lot of stuff is not reported. I mean, consent degrees where -- so, I
28 mean, we have got -- I mean, a lot of the stuff in this request for
29 judicial notice, there are consent degrees that are not reported. So
30 if we had the decrees and we had these documents, we can make them
31 available to you on a CD-ROM or something. So we could make all of
32 this available. And we've done something like this in many of the
33 states in which we've done litigation; in Tennessee and in Georgia,
34 for example. We are happy to share all of that. But I think that what
35 we do intend to do is to write a report and -- you know, sort of, in
36 English that will talk about all of this and try to give some kind of
37 form.
38 MR. BLACKSHER: I'll send you a consent decree.
39 MR. LEE: Ms. Lobos, we really would appreciates it if MALDEF
40 could be doing this as well. I hope you'll tell me that MALDEF is
41 already doing this.
42 MS. LOBOS: Yes. I think our national office is actually working
43 on something that -- I can forward this -- this to them and have
44 something for you also.
45 MR. LEE: Thank you very much. I wanted to ask one general
46 question and turn it over to Commissioner Davidson, Senator. This is
47 for all you. Why should white people in Alabama care about the Voting
48 Rights Act? We've heard a lot a testimony about the African-American
49 population, Latino population. But I just wondered, what do you say to
50 people in Alabama --
51 MR. BLACKSHER: Maybe Reverend Buchanan would be better to answer
52 that than I could.

1 MR. BUCHANAN: Liberation of white people.
2 MR. BLACKSHER: Yeah. Laying the burden down, Mr. Buchanan?
3 MR. BUCHANAN: Liberation from the scales over our eyes and the
4 chains of prejudice and -- and the knowing that -- know who our
5 brothers and sisters are and learning how to call them by their names
6 and understanding their rights are as precious under the Constitution
7 as our own and deserve our full protection, given the great privilege
8 to participate in the process. I think more good has been done --
9 well, when Billy Graham came to Alabama -- I'm sorry. When Billy
10 Graham came to Birmingham, Alabama, he wouldn't come until we would
11 desegregate the audience. And for a while, nothing happened, and then
12 they decided they would have something at Legion Field, and everybody
13 could come who wanted to hear Billy Graham. So when the event finally
14 came and the place was full, and Bear Bryant, the only person since
15 Jesus that could walk on water -- Bear Bryant --
16 MR. LEE: We are in Alabama.
17 MR. BUCHANAN: -- walked all the way from one end of Legion Field
18 to the other to get up on the platform giving his blessing to that
19 gathering. Now, he was neither a racist nor a fool, because he was a
20 football coach. And he had watched how in Birmingham and other places
21 in Alabama these wonderful athletes which graduated from high schools
22 and going off to other states because they couldn't get into state
23 universities. And it wasn't just that he was emancipating; it was just
24 that he was a realist and he understood how much the athletic
25 achievements of those universities would improve if everybody could
26 come to the University of Alabama and Auburn University and the
27 others. And if you look at what has happened to the voting process,
28 rather than having once segregationists and one white supremacist
29 trying to out-hate the other to get the votes of a portion of the
30 population, you have a political process in which there is an honest
31 chance for an honest person on a responsible platform to win on
32 something other than trying to out segregation everybody else. That
33 has been a real emancipation for Alabama politics through these years
34 since 1965. And it's been a step-by-step process.
35 But I think the white population of Alabama and her sister states
36 has much -- has been as beneficial to that population -- what has
37 happened has been beneficial to the white population as it has the
38 black population. We are one people, thank God. And may we be so to a
39 greater extent than we are. Now, I have really done it because for
40 about the fourteenth time instead of asking a question, I act like a
41 (inaudible) --
42 MR. LEE: I don't think it's possible to supplement that answer.
43 MR. BLACKSHER: Can I try -- to follow up on what -- the 1901
44 Constitution, Reverend Buchanan, remember, which the courts -- the
45 Supreme Court of the United States has found and was brought for one
46 person, and that was to disfranchise blacks. But the white northern
47 counties, the white -- what we call the white counties or the hill
48 counties in Alabama in 1901 resisted the conservative -- the big mules
49 and the Bourbon forces, the rural forces, that wanted to put all these
50 caps on property taxes and fundings because they wanted funding for
51 their schools. And they tried every which way to get around the race
52 problem in order to get money for their own -- for the white schools.

1 And they were unsuccessful, because when the race card was played,
2 they had to follow the white supremacy line. And to this day, Alabama
3 has the worst funded schools, public schools in the United States.
4 There was an article in this morning's paper about Montgomery County's
5 got the lowest property tax -- or maybe it was -- I'm sorry, it was
6 Autauga County. Autauga. The lowest of all 128 school districts in
7 this state. And the story is still the case in the Legislature of
8 Alabama today, which is in regular session right now, that the
9 interests of progress for white folks will be blocked until we can put
10 down this burden of racial slavery, segregation, and white supremacy.
11 It's as simple as that.
12 MR. LEE: Ms. Earls.
13 MR. EARLS: I don't know that I can be of help or address Alabama,
14 but I would have two responses to that question. First, a lot of the
15 changes that have a disproportionate impact on black voters and are,
16 therefore, retrogressive still hurt white voters. In the example of
17 the out-of-precinct provisional ballots, there were 36 percent that
18 were African-American voters, but there's that other, you know, 64
19 percent that were white voters who want their votes to count as well.
20 And my second response deals with redistricting. What we found about
21 the North Carolina's Congressional districts, when they were redrawn
22 to provide an opportunity for black voters in the 12th District and
23 the 1st Congressional District of North Carolina, those districts were
24 also the most poorest in the state. And they were the most homogeneous
25 districts. And so for the first time we had an urban district that
26 allowed urban poor whites to have representation, where before they
27 had been submerged in a system that didn't represent their interests.
28 And so there are ways in which white voters really do benefit from
29 districting that provides opportunities for minority voters.
30 MR. LEE: Senator Singleton.
31 MR. SINGLETON: And I agree with her in terms of follow up. And
32 what you see in Alabama in some of the rural poorer counties is that
33 poor whites benefit even from this. In terms of when you're looking at
34 at-large elections, there was a lot of discrimination. Not by race,
35 but even so by class. Even in the white community, whether or not poor
36 whites could even run for particular offices versus -- that it was
37 just for big, rich white landowners. So based on us having that right
38 for preclearance and have single-member districts and -- poor whites
39 are at least given the chance, even in some areas of district, to be
40 able to be represented in government.
41 MR. LEE: Ms. Lobos.
42 MS. LOBOS: I just say you just hit it right there. I think a lot
43 of times -- we need to be participate in the political process. And so
44 it's something that nationwide -- that, you know, in Alabama, in all
45 these states, we want people to participate. And so white voters
46 benefit by more people participating, especially when there is some --
47 a piece of law that will affect a white voter; not a Latino voter or a
48 black voter, but mostly a human; you know, there's a piece of
49 legislation that's affecting them. And this ability to have more
50 people participate helps everyone.
51 DR. DAVIDSON: Well, I'm beginning to sound a little like a stuck
52 record, but I have a question here for Ms. Butler and also for Ms.

1 Lobos. Both of you list many examples of racial discrimination in
2 voting in Georgia. And I'm wondering if you have files or archives of
3 these that you can share with our Commission.
4 MS. BUTLER: In Georgia we do. In 2000 the NAACP conducted a
5 hearing where we had citizens to actually come in and do testimony,
6 and that is on file in both Fulton County and Dekalb County. And we
7 also have -- as a part of our ongoing process, we have what we call an
8 Incident Report Form, where we collect data with regards to voting
9 problems that people have experienced. And so that is documented, and
10 we can make that available.
11 DR. DAVIDSON: Wonderful. Thank you.
12 MS. LOBOS: And recently, we -- we conduct -- we have a report of
13 all the different issues that we saw nationwide, and so we can have
14 that for you.
15 DR. DAVIDSON: Okay. Thank you. And I have one more question here,
16 which I'll just address to anyone who wants to answer it. Ms. Butler
17 mentioned that there are now bills, as I understand it, in the Georgia
18 Legislature that are essentially pretty onerous: ID requirements for
19 the voters. And this is part of a larger pattern across the country.
20 We're beginning to see many of these bills. And a lot of them have
21 already been passed. I think one was passed recently in South Dakota.
22 But I'm wondering, is there any way that the Voting Rights Act can be
23 used to deal with this to the extent that it is a method of a vote
24 suppression?
25 MS. BUTLER: I'm not a lawyer, but I think certainly that it's
26 requiring -- putting restrictions on them that will impact a minority
27 -- minority groups more so than other majority groups. So I don't
28 know. But I believe that this change in the process, because it is a
29 part of the process, HAVA required -- gave an extension or enhanced
30 the way that people can really vote to make it easier to vote, where
31 you could have 17 pieces of ID, and this, then, takes it back and
32 makes it more restrictive. So from that prospective, that it's being a
33 process or change in the law, I believe that under Section 5 that
34 would be covered.
35 MS. EARLS: It is true the Department in the past has issued
36 objections to ID requirements, particularly where there -- evidence
37 that it would be a greater burden for minority voters and also
38 particularly where there was no alternative to sign a statement
39 certifying that you are who you say you are. And that's prior to HAVA.
40 And I'm not sure if there's been anything since HAVA. And the second
41 avenue, it seems to me, would just depend on the proof. But I think
42 particularly when we get complaints that, at certain polling places,
43 election officials are only asking black voters for ID, that can be
44 addressed under Section 2, and I believe that the Justice Department
45 filed a case in Michigan dealing with Arab-Americans being asked for
46 ID when other people weren't. So that's also possible.
47 MR. LEE: Commissioner Meeks has to leave to catch an airplane. I
48 would like to thank Commissioner Meeks, because I think she actually
49 travelled the longest distance in time to get here. And she has to
50 catch a flight, so I told her we'd give her an opportunity to make a
51 closing statement.

1 MS. MEEKS: I have been so pleased to be a part of this today, and
2 I look forward to continuing this. But you all gave such wonderful
3 testimony.
4 And I think the work that we do has got to have an impact; that the
5 Voting Rights Act, that we should be able to prove without a doubt
6 that this is so important, ongoing; that it hasn't -- things haven't
7 changed so much. In fact, things have gotten more complicated. So I
8 appreciate all the work you do and thank you.
9 MR. LEE: Thank you very much to all the panelists on this
10 wonderful panel, and we'll take a short recess. (Brief recess taken.)
11 MR. LEE: Okay. We -- we're now ready to resume the first hearing
12 of the National Commission on the Voting Rights Act. And we have had
13 panels today about the history from academics, lawyers, and advocates.
14 And at this point, we have a session devoted to members of the public
15 who have asked to speak. And so if the first witness would sit down
16 and get comfortable and identify herself, we will begin.
17 MS. WHITLOW: All right. Good evening, everybody. My name is
18 Willie Mae Whitlow, and I'm a resident --
19 MR. LEE: Welcome, Ms. Whitlow.
20 MS. WHITLOW: I'm a resident of Montgomery, Alabama, for the last
21 half-century or better, but I was born and raised in Macon County,
22 Tuskegee Alabama. Educated through high school up there. Educated
23 through college at Alabama State. I have been a long, long fighter for
24 equal rights. And when I look on these papers and it says that a --
25 civil rights community, kind of puzzles me, as to what is meant by a
26 civil rights community. Because to me, there was human rights. And if
27 those who have considered themselves the supreme powers of this nation
28 were to consider human rights, we would all be equal and there would
29 be no need for what we are saying and doing here today. But since it
30 is, I just want to say that I have lived -- and you can look at me and
31 tell I have lived through Jim Crowism. I have lived through the fight
32 for equal rights for our people, which, in my opinion, should include
33 everybody. When I was a very young child, I didn't know the difference
34 between whites and blacks. Because we lived in Macon County, and I
35 guess the poorest of us, both black and white, kind of lived around
36 together. We played together; we ate together; we slept on the porches
37 of each other's house. But when we got ready to go to school -- and my
38 family; there were people who looked like you, including my
39 grandfather, and there were people who looked like me. There were
40 people all around us who looked like each other. And I didn't know the
41 difference until we got ready to go to school. There were the white
42 children -- and the little white girl was my special friend. Same age.
43 We got ready to go to school, and we had to go to different schools.
44 That's when we began to question, why do we have to go to different
45 schools; we love each other; we live together? Then I had to ask my
46 mother and my father, why is it? And she asked her parents. I don't
47 know what her parents told her. But my parent told me, it's because
48 some people think they have a right to everything good and right over
49 other people, but that does not make it the truth, because we weren't
50 made that way. And so I learned -- when I first knew this -- like I
51 say, we played together. We didn't know any difference. But once all
52 of this came to -- into our minds -- certain things have to be

1 learned; people don't -- born not liking each other or knowing what's
2 low class and upper class and all. People are not born knowing that;
3 they are taught that. Because once we were taught that, then we began
4 to look at each other with different eye sights. And goose pimples
5 would pop out on me and I suppose on her when we touched each other.
6 Then we had to go through a period of getting over that so that we had
7 -- we tried, that little girl and I, tried to get over that, tried to
8 get it through to our parents that this wasn't right, but we couldn't
9 do it, because they wouldn't listen. But as time went on and I come
10 through high school and began to think that I ought to have some
11 privileges to vote because that's the way I found out that people were
12 put into places of power over other people. And so I decided, then, I
13 want to vote too, because I want to be in a position so I can make it
14 right for everybody. But I found out that I couldn't vote. Guess what
15 I ran into, the obstacle the obstacle that I ran into? Anybody can
16 think of it here? Grandfather clause. Remember that one? Anybody know
17 what that means? Anybody? Nobody knows?
18 MS. MAJETTE: If your grandfather couldn't vote, then you can't --
19 MS. WHITLOW: If your grandfather was not a registered voter, you
20 can't register to vote. And what grandfather -- although my
21 grandfather looked like you-all, because he was the son of his slave -
22 - mother's slave master, he still couldn't vote. Because back then,
23 you had a little bit of black blood in you, you had to go on with the
24 people who didn't amount to anything. But he couldn't vote. Neither
25 could any of us. So I set out along with other people who were
26 interested and who were concerned to try to get rid of that. And so we
27 worked -- and I don't know of anybody in this building might know of a
28 man named Mr. Rufus Lewis. He was a coach for years at Alabama State,
29 so he got dubbed Coach Lewis. He and some other men back then during
30 the middle and late '40s on into the '50s set out to try to get black
31 people registered, and that grandfather clause had them stumped. So we
32 worked hard to get rid of that grandfather clause. Guess what we ran
33 into after that? I think I heard it back here.
34 UNIDENTIFIED SPEAKER: Poll tax.
35 MS. WHITLOW: Poll tax. Now, it wasn't a whole lot of money.
36 Something like anywhere from 5 to 6 maybe 7 or $8, but back then, that
37 was a whole lot of money for people who were making 50 cents a day and
38 had families to take care of. Y'all think I didn't live through the
39 time when you made 50 cents a day to work, huh? I did. Right up there
40 in Macon County. And they -- we were having to take a little bit of
41 that money that we had and pay a poll tax, not one year just to get
42 registered, but every year. But we fought, and we worked, and we got
43 rid of that eventually. And then they came up with this long drawn-out
44 literacy test. Anybody remember that? Anybody in here remember that
45 one, huh? I do. Because we got copies of it knowing that our people
46 who could scramble up on a little bit of money and got registered, a
47 view of us here and there, when this literacy test thing came out,
48 they didn't know anything about it. And some of this -- the irrelevant
49 -- and I don't want to call it the other name that's really terrible:
50 How many bubbles are in a bar of soap? That's how ridiculous it was.
51 But we had to work through it. And so Coach Lewis, who was really a
52 hard worker, and we went from county to county in this state,

especially all the rural counties, precinct by precinct, street by street, house by house encouraging and helping and teaching people to vote, to overcome that thing. We had to contend with that up until the Voting Act was eventually passed --

MR. LEE: Ms. Whitlow, you know, your testimony has been really very moving --

MS. WHITLOW: Beg your pardon.

MR. LEE: Your testimony is very moving. I wonder, since we have some people following you, if you could --

MS. WHITLOW: Kind of speed it up?

MS. LEE: Try to speed it up maybe like a minute or so.

MS. WHITLOW: But I think everybody will tell you that I'm a firm believer in giving some background sometimes.

MS. LEE: You have done that.

MS. WHITLOW: Coming up to this -- back then, when we only had -- had been able to get a few people registered to vote, the black vote didn't matter anyway, because there wasn't enough of us to make any difference to the candidates. But we still plunged on. And now we come to this voting -- Voting Rights Act. And it has to be upgraded every so often, is why we're sitting here. And my thing is, why is that? Once you recognize that you have wronged a people by taking away or disfranchising them and you say that this is wrong; we're going to make it right so we're going to pass it a Voting Rights Act, why couldn't it be permanent so this wouldn't be necessary? Somebody said that all of this is a waste of time. And it is a waste of time, a waste of energy, a waste of money and all of that. So let me say in closing, we need to say to those powers that be from this commission if we are to give a report as to what we felt in this community, you tell them that this person believes that the Voting Rights Act in the first place was necessary, because everybody already ought to have a right to vote, and that this should be the final act of correction so that we won't have to come back and waste time and money doing this again.

MR. LEE: Thank you, Ms. Whitlow.

DR. DAVIDSON: Thank you very much.

MR. BUCHANAN: Amen. MS. WHITLOW: You-all be blessed, and let us all do the right thing and make things right once and for all.

MR. BUCHANAN: You've blessed us, Ms. Whitlow.

MS. WHITLOW: Thank you much. You-all have blessed us just by being here, but just remember, that it is all so unnecessary and shouldn't be again.

MR. LEE: Sir, would you identify yourself?

MR. COOLEY: My name is Fletcher Earl Cooley, native of Montgomery Alabama. And the reason I requested to follow the first speaker is that I thought she explained the hurdles and obstacles that have been continually placed in front of minorities in their effort to participate as full citizens of this country. I also feel very strongly that if we as a country -- and we do this quite well; we spend money quite well; and we go to war quite well; and we find money to finance wars quite well, but we can't find money to nurture the needs of our own people. I truly feel that all of this is not about black and white. It's not necessarily about rich and poor. But it is

about equity versus inequities and who are the benefits of the equity and who are the beneficiaries of inequity? If, in fact, we can propose in the Iraqi Constitution the rights to protect minorities, why can't we have in our own Constitution the rights permanently presented to protect minorities? We can avoid the -- Afghanistan going through the 19th Amendment or the 18th Amendment for women's suffrage and can demand that that be in their constitution, and yet we have all of these obstacles and hurdles in our own Constitution. So the point is, as the first speaker said, we waste too much money talking. And we talk things to death, which aren't necessary. If, in fact, our leaders see a necessity to protect Iraqis and to lose 15,000 lives and billions of dollars, why can't they have that same feeling for the slaves who built this country?

MR. LEE: Thank you, sir, for your testimony. Please have a seat and could you identify yourself?

MS. WANGAZA: My name is Efia Wangaza. I am the coordinator of the South Carolina Chapter of the Malcolm X Grassroots Movement for Self-Determination. And I'm wanting -- I will make available, as I've told your staff, a copy of the transcript that was the result of hearings that were initiated in Greenville, South Carolina, on January 22nd, hosted by the Greenville Legislative Black Caucus, which was to assess the events of the 2004 election. Despite icy, cold rains, we had members of the community to come out and to talk about their voting experience. And to build on the points that have been made by the previous two speakers, I would simply say that the obstacles that they described have simply mutated into various other forms. And those forms tend to escape the current definition, certainly of preclearance, as I read it. For instance, the changes -- deregulation -- FCC deregulation has a direct impact on a candidate's ability, and thus the black communities' ability to participate in the electoral process. The last election, the campaigning was either radio or television. Without an equal time requirement, people who did not have money, which is characteristic or typical for people of color, had little or no access to the media. Another example of undermining these electoral abilities has to do with the destruction of neighborhoods, either as represented by a, say, (inaudible), where we wind up with scattered sites, Section 8 vouchers, or public housing communities destroyed and half the families or housing being restored and even less of those people being able to afford the housing, which means that by the next census, the number of people who were originally in that district has been substantially reduced, and, therefore, that community is grafted onto a white community, which means that we expect in South Carolina the number of black elected officials to decline with the next census. Another point that was raised in the hearings was that of felony disenfranchisement. The south has characteristically used the criminal justice system as a mechanism for disenfranchising people, and it has -- that continues to this date. I've listened with interest through today's session. Having been involved in voter education and registration since I was 13 years old with the NAACP youth and college chapters and then as a college student with the Student Nonviolent Coordinating Committee, and I am fascinated that -- with the consternation that there are no -- were no

1 statewide elected officials in North Carolina since 1982. There hasn't
2 been any in South Carolina since Reconstruction. And I don't think
3 South Carolina is peculiar in that regard. I think that the question
4 as to whether or not the Voting Rights Act ought be extended is -- is
5 rhetorical, but a more substantial question is the question that Ms.
6 Whitlow raised, and at what point do we begin with the cause? And that
7 is white supremacy. Thank you.
8 MR. LEE: One -- I think we would like to ask you some questions.
9 MS. WANGAZA: Certainly.
10 DR. DAVIDSON: You mentioned a transcript of the hearings, which I
11 believe were held, you said, in Greenville, South Carolina?
12 MS. WANGAZA: That's right.
13 DR. DAVIDSON: If you can make those available to our commission -
14 MS. WANGAZA: Yes, I will.
15 DR. DAVIDSON: Thank you.
16 MS. WANGAZA: I thought you would appreciate that.
17 MR. LEE: Thank you very much. Sir, would you please have a seat
18 and identify yourself?
19 MR. JEMISON: Yes. I'm Apostle James -- Apostle James Jemison, J-
20 E-M-I-S-O-N. I'm with Alabama Alliance to Restore the Vote. Also the
21 Alabama Coalition on Black Participation -- Civic Participation. I've
22 been involved with getting people registered to vote for the past 15
23 years. This past election or -- we worked with the NAACP Voters Fund,
24 and we had the opportunity of coordinating three counties where we had
25 gotten over 14,000 people registered to vote, and the majority of
26 those are right here in Montgomery County. Had the opportunity to meet
27 a lady that was 74 years old that never voted because of the Ku Klux
28 Klan threatening her neighborhood that she lived in, she was just
29 afraid to vote. And so we encouraged her and got that lady registered
30 to vote. We also have been very instrumental in getting
31 disenfranchised ex-felons their voting rights back. We are also trying
32 to get their pardons, where they can be full pardoned, in order to get
33 back into the system of voting, and also being able to have decent
34 jobs to provide for their family. So my main issue is human rights. I
35 feel that a voting right is a human right; a right that shouldn't be
36 taken away from any man or woman that comes of legal age of
37 understanding the power of a vote. They should be able to vote. And I
38 think the biggest problem that we are having now is that problem of
39 people voting for the powers that be. And I mainly think that
40 disenfranchising was the worst thing that could ever happen to any
41 man. You know, regardless of what -- a person go to jail, pays his --
42 do his time, pay his fine, he should be automatically welcomed back
43 into the system. Even if he did his time, he should be welcomed back
44 into the system to vote. Myself, I -- I got in -- I remember -- 1965,
45 I was 13 years old when the march came here from Selma to Montgomery.
46 And I had the opportunity to see a guy. He was an Asian. This guy was
47 a deadly martial artist. He got whipped by policemen right here in
48 Montgomery on High and Jackson. Could have whipped all of those
49 polices. But he took a beating, serious beating, and I think that
50 beating changed my life; made me saw things different. You understand
51 that? Fighting with my fists all the time didn't win. That man won
52 that day when he stood up and took a beating for my rights. He didn't

1 even live in the United States. He was just like Gandhi in another
2 country, and that he wanted to fight for equal rights for everybody,
3 where people had been getting killed, getting their homes burned,
4 losing family members just for the sake of a vote. You know, I think
5 we need to go back to do the human thing, the godly thing, and that is
6 allow God's people to be a part of the system.
7 MR. LEE: Thank you, Mr. Jemison.
8 MR. FOSTER: Good afternoon, Chairman, members of the Commission.
9 My name is Claude Foster. I'm also a native of Selma, Alabama. I grew
10 up there. I went to segregated schools there for a while. My current
11 position is with the NAACP National Voter Fund. The NAACP National
12 Voter Fund was established in 2000 by the NAACP as a free-standing
13 501(c)(4) organization with permission to engage in civic
14 participation, community-based mobilization, and education and
15 awareness campaigns surrounding key communities of color. I'm also a
16 member of the Texas HAVA Commission, and prior to my appointment as a
17 -- the National Field Director for the NAACP National Voter Fund, I
18 served as Regional Director for the Voter Empowerment Program in
19 Region 6, which included the states of Texas, Arkansas, Louisiana, New
20 Mexico, and Oklahoma. I tend to agree with everything that's been said
21 today. Doctor Chandler, if you -- I mean, Dr. Davidson, if you really
22 want some documentation on why it's important to extend the Civil
23 Rights Bill, just read his testimony from the redistricing hearings in
24 Texas. I've never seen a more stronger argument and more compelling
25 case to extend the Voting Rights Bill. In Texas we conducted hearings
26 after the 2000 election, and we made those hearings available too
27 about the climate in all the major urban -- major urban cities, along
28 with Martin Frost. We conducted hearings in east Texas, which -- where
29 a lot of African-Americans reside. We conducted hearings in Dallas
30 County, which is Dallas, Texas; in Harris County, which is Harris,
31 Texas. Also I had the opportunity to work a nonpartisan Get Out the
32 Vote campaign and voter registration campaign in 2003 in the Houston
33 mayoral election. In that election, there were -- stressing the need
34 for Section 5, there was -- the City of Houston -- or the county
35 changed about 200 precincts right before the election and didn't tell
36 anybody. It took the NAACP leadership, political leadership, to sit
37 down and have a special meeting using Section 5 as a leverage to get
38 them to hone up -- because at first they were just saying it was going
39 to be about 19 precincts. So without that legislation, the full
40 disclosure of the number of precincts they had to change would have
41 never been brought to the light. And most of those precincts were in
42 African-American communities. But, you know, I agree with everything
43 that's been said, but I just want to talk about another, I think, more
44 compelling reason to support extension of the Voting Rights Act.
45 There's been recent articles in the newspapers about the military --
46 or having a hard time meeting their recruitment goals, especially
47 amongst African-Americans and Latinos. And I think that -- my own
48 brother served in the first Gulf War, my dad served in the Korean War.
49 I also served in the military for a while, the United States Air
50 Force, and retired honorably for the reasons that we thought America
51 would one day live up to its creed of having a democracy that everyone
52 could enjoy. But, you know, my brother right now in Fayetteville,

1 North Carolina, this weekend has been participating in an anti-war
2 rally, because he is sickened by the fact that there is even any
3 discussion that the Voting Rights Bill is not going to be
4 reauthorized. And I would encourage the Commission to look at -- not
5 only that aspect of it, because I think the arguments -- just like
6 Truman made the arguments about the Civil Rights Bill and our -- our
7 image in the world, I think the Commission should look at that
8 argument, because the argument for Brown versus the Board of Education
9 was not a political or legal argument; it was a compelling argument
10 based on what was fundamentally right. And I think that when you look
11 at what -- the military is having a hard time with its recruitment
12 goals and people are aware, and I think that there is an unwillingness
13 on behalf of African-Americans and Latinos to serve. So I see this as
14 a national security issue as well as a civil rights issue, because the
15 NAACP, a lot of other groups, did a lot of work in Ohio to try to make
16 up -- did a lot of work around election protection to try to adjust
17 the problems in Florida in 2000, and you saw what happened in 2004.
18 Over 120,000 people in Ohio were denied the right to vote. Now, I
19 served on the HAVA Commission. As long as states have control over
20 elections, there is going to be a continuing need for civil rights
21 legislation and the Voting Rights Act. Because whether it is the NVRA,
22 which the states never fully implemented, whether it's HAVA, which the
23 states never fully implemented -- I served on the HAVA Commission, and
24 I'm telling you, there is no -- there is no driving force on behalf of
25 partisan election officials to meet the -- the intent of HAVA, which
26 was to address a lot of the disenfranchising problems in Florida in
27 2000. In fact I attended the National Secretaries of State's annual
28 winter meeting in Washington, DC, and they even passed a resolution to
29 do away with the Election Assistance Commission, because they didn't
30 want to see the Election Assistance Commission turn into an agency
31 that oversaw state elections, which they view as a states-rights
32 issue. So for those reasons alone, I would urge the Commission to
33 continue to take testimony, but understand, that I think that there's
34 a national security concern here, because many, many military folks
35 that I've talked to back in Texas and many parents that I've talked
36 to, minority parents, are unwilling to send their children in a war
37 while we sit here in America and debate on whether or not we need to
38 extend the Voting Rights Act.
39 MR. LEE: Thank you, sir. Thank you for your good work with the
40 NAACP. Sir, please identify yourself and then begin.
41 MR. WAGNER: Yes. I'm Reverend Earl S. Wagner. I'm with the
42 Concerned Citizens Organization. I say greetings to the ladies and
43 gentlemen of the Committee. I would just like to say that as
44 Representative Steele -- or Former Senator Steele said earlier, there
45 is a lot of racism still involved. And I say this because one of the
46 things that happened, my daughter lives in Colorado Springs, Colorado.
47 This was her first time being able to vote in a national election.
48 She'd never been in trouble, straight A student, going to college,
49 works for Carnival Cruise Lines, lives in a well-integrated
50 neighborhood. When she went to vote, they told her she was at the
51 wrong polling place. They sent her to another polling place. She ended
52 up going to three different polling places, and she finally was so

1 frustrated, she refused -- she didn't vote. But she was unaware of the
2 provisional vote, and her fiance, he was aware; they gave him the same
3 runaround. But when he got to the second one, he asked for a
4 provisional ballot. But also, our organization here, we're involved in
5 a lot of activities. And some of the things that we've seen is that
6 this is -- what's going on now is the same thing that went on in post-
7 Reconstruction. They're coming up with low-level crimes and they give
8 you long jail time, and they find a way to give you a felony. And what
9 they did in the post-reconstruction, that was to get the black elected
10 officials out of office; that was to keep the blacks from having a
11 large voting pool. And what we see now -- we see a pattern of the
12 police and the judicial system fabricating minor violations, and they
13 turn them into a larger violation in order to get a felony on the
14 person. We had -- for example -- and we talk about the people; once
15 they have a felony on them, it's so hard to get their right to vote
16 back. And, for example, we had a GOP official here say, when we were
17 talking about getting the voting rights back for ex-felons, he said he
18 was not overly concerned about it because most ex-felons vote
19 Democratic. In some instances, we've asked the Justice Department to
20 investigate and substantiate -- we asked them to investigate various
21 civil rights issues about police planting evidence and that type of
22 thing, and they say, it's up to us to investigate the crime. And I
23 would just like to say, if you compare some of the statistics --
24 sometimes all of the professionals don't compare statistics. But if
25 you look at some of the information provided by the Justice Policy
26 Institute in regard to drug convictions and disenfranchisement, versus
27 the black and white population, you'll see that on average -- their
28 very last statistics I looked at was 74 percent of the black
29 population in prison, federal prison, were for drugs, but blacks and
30 whites use drugs at the same rate. I would just like to say also, one
31 of the things that continues to go on -- Representative Holmes, I
32 talked to him before coming over here. He represents District 80 of
33 Montgomery. He said there's a lot of voter intimidation going on. The
34 ID requirements, they intimidate old people. You know, the old people
35 are not used to showing a picture ID. And some of them haven't had a
36 picture ID before, and they catch a lot of flack. He gave an example
37 of his 80-year-old mother so -- and the other thing he brought up to
38 be told was the high percentage of machine malfunctions in minority
39 districts. And as I prepare to close, I would just like to say that I
40 entered the military in 1969. I retired in 1990. Some of the same
41 civil and human rights issues we as black people were fighting in
42 1969, I find myself as a military retiree fighting all over again. I
43 have a son that's in the navy that has fought in every battle in the
44 Gulf except the first war. I have a son and daughter -- I had a
45 daughter that the navy wanted to recruit to the academy, and the
46 marines want my son. And I told my son, I did not want him going to
47 fight a war to make Bush and Cheney rich. And I would like to close
48 and say that we do need to extend the Voting Rights Act.
49 MR. LEE: Thank you, Mr. Wagner, for your testimony. Do we have
50 any other individuals from the public who would like to speak? (No
51 response.)

1 MR. LEE: Well, at this point, it might be useful if we gave the
2 commissioners a chance to say a few words, and we could close up this
3 session. Do you want to start, Chandler?
4 DR. DAVIDSON: I only want to say that, as I did this morning, I'm
5 honored to be here, and I'm humbled by the testimony that I've heard
6 today from different people. It's tugged at my heart strings. I thank
7 you for coming out here today and sharing your views and your stories
8 with me, and as a member of this commission, I will try to do justice
9 to your testimony by incorporating what I can into the report that we
10 will be writing for this commission. Thank you.
11 MR. LEE: Reverend Buchanan?
12 MR. BUCHANAN: I want to think, especially the public witnesses.
13 As a representative of some Alabamians in Congress for a long time,
14 some of the best insights I ever gained was from people like you. I
15 thank you for caring enough to be here and to share with us your
16 experiences and your thinking on this important subject. As we sit
17 here, within the next several weeks, we may face a very real crisis in
18 our country, because this filibuster, which for many years was used by
19 southern Senators to block civil rights legislation, is now about to
20 be perhaps done away with in order to retreat from civil rights
21 legislation. And if that happens, then 51 Senators can vote in any
22 judge the President sees fit to nominate no matter how unqualified or
23 how extreme ideologue that person may be; then the federal judiciary
24 can be impacted for a generation, and a great many rights or one may
25 be -- back again. If that should happen, God forbid -- and it will be
26 a lot of work to keep it from happening. Once again, our only hope is
27 at the ballot box and free Americans taking out of office the people
28 who got them into trouble; trying to put in office the people who will
29 correct the situation again. So this legislation becomes once again of
30 extreme importance. And it seems to me that a society in which
31 everyone is permitted to vote and given equal opportunity in the world
32 is the only real democratic society, as well as one in which minority
33 rights are, in fact, protected. And if we want to be a model to the
34 whole wide world, we better make sure we've got ourselves that kind of
35 model.
36 MR. LEE: Commissioner Majette.
37 MS. MAJETTE: Thank you. And I just want to say thank you to all
38 the witnesses today. And I certainly have been moved and informed by
39 the testimony that we've heard, and I look forward to working with the
40 other commissioners to make sure that we prepare the kind of report
41 that really will reflect what has happened and be able to help
42 Congress make the decision that it ought to make in terms of
43 reauthorization of the Voting Rights Act. Thank you.
44 MR. LEE: Commissioner Moten.
45 DR. MOTEN: I too would like to thank all of you for coming out
46 and sharing your heartfelt testimonies with us. I've -- I've learned a
47 great deal today. You have demonstrated to me yet again why my
48 decision -- or my wife's and I -- my decision to bring our family to
49 Montgomery, Alabama, to live here in this community was the right
50 decision. You represent in my mind the true heroes and heralds of this
51 movement. I sat here during the course of the day listening to some of
52 this testimony, and I thought of something I once read about a speech

1 that Frederick Douglass had given. I believe it was in Ohio. And he
2 had gone through this litany of what was wrong with white folks and
3 what was wrong with slavery, and Sojourner Truth was in the audience,
4 and I guess she had had enough, and so she just said, Frederick, is
5 God dead? And so I don't think God is dead. I know he's not. I think
6 of Dr. Martin Luther King, Jr., when -- a lot of people think of his
7 "I Have a Dream" speech as one of the -- his best speech. I happen to
8 think that the speech he delivered here in Montgomery at the
9 conclusion of the Selma to Montgomery march was his finest speech. And
10 at the end of that speech, he quotes, being the great (inaudible) that
11 he was, several stanza from the "Battle Hymn of the Republic," because
12 Dr. King knew that God was on your side and his side and our side.
13 There is no doubt in my mind that, you know, the Voting Rights Act is
14 needed, sorely, desperately, and I will do whatever I can to ensure
15 that. Thank you.
16 MR. LEE: Well, I, too, would like to thank the panelists but also
17 the audience, and the public speakers in particular. We've heard a lot
18 of history, beginning with Gwendolyn Patton and ending with Ms.
19 Whitlow, about the fact that we can't proceed ahead without
20 remembering that history. We are still in this (inaudible). We've had
21 a lot of testimony that has been frankly disturbing to us on many
22 levels and very challenging as well. We appreciate that you've come
23 out; that you've taken very seriously our charge and the kind of
24 importance of this issue. We all know how important this piece of
25 legislation has been to the soul of our nation. This is the first of
26 several hearings. We will be moving on to other cities. But I want you
27 to know that this was the appropriate place to launch this commission.
28 So I thank you very much. And as, I think, Professor Davidson has
29 said, we will try our best to put into the report the concerns you've
30 expressed and the insight you've provided. Thank you very much.
31
32 Whereupon, the proceedings concluded at approximately 4:05 p.m., on
33 March 11, 2005.)
34
35 * * * * * * * * * * * *
36 REPORTER'S CERTIFICATE
37 * * * * * * * * * * * *
38 STATE OF ALABAMA COUNTY OF MONTGOMERY
39
40 I, Tiffany Blevins Beasley, Judicial Reporter and Notary Public in and
41 for the State of Alabama at Large, do hereby certify that the
42 foregoing is a true and accurate transcript of the proceedings as
43 taken stenographically by me at the time and place aforementioned.
44 This 5th day of April, 2005. Tiffany Blevins Beasley Reporter and
45 Notary Public State of Alabama at Large
46

1 SOUTHWEST REGIONAL HEARING
2 NATIONAL COMMISSION ON THE VOTING RIGHTS ACT
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8 Tempe, Arizona
April 7, 2005
9 9:00 a. m.
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17 (Copy)
18 PREPARED FOR: REPORTED BY:
19 Marty Herder, CCR
20 NATIONAL COMMISSION Certified Court Reporter
21 CCR No. 50162
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25 AZ LITIGATION SUPPORT (480)481-0649

1 Tempe, Arizona
April 7, 2005
2 9:00 a. m.
3
4 MS. BARBARA ARWINE-IUTRO: Good morning, everyone. My name is
5 Barb Arwine. I am the executive director of the Lawyers' Committee for
6 Civil Rights Under the Law, and I am so honored to be here with all of you
7 today.
8 Thank you for coming to the second hearing of the National Commission
9 on the Voting Rights Act.
10 I want to thank Arizona State University and the Barrett Honors
11 College for their tireless effort in making today's hearing possible.
12 I want to thank Dr. Tucker and Professor Espino for their leadership
13 and commitment to these important issues.
14 And I particularly want to thank the Barrett Honors students for their
15 dedication in assuring that all Americans have an equal opportunity to
16 participate in political decision making.
17 As an activist, it always, as always, gives me hope to meet the next
18 generation of leaders in the country's continuing fight for equality.
19 That hope is also exemplified in the law associates who are helping us
20 here today from law firms throughout the United States. It is critical
21 that young people understand the importance and are, in fact, activists in
22 making everybody understand the relevance of this movement, and are the
23 best emissaries to convey that message.
24 So I am so happy to see you.
25 I also want to thank our commissioners. I am humbled by their talent
26 and skill with these issues.
27 We have assembled a distinguished panel of practitioners, experts,
28 policy makers, judges, and community leaders who will hold on to a common
29 thread of experience on the Voting Rights Act.
30 This distinguished panel is uniquely qualified to develop a record
31 demonstrating the impact the Voting Rights Act has had on the ability of
32 minority communities to exercise their political voice.
33 The task of this commission is nothing short of essential.
34 The Voting Rights Act is the culmination of years of struggle, the
35 pinnacle of a tragic and hopeful movement that broke the shackles of Jim
36 Crow at the ballot box.
37 In 2007 we must reconsider if key provisions of the act are still
38 effective in overcoming discrimination in voting.
39 The record created is a result of these hearings and the commission's
40 independent research.
41 We'll provide policy makers, advocates, the media, and the public an
42 invaluable resource to begin discussions on how to make this historic piece
43 of legislation continually relevant.
44 I also want to extend a special thanks to our many panelists who have
45 flown from throughout the country to be with us today.
46 The Voting Rights Act is a living document. It is daily given life
47 and actualized by the actions of citizens who register to vote, by voter
48 registration groups, by voter education groups, by GOTV organizations,
49 civic organizations, at the local, county, state, and national level.
50 We are delighted today to have witnesses from New Mexico, Texas,
51 Arizona, Colorado, and Nevada.

1 Your testimony today will bring enlightenment and vital information
2 in helping the commission to come up with a report.
3 I want to take this opportunity to turn the program over to the chair
4 of the commission, Mr. Bill Lann Lee.
5 Mr. Lee is a partner at the law firm of Lieff, Cabraswer, Heimann &
6 Bernstein, L. L. P. , in San Francisco.
7 He was the assistant attorney general for civil rights of the United
8 States Department of Justice from 1997 to 2001.
9 Prior to that, Mr. Lee was an attorney with the NAACP Legal Defense
10 Fund, for 17 years, including eight years as head of the Legal Defense
11 Fund's western regional office.
12 Mr. Lee will now give his opening statement. Good morning.
13 MR. BILL LANN LEE: Thank you, Barbara.
14 Good morning and thank you for joining us for the second regional
15 hearing of the National Commission on the Voting Rights Act, which is going
16 to cover the states of Arizona, Texas, Colorado, New Mexico, and Nevada.
17 Today's hearing is also the second day of a conference at Arizona
18 State University's Barrett Honors College.
19 That conference is One Nation With Many Voices, the language
20 assistance provisions of the Voting Rights Act.
21 Later this morning we will hear testimony about a ground-breaking
22 study sponsored by the National Commission on minority language assistance
23 from a team of professors and students. Excuse me, I'm losing my voice.
24 At Barrett Honors College.
25 Let me begin with a little background about the Voting Rights Act.
26 The Voting Rights Act was signed into law in 1965 by President Linden
27 Johnson in response to voting discrimination encountered by African-
28 Americans in the south.
29 It's a story that we all know.
30 When Congress reauthorized the act in 1975, Congress made specific
31 findings regarding discrimination against language minority citizens,
32 including the use of English-only elections and other devices that
33 effectively barred minority language citizens from participating in the
34 electoral process.
35 In response, Congress expanded the act to account for discrimination
36 against language minority citizens by enacting the minority language
37 assistance provisions found in Section 203 and expanding the coverage of
38 Section 5 pre-clearance provisions to Arizona and Texas. I will be
39 saying more about Section 5 and Section 203 in a minute.
40 But first I wanted to give some general background on the Voting
41 Rights Act and what is scheduled to expire in 2007 and what is not.
42 The right of African-Americans and other minorities to vote is
43 guaranteed by the 15th Amendment and is permanent.
44 There are some permanent provisions of the act that ban illiteracy
45 tests, poll taxes, outlaw intimidation, authorize federal monitors and
46 observers, and create various mechanisms to protect the voting rights of
47 the racial language minorities.
48 However, there are some special provisions of the act that will
49 sunset in 2007 unless they are reauthorized by Congress.
50 Our primary focus today is on those special provisions.
51 In 2007 those three major protections are, first, Section 5 of the
52 act requires certain states, counties, and townships with a history of

1 discrimination against minority voters to obtain approval or pre-clearance
2 from the United States Department of Justice or the United States District
3 Court in Washington, D. C. , before making any voting changes.
4 These changes include redistrictings, changes to methods of
5 elections, and polling place changes.
6 These jurisdictions must prove that the changes do not have the
7 purpose or effect of denying or bridging the right to vote on account of
8 race, color, or membership in a language minority.
9 Second, Section 203 of the act requires that language assistance be
10 provided in communities with a significant number of voting age citizens
11 who have limited English proficiency.
12 Foreign language groups are covered by Section 203. American
13 Indians, Native Asian Americans, Alaska natives, and those of Spanish
14 heritage.
15 Covered jurisdictions must provide language assistance at all stages
16 of the electoral process.
17 As of 2002, a total of 466 local jurisdictions across 31 states are
18 covered by these provisions.
19 Arizona, Colorado, New Mexico, Nevada, and Texas are among those 31
20 states. Third, the act authorizes the Attorney General of the United
21 States to appoint a federal examiner to jurisdictions covered by Section
22 5's pre-clearance provisions on good cause or to send a federal observer to
23 any jurisdiction where a federal examiner has been assigned. Since
24 1966, 25,000 observers have been deployed in approximately 1,000 elections.
25 Let me tell you a little bit about the purpose of this commission and
26 its membership. The nonpartisan National Commission on the Voting
27 Rights Act was created by the Lawyers' Committee for Civil Rights Under the
28 Law on behalf of the civil rights community. The commission was
29 created because constitutional standards require that Congress have before
30 it a record of ongoing discrimination in voting in order to reauthorize the
31 minority language and other special Voting Rights Act provisions.
32 The National Commission is comprised of seven advocates, academics,
33 legislators, judges, and civil rights leaders who represent the diversity
34 that is such an important part of our nation.
35 We are also fortunate to have three regional guest commissioners join
36 us as guests today.
37 The commission has two primary tasks. First, to conduct regional
38 hearings, such as this one, to gather testimony relating to voting rights.
39 And, second, to write a comprehensive report detailing the existence and
40 extent of discrimination in voting since 1982, the last time there was a
41 reauthorization of the Voting Rights Act.
42 The commission's report will be based on facts compiled from the
43 commission hearings, United States Department of Justice enforcement
44 records, court opinions, and other sources. The report will be used
45 to educate the public, advocates, and policy makers about the actual record
46 of racial discrimination in voting.
47 Let me tell you about, give you a little bit of a road map of our
48 panelists.
49 There will be four panelist speakers today. We will hear from
50 leading voting rights practitioners in this region, academic experts, the
51 public, and government officials in the first and third panels.

1 Each panelist will provide a seven-minute presentation. After all of the
2 members of the panel have spoken, the commission will address questions to
3 the panelists.
4 In the second panel, the lead researcher and project co-director from
5 Arizona State University will share their insights on their ongoing study
6 of minority language assistance. This is the groundbreaking study
7 that I referred to earlier. We encourage members of the public who
8 are here today to share their voting rights experiences in our fourth and
9 final panel today. If you are interested, please speak with staff
10 members in the back. They're standing there in the doorway.
11 If you would like to share your testimony, but cannot stay, please
12 see one of the staff members in the back. We'll take your statements to be
13 entered into the record.
14 I would now like to introduce the other members of the National
15 Commission who will each make a brief opening statement.
16 Unfortunately, four of the commissioners were not able to join us for
17 this hearing.
18 The Honorable Charles Mathias, former senator from Maryland who's the
19 honorary chair of the commission. Dolores Huerta, co-founder of United
20 Farm Workers of America. Elsie Meeks, the first Native American member of
21 the United States Commission on Civil Rights. And Professor Charles
22 Ogletree of Harvard Law School. In their place we have three guest
23 commissioners, who I will introduce after the national commissioners.
24 First, never the least, Commissioner John Buchanan.
25 Commissioner Buchanan represented Birmingham, Alabama, in the House of
26 Representatives for 16 years. He is an ordained Baptist minister and has
27 served churches in Alabama, Tennessee, Virginia, and Washington, D. C.
28 Commissioner Buchanan, would you like to say a few words?
29 HON. JOHN BUCHANAN: Thank you, Mr. Chairman.
30 When I went from the sublime to the ridiculous and left the pastures
31 of a Baptist church in the Birmingham area to become a member of the
32 Congress representing that city, I was associated closely with two very
33 distinguished members from Arizona. Senator Barry Goldwater, who was as
34 far right as I am on this panel, as we are seated here looking at you, and
35 Mo Udall, who was about as far left as I am to you who are looking at the
36 panel.
37 And it is a pleasure to be in the state that can bring such
38 distinguished members of Congress all across the spectrum. Right now
39 you are governed by one of the great governors of the United States in
40 Governor Janet Napolitano, and you are represented by perhaps the most
41 colorful, interesting member of the United States Senate, Senator John
42 McCain.
43 It's a great pleasure to be in the state of Arizona. It's also a
44 pleasure to be at Arizona State University.
45 Some my daughter's best friends, among the brightest and best of
46 them, chose Arizona State as their university of choice from the Washington
47 area to come here because of the quality of this university. It's a
48 pleasure to be here.
49 You know, our country's great strength as a whole is equal to the sum
50 of its parts. A nation is equal to the sum of its people. Now our great
51 strength has been in our diversity as a nation.

1 We're not just a melting pot. We're a rich mosaic of the world's
2 peoples and cultures and faiths. And yet we have not been wise enough in
3 our history always to honor the potential of our people.
4 I grew up in a state where we held our last hearing, Montgomery,
5 Alabama, where a large portion of our population was denied the most basic
6 rights guaranteed in the Constitution and the Bill of Rights of our
7 country.
8 One of them was the right to vote, which was honored very poorly, if
9 at all, by my state. And out of that came this landmark legislation,
10 which we celebrate and which we seek to extend in 2005.
11 I served for a little while on the UN Commission on Human Rights,
12 when I was -- a few years in the 1970s helping represent our country there.
13 In that commission, if you look at the members, you would see the
14 worst governments on earth helping represent the UN Commission on Human
15 Rights, the Human Rights Commission.
16 I would think that if these are the positions, that the patient would
17 surely die.
18 But whenever I would make a speech as an American representative
19 about the problems, human rights problems on earth and other countries,
20 someone else, one of my colleagues would say, what about Native Americans
21 in the United States, what about your record there. And I would have
22 no answer.
23 So I look forward very much to learning some things today about how
24 we now in this time, 2005, honor the Constitution, the Bill of Rights, the
25 whole basic idea from which this country was created, and celebrate the
26 diversity that is our country.
27 And it's a pleasure to be with you here to pursue that end.
28 MR. BILL LANN LEE: Thank you, Commissioner Buchanan.
29 Commissioner Chandler Davidson is professor emeritus in sociology and
30 political science at Rice University. Dr. Davidson was the coeditor
31 of the Quiet Revolution in the South, a definitive work on the impact of
32 the Voting Rights Act in the south.
33 Commissioner Davidson.
34 MR. CHANDLER DAVIDSON: Thank you.
35 As I told Secretary Vigil-Giron earlier this morning, I love this
36 part of the country. I grew up in a little town in southern New
37 Mexico. Lordsburg, New Mexico. I'm a native Texan, but I spent my
38 formative years in what I consider to be this part of the country. I
39 love this country and the people in it, and I'm looking forward with great
40 anticipation to the testimony of people before this commission today.
41 MR. BILL LANN LEE: And now to our three guest commissioners.
42 The Honorable Rebecca Vigil-Giron is the Secretary of State for the state
43 of New Mexico and president of the National Association of Secretaries of
44 State.
45 As a former head of Civil Rights Division, I can tell you this
46 association is a very important outfit in the voting rights area.
47 She is the highest ranking elected Hispanic woman in the country, and
48 the first Hispanic to serve as president of the National Association.
49 HON. REBECCA VIGIL-GIRON: Thank you very much.
50 I'm very pleased and honored to be with all of you here today.
51 As Secretary of State, and as Bill mentioned, I'm the highest ranking
52 elected state official, woman Hispanic, in the country.

1 We have no lieutenant governors that are Hispanic. No governors yet
2 that are Hispanic governors throughout the United States. Women.
3 And so I'm very, very proud, but sad, that that is the case.
4 I carry my title with distinction. I represent New Mexico. I
5 represent 19 Indian Pueblos. Two Apache tribes. The Jicarilla and
6 Mescalero. Part of the Navajo Nation. Of course our population of
7 Hispanic Americans, over 45 percent in the state of New Mexico, and
8 everyone else that lives in the state of New Mexico as well, I represent
9 them very proudly. As I go to my meetings with the National
10 Association of Secretaries of State, at every single one since I heard that
11 states -- that more than 31 states would be required to translate their
12 election information into the various languages if they had more than five
13 percent of the population as speaking other languages than English, I got
14 very excited about that.
15 I thought what an opportunity for inclusion rather than exclusion.
16 If this does not go through, if this portion is not reauthorized, we
17 are going to fail our country. And I really -- I'm very, very strong in
18 thinking that the only way that the United States and Americans can remain
19 strong is that everyone understands, gets the amount of voter education
20 that is necessary for everyone to participate, to know what kind of impact,
21 at the very, very simplest level, to realize that your tax dollars are
22 going to the infrastructure to paying my salary, to pay the president's
23 salary, to make things happen.
24 You are the only ones that can make things happen, as long as you
25 know what you're voting for and who you're voting for.
26 And for that I'm going to be a very, very strong voice, Bill, with
27 our National Association, make sure that this is at the top of our agenda
28 for the reauthorization. Thank you.
29 (Applause.)
30 MR. BILL LANN LEE: Thank you. That was actually a very important
31 statement. The Honorable Penny Willrich is a judge in the Superior
32 Court of Maricopa County in Arizona. She is also the first and only
33 African-American woman trial judge in the state of Arizona. Before
34 ascending to the bench, she was a sole practitioner and attorney for
35 various legal services, organizations.
36 Commissioner Willrich.
37
38 HON. PENNY WILLRICH: Thank you, Commissioner Lee. It's a
39 pleasure to be here.
40 Good morning to everyone.
41 Ninety-two years ago our Arizona legislature enacted a statute that
42 read: Every citizen of the United States and every citizen of Mexico, who
43 shall have elected to become a citizen of the United States, who not being
44 prevented by physical disability from doing so, is able to read the
45 Constitution of the United States in the English language in such a manner
46 as to show he is neither prompted nor reciting from memory, and to write
47 his name, shall be deemed an elector of the state of Arizona.
48 That was in 1913.
49 This was known as the literacy voting law of Arizona. And it
50 remained an enacted statute in our great state until it was repealed in
51 1972, even though such laws have been deemed invalid by the 1965 Voting
52 Rights Act.

1 In 1973, as a citizen and college student in Texas, I was
2 participating in a local campaign in my home town. And as we were going
3 door to door, soliciting votes for the particular person running for
4 office, I realized that many of the elderly residents of this small town
5 did not realize that the Texas poll tax had been abolished by the 24th
6 Amendment that was adopted in 1964. I took that information to the
7 candidate that I was campaigning for, and we implemented a registration, a
8 voter registration campaign for elderly in that particular community. And
9 we also assisted in providing transportation for those citizens to vote.
10 One of those members was an elderly aunt of mine, who was 70 years
11 old at the time, and I took her to vote for the first time in 1973.
12 It's with that historical backdrop that I say that I'm honored to be
13 here today to serve as a commissioner for the Southwest Regional Hearing.
14 It's a privilege to be a part of this historical fact gathering
15 process as we approach the 40th anniversary of the 1965 Voting Rights Act.
16 The dialogue and the exchange that we will have today will go a long
17 way and will be vital to us taking information to Congress so that they
18 will realize that there is an important need for reauthorization of those
19 special sections.
20 I also believe that the culmination of all of the hearings will
21 provide information and perhaps an impetus to all of us for the need for
22 continued education in communities across this country. As long as
23 the perception exists that voting rights can be thwarted, we all have work
24 to do.
25 It's an honor to be here.
26 MR. BILL LANN LEE: Thank you.
27 Guest Commissioner Ned Norris is a representative of the Intertribal
28 Council of Arizona, which provides a united voice for tribal governments
29 located in the state of Arizona to address common concerns.
30 Those of us outside the west don't often realize that the tribal
31 governments are sovereign institutions in fact in our history, so it's a
32 great honor to have Mr. Norris join us.
33 MR. NED NORRIS, JR. : Thank you.
34 I just wanted to take this opportunity to make some comments in
35 addition to the fellow commissioners' comments, and welcome everyone to
36 this state of Arizona that's not from the state of Arizona. It's a
37 beautiful day outside. We should have had this hearing outside. Maybe
38 next time.
39 The Intertribal Council of Arizona is a nonprofit organization that
40 represents 22 tribes within the state of Arizona, 21 tribes within the
41 state of Arizona.
42 The Tohono O'Odham Nation is one of 22 federally recognized tribes in
43 the state of Arizona.
44 The area that we're in is really the ancestral lands of our people of
45 the O'Odham. There are four O'Odham tribes that are related to each
46 other. The Tohono O'Odham, which is Southwestern Arizona; the Gila River
47 and Ak-Chin Indian Communities; and the Salt River, which is just west of
48 Scottsdale here, east of Scottsdale here in the community.
49 We are all related together, and we are all descendents of the
50 Hohokam, which are our ancestors that dwelled in this area for centuries.
51 In 1924 the United States Congress passed legislation extending
52 United States citizenship to all Indians born in the United States.

1 In 1928, in Arizona, the State Supreme Court in Porter v. Hall
2 decided that Indians be disqualified from voting because they were under
3 federal guardianship, a status construed by the court to be synonymous with
4 persons under disability.
5 That particular decision remained for the following 20 years.
6 It wasn't until 1948 when the Indians in the state of Arizona won the
7 right to vote in a case called Harrison v. Levine, I believe it was. It
8 was that case, two veterans of the United States armed services that
9 challenged, that went to go to vote after having served the United States
10 honorably in the armed forces, went to cast their votes at the election
11 that year, and were denied, denied the right to vote.
12 So they challenged and were successful. And in 1948 won the right to
13 vote for all Native Americans in the state of Arizona.
14 It's unfortunate that in most recent years, you know, that tribes
15 entering into multi-million dollar gaming enterprise businesses, that it
16 wasn't until most recent years in the establishment of these multi-million
17 dollar gaming enterprises that the tribes began to receive some
18 recognition. And the political power that we now are beginning to learn
19 about and beginning to enjoy and beginning to exercise.
20 And, you know, in the state of Arizona there have been a number of
21 initiatives that have come to the voting public in the state of Arizona,
22 the most recent being Proposition 202, which was the gaming law that was
23 passed by the state of Arizona.
24 I think that with that -- actually I was sharing with fellow
25 commissioners earlier that tribes in Arizona had a major influence in the
26 election of our current governor, Governor Janet Napolitano.
27 The tribes have enjoyed a very positive working relationship with the
28 current governor. I think it was the gaming proposition and the fact
29 that we were able to assist in impacting Governor Napolitano's election
30 that at least in Arizona we began to really begin to feel a sense of power,
31 of voting power, a sense that our vote is going to and can and will make a
32 difference.
33 I think that for us in tribal communities where we're really trying
34 to continue that momentum, we're really trying to get our people educated
35 and get our people to understand the voting process and the impact that the
36 tribal vote can have, not only in the state of Arizona, but nationally.
37 And so tribes are spending a lot of time, much time educating their
38 people, going out, knocking on doors, issuing out voter election
39 information, establishing tribal election campaigns, to Get Out The Vote
40 campaigns.
41 And with the national Voting Rights Act, you know, that really is,
42 it's really critical for us to continue the act, and in our efforts to
43 continue the impacts that we believe we know we can have in the elections
44 ahead of us.
45 So it's an honor that we have the opportunity to -- I have the
46 opportunity to be here, and to listen to the important testimony that's
47 going to be provided to this hearing today. And I thank you for the
48 opportunity.
49 I also serve as the second vice president for the Intertribal Council
50 of Arizona, and on behalf of Intertribal Council I welcome you to the state
51 of Arizona as well.
52 Thank you.

1 MR. BILL LANN LEE: I'd like to thank the commissioners for those
2 splendid statements.
3 The first hearing in Montgomery, Alabama, we were reminded of the
4 history, the terrible history that brought the act into being and has made
5 its continuation an important question to us.
6 Here at this hearing we are reminded by these statements that the
7 Voting Rights Act is momentous, not just in the south but also in the
8 western region here. And so I would like to thank the commissioners for
9 reminding us of that.
10 It's now my duty to thank a lot of people.
11 Before we start our first panel, I want to thank the Barrett Honors
12 College at ASU for hosting today's hearing as part of their One Nation With
13 Many Voices conference.
14 I'd like to thank the college for its hospitality.
15 I want to thank our distinguished groups of panelists who are some of
16 the leading voting rights lawyers, academics, and advocates.
17 I would especially like to thank the Lawyers' Committee for Civil
18 Rights Under the Law for establishing the National Commission.
19 And we also need to thank the national co-sponsors, the Leadership
20 Conference on Civil Rights, the NAACP National Voter Fund, the National
21 Asian Pacific Legal Consortium, and the National Conference of American
22 Indians.
23 I also would like to thank regional co-sponsors.
24 The Barrett Honors College at ASU. They've gotten thanked three
25 times now. The Intertribal Council of Arizona, and the Maricopa
26 County branch of the NAACP.
27 I want to thank the law firms of Ballard, Spahr, Andrews & Ingersoll,
28 L. L. P. ; Bingham McCutchen, L. L. P. ; and Skadden, Arps, Slate, Meagher
29 & Flom, L. L. P. , for helping to staff the commission.
30 Last of all, I want to thank everybody in the audience for attending
31 today's hearing. Before we commence with the first panel, we'll take
32 a short break so we can change the location of the camera.
33 Thank you.
34 (Brief recess taken.)
35 MR. BILL LANN LEE: Before beginning our first panel, I need to
36 apologize to the law firm of Fennemore & Craig, Fennemore, Craig, which has
37 done a tremendous job of helping to staff the National Commission.
38 I inadvertently didn't acknowledge them. I do so now.
39 The first panel, Penny Pew, elections director, Apache County.
40 Claude Foster, national field director, NAACP, National Voter Fund.
41 Mr. Foster is a repeat offender since he testified at the first
42 meeting.
43 Nina Perales, regional council, Mexican American Legal Defense Fund.
44 Andres Ramirez, Clark County, Nevada.
45 Alberto Olivas, director, Voting Outreach, Maricopa Community
46 College.
47 And Reverend Oscar Tillman, Maricopa County branch of the NAACP.
48 And Robert Valencia, councilman of the -- I'm sorry, I'm going to --
49 Pasqua Yaqui tribe. I should point out most names in Chinese, I'm
50 Chinese American, are one syllable.
51 The ground rules for this panel are that we ask each panel to speak
52 for no more than seven minutes. If you want to speak for less, that's

1 great. We would like for you to all testify first, so that we follow with
2 questions after you testify.
3 Is there anything else?
4 Thank you very much.
5 So, why don't we start in the order I introduced everybody.
6 And if you could say your name and elaborate on the introduction.
7 Why don't we start with Penny Pew.
8
9 MS. PENNY PEW: Thank you very much.
10 My name is Penny Pew, and I am the elections director for Apache
11 County. I have been elections director since June of 2001. We have
12 a very large area, about 11,000 square miles, in our county. We have about
13 45,000 registered voters.
14 Of those, approximately 35,000 are Native American. So we have
15 a great program. I look forward and appreciate the opportunity to share
16 that program.
17 MR. BILL LANN LEE: Do you want to do your testimony now?
18 MS. PENNY PEW: Pardon me?
19 MR. BILL LANN LEE: Do you want to give your testimony now?
20 MS. PENNY PEW: Do I need to sit here? Do I stand?
21 I'll sit here.
22 I have prepared a small sampling of our program. And I would also
23 like to share some information from my outreach workers a little further
24 into the presentation, if that would be appropriate. MR. BILL LANN
25 LEE: That would be very interesting. MS. PENNY PEW: Okay.
26 We do have a status report that we submit to the Department of
27 Justice after each fiscal year.
28 I have included that in here also.
29 And I will leave this as written testimony for you. I know
30 that the observers and the program that we have developed has improved.
31 I know that with the Section 203 in progress that we have made leaps
32 and bounds.
33 I know that in 2000 we had a total of 19,634 voters that participated
34 at the polls, and in 2004 we had 24,335 that participated.
35 This is a direct reflection of the program that we're running given
36 the demographics for our county.
37 We do work hard and we work a lot of hours. We have poll trainings
38 that are conducted in various portions, parts of our county.
39 We go to the remote areas because a lot of our poll workers do not
40 have transportation. They are in very remote areas. Our translator
41 trainings are also promoted to give credence to the written.
42 The Navajo language is now written. I have outreach workers that now
43 write that language. It's a very time consuming, very -- I don't want to
44 say tedious, that's a negative word, but it is very long. And they do a
45 fantastic job.
46 Each of the poll workers are given a cassette and the option to check
47 out a cassette player to take home and practice their recordings.
48 That is a very crucial part to the uniformity.
49 We can't have poll workers that are giving their personal views on
50 issues, and so we have written sheets of each proposition or school or
51 county issue that may come up.
52 Those are given.

1 Our outreach team does the translator trainings. They do verbal
2 reviews with each of the individuals that are attending.
3 The translators have the option to attend as many trainings as they
4 need to, and they are compensated for each of those. They must be able to
5 feel confident on election day, thus we don't limit them.
6 We have some that can attend as many as four trainings in an election
7 cycle, especially during federal elections.
8 I do have power point presentations that are also in here.
9 Each of them have a pamphlet. Also we've done brochures.
10 In 2000 the presidential preference in Arizona, we did a pamphlet in
11 English, and it was so well received, the presidential pamphlet, that I
12 asked my outreach workers if they would do one in the Navajo language. And
13 so we have one here, and I have also enclosed this in here. Very well
14 received.
15 Things like this that give a little more creativity to the program.
16 We all know that elections, when you say elections in a group, what
17 do we get. Oh, my gosh.
18 Well, we have to have some humor. We have to have the ability to put
19 something different into our program.
20 I do wear a CTR ring, and I do tell them as I'm out that it is a
21 cruising the res ring. For those who are familiar with that, cruising
22 the res is about what I do with 11,000 square miles of places.
23 We have I voted stickers that we have presented in the Navajo
24 language. Those have been very well received.
25 There are just so many things that we can do to add and make our
26 Native Americans feel a part.
27 I voted stickers, when you don't speak English or don't speak English
28 fluently, that's like giving me something that's in a different language,
29 and I wouldn't appreciate that either. I also, as we go through
30 early voting sites -- and this is something that I believe is probably
31 specific to our county and other areas, we have an early voting trailer
32 that goes out and goes to the very remote areas to promote early voting
33 and to give the voters an option to vote. Some of them must travel
34 hundreds of miles to vote.
35 It has been very influential and very productive to go out to these
36 areas.
37 We have one area that's on the border of Navajo County that's on the
38 fence line, and they stand at the gate, and that's where the people come to
39 vote.
40 And it's working.
41 We go to trading posts.
42 We go to chapter meetings.
43 And it's very important that we advertise in the newspapers and on
44 radio. People look for us at the fairs. They know we're going to be
45 there.
46 At this time I would like to bring Matthew and Virgil Attson up, if I
47 could.
48 I would like them to tell you just a little bit about a chapter
49 visit. Chapter is similar to a city council, in very -- various areas of
50 the area.
51 Matthew Noble and Virgil Attson.

1 MR. BILL LANN LEE: Ms. Pew, we look forward to receiving written
2 materials. I guess we could set aside a few minutes to have this
3 presentation.
4 Why don't you go ahead.
5 MR. MATTHEW NOBLE: Thank you again. Thank you again.
6 Ladies and gentlemen, I'm name is Matt Noble, and just a brief
7 introduction. Normally when we come to meetings on the Navajo
8 Nation, we give a brief introduction who we are, and especially our clans.
9 My clan is Edge Water People, which is Ta'bahaa; Tse nji kini, which
10 is Honeycomb Rock People; and my paternal grandfathers are Todich'ii'ii,
11 Bitter Water; and my maternal side of the grandfather is Ah'Sheen'ah
12 (phonetic), which is -- call it Saltwater.
13 Anyway that's my four clans.
14 And I'll let Virgil introduce himself.
15 MR. VIRGIL ATTSON: Hello. My name is Virgil Attson. I work with
16 Apache County.
17 I'm (inaudible).
18 That's who I am. And we introduce ourselves, because at one point an
19 elderly man told me that he had to introduce himself in case we go to these
20 chapter meetings, somebody wants to yell at you, or you have to say your
21 clan. So just in case, you can have relatives in the audience that can
22 back you up.
23 If you don't say your clan, you're on your own.
24 So that's what I learned.
25 MR. BILL LANN LEE: I think you're safe here.
26 MR. VIRGIL ATTSON: Mostly we do these in Navajo. Because Navajo
27 elderly people, you know, they get mad when you talk English. Some of them
28 don't talk English. We do a brief presentation in Navajo. They
29 really like it, you know, and they look forward to it, especially when we
30 go out, they come talk to us. Even when we're off, you know, they'll come
31 talk to us, hey, tell me some more about this deal.
32 So I'll give this back to Matt Noble.
33 MR. MATTHEW NOBLE: Within Apache County, we represent, or actually
34 we take care of 33 precincts. It's a pretty good size area.
35 We have three different boundaries that we -- when an election comes
36 about, we have to identify these areas, which is we have our school
37 districts, and on the Navajo Nation we have five school districts.
38 Like, for instance, in May, this year, May 17, we have a budget
39 override election that's coming up.
40 These Mylar maps, they really help.
41 Back in, I believe, 2002, we had a school district, a budget override
42 election. We didn't have this at the time, but with the Apache County
43 Recorder's Office, they produced these maps for us, and they've been a
44 great help for us too when we go to them and they create these types of
45 tools for us to use.
46 At that time we had a school district election. And some of these
47 precincts, they're divided.
48 Some of them, like, for instance, Kaibeto Chapter, it sits inside the
49 Sanders school district. Also the Ganado school district.
50 So people get confused and they don't understand, like, for instance,
51 the ones that are inside the Ganado school districts, they come to the --
52 the day of election they come out and then, you know, you tell them that

1 the ones that are voting are the ones that are residing inside the school
2 district.
3 So in order to explain it or clarify this information a lot better,
4 we use these Mylar maps. So it helps us when we're doing our
5 presentations at the chapters, school districts.
6 And also we have -- I believe the next one is the justice of the
7 peace districts. And you can see that the boundary lines overlap the
8 school districts. So the boundary lines are a lot different.
9 And also we have the board of supervisors districts.
10 So these overlays really help us when we're explaining things, when
11 we are explaining what the issues are on the ballot.
12 Also we have --
13 MR. BILL LANN LEE: Sir, I wonder if you could finish in like the
14 next two and a half minutes.
15 MR. MATTHEW NOBLE: Sure.
16 We use flip charts. We also use the power point projector, but
17 sometimes we have to have like temporary workers that we hire on the side,
18 and we split them, and we sometimes use these flip charts.
19 We use these binders so when we split up, not every one of us can
20 carry the power point projector.
21 So these are very helpful tools for us when we are doing our
22 presentations. These are just some of the tools that we brought that
23 we wanted to present to you.
24 And as you can see, they're written in our language.
25 The federal offices, and here it says -- Washington (inaudible).
26 It identifies who also all is running for office. Like, for
27 instance, United States Senator, which is Washington (inaudible).
28 Then we give the name of the individual that's running for that
29 office.
30 So that's how we relate, relate our information to the people.
31 Thank you for your time.
32 (Applause.)
33 MS. PENNY PEW: I really appreciate the opportunity to do this. And
34 I think the reauthorization will help us continue with our program.
35 And we do work very closely with the Navajo Nation, weekly, sometimes
36 daily basis, as we share polling places in November with the tribal
37 government.
38 Again, I thank you for your time.
39 MR. BILL LANN LEE: Thank you, Ms. Pew.
40 I wonder if you could hand the mike over to Claude Foster. Mr.
41 Foster.
42 MR. CLAUDE FOSTER: Good morning. My name is Claude Foster. I am
43 the national field director for the NAACP National Voter Fund. The
44 Voter Fund was created by the NAACP in 2000 to engage primarily the
45 African-American community, more along the lines -- MR. BILL LANN
46 LEE: Sir, I wonder if you could speak up a little. I'm not sure
47 people in the back can hear you. We're having problems with that mike.
48 MR. CLAUDE FOSTER: Can you hear me now?
49 MR. BILL LANN LEE: Thank you.
50 MR. CLAUDE FOSTER: Again, my name is Claude Foster. I'm with the
51 NAACP National Voter Fund.

1 The Voter Fund with created by the NAACP in 2000 to engage the
2 African-American and other minority communities in issue advocacy and voter
3 empowerment.
4 Prior to that position I worked for the National NAACP as a regional
5 director.
6 This August we will celebrate the 40th anniversary of the Voting
7 Rights Act of 1965, the act that made state laws restricting political
8 participation by African-Americans and other minorities illegal.
9 The National Voter Fund recently participated in the 40th anniversary
10 of the Selma to Montgomery voting rights march. For me, it was also
11 a homecoming, having grown up in Selma as a youth and having participated
12 as a youth in many demonstrations for African-Americans' right to vote.
13 The 1965 Selma to Montgomery march was a response to Bloody Sunday,
14 that Sunday in March when America watched in horror as law enforcement
15 officers viciously attacked men, women, and children at the foot of the
16 Edmund Pettus Bridge for assembling a march for the right to vote.
17 The members of men on horseback chasing and beating the civil rights
18 marchers through the streets of Selma, even riding up on porches to get in
19 the last vicious lick, are as vivid today as they were 40 years ago.
20 But the march's brave crusade as well the deaths of martyrs, such as
21 Jimmy Lee Jackson, Reverend James Reeb, and Viola Luzzo, compelled the
22 nation to support the passage of the historic Voting Rights Act a few
23 months later.
24 The act became landmark legislation that outlawed poll taxes,
25 literacy tests, and other forms of voter disenfranchisement that had been
26 waged against African-American citizens throughout the south for many
27 decades.
28 The 40th anniversary of the Voting Rights Act deserves celebration.
29 The bravery of the many marchers at Selma's Edmund Pettus Bridge and
30 a growing tide of disenfranchisement with violence against African-
31 Americans, wanting nothing more but the right to vote, pushed Congress to
32 make a constitutional promise of one man/one vote a reality for African-
33 Americans.
34 In two years this legislation comes up for reauthorization.
35 Unfortunately, many Americans are unaware of just how the law works, as
36 evidenced by the fact that it is all over the Internet that African-
37 Americans will lose the right to vote in 2007.
38 There could be nothing farther from the truth.
39 The 13th Amendment establishes the right of African-American citizens
40 to vote. However, there are still systematic efforts to keep African-
41 Americans and other minorities from casting their vote and having their
42 vote count.
43 That's why we need to act now and not wait until 2007
44 Mr. Chairman, I want to thank the Lawyers' Committee for Civil
45 Rights Under the Law and the National Commission on Voting Rights for
46 conducting these very important hearings. In the letter I received
47 from the Lawyers' Committee, I was asked to give a 5- to 10-minute
48 presentation focusing on the efforts of African-American voters in Texas to
49 vote free from discrimination and for the candidate of their choice.
50 And, two, a brief discussion about efforts to address acts of
51 discrimination against these voters and the results of such efforts.

1 In this past election cycle, the NAACP National Voter Fund registered
2 214,769 new voters.
3 Of that total, 28,021 new voters were added to the rolls in Texas.
4 We know from history and past elections that African-Americans would
5 encounter problems at the polls, not just in Texas but around the country.
6 The NAACP National Voter Fund, the NAACP, and many other national,
7 state, and local organizations have spent years developing election
8 protection programs designed to prevent disenfranchisement.
9 However, efforts to disenfranchise African-American voters continue
10 and center on the following:
11 Evasion of Voting Rights Act, Section 5, harassment of African-
12 Americans voters at the polls, removal of African-Americans from voting
13 lists.
14 As part of my testimony I brought with me documentation to illustrate
15 just how African-Americans are still disenfranchised.
16 I would like to take a few minutes and discuss some of the complaints
17 received from actual voters in Harris County.
18 Said they -- and I'm quoting here, and I'm taking it right off the
19 complaints that were received.
20 Said they could not vote because they were not in that county.
21 They claim they ran out of ballots.
22 Tried to vote and the precinct judge told him he was not on the
23 rolls.
24 Told he could not vote in elections.
25 Was told by precinct judge that she could not vote because she was
26 not in city limits. She voted at that same place for 12 years.
27 Showed a list of signed names of the only people who could vote.
28 White people of same ZIP code were allowed to vote.
29 The woman would not let her vote, did not try to help her find out
30 what precinct to vote in, and ultimately was discouraged.
31 Drove 30 miles to vote from original precinct and was again told she
32 couldn't vote. Never allowed to vote today.
33 They asked her name without asking for ID, and told her she was not
34 eligible to vote. She received a challenge ballot. When she tried
35 to submit the ballot, they rejected it saying she could not vote.
36 Told her she could not vote because she wasn't in the county.
37 Again, White people were allowed to vote though.
38 Saw a list of handwritten names and was told those people's votes
39 wouldn't count. Also her husband was on the list, and she was told
40 she was not allowed to vote.
41 The precinct or school called the police. Black people were not
42 being allowed to vote. Mr. Chairman, I also brought with me some
43 additional documents which clearly show the continued disenfranchisement of
44 African-Americans in Texas.
45 I ask that the documents be included in the records as part of my
46 testimony here today.
47 MR. BILL LANN LEE: Of course we'd be happy to receive those
48 documents. To the extent that we can rely on those documents, you
49 can try to summarize.
50 MR. CLAUDE FOSTER: Okay. I'll summarize.
51 I brought a copy of the voter irregularity hearings by the Houston
52 Coalition for Black Participation, on which I was a panel member.

1 The hearings document complaints such as those I described above.
2 A copy of a letter from Carol Douglas, NAACP Region 6 director.
3 The letter was sent to Beverly Kauffman, Harris County Clerk, in
4 regards to complaints received in the November 6, 2001 Houston mayoral
5 election in which Ms. Douglas alleged that Harris County officials may
6 have committed serious violations of the Voting Rights Act, the Motor-
7 Voter Law, and the Texas Election Law.
8 HAVA wasn't implemented at the time.
9 The copy of the Southwest Region's press release, dated December 1st,
10 2001, detailing the assault of one of the NAACP's voting department
11 volunteers for assisting a voter to the polling station at the voter's
12 request.
13 A copy of a press release announcing the formation of the Harris
14 County Voters Assistance Task Force set up to address issues in response to
15 allegations by voters of intimidations.
16 Mr. Chairman, without the Voting Rights Act, what other tool would
17 minority communities have for redress if a state, county, city, or town
18 adopted a discriminatory new procedure by changing voting locations without
19 adequately notifying the community. This was done in the Houston
20 area in the election in 2001, when over 166 precincts were changed without
21 the African-American community being notified.
22 The community was not notified of the changes until the civil rights
23 community challenged election officials under Section 5 of the Voting
24 Rights Act.
25 A word about the status of community university students who were
26 denied the right to vote because election officials challenged the
27 students' residency requirements.
28 The NAACP National Voter Fund worked in over 11 states this past
29 presidential election cycle registering over 475,000 new voters since 2000
30 and helping mobilize over one million voters who voted in various elections
31 since then.
32 The results have led to historical consistent African-American voter
33 participation, despite well-documented cases of voter intimidation, unfair
34 purges, and other barriers as I have described in my testimony here today.
35 The Voting Rights Act is the reason for the continued enfranchisement
36 of the African-American community, despite continuing efforts to deny
37 access to the voting booth. Mr. Chairman, thank you for conducting
38 these hearings today. I look forward to answering any questions you or
39 the commission members may have.
40 MR. BILL LANN LEE: Thank you, Mr. Foster, for the materials about
41 Harris County and Prairie View. They will be very helpful to us.
42 And to the extent that you can give us those documents, that would be
43 great. And, Ms. Pew, I wondered if it's possible to get some of
44 those flip charts and other things that your folks presented?
45 I think that would be very interesting.
46 Now to Nina Perales, MALDEF.
47 MS. NINA PERALES: Thank you. My name is Nina Perales, and I'm the
48 regional counsel of Mexican American Legal Defense and Educational Fund,
49 MALDEF.
50 My office in San Antonio, Texas, covers the geographic territory
51 encompassed by the Fifth and Tenth Circuit Courts of Appeals, which
52 includes Texas, New Mexico, and Colorado. Since its founding in

1968, the political integration of Latinos has been a central part of our work.

MALDEF's first case was a lawsuit to force Latinos to be seated on grand juries in Bear County, Texas, which is where San Antonio is located, because prior to that time Mexican-Americans simply were not seated on grand juries throughout Texas.

From litigating the Wind versus Register case to providing testimony regarding the Mexican-American political experience in Texas for the 1975 amendments, MALDEF has consistently worked to achieve greater political participation and fairer election systems for Latinos.

Today I'll touch on several examples of voting problems faced by Latino voters in the southwest, and hopefully the opportunity to supplement my testimony in writing.

My testimony today will touch on problems related to both dilution, access to the ballot, and retrogressive measures.

Although Section 2 is a permanent part of the Voting Rights Act, I provide some of these examples in the way of context for the kinds of voting problems that are faced by Latinos in the southwest. We offer this testimony today in support of the reauthorization of Section 5 and Section 203.

In Colorado, in 1996, Latino voters won the creation of a Latino opportunity district in the southern portion of the state. Although during the 1990 redistricting process there was a substantial amount of testimony in favor of holding the San Luis Valley together as a community of interest, and the Colorado Reapportioning Commission considered creating a Latino majority district in this area, they ultimately adopted a plan that contained an ineffective district of only 42 percent of Hispanic voting age population.

And it took a lawsuit and a negative ruling by the trial court and finally an appeal to the Tenth Circuit Court of Appeals for the Latino voters in southern Colorado to win House District 60. Past voting discrimination against Latinos in this area of Colorado included: Voting registration branches being placed in Anglo homes, limited hours for farm workers to register to vote, and a system where Anglo county commissioners tapped their friends for election judge, resulting in an all Anglo election judge pool.

We also have significant issues of access to the ballot in Colorado related to language.

Only eight Colorado counties are covered by Section 203. Last year I spoke to local advocates from uncovered counties in Colorado, who stressed as their primary concern the availability of bilingual ballots and other election materials to the voters in their counties.

For example, in Adams County, which is not covered, close to 2,000 voting age citizen, limited-English proficient people live. In Pueblo County, 1500 voting age citizen, limited-English proficient.

Also not covered, El Paso County, 3,200 voting age citizen, limited-English proficient. Not covered by Section 203.

In New Mexico, Latinos are more than 42 percent of the state population.

Most southern counties are covered under Section 203, but not all the counties are covered.

1 And if you look at a colored map where the counties are shaded,
2 you'll see that as you progress north, the language coverage drops off.
3 As the Latino community grows and becomes more of a presence in non-
4 covered counties, it is vitally important that we have Section 203 in place
5 in order to provide language access to the ballot in this northern region
6 of New Mexico.
7 In November 2004, we did an election monitoring project. I'll
8 give you just two examples from New Mexico.
9 One example from New Mexico or really just more vote denial practices
10 includes in Dona Ana County, which is where Las Cruces is, there were
11 Anglos videotaping the license plates of Mexican-American voters as they
12 went to vote.
13 And we received that call, and were told that it is very intimidating
14 to voters to be videotaped and to have their license plates videotaped by
15 Anglos standing outside the polling place.
16 In addition, there were some -- I have to echo Mr. Foster that the
17 relocation of polling places is one of the time honored and classic
18 mechanisms for defeating the minority vote. And in Roswell, New
19 Mexico, I believe it was that the traditional polling place was, for
20 Mexican-Americans, was not open for the same number of hours that the
21 polling place was open in the -- I heard it was weekend hours at the mall
22 in the northern part of Roswell. But I will defer to the
23 commissioners, if you wanted to address that for me.
24 It may have been cleared up in the time that we received the
25 complaint until the election was continuing, which sometimes happens.
26 MR. BILL LANN LEE: Nina, would you pull the microphone closer to
27 you?
28 MS. NINA PERALES: Sure.
29 I did want to touch on -- I seem to have lost my Texas page, and I
30 really did want to talk to you about Texas.
31 Here we go.
32 In Texas, which is where my office is located, we believe there is
33 widespread noncompliance with both Section 203 and Section 5.
34 My anecdote on Section 203 is from Terrent County, which is where
35 Fort Worth is located.
36 Even though Terrent County is required to provide bilingual ballots,
37 their translation or their purported translation of the ballot into Spanish
38 was utterly incoherent, because it had been done by a non-Spanish speaking
39 staff in the county elections administrator's office. And when we
40 appeared, not to sue them, in fact rarely, this was a rare occasion where
41 we went to negotiate, we were simply told flat out by the elections
42 administrator that we were wrong, that this was correct Spanish -- he
43 didn't speak Spanish either -- that it was correct Spanish, and we were
44 simply wrong, and that he was going to go forward with his translation and
45 to heck with the rest of us.
46 With respect to Section 5, political jurisdictions failed to timely
47 submit for pre-clearance of their elections changes or they just don't
48 submit at all.
49 In fact, MALDEF could spend all of its time doing Section 5
50 enforcement actions in the state of Texas.
51 We limit ourselves to litigation where we believe the change is going
52 to either be retrogressive or in violation of Section 2.

1 And my example is that in the spring of 2003, Bear County closed a
2 very large number of its early polling places, and all of the early voting
3 polling places on the west side and south side of San Antonio, which is
4 where the Mexican-American population is concentrated. They also
5 failed to timely submit for pre-clearance under Section 5.
6 If the Justice Department had had an opportunity to view these
7 changes, we have no doubt that they would have concluded that they were
8 retrogressive. Because if you shut down every early voting polling place
9 in the Mexican-American neighborhoods, this is going to have an impact on
10 the ability to vote.
11 We brought an enforcement action and were able to get an injunction
12 from the court to get those polling places reopened.
13 Even today, Section 5 prevents retrogressive changes from being put
14 into place. We won a statewide objection in the year 2001 with
15 respect to the redistricting plan for the Texas House of Representatives.
16 There we were able through getting this objection from the Justice
17 Department to restore three Latino majority Texas Representative districts
18 to the redistricting plan which had been eliminated by the -- I believe it
19 was the Texas legislative redistricting board that did not plan.
20 In Arizona, where I've done some work, even though it's outside my
21 area, it's very, very important to hold the line on retrogressive changes.
22 MALDEF led the Latino effort in 2003 to prevent the dismantling of
23 congressional district four, which is the Latino majority district here in
24 Phoenix, which elected Ed Pastor to the United States Congress.
25 After that district was redistricted as a Latino majority district,
26 certain plaintiffs brought a lawsuit to dismantle that district and lower
27 the Latino population below 50 percent.
28 We intervened and we were able to persuade the judge, even though he
29 was a state court judge, that if he allowed congressional district four to
30 be dismantled and lowered below 50 percent, it would no longer be effective
31 to elect a Latino candidate of choice, and that it was likely to lead to
32 an objection from the Justice Department.
33 So even though this case was not in the context of a pre-clearance
34 action, we were able to talk about Section 5 and talk to the court about
35 the implications and the requirements of Section 5, and we won a ruling
36 that preserved the Latino population in the congressional district.
37 MALDEF offers these from the southwest region to emphasize the vital
38 importance of the Voting Rights Act to Latinos in our struggle to overcome
39 discrimination in voting. The continuing nature of this discrimination
40 shows us that we must achieve reauthorization to continue in our forward
41 progress.
42 Thank you very much.
43 MR. BILL LANN LEE: Thank you, Ms. Perales.
44 Now, Andres Ramirez will be talking about Nevada.
45 MR. ANDRES RAMIREZ: Nevada.
46 MR. BILL LANN LEE: Nevada.
47 MR. ANDRES RAMIREZ: Nevada.
48 MR. BILL LANN LEE: In California we say Nevada.
49 Mr. Ramirez used to work for us under Harry Reed. Is that correct?
50 MR. ANDRES RAMIREZ: That's correct.
51 MR. BILL LANN LEE: Thanks for correcting me.
52 MR. ANDRES RAMIREZ: Senator Reed wouldn't forgive me if I didn't.

1 First of all, Mr. Chairman, members of the commission, good morning.
2 My name is Andres Ramirez. I am a resident of North Las Vegas, Nevada,
3 which is a city in Clark County, in the state of Nevada.
4 I'm here today to talk to you about the voting experience of Latinos
5 in Clark County. Before I begin, I'd like to take some time to talk
6 to you about the demographics of Clark County, to give you an understanding
7 of our community.
8 Clark County is one of the fastest growing counties in America. And
9 the growth is spearheaded by the influence of Latinos.
10 The city of North Las Vegas is the second fastest growing city in the
11 nation, and there are estimates that the Latino population is approaching
12 42 percent of the total population. There are over half a million
13 Latinos in Clark County. And according to the census, there are more
14 Latinos in Las Vegas than there are in Albuquerque, New Mexico, which is a
15 huge misconception.
16 So the population is growing extremely, extremely fast.
17 Many of the Latinos arriving in Clark County are recent immigrants or
18 residents from California who decided to move.
19 Looking for jobs in the casino industry or construction.
20 I have been involved in voter empowerment projects for several years
21 in Clark County. Most recently I served as the state director for the
22 organization Voices for Working Families. The process of involving
23 Latinos in the political electorate has been an arduous task. There are
24 many challenges and obstacles to overcome to accomplish this scope.
25 It's been extremely difficult, and I'll start by saying Clark County
26 is one of the newly covered regions by the Voting Rights Act, because of
27 the Hispanic influence, and so our experience with the provisions and with
28 enforcement have been fairly recent.
29 And it's caused us to take a hard look as to where we are as a
30 country, as a community, and how far we need to go.
31 But the tremendous growth of Hispanics has caused quite a bit of a
32 backlash in the community and has sparked very racist behavior.
33 Upon announcement in 2002 allowing voters to register and to vote in
34 Spanish, the election department was inundated with complaints.
35 I believe the last official tally was a little over 10,023 letters of
36 complaint from people who were appalled and stating that everyone who
37 wanted to vote, who didn't want to vote in English, should have to go back
38 to Mexico to vote in Spanish.
39 It was just very bluntly, almost immediately after we announced that
40 we would be offering voting in Spanish, the group the National Alliance
41 began recruiting in Clark County to organize an effort to stop any efforts
42 of opportunities for Spanish speaking voters in Clark County.
43 So it's, to say the least, it's been exciting to deal with the issue.
44 I think many folks, Mr. -- Claude talked about the early civil
45 rights. It's almost as if we're going through that now, dealing with those
46 issues of protest.
47 Among minority issues, we have several problems of discrimination
48 against the African-American community in Clark County as well. Recently
49 there was an African-American well to do who moved into an affluent
50 neighborhood to join the exclusive golf club because he liked to golf.
51 Upon joining, he found a letter found by his school age daughter pinned to

his door with a picture of a Black man hanging, saying the only good, excuse me, nigger is a dead nigger.

And this was, you know, three months ago.

And this is stuff we're beginning to see in our community explode more and more and more.

Again, with the racism in our communities, and it's something we know we have to deal with and we can't just stand down and let it happen.

But, you know, change is difficult for a lot of people. And people are afraid of what they don't know.

So we have to make sure we educate them about what the law is and why we're pursuing this matter.

I also want to talk about the positive steps taken in Clark County.

As I said, 2002 Clark County election department implemented the new voting machines to enable Spanish language voting. These machines were also able to print a voter verified receipt of the ballot cast to make us the only state in the nation to implement such a system.

It was implemented in 2002, and in 2004 we were the only ones that used a voter verified receipt.

And we continue that now.

These machines that we purchased are multi-lingual. So we don't just offer languages in Spanish. They can be programmed to offer any language that we may need to adapt to.

But, in addition, the election department established a Latino advisory board to help develop education or outreach strategies in the Latino community, as well as they assigned a permanent staff member to serve as a liaison to the Latino community.

And these were, these to us were very, very important steps.

Ms. Perales talked about early voting. In our community, all the early voting locations in the Latino locations are determined by this advisory commission. They decide where they go. They decide what days, the hours of that, and that's what the election department establishes.

The election materials that are produced in Spanish are contracted to a Spanish interpreter, and even still are given to the Hispanic advisory committee to review to make sure they're understood, that the language is simple enough for an average voter to comprehend.

This advisory board has served as a great accomplishment for the election department to ensure that Hispanics have a voice at the table.

And having Elsie Garcia, who is a staff member for the election department, there on staff as well, who is fluent in Spanish and serves directly as a liaison to work with community projects and community organizations to help educate Hispanics about the new voting systems, has been extremely helpful.

These are very important first steps. However, they are just that. They are first steps, and we have a long way to go.

Because we are a newly covered jurisdiction, there has been a lot of misinformation that has been spread over time.

Part of that also comes from the fact that we have people that move to Las Vegas from around the country, not just from California, and there are different voting patterns and rules in each state, as a state establishes its own voting regulations.

So when they come to Las Vegas, for instance, our early voting rules are different in Clark County than they are in Florida, than they are in

1 Texas, than they are in Arizona. The method in which we establish
2 them also differ.
3 In Clark County our early voting systems, you can vote anywhere. Not
4 in the same city. Doesn't matter where you go. You can live in Mesquite
5 and go vote in Las Vegas if you want. It's offered Saturdays and
6 Sundays. We have it available at malls, at grocery stores.
7 We make it as easy as possible for people to vote. We need to allow
8 people to be able to vote in those areas.
9 But people who aren't used to that don't quite understand, and when
10 we try to teach people about early voting, they think we mean for them to
11 show up at the polls at 6:00 a. m. , not necessarily voting before election
12 day.
13 So the educational process about the differences has been a huge,
14 huge problem for us. And also, as I said, just simply the
15 misinformation.
16 Many Hispanics who are first time voters or newly registered voters
17 have been told they can only vote once.
18 So if they happen to vote in the primary election, they believe they
19 cannot vote in the general election because they'd be breaking some law
20 because they've been told you can only vote once.
21 There's simple misunderstandings, but yet when you're talking about
22 someone who has never voted in this country before, it's valid for them not
23 to understand what's going on. Hispanics have also been told they
24 need to speak English in order to vote.
25 Which is also a clear violation.
26 So they have problems.
27 They've been told they need a driver's license, which we know is
28 incorrect. And many, many other false statements.
29 We've also had, especially last year, lots of problems with voter
30 fraud and voter intimidation.
31 One of the motion blatant things that was happening was that non-
32 citizens, Hispanics, were being registered to vote and told that once they
33 became citizens their registration would be active, which is clearly
34 against the law for them, but that's what they were told.
35 And people would show up in nice suits and said, no, you have no
36 problem, we work for the election department, trust us, this is perfectly
37 legal, we're trying to make sure that you're taken care of ahead of time.
38 Obviously it's against the law for people to sign an affidavit saying
39 when the registration form expressly says that you are a citizen and they
40 are not.
41 We were able to identify the problem after many people called us and
42 told us this was happening with the election department, to submit their
43 names, and their forms were discarded, and they weren't reported to any
44 agency for violating any laws for registering to vote even though they
45 weren't citizens.
46 But that happened quite a bit, especially last year.
47 We had several forms of Hispanics who went to register and their
48 forms were found in the dumpster outside some stores, so their forms were
49 not submitted and they could not vote. Hispanics were told that
50 polls closed at 9:00, 9:00 p. m. Again, people would knock on the doors,
51 give then a call, saying, hey, Hispanic, the polls in these communities

are going to close at 9:00 p. m. So if you work a little later, don't worry, you'll still have time to vote.

By the way, these messages were given to them in Spanish, so they assumed they were legitimate statements.

So there are just a lot of problems.

I could go on and go on about all the stuff we experienced last year.

But I'd like to spend some time on some suggestions, at least in Clark County, that I see we can do to improve the system and help develop how we want to work this Hispanic community.

MR. BILL LANN LEE: Can you do that in about two minutes?

MR. ANDRES RAMIREZ: I can do it in one and a half.

Currently there is no system established in Clark County to assess how many Latinos are Spanish speaking. This information is useful. Although we know how many Hispanics there are, we don't know how many really speak Spanish and whether the Spanish speaking come from Guatemala, Mexico, Puerto Rico, Cuba, or various.

I think that's something that we need to begin to collect at some point. What are the Spanish speaking groups, how many speak Spanish.

Also, I think there should be some sort of function on the voting machines to enable us to track how many people are choosing to vote in Spanish, so we know, you know, 50,000 voters needed to vote in Spanish, or 5,000, so that we know that information.

In Clark County, we have a hotline for Spanish speakers for them to call for any assistance they have with voting problems. It's answered by only Spanish speakers that work for the election department.

However, they don't keep a log of how many people called to report problems. They have a hotline, but no information that's kept.

I think there's just some ideas that we want to start tracking. If there's information and it's being reported to an official agency, that this agency be required to tabulate and keep these, these reports of discrimination or problems that they have.

In regards to the Voting Rights Act, it is my assessment that improvements accomplished in Clark County would not have been obtained without the requirements detailing the Voting Rights Act. Specifically the bilingual voting materials requirement. As I mentioned, when the election department announced the availability of Spanish language, they got inundated with complaints.

And we have no Hispanics at the Clark County commission among our elected officials. A lot of them got a lot of pressure not to allow this.

And it would have been easy for them to buckle and say, screw Hispanics, we don't need to spend the money buying new machines and translating materials.

But because there's a law that requires them, they were forced to do so.

In addition to Clark County, we have cities in rural Nevada such as West Windover that are 58 percent Latino and are not covered by this.

In many of them, as a matter of fact in Windover, almost 90 percent of them are Spanish speaking of the Hispanics there.

We have a huge influx of Filipinos in Clark County. I think they now total more than five percent of the population. I

1 t's only a matter of time before we start providing the voting in
2 their language as well, and I can just tell that these protests are going
3 to continue again and again.
4 And if we don't have these requirements in place for the teeth to
5 force the local governments to offer these services, I don't think it's
6 going to happen and many Americans are going to be disenfranchised.
7 Thank you for your time. I'm open for questions.
8 MR. BILL LANN LEE: Thank you, Mr. Ramirez, for that report from the
9 front lines of Clark County.
10 Mr. Olivas.
11 MR. ALBERTO OLIVAS: Thank you very much. It's Olivas actually.
12 Alberto Olivas. I'm here --
13 MR. BILL LANN LEE: As you know, those of us from California are
14 challenged in many ways.
15 MR. ALBERTO OLIVAS: But it was very close.
16 I'm here wearing several hats. I should mention that I'm a newly
17 appointed member of the board of directors of the Arizona Commission on
18 Indian Affairs.
19 I was born in Sierra Vista, Arizona, near our southern border with
20 Mexico. And I am the border outreach director for Maricopa Community
21 College's Center for Civic Participation. We're the largest
22 community college district in the nation. We serve over a quarter million
23 students throughout Maricopa County.
24 And our voter outreach program, which frankly I predicated on my
25 previous experience as state border outreach director for Secretary of
26 State Betsy Bayless, seeks to use our ten community college campuses and
27 resources to provide outreach to our communities and educate community
28 members about important election issues and help build skill levels of
29 voters so that they can understand processes and really begin grass roots
30 level deliberation about policy issues in ways that are meaningful to them
31 and to their communities, starting with local and municipal elections,
32 school district, state, and all those things.
33 What I found in my service as voter outreach director for both
34 Secretary of State Betsy Bayless and currently for the community college
35 district is that a lot of the perceptions people have about non-voters are
36 pure myth.
37 In particular, when we're talking about young voters, 18- to
38 25-year-old voters, trying to understand why they don't vote. When I
39 began my service in the state, it was a brand-new project, the voter
40 outreach program was newly created, and I sought to bring my anthropology
41 background as a scientist to understand the behavioral and psychographic
42 factors affecting non-voters. What was the difference fundamentally
43 between a non-voter and a regular voter and how could we connect those
44 dots.
45 I had to unlearn a lot of things I thought I knew about people that
46 don't vote.
47 In particular, young people, as we did surveys, looked at research,
48 what other states had already been doing, we found that most young voters
49 that aren't voting will tell us that they do feel it is important, that
50 they do think it's a very critical responsibility, but that they don't
51 vote because they don't know how. They don't know enough to vote that they
52 feel it's irresponsible to vote on issues that they don't understand, and

1 that they don't have the skills to understand the system or access it.
2 In Arizona, we do a terrible job of educating our students about their role
3 as citizens.
4 It's something we're struggling with today, where our learning
5 standards that drive curriculum in our state focus on history and facts and
6 names.
7 They don't focus on building skills.
8 And there's an international study that's been out for a few years
9 now that's looked at public education in industrialized democratic nations
10 all over the world to look at what works. What they found is that
11 skill building results in graduating students that understand their role as
12 citizens, are interested in and passionate about voting, and can engage in
13 very high level dialogue about their own nation's policies and political
14 issues. Our students don't look like that, because our students
15 aren't given stills.
16 They're told to memorize facts and dates and names, but they don't
17 understand how to hear news coverage of political issues and understand
18 what's being discussed.
19 They don't understand how fundamentally to vote, how to register to
20 vote, what the time lines and processes are.
21 So as I began my service doing voter outreach, I found I had to do a
22 lot of basic education about election processes, things that people should
23 know and don't know and are embarrassed to admit they don't know because
24 they thinking they're the only ones. That's true for most young voters in
25 our state. They're not given that training in our education system.
26 The problem is only exacerbated in our rural and small towns, which
27 make up 13 of our 15 counties in Arizona. It's even worse for people that
28 have language impedence, which is certainly the case for many of our 21, 22
29 tribes in Arizona and for our Hispanic population.
30 It angers me to no end when I think about -- I thought all the people
31 from California moved to Arizona, coming here to buy houses and making them
32 too expensive for me to buy a house.
33 But Arizona was Indian country before it was anything else.
34 And then it was Indian country and Mexican country before it was anything
35 else. It's only very recently in our history that we're part of the
36 United States, and we have a real cultural change now that it's really
37 making my home town of Sierra Vista a place I don't want to visit anymore.
38 When I was born, it was a little town. Hardly heard about it. A
39 very beautiful part of the state. And people got along. Indian people,
40 Mexican people, and Anglo people. Starting about ten years ago,
41 immigration started pushing everyone through the worst part of our deserts
42 because of their increased enforcement in California, Texas, and Mexico.
43 Arizona was the only place they could come in. And they started coming
44 through the Tohono O'Odham country, which if you don't know how to live in
45 that country will kill you.
46 And so, for about ten years now we have untold numbers of people,
47 many undiscovered, that have perished trying to make the crossing.
48 And the ones that do get through are having a real devastating effect
49 on that part of the Indian nation over there.
50 Those people have had to suffer undue burden.
51 But also the ranchers in Cochise County went from -- as a result of
52 seeing all this increased immigration coming through this part of Arizona,

1 have very much reacted. And our state as a result of increased immigration
2 and as a result of natural Hispanic population growth is becoming very
3 reactive and very hostile to minorities in general and Hispanic minorities
4 in particular.
5 And even more so to Spanish language issues, as they're starting to
6 see more media in Spanish, more signs and television shows, stores with
7 Spanish signs, and election materials. It's like every time they see one
8 of those things, it just make these them angry. They want Arizona to
9 be an English only state, and we have a proposition that's going to be on
10 our ballot next year to make us an English only state where no official
11 government business can be conducted in any language other than English.
12 I think that's driven by a fear of Hispanics taking over the country.
13 In Maricopa County where a quarter of the population now, and we're
14 growing rapidly throughout the state, I don't think there's purposeful
15 intent to affect Indian tribes. I may be naive on that, but I don't think
16 there's overconcern to make sure Indian people are not adversely affected.
17 I think most voters in Arizona have not given it any thought, but
18 that it's not a high priority of them.
19 We have a history in Arizona, a very long history, of preventing
20 people from accessing their civil and voting rights. That's why I'm afraid
21 of the expiration of some of these provisions.
22 I love my state, but I don't trust it. Having worked for state
23 government and done community outreach locally and statewide, I don't think
24 we have a political culture had that has any interest in protecting the
25 rights of minorities.
26 We don't prepare people to defend themselves within our state with
27 our civic and social studies curriculum. We have more and more people that
28 are becoming citizens, legally becoming citizens, entitled to all the
29 rights and provisions of citizenship, that speak pretty good English.
30 But, and I'm going to harken back to my anthropology, I got to study
31 language acquisition issues. I know scientifically and also through my
32 family that if you're past the age of puberty and you start to learn
33 another language, you may get to speak it pretty good, but it's next to
34 impossible to be able to read technical information in another language and
35 understand it.
36 I have a college degree, and I speak both languages fluently, and I
37 worked in elections, and it was still hard for me to read our publicity
38 pamphlet and make heads or tails of it. I have to confess, I never
39 read it before I worked in elections. It was just onerous to get through
40 that.
41 I think it's incumbent upon us as civil officials and as civil rights
42 workers to find ways to hold election officials in state governments
43 accountable for making election information understandable and user
44 friendly for all citizens in their languages.
45 I understand the concern about making these provisions permanent.
46 In particular the pre-clearance provision and the examiner and observer
47 provisions I think should have the lines be reviewed on a periodical basis.
48 I think Section 203 language provision is one that could be implemented as
49 a permanent standing provision based on census data.
50 I also think a lot of the resistance that election officials have to
51 providing election information in other languages is based on expense, and
52 that's reasonable.

1 But I think there are very practical solutions to reducing the cost.
2 For example, as my colleague has mentioned, allow voters to indicate
3 their preference, when you register to vote allow voters to indicate what
4 language you want to receive election information in. Also allow voters to
5 indicate how they prefer to vote.
6 In Maricopa County, I think all counties in Arizona you can't get on
7 a standing list to vote by mail.
8 I am a voter that prefers to vote by mail for a number of reasons.
9 I think voting by mail allows a lot of our minority and rural
10 residents to vote with much more practicality and time to consider their
11 issues and do some research and consideration and avoid a lot of the issues
12 they face at the polls when they get challenged and have their rights taken
13 from them by poll workers, either on purpose or just because they're not
14 trained or not conscientious.
15 But I'm not able to indicate that I always want to vote by mail. And
16 it's very difficult for me to do that every time.
17 And I know better.
18 But for voters that have less education or less familiarity with
19 voting systems, that's difficult.
20 Voters should be able to indicate that they want to vote by mail or
21 vote at the polls and in what language they want to get their materials.
22 That would result in a lot of cost saving.
23 And I'll cut my other comments. Thank you very much.
24 MR. BILL LANN LEE: Thank you very much.
25 Now we return to Reverend Tillman.
26 REVEREND OSCAR TILLMAN: You have it correct.
27 MR. BILL LANN LEE: If you wish to say something about California, I
28 wish you would say it sooner than later.
29 REVEREND OSCAR TILLMAN: Chairman, I'm glad to see you again.
30 I remember introducing you at an NAACP regional conference several
31 years ago when we had people at DOJ that cared about us. So I'm glad to
32 see you here this morning.
33 I have been, and it's kind of going back some years, I see in
34 Anderson County, North Carolina, where I was born and raised, still under
35 watch.
36 And I joined the NAACP in 1952, in Anderson County, North Carolina.
37 So we are here today still fighting what we did in 1952.
38 That's a sad commentary on America today, 2005, that we're still
39 having to go and do this over and over again.
40 When I sat down, I said I wonder what are we going to accomplish.
41 We need to send a message, and we need to state that we have voter
42 rights that are being trampled upon.
43 I believe that the national NAACP and the local, because we received
44 awards three years ago for the number of people that we signed up and got
45 out to vote, Maricopa County, I cannot find where they've ever had a
46 problem on getting the Black and minorities to vote. It's just the
47 fact that somehow seemed like the votes disappear. You can talk to
48 everybody who voted, but yet whenever they're counted, somewhere they're
49 not there.
50 We have, and that's -- I'm filling in basically because the only
51 known Black state elected official, Representative Leah Landrum Taylor, who

1 was supposed to speak, she was notified yesterday that they're on lock down
2 until they get a budget passed, so she's not here this morning.
3 But something is very wrong whenever everybody is out voting but yet
4 somehow between the time you vote and the time they're counted, some very
5 magical numbers come into play.
6 And I'm not going to be as a good old Baptist preacher, I'm not going
7 to kill anybody that's doing anything wrong. But I know one thing, I can
8 count one and one. When they don't come out to be two, somebody is not
9 telling me the truth.
10 The other part of the picture is that the outreach, we have gone and
11 we have found out that our churches have been, as you say, back to the
12 basics.
13 We work very close with the churches. On election day, regardless of
14 whether it's local, state, national, the churches make their buses, their
15 vans available to carry people to the polls. The NAACP have a
16 special fund set aside that we will, if you cannot find a bus, van, or any
17 other way to get to the poll, we have a certain taxi, you call that taxi,
18 we pay the taxi to get you to the polls.
19 We have done that.
20 But yet we still cannot find, and personally the state as a whole, of
21 the legislators as a whole, have really embraced the Hispanic, African-
22 American, and other minorities to vote. It's taken for granted in this
23 state.
24 You vote, okay. You don't vote, okay.
25 We prefer you not to vote because we think you're going to vote for
26 the other candidate, and I won't even mention the other candidate.
27
28 But that is the gist from the national representatives and
29 Congress people all the way down as to their feeling about the Black vote,
30 specifically in Arizona.
31 And until we get to that point where everyone is serious about
32 voting, everyone -- I moved into Willow Historic District over 12, 13 years
33 ago.
34 I have voted at four different places during my 12, 13 years there.
35 So every time you mention voting time has come around, you have to
36 first search out where to vote this time.
37 If you do not pay close attention to that little pamphlet, you're
38 going to drive up. You're not here. You're on your way to work or getting
39 off work, so that's a vote that you and your wife or whoever is not
40 counted.
41 We would love to see where it remained one place. Somewhere, I don't
42 care.
43 If you got four places you're voting at, one of them should suffice.
44 When you continue to change, you confuse the people. So number
45 one, our vote is not taken serious.
46 We fought hard, going back to Anderson County, whenever you go up to
47 vote, and you had to read. And I just wanted to mention here today what
48 they make you read. You miss one word. That one word was always
49 ascertain. If you said "a certain", you can't vote. We're doing
50 that same stuff now. And they're trying to pass rules in this state where
51 you can only vote under this rule.
52 We have historically in the NAACP signed up voters.

1 We were told by the Attorney General we can't do it anymore until
2 this matter Proposition 200 is cleared up.
3 So something that we have taken pride in, I've been president of
4 either local or state going on 20 years here in Arizona. And we take
5 pride in signing up people to vote.
6 We can't even do that anymore.
7 So the system is broken. I don't know how we're going to fix it.
8 But until we get it fixed, we're losing our young people because they look
9 at it, say, why vote, it's not going to count. So along, and I
10 reiterate, we need the teeth back in the Voter Rights Act. We know we have
11 the right to vote. But unless we have the teeth there to make these states
12 do what they need to do, are supposed to do, we will not. We'll go back
13 to where we were in Anderson County in the 1950s and '40s.
14 Mr. Chairman, thank you, and I pray that you'll all do something to
15 change this and turn it around.
16 God bless.
17 MR. BILL LANN LEE: Thank you, Reverend.
18 Mr. Valencia.
19 MR. ROBERT VALENCIA: Good morning, Mr. Chairman, members of the
20 panel.
21 My name is Robert Valencia. I'm with the Pasqua Yaqui tribe. It's a
22 relatively small tribe, a little pinprick next to our neighbors the Tohono
23 O'Odham Nation.
24 We're about 4500 people on the reservation, 13,000 overall. We
25 have communities here by Tempe, in Guadalupe, Scottsdale, and around the
26 Tucson area. So we're all over the place.
27 One of the things I wanted to -- things that have been touched on is
28 the general fear of the minority voting, I guess.
29 You know, there's the Prop 200, which is causing a lot of
30 misinformation.
31 If I could read a couple paragraphs out of this news section last
32 week, it is entitled Napolitano Vetoes Voter ID Bill Citing Legal Reasons.
33 Janet Napolitano vetoed legislation Friday to bar some people who
34 show up at the polls without identification from voting.
35 Napolitano said that the measure, Senate bill 1118, is illegal
36 because it violates the federal voter Help America Vote Act.
37 She said that could result in properly registered Arizona citizens
38 being denied the right to vote.
39 That's something, you know, that law is one thing, and we can argue
40 that up and down, but, you know, to -- I'm talking about Native American,
41 our people on reservations, sometimes, you know, poll workers may be given
42 the wrong information, and, you know, it's like, well, maybe you can vote
43 next time.
44 And the election -- in ours it doesn't happen, because we -- all of
45 our tribal members work at the polls, but sometimes at the other locations,
46 some of this misinformation may be going around.
47 We're talking about, at one point in time, because of some of these
48 rules, one rule that is implied to say, grandmother, those are the rules,
49 you don't have an ID, I know who you are, grandmother, but if you don't
50 have your ID you can't vote.
51 Those type of things.

1 I know that they said tribal IDs would suffice, but some of the
2 people don't have those things.
3 Or they don't have the addresses, depending on the tribes.
4 So there's a lot of that happening.
5 It's not the rules themselves, but how they're interpreted that it's
6 very dangerous. We vote, both our tribes, Tohono O'Odham and our
7 tribe, at the last -- in 2002, took a very active role in getting the word
8 out, and I think we were pretty successful, as Mr. Norris alluded to.
9 The governor credited the tribes for their work in both successful
10 passage of the gaming bill and the election.
11 That's something that we gained a lot of strength from.
12 Some of the things that have changed locally over the Tucson area is,
13 especially with the, I guess, the Pima County voting -- I forgot their
14 name, one of the things is that our people are generally trilingual, so as
15 far as the 203 requirement, English, Spanish, and Yaqui. What has
16 happened before is we already have materials in Spanish, shouldn't that
17 suffice. Well, no, some people may not read Spanish or understand it
18 as well.
19 So the other was, you don't really speak Yaqui, do you?
20 In any case, it's changed from that to where we have our own tapes
21 and we have our own information in our language. And sometimes it works
22 both ways.
23 Sometimes two phrases might be ten pages, or, you know, vice versa.
24 But that's important for us, because the way that I look at things,
25 if an elderly person that's on dialysis, can barely move and walk, their
26 vote is just as important as a multi-millionaire living in the foothills.
27 It makes no difference whatsoever.
28 There has been attempts at marginalization. In our local paper,
29 people expressed that Indians don't matter because they don't vote, so what
30 does it matter, what are they crying about.
31 That's not the case.
32 The more we learned, the more I feel that these type of commissions
33 are out there, the more that we can gather strength in being able to
34 exercise those votes.
35 We do support, the tribe does support the position on Section 5 and
36 203, because they are important.
37 In particular, the dialogue we've had with the Pima County voting
38 division has been also because of the work of Bruce Saddlestein. We met
39 with him a few times, and pretty much he's helped us to learn what are the
40 things that we should be looking for.
41 And I think, like I said, at this point in time that it is getting a
42 little bit better. We know -- the more information that we know, the more
43 we know what to do with the next election. But, in any case, I'd
44 like to thank the commission for coming out here, and, you know, there's a
45 lot going on.
46 It's really hard to express everything in six, seven minutes. And I
47 think I'm the only one who is probably under the time here.
48 In any case, thank you once again.
49 MR. BILL LANN LEE: Thank you, Mr. Valencia. Thank you for coming.
50 We have five minutes until the end of the tape. So we'll go for five
51 minutes and take a break afterwards in order to change the tape.
52 Is that okay?

1 Judge?
2 HON. PENNY WILLRICH: Let me direct this question to Mr. Olivas.
3 Specifically from Maricopa County, how do you think Maricopa County
4 specifically would be impacted or affected if the three provisions of the
5 Voting Rights Act were allowed to expire? MR. ALBERTO OLIVAS: Right
6 now we have various consent decrees with our surrounding Indian tribes that
7 provide for provision of election information in their respective
8 languages. The counties currently struggle with being able to provide that
9 information in a cost effective manner.
10 I know that that would not continue were the Section 203 to expire.
11 Maricopa County is a major source of relocation of refugees from
12 other countries that become citizens, not just Latin American.
13 Having worked with Secretary Bayless, I was able to speak on her
14 behalf at numerous swearing in ceremonies for new citizens.
15 I can tell you that nobody takes their voting rights more seriously
16 and enthusiastically than new citizens from other countries.
17 Many of them are quite elderly, and it is especially difficult for
18 them to learn this language coming to this country at 60, 70, or 80 years
19 of age.
20 They have upon receiving their new citizenship all of their rights
21 and privileges afforded to them of voting and all the responsibilities that
22 citizenship entails, and they shouldn't have more obstacles imposed upon
23 them than somebody that is fluent in English.
24 And I'm very much afraid that the expiration of 203 will mean there
25 will be no language provision for those citizens.
26 We have, in fact, several communities in our county, but other
27 counties in our state are very much distressed and put upon to provide
28 equal access to elections and voting for their citizens.
29 And it's something that is constantly going to the Department of
30 Justice for pre-clearance, changes to procedures, changes to how we provide
31 information, to make sure that we're not putting our rural and small town
32 and reservation citizens at a disadvantage as compared to Maricopa County,
33 that in rural parts of our state, rural parts of our county, people have
34 the same access to information and ability to get to their polls as they do
35 in Maricopa County, that the equipment that they use is suitable for them.
36 We are still struggling with our redistricting of our legislative and
37 congressional districts in Arizona. And without the pre-clearance
38 provisions, we wouldn't have any protection for minority and rural voters
39 and Indian voters in Arizona.
40 Many of our outreach efforts as described by Ms. Pew are modeled on
41 wonderful programs in New Mexico, California, Texas, and other states, but
42 mainly they -- I have to say, even though we have some county recorders and
43 election officials that take their duty very seriously, in many cases we
44 only have these outreach programs because of our consent decree issue or
45 pre-clearance issues that require us to demonstrate to the Department of
46 Justice that we are treating all voters in the state of Arizona equitably
47 and fairly.
48 Without the pre-clearance provision and 203, minority and small and
49 rural citizens would have great disadvantages placed upon them to have
50 access to their voting rights and to election information.
51 I can foresee most, if not all, of our voter outreach programs at the
52 county and state level would be eliminated because they are expensive and

1 they require manpower and hours and dollars, and if there's not the
2 federal onus of that oversight to make sure that we're not violating civil
3 rights and voting rights, I can't foresee that our legislative powers would
4 continue to fund and allow these activities.
5 MR. BILL LANN LEE: You have about 30 more seconds.
6 MR. ALBERTO OLIVAS: I think I'm done.
7 MR. BILL LANN LEE: Let's take a break now.
8 Panelists, if you could stay in your chairs, that would be helpful.
9 (Brief recess taken.)
10 MR. BILL LANN LEE: We're going to start up again from the first
11 questions from Commissioner Vigil-Giron.
12
13 HON. REBECCA VIGIL-GIRON: Thank you. A couple of things
14 before -- I just wanted to answer a couple of things.
15 In Dona Ana County, when I did receive that call that that gentleman
16 on the inside, he was a challenger, he was a watcher, inside. He would
17 call on his cell phone when he saw that person voting provisionally. Okay.
18 Then it was placed in an envelope and marked as such. He would
19 call on the phone to the guy on the outside and say, this guy, videotape
20 him, he just voted provisional, check his license plate so we can see if he
21 is a citizen or not. Okay.
22 We ran him off twice, on two different polling places, by the
23 sheriff.
24 That's in Dona Ana.
25 In Roswell, I think that's an early voting site, and the clerk was
26 able to locate early voting sites wherever they chose. All of our
27 material since 1912 built into our Constitution must be written in English
28 and Spanish.
29 All election ballots are in English and Spanish. All constitutional
30 amendments are translated into a booklet in English and Spanish.
31 Now we have an opportunity to translate into the Navajo language
32 because it is a written language.
33 So we take an opportunity to do that as well.
34 I'm distressed by what I'm hearing, not only because the Voting
35 Rights Act and some of the things surrounding it that would help and
36 encourage what's going on here, but the fact that you have not been able to
37 take advantage of voter education dollars that your states were given.
38 The chief elections official was given millions of dollars to spend
39 on voter education, poll worker training, the purchase of the Help America
40 Vote Act compliant voting machines that assist the disabled and the
41 language minority populations, as well as building their central voter data
42 systems.
43 Arizona, I'm sure, with a population of, what, three million people,
44 four million people, something like that, you received in comparison to my
45 $14 million that I received in New Mexico, you had to have received about
46 $30 million that has obviously not been siphoned down to the locales. And
47 it's not being utilized. And so I urge you, elections officials and
48 activists, demand that money to go to these certain areas.
49 I spent $2 million on a media campaign to teach people how to vote
50 absentee, provisional, in person, how many days prior. I spent $2
51 million in a market of 1. 9 million people in the state of New Mexico in

1 English, Spanish, and Navajo. They ran every 30 minutes prior to the
2 election, beginning 30 days prior to that election.
3 So what I'm hearing, I'm very distressed.
4 Penny, this is for you. Did you receive any -- how do you receive
5 your election materials?
6 Because I'm in charge of that.
7 I translate all of our election materials into Spanish, and I have my
8 Navajo coordinators who translate into the Navajo language. Martin
9 Avila, who coordinates the Tia'Timma'Tomma (phonetic), the two Apache
10 languages into the various languages to -- at least the spoken language, to
11 let our Native Americans know that the proclamation has been issued, that
12 these are the constitutional amendments in those languages. How does
13 it work in Arizona?
14 MS. PENNY PEW: In Arizona we have the Secretary of State contracts
15 with the Navajo speaker and writer. In the past it's been Mr. Harold
16 Noble, who is also in the county as an election outreach, was there when I
17 began.
18 He's very proficient. Everything that is translated is presented to
19 the Navajo Nation contact, Mr. Kim Apiazi(phonetic), for approval, he
20 signs off on that, and then it goes to the state.
21 The State disperses, in this last cycle, all the propositions.
22 We also have --
23 MR. BILL LANN LEE: Could you get closer to the mike?
24 Thank you.
25 MS. PENNY PEW: Matthew Noble, you met him earlier. He's very
26 proficient in the Navajo language.
27 He writes all of the translations that we have from the schools, to
28 the county, to the everything that we do, the pamphlets.
29 They are also now in a linguistics class through the Diné College, so
30 they can continue their education. And it's very crucial that they stay up
31 with the linguistics that are in the language as well.
32 That's how we take care of it on the county level. We know the
33 qualifications that it takes to be a Navajo writer and a speaker.
34 Far be it from me to make those determinations. They have been given
35 that responsibility. And the Navajo Nation and our county work very
36 closely to make sure that those are coordinated efforts.
37 MS. REBECCA VIGIL-GIRON: Did you have any issues that came up during
38 the 2004 elections at any of your polling places by your citizens, your
39 voters?
40 MS. PENNY PEW: We had issues in 2002 that were Caucasians going on -
41 - I believe there were 11 precinct polling places that we had a Caucasian
42 go into the polling place and intimidate and cause far more destruction and
43 commotion that should not have happened. So to try and prevent that
44 in 2004, I presented a political protocol manual and pamphlet. And we gave
45 many presentations, invited personally each candidate, county, state, and
46 federal, or their designee, with a sign-in sheet, to make sure that they
47 attended one or more.
48 They were each given a political protocol manual or brochure, so that
49 we could ward off anything else.
50 It was very disturbing to have the Navajo strong inspector in those
51 areas be intimidated by this Caucasian man.

1 And being Caucasian, I said to him: We'll not have this again. You
2 will not do this. And I had the chief counsel of the Navajo Nation
3 draft a letter, and it's in the information that I submitted also to each
4 party representative, to let them know that this is not going to be handled
5 and they will be escorted off the Navajo Nation.
6 HON. REBECCA VIGIL-GIRON: Thank you.
7 MR. CLAUDE FOSTER: May I respond?
8 MR. BILL LANN LEE: Sure.
9 MR. CLAUDE FOSTER: I'm a member of the Texas commission. And I want
10 to applaud what you did in New Mexico.
11 However, the provision that they spend those dollars for education is
12 not a mandatory provision. They have that option.
13 MR. BILL LANN LEE: You need to pull your microphone closer.
14 MR. CLAUDE FOSTER: The provision that states those dollars be spent
15 on education is not the mandatory provision.
16 HON. REBECCA VIGIL-GIRON: It is based on the state plan.
17 Look at your state planning. They have to assign a certain amount of
18 money from whatever it is appropriated to.
19 MR. CLAUDE FOSTER: For poll worker training.
20 HON. REBECCA VIGIL-GIRON: That also isn't mandatory.
21 MR. CLAUDE FOSTER: It's how the states interpret that? And it's how
22 they implemented that?
23 You're to be applauded.
24 It goes back to the point that you said you're the first Latino, is
25 how these rules are interpreted and how they are implemented and the
26 interpretation of those rules.
27 HON. REBECCA VIGIL-GIRON: Exactly. Who is the one interpreting it.
28 The way that I interpret it is fair access to everyone in the various
29 languages. Even the playing field for everyone.
30 Give everyone the same information in the languages of their choice.
31 And that is the way that I read it and the way that we performed.
32 We had a 26 percent more voter turnout than in the 2000 election, and
33 more people voted absentee and more Democrats voted absentee than the
34 Republicans who always have higher numbers by the absentee voters.
35 MS. PENNY PEW: We did reap some benefits also. KTNN reaches into
36 Apache County, and so we got to hear promoting it, and it was helpful in
37 our Navajo areas.
38 MR. BILL LANN LEE: Ms. Pew, it sounds to me that if different
39 states are construing the same federal statute differently, perhaps your
40 national conference would be helpful.
41 MS. PENNY PEW: I think some of you saw what went on in Ohio, heard
42 what went on in Ohio, in Florida, and other states.
43 It depends on the person in charge.
44 I'm the person in charge of New Mexico.
45 And those 33 county clerks don't work for me, but they work for the
46 state of New Mexico, and they have to follow the laws of the state of New
47 Mexico that I have to administer.
48 MR. BILL LANN LEE: Mr. Norris.
49 MR. NED NORRIS, JR. : You know, it's unfortunate. We're sitting
50 here and hearing all these comments about illegal activities going on in
51 the voting places, and it's unfortunate that racism is alive and well in
52 this 21st century.

1 And we need to continue to address those issues that are negatively
2 impacting minority, the minority vote.
3 Speaking of racism, I guess I'd like to find out from Mrs. Perales,
4 Mr. Olivas, actually any of the other panelists, regarding this
5 Proposition 200 that's right now in front of us here in Arizona, whether or
6 not there are any pre-clearance issues that you know of that you can share
7 with us about Proposition 200, and also would like to hear your thoughts
8 about the -- we heard a little bit earlier about the English only issue
9 that's probably going, as Mr. Olivas mentioned, is going to be before the
10 voters of this state.
11 I think that it's important for this commission to understand how the
12 Voting Rights Act, how those laws that exist, the 200 and the potential for
13 English only, is going to have a negative impact on the Voting Rights Act.
14 I'd be interested in hearing your thoughts on that.
15 MS. NINA PERALES: With the commission's permission, I'd like to give
16 the microphone to Mr. Steven Reyes, who is the staff attorney in MALDEF's
17 Los Angeles office, who worked on the MALDEF comment that went to the
18 Department of Justice regarding Proposition 200's implementation on the
19 election changes that were included and what happened with that, since he
20 worked on it.
21 MR. STEVEN REYES: Good morning.
22 MALDEF has been involved extensively in the pre-clearance process and
23 comment process relating to Proposition 200, and we submitted a lengthy
24 comment letter detailing all the problems that would result with
25 implementation of Prop 200's citizenship verification provisions and voter
26 identification provisions for gaining access to a ballot on election day.
27 This included a number of census data indicating the problems with which
28 people, particularly those who are poor, those who live out in rural areas,
29 would have in obtaining access to different forms of ID that might be
30 deemed acceptable by the Secretary of State or by local county officials.
31 Or by, for that matter, poll workers who may be using their own
32 discretion to decide what is appropriate or not.
33 We were lucky to and appreciative of all the help we received by
34 local community groups and national civil rights organizations in also
35 challenging and requesting that the Department of Justice denied pre-
36 clearance for Prop 200's voting provisions.
37
38 Unfortunately, as some of you may have heard yesterday, they
39 very quickly pre-cleared these provisions nonetheless, notwithstanding all
40 these -- the parade of horribles that we outlined for them in our comment
41 letters.
42 More recently, about one month ago, or a little more than a month
43 ago, the Secretary of State's office here released a draft provision for
44 implementation of the voter ID provisions, which immediately drew an outcry
45 from MALDEF, from a number of accounting clerks throughout the state, from
46 different American Indian nations, and community groups as well.
47 And they profoundly affect the ability of rural voters with P. O.
48 Box addresses, without dated addresses on their driver's license, to obtain
49 a ballot. These are people that would have been registered to vote and
50 voting at the same polling place for decades. This would have
51 affected the ability of women who may have changed their name through

1 marriage or divorce to obtain a ballot, because the names and addresses may
2 not have matched.
3 This would have affected those people who may have been too poor to
4 have utility bills, or utility service, automobiles, all of which the
5 census, United States census data corroborates and says there's a
6 significant population within Arizona which lack access to these basic
7 services and utility services, then consequently IDs. So there is a
8 whole chain reaction of consequences for Prop 200 and that we have yet to
9 see the full impact of.
10 Right now thankfully Governor Napolitano vetoed the bill that would
11 have made worse many of these ID provisions, and now counties are not yet
12 implementing the voter ID provisions of Prop 200 and awaiting direction.
13 It's our hope that those stay unimplemented until there is some very
14 clear assurances of exactly the methods that will protect all those type of
15 voters that I mentioned.
16 And there's still some very significant problems with the voter
17 registration process in Prop 200.
18 That has begun to be implemented in the state already. It's
19 going to severely affect the ability of voter reg groups like Southwest
20 Voter Registration Group, like all sorts of groups who conduct non-partisan
21 registration efforts in the state, like the NAACP, to collect and process
22 those voter registration forms. Because many people do not walk around
23 with that type of required proof of ID with them, birth certificates,
24 tribal IDs, passports, et cetera. So there's still a great looming threat
25 in Arizona's voter practices.
26 MR. ALBERTO OLIVAS: I can only echo what Steve has told you about
27 the potential for the impact of Prop 200.
28 As you can see from all of these comments, in Arizona we've been
29 struggling and struggling for a long time with efforts to make access to
30 voter registration more difficult, access to voting and voting information
31 more difficult. And that's with the pre-clearance provisions in place.
32 Without these pre-clearance provisions, these things would just
33 become law, and these are regulations that would just be implemented with
34 no more recourse to voters.
35 We're not a state that's currently very friendly or open to helping
36 bring more people into the voting system. We seem to be more concerned
37 with keeping people from accessing voting and voter registration.
38 As Steve touched on as his last point, it's very possible that with
39 the implementation of Prop 200 and these citizenship, proof of citizenship
40 requirements with voter registration that nonprofit and non-governmental
41 organizations will no longer be able to conduct voter registration in
42 Arizona.
43 This is an unbelievable and unprecedented concept in Arizona.
44 Minority and disenfranchised voters in Arizona are most effectively
45 reached out to and registered to vote and get out the vote efforts are most
46 effectively brought to those voters not by government agencies, but by
47 community based organizations.
48 Now we face the prospect that these organizations, such as the NAACP,
49 no longer being able to do these activities, much less community colleges.
50 Then it will be the sole purview of the state and county to do this,
51 and probably without the resources to do this effectively.
52 Or the requirement to do it, if the language provision is expired.

1 So we could face a very real prospect in Arizona of a future with no
2 community based voter registration or voter outreach allowable in our
3 state.
4 I think it's a horrifying prospect and one that's all too real.
5 MR. BILL LANN LEE: Did you want to add something, Ms. Pew?
6 MS. PENNY PEW: Yes, I would. Thank you.
7 As it relates to Apache County, I find it quite ironic that I would
8 be questioning the citizenship of just about 90 percent of my voters, as
9 they are Native Americans.
10 I did do a test on my own ID to see if I would be eligible to vote.
11 If I vote early I could be eligible. However, if I were to present
12 my driver's license as it appears with the Post Office box, I would not be
13 able to use that.
14 I would have to take a water bill that has my husband's name but
15 would have to have mine added on there to make it my ID as well.
16 I found that quite to be a tremendous burden on a lot of our voters,
17 as it's $25, I believe, to renew and to change my driver's license.
18 I also found the alternate for my tribal ID. They carry a CIB, which
19 is certificate of Indian blood, which is 8-1/2 by 11. Which would be like
20 me carrying my birth certificate around, which I don't do.
21 Nor does the tribe offer a photo ID with an address on there at this
22 time.
23 So I would be turning away in a community of poll workers who are
24 most of them related -- if not related they go to church, they go to school
25 together, they have lived in the same community for quite some time, and
26 absolutely know that each other are who they say they are, I would be
27 turning away and doing exactly what we have tried real hard not to do in
28 the past few years.
29 And I believe if there was a provision that would offer a provisional
30 ballot, I think Prop 200 probably could be dealt with. But without a
31 provisional ballot option for a voter, I could never, I could never
32 implement that with good ethical. . .
33 MR. NED NORRIS, JR. : For the record, just a couple of quick items.
34 Just in follow up to the comments here, and for the record I just
35 wanted to share that for many tribal communities, and I know for a fact in
36 my tribal community, that there are a number of members of the Tohono
37 O'Odham Nation and other tribes that are -- would not be able to document
38 proof of citizenship because they were born in their tribal community, a
39 remote village within the community, under a mesquite tree somewhere, and
40 there's no record of that.
41 They don't -- for all intents and purposes, they were born in the
42 United States of America, but born at home, and don't have proof of
43 citizenship to document their citizenship. The last comment that I
44 wanted to make is that many of the issues that the panelists have raised
45 with regards to Prop 200, and English only, have been -- was specific to
46 Prop 200 -- have been raised by the Tohono O'Odham Nation and other tribal
47 communities directly to the Arizona state Attorney General's Office, who
48 seriously took those issues into consideration and ordered that Prop 200
49 not be implemented this coming next election because of some of the issues
50 that were raised.
51 I spoke to the state Attorney General about a month ago, and thanked
52 him for the position that he took, but he also wanted to let me know that

1 the state legislature was moving towards eliminating the Attorney General
2 from -- that authority from the Attorney General himself. So. . .
3 MR. BILL LANN LEE: Thank you.
4 MR. ANDRES RAMIREZ: Mr. Chairman, I have a question regarding the
5 Prop 200. I don't know much regarding it, but I'd be interested in
6 seeing, just from what I've heard, will this effectively eliminate the
7 rights of homeless people to vote, since they have to have an address
8 requirement?
9 REVEREND OSCAR TILLMAN: In essence, yes.
10 MR. BILL LANN LEE: I think there's a general consensus --
11 MS. PENNY PEW: It's my understanding that if they have an address,
12 they can vote. That's as broad as the statute is given.
13 HON. REBECCA VIGIL-GIRON: A physical address; correct?
14 MS. PENNY PEW: Correct.
15 MR. BILL LANN LEE: So if you don't?
16 REVEREND OSCAR TILLMAN: Then you are not allowed to vote.
17 MR. BILL LANN LEE: We're a bit behind, but I think this has been
18 important. Chandler Davidson has a question.
19 MR. CHANDLER DAVIDSON: I have two very brief questions.
20 The first one is to Mr. Reyes, but I'll ask it via Nina Perales.
21 Would it be possible to have entered into the record the letter that
22 Mr. Reyes wrote regarding the problems presented by Prop 200?
23 MS. NINA PERALES: Yes, and we can get it for you from our website,
24 where we have posted MALDEF's comment on Proposition 200.
25 It's actually a part of a larger report that MALDEF has done on proof
26 of citizenship and voter identification bills that are currently sweeping
27 state legislators across the country. Arizona is not the only state
28 that has seen these proposals.
29 In fact, there are now 15 states that have dealt with them,
30 including Arizona, all the way from Georgia, which just passed theirs.
31 There are bills pending in Texas. Something, something has passed in New
32 Mexico. We're trying to sort out what it is.
33 And they're all, with the exception of New Mexico's, which is a
34 little bit different, most of them are clone bills.
35 Many of them in a sophisticated way have been wrapped up inside
36 immigration related legislation. It is apparently part of a larger
37 backlash across the country to minority participation that has increased
38 since 2000.
39 And will effectively shut down community based registration and
40 thwart minority voting in many, many states across the country.
41 MR. CHANDLER DAVIDSON: Thank you. This will be very helpful to our
42 commission.
43 The other question I want to ask I address to Reverend Tillman.
44 You mention the fact that votes cast by African-Americans in Arizona seem
45 in some cases to be lost, to use your term.
46 I wonder if there have been any newspaper articles that focus on
47 this, any reports, or data collection by civil rights organizations or by
48 local academics that could shed light on this for the commission.
49
50 REVEREND OSCAR TILLMAN: We have looked at it, but I was talking
51 to the person from Nevada, and they're looking at what they're doing now,
52 and that is monitoring online early voting so they can see in the future.

We have not had that.

As a matter of fact, on previous occasions whenever there have been complaints, I have had to practically threaten a protest to get to sit down with election people at the county level whenever -- I had no problem with our Betsy Bayless. She attempted to open up at the state level.

But as I hear her today, and as we're all talking about the different avenues and different directions we're working with the different tribes, that's not happening with the African-American community.

I don't think you can go into any election office and say what type of education are you doing in south Phoenix, which predominantly has had over the years problems with voting. We don't have that.

We are taken for granted now.

No, we do not have that.

But we're working daily to try to find everything someone else is doing and to look around and say, well, we thought that we had a vehicle with clean elections to look at things. But status quo. There are not one Black on the clean elections panel commission, even -- you know, although they're appointed by the governor, but the point is we're not there.

So we have slowly and categorically, the Black vote has been pushed aside, and further pushed aside under the current administration. We've seen that and to the point that how they have gone after our national organization.

So we are trying, every election, we try something new. But the numbers are there. You can go down and pull the rolls. We're there.

But somehow our vote don't translate into electing people. We have one Black on the city council for the fifth largest city in America. We have one Black statewide elected, State Representative Leah Landrum Taylor.

Something has got to be wrong, when we used to have six and seven. What happened?

We haven't died that many. I know I'm getting old, but I'm still here.

So, you know, in the 20 years I've been monitoring this, every year it seems like, you know, like with Prop 200, something new comes on the horizon.

We had to spend all our time fighting Prop 200. We had to take away getting out the vote to fight Prop 200. We did not want that.

We were getting -- people called the NAACP asking when is your election, we want to send somebody to monitor, we want to do the same thing.

I honestly felt like not telling them of the election. North Carolina sent a delegation out to watch. Louisiana sent a delegation out to watch, so did they, as she mentioned, clone 200. Instead of cloning 200, why not look at what we can do better to vote and push voting rights.

That's the problem we have.

Thank you.

MR. BILL LANN LEE: Reverend Tillman, you're still here.

I'd like to thank the panel. We've run out of time. It's been very helpful.

(Applause.)

1 MR. BILL LANN LEE: What we're going to do is go right into the next
2 panel. So James Tucker, Professor James Tucker, and Rodolpho Espino.
3 (Brief recess taken.)
4 MR. CHANDLER DAVIDSON: Welcome to the second panel of the Southwest
5 Regional Commission on the Voting Rights Act.
6 Our chair, Bill Lann Lee, has had to leave to catch a flight back to,
7 pardon my mentioning this, California -- Florida. Well, I don't have to
8 mention California then. So I will be sitting in for him.
9 The panel that we are going to hear now will present the results of
10 an ongoing research project on language assistance problems, conducted by
11 James Tucker, Rodolfo Espino, and ten student assistants in Barrett Honors
12 College, one of whom will assist in the presentation. Dr. James
13 Tucker is an adjunct professor at Arizona State University's Barrett Honors
14 College and co-director of the Voting Rights Thesis Project.
15 Dr. Tucker is an attorney with the Phoenix law firm of Bryan Cave,
16 L. L. P. , and formerly served as a trial attorney with the voting section
17 of the Civil Rights Division at the United States Department of Justice in
18 Washington, D. C.
19 He has authored several articles on the Voting Rights Act, including
20 the forthcoming piece on the language assistance provisions of the act.
21 Dr. Rodolfo Espino joined the faculty of the Arizona State
22 University political science department in 2004
23 Dr. Espino's primary research and teaching interests are in the
24 fields of minority politics, political behavior, and political methodology.
25 Dr. Espino is presently engaged in a number of research projects,
26 some of which include an examination of Latino political empowerment, the
27 campaign rhetoric of Latino candidates in Spanish political campaign ads,
28 and the political behavior of Whites in response to Latinos. The
29 student who will be assisting them today is Elizabeth Andrews of Tempe,
30 Arizona. She's a sophomore in political science and history, a
31 recipient of the National Merit Scholarship, a leadership scholarship, a
32 Robert C. Burns scholarship, and president's scholarship. She plans to
33 attend the graduate programs in law and public policy, foreign relations
34 and diplomacy.
35 I should add, having listened to the presentation of the students
36 yesterday, I think she's off to a flying start, in whichever career she
37 chooses.
38 So we're pleased to have you with us today, and we will begin.
39 DR. JAMES TUCKER: First of all, we want to thank the National
40 Commission again for coming out to Phoenix, Arizona.
41 You know, as you know, we've got two very large language minority
42 groups that are covered under Section 203 of the act, as well as being a
43 Section 404 coverage jurisdiction for purposes of Section 5 of the Act. So
44 we think it's very important.
45 We want to get started by first of all just mentioning the genesis of
46 this project briefly. This is something --
47 MR. CHANDLER DAVIDSON: Mr. Tucker, could you get a little bit
48 closer to the microphone, please?
49 DR. JAMES TUCKER: This is a project that we had discussed originally
50 with the Lawyers' Committee and a host of other civil rights organizations
51 with respect to information that would be of use in the reauthorization
52 process.

1 And along with that, what we did was we have, through the general
2 support of the Barrett Honors College, ten honors students signed up for
3 this project as part of their senior honors thesis.
4 And Dr. Espino joined as the co-director of the project and really
5 the lead researcher on the project.
6 So, first of all, let's talk briefly about what it is that we did.
7 We're going to go through and discuss briefly the purpose, the
8 surveys themselves, and the findings.
9 The election day survey is really relatively straightforward.
10 We did a total of three surveys.
11 Actually go back to the previous slide.
12 We did a total of three surveys as a part of this project.
13 The first survey was conducted during the presidential election last
14 November in two counties, Maricopa County and Coconino County up in the
15 northern part of the state. We basically looked at two covered
16 language minority groups, primarily Spanish speaking voters in Maricopa
17 County and Navajo speaking voters in Coconino County on the Navajo
18 Reservation.
19 We followed up with a telephonic survey after the general election
20 just to see -- to basically capture voters that we may not have been able
21 to capture on election day. I will go into the reasons why in a
22 moment.
23 And then finally the jurisdiction survey is the survey that we're
24 presently in the process of completing, and I'll talk about that in just a
25 moment.
26 The election day survey was basically designed to measure three
27 things in the two jurisdictions that we examined.
28
29 We wanted to see what the need for assistance was. We have the
30 census data that tells us the limited English proficiency for the counties,
31 but we wanted to see what the actual need was from the voters'
32 perspectives.
33 We also wanted to see what sort of availability of assistance was
34 there. Was there assistance there for them when they went to vote.
35 And, finally, how effective was that assistance, both oral and
36 written.
37 We selected the precincts based on a variety of factors. Initially
38 we did it based on the limited English proficiency data supplied by the
39 census. Summary table three. And we did that with the cooperation of the
40 Maricopa County GIS department that works very closely with the county and
41 state on the redistricting issues. We designed the survey itself in a
42 manner that would evoke honest answers without being suggestive as to what
43 the answer should be. The thing I want to emphasize with this is
44 notwithstanding the fact that the genesis of this project was with civil
45 rights organizations, this is a nonpartisan project, and the other
46 organizations that really formed the genesis of this have been completely
47 isolated from the underlying data. The data would be kept here at Arizona
48 State, and it will not be disseminated for purposes of confidentiality of
49 both the voters and the responding jurisdictions.
50 Ultimately the survey itself is conducted in two different counties,
51 at 50 polling locations.

1 Approximately 40 polling sites in Maricopa County, again, focusing on
2 a range of limited English proficiency precincts that go from about 40
3 percent Hispanic voting age population all the way up to above -- well
4 above 80 percent.
5 And then of course we also covered approximately ten polling sites on
6 the Navajo Reservation in Page and Tuba City. And just given the shear
7 numbers of voters that are Navajo voters, the limited English proficiency
8 rate was significantly higher. On average in Coconino County it's
9 approximately 35 percent. Telephonic survey was meant to capture the
10 voters we couldn't capture on election day for a few reasons.
11 First of all, there are many voters in Arizona, really about half,
12 that voted early, by mail.
13 So if you go to the polls, you already are missing 50 percent of the
14 folks who voted.
15 The other group that we needed to capture under the telephonic survey
16 are those that didn't turn out to vote at all. They're registered voters
17 but for whatever reason they did not vote by either early ballot or on
18 election day.
19 Unfortunately there's one group we could not capture, and those are
20 individuals who are not registered to vote at all.
21 In some respects, while that's a limitation of what we were able to
22 do, the census does cover that because the limited English proficiency data
23 does capture that.
24 Again, what we wanted to do was we targeted the same jurisdictions,
25 the same voting precincts in Maricopa County that we covered during the
26 general election as a follow-up to see whether or not one of the
27 comparisons we could do is whether or not those individuals surveyed their
28 responses different from the voters we surveyed on election day.
29 The jurisdiction surveys in a lot of respects are really the gemstone
30 of this entire project, because it's something that really hasn't been done
31 before on the scale that we've done. The primary focus is -- the
32 voters' focus is a bottom up view.
33 He also want a top down view to get the perspective of the election
34 officials responsible for implementing the language assistance provisions.
35 Along with that, we asked several questions designed to measure not
36 only the availability of the assistance, the quality of assistance they
37 provided, but how well they were in compliance with not just Section 203
38 but other provisions of the Voting Rights Act.
39 The jurisdictions were selected through a variety of means, but in a
40 nutshell it starts with every jurisdiction that is specifically identified
41 in the federal register as a covered jurisdiction. In addition,
42 there are a total of five states, Arizona, California, New Mexico, Texas,
43 and Alaska, that are covered statewide. In those states, we also sent the
44 survey to every county in the state. In addition, we selected cities
45 with populations of 50,000 or more in each of those jurisdictions that I
46 just mentioned.
47 Again, just to see what sort of, what sort of activities were
48 occurring there.
49 And we also wanted to see the few jurisdictions that dropped out as a
50 result of the 2002 census.
51 There were a couple of jurisdictions in two states that are no longer
52 covered, and we did send to those states as well.

1 We also sent the surveys to the chief elections official for each of
2 the 33 states where we mailed the surveys.
3 As you can see, it all totals out to 810 election officials that
4 received the survey. The response rate is ongoing. In fact,
5 ironically as we were having the conference here yesterday we actually
6 received an electronic submission of the survey that I picked up on my
7 BlackBerry.
8 The response rate is between 45 and 50 percent. We expect to
9 achieve 50 percent within the next week or two.
10 The number's actually a little bit higher than that. I estimate
11 about 370 completed surveys.
12 And the responses that we've coded in to date are from 29 of the 33
13 states that we sent the survey out to. This makes it is the most
14 comprehensive survey ever conducted of election officials on this subject.
15 The one prior to this was one conducted by the General Accounting
16 Office in 1984, and they had a total of 295 responding jurisdictions.
17 So to the credit of the students on the project, they achieved
18 something that is actually an improvement upon a study that was done by the
19 federal government some 20 years ago. Okay.
20 MR. RODOLFO ESPINO: At this point we'd like to talk a little bit
21 about some of our preliminary findings, from both the voter survey and
22 election officials survey.
23 Keep in mind that what we are presenting here are our first cut of
24 analysis of the data. But what we are presenting is stuff that we are
25 pretty confident on what the percentages are. There's still some
26 surveys, telephonic surveys, and election official surveys that we will be
27 coding in that may change our percentages slightly and a final report that
28 we expect to produce by the end of the summer.
29 With respect to need for assistance, we asked voters in our election
30 based survey and our telephonic survey whether they need assistance on
31 going to the voting booth for language assistance.
32 And what we found was that 24 percent of Navajo voters -- another
33 question we asked is whether they have ever provided assistance.
34 We'll talk about that one first.
35 We find that 24 percent of Navajo voters have reported providing
36 assistance to another voter in Navajo at some point.
37 Twenty-nine percent of Latino voters have reported assisting Spanish
38 speaking voters in elections at some point.
39 Now, another question I said that we asked was whether voters claim
40 to have needed language assistance in order to vote on election day.
41 We found that 20 percent of Navajo voters said that they did need
42 language assistance. We found that about 9 to 10 percent of Latino
43 voters here in Maricopa County responded that they did need language
44 assistance.
45 Now, of the 20 percent of Navajo voters that claim to have needed
46 language assistance, half of those said that they brought someone with them
47 to provide that assistance. Compare that to Latino voters here in
48 Maricopa County. Of the 9 percent of Latino voters who said they needed
49 assistance, only 10 percent of those voters said they brought someone with
50 them to vote.
51 This is something that we're going to of course explore on, to look
52 at what explains the difference between Navajo voters and Latino voters

1 that we are interviewing here in Arizona. Certainly there's some
2 anecdotal evidence that might suggest why these percentages are coming out
3 the way they do.
4 Jim, you can probably speak to that because you were up in Coconino
5 County on election day.
6 In Coconino County, a lot of these precincts were at community
7 centers where there are all day activities going on, barbecues, so it was
8 much easier for voters there to call out to someone, can you come help me.
9 Also transportation in those rural counties may have played a factor
10 in why these percentages are coming up, because a lot of these voters
11 needed someone to drive them to the polls given the long distance that they
12 had to get to vote on election day.
13 DR. JAMES TUCKER: The thing about the elections up in northern
14 Arizona is the presidential election was combined with the elections for
15 the Navajo Nation, so as Dr. Espino said, what was frequently happening is
16 many of the election sites were conducted at Navajo chapter houses.
17 The ones that we visited, such as the LeChee chapter house outside of
18 Page, they had barbecues outside, so there were plenty of individuals
19 outside of the polls who could provide assistance.
20 The other thing that must be pointed out is many of the voters who
21 went into the polls were also able to get assistance from the poll workers
22 in the polls, because most of the poll workers, I would say well over 90
23 percent of the poll workers in the precincts covered in Coconino County,
24 were Navajo voters themselves.
25
26 MR. RODOLFO ESPINO: With respect to availability of assistance
27 that's being provided by election officials, this is some information that
28 we are gleaning from the election official survey. We found that
29 close to 80 percent of jurisdictions were providing language assistance of
30 some form, whether it be written, oral, or both.
31 We are finding that about 20 percent of the responding jurisdictions
32 on our survey claim to be providing neither written or oral assistance.
33 Now, that may jump out as a really large figure to you. This
34 is something that we certainly need to explore. Because right now at
35 this point we haven't examined whether there are certain characteristics of
36 these jurisdictions that might explain this, most notably whether it's
37 small jurisdictions that could be contracting out to a county, to a larger
38 entity, who are in this 20 percent category.
39 Therefore on the survey they're responding, no, we don't provide
40 assistance. But if you keep reading on the questionnaire, they may
41 indicate that they are receiving this help from some other government
42 entity.
43 So certainly that's something that we want to explore.
44 Continuing on, with availability of assistance, another question that
45 we asked on -- this is from the voter survey here in Arizona. We found
46 that 68 percent of Arizona voters reported receiving language assistance of
47 some type, whereas 32 percent of Arizona voters reported not receiving
48 assistance.
49 And of Arizona voters right now, this is just the percentages of
50 Navajo and Latino voters that we're talking about.
51 Again, this 32 percent claiming not to receive assistance of any
52 kind, this is something that we also want to explore too. Some

1 factors that may contribute to this percentage are the primarily language
2 of the Navajo or Latino voter that we talked to. Consider that
3 perhaps if you are a Latino voter and you receive something in the mail
4 that's in both Spanish and English, if you immediately start reading the
5 English side and don't flip it over to the Spanish area, you may not
6 recognize that Spanish assistance is being made available.
7 So this is something that we want to explore further with further
8 questions in the survey to understand why that percentage is the way it is.
9 Also continuing on availability of assistance, this is information
10 that we're obtaining from the election official survey. We found
11 that 55 percent of responding jurisdictions have at least one full-time
12 member who is fluent in another language. We did not find any
13 relationship between the size of the jurisdiction and whether that
14 jurisdiction had a full-time worker that was fluent in another language.
15 In addition, we examined the distribution of language type across
16 these jurisdictions that claim to have at least one full-time worker that
17 was fluent in another language.
18 And not too surprisingly we found that most of these jurisdictions
19 that had claimed to have at least one full-time worker that was bilingual,
20 that worker was fluent in Spanish.
21 We found that the other percentages were six percent of jurisdictions
22 claim to have at least one full-time worker that is fluent in native, six
23 percent in some Asian language. And then 13 percent reported having
24 multiple workers that were fluent in multiple languages. So you
25 could have a jurisdiction that's responding with we have workers that are
26 fluent in both Navajo and Spanish.
27 Which is a case for a lot of the jurisdictions of course here in the
28 southwest.
29 Jim, did you want to talk about that?
30 MS. ELIZABETH ANDREWS: Basically this presents the percentages of
31 the responding jurisdictions providing assistance for telephone inquiries
32 according to the size of that particular jurisdiction.
33 There's a significant positive correlation between availability of
34 telephone assistance and jurisdiction size. One reason it may not appear
35 so from the chart is the fact that we have so far only received a small
36 sample of surveys back from jurisdictions with populations of 500,000 plus.
37 I think we've received 13 that we've coded in.
38 So this is a correlation of what we've seen so far. But it's not
39 conclusive, because we're still continuing to code and look at this
40 particular information.
41 Keep going?
42 For this particular graph, this one illustrates the bilingual
43 coordinator and telephone inquiries available.
44 It really represents the fact that most of the inquiries that are
45 directed to jurisdictions are responded to by personnel that's located in
46 that area, and the calls are directed to a volunteer. So it seems to
47 illustrate the need for bilingual individuals at those offices in order to
48 respond to all of those particular individuals that need assistance.
49 This just talks a little bit about telephone assistance for
50 bilingual. It shows that smaller responding jurisdictions reported
51 directing phone calls to volunteers fluent in covered languages more often
52 than large jurisdictions did.

1 In addition, smaller jurisdictions may not have the same amount of
2 resources available to larger jurisdictions for telephone assistance.
3 And they have to rely on volunteers because of lower cost.
4 Again, only the largest responding jurisdictions reported providing
5 phone directories in covered languages.
6 No correlation exists so far between size of responding jurisdictions
7 and the presence of an election worker fluent in the languages covered in
8 that particular jurisdiction.
9 MR. RODOLFO ESPINO: Another question that we asked of election
10 officials was whether they had a bilingual coordinator available to
11 actually just be a liaison between the election officials and the community
12 that was in need of language assistance.
13 What we found in our election official survey was that 35 percent of
14 jurisdictions indicated that they did have a bilingual coordinator that
15 served that liaison function. Some of you know that not all covered
16 jurisdictions are required to have a bilingual coordinator but there are
17 some that do.
18 Again, this figure, that 35 percent of jurisdictions are responding
19 that they do have a bilingual coordinator, again, we wanted to explore this
20 further to see if there was a relation to jurisdiction size, a percentage
21 of LEP voters in that jurisdiction, to see if data exists explaining why a
22 jurisdiction would chose to have a bilingual coordinator or not.
23 In terms of availability of oral language assistance, if you turn to,
24 on the election official survey that you should have before you, question
25 two on Section E, which is on Page 6, you'll see that we asked election
26 officials what type of activities did they provide oral language assistance
27 in.
28 And the chart that we have on the screen up there is the distribution
29 of jurisdictions across this question, and we just summed up all those
30 individual election activities.
31 So a jurisdiction that did everything would have a score of 14 on
32 this list, because they provided assistance in all 14 of these activities.
33 A jurisdiction that provided no assistance in any of these activities
34 would have a score of zero indicating they didn't do anything.
35 You see from the distribution of responses that we found that about a
36 third of jurisdictions responded that they provided no oral language
37 assistance in any of these activities on question E2.
38 About another third provided half, assistance in half of these
39 activities. And the remaining third provided more than half.
40 So fairly even distribution across going from zero to half to full
41 assistance on all activities.
42 In terms of availability of written materials, this was derived from
43 the question two in Section F, which is on the following page, Page 7.
44 Here we have a list of 18 types of activities that election officials
45 could provide written language assistance in.
46 And, again, this index ranges from zero to 18.
47 What we found here interestingly was 25 percent of jurisdictions
48 responded that they provided no type of written language assistance in any
49 of these activities.
50 Only 20 percent zero to half.
51 But a large majority of these jurisdictions responded that they
52 provided at least half if not all of the assistance in these activities.

1 This in comparison to the availability of oral -- written, oral
2 assistance activities, what, what you'll find in comparisons of questions,
3 responses to questions E2 to F2 is that jurisdictions are expending more
4 resources and efforts into providing written language assistance than oral
5 language assistance.
6 So it's one of those conclusions that we can reach from the
7 comparison of these two questions.
8 DR. JAMES TUCKER: There are several possible explanations of that.
9 That's something that we could look into in a little more detail.
10 One example might be if a county is a covered subjurisdiction, such
11 as you have a small county in Texas, but it's covered because the state is
12 covered statewide, it may be possible that they're providing written
13 language materials provided by the Secretary of State's office such as
14 bilingual registration materials, but they're not actually providing
15 bilingual poll workers because the limited English proficient percentages
16 are actually quite low for that county. This is another example of
17 where we need to correlate this with the census data to see whether or not
18 that is one of the things that's driving it, or, in fact, especially given
19 the fact that, as we will talk about at the very end, written language
20 assistance costs appear to be higher than oral language assistance costs.
21
22 MR. RODOLFO ESPINO: Now, you commissioners, of course, will
23 probably be interested in the testimony you're gathering here with respect
24 to the voters on the quality of assistance they're receiving.
25 This is a question that we asked on the voter surveys. We
26 asked Navajo and Latino voters to rate the quality of oral and written
27 assistance they received from election officials. The good news here
28 is a large chunk of both Latino and Navajo voters are rating the quality
29 assistance that they're receiving from election officials as good to
30 excellent.
31 I think with respect to the Latino populations, 95 percent or greater
32 of Latino voters are rating the quality of assistance good to excellent.
33 Now, there are some variations within the population that are a
34 function of the primary, their primary language, the voters' primarily
35 language that they speak at home.
36 So, for instance, you'll find that Latino voters whose primarily
37 language is English, they're much more likely than Latino voters whose
38 primary language is Spanish to rate the quality of -- I'm sorry, to rate
39 oral assistance higher than Latino voters whose primarily language is non-
40 English.
41 With respect to Navajo voters, we find that, again, a large chunk of
42 Navajo voters are reporting that the quality of oral assistance they're
43 receiving is good to excellent, but there is not the same distinction by
44 primary language as we saw with Latino voters.
45 That is, that Navajo voters, regardless of whether their primarily
46 language is English, Navajo, or equally both, they seem to be responding in
47 the same general trends toward the rating of the quality assistance,
48 regardless of their primary language. Now, this is something that,
49 Elizabeth, you can probably answer because this is derived from an open-
50 ended question on the voter survey, and so you read these in great detail.
51 MS. ELIZABETH ANDREWS: This particular graph illustrates those that
52 responded to question 14. The question, I believe, was: Do you have any

1 suggestions about ways in which the assistance could be improved. And
2 these are the responses they gave us.
3 As you can see, there's a wide variety. We've tried to group them as
4 much as possible, even though they are individual responses. A lot
5 of people didn't feel -- well, probably a little more than a quarter felt
6 that help was needed. A large degree didn't know that they were available,
7 didn't know that they there. And that's the maroon portion at the bottom.
8 There are a lot of different resources and suggestions that they
9 made.
10 In looking into ways it could be improved, this is something that we
11 hope will give us a little more insight into the needs of the voters.
12 DR. JAMES TUCKER: We also asked a series of questions regarding the
13 frequency of training.
14 What we've seen, what I've seen in election coverages, there's
15 frequently a correlation between the quality of training of the poll
16 workers and the quality of assistance that's being provided to voters in the
17 polls on election day.
18 The good news is, at least according to what the election officials
19 are reporting, is most of them do provide training.
20 Again, you can see there's approximately just under 20 percent
21 provide training annually. And you see the number just about 65 percent
22 actually provide training before each election.
23 So that's actually good news.
24 The interesting thing about this though is that in addition, if you
25 look at the second point, less than four percent of the jurisdictions
26 answered a question specifically asked to test the jurisdictions', the
27 election officials' knowledge of Section 208 of the Voting Rights Act.
28 It's question E6 on Page 7, top of Page 7.
29 And specifically it says who of the following may accompany voters
30 who need assistance in the voting booth, check all that apply.
31 We designed the question that way because we didn't want it to be
32 leading or suggestive.
33 But essentially under Section 208 of the Voting Rights Act the answer
34 is very simple. Anyone who's the assister of the voter's choice may
35 accompany the voter into the -- even into the voting booth, with two
36 exceptions. One of the exceptions is the voter's employer and the other
37 one is the agent of the union that the voter may belong to.
38 And curiously enough what we found was that of all the jurisdictions
39 that responded to this question, only 12 answered it correctly.
40 And they actually wrote in what I just said.
41 Everyone can go in and provide assistance with the exception of the
42 voter's employer or their union agent.
43 So, again, this shows that 96 percent of the jurisdictions are
44 getting it wrong in some respects.
45 The other point that should be made about this is that many of the
46 jurisdictions specifically said that they would not allow children to
47 provide assistance to a parent. Only adults can accompany the voter into
48 the voting booth to provide assistance.
49 This is inconsistent with the plain language of Section 208.
50 The data is preliminary, but we don't think these numbers will change
51 a lot.

1 MR. CHANDLER DAVIDSON: Could I just interrupt here and say we're
2 running late, and I want to ask you if it's possible for you to wrap up
3 your presentation in the next five to ten minutes.
4 DR. JAMES TUCKER: Yes, actually what I will do is I'll look through
5 this very quickly.
6 First of all, this slide basically shows that most jurisdictions do
7 not require any kind of confirmation of language abilities of the poll
8 workers.
9 Again, you see this slide actually shows that most of the
10 jurisdictions providing training to poll workers do so through written
11 materials.
12 The numbers that are actually a little striking are the numbers, the
13 figures to the right of the slide which indicate that jurisdictions are not
14 providing any kind of demonstrations to elections officials. Very few
15 jurisdictions do that. As well as a small number of jurisdictions actually
16 provide training on covered language groups in the jurisdictions.
17 And then in addition, see the slide there, I actually want to move
18 on, but this shows a little bit about how the voters are actually informed
19 about the assistance.
20 As far as the costs go, this is the last point that we have as this
21 part of the presentation. Two thirds of the responding jurisdictions
22 provided at least some cost data. Roughly about half provided data
23 concerning the cost of both oral language assistance and written language
24 assistance.
25 And what we did find in this is that many of the comments that were
26 provided along with the survey response confirmed the difficulties that the
27 general accounting office experienced when they sent out the previous
28 studies in 1984 and 1997.
29 That is, most jurisdictions simply do not separate out the cost of
30 providing language assistance, whether written or oral.
31 The data that we found does, however, correlate with what the
32 findings of the earlier GAO studies were. Particularly the 1984 GAO study
33 published in 1986.
34 They found roughly two percent -- of the responding jurisdictions,
35 roughly two percent of the total elections expenses were providing oral
36 language assistance. That's exactly what we found.
37 The number hasn't changed.
38 The 1. 4 percent simply refers to the total -- percentage of total
39 election cost for providing oral language assistance on election day.
40 You see the range from zero to 30 percent.
41 Telephonic language assistance makes up a very small percentage of
42 total election costs. Of those that do provide telephone assistance that
43 reported, on average it makes up about one half of one percent of the total
44 election expenses.
45 Again, you see the range from zero to 20 percent. The 20 percent is
46 going to correlate, in all likelihood, this is something we need to explore
47 a little bit more, it's going to correlate with the smaller jurisdictions
48 that have smaller budgets.
49 And as far as the cost of providing written language assistance, the
50 earlier GAO studies found that roughly seven and a half percent of total
51 election expenses went to the cost of providing written language materials.

1 Our numbers are actually showing it's a little bit lower. It's
2 probably roughly consistent with what the GAO found.
3 On average the jurisdictions that responded to this, which is
4 approximately 52 percent of all the jurisdictions, reported that five
5 percent of the total election expenses are spent on bilingual written
6 language materials.
7 You see the costs range from zero to 75 percent.
8 Seventy-five percent is an outlier because you see only four
9 jurisdictions responded that over 50 percent of their total expenses went
10 to written language materials.
11 And that brings us to the conclusion of our formal presentation.
12 If the commission has any questions.
13 MR. CHANDLER DAVIDSON: Thank you very much.
14 Do the commissioners have any questions?
15 (No oral response.)
16 MR. CHANDLER DAVIDSON: Let me ask one preliminary question.
17 I believe you mentioned that your findings here are preliminary,
18 there are still questionnaires being returned, and you will finish the
19 study sometime this summer. And I presume that you'll make a copy of that
20 finished study available to the commission for inclusion in its record?
21
22 DR. JAMES TUCKER: Yes, that's correct. We're in the process
23 now of continuing to receive responses to the jurisdiction survey.
24 We are still coding in some of those responses we have. The
25 universal data we have here is pretty big. That represents roughly 45
26 percent of all the surveys that were sent.
27 So we believe that's a fairly representative sample of what you're
28 going to see.
29 We don't expect the numbers to change a whole lot.
30 In addition, one of the bigger tasks that we're going to have is
31 simply to choose the variables. Again, this is a snapshot. We have
32 literally thousands of possible variations that we can do based upon the
33 variables that we're comparing.
34 The one thing we want to do is integrate the 2000 census data into
35 this, because we can actually look at percentages by the responding
36 jurisdictions to determine if there's a correlation between some of the
37 census data, whether it's population size or limited English proficiency,
38 by the responses we received. MR. RODOLFO ESPINO: That will allow us
39 to speak to whether there is a need in that area, and that election
40 officials are responding to that need.
41 MR. CHANDLER DAVIDSON: Thank you.
42 HON. PENNY WILLRICH: I have a question for any of the panelists.
43 This deals with the issue of literacy.
44 When you're looking at the data that you're gathering, are you
45 looking at literacy from a perspective of a voter being able to speak their
46 native language plus English, and a voter who only speaks monolingual in a
47 particular language, and whether or not there's a correlation to literacy
48 as they're looking at voter material and getting assistance?
49 MR. RODOLFO ESPINO: In the voter survey we did ask a couple
50 questions that we have not looked at yet related to those questions.
51 And those questions in particular were asking the respondent to rate their
52 ability to speak English and to read English.

1 Again, we have not looked at how those, how those responses to that
2 question relate to the other questions that we've presented here.
3 DR. JAMES TUCKER: One of the other points that needs to be made is
4 the categories that we used in the voter survey track the same definitions
5 that are used by the census department. We ask the voter to self-
6 report whether or not they speak English very well, well, poor, or not at
7 all.
8 By definition, a limited English proficient voter is anyone that
9 speaks English less than very well.
10 For any of us that looks at any of our many propositions on the
11 ballot in Arizona, you fast understand why that's the case. In
12 addition, one of the additional forms of analysis that we perform is to
13 compare the data self-reported by the voters and compare it to the limited
14 English proficiency data available through the 2000 census.
15 MR. RODOLFO ESPINO: A good indication to us too about ability to
16 read or write in English is just the language in which the survey was
17 conducted. That's something, again, that we want to be looking at.
18 MR. NED NORRIS, JR. : The only question I have is, I find it all
19 interesting and great information, I was just wondering, the Navajo Nation
20 was one of your survey areas, target areas. I was wondering if there was
21 any consideration to any of the other tribal entities that are in the
22 state, and, in particular, you know, the Salt River or the Fort McDowell or
23 the tribes closest to the Phoenix metro area.
24 DR. JAMES TUCKER: There were basically a couple considerations that
25 went into it. One was the sheer logistics of the operation.
26 The thing to the credit of the students, the students here were able
27 to recruit over a hundred volunteers at no cost to us at all who went out
28 to the polls in Maricopa County. We were looking at precincts where
29 we could get the biggest bang for our buck. We did not want to exclude
30 Native Americans just by looking at the precinct numbers, you know, the
31 number of registered voters.
32 We selected Coconino County as a good location because of the large
33 numbers of Navajo speaking voters.
34 It may be the Maricopa and Pima Indian communities, the numbers, and
35 Tohono O'Odham, the numbers may actually vary, but we know based on the
36 limited English proficiency data for Arizona that the Native American
37 population with the greatest need for language assistance is the Navajo and
38 Hopi Nations.
39 Coconino County was specifically targeted because 35 percent of all
40 Navajo voters in Coconino County indicated in the 2000 census they require
41 assistance in voting.
42 So it was not designed in any way, shape, or form to exclude any
43 communities. It was largely based on getting the biggest bang for
44 the buck.
45 MR. NED NORRIS, JR. : I understand that.
46 I guess my thought was there's a lot of important data that you've
47 been able to gather as a result of the survey, and I think if you went to
48 some of the other tribes with the same or identical survey you're going to
49 assist us in our ability to justify the need for these resources that we
50 may not be able to secure at this point within some of the other tribal
51 entities here. DR. JAMES TUCKER: I think it's a very good
52 recommendation.

1 I think one of the things we can pursue is Dave Castillo through the
2 Intertribal Council of Arizona has been instrumental in helping us with
3 many portions of this, so perhaps the most logical way to do this is to see
4 if we can circulate the survey through the ITCA and cover all 19 tribes in
5 the state of Arizona.
6 MR. CHANDLER DAVIDSON: I have one other question with regard to one
7 of your findings that was especially interesting, as I wrote it down, 79
8 percent of the jurisdictions that you surveyed said they'd provided some
9 form of language assistance, and the remaining 21 reported providing none
10 at all.
11 Is there any way for you to estimate now, or when you further analyze
12 the data, how many language minority voters live in this 21 percent of the
13 jurisdictions that provide no assistance at all?
14 MR. RODOLFO ESPINO: With the data we have right now, no. But our
15 plan is in the next couple weeks to merge that census data to the
16 jurisdiction survey results that we have to answer that question exactly.
17 This was something that Jim and I have been talking about that we
18 need to do first thing.
19 DR. JAMES TUCKER: One point that needs to be made about that too for
20 the record to make it clear.
21 We do know, we know on the survey project the numbers that correlate
22 with the respondents, we're able to do that, but we have promised the
23 respondents, the election officials strict anonymity.
24 To the extent that over the course of the summer, as we wrap this
25 project up, if there is particularly good narrative data that might
26 disclose or otherwise identify the jurisdiction that responded, we're going
27 to have to suppress that data. Valuable though it might be.
28 But that's the manner in which we're going to be able to correlate
29 the census data.
30 MR. CHANDLER DAVIDSON: I think just the numbers themselves, aside
31 from identifying the jurisdictions in question will be invaluable
32 information for this commission to have.
33 DR. JAMES TUCKER: Certainly.
34 MR. CHANDLER DAVIDSON: I would like on behalf of the commission to
35 thank you once again for appearing here. As a sociologist, I would also
36 like to compliment you on the research that you've done.
37 If you want to continue to answer some of these questions and you're
38 running short on money, I'm not going to provide it myself, but I strongly
39 urge you to contact the Law and Society Section of the National Science
40 Foundation. This seems to be the kind of research that they would be
41 interested in.
42 Thank you again very much.
43 (Applause.)
44 MR. CHANDLER DAVIDSON: We'll resume our hearings at 1:30.
45 (Brief recess taken.)
46 MR. CHANDLER DAVIDSON: Welcome to the afternoon session.
47 I'm one of the members of the commission, Chandler Davidson.
48 I'm sitting in for Bill Lann Lee, the chair who had to leave earlier
49 today.
50 It's a pleasure to be with you this afternoon, and I'm going to begin
51 by introducing the panelists who will be giving their testimony.

1 And I will begin by introducing Richard Ellis, who is chair,
2 Southwest Studies at Fort Lewis College.
3 Dr. Ellis lives in Durango, Colorado.
4 From 1987 through 1995 Dr. Ellis served as director of the Center of
5 Southwest Studies at the college.
6 He has served as director of the Institute of Southwest Studies since
7 2004.
8 He is the author, co-author, or editor of seven books, sixteen book
9 chapters, 21 articles and professional journals.
10 Dr. Ellis has served as an expert witness in the Cortez and
11 Montezuma school board. He was an expert for the ACLU and the water
12 rights case New Mexico v. Emmett.
13 Our second panelist is Shirlee Smith.
14 I'll find the bio very quickly.
15 Ms. Smith, originally from Navajo, New Mexico, speaks Navajo
16 fluently, has worked with the Bureau of Elections in Bernalillo County, New
17 Mexico, for seven years.
18 As a Native American election information coordinator, Ms. Smith has
19 been responsible for interpreting voting procedures for the urban rural
20 native people in Bernalillo County. She also coordinates the Sandia
21 tribal government, Teewa (phonetic) and Carris (phonetic) language
22 interpreters that are selected and trained.
23 Lydia Guzman is the policy director of the Clean Elections Institute.
24 She is based in Phoenix.
25 She has more than 15 years' experience with voter registration, Get
26 Out The Vote campaigns. She was Arizona state director for the Southwest
27 Voter Registration and Education Project.
28 Prior to that was the director of voter outreach for the Arizona
29 Secretary of State.
30 Ms. Guzman was a clean elections candidate for Senate in 2004.
31
32 Adam Andrews is an executive assistant of the chair and vice
33 chair of the Tohono O'Odham Nation.
34 The Tohono O'Odham Nation is comparable in size to the state of
35 Connecticut. Its four noncontiguous segments total more than 2. 8 million
36 acres, at an elevation of 2674 feet.
37 Within its land the Nation has established an industrial park located
38 near Tucson. Tenants of the industrial park include Caterpillar, the maker
39 of heavy equipment; the Desert Diamond Casino, an enterprise of the
40 nation; and a 23-acre foreign trade zone.
41 Next is John R. Lewis, who is the executive director of the
42 Intertribal Council of Arizona.
43 The Intertribal Council of Arizona was established in 1952 to provide
44 a united voice for tribal governments located in the state of Arizona and
45 to address common issues of concern.
46 On July 9th, 1975, the council established a private nonprofit
47 corporation under Tribal Council of Arizona, Inc. , under the laws of the
48 state of Arizona to promote Indian self-reliance through public policy
49 development. ITCA provides an independent capacity to obtain, analyze, and
50 disseminate information vital to Indian community self-development.
51 The members of ITCA are the highest elected tribal officials.
52 Tribal chairpersons, presidents, and governors, these representatives are

1 in the best position to have a comprehensive view of the conditions and
2 needs of the Indian communities they represent.
3 As a group the tribal leaders represent governments that have a
4 shared historical experience. Consequently, the tribes have a common
5 governmental status as well as similar relationships with federal and state
6 governments.
7 Next is Daniel Ortega, who's a partner of Roush, McCracken, Guerrero,
8 Miller & Ortega.
9 He practices -- his practice concentrates on serious personal injury
10 and wrongful death cases.
11 He serves on the board of directors of the National Farmworkers
12 Service Center, and Los Abogados, Hispanic Bar Association. He has
13 also served on the board of directors of the Mexican-American Legal Defense
14 and Education Fund, National Council of La Raza, the Arizona Trial Lawyers
15 Association, Valley of the Sun United Way, Arizona State Alumni
16 Association, Chicanos Por La Causa, Incorporated.
17 I skipped and will now go back to Rogene Calvert, an old friend from
18 my early Houston days.
19 Rogene G. Calvert is a native Houstonian of Chinese descent, who has
20 been involved in the non-profit field for almost three decades.
21 She has worked for the Community Welfare Planning Association, United
22 Way of Texas Gulf Coast, and served as the first executive director of the
23 Child Abuse Prevention Network.
24 Ms. Calvert was the founder and interim executive director of the
25 Interethnic Forum and served as the first executive director of the Asian
26 Pacific American Heritage Association.
27 She is now serving in Houston, Mayor White's administration, as
28 director of personnel and volunteer initiatives program.
29 And our last presenter is Paul Eckstein, partner of Perkins, Coie,
30 Brown & Bain, PA. He's worked on redistricting cases in Arizona for
31 the last three decades, and his law practice's areas of emphasis include
32 civil litigation, including appellate, media law, political law, Indian
33 law, gaming antitrust, and alternative dispute resolution.
34 Mr. Eckstein is a regional vice chair of the Lawyers' Committee.
35 He is currently on the board of directors of Arizona Town Hall, and
36 is the former president of the Arizona Center for Law in the Public
37 Interest.
38 I'll begin by asking Mr. Ellis to give his presentation.
39 And just so we understand the procedure here, I will ask each person
40 to give his or her testimony, and then after everyone has presented, the
41 members of the commission will ask you questions.
42 Mr. Ellis.
43 MR. RICHARD ELLIS: Mr. Chairman, members of the commission, is that
44 better? I'd like to think that I was invited to be here because of my
45 brilliant scholarship and brilliant performance in the classroom, but,
46 alas, that is not the case.
47 I was asked to be here because I served as an expert witness on what
48 we call the Cuthair case, which was a case filed by a number of Ute tribal
49 members, Ute Mountain Ute tribal members, against the Cortez-Montezuma
50 county school board.

1 Because the school board used at large elections as an effective
2 technique of disenfranchising or at least disempowering Ute Mountain tribal
3 members.
4 I was asked to keep my comments to five minutes, and told my students
5 that yesterday, and they bet me that I couldn't do it.
6 But I'll --
7 MR. BILL LANN LEE: We're betting on you.
8 MR. RICHARD ELLIS: I was asked to summarize, I guess, what I had
9 uncovered in the Cuthair case, and was asked by the attorney for ACLU to
10 look at attitudes in Cortez, Colorado, and Montezuma County, but to go back
11 a little bit and try to give a historic perspective to attitudes toward
12 American Indians in the state of Colorado.
13 And I work in that field, so I wasn't surprised at what I found.
14 It is a long and sad record, but as a former New Mexican having
15 worked in New Mexico history, I know the record is bad there. And Arizona
16 and other western states are the same. Colorado had its origins in
17 the gold rush in 1859, and Coloradians, at least the first Whites who went
18 out there, were trespassers on federal land, and knew it, and so what they
19 wanted to do was find a way to acquire title to that land and move Indians
20 out.
21 And they persisted in that attitude through the 19th century,
22 attitudes that perhaps best are expressed by a quote or two.
23 This came after a failed effort on the part of the United States
24 government to buy land from the Utes who owned the western two thirds of
25 Colorado.
26 This is from the Boulder News, Boulder, Colorado, newspaper.
27 The Utes would not resign their reservation. So the fairest portion
28 of Colorado and some of the richest mining country is closed to settlement
29 unless it be settled by force of arms. So settled we believe it will be
30 and should be. An Indian has no more right to stand in the way of
31 civilization and progress than a wolf or a bear.
32 By the latter part of the 18th century, the newspaper editorials in
33 Colorado picked up literally what became the chant in print, the Utes must
34 go.
35 And you find that expressed in virtually all of the newspapers in
36 Colorado.
37 An attitude that is supported by the memorials to the territorial
38 legislature, by petitions from the governor. It is the attitude of
39 Colorado.
40 And ultimately they effected that desire with the exception of a
41 narrow strip of land on the New Mexico-Colorado border, that is today the
42 home of two reservations, initially one, but then later split.
43 The Southern Ute Reservation and the Ute Mountain Ute Reservation.
44 The Ute Mountain Ute reservation is located in the western part of
45 that stretch of land. It is in Montezuma County, just south of the
46 community of Cortez.
47 And by the second half of the 20th century, Ute Mountain Ute children
48 began to enter the school system in Cortez, Colorado.
49 One of the things we did was to try to sample public opinion by use
50 of the newspaper. A small town newspaper is usually an effective gauge of
51 the attitude of the community. And in the 1940s, there are jokes,
52 for example, about Sambo and Rastus. There's the use of, quote unquote,

1 nigger talk. And virtually no mention of Ute Indians in the newspapers,
2 until they began to acquire funds from gas and oil and from the claims case
3 against the United States government.
4 And it was only then that they began to become important.
5 And as the school superintendent in 1956 said: Gee, now that the Utes
6 are getting some money, we need to pay attention to them.
7 The newspaper through the remainder of the century and into the
8 beginning of this century expressed attitudes opposing tribal sovereignty,
9 opposing Indian voting, opposing the Navajo Indian irrigation project
10 because it would give cheap water to Indians.
11 It is a community that as late as 1968 had the county clerk seeking
12 an opinion from the Attorney General, she failed, but she sought an opinion
13 that Indians residing on reservations should not be allowed to vote.
14 It's a community that in the 1980s saw two White men kill a 78-year-
15 old Ute that was asleep in the county, in the city park, and nothing
16 appeared in the newspapers until a nurse in the hospital who happened to be
17 married to a jailer -- a daughter of the jailer and married to a state
18 patrolman let the news out. And only then was an investigation undertaken.
19 The DA chose not to prosecute even though they had a confession from
20 the two perpetrators.
21 So this is an attitude that purveys at least Montezuma County and
22 extends over into my county to the east.
23 We continue to see anti-Indian attitudes.
24 When I did the research in the Cuthair case and went through the
25 newspapers, I wanted to hire two of my best students, and they declined
26 because they were from Cortez, and they were preparing for teaching jobs,
27 and if anybody learned that they had helped me in the research, they knew
28 that they would not be employed.
29 And so, I know that we're dealing with contemporary issues, but it
30 seems to me that something of a historic background is useful.
31 And I may have missed five minutes, but I came pretty close.
32 MR. CHANDLER DAVIDSON: I would call it a draw, that bet, between you
33 and the students.
34 Thank you very much.
35 Mrs. Smith.
36 MS. SHIRLEE SMITH: Good afternoon.
37 Members of the commission, can you hear me?
38 Excuse me for my cold, but my name is Shirlee Smith, and I am Navajo,
39 and originally from Navajo, New Mexico, and I moved to Albuquerque, New
40 Mexico.
41 And I work for Bernalillo County as a Native American election
42 information program coordinator. And just recently my title was changed to
43 voting act coordinator.
44 First of all, I would like to just talk about myself a little bit.
45 And then I'll go into the consent decree that we're under.
46 First of all, when I came to, as I was growing up, we moved around,
47 and my first language was English. And as I grew up, I went into -- I
48 learned my Navajo language.
49 My reading, my writing, my speaking, and my background is mainly
50 accounting, but when I came to Albuquerque, I came across this position.
51

1 And it was interesting, because I never had expertise or
2 experience in an election. And when I applied for it, I got it. I
3 came down to the county, and the position was given to me. They told
4 me that here's this position. This position, we don't know what we're
5 going to do with it, but you handle it from here. So I took on this
6 position, went out to the rural areas, which are the Native Americans.
7 They have four tribes, reservations that are in this county. We have
8 the Laguna Reservation, the Navajo Reservation, the Isleta Pueblo
9 Reservation, and Sandia Reservation.
10 And when I went out to go visit them, to start finding out and give
11 them the information of the election, I had to start from the bottom with
12 our Native Americans. None of them didn't know anything about election,
13 how to vote, what kind of document is needed. A lot of it was, you
14 know, rumor. And I had to gain my trust with the Native Americans.
15 What are you doing here, is what I always got. And I had to start
16 from the bottom.
17 And the negative attitudes that they had toward the election was --
18 all of that, I had to turn that around and more like educate our people on
19 the election process.
20 It was sad because a lot of elderlies that I listened to had tears
21 running down their eyes and saying that, you know, we didn't know about
22 this, we didn't know we were a part of this.
23 We have people come out here to spring documents and say you have to
24 go, and we don't know anything about it, we just, we just vote.
25 So that was where I started from. And start educating the elderlies.
26 And telling them that the positive part of it, to put aside the
27 politicals and stuff on the side and teach them the procedures and how
28 their voices can be heard.
29 As far as funding, how they're living, what kind of changes they can
30 make just by voting.
31 And all of that had to be taught to our people.
32 And then I started going into schools, younger generations. And a
33 lot of it was, you know, what elderlies said, how it was brought down.
34 So even that had to change.
35 As I was going through this whole thing, a lot of our language was an
36 unwritten language. Especially with our Pueblos. They don't want it
37 written. They would rather have it interpret.
38 So in the election process, a lot of words in there, we don't have
39 words for them.
40 And we had to come up with words. We had to come up with identifying
41 the position by explaining what the individual did or does or their
42 responsibility is.
43 So an elderly, when you're interpreting, you practically have to
44 explain what that individual or what that candidate position is, what their
45 responsibility is.
46 A lot of the written and writing stuff had just recently come about
47 onto the reservations, because of the board. We had code talkers back
48 then. So that's where our writing started, and that's where our reading
49 started.
50 So we didn't have words.
51 We don't have words for the elderlies.

1 We had to, you know, to interpret things became longer and time
2 consuming. And now we have colleges that are going into courses that
3 are, you know, they're learning how to read and write.
4 It's sad to hear, you know, they sound good, they sound like they're,
5 you know, real good in their language.
6 But sometimes you ask them more, and they won't know what you're
7 saying. They don't even know what they're saying.
8 So it's kind of sad.
9 But the people are all at a different level with the Voting Rights
10 Act being in place. There's a lot of teaching. To have, you know,
11 I'm looking forward to seeing the act reestablished for the people,
12 because it's time consuming to teach the people the process of the
13 election. So at the people's level, that's how it is.
14 Then when I'm working within the election office, I hear a lot of
15 these changes happening. Policies, bills that are being passed,
16 identification, all these other things that are coming about.
17 And to say that this is ending or it's not going to be renewed, I
18 wonder about our people, who's going to interpret for them.
19 What's going to really happen.
20 You know, that's what I'm looking at.
21 I would like to see this reauthorized for our people, for all the
22 Native Americans that are, you know, needing the language assistance in
23 their area.
24 It's really touched my heart to see our people, not knowing what the
25 process and how much their voice can be, it's important to them, and it's
26 important to us, and will make a difference, that they can make a
27 difference. That's the way I look at it.
28 And we also, the county is also 293,000 voters, is what we have in
29 our county. We have four tribes that are living there.
30 I think that's it. Thank you.
31 MR. CHANDLER DAVIDSON: Thank you very much, Ms. Smith.
32 Commissioner Buchanan has to catch a plane very shortly, and he has
33 asked to have a few minutes before he leaves, and we're pleased to give
34 that to him.
35 HON. JOHN BUCHANAN: I express my final appreciation to our
36 distinguish commissioners, regional commissioners, and to all of the
37 panelists, both those that we have heard and not yet heard. I look forward
38 to reading and/or hearing your testimony in the future. And I think
39 this visit to Phoenix has been invaluable to the commission.
40 We appreciate very much your contribution and your presence here.
41 Please forgive me, when I leave you, it will be with great regret, but I'll
42 be listening for and reading about your testimony. Thank you.
43 MR. CHANDLER DAVIDSON: Thank you, commissioner.
44 (Applause.) Mrs. Guzman.
45 MS. LYDIA GUZMAN: I don't know if I need a microphone. I've been
46 told that my voice carries.
47 Again, my name is Lydia Guzman. I thank you very much for taking the
48 time to listen to our testimony.
49 I come here wearing several hats.
50 One of them is indeed with LULAC. I'm also the district director for
51 LULAC, district one, which encompasses the areas of Kingman, all Maricopa
52 County, and a lot of the rural areas in Yuma and Yuma County.

1 So we have a lot of folks that this definitely affects as well in the
2 Latino community. I wanted to share with you my experience with
3 doing voter registration.
4 I started off as a teenager conducting voter registration drives,
5 knocking on doors and helping to empower communities in some of the small
6 suburban communities in Los Angeles County where we had a high number of
7 Latinos living in an area where we didn't have representation.
8 This is years of movement. However, in doing the voter registration
9 drives, and knocking on doors, and asking people to register to vote, it
10 was a true blessing to see that the voter registration forms in L. A.
11 County were bilingual.
12 They were bilingual.
13 And so it tremendously helped because a lot of folks in asking for
14 that information, sometimes they liked to fill out the forms themselves and
15 see what it is that they're actually filling out and signing.
16 And that really helped a lot to empower communities like that.
17 Now, in working that way, I was doing this as a teenager as a
18 volunteer for an organization called Southwest Voter Registration Education
19 Project, who has been empowering Latino communities for years and years in
20 the southwestern region.
21 And their motto and their emblem has always been Su Voto es Su Voz.
22 Which in Spanish, that's the way it's always been, it translates to your
23 vote is your voice.
24 Okay. But the fact that it's in Spanish is only symbolism of the
25 fact that they can go to the polls and Latino communities can go to the
26 polls and they can receive information in Spanish because they're going to
27 voice their vote in Spanish.
28 They do have a vote, the Latino citizens. The U. S. citizens have a
29 vote indeed. Through the course of doing voter registration drives,
30 I remember after Proposition 187 in California so many people that didn't
31 have the power of the vote started applying for citizenship.
32 More people became citizens, more people applied for citizens, for
33 citizenship in the following two years, after Prop 187 in California, than
34 in the previous 30 years, that of course there was a huge backlog, and
35 everybody knows the history of what that backlog created. However,
36 what that did is that empowered a lot of Latinos in the state of Arizona to
37 say this isn't going to happen to us again. We have mean spirited
38 propositions that are attempting to hurt us in every single way, when it
39 comes to areas that are grave concern to us, in areas of education, in
40 areas of housing, in so many different programs, that we need to step up to
41 the plate and we need to go to the polls.
42 And of course that increased the number of Latinos that were
43 registering to vote. Again, thank goodness that it was bilingual.
44 Bilingual and there was assistance.
45 And even though we -- I saw problems. I remember my aunt, for the
46 first time in California, this was a few years back, when she went to the
47 polls, she called me right after she voted, and this was in Palmdale,
48 Palmdale, California, and she said, you know, I was so humiliated, I
49 voted, but I tell you what, I voted biting my tongue.
50 I asked her why.
51 She said, well, because I asked for assistance in Spanish, and
52 because I heard them say, they may not know that I can understand, I may

1 not feel comfortable speaking it, but they said: I'll bet you she's
2 illegal.
3
4 Okay.
5 So it broke her heart.
6 I said this is why you need to continue to go vote. You need
7 to continue.
8 She was so heartbroken by this.
9 Her original intent was never to go back to the polls. She
10 doesn't want to be mistreated this way. The fact that she was mistreated.
11 And this is only symbolism of why we need also more bilingual workers
12 at the polls.
13 But, but just, in continuing to do this work, and I am trying to do
14 this in chronological order so you can see how this is slowly affecting and
15 the problems continue to exist throughout the years. Coming here to
16 Arizona, again, doing voter registration with different projects and
17 working with several different organizations, I found myself being hired
18 by Secretary of State Betsy Bayless, who you heard testimony from Alberto
19 Olivas, he had the position before I did.
20 And she was the first Secretary of State in Arizona to ever create
21 such a position to have a voter outreach person covered under this
22 provision that had to be bilingual.
23 And I applaud her effort for doing this.
24 You know, she allowed the person in this position, and Alberto and
25 myself, to go out into the communities.
26 Now, in doing so, one of our primary duties as a voter outreach
27 director was also to conduct town hall meetings in different communities of
28 Arizona on the different ballot initiatives. In doing so, everything, of
29 course, was bilingual.
30 I am so thankful that we had bilingual folks in the different
31 counties that were able to assist in the Navajo Reservation, when it came
32 to areas like Fort Defiance, Kayenta, Chinle, and all of the Native
33 American communities, because without them, and they were covered, their
34 positions are covered under this provision, without them, I don't think
35 that I could have effectively shared the information so that they could
36 make a conscientious decision on the different ballot initiatives.
37 Especially in that election where we had initiatives that were
38 affecting the Native American community, three different gaming
39 propositions, they had a lot to win or lose.
40 And in moving right along in time, there was recently a proposition
41 that would have closed a county hospital.
42 A county hospital locally here that would have closed services to so
43 many folks in Central Phoenix, majority Spanish speaking, a lot of low
44 income.
45 And this was, even though it was a county election, the folks that
46 stood to lose the most were the folks that this hospital serviced.
47 Many of these folks were registered voters. However, they were
48 monolingual Spanish.
49 The importance of bringing out this message -- at this point I was
50 the state director for Southwest Voter Registration Education Project.

1 At this point so much information came out in Spanish to allow the
2 information to the voters saying your county hospital, the one that
3 services you the most, is about to be shut down. Come to the polls.
4 Those are the small elections that the Latinos stand to lose the
5 most.
6 We lose so many programs on the local level, even though, you know,
7 the presidential elections, they bring in a lot of folks, they do a lot of
8 commercials, they do a lot of everything bilingual, and they have the money
9 to do so.
10 However, in the smaller elections when the Latinos have so much to
11 lose, we lose so many wonderful programs, like for school programs, bond
12 elections. There's not a lot of money put into that.
13 Because of those small bond elections, maybe we have counties that
14 consolidate their polling places, so where you vote in one place in one
15 election will definitely change, and it's because of the consolidated
16 voting place. If it's not in Spanish, what's going to happen is that so
17 many folks in the areas where these programs are going to be lost, if they
18 don't get the voters out, they're going to lose those voters anyway.
19 Recently, of course, in my bio, when you read, I did run for the
20 Senate -- I know I have one minute left -- I wanted to share with you this.
21 My mother, my mother voted for the first time this election.
22 She had an opportunity and she was very blessed to vote for the first
23 time in voting for me. Okay.
24 And it was wonderful. However, it was a terrible experience at the
25 same time.
26 She voted at the Dreamy Draw legislative district ten. There were no
27 bilingual assistants outside. I stood outside, outside the limit, and I
28 explained to her how she was, you know, how to effectively vote for a
29 candidate, in connecting the arrows, just, you know, we do have a mark
30 system and we have to connect the arrows, and I thought I did a wonderful
31 job explaining to her for the first time.
32 I forgot one important thing. So when she went in there, she was
33 lost.
34 The poll workers, they didn't deny her the right to vote, but they
35 did deny her the opportunity of being properly instructed in how to vote.
36 It was a terrible experience for her. She was heartbroken because
37 she thought maybe her vote didn't count. Simply because there were so many
38 other candidates on there that she wasn't sure whether or not to vote.
39 She never heard of them, and we had so many justice candidates on
40 there that she never heard of.
41 So she was wondering if I vote yes, if I vote no, when you vote would
42 you do more harm than good. If abstaining from voting, will her entire
43 ballot be tossed out.
44 So I forgot to give her those instructions, so she was heartbroken
45 thinking that her vote didn't count.
46 For so people like my mom, I'm asking that we continue to extend and
47 to reauthorize. Like my mom, there are so many cases. And for all of
48 those folks that are going to apply for citizenship as a result of this
49 passage of Prop 200, Prop 200 will disengage so many voters because of the
50 new ID requirements and because of the new strenuous, not only iD
51 requirements, but the citizenship requirements that are going to be imposed
52 on the voters. Our Latino voters stand to lose so much.

1 I'm very concerned about this not being reauthorized.
2 I'm very concerned that we're going to lose, where we call ourselves
3 the sleeping giant that is awaking, if we don't have this reauthorized,
4 this is just like giving that sleeping giant a sedative.
5 Thank you.
6 MR. CHANDLER DAVIDSON: I'm going to take a couple of our speakers
7 out of order, because they are both going to be addressing an issue from a
8 different point of view, as I understand it, and I think it would benefit
9 the commission to hear both of them give their points of view, and then for
10 us to be able to ask them questions before at least one of them has to
11 leave.
12 And so with your permission, I will ask Mr. Ortega to present his
13 views.
14 MR. DANIEL ORTEGA: Thank you very much.
15 I appreciate this opportunity to come before you today, and
16 especially to give you an opportunity to deal with the reauthorization of
17 the Voting Rights Act, and for taking me out of turn.
18 I thank all of you.
19 First, my name is Daniel Ortega. I'm an attorney here in Phoenix and
20 have been practicing law for approximately 28 years. I say approximately
21 because I haven't gone beyond 28.
22 I don't want to say 40 like Paul here.
23 Approximately 28 years, and having in that time handled a variety of
24 cases involving election law as well as issues related to the Voting Rights
25 Act.
26 I've specifically handled over a dozen election cases in my career.
27 I have been involved in both the redistricting legislative and
28 congressional district cases.
29 I was also co-counsel to Paul, with Paul Eckstein, on a lawsuit that
30 was brought against a high school district, Phoenix Union High School
31 District, asking to split up the districts. And we were successful
32 in doing that.
33 Currently I am Arizona counsel on the legal challenge against
34 Proposition 200, along with MALDEF, who is also here.
35 In the redistricting cases that come around every ten years, I've
36 represented Congressman Ed Pastor in the first one back in 1990. This time
37 I represent Congressman Ed Pastor as well as the Hopi Tribe.
38 Currently that litigation is underway, and I am representing the Hopi
39 Tribe.
40 I'm a member of the national council and also board of directors.
41 I'm a member of the National Farmworkers Service Center board, as well as
42 Hispanic Bar Association board here in Phoenix, Arizona.
43 If ever there was a time in the history of Arizona to reauthorize
44 VRA, it is today. There has never been the onslaught of legislation
45 and actions taken that affect voting ever in the history of Arizona as
46 what's occurred in the last year.
47 And it started with the license the voters gave the legislature of
48 this state in approving Proposition 200.
49 Proposition 200, as you know, under sections three, four, and five
50 deal directly with changes to the election laws regarding new requirements
51 for registration as well as new requirements for voting.

1 But because they did it so poorly and the drafting was so bad, they
2 had to figure out a way to fix it.
3 They attempted to fix it. Luckily we have a governor who chose to
4 veto the bill when they tried to fix Prop 200 and sections three, four, and
5 five.
6 The problem is we don't know how long this governor will be there.
7 And we'll continue to need the protection of justice and pre-clearance with
8 regard to the changes that I believe will be made by this reactionary
9 legislature in the future.
10 I always want to -- last week I heard the governor talking. She told
11 a group of us that she was going to veto the bill dealing with the changes
12 in the election laws to try to fix Prop 200.
13
14 And she said that the bill was on its way to her office and she was
15 going to get her veto stamp out to make sure it was vetoed. She also
16 said something very interesting.
17 She said this is the legislature that's also going to get rid of the
18 Equal Employment Opportunity office for the state of Arizona. There
19 are only two states in the whole country who don't have EEO offices, and
20 they are Alabama and Mississippi.
21 This state wants to join that group of people.
22 If ever there was a time for the Voting Rights Act to be authorized
23 and Section 5 be directly applied to Arizona, it is now, folks.
24 We're talking about legislature that believes in English only.
25 We're talking about legislature that doesn't believe in bilingual ballots.
26 We're talking about a legislature that's trying everything in its
27 power to disenfranchise a segment of voters primarily which are the
28 Hispanic community and the Native American community. We definitely
29 and unequivocally need the protection of the Voting Rights Act, and in
30 particular Section 5.
31 I know that my colleague Paul is going to speak to the contrary with
32 regard to Section 5 and its application, and I recognize the debate that
33 exists about how the Voting Rights Act has benefitted the Republicans.
34 I would be dishonest if I didn't tell you that. But there has to be
35 a balancing. The balance has to weight in favor of people of color and the
36 minority communities who have historically been disenfranchised from the
37 electoral process and but for the Voting Rights Act would not have had the
38 gains that they had over the years to ensure that people of color can elect
39 candidates of choice. We have made unbelievable strides in
40 legislatures across the country, in city councils across the country, in
41 the Congress across the country, all because of the Voting Rights Act.
42 Has it benefitted the Republicans? Yes, it has. I will not tell you
43 that.
44 So the Democrats argue that we're better off without Section 5
45 jurisdiction and allowing the process to take care of itself and elect more
46 Democrats because the policies that come out of legislature and the things
47 I'm complaining about this legislature could be taken care of at that
48 level.
49 But what that really says is that we should take the chance to be
50 elected, Hispanics and Native Americans.
51 That would be the cost to assure that more Democrats get into the
52 legislature.

1 Before the Voting Rights Act, Democrats didn't take care of Hispanics
2 and Native Americans.
3 It took the Voting Rights Act to do it, and I urge you, I urge you
4 now is the time to reauthorize the Voting Rights Act, to please remember
5 that we're dealing with an environment that is hostile to people of color.
6 They color it with an anti-immigrant code. It is nothing but a code.
7 It is primarily in this state anti-Mexican.
8 And it's going to spill over into our voting laws, and we need the
9 Voting Rights Act to protect us.
10 Thank you.
11 MR. CHANDLER DAVIDSON: Thank you, Mr. Ortega.
12 Mr. Eckstein.
13 MR. PAUL ECKSTEIN: Thank you very much.
14 Chairman, members of the commission, my name is Paul Eckstein.
15 As my good friend Dan said, I have been a lawyer here for 40 years.
16 I have worked on a number of election cases like Danny, written
17 initiatives, indeed opposed the first attempt at English only in 1988.
18 As Dan said, he and I and a lawyer from the Legal Defense Fund
19 brought an action under Section 2 in the early 1990s, I think it was 1990,
20 to force the Phoenix Union High School District to elect its board members
21 by district, rather than at large.
22 Prior to that board members had been elected at large, and even
23 though at that time I think approximately 30 percent or 40 percent of the
24 students were members of one minority group or another, Latinos or African-
25 Americans, I think there had only been one or two African-Americans and/or
26 Hispanics that had been elected to the board.
27 Since that time with districts, a number of African-Americans and
28 Hispanics have been elected to the Phoenix Union High School board.
29 I point that out because that action was not brought out under
30 Section 5. That was brought out under Section 2.
31 One of the things that I would like to stress is that in my belief
32 Section 2 and the 14th Amendment are sufficient tools to deal with the
33 issues that are before a number of states, including Arizona, today.
34 I have worked on several Congressional and legislative redistricting
35 actions.
36 As the chairman said, one in the 1980s, I think 1982, and one that
37 started in 2001, and is still going, and may be going until I retire from
38 the practice of law.
39 Indeed we have an appeal in that case before the Arizona Court of
40 Appeals next Tuesday.
41 We have, as you may know, a different kind of law in Arizona that it
42 was adopted by initiative, an amendment to our constitution, that provides,
43 number one, that an independent redistricting commission do the
44 redistricting; number two, that the commission meet six particular goals,
45 one of which truly is unique, that is the favoring of competitive
46 districts. I am, as the chairman noted, a member of the national
47 board of the Lawyers' Committee and a regional vice chair, and I need to
48 say right up front that it's very generous of the Lawyers' Committee to
49 invite me to be a participant here, knowing that my views are different
50 than I suspect the majority and maybe everyone connected with the Lawyers'
51 Committee except for me.

1 I have this view based on 30 years of experience in the trenches, and
2 I would like to share that with you.
3 I want to make five points.
4 The first point is that I seriously question the necessity and wisdom
5 of renewing Section 5 of the Voting Rights Act of 1965.
6 I do not question that when it was adopted in 1965 the Voting Rights
7 Act was necessary. I do not question that in the 1960s, '70s, and
8 '80s the Voting Rights Act of 1965, in particular Section 5, were used
9 effectively to elect members of minority groups, African-Americans in the
10 south, Latinos in Texas and Arizona and California, and perhaps other
11 states, New Mexico certainly.
12 I suspect that the panel and the staff of the panel is well aware of
13 a law review article that appeared in the October 2004 issue of the
14 Columbia Law Review authored by Samuel Issacharoff, and it's entitled Is
15 The Voting Rights Act a Victim of Its Own Success.
16 I don't have time to reiterate the arguments, and I couldn't
17 reiterate them as well as the author, but I want to go on record as saying
18 I subscribe to the positions taken by the professor in that article.
19 He asks the question, comparing the situation of African-Americans in
20 New Jersey, which is not covered by Section 5, and Georgia, which is
21 covered by Section 5, asking why the African-Americans in that case in
22 Georgia should not enjoy the same rights to form cross political
23 connections as African-Americans in New Jersey.
24 I ask a slightly different question.
25 That is, if this Section 5 is so good, with states like Georgia and
26 Alabama and Mississippi and Texas and Louisiana and somehow Alaska and
27 Arizona, why is it not adopted at the national level? If it is really that
28 good, why not adopt it at the national level.
29 I think I ask the question, the answer is in part we know why it
30 isn't, because politically that just wouldn't happen. It can't happen.
31 The second point I want to make is that Arizona should never have
32 been added to the list of states covered by Section 5 of the Voting Rights
33 Act when it was added in 1975 Arizona was added in 1975 because of an
34 amendment that Congress had adopted that said a voting test included the
35 fact that ballots and other information were not made available in the
36 language in which five percent of the people, other than English, five
37 percent of the people spoke.
38 To wit, Spanish.
39 And in a state where more than 50 percent of those who were
40 registered to vote -- were not registered to vote, are those who were
41 eligible to vote, did not vote in the presidential election.
42 Arizona was such a state, in 1975.
43 But Arizona is not such a state today.
44 I don't deny there are innumerable injustices that go on every day in
45 this state. There are major and minor slights, and they need to be
46 dealt with.
47 Oftentimes through the courts. Sometimes through the political
48 process.
49 But Section 5 is too blunt a tool, too blunt an instrument to deal
50 with those kind of acts. What fine company Arizona has, states in the
51 old Confederacy.

1 I ask, where is Arkansas, where is Tennessee, where is North
2 Carolina, where is Virginia.
3 Arizona has had, under the Voting Rights Act, and if there's any
4 question about it, I certainly subscribe to the notion that federal law,
5 whether it's in the Voting Rights Act or not, ought to make absolutely
6 clear that ballots are provided in other languages.
7 Maybe the five percent threshold ought to be lowered.
8 I certainly support that.
9 And I think that if one does that, one solves the problem that
10 Section 5 is designed to do. Oliver Wendell Holmes said a hundred
11 years ago that when the reason for a rule ceases to exist, the rule ought
12 to cease to exist.
13 That's where we are, at least in Arizona, and I submit, based on my
14 knowledge, the nation.
15 The third point I want to make is that Section 5 creates an
16 incredible burden, an incredible burden on the states and other
17 jurisdictions that have to deal with it. The burdens are cost and time.
18 Every time one goes to a particular county that is responsible for
19 redrawing district lines, one is met with the argument, it's going to cost
20 us a whole lot of money to redraw those precinct lines, and we don't have
21 enough time to do it, even though the argument is made in January for a
22 November election.
23 I face that argument time and time again. And I almost believe it.
24 I know they have the time to do it, but I also know that the
25 costs are incredible.
26 Every single precinct line change in Arizona has to go to the Justice
27 Department to be pre-cleared with Section 5.
28 That is an enormous waste.
29 I haven't tried to add it up, but it wouldn't shock me if there's $5
30 million in salaries and computer time that is spent this date to try to get
31 precinct lines cleared by the Justice Department. That is a waste.
32 Fourth point is that Section 5 is subject to manipulation.
33 It's subject to manipulation by the bodies responsible for redistricting.
34 It's subject to manipulation by the Justice Department. And
35 it's subject to manipulation by incumbents that use Section 5 to justify
36 understandably increasing people who are favorable to them to make sure
37 they get elected.
38 As far as bodies responsible for redistricting, we see in the
39 legislative redistricting a special case of that where the Justice
40 Department and the expert hired by the Justice Department in federal court
41 approved 55 percent of voting age Hispanics in district 14, and when the
42 independent redistricting commission got a hold of it, it was boosted to 58
43 percent.
44 Fifty-five percent was sufficient. Fifty-eight percent was put in,
45 and as a result they couldn't meet the competitive goal as required by the
46 Arizona Constitution.
47 Final point I want to make is that Section 5 was designed as a
48 temporary measure.
49 It was voted on again -- first voted in 1965, voted on again in 1982,
50 extended for 15 years in 1982 to 1997
51 And then sunsetted in 2007.
52 That's why we're here.

1 I realize in Washington the temporary often have a way of becoming
2 the permanent.
3 But it not ought to become permanent without good reason. I
4 think, I truly believe based on my experience in the trenches that Section
5 2 of the Voting Rights Act, which is not up for renewal, should be kept in
6 the act at all costs, and the 14th Amendment are sufficient tools to allow
7 protection of minority voting rights in Arizona and in the United States.
8 Thank you very much.
9 MR. CHANDLER DAVIDSON: Thank you, Mr. Eckstein.
10 Now I will give the commissioners a chance to ask both Mr. Eckstein
11 and Mr. Ortega questions.
12 HON. REBECCA VIGIL-GIRON: Mr. Eckstein, I'm president of our
13 National Association of Secretaries of State. I'm from New Mexico.
14 And a few years ago, just before we passed the Help America Vote Act, the
15 Justice Department, of course, identified 37 states throughout the United
16 States that have very high language minority populations.
17 And basically telling all of us, New Mexico already translating into
18 Navajo and Spanish, all of our election materials, but telling the other 36
19 states you must translate into those languages where you have five percent
20 or more of one minority population or another language-wise.
21 Well, 36 states, more or less, said, oh, no, we can't, we can't do
22 it, we want an exemption until 2007.
23 Back then I didn't realize why they wanted to wait until 2007, until
24 I was invited and brought up to speed with what was going on today and next
25 year and the year after that. The reason why we need to reauthorize
26 is because they will not do it on their own.
27 They will not translate on their own.
28 Not because there aren't plenty of people out there to translate and
29 that know how to translate into those various languages, but because they
30 don't want to take the time, the effort, and they use the excuse of money
31 as well.
32 I don't buy that.
33 And that's why we have to reauthorize.
34 Please, your thoughts.
35 MR. PAUL ECKSTEIN: Chairman Vigil-Giron.
36 HON. REBECCA VIGIL-GIRON: Vigil.
37 MR. PAUL ECKSTEIN: Before I answer that, I want to make one point
38 that I neglected to make.
39 Mr. Ortega is absolutely right about Proposition 200.
40 Proposition 200 was submitted to this Justice Department for pre-
41 clearance.
42 And they pre-cleared it in record time.
43 If Section 5 of the Voting Rights Act was designed to do anything, it
44 was designed to make sure that a proposition like Proposition 200 would not
45 pass.
46 And if one is going to do -- if one is going to renew this act, one
47 has got to figure out a better way to make sure that non-political
48 considerations are visited upon propositions like Proposition 200.
49 And whether it goes to courts or not, I don't know, but I was shocked
50 at what the Justice Department didn't do, particularly in light of what
51 they didn't do in our case, which they had three districts that they had

1 previously looked at three times, and diddle-daddled for 45 days, and ended
2 up doing nothing.
3 Now, in response to your question, I absolutely agree that there
4 needs to be legislation, whether it's in Section 5, Section 2, or
5 independent legislation, to make sure that different language groups, and
6 as I said I don't know where the threshold ought to be, have the right to
7 have ballot and voting information in their languages.
8 And I would go further.
9 I would appropriate the money to have people to translate, to make
10 sure that those people who are citizens of the United States, whose
11 primarily language is another language, have the right and the ability to
12 vote in their languages.
13 But one does not need the pre-clearance provisions of Section 5 to
14 accomplish that. That is my point.
15 HON. REBECCA VIGIL-GIRON: Well, I think it's more or less an
16 insurance until we get to that point when we can pass legislation within
17 our states.
18 It's not the other way around.
19 I don't think that states will take it upon themselves to pass
20 something that is fair and just for the minority populations within their
21 states.
22 MR. PAUL ECKSTEIN: I wouldn't leave it to the states.
23 This is something that I would press on Congress.
24 The point is if Section 5 is such a wonderful thing, why did it not
25 operate to prevent the operation and the enactment and effectiveness of
26 Proposition 200.
27 HON. REBECCA VIGIL-GIRON: I think Daniel wants to answer that.
28 MR. DANIEL ORTEGA: The Justice Department, as I understand it, pre-
29 cleared the provisions of Prop 200 so that the Secretaries of State and the
30 counties, and anybody that was going to have an election, there was an
31 election in March, what the Justice Department said was pre-clear the law
32 so that you can begin to put together the policies and the procedures or
33 guidelines that you're going to operate under to implement Prop 200.
34 But those procedures are going to be subject to pre-clearance.
35 So it's not over.
36 That gave them the go ahead to put together the guidelines under
37 which to operate, so it's not over.
38 HON. REBECCA VIGIL-GIRON: Thank you.
39 HON. PENNY WILLRICH: I have a question for Mr. Ortega.
40 Given Mr. Eckstein's position, and if Section 5 is not reauthorized,
41 it appears that we might return to a case-by-case challenge of a Voting
42 Rights Act violation.
43 Do you think that that is really a wise way to handle it, or would
44 reauthorization of Section 5 perhaps with some changes or some measures to
45 tighten it up be more effective? MR. DANIEL ORTEGA: Well, I'd like
46 to say that having the federal government involved in the pre-clearance
47 process that presently exists is a good safeguard for what we potentially
48 believe could be violations of the Voting Rights Act and a measuring stick
49 by which we can all operate.
50 The bottom line is that typically litigation ensues in either
51 direction, so you're always going to have litigation.

1 But I think the Justice Department and the way it has gone about with
2 regard to pre-clearance, and many of the things that occurred in Arizona,
3 has provided what I believe to be a good measuring stick and a good
4 guideline for how commissions, legislators, city councils, counties
5 operate, and the way they redraw their districts and/or enact ordinances
6 or laws.
7 MR. PAUL ECKSTEIN: If I could respond, I think as Professor
8 Issacharoff points out in his article, one of the evils of the pre-
9 clearance provision of Section 5 is that it is in the hands of a political
10 department.
11 Now, there are those that say that the Civil Rights Division, in
12 particularly the voting rights section, are immunized and isolated from the
13 politics of that department.
14 I don't know one way or another whether they are or they aren't.
15 But one thing I know is that the invitation, the opportunity to do
16 mischief is there. And I have seen results that are difficult to explain
17 in any way other than political action.
18 One of the problems with Section 5, the pre-clearance provisions of
19 the Voting Rights Act, as Mr. Ortega has said, is that those in power,
20 either in the legislature or in Arizona, in the case of the independent
21 redistricting commission, can and I believe have taken advantage of Section
22 5 to pack minorities in certain districts to make sure that the vote that
23 the minorities would typically give typically to Democrats is widely
24 dispersed.
25 And I gave you the example of district 14.
26 That commission did not have to do that.
27 It used Section 5 of the Voting Rights Act as an excuse, even though
28 the Justice Department had blessed 55 percent, even though the expert
29 called by the federal court in 2002 had blessed 55 percent, they put in 58
30 percent.
31 There was no reason, no necessity to do that.
32 HON. REBECCA VIGIL-GIRON: I don't understand the word packed.
33 They already lived there in those areas.
34 The gerrymandering that goes on during these redistricting procedures
35 and processes is unbelievable what they do to some of our communities.
36 I know specifically in Albuquerque, in Bernalillo County, it's like
37 the problem is cut in half.
38 If they would sue me, I want them to sue me, so that we can prove
39 that this is a strong district that could be primarily of all of the
40 reservation of the Isleta Pueblo.
41 It hasn't happened yet. I don't really like that word packed.
42 We're already there.
43 We're not moving in because somebody is paying us to move into those
44 areas so we can have that 58 percent, or whatever the test is.
45
46 MR. PAUL ECKSTEIN: There's no doubt that there are minority
47 groups in Arizona, Native Americans particularly on the reservations, that
48 provide a concentration of particular minorities groups, and Latinos in
49 Tucson and Phoenix.
50 And no one is saying that people ought to move out of their
51 districts.

1 The point is that lines can be drawn anywhere, and if the line
2 between district 14 and district 10 had been moved north rather than kept
3 where it was -- I'm sorry, moved south so that there were more Latinos in
4 district 10, we might have a state senator sitting on this panel.
5 That's the point.
6 Three percent Latinos were not necessary to allow Latinos to elect
7 representatives of their choice, given the fact they had 55 percent
8 Hispanic age voting population.
9 That three percent could have made the difference, if not this year,
10 next year, or the next year in district 10.
11 MR. NED NORRIS, JR. : I'm debating in my own mind whether or not I
12 should ask this question.
13 Mr. Eckstein, you had commented, I believe, that you felt that
14 Section 5 could be manipulated. I think that was the term that you used.
15 What do you mean, and could you give me an example, of manipulation
16 of Section 5?
17 MR. PAUL ECKSTEIN: We spoke of three groups that can manipulate.
18 Number one, the Justice Department, which can, depending on who's in
19 office, decide that there need to be more of a particular minority group.
20 And that's typically the way it is manipulated. And we saw that in
21 the Supreme Court case of Georgia versus Ashcroft, where the Justice
22 Department insisted in its pre-clearance procedures under Section 5 that
23 there be a higher percentage of African-Americans in certain districts.
24 And when the Supreme Court looked at it, they said no.
25 There were alternative ways to do that.
26 So it clearly is susceptible, it's susceptible in terms of timing.
27 The Justice Department has 60 days and it can grant itself another 60
28 days to do the pre-clearance.
29 Last year at this time the Justice Department submitted -- it was
30 given a new plan that was identical to a plan they had pre-cleared a year
31 before, except for three districts. It didn't take 60 days to pre-clear
32 that plan. Yet they never got around to doing it.
33 Forty-five days went by. We were up against election deadlines in
34 Arizona, and the Court of Appeals stayed the judge's order which provided
35 for the creation of that new map.
36 I think that was a potential for manipulation.
37 The bodies that do the redistricting, in some states legislatures,
38 and in Arizona the independent redistricting commission, and in other
39 states commissions like Arizona, can and often do use the Voting Rights Act
40 as an excuse to pack, and that is an acceptable word and it is a word that
41 people who do this understand very well, although they would deny it,
42 minorities into certain groups so as to limit their influence.
43 One knows, it is important that under Section 5, and it is the law,
44 minorities be able to elect representatives of their choice.
45 But, it is also well known that by putting more minorities into a
46 particular district, one limits the ability of those minorities to be in
47 other districts and therefore have at least an influence on the election in
48 other districts.
49 That happened in Arizona, in the 2001, 2002 redistricting.
50 It happened with district 23.
51 Pete Rios was the senator from that district. He was district six
52 under the old map. And he and my clients in the redistricting case urged

1 the independent redistricting commission to move the line so that there
2 would be more Latinos in that district, even though it was well under 50
3 percent, because that was a, what's called, an influence district.
4 And the Justice Department agreed with us on that one.
5 But I think the commission took advantage of that saying, no, there
6 is no such thing as an influence district. We are going to, here's the
7 word again, pack Hispanics into certain districts, and if Pete Rios only
8 has 25 percent instead of 29 percent, so be it.
9 Third, the third way in which the act can be manipulated is by
10 candidates, when they're in the legislature, and legislators are looking
11 out for their self-interest, candidates can say and often do say, look,
12 the Voting Rights Act requires that people in my district be able to elect
13 representatives of their choice.
14 I'm their representative.
15 Let me tell you, I need 60 or 70 percent to get elected.
16 Every politician, every politician argues for getting as many votes
17 that will elect him or her as possible.
18 I understand that.
19 Those are the motivations that I think Section 5 derives.
20 MR. NED NORRIS, JR. : I guess the comment I would like to make is
21 whether or not the answer is to disallow any reauthorization of Section 5
22 versus looking closely at the section itself and see how any legislation
23 might be able to address those concerns.
24 I'd like to hear Mr. Ortega's comments.
25 MR. DANIEL ORTEGA: I think what I find interesting about -- and Paul
26 is not making this argument. I'm not saying that he is.
27 But what I've been hearing generally about the opposition to the
28 reauthorization has been more so from leaders within the Democratic party.
29 And if you want to talk about manipulation, what some of the leaders
30 within the Democratic party are saying is that it's more important to elect
31 more Democrats in the state of Arizona, and they can coexist with making
32 those Democrats people of color, Native Americans or Hispanics.
33 Therefore the shift in percentage of two or three percent in a
34 particular area, that would give a Democrat the opportunity to be elected,
35 who could be a person of color, is also important to the process.
36 The problem with that is it's all, though I think some people are
37 well-intentioned, and I think some people are making that argument in good
38 faith, the fact of the matter is it doesn't work that way.
39 And that what you do have is Anglo Democrats elected in those
40 districts where those shifts are made for the most part. Okay.
41 Not as a matter of design, but just simply as a matter from the
42 standpoint of voting patterns.
43 And so the way to deal with the numbers as it relates to electing
44 Hispanics who are not incumbents to new legislative districts is extremely
45 important, and the numbers that we get, I think, are highly protected by
46 Section 5 of the Voting Rights Act.
47 MR. CHANDLER DAVIDSON: I would like to exercise the chair's
48 prerogative here to thank both Mr. Ortega and Mr. Eckstein for being here
49 today and engaging in the important and very civil debate here.
50 And now, I think, given time constraints, it's important to move
51 forward.

1 We're told that we've got five minutes to go until the tape runs out.
2 So maybe before we resume, we just call a brief halt here and in a few
3 minutes get back to business.
4 Thank you very much.
5 (Brief recess taken.)
6 MR. CHANDLER DAVIDSON: Okay. At this time I would like to ask Mr.
7 Andrews for his comments, please.
8 MR. ADAM ANDREWS: In the spirit and purpose of this hearing, I would
9 like to greet all of you in my first language and the first language of
10 this area and just say is: (Whereupon, Mr. Andrews spoke his native
11 language.)
12 What I was just sharing is saying good afternoon and I want to thank
13 the chair and the commissioners for allowing us to be heard as it
14 references this act.
15 And in hopes that it would benefit all people and all walks of life.
16 I am pleased to serve as a panelist this afternoon and to share with
17 you the impacts of the reauthorization of this act will have on the Native
18 American community, but specifically I will speak to the impacts to the
19 Tohono O'Odham Nation.
20 As mentioned by the chair, my name is Adam Andrews. I'm Tohono
21 O'Odham, and I work with the Tohono O'Odham Nation as executive assistant
22 to Chairwoman Vivian Juan-Saunders and our guest commissioner here Vice
23 Chairman Norris.
24 The Tohono O'Odham Nation recognizes the importance of its members to
25 participate in the Democratic process, both as citizens of the Tohono
26 O'Odham Nation and as citizens the United States of America.
27 This is a demonstration of the value system, and the American value
28 system, that stems and speaks to responsibility and community
29 responsibility.
30 Historically voter registration and voter turnout on the Tohono
31 O'Odham Nation has been less than 50 percent of the eligible population.
32 Just recently the nation was able to field a voter turnout of 55
33 percent in this last 2002 election and a 59 percent in the 2004 election.
34 The Tohono O'Odham Nation, as mention earlier, is 2. 8 million acres,
35 and is located within the congressional district seven, with a total
36 eligible Native American population of 27,869, or in translation 6. 2
37 percent of the total population.
38 A large percentage of this, of those in this district are members of
39 our tribe, Tohono O'Odham.
40 The nation has about 28,000 enrolled members, and of which 17,000 or
41 64 percent of our population are eligible to vote.
42 And I want to share with you, to speak this afternoon specifically to
43 Section 203 and its benefits for us.
44 Tohono O'Odham Nation is covered by three counties. Primarily Pima
45 County, and Pinal County and Maricopa County.
46 As mentioned earlier, the tribe is 2. 8 million acres, which is
47 comparable to the size of Connecticut.
48 And with that, there are certainly counties that stem into portions
49 of our nation. But, again, as I mentioned earlier, primarily the nation is
50 in Pima County.
51 A large barrier to effectively mobilize our tribal members to vote
52 has been the rural environment and the ability of the voter block to make

1 it to the polls on election day. And common reasons cited for low
2 voter turnout are a lack of transportation, a lack of supervision for their
3 children to get to the polls, employment responsibilities, and lack of
4 employment, and overall a lack of education and apathy towards voting.
5 Within the successes of the nation to be able to get people to the
6 polls in this last election, 2004, we were able to increase our voter
7 registration to close to 1,000 voters, and we attribute that success to our
8 partnerships not only on a grassroots level but also on a very state and
9 national level.
10 We were able to get support from the Intertribal Council of Arizona,
11 the National Conference of American Indians.
12 Organizations, nonprofit organizations such as the National Voice,
13 Moving America Forward.
14 The Democratic party reached out to tribes, and our tribe
15 specifically, to assist.
16 Pima County elections office and the counties that exist on our
17 nation.
18 And as I mentioned earlier, we were able to gain and increase our
19 voter registration to close to 1,000, a total of 955 newly registered
20 voters.
21 One of the avenues that we approached in getting the vote out in 2004
22 was to do early voting.
23 We were able to successfully do that and so much that we were able to
24 get 850 early votes cast within the last 2004 election. And a lot of
25 the tools and mechanisms that we used to address or get people to the
26 polls, not only during early voting but also during election, was to
27 provide incentives such as a barbecue as was mentioned by an earlier
28 panelist that is done at the rural areas. Also free goodies. You
29 know, T-shirts.
30 Also tribal members seek -- look to the government to guide them in
31 terms of what the issues are and what direction or suggestion they would
32 like the members to vote on particular issues or particular candidates.
33 And in doing so, we were -- the tribe was able to produce a voter
34 guide.
35 Also the tribe recently opened and began its own tribal radio
36 station.
37 And within the last year was the first year that we were able to have
38 the radio station during an election season.
39 We very much maximized that opportunity to speak in our native
40 language to members of the tribe on the importance of voting and
41 specifically making note, taking, making it specific to them that we all
42 have assistance for them in the polls.
43 And, again, going back to, as I opened my statement, I wanted to
44 speak specifically to the benefits of Section 203.
45 Pima County, as I mentioned, is primarily of the nation, and they
46 have been real helpful in respect to meeting the requirements or respect to
47 meeting our request to engage tribal members in the electoral process.
48 One of the ways is they seek out and they work with the tribe to
49 identify people within the nation that would translate material, translate
50 pamphlets, translate proposition language in our native language.
51 And those are put on audio cassettes and distributed throughout the
52 tribe.

1 And I will say that most of our tribal members who do vote are elders
2 and, of course, certainly most, all of the members who are elders speak the
3 O'Odham language as their first and primarily language.
4 We -- they also offer employment for poll workers to be tribal
5 members, so certainly that also assists in helping people to feel welcome
6 to the polls, and not feel a sense of fear, to cast their vote and to
7 participate.
8 And that we also -- they, the county has also been more than willing
9 to accommodate early voting, specifically during a time when this last
10 election, during a time when a ceremony, tribal ceremonies were taking
11 place that would prohibit people from getting to the polls on that
12 particular day.
13 So we are very much in support of the key provisions that are being
14 considered for reauthorization, but specifically to Section 203 for the
15 reasons that I mentioned earlier. And I want to go ahead and
16 conclude my statements here, and again the Tohono O'Odham Nation supports
17 the reauthorization.
18 MR. CHANDLER DAVIDSON: Thank you, Mr. Andrews.
19 Mrs. Calvert.
20 MS. ROGENE CALVERT: Good morning.
21 My name is Rogene Calvert, and I'm representing Houston, Harris
22 County, Texas. Today I plan to cover my experience as a community
23 leader in the rollout of the Vietnamese voting language assistance program
24 in Harris County.
25 I first heard the news that Harris County met the threshold for
26 Section 203 of the Voting Rights Act in late July of 2002 when
27 representatives of the Justice Department came to the National Organization
28 of Chinese Americans, OCA, annual convention to inform those of us there
29 that our local chapters or the cities in which we reside were part of the
30 jurisdictions that were deemed eligible based on the 2000 U. S. census.
31 Having no prior knowledge of Section 203 and how it could affect our
32 community, I was delighted to know that our Vietnamese community in Houston
33 and Harris County would now have voting information in their native
34 language.
35 Shortly after returning to Houston, I spoke with our county clerk
36 Beverly Kauffman whose responsibility it would be to manage the county's
37 Vietnamese voting language assistance program.
38 I suggested putting together a community advisory committee to assist
39 in this endeavor as I imagined there would be mountains of information to
40 translate.
41 And from experience I knew that simple translation is not an easy
42 task and would be best to have the translations reviewed and translated
43 back into English to ensure accuracy. Within a month the community
44 advisory committee met to discuss their agenda. Tackling the translation
45 of materials was both easy and difficult. Since other communities had
46 already translated voting information into Vietnamese, the county chose to
47 use one of those companies from another state.
48 The local advisory committee had issues with some of the translation,
49 down to the choice of words.
50 In some instances the choice of a certain word over another indicated
51 whether it was before or after the communist takeover.
52 And this was a great offense to the reader.

1 Members of the committee recommended revisions of the translation.
2 Of course, revisions mean expense, and expense was not always
3 tolerated.
4 It was not as important or sensitive to a non-Vietnamese speaker who
5 had the decision-making power to deem if the change was substantive or not.
6 Just earlier in Harris County the change from the paper ballot to the
7 E-slate had taken place.
8 This, of course, is a critical part of the voting process.
9 As it turned out, the county was not able to put the E-slate ballot
10 in Vietnamese until two years later, March of 2004.
11 They gave us a reason for not having the E-slate ballot in Vietnamese
12 because the Internation Testing Authorities had not fully certified with
13 firmware required to run the necessary applications on the E-slate.
14 This was because of the lack of clarifying input from the Election
15 Assistance Commission, EAC, which was authorized through the Help America
16 Vote Act of 2002. However, the EAC was not in existence yet.
17 Whether this excuse was valid or not we will never know.
18 We were, however, very disappointed, and this excuse seemed
19 indicative of the general attitude of the county.
20 To get done just what was necessary to get by.
21 After all, it was almost two years since we had begun the Vietnamese
22 language program, and the E-slate should have been one of the most
23 important things handled. Furthermore, the alternative left much to
24 be desired.
25 Instructions for using the E-slate was of course put into the
26 Vietnamese language along with a paper ballot template in Vietnamese. This
27 was held up next to the E-slate machine for the voter to read while looking
28 at the E-slate in English and Spanish.
29 It was during this election process that the Asian-American Legal
30 Center, AALC, documented voting problems among the Vietnamese.
31 The lack of Vietnamese speaking poll workers was a critical issue,
32 especially since the actual E-slate voting process would require more
33 assistance.
34 It was also noted that the translated paper ballot template and
35 instructions were not always available at the polls, or Vietnamese voters
36 were instructed to go downtown to get them.
37 Furthermore, poll workers were not properly trained to know about or
38 to use the translated paper templates.
39 As a result of this less-than-satisfactory effort, the Justice
40 Department and the county entered into a memorandum of agreement that
41 outlined certain terms that needed to be accomplished.
42 Some of these terms addressed the need for Vietnamese speaking poll
43 workers in precincts with 50 or more registered Vietnamese voters and
44 Vietnamese speaking workers on call for smaller precincts.
45 To emphasize letting voters know in Vietnamese that anyone can assist
46 them with voting, except their employer or agent of the employer or the
47 union.
48 I know this has been mentioned a few times today, and actually
49 I was called by the daughter of a woman -- the daughter was asking if her
50 mother could go back and revote because when she went to vote, the poll
51 worker went into the booth with her, did not offer for the daughter to go.
52 The mother who was elderly felt very pressured and felt very rushed.

1 Therefore she got nervous and ended up not voting for the person she
2 wanted to.
3 And of course they couldn't go back to revote.
4 Also it said that we had to address, it had to address the use of
5 county employees who speak Vietnamese to work the polls during election
6 day.
7 They had to keep strict records on who was trained and a checklist of
8 the items upon which they are trained.
9 They had to employ on a full-time basis a coordinator for the
10 Vietnamese language program.
11 And they had to convene an advisory committee that meets monthly
12 during the election cycle and whose meetings are documented in summary
13 fashion.
14 This agreement would continue through December 31st, 2006.
15 This agreement has helped tremendously in implementing things that were
16 lacking previously or seemed to take excessive time to complete.
17 The Vietnamese speaking coordinator has been helpful in recruiting
18 more poll workers, but the numbers are still not enough to fill the need.
19 More resources are required to recruit and maintain these workers.
20 They need to be educated about the importance of this task, and their
21 employers need to be -- to understand why a day off from work is critical.
22 Many Vietnamese are employed in service industry jobs or own their
23 own businesses and cannot take a day off without negative ramifications.
24 The suggestion to add a polling place in the densely populated Asian-
25 American area of southwest Houston was finally adopted. In the last
26 election, this polling place saw waiting lines every day during the early
27 voting period as well as on election day.
28 The familiarity and convenience of this site run by Vietnamese poll
29 workers as well as it being a presidential election year and we had a
30 Vietnamese American on the ballot drew Vietnamese voters from all over the
31 county and many first time Vietnamese voters as well. With the
32 obvious success of the Vietnamese language voting program, the large and
33 diverse Asian American community in Houston is hopeful that the Chinese
34 language can be next.
35 Community leaders are willing and ready to work with the county on
36 incrementally translating information into the Chinese language.
37 Congressman Al Green, who has a large part of the Asian American population
38 in southwest Houston in his district, has committed to finding resources to
39 do so.
40 I am somewhat dismayed, however, at the possibility of this happening
41 without Section 203 making it mandatory.
42 I recently spoke with the county clerk to introduce the idea of
43 working voluntarily towards this end, as she too agreed that in due time
44 the Chinese population would probably meet the threshold, but she indicated
45 that unless it was mandatory she wouldn't be as, quote, enthusiastic.
46 I think this statement sums up my experience with the local
47 municipality in charge of the language assistance program.
48 Unless it is mandatory, it would be done less enthusiastically.
49 Unless we have the Voting Rights Act and especially Section 203, the
50 effort to assist limited speaking populations with the right to vote would
51 be less than enthusiastically accomplished, if at all.

1 Thank you all for the opportunity to share my thoughts and
2 experiences with you. We are on the brink of making or breaking a
3 very important program that has ensured that many persons in this country
4 can exercise their right to vote.
5 Please let those who make this decision know that hundreds of
6 thousands of individuals in Houston, Harris County, are grateful for the
7 language assistance program in both Vietnamese and Spanish.
8 Thank you.
9 MR. CHANDLER DAVIDSON: Thank you.
10 And now I will ask my fellow commissioners to -- I'm so sorry.
11 I'm so sorry.
12 Mr. Lewis, I apologize.
13 MR. JOHN LEWIS: Thank you. Thank you for the opportunity to be here
14 and to speak in support and need for the Voting Rights Act and its
15 reauthorization.
16 Welcome on behalf of the Intertribal Council of Arizona to Indian
17 country.
18 Here in the state of Arizona, tribal nations occupy approximately 27
19 percent of the land base here in the state of Arizona.
20 Nationally, the land base here with the tribes in Arizona is over 50
21 percent. So this really is Indian country.
22 We also as have heard Tohono O'Odham is the size of Connecticut.
23 Navajo Nation is the size of West Virginia. I guess that means we have 48
24 states to reclaim yet.
25 What I want to do is give you a little history, and the importance of
26 it, because this has been an ongoing struggle, as it is with the other
27 people that have been here before you today. This is something that
28 ended here in Arizona with the recognition of the right to vote in 1948 for
29 the American Indian.
30 In that Supreme Court decision, the Arizona State Supreme Court, Levi
31 S. Udall, the father of Congressman Morris Udall, quoted the Indian law
32 scholar Felix Cohen, that in a democracy suffrage is the most basic civil
33 right since its exercise is the chief means whereby other rights may be
34 safeguarded.
35 To deny the right to vote, one is legally entitled to do so, is to do
36 violence to the principles of freedom and equality.
37 I think that really does lay the foundation for what we're about
38 here, and what the act is about, and something that we do have to continue
39 to protect.
40 The issues that have been facing the Indian people, particularly here
41 in Arizona, is of a rural nature and the distances here that people have to
42 travel, long distances. And tribes are scattered throughout.
43 We have a tribe located in the bottom of the Grand Canyon.
44 And all that has to be considered in designing how best to ensure
45 that there is maximum voter opportunities.
46 The idea of distances is real crucial in terms of where voting is to
47 take place.
48 The other thing that is important to recognize historically is that
49 there's -- the citizenship of Indian people wasn't until 1924, before
50 Indian -- American Indians were recognized as citizens of the United
51 States.

1 And one of the leaders of Indian rights in that era was Carlos
2 Montezuma, a Yavapai Indian, from Fort McDowell, an Indian reservation here
3 in Arizona.
4 And it wasn't again until 1948 until recognizing the right to vote.
5 But as citizens of the state and citizens of the tribal nations and
6 citizens of United States, this is, this is all important that those rights
7 are upheld.
8 The other area is in the role of the American Indian people in terms
9 of looking at the military service in World War II, and joining in
10 defending the country before they were citizens in 1947.
11 Returning veterans, not only here in Arizona but in New Mexico and
12 other states where there's an Indian population, came back and fought for
13 the right to vote and achieved it. So this is something that is not
14 unique to Arizona as Indian people, but all Indian people across the United
15 States has had to deal with.
16 So those, I think, are important things to remember as we look at
17 this area. There's been continuing struggles in terms of
18 implementing and participating in voting. There have been the type of
19 thing that was mentioned here, in relation to redistricting. There
20 is the challenges that Indian people have faced at the polls, and just the
21 basic information access to it.
22 The locations of precincts and other things.
23 And but most important was the language and ability to get assistance
24 and to have assistance in the polling places and as part of voter
25 education.
26 All these things are really key to the opportunities.
27 So we see that the 203 is a very important part of the Voting Rights
28 Act, and that really does need to be protected and enhanced in terms of
29 what's happening here.
30 As has been mentioned, Proposition 200 requiring identification or
31 different forms of identification, including pictures, how difficult that
32 is. And we have citizens, Indian citizens who may not have been born in
33 the United States because our tribes extend into Mexico, and those areas
34 are being -- need to be challenged and dealt with in an appropriate manner.
35 And birth certificates and other forms of ID, Social Security, all are
36 difficult in many of the tribes to produce in terms of what's been now
37 required. So there is a need for the ongoing challenge in those areas.
38 Just the idea, as we mentioned, people of color here, with surnames,
39 very similar in terms of the American Indian population.
40 And Hispanics. In terms of people of color, we're all treated the
41 same.
42 There's no distinction, American Indian, Hispanics, and others, in
43 terms of the attitudes and barriers, we all face it equally.
44 So, again, all those issues that have been discussed here are
45 applicable to the American Indian.
46 So voting rights, the Voting Rights Act, and Section 203
47 specifically, that we really do need to enhance in order to ensure the
48 viability of the democratic electoral process and to ensure that all
49 citizens are encouraged to vote in exercising the most basic civil right,
50 the right to vote.
51 Thank you.
52 MR. CHANDLER DAVIDSON: Thank you, Mr. Lewis.

1 Now I'll invite commissioners to ask any questions that they would
2 like.
3 HON. REBECCA VIGIL-GIRON: You mentioned that, and I didn't quite
4 understand who gave the excuse that the EAC was not in place before 2004,
5 so that the firmware for the E-slate, and I can't remember what company
6 produces the E-slate --
7 MS. ROGENE CALVERT: I have to look it up, but I have it with me.
8 The county gave us that excuse.
9
10 HON. REBECCA VIGIL-GIRON: Okay. Well, the firmware for any
11 type of voting equipment is actually tested by our national laboratories,
12 our testing authorities.
13 The firmware goes to one location, and then the software goes to
14 another location to be tested.
15 So it was the responsibility of the company to have sent that and be
16 certified in order for them to have brought it back to your county or
17 state, or however it is that you purchased voting equipment.
18 The EAC was in place shortly after -- latter part of 2003. The
19 moneys that were also appropriated for the creation of the EAC came later
20 on. The Help America Vote Act was 2002.
21 So getting the ball rolling in regards to the Help America Vote Act
22 process was a long process, but they were in place by January, February
23 2004.
24 Not 100 percent, but they were in place, so they should not have used
25 that excuse.
26 MS. ROGENE CALVERT: It was the 2003 election that we didn't have it
27 ready. So it could be that they weren't ready. It was Hart
28 InterCivic.
29 HON. REBECCA VIGIL-GIRON: Hart. Yes, I know them. So it's
30 their responsibility to get that firmware certified and be brought back to
31 your county to be recertified by your county.
32 MS. ROGENE CALVERT: And would the EAC have to have input into that,
33 so if they weren't up and running at the end of 2003, then that would have
34 been a reasonable excuse?
35 HON. REBECCA VIGIL-GIRON: What's happening right now is the EAC and
36 the National Institute of Standards and Technology have joined to create
37 new standards for voting equipment.
38 Those new standards are based on the voting equipment that's
39 identified in the Help America Vote Act, and those will be out hopefully by
40 the end of April, beginning of May, on the national registry so that the
41 public can make comments for 45 days. And then we'll adopt them once we
42 join the EAC in July of this year, so that everyone, the vendors will know
43 what to create out there, based on those standards.
44 MS. ROGENE CALVERT: We were suspecting or suspicious of whether or
45 not this thing sat on someone's desk and didn't get the attention it needed
46 to move it along.
47 That was sort of what I was inferring, is that perhaps people just
48 weren't paying attention to it.
49 HON. REBECCA VIGIL-GIRON: I don't believe it would have been on the
50 end, NASED is the responsible party right now, National Association of
51 Election Directors. They're going to be replaced by the EAC for the
52 certification process and give those numbers to those companies that are

1 producing the voting equipment. We'll wait to make that transition,
2 but NASED wouldn't have sat on it. That's for sure.
3 MR. CHANDLER DAVIDSON: Other questions?
4 HON. PENNY WILLRICH: I'd like to ask any of the panel members that
5 are still here if there are any specific acts of discrimination that have
6 been related to you or that you are aware of that has occurred, and how, if
7 it did, the Voting Rights Act helped to resolve those issues that arose.
8 MS. LYDIA GUZMAN: I'd like to answer that. Thank you very much.
9 This is in reference to those folks who go to polling places, and
10 I've seen this over and over again, and I'm going to use a general, you
11 know, answer for this.
12 We have folks that sometimes because of the consolidated voting
13 places they go and vote at the wrong place.
14 And in giving out the information, sometimes, you know, the
15 information that's posted on the door is so small that you miss it. You're
16 not sure whether it's one of those small things that you see when you walk
17 into the bank where it says member FDIC. Right. It's real small.
18 In there, you know, obviously it says you have the right to request
19 information in Espanol. Right.
20 But you miss it, because you're in there and you want to go vote,
21 then they say, you know, you're not on the rolls.
22 So at this point, you know, this is when, this is when, of course,
23 you know, the opportunity has come up to -- for those folks to actually
24 point out and say, you know, like a poll worker or a poll monitor will
25 actually come up and say, look, you have the right to request assistance in
26 Spanish.
27 In which, because of the lack of a bilingual worker in that polling
28 place, they were able to call somebody, you know, to do that.
29 However, still the fact that this person could have been potentially
30 disenfranchised because of that, this was someone who was a potential
31 falling through the cracks and being disenfranchised because of that.
32 Another is with provisional ballots.
33 In the provisional ballots, you know, many, many times when a person
34 requests a ballot, they receive the ballot, you know, to vote by mail
35 absentee ballot.
36 And sometimes because of, you know, maybe you want to sit down and
37 you want to vote in the comfort of your own home or whatever, you lose the
38 ballot, you misplace the ballot, you spoil the ballot. The information is
39 not properly out there, you know, in Spanish or other languages to inform
40 the voter that they have a right to request another ballot at the polls for
41 those folks that have lost that ballot and the opportunity to vote
42 provisional at the polls or an opportunity to vote at the polls, is not
43 there in many, many times.
44 HON. REBECCA VIGIL-GIRON: Let me answer the provisional ballot
45 concept. It's not for the people that have received an absentee
46 ballot or spoiled them.
47 It's for the person that is -- does not appear on the roster because
48 he was not processed in time or his application was lost or it never
49 reached the location where it should have gone or it's for the person, the
50 first time voter, who registered to vote by mail.
51 Now, states treat provisional voting differently all over the United
52 States. I've seen this. The way that we saw the absentee ballot

1 situation as recent as yesterday in our legislation reform legislation, if
2 you received your absentee ballot, you can actually walk it the day of the
3 election to your polling place rather than your county clerk's office which
4 is 10 miles away from you.
5 So you will have a chance to surrender your ballot, destroy it there,
6 and vote on the machine if you choose.
7 MS. LYDIA GUZMAN: I agree, and that is the case also here.
8 However, in many times when, when you lose your ballot, and you have
9 to go over there, and then of course at the polling place and the poll
10 worker says, I'm sorry, I'm showing here on your records that you already
11 voted early or you voted provisional -- an absentee ballot by mail, that
12 whole process in itself still needs to be worked out and more attention
13 from Section 203 can still be, you know, emphasized on that because we do
14 lose a lot of voters in that situation.
15 A lot of folks in the Latin communities and Spanish language voters
16 are choosing to vote by mail, because of -- that will alleviate the
17 pressure of voting at the polls and the pressures of somebody watching over
18 them, and they'll be able to do the research. However, many times
19 because of the complex lives that we have and the busy work schedules, many
20 of us, and I include myself because I'm terrible at this, we lose things
21 in our homes. You know, you misplace it and of course on election
22 day, you know, a person tries, makes an attempt of showing up at the polls
23 and trying to vote.
24 Then, of course, when the poll worker says just this, then the
25 Hispanic voter may just turn away and say okay.
26 HON. REBECCA VIGIL-GIRON: I don't know what kind of fail safe voting
27 or emergency voting you have in Arizona, but in New Mexico if that does
28 happen you still can go to a polling place and swear or sign an affidavit,
29 get a ballot, it's placed in an envelope, and then it's questioned later
30 on as they're canvassing the votes, did this person vote twice or is this
31 going to be accepted or not.
32 MS. LYDIA GUZMAN: And that should be the process here.
33 It is the rule. That is the rule here.
34 Then, of course, it's the County Recorder's duty to verify to see if
35 this person voted twice by checking anything that was received in the mail
36 at the same time anything that's also been voted on the provisional ballot
37 that's in a separate stack.
38 However, before it gets to that process, many voters will be turned
39 away because they were given that excuse by the poll workers.
40 MS. ROGENE CALVERT: I don't have individual cases, but I know for a
41 fact just from people that have run the polls or poll workers that the fact
42 that in the Vietnamese or Asian-American community where names, especially
43 Vietnamese communities, where you have just really a handful of surnames,
44 and they're so similar, and also with the Asian language you put the last
45 name first, so there's a lot of mix up that when you're looking for a name
46 in the book and the poll worker can't find it if they're not familiar with
47 the language and those customs and all, that has been very discouraging.
48 So having somebody who speaks the language and knows the culture has
49 helped a lot in understanding those nuances.
50 Also if there's questions just like she said, okay, I have a
51 question, when I show up, if someone can speak your language and takes the

1 times to listen to you and looks like you, so that you feel comfortable
2 talking to them, that helps tremendously.
3 And they just come away better informed all the way around because
4 they've had the opportunity to read it in their own language.
5 So now hopefully there would be fewer mistakes or misunderstandings
6 because they've had a chance to understand it.
7 MR. CHANDLER DAVIDSON: Mr. Lewis, or, Ms. Smith, would you like to
8 add to that?
9
10 MR. JOHN LEWIS: I think it's somewhat difficult to really
11 assess sometimes the outright discrimination versus -- although it is
12 there. And I think people feel it, and there's certainly those
13 perceptions, but also part of the problem is that people manning the polls
14 may not be trained properly, and there is the communications and cultural
15 aspects of it.
16 And I think what's -- as groups and organizations and individuals
17 promote voting, and you have a lot of first time voters, and they run into
18 one or two of these things, I mean, that's where the perceptions come in.
19 And sometimes they can be explained, just like is happening right now
20 in terms of what the alternatives are to proceed with and better understand
21 the procedures.
22 Again, that turns into perceptions.
23 But, in other cases, you know, there are other things that kick in.
24 But when challenged as to discrimination, it's easy to roll off these
25 other types of things.
26 So that's why I say it's sometimes a little difficult to assess. And
27 I think that there does need to be some effort to monitor better and
28 document these situations. And of course do better education, difficult as
29 it is, because people are volunteers that are manning the polls and
30 working with them.
31 But there needs to be some more thought given by everyone as to how
32 best to improve in that area.
33 MS. SHIRLEE SMITH: To add on, the experience that I had during one
34 of the elections or the previous election that I -- that we had is the
35 provisional ballots.
36 The problem we had was miscommunication. The problem we have is
37 through physical address, and one of the tribes that's in our county don't
38 have streets, street names or house numbers.
39 So they give directions by, you know, two miles, I live two miles
40 away from this building. That's their physical address.
41 And the experience that came about in our county is that when they
42 had to vote, some of them had to vote provisional. And the problem that --
43 the reason why they weren't counted was because their physical address
44 didn't match up in our system. And they were turned away because they
45 needed a physical address that they said maybe ten years ago when they
46 registered and they might have put a mile away, but this time they might
47 have said a mile and a half, not remembering.
48 So that was a communication.
49 And also the education part for the people to get the provisional,
50 you know, straightened out, we lost a lot of new voters because of that,
51 the provisional also.

1 As it goes along, rules and regulations have been passed so, you
2 know. I really think the Section 203 should be, you know, placed
3 ineffective because it does have impact on people.
4 MR. CHANDLER DAVIDSON: Mr. Andrews, finally, would you like to add
5 anything to that?
6 MR. ADAM ANDREWS: Not specifically to any strong examples of
7 discrimination but for Tohono O'Odham because our members are both on the
8 American side and the Mexican side, certainly the citizenship issue that
9 we're dealing with, but moreover, during the last election there was
10 threat of poll watchers who were to come to Tohono O'Odham Nation and
11 harness or dispatch some level of intimidation to tribal members, you know,
12 and then do some racial profiling, namely because, you know, our tribe is
13 the border there to Mexico.
14 But fortunately that was just that, hearsay, and we did not have any
15 prominent or paramount issues in relation to that.
16 But certainly that's not to say that that may still be an issue in
17 the future, future elections.
18 HON. REBECCA VIGIL-GIRON: Dr. Ellis, do you think that it was not
19 just the fact that they recognized the Ute Nation or the Ute tribe as being
20 resource rich that the 1965 Voting Rights Act had an impact and all of the
21 provisions in it also had an impact, of were they treated any differently
22 because Colorado recognized them as having these rights? MR. RICHARD
23 ELLIS: I think that came, the impact of that was slow. I think the level
24 of hostility toward Utes was very evident in the late 1970s, 1980s.
25 I really do think that the economic factor has probably been most
26 important. Today the Southern Ute tribe of La Plata County is the
27 largest employer in the county. People think it's because of the
28 casino, but it's more oil and gas.
29 But they are the largest employer. If the Ute Mountain Ute tribe
30 isn't the largest, it's got to be one of the top one or two.
31 That's had a huge impact.
32 It also increases jealousy, and I've said in class and heard Southern
33 Ute tribal chairmen say it as well publicly that people in La Plata County
34 like the Southern Utes when they're poor, but when they have money then
35 they don't like them quite so much.
36 La Plata County, for example, demanded that the Southern Ute tribe
37 provide the salary costs for the automobile, equipment, et cetera, for a
38 police officer, county sheriff's patrolman, because of the heavy traffic
39 that would be generated by the casino.
40 We have a ski area which is not charged for a policeman. And we have
41 a college, which generates a whole bunch of traffic, and it was the added
42 expense, you know, caused by gaming, which is alcohol free, for the
43 Southern Ute tribes.
44 So economics I think probably more than the, at least initially, with
45 the Voting Rights Act.
46 MR. CHANDLER DAVIDSON: Dr. Ellis, I have a question for you too.
47 You said you were an expert in the Cuthair case.
48 Could you tell us what happened so far as school board elections
49 following the resolution of that case?
50 MR. RICHARD ELLIS: The decision was 1998, and the districts were set
51 up so that no longer they're elected at large, of course.

1 And the Ute Mountain Ute Reservation is in a district so that tribal
2 members have been elected since 1998. So the decision has been effective.
3 MR. CHANDLER DAVIDSON: Any future -- any other questions for the
4 panel? I would like to take this opportunity to thank those of you
5 that came this afternoon for giving very useful testimony and sitting here
6 over a large period of time.
7 And I hope that -- I know that we will have a chance to use your
8 testimony and the report that we're going to write.
9 And I also want to thank my fellow commissioners for being here
10 today, and in some cases traveling rather long distances to get here.
11 I hope our paths cross again one of these days. Thank you very much.
12 (Whereupon, the meeting concluded.)
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33 STATE OF ARIZONA)
) ss.
34 COUNTY OF MARICOPA)
35
36 BE IT KNOWN that the foregoing proceeding was
37 taken before me, C. Martin Herder, a Certified Court
38 Reporter, CCR No. 50162, State of Arizona; that the
39 proceedings were reduced to typewriting under my direction;
40 that the foregoing 222 pages constitute a true and accurate
41 transcript of all proceedings had upon the taking of said
42 meeting, all done to the best of my skill and ability.
43 I FURTHER CERTIFY that I am in no way related to
44 any of the parties hereto, nor am I in any way interested in
45 the outcome hereof.
46 DATED at Chandler, Arizona, this 5th day of May,
47 2005.
48
49
50 _____
C. Martin Herder, CCR
Certified Court Reporter

1 Certificate No. 50162
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NORTHEAST REGIONAL HEARING
ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK

June 14, 2005
9:00 a. m.

City Bar Association
42 W. 44th Street
New York, New York

Reported By:
Margaret E. Antz

1 MS. KLEVIN: Good morning. It's my pleasure to welcome you today on behalf of the
2 Association of the Bar to the City of New York, today's Northeast Regional Hearing. My name
3 is Betsey Klevin. I'm president of the Association of the City of New York. I'm also welcoming
4 you here today in light of the Association's long history of support for Civil Rights including
5 voting rights, which was founded 135 years ago for insuring the democratic processes of our
6 government.
7 We are particularly pleased to host these Northeast Regional Hearings today on behalf of
8 more than 23,000 members. It's my pleasure to welcome at this time commissioners and
9 members of the public to the Association for this purpose. This year we're celebrating the 40th
10 anniversary of some of the most important provisions. At this time of reflection of the legacy of
11 the Voting Rights Act, we're aware of how far we've come as a nation and equally painfully
12 aware of how far we have to go. The proceedings today are an important part of the Civil Rights
13 community's efforts in voting, the key provisions of the Voting Rights Act, which are set to
14 expire in August of 2007. Now, it is my pleasure to introduce from the lawyers' panel Marjorie
15 Mennon.
16 MARJORIE: I'm one of the co-chairs, and I too am delighted to welcome you here
17 today, and I want to thank the Commissioners, the Guest Commissioners, and panelists, who
18 have taken the time to be part of this important process.
19 It is my pleasure to introduce Barbara Arnwine. Barbara has been our Executive Director for
20 many years, and she, along with our staff, has the foresight to realize that this kind of fact-
21 finding is the key to making sure the evidence for re-authorization of the Voting Rights Act is
22 present. With that, I turn this over to Barbara Arnwine.
23 BARBARA: Good morning, everyone. Thank you so much, Marjorie. However, before
24 I make my remarks, I would like to introduce Sidney Rashliter, who is Chair of the Civil Rights
25 Committee of the Bar Association of New York.
26 MR. RASHLITER: Good morning. I'm going to be very brief. I think the only thing I
27 would think this morning, after attending a lawyer's committee dinner last night is, if anyone
28 heard John Lewis, you would know how important these hearings are; to have the effort of the
29 Voting Rights Act renewed in 2007.
30 The Civil Rights Committee has been working on a pledge for authorization and to
31 have this opportunity to co-sponsor the hearings today. I am very proud to be a part of this and a
32 part of the Association's Commission. I am most proud to be a part of the Lawyer's Committee,
33 so, thank you very much for allowing me to be here and the privilege of participating.
34 BARBARA: Thank you, Sidney. I also want to thank Betsey Klevin, President of the
35 Bar Association of New York, and the great Board of the Members of the Lawyer's Committee
36 for hosting us today. When I mentioned this to Betsey, the possibility of wanting to have the
37 hearing here, she immediately said, "they want to be "in the house. " So, we're happy to be here
38 this morning.
39 I want to start by thanking everybody for coming to this, the Northeast Regional Hearing
40 on the National Commission on the Voting Rights Act, and in particular, I want to extend a
41 special thank you to the Association Bar of the City of New York who has graciously loaned us
42 this wonderful space, and the time of staff and members for hosting this for us. I would like to
43 thank the law firms of Scadden, Arps, Slate, Meagher & Flom, LLP, Bingham, McCutchin,
44 LLP, and Balluts, Swallard, Andrews, and Ambersol, for their time and effort in making this
45 event happen. I want to thank Demos for hosting two events that helped educate the public about
46 the Voting Rights Act, and also the Commissioners' work. I also want to thank the co-sponsors

1 of the National Commission. These are the National Co-sponsors, they are Associates of the
2 Community for Organization For Reform Now, (ACORN), Congressional Black Caucus
3 Foundation, Democracy Works, Demos, The Korean American League For Civil Participation
4 Conference and Civil Rights. The NAACP National Voters Fund, The National Asian Pacific
5 Consortium, the National Congress of American Indians, People for the American White
6 Foundation, Project Vote and Vote Rainbow is having its big convention right now. It's this
7 coordinated effort that will accomplish its task. Many of us were in law school when we studied
8 the 14th and the 15th Amendments, and we noticed how critical this was that these amendments
9 granted our citizens the right to vote. Well, that right, despite the internet rumors, is permanent.
10 However, it is the Voting Rights Act which gives the federal government the ability for the
11 citizens to protect and support that right.
12 It was only after the Voting Rights Act was passed in 1965 that they were able to
13 exercise their vote. That's why the Voting Rights Act might be the most important Civil Rights
14 statute ever passed by Congress. Some of the provisions of the Voting Rights Act are permanent
15 and some are temporary. The temporary provisions, are the Preclearance Provisions of Section
16 5, Minority Language Provisions of Section 203 and the provisions which are given to the
17 Department Of Justice. These are about to expire in August of 2007 unless they are re-
18 authorized. The Lawyer's Committee hopes to create the National Commission on behalf of the
19 civil rights community to identify the degree of racial discrimination in voting, as the nation
20 discusses the issue of re-authorization.
21 This is the National Commission's third hearing since March. In addition to holding
22 these hearings across the country, the Commission will be releasing a report that will offer a
23 comprehensive picture of the evidence uncovered through the period process as well as the
24 study of the historic work of the Department of Justice, responsibilities of the individual voting
25 rights. And right now, as we are meeting, because of the great work of so many of the law firms
26 I mentioned, there are law students throughout the country visiting those voting rights lawyers,
27 going through their files, finding the best documentation of the problems in voting. And we will
28 continue to look at other relevant data that will help maintain a comprehensive picture in voting
29 for the past 40 years and how the minority voters will pass protection to the political process.
30 The evidence we have gathered so far is both hopeful and thrilling.
31 During the Commission's first hearing in Montgomery, Alabama commemorating Bloody
32 Sunday, practitioners, advocaters, educators, knew about the all too familiar legacy of voting
33 discrimination in the south. We have heard from citizens in the State who have been active for
34 over 40 years, that African American citizens can exercise the right to vote freely without
35 intimidation, administrator obstacles, and so many other barriers in the implementation of their
36 rights. Over the last 40 years we have heard from citizens and experts who gave a technological
37 and statistical analysis, particularly Section 5 of the Central Provisions. The Voting Rights Act
38 must be re-authorized. The Voting Rights Act has been responsible for providing a voice to a
39 fairly voiceless community. Unfortunately, we don't, and very sadly, we have also heard from
40 advocates and citizens quoting the continuing experiences between minority voters. Clearly,
41 the work of the Voting Rights Act, while dramatic and powerful, is not done. In Phoenix,
42 Arizona, where the Commission held its second hearing, we worked with the Commission in
43 Arizona University to identify the legacy of obstacles to the ballot box, voters in the south --
44 lives who told stories in counties, including language assistance, and currently sensitive
45 electoral officials, the areas covering our first Americans. The Commission also took testimony
46 from experts, academics voting rights practitioners and others in the Latino Commission who

1 told how Section 203, the Voting Rights Act which require jurisdictions to provide multi-lingual
2 systems to voters, Spanish language to "speak only Spanish" -- as Spanish is their primary
3 language -- to participate in the process. That is not set up for the demand of minority
4 communities, and to illustrate that society has been central in addressing many of these
5 concerns. But it's work, once again, is not done. Today, we will hear from voters and expert
6 advocates and academics and many others who will detail the roles of those in the states of
7 Connecticut, Massachusetts, New Jersey, New York, Pennsylvania, and Rhode Island, and we
8 will talk about how the Voting Rights Act has had an impact on discriminatory practices.
9 I am looking forward to hearing today's testimony and adding it to the already impressive
10 August file. When we put together this impressive group of Commissioners, we did so knowing
11 this was not an easy one. The continuing accordance of arguably, the most important piece of
12 Civil Rights Legislation that has passed Congress, they have responded with distinction. I am so
13 proud to see this process unfolding and to have this opportunity to work with such a
14 distinguished group. I will now turn it over to the Commission's Chair, Bill Lan Lee who is the
15 former Assistant Attorney General for Civil Rights where he made sure that the word "justice"
16 meant a lot, and he has been an attorney for seven years with the NAACP Legal Defense
17 Educational Fund the law firm founded by Justice Thurgood Marshall. He headed three defense
18 fund's Western Regional office in Los Angeles, and anyone one who knows Bill knows that
19 when we called him and said, "Bill, would you do this?" Everyone had been calling on Bill to do
20 everything, from suing the president over the failure to protect people in prison in Iraq, and for
21 all of the other work that he's doing, he graciously, even though it's a hard personal time, said,
22 "I'll do it" because we knew he was the best. Please, ladies and gentlemen, join me in
23 welcoming the Chair of The National Commission Voting Rights Act.
24 MR. LEE: Thank you, Barbara. That was very rousing. On a personal note, when I
25 was a young lawyer I was a member of this Association on several reports. Good morning.
26 On behalf of the National Commission, I welcome you to what is the third of nine public
27 hearings. The Commission will be conducting this, as Barbara mentioned, over most regions
28 covering States of Connecticut, Massachusetts, New Jersey, New York, Pennsylvania, and
29 Rhode Island. In the past two hearings, which Barbara has vividly described, we heard some
30 compelling testimony about voting discrimination and the impact on the Voting Rights Act on
31 African-Americans themselves, Latinos and Indians in the southwest. Today we're concentrating
32 primarily on the Spanish, African American, Latino and diverse areas of the nation. First, a
33 little bit about the history. The Voting Rights Act was signed into law in 1965 by President
34 Lyndon Johnson, in response to voting discrimination encountered by African Americans in the
35 South. Those of us who were fortunate to attend, heard the description of what life was like
36 back then. Congress re-authorized Voting Rights Act in 1975. It also made specific findings
37 that I think only legislation and others that affected the Bar, and minority language citizens were
38 participating in electoral responses. In response, Congress expanded the act to counter Section
39 203. Before discussing Section 5 and 203 in greater detail, I want to explain what is scheduled to
40 expire in 2007 and what is not. African Americans and other minorities is permanent. This is a
41 very important point, and I want to reiterate because it is sort of an urban legend that African
42 Americans will lose their right to vote. Permanent revisions of the act, the literacy faction,
43 authorized federal monitors and observers to various mechanisms. However, there are some
44 temporary provisions which will expire in 007 unless they are re-authorized by Congress, and
45 those temporary provisions are our focus today. First, Section 5 Preclearance Provisions of the
46 Act requires jurisdictions in all or part of sixteen states to submit voting changes to the United

1 States Department of Justice or the United Sates District Court for the District of Columbia for
2 preclearance approval before they can be implemented. They have to obtain pre-approval before
3 the district director before making a voting change, re-directing the change to a methodof
4 legislation and polling rights jurisdiction. Section 5 must prove that the change does not have a
5 purpose or effect of denying or bridging the right to treat only race, color, or language minority.
6 Section 203 requires that language assistance be provided for communities with a significant
7 voting number having limited language for American Indian, Asian Americans, Alaskan native
8 to provide language assistance. As of 2002, a total of 41 states are covered by this provision.
9 Counties in New York, New Jersey, Pennsylvania, Connecticut, and Massachusetts are among
10 those jurisdictions covered in Section 5. Third, the Act authorizes the Attorney General to
11 appoint a federal examiner or send observers to any jurisdiction to comply with Section Five on
12 good cause. Any jurisdiction where a federal examiner has been assigned is very important.
13 Since 1966, 25,000 federal observers have been employed under probably 1,000 legislations in
14 our country. Let me tell you a little bit about the Commissioner's purpose. The lawyers in the
15 civil rights, acting out of the civil rights, created a nonpartisan of the Voting Rights Act to
16 examine discrimination in voting since 1982. 1982 was a critical date because that was the last
17 time it was re-authorized. The Civil Rights leader represents the diversity of the some of the
18 panelists, Honorary Chair Commission of the National Commission is former United States
19 Senator, Republican Charles Matthias, is not able to be with us. To the other six commissions:
20 The Honorable John Buchanan, leading Voting Rights Scholar, Dr. Chandler Davidson, Dolores
21 Huerta, co-creator of the United Farm Workers of America; Elsie Meeks of the U. S.
22 Commission on Civil Rights, and Harvard Law School Professor, Charles Ogletree and the
23 Honorable Judge, former Republican Lieutenant Governor of Colorado, Joe Rogers.
24 Commissioners Buchanan, Davis, and Rogers are present along with me today. We are also
25 fortunate to have three regional Commissioners: Juan Cartagena, Kimberlee Crenshaw, and
26 Miles Rapoport. Ron, the Commissioner from primary past, was the first to conduct these
27 regional hearings such as this one, across the country, gathering testimony relating to the
28 Voting Rights Act and the second to write a comprehensive report detailing the commission
29 since 1982. The report will be used to educate the public, advocates, and policymakers on this
30 record of discrimination and its relationship to the upcoming re-authorization. It will also be
31 submitted to Congress as to the purpose of this and how we'll proceed.
32 There will be five panels of speakers today. The first four panels will be comprised of
33 the Voting Rights Practitioners and members of the aid who are effective in the voting rights
34 issues. Each panelist will have five or ten minutes to make a presentation. After all the
35 panelists have spoke, members will ask questions. We encourage you the public, to share in
36 their voting right in our fifth and final panel, and if you are interested, please speak with a staff
37 member on the back or the side. One of the staff members -- actually maybe we should have the
38 staff members raise their hands. They are very friendly. And if you can't stay, please talk to the
39 staff members to take your statement. That statement will be included in the record along with
40 Barbara Arnwine. To know how democracy works the Post National Commission is conducting
41 a committee, Voting Discrimination and Voting Rights Act in Connecticut. That program is
42 going to be videotaped and telecast from the record of that program and that will be incorporated
43 in the record. I'd like to introduce each of the Commissioners present at today's hearing and
44 each one will make a short opening statement. Commissioner Buchanan is our hotel
45 commissioner. He is the ordained commissioner of Alabama, Virginia, and Washington, D. C.
46 He also represented Birmingham, Alabama Congress in the past 16 years, as well as the 1979

1 reauthorizations. For the outset of his career, he worked for and was a strong component for
2 representation. After Congress, he chaired the Civil Liberties Organization and People For The
3 Americans for ten years.
4 MR. BUCHANAN: I'm a filibuster, particularly when I'm the one doing it.
5 MR. LEE: Thanks for the warning.
6 MR. BUCHANAN: 1965 was my first year in congress. I was elected in the Goldwater
7 sweep in 1964 in Alabama which turned out to be a Johnson sweep in most other places and the
8 first vote that was elected for congress was Jerry Ford to become a minority leader. Virtually
9 everything that Lyndon Johnson proposed in the straight society programs, Jerry Ford came up
10 with constructive republican proposals, and this collided with the Voting Rights Act. Jerry
11 came up with a different -- it was a strong Bill that applied more equally in the whole country, to
12 take care of going after the whole state -- my own state, and I sponsored that, but I supported his
13 alternative proposal. Now, it is not true that Jerry Ford was captain of the football team of the
14 University of Michigan in college. He went to a University for law and at Yale University, he
15 was not the "C" student as some of us -- I won't mention -- but he was in the upper third of his
16 class while coaching football at Yale, and I thought Jerry had some good ideas, so I supported
17 it. But I feel that Lyndon Johnson in this instance were righter than we were. This legislation
18 has been extremely important to the country and the provisions that are set to expire. I think we
19 need to take a hard look at this commission. Taxation without representation is wrong, and it is
20 wrong in the world's greatest democracy for us to deny people their votes or any kind of
21 discrimination or any kind of democracy and that's clearly happened in the past years and we
22 want to hear from you young "C" students. We're anxious to hear from you. We're determined
23 that those protections that guarantee our constitutional amendment and rights by voting in 1965 -
24 - which transformed the political life in my part of the country -- that those rights will be
25 sustained and need to be sustained and individual rights of the American citizen will be
26 protected under the law. Thank you.
27 MR. LEE: Thank you. Commissioner Chandler Davidson served as Chairman of the
28 Department of Sociology. Dr. Davidson was the co-editor of Quiet Revolution In The South, a
29 definitive work in the South. Dr. Davidson testified before Congress during the 1982 Voting
30 Rights Act.
31 MR. DAVIDSON: Thank you. It's always a pleasure to visit New York City and I look
32 forward to hearing the testimony that you're going to give today.
33 MR. LEE: Commissioner Joe Rogers completed this term as Lieutenant Governor of
34 2003. He was the youngest Lieutenant Governor and only the 4th African-American in the
35 United States of America as Lieutenant Governor. He served as founding chairman in the
36 Lieutenant Governor Association, served on the executive committee of the National Congress.
37 Joe Rogers created "I Have A Dream," a program in dedication to the memory and legacy of
38 Martin Luther King.
39 COMMISSIONER ROGERS: First of all, it's just good to be here in New York. How
40 many of you have been to Colorado? Well, you've all been to God's country. You already know
41 there is good reason to call it God's country. Colorado is one of the highest sea levels. In New
42 York, it's always a pleasure to come here, and in particular, to see so much of the man-made
43 monuments in the context of our great nation. The United States is a cross-section as you well
44 know, of people and culture. The Northeast in particular, with the brashness that you might
45 argue with Northeasterners, as you might insist. The South is more congenial, and the West, if
46 you come to my part of the world, wide open, cowboy country. And then you head over to

1 California. As you well know, you get a different feel and sense of America. The same is true
2 of us. We all have unique beings and a sense of culture that exists here, despite the differences.
3 We are one great nation. The Voting Rights Act of 1965 was enacted one year after I was born.
4 I was born in 1964 and so much has occurred in the past years. There is great progress that has
5 been made in these United States of America. Great changes have occurred in the United States.
6 We're proud of our progresses we have made in the nation. I wouldn't be sitting here today,
7 certainly not having served as a Lieutenant Governor, but obviously so many great leaders who
8 gave us an opportunity to help us all in the Civil Rights Act of 1965, the Voting Rights Act of
9 1965. We're here to assess the fact that the Supreme Court is such that we have to establish a
10 factual basis in order to continue with reauthorization with certain provisions of the Act. If we
11 cannot establish a factual basis that certainly has to be authorized. That's crucial, in terms of
12 overall process, and so we're here to today, particularly in this region of the country whereby it
13 is that voting rights has been addressed with practice and issues related to enforce them.
14 Problems related to voting. Obviously, in this region of the country, I look forward to hearing
15 the commissioners this first year, and I'm looking forward to hearing from you individually.
16 Good to be with you.
17 MR. LEE: Thank you, Commission Rogers. I mangled his name, I apologize.
18 Commissioner Cartagena is a Civil Rights attorney who serves as a General Counsel for the
19 Community Service Society of New York and co-chair of the New York Voting Rights
20 Consortium, which is a collection of major legal defense funds that protect voting rights of
21 racial and minorities. That sounds relevant for our purposes since 1981. The Commissioner
22 has represented Latino and African-American Voting Rights litigation and other states,
23 including some of the states we're covering today, New York, New Jersey, and Pennsylvania.
24 Commissioner Cartagena.
25 COMMISSIONER CARTAGENA: Good morning. I am so happy that we're celebrating
26 this in New York and to also be participating and submitting testimony to this commission. In
27 many ways, I am very happy that this is happening in New York as well because of the
28 incredible richness to one segment of the voters in the United States, the unique nature of the
29 relationship of this one particular item in this county. A lot of what we talked about in New
30 York State and New York City, most particularly in the 1960's, when the Voting Rights Act
31 was the home and epicenter of the entire migration to the United States. I was very welcoming
32 of the remarks by Mr. Buchanan through the course of the day. We talked about '65, and I
33 want to share a little quote that I found from the record in '65. It had to do with the Voting
34 Rights Act because in 1965 when that act was passed, the Voting Rights Act also passed a
35 Section 4E. It particularly stated that no voter could achieve a sixth grade education because of
36 an English only registration. New York State also had a English literacy requirement in the
37 1960's. In 1965 two Senators, Barbara Kennedy and Jacob Javitts composed Section 4E. A
38 senator from the floor said the following. "My consciousness happens to be in the deep south. "
39 He said, "In the state of Florida, there are tens of thousands of citizens of Latin American
40 heritage. Many of them not yet able to speak the English language and have limited education
41 to even know what they're doing. " For years we have permitted them to vote and we're very
42 happy of the fact that the great State of New York now turns to us in the democracy which we
43 believe the State of New York has been in need for a long time. The nature of the debate in the
44 '60's
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1 which I would love to hear from Congressman Buchanan about, and Howard -- you know --
2 focused particularly in the south. That is that one exception, and that one exception is New York
3 City State. The English Literacy Program was used to effectively stop the people from voting.
4 The many cases of the 1970's allowed the voters to vote freely despite the fact it was in an
5 "American flag" school where the language was Spanish. Bilingual Congressman debated that
6 privilege, looking at what happened to New York City with bilingual issues going on until early
7 '70's, and basically said, "Having a bilingual structure in the cities of New York is not a radical
8 aspect." . Because the Voter Rights Act, which now extended protection to Asian languages,
9 the American language endorsed all the Spanish languages in the cities throughout the county.
10 They had this precursor here in New York City because of Section 4E, because of that,
11 Commissioners, I also commit to continuing my obligation. Now, going into the States besides
12 New York City. Now you will hear, I'm sure, today, testimony from others, and other States in
13 the Northeast which makes it very, very interesting in terms of reauthorization. A new nature of
14 Puerto Rican experiments, so to speak. Except for a small segment, Puerto Rican issues have
15 not changed since 1982, so in many ways, the one small segment of the population that has, has
16 been because of the ingenuity of a handful of lawyers and that ingenuity. Thank you.
17 MR. LEE: Thank you, Commissioner. Commission Kimberlee Crenshaw is a bi-
18 coastal Professor of Law in the University of California. At present, she is also an ACLU Racial
19 Justice Fellow. Professor Crenshaw is a specialist on race and gender. Her work was influential
20 in drafting the quality and cause of race and gender discrimination for the United Nations World
21 Conference. Commissioner Crenshaw.
22 COMMISSIONER CRENSHAW: Thank you, Mr. Chairman, Executive Directors, On-
23 line Commissioners, distinguished members of the Bar, colleagues, friends, good morning. First
24 off, it's a distinct pleasure and a privilege to be a part of this important fundamental right as
25 American citizens. The right to participate as equals in the political process. As we gather this
26 morning in New York City, I'm mindful of the events that are transpiring right now in
27 Philadelphia, Mississippi, where a new generation of Americans has taken up the task of
28 confronting the human toll paid by the challenge to America to live up to their ideals and
29 democratic commitments. Forty years have passed. We have paid the highest price possible to
30 register African-Americans in this city to vote. This injustice may well have faded from memory
31 had it not been for the efforts of three young people who determined that they would search out
32 the truth and make the truth matter. We commend those students not only in Mississippi, but
33 because their democracy can't be deterred by sentiments that would wish these problems away
34 or hope that they would be resolved merely through the passage of time. As much as we all
35 recognize the quality to living the dream, it requires us to be conscious of current realities that
36 frustrate or deny our enjoyment of the rights that this country was created to defend. So today,
37 here in New York, we take up the task of the state of democracy to challenge. We continue to
38 fight the Voting Rights Act which is perhaps the most important and successful civil rights
39 legislation. In part, because it was grounded in actual voting conditions. Its prophylactic
40 provisions balanced the barrier of removing the bad lot of those who have the power and the
41 authority to make wrongs right. It is fitting, therefore, to visit on the factual upon which these
42 presumptions remain, as our highest ideals of democracies, to the sacrifices that were made by
43 civil rights activists of people born in the Mississippi Delta, but also to the Americans and from
44 all other countries from around the globe. Perhaps Jamie Goodman and Joyner would never
45 have drafted the benefit of sacrifice, but when we pay attention through the democratic

1 association, the ideal simply can't be contained. I look forward to today's testimony and am
2 grateful for the opportunity to play even a small role for our nation.
3 MR. LEE: Thank you for those thoughts. Commissioner Miles Rapoport holds up the
4 City of Connecticut. The Commissioner is President of Demos, the Research and Ethics
5 Organization, dedicated to ensuring the highest levels of electoral civil litigation, and many
6 economic prosperity opportunities broadly shared in prosperity from serving at the Demos. The
7 Commissioner served for ten years under legislation as secretary of state.
8 MR. RAPOPORT: Thank you, very much. I'm delighted to be here, commissioning
9 here today, and I really am glad to come to today's proceedings. As mentioned, I was
10 Secretary of State for Connecticut for four years in the 1990's and as such, was the Chief
11 Legislation Officer for the state. And it was clear to me at the time when I was Secretary then,
12 the fact of how the legislation laws were implemented, how the local legislation officials made
13 decisions, and how bifurcation of rights are carried out. The way the Voting Rights Act are
14 treated has everything to do with whether people are encouraged to participate in the process or
15 discouraged to participate in the process. I think that all officials should do some backup. Not
16 all voting processes are as high as we can possibly make it. I don't think any of us, despite the
17 uptake in the turnout in the 2004 Presidential Election, can feel good about a situation which, in
18 many elections, less than half of eligible persons are voting, and the very simplest in all of the
19 studies that have been done, don't go first to the deepest question of whether people choose to
20 vote or not. But many people don't vote because of procedures. So that brings me to wonder if
21 the maintenance and understanding of the Voting Rights Act is to encourage or to discourage the
22 behaviors of elected officials in Connecticut. That, I do see the need for that kind of thing. The
23 need is that these issues are alive and well and need to be addressed, but as a point of view from
24 the Demos, I think the system is always fundamental in the root word of democracy, and I think
25 it's our fundamental decision that democracy is the most vibrant, and inclusive. It's interesting,
26 this management issue, that Demos and Lawyer's Committees and other organizations that are
27 represented here address neutral issues that should encourage or discourage people, whether
28 that be people with felony convictions getting their voter's rights back or not. All these things
29 have a great deal of impact, and these are policy issues that we want to continue to address. But
30 while looking at the new frontiers, what discourages or encourages people from voting, I think
31 what we will let slip is one of the most crucial things that is something that we ought to pay great
32 attention to. So I am delighted that the Lawyer's Committee has taken an interest in putting this
33 together. I'm very happy that Demos is participating, and I will look forward to the testimony
34 that we're going to hear today.
35 MR. LEE: The Commission wishes to thank the Association of the Bar of New York
36 for providing this majestic room. The Commissioners would also like to thank Mr.
37 Greenbaum, the director, and Masiah Johnson -- Deputy for this project -- for their valuable
38 effort for running the show. We will proceed to the first panel immediately after we have a
39 camera change, so we will start in about five minutes. Thank you. Okay. The first speaker of
40 the panel is the Honorable David Paterson. He's been a member of the State Bar of New York
41 since 1985, representing the third district, representing Harlem and East Harlem and the upper
42 west side. He has been a Senator since November 2002. The Senator has to leave early, so we're
43 going to go forward with his testimony and the commissioners will have a round of questions for
44 him before proceeding with the other speakers. Is that okay? Thank you very much.
45 COMMISSIONER PATERSON: Good morning, Commissioners and members of the
46 Lawyer's Committee, and all of you who have come together to discuss the Voting Rights Act.

1 I will try to confine most of my remarks to the issues relating around Section Five which is
2 obviously one of the sections that we have been involved in, in some issues. The
3 reapportionment, and also designations of New York. It's obvious there is still "bloc" voting that
4 is practiced to a great degree and exists, so therefore, we would hope that the judiciary and
5 private citizens can still take advantage of the pre-clearance provision of the Voting Rights Act,
6 Section Five. Whenever there are situations where there are devices or practices that have a
7 purpose or effect of diluting the voting strength of people who live in the minority communities,
8 Section Five is hardly the best section in the Voting Rights Act for application. Actually,
9 Section Five relates more to procedure than it actually does to substantial issues. Section Five
10 has been important in our circumstances and actually Section Five was vital in a case that was
11 brought in the federal court in 2002 relating to New York City's reapportionment. There are
12 areas in Long Island, Hempstead, Freeport, Uniondale, Garden City and Lakeview, where
13 citizens who lived in what had to be considered a politically cohesive community and a
14 geographically condensed community. It would have comprised about 40 percent of a potential
15 single State Senate district, however in the 2002 reapportionment those communities were
16 "cracked" and "broken" through the district. The result was, there were no more than 13
17 percent, and as low as six percent in the North, the smallest district. This "cracking" had the
18 effect of completely alienating minority citizens in those communities from the actual
19 government and electoral process, and so when Martin Luther King was arrested in February
20 1st in Selma, Alabama and we heard the first of testimony letters, we considered that voting
21 would be one of the most important parts of democracy and that is true in Section Five. We
22 brought in the circuit effect of the federal court because the effect of splitting up individuals
23 living in the neighborhood would have that effect of denying, really, any opportunity for them to
24 participate in this process. The court's ruling was that the minority communities being less than
25 50 percent of the overall population couldn't really guarantee that that would be the catalyst for
26 electing a minority representative. But what the court really wasn't thinking about was the issue
27 that it was a significant percentage compared with other groups in the area. It could produce a
28 minority representative in that area, and what was most important about the decision was that,
29 though it was a strict interpretation of Section Two by the court, in the end, Section Five was
30 actually irrelevant, because Long Island was not a covered area. It legally had no effect, because
31 Section Five tried to preserve what a minority voting district backup doesn't enhance, but when
32 Section Five was first adopted in 1965, it probably had a positive affect then, because what we're
33 look for is districts of minority communities to be represented in the government. The question
34 is, is that really representative of what minority strength actually is, and would there be an
35 opportunity to go beyond Section Five with some kind of legal redress where enhanced
36 capability is possible as it would have been in that particular area? I grew up in that area and I
37 would never have had an opportunity to be in the New York State Senate in that area, and
38 basically it's a good thing I moved out. So Section Five still has a valid use and valid meaning
39 in our society as we found in another district, the 34th Senate District, which is the Bronx and
40 Westchester. This district was "gerrymandered" in a way to ensure White representation. It
41 violated the county line more than once, which is against the statute and basically rounds up all
42 the White in the still Parkway on a piece of paper, which would be reminiscent of a dismembered
43 lobbier. It has absolutely no relevance to the geographic location there are five small districts
44 in the Bronx, and to accomplish the maintaining of the 34th district, it was up to the other four
45 minority districts with each of them now representing over eight minorities, to keep this one
46 White district viable in that particular area. In ruling against our claim, the Court

1 said that it had a concern about the picking of the minority district. That the percentage
2 dropped from 85 to 75 or even 70 percent. The Court feared that that would actually be a threat
3 to the ability of African-Americans or Hispanics to represent those districts. Meanwhile, it
4 showed a viable, a 59 percent White district which was drawn in such a way that we felt that it
5 violated the sections of the Voting Rights Act. So one of the issues that we would hope in
6 extending the Voting Rights Act is that Section 5 would never be used to "overpack" the
7 minority districts. When minority districts are overpacked, when seats change hands, there is so
8 much of a "warming effect. " African-American and Hispanics run against each other,
9 therefore a White candidate can win. So those are some of the relevant issues that we thought
10 we would point to the commission this morning, relating to the application of Section 5. As we
11 review the authorization of the Voting Rights Act, I must confess to the Commissioners, ten
12 years ago, when I first heard of expiration of the Voting Rights Act which expired in 1975, 1982,
13 and will again in 2007, I thought that districts around this country were represented so well by
14 African-Americans and Hispanics, that there would really be no need to re-authorize theAct. But
15 looking now at the progress of the last decade, looking at what may be further confiscated
16 methods that may be used as a purpose, is a result of diluting minority strength. These are
17 things such as charges of voter fraud, and recent advocating for voter identification of the
18 polling places, which significantly reduce the influence of African-American and Hispanic and
19 other minority communities. It is our feeling that the re-authorization of this section is
20 paramount to maintaining the opportunity for equal representation. An equal opportunity in
21 voting, and that's why I'm very pleased that the Commission would examine it this morning and
22 would allow me to express my viewpoint.
23 MR. LEE: We'll start with you Mr. Buchanan.
24 MR. BUCHANAN: I'd like to say that the 1970 and 1975 Voting Rights Act didn't
25 protect anybody but my own constituent. But I hope they're taking a hard look -- Congress -- at
26 your experience. Like your own business, we have not often come up with perfect legislation
27 in Congress, and it is perfectly clear that we need to strengthen in what is possible.
28 MR. LEE: Commissioner Cartagena?
29 COMMISSIONER CARTAGENA: One question. Since we have the benefit of your
30 knowledge with respect to what happens in Albany to re-districting, could you just comment a
31 little bit about how Section 5 is viewed up there? How it's talked about -- your colleagues in the
32 Senate -- how aware of the provisions, what it means, what it stopped them from trying do?
33 COMMISSIONER PATERSON: I think it's unfortunate that Section 5 has been twisted
34 and cajoled in such a fashion. The idea of overpacking districts -- which is the new and modern
35 form of segregation -- in order to accomplish the same goals that were, of course, to antagonize
36 40 years ago, of representation. What they found 40 years ago is that they could divide
37 minorities in such a small area that they would create a chilling effect in the preliminary
38 process, and obviously dilute any representation. Now, because of voter population and
39 demographic changes, the minority communities are too large. They are just too large to divide
40 into small areas in the same fashion. So the new way is to draw the district in such a way that
41 you pack as many minorities in one area. That is misunderstood in some points, and to be
42 perfectly honest, I sense that my Hispanic legislators, even when making sustaining personal
43 interest, obviously are going to have an easier time in "dogging" the district. It's decreasing the
44 overall count that can be elected. If the districts are drawn coordinately from political conflict
45 and communities of interest, I think that the Section is in a sense, the way it was written --
46 being manipulated for purposes other than which it was intended.

1 MR. LEE: Questions?
2 COMMISSIONER CRENSHAW: I want to say congratulations that you were able to
3 move all of us. We are better for it. The re-authorizing with regard to the two stories that you
4 tell. You tell a story of the effect of "cracking" in the minority district and the inability to
5 effectively contest that with the existing provisions. And the latter story is one of "packing," and
6 so, I'm curious about how you go about what might be the best way of providing the "cracking"
7 that you talk about and the "packing" that you talk about. And the second question, there is a
8 general conversation about whether re-districting can happen in that colorblind way, given your
9 experience in Albany. Anyone? If you can speak to that?
10 COMMISSIONER PATERSON: Well, the interesting aspect of "cracking" in Nassau
11 county and "packing" in the Bronx and Westchester county -- what's crucial about it is that the
12 courts both ruled in the same situation and one has to wonder as a matter of sophistry, what the
13 reason was that the Court took this rather mercurial position of almost defending two competing
14 aspects of law at the same time. And that is why we can't have colorblind districts, because the
15 people who are drawing them aren't colorblind and the people ruling on the cases are less. So the
16 reality is that the desire to have a colorblind environment was exactly what we were pursuing in
17 Nassau county. We have said that we could draw a district of a majority-minority nature but
18 what you're saying is, if you get 40 percent, that a candidate was strong in his or her minority
19 community backup, and avert the issues in such a fashion that was particular in other
20 neighborhoods, you could have an opportunity to win, as opposed to never having an
21 opportunity to win. So there was the colorblind argument. They rejected it in that case. Then,
22 when it went to the "packing" issue, they became color-conscious and decided to recall four
23 districts of over 80 percent minority, because they considered that to be a concern of minority
24 representation, whereas minority representation could come through as a conflict of the White.
25 They rejected it. The unfortunate aspect of Section 5 is that in many respects it was restrictive
26 for issues that went beyond some of the basic voting rights problems we had in 1965 I don't
27 want to diminish the gravity of changes that have been brought by many people -- you
28 commissioners and the audience -- but we have preached a reality that's representative or
29 reflective of the considerable ability and talent that existed in African-American and Hispanic
30 communities that could be seen in government, if any of us had more of an opportunity to serve.
31 And, so, just in terms of trying to fulfill the ideal that the constitution and declaration provide for
32 us, it's my suggestion that we're going to have to, if anything, enhance the Voting Rights Act to
33 address some of the specific issues that might not have been really in the part of the thinking that
34 went to passing the legislation 40 years ago.
35 MR. LEE: Commissioner Paterson, you're essentially talking about folks wanting to
36 have it both ways. You've indicated what the purpose or the rationalizing and the influence of
37 "packing," is, and so, when you look at essentially how you resolve that concern, you talk about
38 issues related to how you enhance, for example, the Voting Rights or the Voting Rights Act.
39 How do you strike that balance? How has that been articulated by a Court, to your knowledge,
40 or was it an articulated period or the balance that's been struck in terms of meeting -- about
41 "packing" on the one hand -- having influence on the other?
42 COMMISSIONER PATERSON: I can't site Court actions that I'd say would properly
43 reflect the right balance between the methods from within. Districts can actually be drawn as a
44 precursor to that, because for me, it might be somewhat of a -- it's just something that I can't
45 perceive right now. What I would settle for right now is consistency. A method which is using
46 a standard and applying it the same way, and that did not happen in our case that we brought

1 before the Court. In fact, we had planned that when we were addressing the Court, we would
2 actually use a standard deviation of 10 percent of the population in districts to actually pack
3 more constituents into the "down State" region jobs in New York and less in the "up State"
4 region jobs to create another "White seat" in upstate New York. So, in other words, what they
5 did was, when a 10 percent standard deviation was lowered in the "down State" areas, all of the
6 "down State" seats had approximately 15,000 to 20,000 northern citizens in this "up State. "
7 With what was left over, they were able to create another seat upstate where the minority is about
8 6 percent, as opposed to down State, with the minority population at 20 percent. So, in trying to
9 bring this argument, what we were saying is that there was a racial aspect to the draw and that
10 was also rejected. But as I said before, the Court allowed the racial aspect, re-drawing, when
11 they put 85 percent of minority districts in force in the Bronx seat to validate a fifth seat where
12 they now packed all the White citizens. So it would probably take some research for me to find
13 what I think would be the most negotiable portion to be fair, but what I could say right now is,
14 what we observed was so antithetical to what we were trying to achieve. And specifically, the
15 same in all the areas, the population of minorities in New York State is such that, in the other
16 house of government, there are 42 minority seats, whereas, in the Senate there are only 11. Even
17 though the other house is only two and a half times the size of the senate. So strangely enough,
18 if they do the districts continually, one right after another, that would, in and of itself, would
19 assure us four or five African-American Senate seats.
20 MR. LEE: Do you believe because of racial bloc -- is that correct, Commissioner
21 Paterson -- the problems you've identified with "cracking" and also "packing" you would have to
22 do sort of the administrative -- I guess picking appropriate remedies in the racial block realities -
23 - thing.
24 COMMISSIONER PATERSON: Yes.
25 MR. LEE: Do you believe there is a long -- language-wise –
26 COMMISSIONER PATERSON: Yes.
27 MR. LEE: Well, I think that it's rare that we have an official here.
28 COMMISSIONER PATERSON: I think that wherever there is a harmonious equality
29 that impinges on a geographic area, that there would be similar voting patterns, and the aspect
30 of language and language spoken. I think it would be based on national orientation and some of
31 the other protected classes. The opportunities and the interests in the voting itself are actually
32 greater at times, as we found, in particular, the Dominican area, because they have such a
33 political orientation in the Dominican Republic. What actually was keeping the voting poll
34 places down in New York City was the inability to have dual citizenship in the Dominican
35 Republic and the United States. When that was granted in the year 2000 by President Lionel
36 Fernandez of the Dominican Republic, the increase in voting population in that area has been
37 immeasurable and has produced three new senates in the New York State counsel. But what
38 often has been the barrier is obviously the disconnect, that people would speak their native
39 language with society in total. In terms of reapportionment, the language issues are drawn,
40 probably based not on language, but based on ethnicity, so just in terms of motivating or having
41 bigger opportunities to vote, they probably go hand in hand.
42 MR. LEE: Thank you, Senator. I know you have to leave, and it's 11:00 right now.
43 Thank you.
44 COMMISSIONER PATERSON: Thank you.
45 MR. LEE: Our next speaker is Joan Gibbs. Ms. Joan Gibbs is General Counsel, Center
46 for Law and Social Justice, Medgar Evers College, The City University of New York.

MS. GIBBS: Thank you. Good morning, and thanks to the members for participating in this hearing. The center is in the process of preparing detailed analysis of the impact of the Voting Rights Act and the litigation in the City of New York and particularly in the borough of Brooklyn, where the center is located. We have not finished that analysis yet, but actually, we are at the end of it. It's being edited right now. Its being edited by our secretary right now. But I would like to talk about what's to be included, we believe, what's to be re-authorized. And we also want to show support for portions of New York City that are covered by Section 5 to continue to be covered by it in every re-districting city. Since New York has come under Section 5, in every district, the Black community, particularly along with other minority communities, have been committed to intervening or initiating litigation. First,
to secure, and second, to secure our proper voting strength representation. Their last cycle, for example -- and Senator David Paterson was talking about this case -- and we're involved in this case as well, Rodriguez versus Patak. Unfortunately, it was lost. But in any event, in that meeting it was pursued from the beginning and it continued afterward, because the concerns about the U. S. Senator district, were currently represented by English, and so we continued in this litigation. And one of the things that we found -- and they're really concerned about it -- was the prevalence of the racial voting in Senator Ingle's district. The other issue we wanted to talk about, because everybody focuses on the broader electoral, we also had reason to use Section 5 in other areas, particularly New York City. They used to have community school boards. The school boards were dismantled a couple of years ago and we went to the Justice Department to argue that that was a violation of the Voting Rights Act. And that has been true, not only around the legislation joint district, but the Section 5 application has been for the the residents of New York City. The other thing that we are looking at in our stadium, because we believe that it's important, cities are undergoing in certain communities, demographic changes, and by that I mean that, although external districts are now majority-minority districts, that might not be. And so we're concerned that the Voting Rights Act remain particularly in Brooklyn. Rapid changes may be active because people might have to resort to maintaining their strengths, not necessarily in positions. The other issue that we're looking at in the study is that last year, the Voting Rights Consortium, which is comprised of members of the Legal Defense Fund Community Service Society, Asian Legal Defense Fund for Legal Defense, as well as a group of minority district professionals. Our office focused on the federal talks about the broader findings, but when Brooklyn joined the legislations, we found that there was a lot of confusion. A lot of people were being asked for I. D. , which was inappropriate, but nevertheless, they were being asked for I. D. And we're going to document that in our study. And we see this with new voters. A lot of people have been familiar with just the process of the Voting Rights education, so that's one of the other areas to educate people. Thank you.

MR. LEE: Thank you, Ms. Joan Gibbs. The next panelist is Martin Perez. Mr. Perez is the president of the Latino Leadership Alliance of New Jersey. Originally from Puerto Rico, Mr. Perez is a labor leader of the National Workers Union.

MR. PEREZ: Thank you, Mr. Chairman, honorable members of the commission. I want to start by thanking you for this opportunity to address the commission on this most important issue for our State, and in particular, for the Latino community. The Latino Leadership Alliance is an umbrella organization that includes most of the Latino organizations in our State. It was established in 1999 to foster the political empowerment of Latinos across New Jersey. In the last decade, the community has made some progress, but we are still under-

1 represented in the halls of power of our State. New Jersey Latinos make up 14 percent of New
2 Jersey's population which is an estimated 1. 2 million residents. Census trends indicate that by
3 next year, our percentage of the State's population will climb to 17 percent. We are the largest of
4 all minorities in the New Jersey area and in the nation, yet our faces are missing on many of the
5 governing bodies of the United States, even with sizeable Latino populations. There are no
6 Latinos in our State Senate. That is what brings me here today. The Voting Rights Act of 1965
7 is widely regarded as the most influential civil rights statute. Latinos in New Jersey rely on the
8 Act to protect our fundamental right to vote. In 1999, the Department of Justice's Civil Rights
9 Division found that Passaic County was discriminating against Latino voters by denying equal
10 access to the election process. The county was not providing Spanish-speaking workers or
11 Spanish language voting materials. The Civil Rights division entered into a consent decree with
12 the County of Passaic. From 1999 to the present, Passaic County conducts four elections each
13 year, all monitored by the federal observers. A three-judge panel of the U. S. District Court of
14 New Jersey was formed to ensure that the County will comply with the court orders. The
15 monitor assisted the County in its efforts to comply with the Court's orders and to implement
16 major institutional reforms. The Passaic case has not only helped the Latinos in Passaic
17 County, its influence was felt in other parts of the State. In order to avoid similar intervention
18 from the Civil Rights Division, other counties took affirmative actions to bring themselves in
19 compliance with the Voting Rights Act. We rely on the minority language and other provisions
20 in order to protect our rights to vote. These provisions are scheduled to expire in August 2007.
21 The question that we face today is, do we need the re-authorization of these provisions? There is
22 no doubt that the answer is yes. New Jersey has made progress in efforts to comply with
23 implementing the Voting Rights Act, but the reality is that we still have a long way to go. Our
24 organization receives complaints in every election from almost every county. Some of the
25 complaints are as follows:) Counties don't recruit enough bilingual election workers that work
26 specifically in Passaic, which by the way, Passaic was supposed to stop in 2003, and the Civil
27 Rights division saw fit to extend it because they still haven't recruited better workers and trainers
28 for the county. . 2) The election workers are not properly 15 trained to deal with language
29 issues. 3) The Spanish language signs and 17 documents are not in the poll places and are 18
30 not posted in places accessible to the 19 people in the community. 4) Community Outreach:
31 To educate our 2 community that language assistance is 22 available is deficient at best, and in
32 some 23 instances, non-existent. We are state-wide with more than 200 in minorities. I have
33 never received a call from any county to ask me to cooperate for any election problems. New
34 Jersey has seven counties that qualify for coverage under Section 203 of the Act. Middlesex,
35 Passaic, Union, Bergen, Essex, Hudson, and Cumberland. Due to population trends, it is
36 reasonable to expect that after the Census, we will have more counties qualifying for coverage
37 under Section 203. It is also fair to expect that, unless we maintain vigilance, the complaints will
38 increase. We acknowledge that there are other laws, like the Help America Vote Act (HAVA),
39 that set minimum standards for voting systems and accessibility for persons with disabilities and
40 non-English speakers. These laws are a compliment to the Voting Rights Act. For example,
41 HAVA requires that so that new voters, Registered by mail since 2003, produce some form of
42 identification at the voting place. We received complaints from Latinos from the City of
43 Vineland during the last mayoral election that election workers were asking for identification
44 from many Latinos irrespective of whether they were new mail registers or not. Some people,
45 because of frustration or embarrassment, simply go home and don't return to vote. The conduct
46 of the Vineland election workers, which might be a lack of training, is not only in violation of

1 HAVA, but also of the Voting Rights Act. Some people could argue that if Section 203 of the
2 Voting Rights Act is not reauthorized, Latinos in New Jersey can turn to the state laws for
3 protection. Those who've lived in New Jersey long enough, know that the office of the Attorney
4 General in our state has not been the most effective agency in prosecuting corruption or illegal
5 conduct of other government agencies. We understand that it is the responsibility of New
6 Jersey to continue to pressure our state agencies, like the Attorney General, to become more
7 effective, but the reality tells us that we still need the Department of Justice to protect our voting
8 rights. It is our insurance. Yes, we have made progress in protecting voting rights in New
9 Jersey, but the only guarantee to maintain the progress and be ready to defend our rights against
10 new and creative forms of discrimination is the re-authorization of the Voting Rights Act.
11 MR. LEE: Thank you, Mr. Perez. I think that the commission would appreciate it if
12 some of our members could talk about the complaints you have received from Latino voters.
13 Would that be possible?
14 MR. PEREZ: Yes.
15 MR. LEE: And Ms. Joan Gibbs, we would like a report. Do you have a copy?
16 MS. GIBBS: Yes.
17 MR. LEE: Thank you. The last panelist is Ted Shaw. He is a Director of Counsel,
18 Associate Director for the NAACP Legal Defense and Education Fund.
19 MR. SHAW: Thank you, Mr. Chairman. It's an honor to be here at the National
20 Commission On Voting Rights Act, and I want to commend Barbara Arnwine and the Lawyer's
21 Committee and staff for all the hard work that they are doing, and the many silent workers in
22 working toward the re-authorization Voting Rights Act. Being in this commission, I have
23 testimony that I have submitted in writing, and I will not go into all the detail in that testimony,
24 but selectively read some of it.
25 MR. LEE: We have the testimony.
26 MR. SHAW: Thank you. The Legal Defense Fund was a pioneer in the efforts to
27 secure and protect minority voting rights in the United States, particularly those of African-
28 Americans, and it has been involved with the voting rights since its inception. The Legal
29 Defense Fund co-chairs, the New York Voting Rights Consortium, which is a group of New
30 York Minority Voting Rights advocates which include the Community Service Society of New
31 York, the Center for Law and Social Injustice at Medgar Evers College, The Asian American
32 Legal Defense, and the Education Fund, Inc. , the Puerto Rican Legal Defense Fund. And it also
33 includes other voting rights of independent practitioners and experts. In addition, we've been
34 active in monitoring and/or challenging various issues affecting race and language minority
35 voters on voting rights in the New York area. What I want to do is talk briefly about Section 5
36 of the Voting Rights Act, particularly since 1982. Attached is Appendix A to my testimony
37 which is a listing of all the Section 5 objections since 1982 and in New York State. And you
38 also have a timeline that is Appendix B, which shows you when those objections were
39 interposed. Since 1974, New York Municipal and State governments have attempted 19 times to
40 make electoral changes that the justice department found have a retrogressive effect on the
41 minority Voting Rights Act. But for the Justice Department's rejection of those retrogression
42 plans, there would have been numerous instances of changes which would have harmed minority
43 voting rights. The job in New York, therefore, clearly isn't over. As you heard earlier, there is a
44 long history in New York State, going back to the days before the passage of the Voting Rights
45 Act, particularly with respect to Puerto Ricans in New York, where there were explicit rules in
46 effect that took away or blocked the right to vote for individuals based upon the language of

that vote. So there is deep history, and of course, New York City is covered. The City of New York is covered in part, by Section 5 of the Voting Act. That is to say, New York County, Kings County, and the Bronx. What I want to do then, is to give you a little bit more detail on that. First I want to illustrate that part of minority vote changes which have continued over 40 years. Second, the jurisdictions with multiple growing minority populations, including complex voting processes that provide many opportunities for discrimination. And thirdly, I want to say that, contrary to particular belief, Section 5 -- a lot of people believe that Section 5 only protects African-Americans while the Voting Rights Act language provision protects only language minority. First of all, anybody that knows anything about the various populations of New York knows that the split people try to draw between race and language minorities is a false one. That's one point. But the reality is that voting, symbolically and practically, the Voting Rights Act created an integrated protection program. Let's talk about some of the Section 5 issues in New York. In July, 1970, the Attorney General filed a determination that New York's English Literacy Program adversely impacted minority voting participation and that, of course, is relevant to the Section 5 triggering formula.

Of course, in March of 1971, the U. S. Bureau of Census reported that fewer than 50 percent of the voting age residents were registered and that, of course, what initially triggers coverage in New York of those jurisdictions. From 1982 or since then, Section 5 objections have helped prevent minority vote dilution in re-districting, non-geographical election procedures, and election controls, (suspension of elected bodies, etc.) and barriers to political access for linguistic minorities. The scope of these categories is significant. There's talk about re-districting since 1982. That authorization objection has occurred six times against proposed municipal, state and federal voting power, and that is reflected as I indicated earlier, in our appendices A and B. Each individual objection to each redistricting plan in fact, sited multiple harms to minority communities across the city so, in effect, at this time, the total number of changes that would be prevented by intervention of the Section 5 objections was more than six incidences. This occurred under both democratic and republican administrations, three Departments of Justice have stopped discriminatory voting changes in neighborhoods that reach across New York City, including Williamsburg, East and West Harlem, Flatbush, Bushwick, Cypress Hills, East New York, Fordham Road, Morris Heights, Inwood, Washington Heights, Williamsbridge, Wakefield, University Heights and Union Port. In my written testimony you have more specifics with respect to those instances and you'll see them also again reflected in the appendices. They include instances which "packing" and "cracking" were at stake, but also included non-geographic methods of eluding minority voting strength. The borough of Queens is not included in the voting Rights Act. It is not covered, but interestingly enough, the influence of New York City provides a unique front to observe an impact. If you compare Kings County, New York County, and the Bronx with Queens -- which never, of course, had Section 5 protection in Queens where redistricting plans are not subject to the scrutiny of preclearance review, pressure to protect White incumbents from dramatic demographic changes has wrought a districting pattern that, according to former Assistant Attorney General John R. Dunne, who served under that public administration of the Justice Department, "consistently disfavored the Hispanic voters. " The Queens county district is twice as overpopulated as Kings County, New York County, and Bronx County. If Section 5 is allowed to expire, we can expect to see that pattern become the "norm" in the covered jurisdictions. Now in New York City, as we see in Queens, a few examples of non-geographic vote dilution from 1994. That state amendment to the Bill proposing the allowing of the Governor to appoint judges to the Court of

Claims and then immediately transfer them to the Supreme Court. That would effectively take away or dilute the Voting Rights Act with respect to Supreme Court Justices. The Civil Rights provision rejected these under Section 5, noting that the method of selecting supreme court judges, from election to appointment has changed. In 1996, Section 5 allowed the jurisdiction to intervene when the Schools Chancellor dismissed nine minority community school Board members elected by a 90 percent minority district and replaced them with unilaterally chosen political appointees. Now we see the dismantling of New York City community schools, but these obviously occurred before that, and even that dismantling was subject to Section 5 with clearance, which should have been. It was pre-cleared over the objection of the minority advocates. But, nonetheless, the early evidence demonstrated Section 5 to secure our protecting the Voting Rights Act, and finally, still more recently, a federal government blocked a 1999 proposal that would have claimed to alienate government in voting, in school board elections. Limited voting is a classic "anti-single-shot" strategy to prevent minorities to casting their vote in blocs, and as the Chair of this Commission may recall when he was in the role of acting Assistant Attorney General for Civil Rights, he determined that these changes would have made it three times as hard to elect a candidate of their choice to the New York City school board in elections. So Section 5 is well documented. These kinds of methods would "pour new poisons into old bottles," and Section 5 was enacted to "shift the advantage of time and inertia from the perpetrators of the evil to its victims. "

I also want to point to that in New York City, with respect to the Chinese language speakers in New York. So half-hearted was New York City's original Chinese translation language plan that acting Assistant Attorney General James P. Turner, 1993, noted, "There was no awareness that there were multiple Chinese dialects spoken in the city. " In addition, no procedure for assessing the language abilities of the people and the translation skills. " Without the intervention of Section 5, that city's plan was to send one interpreter to the polling place, no matter how many Chinese speakers needed translation in that district, and one single interpreter would have had to have served 2,000. Before the Department of Justice objected, the city's plan was to provide no translation services at all in all districts with fewer than 200 Chinese, and this goes on and on and on. Details of the testimony of the Chinese is continuing to increase and has increased since 1982 reaching 47. 6 percent of all New Yorkers by the 2000 Census. Without Section 203 and Section 5 a critical number of linguistic minorities face barriers of their fundamental rights to vote. In some of that, Section 5 provisions, it serves also as a deterrent to voting changes. In other words, what you speak, with respect to objections under Section 5 that arelodged, that does not reflect that entire force and effect of having Section 5, because judges know that they have to abide by or pass Section 5 scrutiny, and often don't propose that. They otherwise propose, in the absence of Section 5, the need for Section 5 support of minority voting rights in New York city has not declined since 1982. In fact, the 19 times the Civil Rights Division has made Section 5 objections, in the City of New York, 11 have occurred of the voting rights, and just as much discrimination, since 1982. In 1982, most Assistant Attorney Generals who have served under Republican and Democratic presidents, have noted the persistence of racial polarized voting in New York City. Geographic segregation by race, ethnicity, language was significantly higher than the national average and reflects the existence of continued impediment. The job is not over. Section 5 is necessary. I commend the commission for the work that it is doing for the Voting Rights Act extension, and we are available for any further questions. Thank you.

1 MR. LEE: Thank you, Mr. Shaw. I wonder if you're preparing similar reports for
2 other regions?
3 MR. SHAW: We will participate in any way that we can be helpful. We work closely
4 with many lawyers. We of course, have a flex office, which is our West Coast Regional office,
5 and we will participate.
6 MR. LEE: Very well.
7 COMMISSIONER CARTAGENA: Well first of all, I want to thank all three of you who
8 took the time in sharing your views with us, and New Jersey found "fills" in a lot of gaps and this
9 kind of work can be done in general, of these United States. I have a short question for Mr.
10 Perez and that is, you mentioned before that there are more Blacks connected to the New Jersey
11 State Senate. Could you just give us your opinion of what may contribute to that,
12 dysfunctionally or otherwise?
13 MR. PEREZ: The biggest contribution? The contributor is the registering process. We
14 try to engage in the past registering process and we even prepare charts and new maps that we
15 submitted to the commission, but the reality is that for these to process, it is generally controlled
16 by both political parties and it is assigned to protect incumbents. That's the reality in New
17 Jersey. Some incumbents are controlled by the Democrats, and some counties are controlled by
18 the Republicans. You protect the incumbency, and by the way, politics work almost in similar
19 situations in taking different organizations, and you end up with the same people. So it's fair to
20 say that the registering process in New Jersey has not been kind to Latinos and that's why we're
21 working -- we're going to work in context in trying to select this Senate for this control.
22 MR. LEE: Kimberlee?
23 COMMISSIONER CRENSHAW: I'd like to thank all of you. I have two questions for
24 Mr. Shaw. I understand and take most of the facts that both Democratic and Republican
25 administrations have intervened, using the Voting Rights Act against various changes in voting
26 policy. Is it also fair to infer that both Democratic and Republican local administration have
27 been "equal opportunity violators" of the Voting Rights Act? And question number two, I was
28 really interested in the comparison that you offered between counties where the voting act was in
29 effect and counties that are not covered. I was wondering, if you were to "flip the script"
30 somewhat, do you have any sense that Section 5 has a pre-numbered effect? In other words,
31 does it have an effect even in areas that are not correctly covered in part, because of carryover
32 or seen in areas where Section 5 is in effect?
33 MR. SHAW: Let me answer that first question by simply saying, yes. With respect to
34 the second question, I think that if the negotiable instrument you were asking about was in play
35 everywhere, we would not see the difference between Queens County and the covered
36 jurisdictions in New York City, that is, Kings county, the Bronx and New York county. So
37 while I would like to be able to say that Section 5 creates a culture that extends beyond covered
38 jurisdictions and maybe some of that effect, certainly it isn't a complete "Halo" effect which only
39 underscores the need for extension. Section 5 jurisdiction, where we do have problems from
40 West New Jersey has cases -- that are KNC and RNC, are provided, I believe, by Judge Boyd,
41 and I'm curious, (turning and addressubg panelist Mr. Perez,) over the recent years, have you
42 observed any attempts of voter supression, specifically in Passaic county, which I imagine you
43 have observed?
44 MR. PEREZ: This making complaints against the Sheriff's Office -- Sheriff of Passaic
45 county -- Sheriff Paiyalsik -- that tried to suppress the Latinos voting. The Latinos were trying to
46 organize Latinos, and he was there from time to time suppressing the vote. And Mr. Paiyalsik

is still the Sheriff of Passaic county. And when he was elected, his first act was to fire 12 Latino Sheriff Officers that participated. There are some litigations still going on in the Courts.

MR. SHAW: Thank you.

MR. DAVIDSON: Mr. Shaw, the question that I have for you has to do with the state that you have and it's a little more in your report here. I'm reading it, and essentially, that document has found just as much discrimination since 1982 in the years prior. And you're talking about New York and I gather that most of the evidence for that statement is found in the preceding sentence there, where you say in fact, of the 19 times the Civil Rights Division has made Section 5 objections in New York, 11 have occurred since 1982, and then you also footnote some letters from the Assistant Attorney General James Turner and Acting Assistant Attorney General, Loretta King, and I'm wondering if you have copies of those letters that you could give to our commission?

MR. SHAW: I don't have them with me, but we will submit them to Mr. Greenbaum.

MR. LEE: Joe Rogers, obviously one of the key Voting Rights Act is to make sure that new and creative -- that people are not disenfranchised and neglected. Several states, Indiana among them, have recently adopted requirements, and this will very well have some impact on the levels, and that might be something that the presence or absence might have a significant impact on them. How concerned are you, or what evidence are you seeing that newly enacted identification requirements may have a changing effect on people's participation?

MS. GIBBS: Well, as I said when I spoke earlier in our office with headquarters in Brooklyn, we received a number of calls -- a substantial number of calls regarding requests for identification in circumstances where it wasn't required, and we are concerned about that. We are familiar with the demographics of Brooklyn. Brooklyn is a large home of people of African descent, and it is also the home of a number of immigrants from all over the world, including the African immigrant. And we are concerned our registered voters -- and have been -- that they are subject to be asked for identification as well as Latinos and Hispanics being asked for identification. We're very much concerned about that.

MR. SHAW: The I. D. requirements are being counter-played in jurisdictions. They are reminiscent of Prop 196 in five elections. Requirements that selectively enforced African-Americans and other people of color. So, for example, even though people argue, you have to show an I. D. card to rent a video at Blockbuster, it's no big deal. We know that something that should be neutral is subject to be used in a racial discriminatory way. So, for example, just as before in 1965, African-Americans in the south were subjected to a literacy test, there may have been requirements that specifically applied directly to African-Americans that were particularly discriminatory. Beyond that, the right to vote is something that is guaranteed and should be guaranteed of every citizen of the United States of voting age, and that guarantee should apply regardless of whether there person has a Driver's License, a State I. D. , how poor that person is, whether that person has a home. It's guaranteed to the rich and the poor, the homeless and those who are wealthy, and the imposition of I. D. requirements in my view, and in the view of the Legal Defense Fund, hopes all kinds of opportunities of mischief with respect to depriving people of the right to vote, particularly people of color.

MR. PEREZ: I have a brief comment. One of my biggest concerns in the process of re-authorizing the Act -- in the process of discussion -- the enactment -- there are some people in the federal legislature, in the Senate, and Congress was trying to somehow connect the real I. D. act and the electoral process, and that would have an effect on participation of the people. So,

one thing is to be very careful in pursuing it, to propose any type of tie with the electoral process.

MR. LEE: Mr. Buchanan?

MR. BUCHANAN: Mr. Shaw, when I personally registered to vote, I walked into the room. There were these Black Americans pouring over these questions on a literacy test. I couldn't answer the questions as a registered voter. I had just graduated from college. I told the person in charge, "I don't think I can pass this literacy test. " He said, "Who is the first president of the United States?" I said, "George Washington. " He said, "Use this card, you passed. " So, I know what's going on.

MR. SHAW: And that's consistent with the story of the Harvard graduate, the black Harvard graduate who returned to Mississippi and was asked, "What does this mean?" And he was answering all these questions, exactly what they meant, but it was a means to say, "You don't want me to vote. "

MR. LEE: Well, we've run out of time. Thank you Ms. Gibbs, Mr. Perez, and Mr. Shaw. Could we have our next panelists? Ms. Cohen, Kevin Peterson, Marc Morial, Joe Rich. Joe Rich is the Director of Fair Housing and the Community Development Project. He is also the Former Chief of Voting Section of the Department of Justice. Mr. Rich has several decades as a lawyer in the Civil Rights division, including the voting sector which we've heard so much about. Mr. Rich.

MR. RICH: Thank you, and thank you for asking me to speak. I have been with the Lawyer's Committee for the last six weeks and my testimony today is based on my experience at the Department of Justice and in particular, I was the Chief of the voting section for about five and a half years until the end of this April. But it is also based on my long career in the division. I have had extensive experience enforcing the Civil Rights Act of 1964 and the Fair Housing Act for many years. The reason why I mentioned this is because it is very clear that the Voting Rights Act has been most successful of all the Civil Rights Acts passed, and indeed, it is my judgment, one of the most important pieces of legislation in this country's history is the success of this Act. It became apparent very quickly in some States showing tremendous increase in African-American voter pre-act, and even shortly after that Act, up to a point today where the African-American percentage of registered votes is equivalent to other groups, particularly Whites. Similarly, the states are showing a tremendous increase of African-American elected officials. This has been a steady increase since the Act passed. There is no doubt in my mind that particularly, especially the provisions up for renewal, played a real crucial role in this progress. The question now, given the success, why do we need to renew it? And to me, there is no question. It needs to be renewed. I will briefly go through the three provisions that are up for renewal to indicate why I think they are so important and remain important, and in particular, I'll start out just by saying in my mind, what Mr. Shaw said, "Stand out the deterrent factor of these provisions. " If you look at the states of Section 5, the voting section gets some 4,000 voting changes per year to review. Under Section 5, 4,000 submissions for 20,000 voting pieces are included in that. Probably less than 1 percent of those changes we make objections to. So, again, the question is raised. "Why is Section 5 so important?" Well, it's important, because again, what Teddy said a minute ago. He said, "Those jurisdictions are covered and they have to consider that Section 5 is the consequences of their Act or their voting law that they are considering makes a big difference. " I have seen it and anecdotally, of all the years I was in the voting section, whether the stories would come out in consideration of that law or not, the tremendous debate of what the Section 5 consequences of those changes were before

1 committed, and more recently, the voting section. One of the practices we have is, when we
2 have some concerns with a voting right, we, on many occasions, send out letters for additional
3 information which is considered generally by a voting community, to be a signal that we have a
4 concern about that change and Bond gave me some statistics that he's reviewed. These letters
5 and over 500 of these letters lead to the jurisdiction withdrawing the change we had showed
6 concern about, and either connecting it or not submitting it, and again, that to me, is indicative
7 of the deterrent effect that Section 5 has on voting changes. And its continued to be there. The
8 fact that there's only a few objections is, a smoke screen, frankly, for somebody arguing, "You
9 don't need them. " It's just what Teddy said. "If you know you have to submit, if you know you
10 have the burden, it makes a big difference of how the laws get protected. " Secondly, the effect
11 of provisions. Observer provisions only applied to Section 5 jurisdictions or jurisdictions that
12 have been ordered by the Court. And part of the Court order is to authorize federal observers to
13 observe elections, and the voting section over the years has a very careful procedure for making
14 those determinations. We have very well trained observers who are employees of the
15 Personnel Management or observers who go into a jurisdiction you know is going to have a
16 determined effect on discrimination and that decisions are made where we think there is a
17 potential of that type. Discrimination is the discussion of Passaic. It is a good example of how
18 observers affected that day in Passaic. There was a consent decree that permitted the Attorney
19 General to send in observers, despite the fact that the Passaic legislation officials were still in
20 compliance with Section 203. Our observers have come up with a series of information, and
21 based on that information, we brought a Contempt Act, and it lead to concluding inspection
22 methods. These observers are not only a deterrent effect, they can gather information that could
23 lead to enforcement actions. I would say that is rarer than the fact of being there. The
24 importance of being there, that federal government having the presence -- having the current
25 effect of it happening, and the need for that continues. This last election, the Department of
26 Justice sent out more observers than ever before. The Department of Justice, in recent years,
27 have been sending out people that aren't observers, but are sending similar work of observers.
28 We are not authorized to send out observers, but we have sent out employees that are not in
29 violation of the law. And finally, Section 203. I don't think it's any question that it's needed
30 more than ever. To be able to vote is essentially to understand the ballot and understand the
31 process in this country. The increase in the number of citizens that have limited English
32 speaking abilities has increased. It's shown in the number of jurisdictions that are covered as a
33 result of the 2000 election. It was a significant increase and the number is on the tip of my
34 tongue. It's indicative of ingrowth in relation to this population. You have that increase and you
35 don't have that protection for English speaking ability. You're in a spin, bridging their right to
36 vote, and again that amount of effort the department has put into enforcement of this provision in
37 recent years has increased significantly, and I think it's indicative of -- it's important. So, I'll end
38 with that. Just the fact that these -- the importance of these three provisions cannot be
39 overstated, in my mind, over half -- well over half -- go into enforcement. You take away those
40 provisions, the voting section is outreached in protection and will be dissipated.
41 MR. LEE: Thank you, Mr. Rich. Our next panelist is Nadine Cohen. Ms. Cohen is
42 senior staff counsel of Boston Lawyers' Committee for Civil Rights Under Law. Ms. Cohen
43 has also served in counseling including re-districting.
44 MS. COHEN: Thank you, and thank you for inviting me to participate in this critical
45 hearing and an opportunity to discuss the challenges facing minority voters in Massachusetts.
46 The Boston Lawyer's Committee was actually the first local affiliate of the National Lawyer's

1 Committee and since the committee's inception in '68, we have been actively involved in
2 protecting the voting rights in Massachusetts. The African-Americans, Latinos and Asian hold
3 less than two percent of the key elected offices. The State's twelve-member congressional
4 delegation is comprised of all White men. All statewide constitutional offices from the
5 government on down are held by Whites. There has not been one non-white official elected to
6 statewide office since Ed Brooke was last elected to the U. S. Senate 30 years or more. The
7 160-member House Of Representatives has only five African-Americans and three Latinos, and
8 the Latinos have recently elected the fourth in the State. Massachusetts Senate has only one
9 African-American senator and has had only one African-American senator for most of it's recent
10 history. Just very recently, the first Latino was elected to the State Senate. No African-
11 American or Latino member of the state legislature has ever held any of the influential
12 positions. Virtually every mayor in the state is White. Only 40 or so of the state's 351 in the
13 community have elected an official of color in the past 25 years. In 000, officials ranked 26th
14 in the number of Black elected officials, and since 1980, has not improved that rank. People of
15 color have battled over districts for seats for city counsel and school committees that have
16 operated to dilute minority voting strength in a state that was once the center of the movement to
17 abolish slavery. The Senate can improve. Of course, I would be remiss if I didn't also state that
18 it was Massachusetts that invented "gerrymandering" when in 1812, Governor Elbridge Gerry
19 Mander began this, and unfortunately, "GerryMandering" continues to be used in the office as a
20 means to dilute the vote. Section 5 is essential where minority voters have faced many barriers
21 in there efforts to retain their freedom of choice. I want to focus on two specific issues. One is
22 the re-districting of the state House of Representatives in Massachusetts, and the other is the
23 language assistance issues and some other voting problems affecting people of color. For re-
24 districting, the 2000 Census first became a majority-minority city with people of color making
25 up 50. 5 percent of the population. Despite the substantial growth of the minority population, the
26 two -- now one district began. Instead of increasing the number of minority districts for the
27 state, the House Of Representatives eliminated two majority-minority districts and put in White,
28 and several of the incumbent districts and super-packed another district so that it had 98 percent
29 minorities. The district's performance was well in excess of the number justified by the white
30 voting-age population. The Re-districting Act, "gerrymandered" districts and diluted minority
31 strength in violation of Section Two of the Voting Rights Act. And the constituents re-
32 districting actions deprived them of equal voting power and prevented them from re-electing
33 candidates of their choice. The Lawyer's Committee for Civil Rights Under Law brought suit in
34 Federal Court, on behalf of several organizations, including the Black Political Task Force and
35 Oiste, and 13 individuals of color. In 2003, we had a trial before a three-judge panel. The three-
36 judge court in 2004 found that the re-districting plan was unlawful and deprived the rights of
37 African-American voters, in that it diluted the minority vote. The Court found that the
38 legislature -- and this is their language -- sacrificed racial fairness to the voters to achieve
39 incumbency protection, and to make matters worse, the House knew what it was doing, despite
40 the fact that this is what the Court found. It increased the number of majority White districts to
41 12, and diminished the number of black districts to one. The court found that the plan
42 contained extremes and unexplained "packing. " After moving out of two districts, it says the
43 plan leaves African-American citizens in the Boston area less opportunity than other members of
44 the electorate to participate and elect representatives of their choice. The court gave the
45 legislature six weeks to come up with a new plan and they specifically told the legislature that
46 they could not "rob Peter to pay Paul. " After the haggling, we finally agreed on a new plan, and

1 I'm very happy to say that as a result of the districting laws, the speaker, as the House of
2 Representatives, which was once the most powerful politician in the state, reassigned an
3 American-Asian person, and he has recently been indicted by the D. A. for lying in the re-
4 districting, saying that he had never seen that plan prior to his disclosure. In an unusual
5 footnote, the evidence strongly suggested otherwise. This case will explain the minority voters
6 in Massachusetts as well as throughout that country. We still don't have a level playing field and
7 we still need a Voting Rights Act to protect them. That case also shows a warning that they will
8 not be able to get away with depriving people of color of their right to vote. As a matter of fact,
9 this very moment, the former speaker is being arraigned in the U. S. district court for perjury. I
10 know my time is limited.
11 MR. LEE: You stayed between us and lunch.
12 MS. COHEN: And the one thing that I'm more passionate about in the Voting Rights
13 Act besides eating too, is that the unfortunate voting disenfranchisement that is also alive and
14 well in Massachusetts as it is in other parts of the country. Minorities will hold a public
15 hearing. We listed all the problems, including polling places, that were inaccessible. People
16 were told they couldn't vote because they were not on the voting list. We tried to work on all of
17 these things in the 2004 election. We participated in the election protection project, we covered
18 11 stipulations and testimonies en masse and we just released a report of the voting problems
19 similar to other places and I should say, the 11 cities were places that were fundamentally
20 communities of color that were disproportionately limited, affected the minority voter translation
21 problems. Twenty-eight hundred voters were told they were not on that list of registered voters.
22 This can mean that a county can have between 100,000 and 200,000 people prohibited from
23 voting. Provisional ballots were not given. Poll worker issues. Misapplication of I. D.
24 requirements were real problems in a number of communities of color. Poorly trained pollers,
25 and language issues were probably the most critical voting problem. We worked with AALDEF
26 in Massachusetts and they had observers and people monitoring at a number of locations. We
27 found that interpreters were not provided from communities where they were needed. The
28 Boston officials only provided interpreters if they were requested ahead of time. Translation
29 persons were not available, and we have instances where inappropriate language assistance in
30 Chinatown. People were told by some of the poll workers who to vote for, and that has been a
31 problem. A growing number of Latinos, Asian, Haitian are not only re-authorized, but fully in
32 force. Voters who need language assistance are able to vote and have their votes counted. I
33 thank you for this opportunity to be able to be heard, and I will give you my written testimony.
34 MR. LEE: Thank you very much, Ms. Cohen. The next panelist is Randolph
35 McLaughlin. Mr. McLaughlin is the Professor at the School Of Law, Civil Rights and Labor
36 Law.
37 MR. McLAUGHLIN: Thank you very much for your kind remarks. Thank you to the
38 Commission for inviting me here. I'd like to talk about two things. One is Section Two of the
39 act and some general comments about the Voting Rights Act, and where we are, and what we
40 need to do. I think we are -- right or wrong -- over 30 years ago, 40 years ago when Civil Rights
41 workers were in Mississippi trying to get Blacks registered, they were brutally murdered, not
42 one of those allegedly accused were executed. One day after the United States Senate
43 recognized that it had been wrong, lynching statutes came into effect. So we are in a historical
44 time, and I think we also have to be cognizant of the climate in which we function. This is not
45 1982, when the Civil Rights problem has won the Voting Rights Act and turned it aside. I will
46 suggest to you that we are in such a climate now, that the Supreme Court of 1982 has done a

1 fairly good job of cutting back the Voting Rights Act, and I suggest -- as we go in 1982 -- I
2 suggest to you -- in 2005, we need a Voting Rights Restoration Act to correct the many wrongs
3 that have been on our national report. To Section Two, it is clear why we need Section Two for
4 provisions and protection. As a Civil Rights Officer, I teach going back to the Civil Rights Act,
5 case after case. You have heard testimony here throughout the entire day through all the
6 counties, one case after another, where jurisdictions are not covered in Section 5. Numerous
7 cases and litigations. I just want to mention too, you will hear from New York that one is
8 entitled to the "Court of Hempstead." Let me state the second interpretation of Section Two of
9 the Act. I was one of the counsel, and the other case is fairly recent -- vintage 2003. New
10 Rochelle. Davis versus New Rochelle, and Davis was the late Ossie Davis. First the
11 Hempstead case. That Hempstead case was filed in 1981 with a challenge to "at large" election
12 system used in the historical town of Hempstead, which is the largest town in the country, largest
13 in the cities. It took us ten years, ten years to bring that case to trial, to successfully litigate it to
14 trial successfully. Ten years later, in the town of Hempstead, after having created an African-
15 American district when they were redistricting, we had to again threaten that town with further
16 litigation and they had to come to their senses that it was not a good thing to try and butcher that
17 district. We weren't as successful in New Rochelle. In 1980, we were successful in filing this
18 case. Davis had previously been an "at large" location for the citizen counsel. The first
19 opportunity the citizen counsel had in New Rochelle to redistrict itself. It decided, over the
20 objection of the NAACP, the African-American community might open testimony. It decided to
21 gut the only black district in the city. New Rochelle was literally polling off sections in the
22 Black communities and placing them in White communities and importing them into a heavily
23 Republican town, reducing them to a majority Black district. To the minority district, we were
24 forced to sue New Rochelle. We were successful under Judge Bryan and the Judge ordered the
25 city of New Rochelle to restore the Black district to a majority status. Now those two cases are
26 relevant for that following reasons. The city of New Rochelle particularly would not have a
27 Black district, and why is that? Because there are too few Voting Rights Organizations, Civil
28 Rights Organizations, and there is too much work out there in the field. You can't be
29 everywhere, and the difference between Section 2 and Section 5 is quite clear. With Section 5,
30 the burden is placing all districts from Section 2. That burden is placed on the community that
31 can least afford to protect itself or retain counsel to protect it. Now you might say, "Well, you
32 might not sell. But certainly you can argue there are attorney's fees -- if you went, with respect
33 to any litigation expert witness -- fees that can run anywhere from $15,000 to $20,000. Those
34 aren't covered, nor is that an oversight. So any suggestion is to clearly reenact Section 2 and
35 Section 5. It's no "quick fix" because of the efficiency and effectiveness of the voting section.
36 Whether it's the Reagan Section, Bush Section, or Clinton Section, each of that voting has been
37 consistent with the protection for the rights of minorities to vote. My suggestion is that I do
38 believe that we need to "push the envelope" and consider expanding the scope of Section 5
39 protection to include, not just the districts that are presently under the Act, but to include perhaps
40 districts where Civil Rights plaintiffs have successfully gained Section 2 cases over a period of
41 years -- make it five years, ten years. Because if you do that, if you study these jurisdictions
42 where successful plaintiffs have moved against these counties, districts, and states, you will find
43 that those districts where Section 2 combines with Section 5 don't know Section 2 districts are
44 just as likely to violate the Act as covered districts are. But because of Section 5, the district,
45 many of those protected are being visited. Only African-Americans, Latinos, and Asian
46 communities are not being protected. Since 1982, there has been a number of decisions at the

1 Supreme Court Level. I just want to read two lines of a case. One at Thornby General, which
2 starts to read back into the Act, the "intent" requirement. We had to prove the intent of the
3 voters, that there are many resistant voters, which is almost an impossible burden, and there is a
4 split on that score, but we need to write the intent out of the Voting Rights Act. It has no role in
5 the statute. Second, since the Voting Rights Act in 1982 was reenacted, the Supreme Court has
6 created a whole line of cases called the "Shaw V. Reno" cases that we saw in the affirmative
7 action case. It's retrogression, it's quiet community saying, "We are being disadvantaged, it's
8 reverse discrimination. " And I think that the Court has articulated some standards. What to do
9 when there is a conflict between the 14th Amendment and the 15th Amendment, the standard is
10 not clear. I think if there is a reenactment of this statute, we need to make it very clear what
11 the standard is. Whether or not that voting rights in the 15th Amendment and 14th Amendment
12 rights goes to that next round of redistricting. What are the standards? Otherwise, we would be
13 faced with numerous cases along these lines yet again. Finally -- and I've mentioned this already
14 -- in reenacting statutes, we must put back into the statute, payment of expert fees. The burden
15 of minority payments is an exorbitant amount, and as I said earlier, the conflict is there. For
16 example, one case I know that is an academic case -- I am academic, but I am also a litigator --
17 how many plaintiffs are unable to get professional help in their counties without that aid? How
18 many are unable to fight back on their right to be violated? Thank you.
19 MR. LEE: Thank you, Mr. McLaughlin. Our final panelist is Walter Fields. Mr.
20 Fields was a consultant to the Democratic and Republican Label campaign. He is the Director
21 of Political Development, Community Service Society of New York. Welcome Mr. Fields.
22 Thank you for coming to New York City. It's nice to have you here in the north in New York
23 City examining these issues.
24 MR. FIELDS: I recently returned to the Community Service Society, better known as
25 CSS. After being consultant to both the Democratic and Republican parties, redistricting in the
26 last two rounds and an expert witness in the last case known as Page and Martel, as well as
27 insights into what has transpired from New Jersey CSS, one of the oldest cities, dealing with the
28 needs of low-income residents. It has been in the forefront of the evidence, from the founding
29 of the Columbia of University's social lunch program, to building the first model and those
30 recently affected by the 2000 September 11 terrorist act, and -- I'm fanatic -- and I'd like to site a
31 few examples in 1989. We successfully used the Voting Act to stop the discriminatory purge of
32 over 320,000 voters, United Parents Association Versus New York City Board of Elections.
33 Subject to the State's non-voting purge, CSS proved that the law's application had an unlawful
34 discriminatory affect as Blacks and Latinos were 32 percent more likely to be purged for non-
35 voting. The Federal National Voter Registration Act of 1993, a facility agency based
36 registration, particularly in agencies serving poor communities. In 1995, CSS sued in State
37 Court to fully implement voter registration in mayoral agencies and whether franchise law CSS
38 fully supports that reauthorization of the Voting Rights Act mandating pre-clearance changes,
39 covered jurisdiction, and Section 203, mandating consideration of language and minorities.
40 New York City by any definition, one of the nation's most complex cities to administer elections,
41 continues to warrant the oversight of the Voting Rights Act political advantage, providing access
42 to the ballot by preventing the manipulation of the balloting procedures, and to make it effective
43 and complete. You may know that New York State election law is notorious for the effect it has
44 on candidate access to the ballot and the resulting diminishment of the public's choice for
45 elective office. What appears to be minor considerations in the electoral process, such as the
46 age of voting machines, can, and in application, be used to disenfranchise large pockets of

1 voters, primarily the already under-represented who most often are racial and ethnic minorities.
2 As the city continues to serve as one of the nation's largest portals for new immigrants, it is
3 imperative that protections in the election system are maintained for non-English speaking
4 citizens. The large numbers of immigrants that are entering New York City, new to our nation's
5 democratic practices, are most susceptible to having their voting rights diminished by
6 discriminatory practices and devices, including the consideration of language differences in the
7 context of elections, staffing of coworkers, and displacement of election information on both
8 machines. Language should not be a barrier to the electoral voting participation. That causes
9 great concern over manipulation of the Act, particularly Section 2, mainly in the drawing of
10 state legislative districts. Both the major political parties have each found reason to cast their
11 fate in a self-serving manner in the name of political voters. In solidarity, the answer of
12 disenfranchisement under 2001 elections in the District of New Jersey is of the Voting Rights
13 Act. Minority succeeded the White district and I will say that I am a registered democrat. In
14 2001, I crossed the party lines to be in the republican party because of my outrage of what was
15 happening in the state, and all this was on that premise that some Black elected officials were
16 from minority districts and their outright control by powerful party bosses. In this case the
17 numbers lied, because we did not accurately represent the dearth of the Black state. And, to add
18 insult to injury, they were required to sign identical affidavits attesting to the plan's positive
19 impact on minority representation without ever first seeing the plan. My action was shared with
20 Black legislatures, but I had it as a consultant for one of the parties. They never signed the
21 plan, but that plan empowered the party's leadership, insisting that there be an expanse to the
22 Democratic floor. Their plan would empower Black voters indirectly by reclaiming that it be in
23 line to control committee assignment. It was a spurious claim then and remains so today. For
24 years, the number of Black voters in New Jersey has not increased, and their presence has had
25 little impact, judging by their inability to claim any of the primary leadership posts. If you look
26 at Hudson county in New Jersey, the fact of the matter is, it had a black legislature. It no longer
27 has a black legislation. They also denied the line to identify black incumbents, replaced the
28 black incumbents and then tried to remove the incumbent when they tried to run for the
29 presidency. So, I think we have to be very careful with how the Act has become a partisan tool.
30 This is not to say the Act is not necessary. I am just giving some warning after hearing the
31 Massachusetts case, after learning and experiencing the New Jersey case, after coming back to
32 New York City, and still having the issues in this city. It is clear to me that the Voting Rights
33 Act continues to be necessary, particularly Section 5, and I was so moved that perhaps that entire
34 city has been under Section 2, so I appreciate my invitation to share my thoughts with you. This
35 requires extra measures guaranteed in our race, ethnicity or native roots. Thank you.
36 MR. LEE: Thank you, Mr. Fields. Questions?
37 MR. RAPOPORT: Question to Nadine. One of the most heartening developments in
38 the last recent years has been the efforts of Boston, Massachusetts to have a substantial increase
39 in the number of voters in the communities of color. The stats have been the voting registration
40 in Boston are not to say, phenomenal, so they question whether you can link that to Voting
41 Rights Act in which there's instances which the Voting Rights Act were attempted to be final,
42 immediate, or attempted to be commuted in any way?
43 MS. COHEN: Well as a "non Section 5 community," certainly under-redistricting would
44 have helped us. I think if we had that, provisions of Section 5, in terms of increasing the
45 numbers of people of color who are voting, I really think that that has been a community effort,
46 and we've gotten some support from the election departments, but not enough. And I think that

1 it really has been the force of groups like Black votes and other Latinos. Asian groups have
2 really gone out and really registered people and have seen the effectiveness of voting. I think
3 the re-districting -- in the case of the people of Boston -- that you can use the law to challenge
4 procedures to dilute the minority vote, and the fact that we had some success in getting some
5 elected officials of color really increases the people's feasibility, but if we didn't have the Voting
6 Rights Act, we would be much worse off. And I just want to say that I agree with this re-
7 authorization or a restoration of the Voting Rights Act and in expanding it. It may be an unreal
8 figure, but it really makes sense, because we see these Northeastern cities, New York, New
9 Jersey, Massachusetts, and Connecticut, and we need that protection of the Act.
10 MR. LEE: Mr. Davidson, I'm asking you to try to get a perspective on the other side,
11 because I see the need for re-authorization. I'm trying to understand arguments that work in the
12 office, in particular, Mr. Rich, given your experience -- trying to balance out the interest in
13 anything, whether there are violations or not, solutions. What is the essence of the argument that
14 says no on re-authorization of Section 5 in an argument with respect to Section 2. What is the
15 essence?
16 MR. RICH: I'm only looking at the re-authorization of Section 5. Section 2 is in the
17 law. I'm just looking at Section 5, and the argument, to my eyes, has been that Section 5, when
18 it was passed, was rather a far-reaching type of statute, putting a burden on the local or state
19 jurisdiction. It proved to the justice department, the burden on them to show that their voting
20 claim was not discriminatory. That's a fairly significant burden placed on this issue, and I think
21 that the arguments over the years has been particularly -- as I said earlier, it is after the law was
22 passed, many of the issues that lead to the law, disappeared. Voter registration went up, Black-
23 elected officials increased tremendously. Why do we still need it or why should we just limit it
24 to one part of the country? I think these are the arguments that have to be dealt with. I
25 understand these arguments, but my feelings are, yes, there was a tremendousamount of
26 discrimination in the districts that lead to this act, and one of the problems in a voting change is
27 that the justice department would put in tremendous resources and get an injunction against that
28 particular law. A new law was passed right after that concerning that discrimination. Section 5
29 testified that it's a burden. You can't just pass a law to continue discrimination. That type of
30 blatant discrimination frankly, has gone away, in my eyes, but that amount of discrimination is
31 still out there, but much more subtle. You're getting it from all our hearings on this, that's why
32 the Voting Rights Act is still needed. It may be that you may want to consider certain changes to
33 Section 5 because you're seeing discrimination throughout New England, all parts of the country
34 that aren't covered by Section 5. Now, do you do that as justified under constitutional law? That
35 is something that has to be considered. The Speaker has to look very carefully. The Voting
36 Rights Act has traditionally been looked at as a justifiable act, and because we're at the point
37 where we're at now, its going to have significant effect.
38 MR. DAVIDSON: As opposed to the Supreme Court.
39 MR. LEE: That is a race-conscious remedy, in an effort to resolve problems and
40 equality, with its highest standard as we all know. And so on a factual basis, it's more than
41 what's so critical. I think its remarkable to point out that statistical information, as it relates to
42 the number of claims and how that plays out, as it relates to the factual basis for reorganization.
43 And I hear you clearly in terms of the turn around. In other words, what their needs in effect,
44 have clearly seen. What that opposition sees. In fact, saying no to the re-authorization.
45 MR. RICH: There has been no less discrimination. We don't need it any more.
46 Section 2 will take care of these problems. But to me, there is less blatant discrimination and

1 people are in need of more wider discrimination. In 1965 the focus was on the deep south
2 because of what was going on there and it was blatant. It was terrible. There is still a
3 tremendous need all over the country, because without that Section 5 protection, some of that
4 discrimination will reappear. That's the effect of Section 5. Those jurisdictions are saying we
5 might want to do this, but the justice department might be a problem if you're under Section 5.
6 Well, we'll take our chances. I don't think anybody would sue us under Section 2 and Section 5.
7 That kind of prophylactic effect is really crucial to that type of vote.
8 MR. LEE: Referring to the earlier testimony of racial bloc polling, what or how
9 widespread is racial bloc polling? I'd like to ask the same question to Joe Rich.
10 MR. RICH: I don't have a real full answer on that. I know that in the case of Georgia it
11 was assumed there was racial bloc polling. In South Carolina, it was assumed there. Usually
12 there has not been an argument in States, particularly Section 5 States, that racial bloc polling
13 continues. We do have a lot of arguments about racial bloc polling in other jurisdictions. I think
14 when you see it come up, I think in New Jersey, if the argument that New Jersey was the racial
15 bloc polling, how serious was the racial bloc polling without the racial bloc polling? It was not a
16 Section 2 violation, and I think that's what the Court reached as such. So it depends on where
17 you are. It's a big comparison between that New Jersey case and the Georgia case and any point
18 of view. There is no question there was racial bloc polling. Different kinds of cases, but they
19 had racial bloc polling.
20 MR. McLAUGHLIN: I think it's a very complex question. That question in the
21 Section 2 case, I think is, what type of legislation are you looking at? Are you looking at the
22 Department of Justice legislation or the Department of Justice elections? If the voters had a
23 choice in the Department of Justice legislation, look at the Department of Justice elections. That
24 is a very, very complex question with a lot of layers to it, but I will suggest to you, depending on
25 that method, the analysis you can find is in racial bloc polling. Now what is racial bloc polling?
26 If weget back to the issue of intent, I would have to show that a voter voted against that
27 candidate because of their race. Do I have to show that a voter voted for a candidate because of
28 his race? Then that intention creeps into it. You've got to get a multi-varied question analysis
29 which is so expensive to prove. Again, I think that's purely an aggressive analysis. If you had a
30 White voter on one access and the racial voter on the other access, the race of the candidate, and
31 you want to determine whether there is some correlation between those two, the more Blacks that
32 are voting for a Black candidate or for a White candidate, when given a choice, which one
33 should you look at?
34 MR. LEE: Mr. Fields?
35 MR. FIELDS: I think that's one of the difficulties that we face. The question that I
36 raised in Court was this issue of motivation. Was it whether or not it's the choice of the voter?
37 In a state like New Jersey, where you still have a very strong party of machinery, my argument
38 was that those choices were not made by voters, even though you see cross racial bloc polling
39 voting to make that argument that voters truly have been disenfranchised. One of the other
40 issues in New Jersey is they're using a very short time span to prove that voters were voting
41 across race. It was a fairly new phenomenon in New Jersey. We had these suburban districts
42 where you had Blacks that were elected from non-Black districts due to the politics of the State.
43 There were those of us who were very concerned that the Court sided with that democratic
44 society to make that analysis.
45 MR. LEE: Ms. Cohen, do you have anything to say along these thoughts?

1 MS. COHEN: Well, I just want to state the obvious. In Boston, we were able to show
2 Black voting and I think, particularly, when you start having large Latino and Asian and ethnic
3 growth populations, it becomes more and more difficult to do that. Just a note, I have a case --
4 the Springfield case, and again, we think we're going to be able to prove Black-White voting,
5 so I think it's still out there all over.
6 MR. DAVIDSON: I have a question for Mr. Rich, which follows up Mr. Rogers'
7 question and it tends to start where our arguments begin -- re-authorization of Section 5. Some
8 people argue that it's no longer necessary, but one of the leading cases in Georgia V. Ashcroft is
9 now presenting a criteria for deciding racial polarized voting. I'm wondering what your view is
10 on -- I mean vote dilution -- not racially.
11 MR. RICH: I'm still trying to understand after a couple of years, but clearly, it
12 complicates Section 5, and how you're going to apply it, taking into effect a lot of the factors
13 that weren't considered before. I don't think that's a good argument for that section, but if
14 you're concerned with Georgia V. Ashcroft, legislatures should try to define what they think
15 the standard should be. It was developed by the courts and cases in '76 of what I thought was a
16 pretty standard retrogression, and all of a sudden, we got this new standard and how that was to
17 develop under this pre-authorization would be an interesting thing. I think it raises a lot of
18 issues. It's harder to administer, but having done it for the last two years, it can be done. It's
19 harder, I think, in the end. It can give States a lot more leeway as to what they can do, but still,
20 there is still a need for Section 5 under Georgia V. Ashcroft, and I'd say particularly at the local
21 level. The local level in terms of what they do in the State district, and that's where the greatest
22 need for Section 5 is. These are limited communities, smaller communities that don't have the
23 protection of the Black Caucus, and I don't think, in my judging Georgia V. Ashcroft on those
24 communities. And I think putting emphasis on how Black legislatures vote in the compass of
25 Section 5, I think may employ certain local Black legislatures, because if they come forward and
26 say, as a group, it may be one or two of them, "We don't like the plan," that is a factor of what it
27 takes toward finding retrogression. It could be Black legislatures. It's a fine plan without
28 understanding it or because it makes it easier for business. It's a short answer,but I don't think
29 that it's a good reason for not renewing. If you think clearly, it makes the Section 5 analysis
30 more difficult, not so much more level. Kimberlee?
31 COMMISSIONER CRENSHAW: Thank you. I do have a few questions. First of all, I
32 want to thank you all for real provocative answers. My first question is for Mr. Rich. We have
33 been largely talking about Section 5 and language provisions, but I appreciate your bringing to
34 our attention the federal examiner and observer provisions. I have a couple questions. First of
35 all, following up on anticipating arguments against refuel. It would be useful to have some
36 understanding to what kind of factors, what kind of complaints you have received that prompted
37 the deployment of observers? We tend to have an understanding that happened a long time ago,
38 but I'm somewhat interested in hearing just what kind of conditions that prompted this, and
39 together, you mentioned that in non-covered jurisdictions, the employees of the Department of
40 Justice are anticipating that. An impossible response -- you already have this ability to do so, so
41 what would be the requirement of using the examiner status if you can, in fact, use employees
42 of the Department of Justice? What is it that they cannot do or to apply the question, how does
43 the effect of Section 5 affect the examiners?
44 MR. RICH: I think the first question is, many of the situations that we find that we
45 think federal observers are needed are certainly not as prestigious as we found 30 years ago.
46 What we find is a situation where there is a race on both sides. Whether a local city counsel is

1 going for the majority Black, anyone White will turn that around, and it gets asked and we get
2 information. Interestingly enough, we get questions from local jurisdictions that they would like
3 us there just to have a calming effect. There is a federal expense to make sure people have
4 assuredness in the place. In other situations, we -- and this is less in the federal observers -- if
5 we have information of a possible violation, it might be some sort of intimidation not directly
6 related to the election. This gives us a chance to have a coupling effect, but also to gather
7 information that may lead us to use it. And that second question is a good one. The number of
8 departments of employees has increased dramatically, but there is a limit. In fact, in November,
9 we were recruiting not just the voting section, we were recruiting throughout the Civil Rights
10 division, so we had more people out there than we did before, but I don't think you can expect
11 that to happen. OPM are specially trained, better trained than the Department of Justice lawyers
12 have ever been. But another factor too, is that if the jurisdiction says we're not going to let you
13 in our State, law doesn't let anybody in. Outside in the polling places, we're right in the polling
14 places observing what's going on in the polling places, and they can keep us out, and this
15 happened to us in the case of Reddick who did not have observer coverage. They had serious
16 4E problems in Reddick. We sent several people up in several elections that didn't go in. It
17 happens that they had to get in the polling places. Our employees had some effect, certainly, on
18 the federal observers.
19 COMMISSIONER CRENSHAW: Thank you.
20 MR. LEE: Also, I want to point out how many lawyers, including Joe Rich -- it's about
21 45, so we're talking about how many?
22 MR. RICH: We have been sending out attorneys too, but also using paralegals and other
23 professionals.
24 MR. LEE: Well, excluding secretaries, it was 100.
25 MR. RICH: It's not a big coverage.
26 COMMISSIONER CRENSHAW: My second question is a follow up to the quite
27 interesting notion presented by Professor McLaughlin. Thinking of this potential as a
28 restoration, an even expansion, I want to ask both you and Mr. Fields if you could give us a
29 little bit more guidance in this regard. You will recall from 1982, some part of that debate was
30 how to correct and some of that correction was in the debate. If you would respond to attempts
31 to suggest ways of to correct that. I was wondering if you had more "flesh that you could put on
32 the bones?" For example, you mentioned, Professor McLaughlin, about the possibility of making
33 jurisdictions who have lost Section 2 cases, a covered jurisdiction under Section 5, which I think,
34 is provocative. We've heard earlier from Senator David Paterson about the action of "packing"
35 in one instance, and "cracking" in another, and the difficulty in finding some kind of direction
36 other than that consistency. Also, Mr. Fields, you mentioned abuse of Section 5, and I am just
37 wondering if you have any general ideas about that kind of declaration of statements like in
38 1982? How do we best interpret these Sections?
39 MR. McLAUGHLIN: I think the clearest thing one can do is -- to make it crystal clear --
40 is that the intent of a vote in the racial bloc voting analysis that creeps in is irrelevant to a Section
41 2. That other thing we've seen in the "Goosebine" case, for instance, is when we won that
42 liability case and the Court ordered the district to create a jurisdiction. They can't create
43 jurisdictions without violating, so I think it has to be clearly stated in the act. The Supreme
44 Court has said, to my knowledge, you can use race, not as a factor, but the predominant factor.
45 But I think the statement is we have to have clear standards in authorizing.

1 MR. SHAW: So that when -- and it's really a Section 2, I remember what the
2 jurisdiction is in Section 5. Whether creating circumstances like Shaw V Reno is leaning over
3 their head. So it has to be clear in Section 5 as to what the instances are, what race can play in
4 the re-districting effort and what Shaw V Reno can play, and that's the conflict. Even if they
5 pack the pre-clearance provision, they'll be sued by the White voter.
6 MR. FIELDS: My agreement also. Which is Section 5 jurisdiction, Section 2
7 jurisdiction. When you look at what transpired in 2001, one of the real difficulties was that none
8 of the rights of the voter -- whether you look at the case of New Jersey -- was truly given by a
9 party boss. None of those officials served. In my estimation, you can't run from New Jersey
10 without that beating of a party boss. There is no such thing as challenging the party line and
11 winning, it does not happen. So this notion of using a racial bloc analysis becomes difficult in a
12 place like New Jersey, because even when a jurisdiction is created that you have say -- White
13 voters voting for a Black candidate. The question then becomes whether that person truly
14 represents his or her --
15 MS. COHEN: Community. But his or her community did not elect that community,
16 because one, the party machinery did their testimony in New Jersey. That, I think, could be
17 considered for Section 5. A place like Hempstead county, a place like Hudson county, a place
18 like Essex county. But unfortunately, we have a picture based on the current district. The
19 Voting Rights Act is to prevent Black voting rights from being diluted. When you have Black
20 voters elected from majority White districts, it's a tough case to make, and unless we have some
21 across the board, we'll never see the Black number. In fact, the Blacks and Latinos in New
22 Jersey are not empowered by any stretch of the imagination, and I think at the end of the day,
23 that has to be the final say of the test of any Voting Rights Act.
24 MR. LEE: Last but not least. Mr. Cartagena.
25 COMMISSIONER CARTAGENA: Well, I'll ask this -- by the way, I really appreciate it
26 what you said about the indictment Ms. Cohen, because he lied about what he claimed to see or
27 not see, in Court. It is amazing that the officials are not even seeing the plan in favor of the
28 voting. We hear that a lot in Albany, and I think "you hit the nail on the head" with respect to
29 Jamison, which does say that the intent of the voting provision, the voting analysis is irrelevant
30 from a basis. Mr. Joe Rich, here is my question. To the extent that you have been using
31 employees in some jurisdictions but not observers with respect to the observer process of the
32 Voting Rights Act, did you have any recommendations for improving it, or is it just more
33 money?
34 MR. RICH: I think that observers have always been put in Section 5 coverage
35 jurisdictions. I think the need for observing and monitoring is not so much in the last five years.
36 There should be consideration given about anything the Justice Department can do, which is a
37 very effective tool for keeping common places. It makes a difference. I'm not sure what kind of
38 opposition. Maybe that the idea is logically you win or constitutionally you have your reason,
39 but the fact is what I said earlier. Is it that so many people of the jurisdiction, elected officials
40 not minorities, are afraid of a possible intimidation of voting rights violations? So many of the
41 officials welcome business. I think its confidence in the public in selection that have that
42 presence. I think that's a very strong argument for broadening and that's really, I think, it
43 explains what we're doing. We've broadened it by sending out Department of Justice people. I
44 think it would be much better to have neutral observers trained by a trainer to have them sent out.
45 I don't have any particular formula. It should be nationwide or something less, but my feeling is,
46 it's a greater need for it now than when I first started.

1 MR. LEE: Well perhaps you can take account of the history of Section 2.
2 MR. RICH: Yes.
3 COMMISSIONER CARTAGENA: Much less under terms of constitutional, because
4 we're talking about someone paid by federal.
5 MR. RICH: And right now, the recent monitor out, I consider that part of the
6 investigation. We're sending them out because there may be a violation of the law. Are we
7 building a case, because that's a given. The Department of Justice has the ability to work on
8 investigation violations of the law. The difference -- the only thing I think is, that observers
9 have the right to get into the polls and that's important, but I must say, that generally speaking,
10 there have been very few jurisdictions. We go through them and we say, "You know, we're
11 coming down to monitor elections if you let us. " And we very well knew of them because of
12 state law, even federal law enforcement. So you know what I'm saying now, may be that we do
13 have that ability, but I would much prefer to see it formalized in legislation to a Federal plan.
14 Federal observer provision.
15 MR. LEE: Well, thank you very much. The panel has obviously been very helpful.
16 Mr. Fields, Ms. Cohen, Mr. Rich.
17 MR. LEE: Our next panelist is Marcos Devers. Marcos Devers is an "at large"
18 member of the City Counsel in Lawrence, Massachusetts, Latinos First, In The Wake Of Voting
19 Rights In A Lawsuit By The Court And Jury.
20 MR. DEVERS: I thank you, the Civil Rights Commission Voting Rights Act, for
21 inviting me here. As you said, my name is Marcos Devers. I'm City Counsel of the City of
22 Lawrence. That is called the City of Immigrants. The city has a beautiful and strong history of
23 immigrants, the spirit of Lawrence. Six point five area miles and 73,000 people. In the past, the
24 community has been, in the last four decades, however the Hispanics in the City of Lawrence is
25 60 percent of the population. I'm also a civil engineer, math and science instructor in the school
26 of Lawrence. I have run successfully in the years 1991, 1993, 1995, and 1999. It was in 1999
27 that I finally made "City Counsel At Large. " It was more difficult to make City Counsel At
28 Large at that time. There was already a Latino in the district counsel in the county. The six
29 wards that we have, A, B, C, D, E, and just one Latino made it and it was in 1993, but "at large.
30 " I was the first getting there in that position. In the year 2001, I became the first Latino Mayor
31 and the first Dominican Mayor of any U. S. city and that was when the city counsel appointed
32 me. I was re-elected as city counsel in the year 2001, and I got the majority of votes in the
33 history of Lawrence, over 8,000 votes. I served as counsel president just after being mayor.
34 Now, in getting to the lawsuit in the City of Lawrence. In 1978, the Department Of Justice
35 applied to the lawsuit, which lead to numerous violations of the Voting Rights Act. Section 203
36 and Section 2, regarding lack of Spanish language assistance of the Voting Act. At this time
37 only one of the City Counsel members was on that team, yet, this action alleged that the city's
38 methods of electing it's city counsel school board violated Section 2 of the Voters Rights Act,
39 an illegal opportunity to participate in the process of electing a candidate of their choice. The
40 Department of Justice also alleged that violation of Section 2 and Section 203, the National
41 Information Spanish Language Assistance and refusal to appoint Spanish speaking monitors.
42 They were able to resolve several of their claims. The city subsequently was to change the
43 method of electing the school committee from a large member to single member distance and a
44 plan for the city counsel board, 2000. Until 2001, it was alleged that the proposed 2000 census
45 resulted in Section Two violations. That counsel agreed to 2002 of both bodies to provide an
46 additional Latino. The counsel also agreed or required the city to hire a person who is bilingual

1 and Spanish to it's staff, in connection with it's office. My testimony. I would like to refer to
2 the fact that on many occasions, the complaints that those violations happened from all sides,
3 and although I didn't observe particular situations, specific situations, it is in every election
4 event. We had to handle situations that were in violation, and complaints of people that couldn't
5 vote, and even on some occasions, the complaints were about possible fraud or were
6 demonstrated and implemented by those in power. And some of my constituents thought that in
7 1977 we run the race in just the kind of environment we had. I couldn't make it, but in 1999 after
8 providing important services, I could make it. Obviously the voter turned out as being more
9 participation. After that and since, although we have a lot of progress after the Department of
10 Justice intervention, I still feel that we need this kind of assistance, Minority Language
11 Assistance. We have more bilingual Hispanic co-workers. Eventually we're going to need
12 Asian. The Asians are moving to Lawrence. There are right now 2000 and there are voters
13 going to the polls and need to exercise that right. That's it. Thank you.
14 MR. LEE: Thank you, Mr. Devers. Questions?
15 MR. CARTAGENA: Well Mr. Devers, congratulations on your accomplishments there,
16 and being part of a, I'm sure, it's a very energizing accomplishment, being elected as the first
17 Dominican in office. That is an accomplishment. Can you tell us a little bit more about
18 language assistance in Lawrence today? In your opinion, the last population that still needs
19 testimony in those kinds of circumstances.
20 MR. DEVERS: Yes. The more immigrants, mostly Dominicans and also from Central
21 America. They also don't know the language, this population, the Dominicans. Still, folks who
22 know the language cannot exist in this environment. As you know sometimes I don't see the
23 possibility. You have kids in San Francisco, the poll workers should be bilingual, English,
24 Spanish, and eventually some of the Asian language.
25 MR. CARTAGENA: Thank you.
26 COMMISSIONER ROGERS: Congratulations. I am curious. In your experience you
27 experienced office in the way of immigrant people, Hispanics and peoples from all walks of life.
28 MR. DEVERS: All different kinds. The city had to know I was running for the district.
29 It would have been easier, but I tried "at large," and I was able to accomplish it.
30 COMMISSIONER ROGERS: What was the terms of percentage in non-immigrating
31 percentage?
32 MR. DEVERS: Demographics have changed drastically since 1999. There were voters
33 with Italian last names and similar, so it was less than 10 percent and 90 percent of the
34 registered voters were all Latino. Now we are 50/50, and also, in terms of the total registration,
35 we are 70 percent Latino and 30 non-Latino. Make that 60 percent Latino and non-Latinos,
36 White, over 35 percent.
37 COMMISSIONER ROGERS: What's the actual registration?
38 MR. DEVERS: Close to 10,000 voters.
39 COMMISSIONER ROGERS: But thepercentage of the population you're seeing is
40 roughly are voters of the community?
41 MR. DEVERS: Close to 50 percent is Latino registered voters. Now, in terms of
42 population, Latinos are 60 percent population.
43 COMMISSIONER ROGERS: You were successful in obtaining -- what was your
44 percentage -- I'm just curious -- under terms of your non-Latino percentage?
45 MR. DEVERS: Non-Latino?
46 COMMISSIONER ROGERS: Non-Latino.

1 MR. DEVERS: Oh, at least two elections. The ratio between 60 and 40. Sixty percent
2 Latino and 40 percent non-Latino.
3 COMMISSIONER ROGERS: So of the White voters -- you carried White voters?
4 MR. DEVERS: Yes, roughly.
5 MR. LEE: Mr. Devers, do you have any opinion on our having a need for observer
6 coverage? We talked about it earlier. I was wondering if you were -- if you have had any
7 experience in the City of Lawrence?
8 MR. DEVERS: Could you rephrase that?
9 MR. LEE: Federal observers in Lawrence.
10 MR. DEVERS: Yes. We have in the last three legislations. The Secretary of State had
11 sent observers and monitors. Did I understand your question?
12 MR. LEE: Well, I was trying to figure out if you thought that that coverage was useful
13 for electoral?
14 MR. DEVERS: Definitely.
15 MR. LEE: Can you expand a little on that?
16 MR. DEVERS: Sorry. Your question is?
17 MR. LEE: What benefits were there to having the observers?
18 MR. DEVERS: In Lawrence, they have been attainable. A few families have been
19 willing to see a group in power and it has been using the Latino statistics to get the funds from
20 the state, from the federal government. Then they are in the position, and some of them even are
21 willing to receive by remote control. They just use the minority statistics to get those funds and
22 other grants provided by the federal Government and State. They are for producing more
23 organizations like that and the Voting Rights Act and any other legal instrument. The Federal-
24 State government act, definitely, has been a lot of benefit to everyone. That's why we're trying
25 to guarantee this system of democracy.
26 MR. LEE: Thank you, Mr. Devers. I know you have to catch a plane.
27 MR. DEVERS: It's a pleasure. Thanks again.
28 MR. LEE: Our next panelist is Margaret Fung. Margaret Fung is Executive Director for
29 the Asian American Legal Defense and Education Fund. In 1974 she founded the Native
30 American particularly active voting rights activity in New York City and elsewhere, I
31 understand.
32 MS. FUNG: Thank you, very much. Good afternoon. We are a one-year-old
33 organization and we do litigation at the community level, Education, Immigrant Rights,
34 Economic Justice for Workers, police misconduct, language access to services, youth rights
35 and educational equity, and voting rights and civic participation for the last decade. And
36 several more years all of this monitored legislations on a regular basis for compliance with
37 Section 203 of the Voting Rights Act. In 2004, our monitoring efforts were focused in Rhode
38 Island, Michigan, and Illinois. In the past we've campaigned to secure fully translated language
39 in Chinese under Section 5 of the justice department, in rejecting a plan for diluting minority
40 strength, as well as the minority screen that would discriminate against Asian Americans. In a
41 challenge to New York's 12th Congressional District, we determined that Asian Americans in
42 Manhattan and Brooklyn constituted a community of interest. Conducting the largest
43 multilingual exit polls of Asian American voters on the East Coast, polling over 5,000 Asian
44 New Yorkers in the 2000 elections, and almost 11,000 Asian American voters in 8 states in the
45 2004 elections, including a weekly events in which we registered newly-naturalized citizens in
46 federal court. I want to talk today about the significance of 203, the Voting Rights Act, to

1 promote Asian Americans' participation here in New York City to support 203. In order to
2 support it 13 years ago, I testified before the House of Judiciary SubCommittee on Civil and
3 Constitutional rights in support of the Voting Rights Act, Assistance Language Act of 1992, and
4 only covered jurisdictions of at least 5 percent of the members of a single-language minority.
5 We argued for a new alternative benchmark of ten new language minority citizens, because large
6 concentrations of Asian Americans in New York would not otherwise have been covered under
7 the existing cover. Of the New York City legislature or the New York City counsel, no Asian
8 had been elected. Four out of five voters in Manhattan's Chinatown, Flushing, and Queens did
9 not speak or read much English, so when the amendments were passed in 1992, 200,000 Asian
10 Americans were covered under Section 3 MR. LEE: The amendments to pass coverage under
11 Section 203 -- 200,000 Asian Americans worldwide? MS. FUNG: Looking at the Census --
12 200,000. That's tremendous. There are now 16 counties in seven states that are now required to
13 provide assistance in one or more languages. Asian Americans' language population remains
14 one of the most fastest growing communities of color. That rose to 7. 1 billion. In 2004, 6. 7
15 million Asian American voter turnout has also increased very steadily to nearly 3,000,000 in
16 2004. So for us, Section 203 really is a success story because thousands of Asian Americans
17 are registering to vote for the first time. We did an exit poll, asking questions of almost 11,000
18 Asian Americans in eight states and found that almost a third of them needed some form of
19 language assistance. Around 46 percent were actually first time voters, and every year that we
20 do the poll for the first time, so the most fundamental level translated ballots in voting machines
21 have enabled Asian American voters to exercise their rights to vote independently and privately.
22 In several places, the availability of interpreters can provide additional oral language assistance
23 for Asian American voters who are not fully proficient in the English language. Section 203 has
24 aided the voter registration efforts to increase when only a handful of voters such as the
25 Chinatown Voter Education Alliance and the Coalition of Korean American Voters in New
26 York City did voter registration. There are now scores of Asian American groups on the East
27 Coast that are doing voter registration for Filipino, Asian Indian, Pakistani, Bangladeshi,
28 Cambodian, Laotian, and Vietnamese communities. Many more Asian Americans return for
29 office and they can effectively reach out to their constituents in voting districts. In 2001, for
30 example, John Liu was the first Asian American elected as City Council member in New York
31 City and Jimmy Meng became the first Asian American member of the New York State
32 Assembly in 2004. Notwithstanding the success of 203, there continues to be a deficiency in the
33 program. The translations in the 2000 Presidential elections of "Democrat" and "Republican"
34 were converted in several polls in Queens. Absentee ballots contained mistakes in the Chinese
35 language. Asian Americans were given instructions in Chinese to "vote for three," other
36 instructions to "vote for five. " The word "yes" was translated as "Si" on the Chinese ballot.
37 John Kerry complained that voters were not able to recognize his name based on the Chinese
38 translation, based on what the Chinese were given, the interpreters which created long lines in
39 the polling process. Two hundred and three sights were targeted and 66 sites were targeted
40 with a combined 979 interpreters, and the board did not come close to meeting that required
41 number. This, unfortunately, still exists among Asian Americans in the polling place, and I want
42 to give you a few examples. Jackson Heights, Queens at P. S. 69, one poll inspector told an
43 oriental guy, "You are taking too long to vote," and turned to one of our monitors to say for them
44 to tell "his people" -- implying Asian Americans -- they should really vote faster because others
45 are waiting on line. Another one commented if they need help with language, they should not
46 ask to vote. At the poll site, a Chinese American voter who asked for language assistance, was

1 directed to a Korean interpreter, who could not help. And several hostile White voters at this
2 poll site made remarks such as, "You're all turning this country into a third world waste dump,"
3 and "You can't have anyone go inside the booth with you. " and "You should prepare and learn
4 English before you come out to vote. " A recent example in New Jersey: Two talk radio hosts on
5 101. 5 FM, a so-called radio announcer made racist remarks about Jun Choi commenting on an
6 accent in response to a color stated a caller, "Indians have taken over Edison. " The response
7 was, "It's like a foreigner in your own country. " The Asian American, South Asian community
8 organized a broad-based coalition to protest these remarks and they got an on-air apology from
9 Millennium Radio. Observers sent a questionnaire in terms of community groups and that really
10 did make a difference in terms of the elections. During the language minority assistance, New
11 York City is one of the places where both Section 5 and 203 are funded in the New York City
12 after 1992. Real assistance, bilingual ballots, the Board of Elections kept saying, "Well we
13 provide translation of simple ballots, but we really can't interpret ballots in the voting machines.
14 " And the oversight in the Chinese Language Assistance Program. It was mailed to Chinese and
15 there was a faulty translated ballot in New York City and that really wouldn't have offset it
16 without Section 5. Both Section 5 and Section 203 need to be continued for minority language.
17 Congress really ought to be expanding coverage in Section 203, and Section 5, especially when
18 the time of the Civil Rights Act is getting to have real significance in the Asian American
19 community.
20 MR. LEE: Thank you. Our next panelist is Mr. Carlos Zayas from Redding,
21 Pennsylvania, and you're a community activist?
22 MR. ZAYAS: Yes, sir. Some people say I'm a community voting rights advocate for
23 racism, some say I'm an agitator. That can be a different point of view from where they are
24 judging, but the truth is, I have been working for the last six years on voting rights for our
25 community and I have understood that doing that would involve this poll of the political machine
26 that is more difficult. We the people believe in what we are doing and this is why all of us are
27 here. We need to keep working pretty hard. If you think listening to Margaret Fung -- I realize
28 that the racism that was shown against her people was the same one that was shown in Redding,
29 Pennsylvania. They were throwing against us -- the Hispanic -- exactly the same remarks, and
30 that was the observers of the Department of Justice. For two years we have been working in the
31 investigation. Also, if we can't trust them, we came to Passaic we can make with the
32 department in this situation. I will need to say, here at the Department of Justice, that the
33 section is doing a very good job in the same way that we found out in Passaic that we can trust
34 them. We called them and provided all the areas that we collected and that expedited the
35 investigation in Redding. They spent two more years during the investigation because they said,
36 "as you know, they don't trust no one. " And in that investigation in Pennsylvania, they
37 augmented all the findings, and eventually they went to Federal Court because there was no
38 explanation from the statutes of 1999. Every time that we asked for something -- their standard
39 reply -- they always said, "You want something here, take us to court. " And now they have
40 compliance. At least not so happy, but they are trying to move. I want to mention here that the
41 Board of Pennsylvania, the 21st century in my point of view, is the case of discrimination of the
42 polling base of the minority language for the past six years. As I said, I have seen the action of
43 the rights and voting rights in Pennsylvania, especially the Pennsylvania Dutch country, Berks
44 county, and surrounding counties. My approach to the voting issues is nonpartisan, based on the
45 fact that I don't have any political affiliation. My ultimate goal is to improve the voting process,
46 to advance the public interest in a real election reform. I want to mention here, that I have been -

1 - I have come with Juan Rodriguez, another Voting Rights Act advocate or activist. I intend to
2 provide the National Commission on the Voting Rights Act with summaries and some of the
3 issues that our community is confronted with. A special emphasis will be made to focus on the
4 findings and outcomes of the investigation made by the Civil Rights Division and Department
5 of Justice in the city of Redding, 2001 to 2003. The election practices and procedures in the
6 county of Pennsylvania resulted in the issuance of an injunction and later, a permanent
7 injunction by a federal judge. Those decisions are cited by the County of Pennsylvania, 250 F.
8 Supp. 2d 525 (E. D. Pa. 2003) in the Eastern district of Pennsylvania. And the second one is the
9 final injunction, the final order, 277 F. Supp. 2d 570(E. D. Pa. 2003). Eastern district, Division
10 of Pennsylvania. In the summary, the Court found that Berks County "use of "English only"
11 election process violated Section 4E of the Voting Rights Act by continuing the right to vote for
12 the county's Puerto Rican community. Many who attended schools in Puerto Rico were not
13 really able to read, write, understand English. " They denied information and assistance
14 necessary for those citizens to participate in the election process and initial findings was that
15 "English Only" election process violated Section 203 for the test on Voting Rights Acts. The
16 voters of Puerto Rican descent received voting assistance from assistants of their choice. The
17 Federal District Court also decided "that the English-only election process, violated Section 203
18 of the Voting Rights Act, by failing to provide language assistance to limited-English proficient
19 voters and by failing to appoint minority poll workers. " The court emphasized from the
20 evidence, that the election officials permitted poll workers to openly express hostility to Hispanic
21 voters; that Hispanic voters were treated differently and discriminated against at polling places,
22 and Hispanic residents in counties where they were severely under-represented as poll workers.
23 I want to emphasize the treatment of discrimination, a treatment of hostility, and when we talk
24 about this, these findings of the Department of Justice in 2001 to 2003, we were not talking
25 about older stuff, we are talking in the 21st century in Pennsylvania in the United States of
26 North America. These situations cannot happen as Judge Baylson pointed in the opinion of the
27 preliminary injunction. That was a situation more close to heavy shame, with the condemnation
28 that was based on the opinion of the preliminary injunction. At the heart of this case is Section
29 4E of the Voting Rights Act, an act of Congress which mandates protection of the voting right of
30 non-English speaking rights of U. S. citizens. Berks County, particularly in the City of Reading,
31 where only Puerto Ricans are educated in Spanish speaking schools, Congress mandated
32 protection of their rights to vote in a language other than English if they are illiterate in English,
33 and it's important to pay attention to Section 4E, because not so many people are aware of this
34 section. Not so many people, and this is what the Berks County commissioners confirmed.
35 The Director of Relations, they are assuming that we have no case because they were under
36 Section 203, and we weren't there. Section 4E was there for us. Section 220, a full Section 203,
37 as I understand it in the case of the Department of Justice, and it's important to summarize the
38 county of Pennsylvania. The hostility that Hispanics and Spanish-speaking voters receive. Poll
39 workers turned away Hispanic voters because they could not understand their names or refused
40 to deal with Hispanic surnames. Poll workers made hostile statements about Hispanic voters;
41 others made discriminatorystatements about Hispanic voters that are not imposed on Anglo
42 voters like, demanding photo identification. That was not a requisite. The city of Pennsylvania
43 required only Hispanic voters to verify their address. Hispanic voters say this hostile treatment
44 in the public place discourages them from voting. That was at this time a practice that was
45 mentioned. Another one is the lack of bilingual poll workers that are left to recruit, train, or
46 maintain a pool of poll workers that are Hispanic. One more approximating 30 percent of poll

1 workers in Reading precincts with Spanish surnames compared to a voting population that is
2 over 30 percent. Now it's more dramatic, but in every Census, computing has been
3 communicated for the numbers that were mapped on 1989, 1990 and that happened in 2000.
4 And now by those projects, based on the fact that in 2000 we have 70 percent of the total
5 population of the city, I am sure that we are very clearly, a minority in the city of Reading at this
6 time, because we do this change every ten years. There is a lack of latin speaking in the
7 community. That was the finding at that time. They made improvements in that area, but there
8 is still some areas which they need to comply with the mere use of the media to reach our
9 community. There was a denial of a choice to vote due to lack of bilingual materials and
10 assistants for Hispanics in the voting places. Many voters would bring their friends, their
11 companions of choice to vote. But poll workers have not permitted voters to bring their assisters
12 of choice with them. Also the county officials have acknowledged to reintroduce this
13 information, and they have knowledge about this in practice, and I think since the state began
14 telling me to take them to court in regards to Section 4E. It's important that the Congress
15 declared that to secure the rights under the 14th Amendment of persons educated in American-
16 flag schools in which the predominant classroom language was other than English. It is
17 necessary to prohibit the States from continuing the right to vote of such persons on ability to
18 read, write, understand, or interpret any matter in the English language. Berks county
19 conducted English-only elections and fails to provide limited English proficient United States
20 citizens of Puerto Rican descent with election information and assistance necessary for their
21 effective participation in the electoral process. By failure to ensure that all voters who are unable
22 to read the ballot receive assistance at the voting places.
23 MR. LEE: If you would shorten up your testimony?
24 MR. ZAYAS: Okay. Basically, Section Two -- but it's important that also the
25 correspondence established in the case of U. S. versus West county that was later mentioned in
26 the one case in California, that they could not find to conduct elections to comply with the
27 Voting Rights Act, so that all citizens may participate, serve, interest, remuneration of the
28 different order that provides the judge base. So I mentioned already, the size of these cases that
29 was provided to the commission to finalize any presentation of my other peers here. I want to
30 say that despite some improvement in West county elections' practice and procedures, many
31 areas that need improvement lack consistency in places of officials. The uncertainty about how
32 West County deals with the positions of Latinos and on correspondence all around, there are just
33 as many on welfare and they are not trained in all the aspects of the election process. There is a
34 need to improve communication and education using the media. Those remain areas of concern.
35 Despite that, there is a change. There was a lot of improvement in the voter turnout after the
36 decision of the federal court and signs to the Department of Justice. They need to reuthorize the
37 Voters Rights Act to the law as the only safeguard of compliance. The compliance need not
38 depend on which or whom the voting party is in control. The political parties are the ones that
39 are improving compliance Voting Rights in order to have a relation that is still demanding and
40 improving their rights, but despite all that we can do, there are situations where we need to attain
41 within this year and next year if we want to improve voting rights. As you know, all of you will
42 know the case of Pennsylvania and the United States, andit's important that the process with
43 legislation, creating a nonpartisan redistricting commission. If we want a real reform, the
44 nonpartisan commission is the way to go. It's also important that the Amendment at state efforts
45 of the Ballot Access laws improve fair competition and participation in the electoral process.
46 That they were not affiliated to the mayor, and also, I assume it's a good idea, and their term of

"Nonpartisan Judiciary Election Act" which improve the system of elections for the Judiciary. In order to focus on a nonpartisan in regards for a Justice of the Peace, but you know that a nonpartisan can change the establishment in terms of running a campaign for a justice, but they can't vote on a single issue, because they were not only partisan and I'm able to understand the filing of California, Democratic Party versus Jones.

MR. LEE: We accept your statement, but I wanted to see if you could finish so we can give Mr. Bolton a chance?

MR. ZAYAS: Well, just to finalize, this was mentioned by Ms. Fung about the vote dilution and that is also a process to use. The last round of the district, we went to the Supreme Court of Pennsylvania 127. A district that was a City of Reading. And the fact that there was no deviation at all and we asked for maintaining the status quo, because there was no indication to move the tenth district out. Eventually, Pennsylvania based quality of population over voting. Well, as you may know, after that, we submitted in the plan to the City of Reading, not based on the filing of the Court in the City of Pennsylvania we reached for, but when we went to the City for the final plans, of the city, you know what they tell us? No, now we want the status quo. We cannot get there. We showed them the quality of cooperation. We went to the city with the best plan admitted publicly by members. Despite that, our plan was the most won.

MR. LEE: I see it's an unfinished struggle. Going on to Mr. Walton, Charles Walton is currently the Director for Special Programs for the Community College of Rhode Island from 1983 to 2002. Mr. Walton served as a Rhode Island State Senator, as the first African American to be selected as tempore for the Senate. Welcome, Mr. Walton.

MR. WALTON: Thank you, Mr. Chairman, and good afternoon to you and the distinguished members of the commission. It is certainly my honor to come before you and speak a little bit about learning where we're at, at least in Rhode Island, and perhaps, in the nation, with respect to why it's important to have the Voting Rights Act renewed. Because as you've heard already, it's made a difference in so many other places across the country, especially in our country that is changing so rapidly and for the better. We need to figure out better ways to make sure everyone's vote counts in this country, and everyone has an opportunity to participate in this process. I got elected in 1983 for the first time, in a special election following litigation that determined, among other things, that the legislature's initial redistricting plan discriminated against African-Americans and served in the State Senate. That was then passed in the state Senate where there was a re-districting plan in violation of the Voting Rights Act. Through that process, I was able to be the first African-American to serve in the state Senate, and I will tell you, this is a sorry state of the history in general. As I indicated, being the first African-American serving on that body, I think we only had one or two members to serve. That did change. After the 83rd district case brought our numbers up in the House Of Representatives. Just to give you a small history of Rhode Island and the uniqueness of it which extends back to the evolution of this country, it being one of the 13 colonies as part of the triangle that ensured there were Africa's imported slavery which had a tremendous impact on several economic bases. We somehow got by that, and I think one of the real reasons obviously, is the 1965 Voting Rights Act which had tremendous impact on us, including so many people who were left out and were not a part of that process. For example today, the city is a minority-majority system for the first time, and we still have a real void in representation of Black and Latino in the state 2 African-Americans, and 2 Latinos. And a part of that is that I've seen some of the political problems that my fellow panelists here have already mentioned, and that is, we're a city where there are about 70 different languages spoken. We're a city where the school system

is about 85 percent minority, but yet, our school system is an apartheid system with about 80 or 85 percent who are applied in the system. So when you start looking at the person that exists under horrendous conditions, we have some cities in the State of Rhode Island that are decisive in the majority. There is no one that serves on counsel. There is no one in the school committees, but the decision within the larger system are made essentially by the minorities. Minorities in this case being minority White, and this is a pattern I think. It is a pattern not only in my state of Rhode Island, but it is a pattern that is indicated by most Northeast states as indicated by many of my fellow panelists. We're looking into several states where we have had minority candidates, Latino and Asian Americans. They run and have never been successful, because all too often, the game changes. We've seen some of our cities go from single districts to "at large" districts, and one sterling example was in Kentucky. At one time I think it was a five-member committee. Four of the five members all lived on one street, but yet, in the school system, the school system is about 65 percent minority. There has never been elected on the school panel in some of our urban areas. It continues to be a pattern and it's a problem to break out of that pattern. I have been fortunate with the Lawyer's Committee For Civil Rights to come to Rhode Island. When we had our re-districting fight with the state Senate, we clearly demonstrated and drew maps that would indicate we could have had, after the 2000 Census, at least three of the six senatorial districts represented by people of color, but my White colleagues wanted to maintain the authority of incumbency and went ahead and denigrated our arguments. After a long drawn out testimony to the contrary, they delegated and went forward and made sure after the 2000 elections that five of the six seats were held by White incumbents, and that compelled us to challenge through legal efforts. We fortunately, ultimately won in that situation. I absolutely agree with the gentlemen to my left. There are language problems in the system in many places, but it starts before that. All politics are local, but the fact of the matter is it's still local. All too often we eliminate the local voice and local input of the real voters which should have an opportunity to exercise their basic rights. There are a couple of points that I would also like to make, and I'm not sure how it fits under the 1967 Voting Rights Act, and that is the problem of the disenfranchisement issue. That is a growing issue in our community. The Senator right now replacing me, Howard Metts, has restored the rights to counsel that the system had cleaned out any past records, etc. etc. That is a situation that really impacts a great portion of our community as well, and we continue to face this if we don't try to meet head on the litigation or other means as well. I just wanted to go back -- that I know when the '65 Voting Rights Act was heavily focused on the South and it was heavily focused on all of the bad things that happened in those months, but I can tell some don't even look on Northeast when it's in New York City, in Pennsylvania, in New Jersey, Rhode Island, Massachusets. We have these patterns of discrimination that continue to exist and so much of our urban communities perceive our immigrant population of these cities, and again, to franchise the right to vote. They are going to continue the system, so we need to look at the language barrier that many of these cities and states put in front of the population to deny the opportunity of the right to vote. And it's not just the right to vote, because I can tell you, for years in the African-American majority, I could bring issues that most other legislatures wouldn't even care to think about. Healthier areas in the district. I represented at least three fourths of that district until I was able to get on the books, and today, I can absolutely tell this, if you were to come to the district that I represent, it is the fastest growing district in the state, and that's because I was able to help craft legislation to deal with these problems that our communities are confronted with. So I'm absolutely here to tell you that it is absolutely essential that we find every ounce of energy

1 to get the 1965 Voting Rights Act renewed, because it would have further impact across this
2 country. I don't see too many other avenues, with all due respect, I don't see too much hope there
3 as well, so I'm going to check my remarks at this point and will happily take my leave.
4 MR. LEE: Thank you, Mr. Walton. Going back to what Mr. Walton said about these
5 communities, the freedom of language. How prevalent in the state of Pennsylvania is it? Are
6 there a lot of cities in Pennsylvania that have a lot of inadequacies?
7 MR. WALTON: Yes sir.
8 MR. LEE: Can you name some of them?
9 MR. WALTON: And also at this point, the Department of Justice is aware of this
10 situation. They came to Reading to investigate. We explained the demographics of the other
11 cities and the situations at that point. I know there is a violation going on in Bethlehem. I
12 assume by accepting information, knowledge in Philadelphia, Section 5, we have an extremely
13 huge Hispanic population in Allentown, Bethlehem, Lancaster, York, and Montgomery county.
14 But the big ones, Allentown, Bethlehem, Lancaster and York is growing.
15 MR. LEE: Thank you, very much.
16 MR. CARTAGENA: This is very, very informative and helpful. Pretty quick, for
17 Margaret Fung, I've read your testimony and I think you've emphasized this in your remarks to
18 us, if you didn't have Section 5 in New York City at the time you are doing this work with
19 respect to sharing access to Asian American voters in New York City we could expect thousands
20 that would have been without a means to vote. And to Mr. Walton, I have done workshops on
21 the voting literally since 1998. Every time I talk about the difference between our system, I just
22 make up this thing, in that all five counsel members probably live on the same block. You are
23 the first person in the 20 years of work that has actually given me that story as a true statement.
24 So I can now put it with a true statement. But my question is, please elaborate on the report on
25 improvement of parole. How does it work? I had a long conversation with Mr. Zeis over lunch
26 about this.
27 MS. FUNG: Even today, 14 years later, we're still fighting with the New York City
28 board of legislations whether or not it's assigning enough interpreters, why it can't do
29 translations correctly, but nonetheless, the program has become more institutionalized.
30 It is their thinking and people putting pressure on registrars and legislations. We would not get
31 into polling sites to examine the ballot machines if the justice department had not also sent in
32 their own observers to see if there is a problem or not. Being given provisional ballots, enables
33 us, because the justice department -- in addition to sending in federal observers to monitor this --
34 when those changes or various proposals for pre-clearance came in, the justice department
35 denied the plan. It went back into the plan because we were making the argument that in votes,
36 you can translate these names, put them into machines. It would have been a much longer
37 battle to get to where we are now. The very fact that there is a program and it works, and the
38 justice department comes back and periodically monitors and reviews changes, other cities and
39 other counties also, they do volunteer, which we encourage, and they see it's not that difficult and
40 they provide a language that everyone will be able to vote.
41 MR. WALTON: If I could respond briefly to the vote. I'm not an expert in this area, but
42 I'm learning real fast. We have in the State of Rhode Island ex-felons disenfranchised that
43 accepts anyone who has to retain their voting rights. Part of the problem is if there has been a
44 charge of not guilty in places, they simplyhave been charged that they have no right to the vote
45 any more. And I think this is illegal, but people have mainly been told that we have a growing
46 problem, not unlike the national problem. The percentage of African-Americans and Latinos

1 who are cut up in the justice system is appalling. In Rhode Island, for example, one in five
2 black males are involved in some way or another in the criminal justice system. One in 11 are
3 involved in criminal justice. Those numbers are not probably going down. So when we look at
4 the voting rights, it is also in the community. This is an area at some point in time where many
5 of these men and women are going to enter into society, and what are we going to do when they
6 are fully enfranchised? When they do that, it's an issue, and I know there are testimony that has
7 legislation before our assembly right now to look at the direction that this issue has taken in our
8 state, but it's a huge problem now. Especially when we start talking about prison industries. As
9 we're talking about prisons, that can be used -- started and so forth. It's an issue.
10 MS. CRENSHAW: Thank you. My colleague has returned the favor of asking the
11 question that I wanted to ask about the interactive effect between Section 5 and 03, and it would
12 be important to hear more about that interactive, particularly those who might be sustaining
13 Section 203 and not sustaining Section 5. So, thank you for your comments. I have a couple
14 questions for Mr. Walton. You might have mentioned this and I didn't write it quickly so I
15 didn't get it. Can you tell us what percentage of the Latino and African-Americans are in the
16 population in Rhode Island in particular, and in the county of Providence?
17 MR. WALTON: As a result of this last Census, the Providence did become a majority-
18 minority fate. The majority is Latino. That population is somewhere around 35 percent. All
19 know it is slightly higher. The African-American population is just under ten percent, the
20 Asian American population is close to ten percent, and then there are other immigrant
21 communities in Rhode Island. There is also a Carribean community, so put it all together, you
22 end up with 70 different languages that are spoken in the city across the state, and that makes up
23 a majority-minority in the state. The city counsel is made up of 15 single-member districts and
24 out of that 15, there are four people of color.
25 MS. CRENSHAW: And no Asian American?
26 MR. WALTON: We have no Asian American. It's a city that is one square mile. It's
27 called Central Falls. I think eight percent are Latino, one city counsel person, no school
28 committee people.
29 MS. CRENSHAW: Okay. My second question -- this might call for a little bit of
30 speculation, but I'm interested, because so many times I'm interested by efforts to maintain
31 incumbency, and your story is hopefully in the sense, that Section Two can be effected if the
32 source is available to engage in litigation. But we've heard how difficult it is to amass the
33 resources, so I'm wondering if you have any thoughts about how to strengthen Section Two. It's
34 more of a prophylactic to dissuade your colleagues in using minority voters to support. There
35 are incumbencies.
36 MR. WALTON: That is a big question, but it's a very important one. What we did I
37 think in Rhode Island, I worked for the past ten years, ten years prior to 2000 redistricting
38 process. One of the things that we did was made our effort very clear. You can't just discard
39 the fact that you are part of a large minority-based population, and you need to include that in
40 that process. And with Rhode Island, Section Two favored out how we ended up going to the
41 courts. It's an ongoing fight, but I think the thing that absolutely helped us was the threat of legal
42 action. We continued that process. We made it clear to them if they were going to go forward to
43 pass this legislation, they were leaving too much to the significant minority-based population,
44 and they did with the district that I had to run, in that they changed the numbers over 90 percent.
45 There was 65, close to 70 percent Latino which I never had. In fact, I ran in adistrict that was
46 less than 50 percent African-American, so it's the least threat of the Voting Rights Act. That

1 was certainly one that they were not concerned about. In fact, they tried to build their entire
2 argument, why their claim was sensible, versus our proposal, and in the end, we were at the
3 district level and it wasn't very favorable there. But when we got to the circuit court there, it
4 was very favorable because my previous election indicated that I could win, made up on black-
5 white, so on and so forth, and it may be the issue in the future if we look at the population. That
6 is an interesting point. One of the arguments they made at the City of Providence is that they
7 were going to hold all the elections within the city boundaries and our argument was no, because
8 when you do that, they come up blank. They try to justify it and when you have a board of
9 community that is subjected to a major city and you have a population, you would "straddle" to
10 the city, to the suburban district, those populations, it is, in some ways, has a more common
11 interest -- are disenfranchised -- which is what we demonstrated. We demonstrated that you
12 can go outside the city barriers and still satisfy the need to minority versus majority. Not being
13 an attorney, it's hard for me to give you the "size one," but we shouldn't be restricted as to how
14 you draw boundaries. You shouldn't "gang" people of common nationalities together.
15 COMMISSIONER ROGERS: I had three questions I wanted to ask you. You said there
16 was roughly about 6. 7 million Americans in the country?
17 MS. FUNG: About 6. 7 million citizen voting population.
18 COMMISSIONER ROGERS: Okay, 6. 7 million citizen voting population. The
19 percentage would be what percentage?
20 MS. FUNG: Unclear, because the census represents numbers which sometimes don't
21 seem to accurate.
22 COMMISSIONER ROGERS: We're required to make a factual report to the House and
23 Senate that would be reviewed by the Supreme Court. Roughly three million or so Asian
24 Americans voted in the last elections. I can't figure out how those numbers are accurate if you're
25 looking at a total base of 6. 7 million or so and then some turnout according to the numbers
26 you've given us.
27 MS. FUNG: I think the 6. 7 number may have referred, I'm pretty sure -- no, that's the
28 number according to the census -- is that it's 6. 7 million Asian American citizens of voting age
29 and some percentage -- I don't have the estimates -- that get thrown out at various times at
30 somewhere around 40 percent, 40 to 50 percent.
31 COMMISSIONER ROGERS: I think it would be good to know how these numbers are
32 actually done, because I know that the Census underestimates, based on project. Ms. Fung, it
33 would be wonderful if you could get us the accurate number. I understand that the numbers are
34 thrown around. Asian American would have to be the highest percentage of voters in the United
35 States. If up look at the total, and I'm not quite sure that is accurate, of the immigrants voting,
36 and the new immigrants are not registered to vote even though, and with respect to Section 203,
37 it has been re-authorized three times, '75, '82, '92. Presumably, the purpose in setting a time
38 period as it relates to Section 203 was the assumption that the goal would be accomplished by
39 the jurisdiction of the United States. Is that accurate?
40 MS. FUNG: Was that the assumption? I think I recall a question? When would the
41 time come when language assistance would no longer be needed? Is that -- for now there are
42 more Chinese American voters. There are many other populations that are now coming to the
43 United States that are growing in numbers and now -- language assistance -- well, at that time,
44 this was focused only on Chinese and Japanese assistance. Those populations have grown now
45 in many more places than in New York, California, and Hawaii which is -- what was covered. I
46 think there will be a time when discrimination will be over, I don't know, but I know it's not over

1 now. And look atthe population demographics that have occurred. Not only Chinese, Japanese,
2 Korean, and Filipino, but also many of the South Asian Americans are immigrating here.
3 COMMISSIONER ROGERS: Who is arguing for a nonrenewal or nonreauthorization
4 for Section 203?
5 MS. FUNG: Right now, I don't know who would be arguing that. I don't know that
6 there is anybody who said it should not be reauthorized.
7 COMMISSIONER ROGERS: One last question. As a group, I'm curious about this
8 present action in terms of Section 203, as well as Section 5. Specifically, are you raising
9 conscious preventions, talking about race? Nowadays, what they do or what happens can be
10 very broad, but we don't speak in terms of White and Black, we don't specifically talk in those
11 terms any more. But I'm curious, given your testimony, Section 5, and in particular or with
12 respect to your thought to Rhode Island, you essentially said you were raising these arguments,
13 that they were going to be diluting our voting strength and power. Just don't do it because it's
14 the wrong thing to do. Your opposition said no, it's the right thing to do. But they didn't say it
15 was the right thing to do based upon race. Presumatively the argument was made to say,
16 essentially, listen, it's about politics. It's about who will vote for us and not vote for us, so they
17 argue that it's not a race consciousness. They argue, it's simply a matter of political speaking,
18 and many reasons why I raise that and forgive me for that. I think it's critical. The Supreme
19 Court says that it's okay, you can fight out this arena, but issues relating to race are sort of
20 counterbalanced. The 14th and the 15th Amendments, that race, as it applies in Rhode Island in
21 particular, where White people will not vote for you. Is that what you're -- at the end of the day -
22 - Whites are no longer voting for, as a practice, African-Americans in Rhode Island, where we
23 have significant numbers of minority influences. Some Whites will vote for you in exchange of
24 African-Americans that will vote for you?
25 MR. WALTON: It is rather a long question. I don't think I said that Whites won't vote
26 for African-American candidates. What I think my focus is, is to ensure that African-American
27 voters would be in a position to make a choice or candidate, and we shouldn't do things to limit
28 their ability to make a choice for a candidate. In other words, a candidate as their choice. And I
29 think what we're experiencing in Rhode Island is that the legislature was drawing districts that
30 would in fact, would have done that. They would have eliminated voters for making African-
31 Americans or other minorities from being part of a collective community for making a vote that
32 would have some impact in terms of voting for some that represented their interest.
33 COMMISSIONER ROGERS: That would have been political expediency or race?
34 MR. WALTON: Exactly.
35 COMMISSIONER ROGERS: What would it have been, political expediency or race or
36 both?
37 MR. WALTON: There are people "in the closet" in the issue of race or political power.
38 I think in the case that we're facing, it was more of a final approach to dealing with the problem.
39 There was certainly decisions on the part of the leadership to protect the White incumbents for
40 political reasons, but at the same time, our argument that they were doing it at the expense of
41 people who would have lost there enfranchisement of voting for candidates of their choice have
42 done that historically.
43 MR. LEE: Actually I would like to ask a few questions, but I'm not going to. Thank
44 you for disproving the adage that there is always a letdown after lunch. Thank you, Ms. Fung,
45 Mr. Walton. (Break)

MR. LEE: We're going to come to order. If the attendees could sit down. I've been admonished by the commissioners, I'm being too hard on the commissioners and too soft on the witnesses. Our next panelist is the president of the City of New York State conference of the NAACP. Hazel Dukes is an expert on votingand things of that kind.

MS. DUKES: Good afternoon. Thank you for inviting us to participate today. The right of the United States citizen shall not be denied by the United States or by any State on account of race, color, or previous conditions of servitude, so I want to ask the question of the commission. Race is a problem and Whites don't vote for African-Americans in the numbers that they do for others. I want that to be in the record. For my point of view, the 15th Amendment to the United States constitution was passed and ratified in 1878. However, in every election since then, African-American voters faced the determined efforts of White Americans to deny African-Americans their right to vote. Neither were the so called "qualifying" tests they used, too ridiculous. Who knows how many bubbles are in a bar of soap? During this era of terror the persecution of African Americans who sought to exercise their citizenship rights, The National Association For the Advancement of Colored People was established in 1909. Since that time, the NAACP has fought in the courts and communities all across this land to secure voting rights for our people. The ballot today is stained by the blood of NAACP heroes like Medgar Evers and many others who were killed by White racists who refused to share the power of the ballot with African Americans. Indeed, registering to vote was hazardous to your life if you were a Negro. In 1965, Congress finally addressed disenfranchisement of African Americans by enacting the Voting Rights Act. Some argue that no other legislation before or since has had the impact and significance of the Voting Rights Act of 1965. The political landscape of America was dramatically re-aligned. The resulting redistribution of political power brought African Americans to city, state and national legislative, executive and judicial positions in places all over the nation. And, in those positions, African Americans were able to make economic decisions that benefitted their communities for the first time in our nation's history, the cold, exclusive clammy hold of white racism on the throttles of power, were lucid, and African Americans were finally able to get a grip. There are now, according to the African-American Members of Congress 43, there are now 24 African-American members of the New York State legislature. There are 135 African-American judges in New York State. There are two new State legislative seats created in primarily African-American communities in Long Island, New York. But for every step forward into the political and economic power circles made by African-Americans, the White power brokers are busy developing new tactics and modernizing old ones to take back the political power of the ballot that the Voting Rights Act produced for African-Americans. I will address just three areas. Voter intimidation in recent legislations have been both blatant and subtle. For example, here in New York City, White off duty officers with guns in view, blanketed polling sites in Black communities during the 1993 mayoral election in an effort to discourage Black voters from casting their ballot in the re-election of David Dinkins. Voter access was severely inhibited in 2000 by reducing the number of voting machines and using old voting machines which broke down and which were not repaired in a timely way in Black polling sites. This was purposely done to oppress the Black vote in the Gore-Bush presidential election. Many African-Americans who registered to vote in public agencies such as Motor Vehicles Departments, Social Security and public assistance offices. Names were not sent to the Board of Elections in a timely manner so that these voters were not able to go into the voting booths on election day and many were not able to use a paper ballot either. Felony disenfranchisement. You've heard that many

1 African-Americans are not able to vote because of their life in prison or on parole. For some,
2 there is a lifetime ban on their right to vote, even after release from prison. Here in New York,
3 there is pending before the 2nd circuit, a lawsuit brought under the Voting Rights Act claiming
4 that New York's felon disenfranchisement laws differ from State to State. Maine and Vermont
5 permit felons to vote from prison, however, the number of African-Americans in both these
6 Statescombined is so small as to be less than those in the village of Harlem. But in some states,
7 felons are denying the rights of a citizen of the United States to vote for life. The re-
8 authorization of the Voting Rights Act is essential to address the new and entrenched resistance
9 to full and free access to the power of the ballot for all Americans. It took a constitutional
10 amendment in 1870 and the Voting Rights Act of 1965 to bring us this far on our way. We
11 must always remember and remind others that the ballot is stained with the "blood of many
12 martyrs. " In the words of Frederick Douglas, "Power concedes nothing without demand. " It
13 never has and it never will. The right to vote is the most powerful component of our democratic
14 nation, and it must be fully and freely available to all adult citizens without regard to race, color
15 or prior conditions of servitude. Thank you.
16 MR. LEE: We note that the NAACP has faithfully justified this. Are there any
17 questions?
18 MS. DUKES: And the Lawyer's Committee For Civil Rights has always worked with
19 us. We maintain great relationships.
20 MR. LEE: Questions on this side, the reason that I ask -- Ms. Dukes has informed me
21 that she has to run, so you're released at this point. Veronica Jung of the Korean American
22 League For Civil Action which provides civic education in it's internship program, welcome.
23 MS. JUNG: Thank you.
24 MR. LEE: If you could move that microphone closer to you.
25 MS. JUNG: I sit before, you not only as a Civic Director of a community-based
26 organization, but also as an Asian American. I am grateful to the United States. Today I wish to
27 speak to you on the direct impact that the Voting Rights Act has on the community, because I
28 know of the community, best of all, the Korean community. Of all communities impacted, the
29 Korean community, as you know, is a community that, in comparison to some other Asian
30 American groups, is a recent arrival group to the United States. And as such, according to the
31 2000 Census, the incidents of language fluency is the lowest in our community, so that over 60
32 percent are faced with limited English proficiency. Section 203 became applicable to our
33 community in 2002. As of that date, as low as 15 percent of registered voters were enforcing
34 Section 203. Under familiar suggestions, we have been told that this language is too crude,
35 Korean, as a language. We have studied the increase, and in 2004, the participation turnout rate
36 was 75 of registered voters with traditionally low levels of experience.
37 MR. LEE: Any response? That's really high.
38 MS. JUNG: As I stated earlier, as a recent arrival from Korea, our community has been
39 known to have a higher level of illiteracy to protect it, but in this instance, regardless of whether
40 you're a college or Grad school graduate, that does not necessarily translate into English
41 proficiency. That is truly the case in our community, where over 8 percent of the community
42 receiving the main source of the news happens to be from the media. According to the 2004
43 general elections, at the communication centers, nearly a third of the voters were first time
44 voters, so that goes to the heart of the matter. That in our particular community, this one is
45 particularly vulnerable. So that we can have a direct relationship with the lack of English
46 speaking people and actually control the incident of people turning away or being turned away

by poll workers. I would also like -- and it has been raised by the few -- that perhaps this type of protection promotes separatist activity, but in fact, it promotes a person to fully participate in the intern process. I would also like to point out ways in which we have communications with the Board of Elections in New York City, however, despite a full mandate of federal law, there are serious ways in which the Board of Elections has fallen. In other words, providing full protection of the law -- just to give you a small example, in the last elections, despite the federal mandate to provide language assistance for Koreans as a required language, there were 4 states that provided zero interpreters on Election Day. (Cases Q38, Q0086, Q0040.) Of all those cases in Queens county, where there were clear indicators likely to have Korean efforts to the polls, there was actually zero interpreters to those non-designated sites, and so between those types of numbers and the fact that the overall percentage of our communities report having difficulties, and despite even the speaking -- lack of -- the panicking with the current foreign language, it is very imperative that we do much more to enforce federal law. With that said, I would like to move on to a greater need of translators and we are trying to help people become interpreters on a mandate with such urban coalition. Before that, we have made efforts to provide the Board Of Elections with applications of individuals who are both qualified, interested, and available to work as poll workers on interpreters on elections days. Despite their efforts, we have noted that it is at times, difficult to determine the feasibility which these applications are processed, because it is clear that there was significant numbers of who do apply, but who are not on election day, appointed as poll workers. Thirdly, I'd also like to point out that there is that same great need for more proactive community outreach, that is to say, given the high levels of communication and access to information about election day directed through the media, it would be a gross understatement to say that the Board Of Elections in New York City are utilizing the pieces at its disposal. So we would urge the commission and Board of Elections to pay particular attention to this matter. It is our understanding at this time that their staff at the present time, is the initial staff in New York City. However, the rate is not clear to us at this time if that staff is able to provide education to help the election process. Thank you, very much.

MR. LEE: At this time, our next panelist is Ozzie Maldonado. He is a resident of Passaic, New Jersey which we've heard a lot from, and he is the founder and current Chairman of the Puerto Rican Counsel of Passaic. Welcome Mr. Maldonado.

MR. MALDONADO: Thank you. Thank you very much. I was asked to be here because in the year 2000, the Justice Department came into the City of Passaic because of the irregularities that existed in the voting process in the City of Passaic. One of the things that I would like to speak on is looking back on the time the Justice Department came into the City of Passaic. We had 33 districts and all the districts in the City of Passaic are largely Hispanic, which qualifies the act of Hispanic poll workers. Normally you would have in the 33 districts, you would have one Republican, one Democratic poll worker. So that would amount to having 66 Hispanic poll workers. In the City of Passaic, when the Justice Department came in, there was only 12. They started implementing the county, so on and so forth, and eventually it brought it up to par. That was extremely important, because in urban cities like Passaic, you have many problems with poll workers, and the Latino community there has been discouraged and how would you say -- making the voter uncomfortable by certain forms of harassment. And harassment leads to not just ill-treating them in a lower manner, we've had many of these problems prior -- where it was a form of discouraging voters to go out and vote. When the Justice Department came in and we started getting Hispanic poll workers, it made it better as far as the Hispanic communities to go out and vote. If they had any questions, they could ask the

poll workers and thus far, we've had a great deal of success in that area. We then established a commission work with the Board Of Elections of the county where you have a master poll worker and you have individuals working to make sure that you have enough poll workers on election day, not only in the City of Passaic, but in certain towns in the county. That was basically due to the Justice department coming in before everyone knew. But it was hard to break ground. We've been successful in that area. In the other area that I would like to speak on is the provisional ballots. In the urban cities we have a large portion with the minorities and the transient. You take a city like Passaic or what we call the East Side. We have residents that live in an apartment for two months a year and they move out of economic reasons, so on and so forth. We have a lot of transient. At one time, even if you lived in an apartment where it was 11B and you moved to 12B, you were not eligible to vote. They would turn you down. If you moved and didn't change your address and so forth, with the changes that occur, they have no work. If by district the same community becomes the district. A person goes to vote and that is very important, because it was a form of discouragement. At one time you'd go to vote, they'd look up your name. A lot of times your name might have been there but they couldn't find it, but they'd tell you, "You're not eligible to vote. You can go to the county and file a complaint. You can go in front of the judge. " This would take all day. With the provisional ballots now, we tell everyone when they cannot find your name or they can't find you for whatever reason, you ask for a provisional ballot and you vote. The ultimate decision is made by the Board of Elections, which is a nonpartisan group by the county. If it is within your district, then they make your vote count. If you didn't apply within the district, what has happened with this situation is that it neutralized the atmosphere at the polls. The poll workers realize that if they can't find you, that you were entitled to -- as a community person -- and what happens is that when you sit out campaigns and you find that someone is turning people away, the first thing you try to do is get in touch with the city clerk and notify them that there is an irregularity going on within the polls, because they aren't supposed to give this provisional ballot. Because I heard someone mention a decrease of the City of Passaic and the county as being a success. For that reason I am here. I ask for this commission to take in hand that the Justice Department and the monitors that they do send out are extremely important to urban cities so that they can continue. If it's not done, what could easily happen is since the communities, these urban communities are very vulnerable, it could revert back to the same old system, to the system prior to it. So take this in mind, that the advancement of getting out to vote and having the people have the right to vote. If they are American citizens and they are voting, okay. They should be able. If they don't comprehend the English language, voting, which ever language, they need to have -- an assistant should be there. As American citizens, they should not be turned away from voting because of not understanding. So it's extremely important for you to continue in having this type of commission go into urban cities and cities of need so that we can continue progressing and having the citizens of the United States have their right in voting. I want to thank you. Any questions pertaining to these issues, I'd be glad to answer.

MR. CARTAGENA: Thank you, Mr. Maldonado. We're going to hear from Jose Garcia. Mr. Garcia is vice president for Policy Analysis and Advocacy Coordinator, Puerto Rican Legal Defense and Education Fund.

MR. GARCIA: Thank you. I'm here for the Telephone Policy Board Of Right Network. That is according to a policy in New York City 982 as a nonprofit, nonpartisan, focusing on Latino issues. Since our inception we have worked to protect Latinos and other people of color as part of our city participation program. It is based on more than two years of

1 experience. The Board has the right issue and we can testify to the continuance of the need for
2 the Voting Rights Act to fully participate in this country's electoral system. We support the
3 reauthorization of the Voting Rights Act that is scheduled to go into the sunset in 2007. Section
4 5, Section 203, bilingual as steps for authorizing the Department of Justice to appoint and expand
5 observers to any jurisdiction covered by Section 5. The Latino Board of Right Network has 8
6 states on the East coast, individuals, and the United Nations and other areas of the country
7 including Puerto Rico and the Virgin Islands. The state which we've been working in are
8 Kentucky, Florida, Delaware, Massachusetts, Pennsylvania, and Rhode Island and New York
9 City. And we want educate our community in the use of the Voting Rights Act and also, have
10 full participation in the electoral system. It was estimated that the Latino community in 2004
11 numbered over 41 million. That means one in every seven residents of the United States
12 reported that the Latino population grew by 3. 6 percent in one year. More than three times that
13 of the total population. For Latinos, that growth was, for the first time, citizen driven by the
14 growth rate. And immigration, which is still the highest immigration, about two thirds of Latinos
15 are of voting age and about 60 are national origin immigration status. The Voting Rights Act
16 impact on these segments of the community have been in different and important ways, the
17 Carribean, which is a minority, and Puerto Rican. The Puerto Ricans migrated into the United
18 States and have been U. S. citizens. In 1970, by an act of the U. S. Congress, they have been
19 coming to the U. S. for the entire period. For those born in Puerto Rico who attended
20 "American-flag" schools whose instructors were primarily Spanish, along with Mexicans, Puerto
21 Ricans were among the original Latino groups in the Voting Rights Act that have been actually
22 discriminated against the Voting Rights Act. In the counties in the Southeast coast, these more
23 recent arrivals have more significant -- have hurdles to the voting process. The U. S. has more
24 citizens coming in, and the failure for the Latinos to be accommodated with their national
25 language -- Puerto Ricans have been residing in cities of New York for more than 150 years. In
26 the 1990's they, like other Dominican groups, had no historic ties with large Latino
27 populations, while in large cities like in New York, Hartford, Philadelphia, Boston, explaining
28 the Voting Rights Act in smaller cities and towns have been introduced more recently in the
29 face of rising issues in general. Race, employment, housing, other areas that have resulted in
30 highly concentrated Latino segregation. In sections of New York its effectiveness in protecting
31 the rights of Latinos and voting for candidates of their choice in New York City alone there are
32 25 Latino officials, most elected in the three counties that are covered by Section 5 of the Voting
33 Rights Act. However, now, in the newer and faster growing Latino communities in the county of
34 Queens, which is not covered by Section 5, there have been increasingly community questions
35 for Section 5 Protection Rights. The challenges for the 2007 re-authorization is how to continue
36 this protection in large communities where needed and, at the same time, in Latino communities
37 in the smaller cities and towns, as well as part of where Latinos experience a more direct voters
38 discrimination and communication. The first voting rights obligation for minorities is to go
39 forward in its re-authorization in it's more complex and challenging context. The members of
40 the Voting Right Networks have reported over time a recurring set of policies and practices that
41 have undermined the voting rights of Latinos. These having to do with such things as "Racial
42 gerrymandering," packaging, municipalities ignoring the rights of that district. Everything is to
43 the exclusion of Latinos from the decision-making process. In the setting up of restricting rules,
44 problems and practices, not providing the sufficient English-Spanish needs for the public
45 hearings and other aspects of the redistricting process. The training of poll workers to identify
46 foreign looking and sounding voters, to single out the ineligibility to vote. Poll workers are

1 preventing millions from trying to vote and threatening them with being deported directly. They
2 are instructing citizens not to vote. They are directing Spanish speakers to learn English or "Go
3 back to your own country," Or raising objections as to the denial to register to vote in Puerto
4 Rico or the Virgin Islands and the moving of no recorded places of necessary work request. The
5 support of Puerto Rican policy and Puerto Rican defense and education is sponsored throughout
6 the preliminary. And among other things, there has been a systematic documenting of these
7 voting rights violations, how it has played in the protection of those rights. The Voting Rights
8 Act continues to be an important part in assuring the full participation in the electoral process
9 for it's continuing vigilance to our community and other communities, by assuring that the
10 Voting Rights Act of Latinos are protected. The Voting Rights Act also protects the integrity of
11 the electoral vote for all communities. Thank you for letting me express my views.
12 MR. LEE: Thank you, Mr. Garcia.
13 MR. CARTAGENA: Ms. Jung, if you don't mind, would you repeat for me the four
14 cases you mentioned earlier, and would you just perhaps, if you know the area of Queens, where
15 this occurred?
16 MS. JUNG: Well, first of all, I neglected to mention earlier that we do work with the
17 Department of Justice as well as the Defense Fund, so the whole site that I mentioned earlier
18 included poll site Q 2308 it's a Junior High School 73, and we know that there are 63 voters, 36
19 in that area. The next poll site was Q0086, P. S. 173 where there were 93 Koreans identified
20 on the register to vote and then zero sited. P. S. 209, and that was 32 registered Koreans at
21 that poll site.
22 MR. CARTAGENA: That was the image and what you mentioned for provisional
23 ballots and how you were counseling people -- community education effort. If there were any
24 questions they can find out that day. Have you considered whether it would also make sense to
25 change whatever policies or procedures might exist in New Jersey, so that a provisional ballot
26 would serve from that day forward? So this way, if a person -- if you can't find the name in a
27 book and a person can find a provisional ballot by their place in the next election in the next
28 year --
29 MR. MALDONADO: Well normally, if they assume, and I think that the procedure is,
30 once they accept that provisional ballot, the individual would find ways to redistrict and they'd
31 reject the registered voter, but transfer them into whatever correct address it might be, so it
32 wouldn't occur again. I assume that that would be the proper procedure, but you don't want him
33 to come back the following year with the same problem, so I think that they would use corrective
34 measures, but if they find you in the district and you're eligible to vote within the state –
35 MR. CARTAGENA: So you have come across that problem.
36 MR. MALDONADO: It's a good question, because what we intend is for the person to
37 have his right to vote. Once he accepts the provisional ballot, the county takes it from there and
38 makes the decision. I'll give an example. The mayor of the City of Passaic. The first time he
39 ran, the provisional ballot was not counted. It was never enacted on. The second time he ran and
40 he was successful, we lost by 103 some odd votes. The second time he was successful and the
41 provisional ballot existed and he got very close to 400 ballots. If that would have happened in
42 the very first election who knows what the outcome of that election would have been at that time.
43 So, as far as I'm concerned, the provisional ballot through the United States would be for the
44 benefit to the voter, because a lot of times it's a form of discouragement when they can't find
45 you in the books and so forth and so on. Because I'm sure what is testified on this issue pertains
46 to Asian because it didn't turn the voter away from the provisional ballot. That's one of the

1 things we don't want if this vote doesn't count. Because he came from a different district,
2 because he had an opportunity to question that.
3 MR. LEE: Could you give us the name of the Mayor you're referring to.
4 MR. MALDONADO: Yes. His name is Sam Rivera.
5 MS. JUNG: Also, if I may, the problem with voters being turned away is certainly not
6 just to the last community. It's simply to point out that our people monitoring where voters who
7 have turned out to be on the books all along. Oneexample was a family of five. I personally
8 accompanied them 30 minutes before they were polled because they were told repeatedly during
9 the day that they were not on the census. I feel very strongly about this, that it's really
10 important to have interpreters available on the polls. Sometimes it's used in a way to detect
11 disenfranchisement. Whether it's a fact that they really should have been allowed to go in the
12 first place.
13 MR. CARTAGENA: And the last question, Mr. Garcia, to your knowledge, you're
14 familiar with the census policies as a result of your position in the policy, but to your knowledge.
15 in this decade and going forward, will the Census conduct surveys on a more frequent basis?
16 MR. GARCIA: Yes. The Census is planning to serve a long term, which is happening
17 in ten years. Internal communities, surveys would be yearly data that would be provided, not
18 only would they deal with issues of language, but also they would deal with other policies.
19 However, when we talk about the last community and specifically, Asian communities, the
20 sample is not as good. The provision of ACS might not be all of them. Representation for the
21 Latino survey can be under-counted. It would not be a good count for the planning provision
22 under certain areas, but yes, it would be a community on a yearly basis. But there are still some
23 issues for minority opportunities to deal with.
24 MR. LEE: Thank you.
25 MS. CRENSHAW: Thank you all for an informative panel. In the interest of time, I'm
26 going to ask a few questions. My question is to Ms. Jung. I was really interested in the literacy
27 in Section 203. I've always been puzzled by that as well, so I wanted to know whether you were
28 aware of anyone attempting to qualify -- the attempts to conquer the literacy rights, and second,
29 what would your recommendation, with respect to re-authorization be? Would you recommend
30 the entire provision of illiteracy be eliminated or would you suggest some other form of
31 provision?
32 MS. JUNG: Well, Commissioner, that second question, I think, goes to a higher
33 standard. Effectively, that has been something that we begin to scratch our heads, so I think it's
34 fair to say that many of our communities felt that they were not qualified and it was an unfair
35 burden, an extra burden to not only meet the ten, now five percent -- we're growing, but to in
36 fact, have higher than the National Average and that would be the very state the Congress
37 requires.
38 MR. LEE: So the decision is to eliminate literacy rights.
39 MS. JUNG: What was the rationale behind that. The extra burden, where you're
40 requiring certain communities to having certain greater incidents of literacy and particularly the
41 Bronx, where I've seen increasing populations arise in New York City for Korean language, I
42 think it's very -- there will be a higher need for the purpose of such provisions, and that is
43 certainly true of other communities in say, today. That may be communities such as
44 Bangladesh and others that are in great need of true network. It's something where even if it
45 were necessarily protected by provisions. As of now, it's very easy for the Board Of Elections to
46 happen to be bilingual, so to address your first question, our effort to quantify that effect, there

1 has been no such studies on that particular question. However, it is very extremely true in
2 particularly the Korean American community. I think that the literacy rate is probably in the 80
3 percent range, not higher. The fact that most people are reading the paper in their first language
4 to get information. And I think despite this objection, it has had some impact. We, on our hot
5 line election day, we did receive calls from voters outside of Queens who encountered problems
6 in the polls. They didn't have the wherewithal to view those calls from the Bronx and Brooklyn
7 and use that as a portents as to what was to come.
8 MS. CRENSHAW: And the second question, very quickly is for Mr. Garcia. Did I
9 understand you correctly to say that in the Metropolitan area with the highest percentage are
10 those that are covered by Section 5?
11 MR. GARCIA: Yes. The higher percentage of elected officials is where Section 5 now
12 leans. For instance, you can take Jackson Heights, 88 percent of the community with a lack of
13 language proficiency, the highest percentage of poverty, which means low in terms housing,
14 segregation, political structure, and, it will be, I think, very beneficial for the betterment and
15 integration of these communities who have Section 5. Much of their arsenals are basically to
16 empower this community to be part of the system, to participate and so on, and support their
17 issues.
18 MS. CRENSHAW: Thank you.
19 MR. LEE: I have a question for Mr. Garcia. Do you have any materials to document
20 the proliferation of language minority communities throughout the Northeast?
21 MR. GARCIA: We definitely can create it.
22 MR. LEE: I think that would be helpful actually.
23 MR. GARCIA: Yes. I have mentioned this afternoon that many other people have
24 mentioned 1965 and 1980 and so on, where urban issues were settled. That is not the case any
25 more. You have small towns and issues. We are like in the first stage. Basically I would say
26 incorporation, the political structure, I think, has homogenized this community and they are
27 having a hard time being incorporated, and I think in a way, the re-authorization of the Voting
28 Rights Act and the providing of Section 203 in the community would be better.
29 MS. JUNG: Well, as an organization, we would not be, on our own, able to provide that,
30 but certainly with privileges -- that we work towards -- I think that would be in favor of, off the
31 top of my head -- like New Jersey or Massachusetts. The population of the Asian American
32 community politically tries to get to the exact level of the 10,000 mark, for example, but they are
33 very close or almost getting there. But that, we can provide in partnership with other alliances.
34 MR. LEE: Mr. Davidson, I have a question for Ms. Jung, and it has to do with your
35 statement a few minutes ago, that you feel the need for transparency on the election system, and
36 one of the reasons you said is that you've provided the names of people who would be willing
37 to work as poll workers, but many of these people didn't get appointed, and I was curious as to
38 whether your group had contacted the officials and made any effort to get an explanation from
39 them and allow more people to suggest it, like you had pointed out?
40 MR. DAVIDSON: Yes, I referred to that. In fact, we do more than just providing the
41 names of potential workers. The Coalition which is an "Umbrella Group," which includes Latino
42 groups, Asian American groups, and others to actively recruit by bringing workers. So this past
43 election year, we were actually able to encourage members of our community not just to inquire,
44 but to actually apply and submit and fill out applications. We have data on that. We've
45 participated in every hearing by the Board Of Elections and have had meetings from time to
46 time with the Board Of Admissions, also in New York City. And we have asked for more

1 transparency. They didn't provide a roster of presenters of that pre-planned effort to use on prior
2 notice, with respect to the process that they use to either reject or accept a person. One claim
3 that we faced several times is that the district leader in election areas make the determined
4 decision that gets connected to the various poll sites and that may be a poll right in New York
5 City. However, it is not to our understanding. There is no requirement that that be the case, and
6 so to that extent, it is the way it appears to be. We note that some of the communities were
7 "under-serviced," and see ways in which neglecting to tap into those resources have not been a
8 benefit to them.
9 MR. LEE: Thank you very much, panelists, Ms. Jung and others. It's been a long day,
10 but I think that this has been really very, very helpful. And now, we have the last panel. A
11 public testimony. The following individuals have identified themselves, if they could come up
12 to the table, Kevin, from the New Democracy Coalition, Delores Watson from ACORN, and
13 Colombina Santiago from ACORN. And if there are other members from the public who wish to
14 testify, if they raise their hands, they can make some room at the table. Okay. Mr. Reynolds?
15 MR. PETERSON: Actually, Kevin Peterson.
16 MR. LEE: I'm sorry. The New Democracy Coalition is a nonprofit --
17 MR. PETERSON: Nonprofit, nonpartisan organization based in Boston.
18 MR. LEE: We referred to a little bit about Boston in the morning.
19 MR. PETERSON: My intention is to complement the speaker Ms. Cohen, to amplify
20 her testimony. I hope that you accept these comments as broad and not specific focus on just
21 Boston. With Boston, specifically as Director of the Civic Rights Organization I briefly want to
22 testify, to give my support to your efforts to substantiate the necessity for you extending the
23 Sections of the Voting Rights Act. Building efforts is indeed needed to broadcast the broad
24 sentiments in support of this renewal effort. In countries so divided in terms of political entities,
25 in which all Americans can agree on a united, collective stand, I applaud the Commissioners for
26 organizing and the strategizement of this renewal. I do understand that the general purpose is to
27 collect the documents of instances of voting rights abuses in forms of electoral justices, but
28 thank you for extending to me, the voting rights as a means of articulating. The Voting Rights
29 Act has been called the greatest of the Civil Rights Legislation of the 1960's. Public policy,
30 expression of thoughts across the country. Forty years after it's passage, we marked it's
31 incredible journey and in that and since the passage, two Blacks have been appointed to the
32 Supreme Court, three elected to the U. S. Senate, and two have served as the Secretary of State,
33 a man, and a woman. Whereas in the vote of registration, in 1965, such states as Mississippi and
34 Alabama, it was 19 and 7 percent respectively, African-Americans, one of which was Ronald
35 Walters out of the University of Maryland. Two Blacks out of 3. 6 percent registered voters,
36 while Whites were 6. 7 percent. And the program in 2004, Blacks were 53 percent of those
37 voters who came out to the polls, while White voters were 56 percent. With the passage of the
38 VRA, the political fortunes of so-called minorities have also appointed Native Americans, and
39 Asians have now taken seats in Congress and State Houses across the country. But more than
40 this, the Voting Rights Act must be renewed because it now represents our collective
41 commitments as a civil society. On a philosophical level, democracy within communities
42 determine access to freedom and liberty. Democracy is a communal expression of those
43 sentiments that concern the deepest well being of all citizens. In fact, that is a tool that we give
44 ourselves. The municipalities and the national governments.
45 The Voting Rights Act enlivens all of the above. That is why it must be re-authorized.
46 For decades, an unlettered and misunderstood daughter of a Mississippi sharecropper said,

1 "Nobody is free until everybody is free. " With this famous, simple speech, with power and
2 persuasiveness, we note for the record, that our freedom to vote is presently being surveyed in
3 Massachusetts. A recent study last being reported that up to 100,000 voters across the State are
4 being dealt with. Serious problems across the country are that the voting machines in certain
5 cities simply vanished on election day. In Georgia, they have enacted stricter voter
6 identification. For these reasons, I want to put these comments on the record and encourage the
7 commission that the Voting Rights Act be renewed and strengthened, as the Sections that are up
8 for renewal are needed. Thank you.
9 MR. LEE: Thank you, Mr. Peterson. Mr. Thuy?
10 MR. THUY: Very quickly. I wasn't planning on testifying. I am here with Ms. Fung.
11 Mr. Cartagena had asked the question, what would have happened if we only had Section 203
12 and only 65 percent coverage in New York. I want to examine that. In 1994, I mean the '90's
13 had proposed creating separate but equal voting machines in New York. So one machine would
14 be English one machine would be Chinese and that would create two segregated lines of all
15 minorities and all the Whites -- oh, I mean the English speakers. All that opposed the segregated
16 voting machines would have had access to requirements that we felt were improper under
17 Section 5, particularly improper given that "equal but separate. " where hundreds of people of
18 color would be problematic, we would oppose that. So in passing Section 5, we would have
19 separate but equal voting machines in New York. We don't have it, so we are grateful to
20 Section 5.
21 MR. LEE: But since you did come, Mr. Thuy, I asked earlier about the documentation
22 of the ratio of the Asian minority throughout the Northeast area. Can your organization help on
23 that?
24 MR. THUY: We are trying to develop that. That's an incredible project, and we are
25 trying to do that. We will make it available to the commission, yes.
26 MR. LEE: Thank you.
27 MS. WRIGHT: My name is JoAnn Wright, W-R-I-G-H-T. I'm with ACORN and I'm
28 going to be reading a testimony of ACORN. I also have Ada Lopez with me.
29 MR. LEE: We actually have a written testimony.
30 MS. WRIGHT: Most of the ACORN members are elderly and so I speak in there behalf.
31 ACORN is a national grass roots organization with chapters in 86 cities around the country.
32 We have 150 new members, all lower income families of color. So, I'm going to be reading the
33 testimony of Delores Watson as a member of ACORN-Long Island. "Hello, my name is
34 Dolores Watson, And I am an ACORN member from the Village of Hempstead, Long Island. I
35 am here today representing our members on Long Island. I have been an ACORN member for 5
36 years, and have lived in Hempstead for 10 years. I am the president of my tenant association, a
37 Democratic Committee person, and a member of the Working Families Party. I'm speaking
38 today to tell you about the problems we have had in Nassau and Suffolk Counties on Long Island
39 so you know how important it is to re-authorize these parts of the Voting Rights Act. When
40 Mayor Garner ran for election in Hempstead in March 2001, the management of HUD senior
41 citizen buildings told tenants that if they didn't vote for Mayor Garner, they would lose their
42 apartments. At 260 Clinton, a senior HUD Building, the management put up flyers saying that
43 HUD was coming out to inspect their apartments on Election Day and if they weren't home to
44 let the HUD inspectors in, they would risk losing their apartments. ACORN was organizing in
45 that building then, and so, the management was worried about people voting against Garner. We
46 complained to the management and put out another flyer to tenants saying that management was

just trying to scare them and that they couldn't take away their apartments. Management called a meeting with the tenants two nights before Election Day to say they were sorry and that they would change the day for the HUD inspections, but then, on Election Day, they still stood out front telling people that if you don't vote for Garner, you'll lose your apartment. Also, during that election, workers inside the polls were asking people if they were Democrat or Republican, and this was a general election, not a primary. They asked me and I got very angry and told them they couldn't ask people that. Poll inspectors were turning people away if they didn't tell them what party they belonged to. This past November, they had long lines even in the morning when I went to vote, because the poll workers were confused about which machine they should be telling people to vote on. They had three machines and they usually only just have one. The poll workers were sending people away and telling them to vote at Kennedy Park, and then the people at Kennedy Park were sending them back over to the middle school. When people were turned away from voting, I told them they should challenge that and ask for a provisional ballot, but once they've been hassled, they won't go back. ACORN has been working with the Long Island Immigrant Alliance on voting issues in Nassau and Suffolk Counties for a few years. Suffolk has been under the Department of Justice ruling, requiring Spanish and English signs at polling places for 12 years, but they didn't really do anything until the last year. A bilingual poll inspector there was told by her supervisor not to speak Spanish in the polling place. In 2003, we did a press conference at the Suffolk elections office and got in the press, and so finally, the Department of Justice pushed them last year and made them call us. The elections office finally sent out notices of the election coming up in Spanish, but it was translated by a computer, so no one could understand it. We did a survey to see if people had signs in Spanish in the polling places and asked how do you handle people speaking only Spanish, and the main result we found was that poll inspectors need more training. Nassau County, where Hempstead is, has been under the Department of Justice ruling requiring Spanish and English signs at polling places for 2 or 3 years, and they have been working with us and trying to get better, but they need to do much more voter education and outreach. We suggested to them that they put the Spanish on the same sign as the English, because what was happening is they put up the English signs and not the Spanish signs. There is also a special hotline for Spanish speakers to call on Election Day, but the poll inspectors didn't even know about it. ACORN had a series of meetings with the Nassau County Department of Justice, bringing them ideas and pushing them forward, and the county has doubled the amount of Spanish poll inspectors and made other improvements. We have made progress over the last few years, but only with pushing and with the help of the Department of Justice. We need to re-authorize these sections of the Voting Rights Act so that people know they can't intimidate voters and have to protect everyone's voting rights. Testimony of Colombina Santiago. My name is Colombina Santiago, and I am an ACORN member from the City of Passaic in New Jersey and I am here today representing our members in Passaic County. I have been an ACORN member for three years and am a graduate of ACORN's leadership school. In 2002, my home was the headquarters for a "Get out the vote drive," and I increased the turnout in my precinct from 95 to 134 voters. I want to thank you for listening to my testimony, since I want to make sure that our rights as voters are protected. In Passaic County there is a history of voter intimidation, especially against voters who speak Spanish. My home was the headquarters of a "Get our the vote project" in my neighborhood and we had some problems. Many people we talked to were voting for the first time and were very excited. There was a problem with absentee ballots though. Many people got them, but didn't fill them out and wanted to vote at the polls instead. When they got to the polls, they were

1 told they couldn't vote and weren't offered a provisional ballot. I got a ride to Paterson on
2 Election Day to turn in my ballot at the elections office and make sure my vote counted. In
3 2002, Latino voters got a letter telling them that armed police officers would be out at the polls,
4 and I think this scared away a lot of people who wanted to vote. In the City of Passaic, the
5 administration tells businesses that they have to put up signs supporting the current leaders, and
6 if not, they will have a hard time. In Clifton, another city in Passaic County, every election
7 they try to make it English only, and don't want to have information and ballots in Spanish and
8 other languages, even though lots of people didn't learn English as their first language. I don't
9 speak English well, but I am very active in my community. I have even been to Washington and
10 spoken with our Congressmen, and I want to make sure my vote counts. Please re-authorize
11 these important parts of the Voting Rights Act and protect the voice of al American citizens.
12 MR. LEE: Thank you.
13 COMMISSIONER ROGERS: Thank you very much for your testimony.
14 MR. LEE: Thank you very much. Well, that brings an end our Northeast Regional
15 Hearing on the National Voting Right Act. It's been a long day, but I think that all the
16 Commissioners agree that it's been extremely valuable. I confess, I was born in New York City
17 and there is a lot of change that has gone into effect. Certainly there have been needs for the
18 Voting Rights Act, but there are new facts that are on the ground, and it's interesting to me that
19 there has been a credible disproportion of the minority population language. It's interesting, the
20 differences between Section 5, coverage between the districts in New York, and noncoverage in
21 Queens and Staten Island. We have heard some interesting testimony about Section 203 and
22 observers, and what struck me was the extent of the demographic change in these areas and the
23 implications it has for the issue we are charged to report about. Do any of the Commissioners
24 want to make any comments? Commissioner Buchanan is never at a loss of word.
25 MR. BUCHANAN: To the great regret of my colleagues, I would like to compare the
26 commissioners to the wise lawyers of Chicago and they said, "what we shall do in this country
27 is to make promises on paper for the Constitution and the Bill of Rights to be of help all over
28 the world and America. " I grew up in a part of the country which was mostly African
29 American and European American. It is impressive, and it has been a rich experience to hear
30 these witnesses say that they want to remind you that they're one people.
31 MR. LEE: John Buchanan, thank you, very much.
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1 C E R T I F I C A T E
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4 STATE OF NEW YORK)
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6 COUNTY OF NEW YORK)
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8 I, MARGARET E. ANTZ, a
9 Shorthand Reporter and Notary Public within
10 and for the State of New York, do hereby
11 certify that the foregoing proceedings were
12 taken before me on June 14th, 2005;
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14 That the within transcript is
15 a true record of said proceedings;
16 That I am not connected by
17 blood or marriage with any of the parties
18 herein nor interested directly or indirectly
19 in the matter in controversy, nor am I in
20 the employ of the counsel.
21
22 IN WITNESS WHEREOF, I have
23 hereunto set my hand this day of
24 2 , 2005.
25
26
27 _____
28 MARGARET E. ANTZ

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4 NATIONAL COMMISSION
5 ON THE VOTING RIGHTS ACT
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7 MIDWEST REGIONAL HEARING
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9 11:00 A.M. JULY 22, 2005
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1 MR. CARLSON: Good morning. I'd like to welcome you all to the Midwest hearing of
2 the National Commission on the Voting Rights Act.
3 My name is Steve Carlson. I'm one of the two pro bono partners at Dorsey & Whitney,
4 and I want to welcome you all to Dorsey & Whitney for this hearing.
5 At Dorsey & Whitney in the participation of this project, we've had a team of lawyers and
6 summer associates who have been involved in working on the report. And I want to acknowledge
7 Mike Pignato and Chris Shaheen who have been involved in the project and leading this from the
8 Dorsey perspective. On a personal note, two things. I wanted to indicate how much we enjoy
9 working with the Lawyers' Committee on Civil Rights. They've just been very much involved in
10 this project.
11 And also just to mention that I have been reading just this week, refreshing and taking a
12 look at the speech that President Lyndon Johnson gave when he proposed the Voting Rights Act
13 after the march in Selma, Alabama. And I've been reading that piece because it was striking both
14 in what a distance we've traveled in 40 years but also what a distance we have to go. It's my
15 privilege to introduce Jon Greenbaum, who will be taking things over. Jon is the director of the
16 National Commission on the Voting Rights Act and the director for the Voting Rights Project of
17 the Lawyers' Committee for Civil Rights Under Law. As director of the Voting Rights Project,
18 Mr. Greenbaum is responsible for the Lawyers Committee's efforts to secure racial justice and
19 equal access to the voting process for all voters. From 1997 to 2003, Mr. Greenbaum was a trial
20 attorney in the voting section of the Department of Justice, the civil rights division, where he
21 enforced the Voting Rights Act to protect the rights of minority citizens throughout the United
22 States. Mr. Greenbaum.
23 MR. GREENBAUM: Thanks, Steve. Good morning, everybody. Thank you so much for
24 coming out. I want to thank Dorsey & Whitney for the tremendous amount of effort that they've
25 put into today's hearing, including a 200-page report for the commissioners that goes through the
26 14 states that are part of today's hearing, as well as the hospitality that Dorsey & Whitney have
27 shown in putting this event on, and we're very much appreciative. The Lawyers' Committee for
28 Civil Rights under Law has been dedicated to civil rights issues for the last 4years. And right at
29 the -- right in the center of that is the issue of voting and the Voting Rights Act. On behalf of
30 the Civil Rights Committee, the Lawyers' Committee created the National Commission to look at
31 the record of discrimination and voting as Congress looks at reauthorization of certain portions
32 of the Voting Rights Act.
33 And we're very honored to have the group of commissioners and guest commissioners
34 that are part of this process. And I want to turn it over to Bill Lann Lee, who is chair of the
35 National Commission on the Voting Rights Act. Bill is a partner of the firm of Leiff, Cabraser,
36 Heinmann & Bernstein in San Francisco. Prior to that, from 1997 to 200he was the Assistant
37 Attorney General for civil rights appointed by President Clinton. And for 17 years prior to that
38 he worked for the NAACP Legal Defense in Education Fund. And for several of those years he
39 was the Legal Defense Fund's western regional office head in Los Angeles. Bill.
40 CHAIRMAN LANN LEE: Thank you very much, Jon. Well, good morning. On behalf
41 of the National Commission on the Voting Rights Act, I welcome you today to the fourth of nine
42 public hearings that the commission will be conducting.
43 This hearing covers the Midwest Region and will look at the state of discrimination and
44 voting in 14 states: Idaho, Illinois, Indiana, Kansas, Michigan, Minnesota, Missouri, Montana,
45 Nebraska, North Dakota, Ohio, South Dakota, Wisconsin and Wyoming. In our previous

1 hearings, we've heard some compelling testimony about voting discrimination and the impact of
2 the Voting Rights Act on minority voters in the South, Southwest and Northeast.
3 Today's testimony will examine the experiences of African-American, American Indian,
4 American and Latino voters in the Midwest; as you know, a vast, diverse region. I'd like to start
5 off with some background about the Voting Rights Act. The Act was signed into law, as you
6 heard, in 1965 by President Lyndon Johnson in response to voting discrimination encountered by
7 African-Americans in the South.
8 When Congress reauthorized the Act in 1975, it made specific findings that the use of
9 English only elections and other devices effectively barred minority language citizens from
10 participating in the electoral process. In response, Congress expanded the Act to account for
11 discrimination against language minority citizens, and we see that through Section 203. Before
12 discussing Section 5 and Section 203 in greater detail, I want to explain what is scheduled to
13 expire in 2007 and what is not. The right of African-Americans and other minorities to vote is
14 guaranteed by the 15th Amendment and is permanent. The urban legends you've heard that
15 African-Americans will lose the right to vote in 2007 are simply not true.
16 The permanent provisions of the Act ban literacy tests and poll taxes, outlaw
17 intimidation, authorize federal monitors and observers, and create various mechanisms to protect
18 the voting rights of racial and language minorities. However, there are some temporary
19 provisions of the Voting Rights Act that will sunset in 2007 unless they are reauthorized by
20 Congress. Now, these are temporary provisions, but keep in mind they have been in effect for
21 over 20 years.
22 Now, what are these expiring provisions? First, Section 5 of the Act requires certain
23 states, counties and townships with a history of discrimination against minority voters to obtain
24 approval or preclearance from the Department of Justice in Washington, D.C. or the United
25 States District Court in D.C. before they make any voting changes.
26 Now, these changes can include redistricting, changes to methods of election, polling
27 place changes, things of that kind. Jurisdictions covered by Section 5 must prove that the
28 changes do not have the purpose or effect of denying or abridging the right to vote on account of
29 race, color or membership in a language minority. In this region, two counties in South Dakota
30 and two counties in Michigan are covered by Section 5.
31 Second, Section 203 of the Act requires that language assistance be provided to
32 communities with a significant number of voting age citizens who have limited English
33 proficiency. Four language groups are covered by Section 203: American Indians, Asian-
34 Americans, Alaska natives and those of Spanish heritage. Covered jurisdictions must provide
35 language assistance at all stages of the electoral process. As of 2002, a total of 466 local
36 jurisdictions across 3states are covered by these provisions. In this region, 37 counties and one
37 township are subject to Section 203 requirements.
38 Third, several sections of the Act authorize the Attorney General to appoint a federal
39 examiner to jurisdictions covered by Section 5's preclearance provision on good cause or to send
40 a federal observer to any jurisdiction where a federal examiner has been assigned. This is a very
41 important provision. Since 1966, 25,000 federal observers have been deployed in approximately
42 1,000 elections. Let me now tell you a little bit about the commission's purpose and its
43 membership. As you heard, the Lawyers' Committee acting on behalf of the Civil Rights
44 Committee created a nonpartisan commission to examine discrimination voting since 1982, the
45 last time the Act was extended.

The commission is comprised of eight advocates, academics, legislators and civil rights leaders who represent the diversity that is such an important part of our nation. The honorary chair of the commission is the Honorable Charles Mathias, former Republican senator from Maryland.

The other six national commissioners are the Honorable John Buchanan, former congressman from Alabama. Chandler Davidson, scholar and editor of one of the seminal works about the Voting Rights Acts. Delores Huerta, co-founder of the United Farmers Workers. Elsie Meeks, the first Native American member of the United States Commission on Civil Rights. Charles Ogletree, a renowned Harvard law professor and civil rights advocate. The Honorable Joe Rogers, former lieutenant governor of Colorado. Commissioners Davidson, Meeks and Rogers are present today. We are also fortunate to have the legendary Matthew Little, chair of the Minneapolis NAACP serving as this hearing's guest commissioner. The commission has two primary tasks: first to conduct these regional hearings, to gather testimony and information relating to voting rights. And second, to write a comprehensive report detailing the existence of discrimination in voting since 1982.

The report will be used to educate the public, advocates and policy-makers about the record of racial discrimination in voting. We've all read the newspapers, and there seems to be emerging a bipartisan consensus that the Voting Rights Act ought to be extended. However, under our existing legal standards, in order to get that, and if that is appropriate and it should be done, there needs to be a factual record examining what is the state of discrimination in voting rights. Does it still exist, how pervasive, how extensive. And we need to find out what is the record. Should the Act be extended, should the Act be improved. Those are kinds of issues that we're addressing, and we're trying to create a record so that Congress and the public can act in a manner that's informed and cognizant of the reality of voting rights today.

There are going to be five panels of speakers today. The first four panels will be comprised of members of the US and state legislatures, leading voting rights practitioners and members of the community who have been active in voting rights issues. Each panelist will provide a five- to 10-minute presentation.

After all the members of the panel have spoken, the commission will address questions to the panelists. We encourage members of the public who are here to share their voting rights experiences in our fifth and final panel of the day. If you are interested, please speak with some of our staff members. Maybe they could stand.

There's Marcia. Please see Marcia if you're a member of the public and wish to testify later this afternoon. Now I'm going to introduce each of the commissioners who are present at today's hearing and each will make a short opening statement. Commissioner Chandler Davidson is the Radoslav Tsanoff Professor of Public Policy Emeritus, and served as the department of -- and is chair of the department of sociology at Rice University in Texas. Dr. Davidson was the co-author of the "Quiet Revolution In The South," a definitive work on the impact of the Voting Rights Act in the South. Dr. Davidson, among other things, testified before Congress during the 198reauthorization of the Voting Rights Act. Commissioner Davidson.

MR. CHANDLER: Thank you. I'm very pleased to be in the interesting and beautiful city of Minneapolis today. As a longtime scholar of minority voting rights, I'm very concerned that all adult Americans have the unimpeded right to vote and to have their votes accurately counted. I'm therefore eager to hear testimony on the subject today.

CHAIRMAN LANN LEE: Commissioner Elsie Meeks is the first American Indian to serve on the United States Commission on Civil Rights in its 48-year history. I must say it's long

1 overdue. But Ms. Meeks has spent most of her adult life working to improve the conditions that
2 exist in some of the nation's poorest communities by promoting economic development. Ms.
3 Meeks is currently executive director of the first nation's Oweesta Corporation, a national
4 financing intermediary that assists American Indians in establishing community development
5 financial institutions. Commissioner Meeks.
6 MR. MEEKS: Thank you. I'm so pleased to be able to serve on this, as a commissioner
7 on this panel. I just don't think that we can take for granted, coming from Indian country myself,
8 that we can take for granted that our rights will always be upheld. And so these hearings are
9 very important, and we will appreciate all the testimony given. So thank you.
10 CHAIRMAN LANN LEE: Commissioner Joe Rogers completed his term as lieutenant
11 governor of Colorado in 2003 where he held the distinction of serving as America's youngest
12 lieutenant governor and only the fourth African-American in the United States history ever to
13 hold the position. We have some commissioners who have established landmarks in our history.
14 Joel Rogers served as founding chairman of the Republican Lieutenant Governors Association,
15 has served on the executive committee of the National Conference of Lieutenant Governors. Mr.
16 Rogers created the acclaimed Dream Alive Program in dedication to the memory and legacy of
17 Martin Luther King, Junior and the leaders of the civil rights movement. Commissioner Rogers.
18 MR. ROGERS: Thank you, Mr. Chairman. You all, it's just good to be with you today. I
19 often would not say that, by the way, about Minneapolis. We have played a football game or
20 two, as you well know, with the Denver Broncos. But it's good to be here. I'm delighted to join
21 you now. We're excited, frankly, about the idea of hearing testimony, obviously, in this region
22 of the United States. As you well know, the issues in terms of civil rights have been definitive
23 issues in many respects for the United States of America. They define, in essence, who it is that
24 we are with respect to not only ourselves but in many respects with respect to our world. And
25 when you look at the key pieces of civil rights legislation, you're essentially talking about the
26 1964 Civil Rights Act, as you know, that landmark piece of legislation which fundamentally
27 changed the life in America for all of us of all different races, creeds, colors and backgrounds. It
28 helped to really bring about the full substance of what obviously President Lincoln talked about
29 in terms of the Emancipation Proclamation, and even dating back, frankly, to what President
30 Washington talked about in the founding of this great nation, what it is that we would be about as
31 one nation under God with a sense of liberty and justice for all. The other key piece of
32 legislation, obviously the Voting Rights Act in 1965, as the chairman has pointed out and Jon has
33 pointed out, central to the substance of who it is that we are, our ability fundamentally to vote
34 and guaranteeing that right to vote is, in essence, key to our life and way of life as Americans.
35 And obviously following that was a another key piece of legislation which dealt with housing.
36 Those three pieces of civil rights legislation fundamentally altered America. So we're glad to be
37 here today. We're looking forward to testimony that each one of you will present. Thank you
38 kindly.
39 CHAIRMAN LANN LEE: I'd like to point out that Commissioner Rogers, when he
40 served as lieutenant governor of Colorado, was particularly active on Native American issues.
41 Commissioner Matthew Little needs no introduction in this town; however, I've been asked to do
42 so. He has been somewhat active in civil rights for the last 40 -- 50 years or more. And as
43 president of the Minnesota NAACP, he organized busloads of activists to attend the historic
44 1963 march on Washington. And he probably remembers when the '65 Civil Rights Act was
45 passed with its voting rights provisions. Commissioner Little recently supported the NAACP

1 lawsuit against the government of Minnesota which charged that the public schools had failed to
2 provide equal educational opportunity to all children. Commissioner Little.
3 MR. LITTLE: Thank you very much, Mr. Chairman. First of all, I want to express my
4 appreciation on the part of the city of Minneapolis that it has been chosen for this hearing. And
5 also, of course, Dorsey & Whitney Law Firm who has really been completely in support of the
6 NAACP in its efforts throughout the years as far as pro bono support. So I am -- those are two
7 things I'm very proud of.
8 And having to act, having been actively working in the field of civil rights for the last
9 half century or so, I've certainly seen an awful lot of changes, not only throughout the country
10 and the South but also in Minnesota. For example, here regularly there was a time when I first
11 came to Minnesota in which Minneapolis was held nationally as the anti-Semitic champion of
12 the United States. And to give just an idea of the kind of prejudices that were here that was prior
13 to the Humphrey era, of course, who was -- who changed things so dramatically in that regard,
14 and had a tremendous hand in the passage of the civil rights as a leader in Congress at the time.
15 As a matter of fact, he was a whip at that time.
16 And so things have changed dramatically, but it has still not reached the point of Martin
17 Luther King's dream; that is an ongoing process.
18 But I do think one of the keys to all of that again is voting rights. I think that one of the
19 things that held African-Americans back so long was the lack of being able to vote, which is so
20 American and so important. And for all those reasons, I am indeed honored to be here, a
21 commissioner here, and welcome the rest of the commissioners and the National Commission on
22 the Voting Rights Act. We welcome them here, and I hope that the testimony that we receive
23 here will be of some assistance for their overall aim of the commission. Thank you very much.
24 CHAIRMAN LANN LEE: Thank you. The commission wishes to thank Dorsey &
25 Whitney not only for its hospitality in providing us this wonderful facility to hold the hearing but
26 for the excellent report. I have to confess I didn't see this report until earlier this morning, and I
27 haven't had a chance to read it.
28 But it obviously is going to be substantially helpful in one of the key objectives of this
29 fact-finding effort, which is ferreting out all those voting rights cases that not even lawyers from
30 the civil rights division of the Department of Justice have known about. Particularly in this
31 region, which is usually not thought of as a place where the Voting Rights Act has had an
32 impact, I think these cases that you've ferreted out are really going to be very helpful. And I
33 think one of the themes that's emerged in all of our hearings is that because of the long time span
34 that we're talking about, people sometimes forget the substantial number of cases that have
35 actually been filed and litigated and the kinds of problems that have arisen in various areas that
36 have been dealt with not just through litigation but by protests and other means.
37 So I'd like to thank Dorsey & Whitney in particular for their substantial assistance in
38 preparing this wonderful report. We're going to take a short break and ask the panelists on the
39 first panel to come forward and we'll get set up. So we'll take a break for about two minutes.
40 (A recess was taken.)
41 CHAIRMAN LANN LEE: We're going to start the first panel with some -- two
42 congressional statements. And why don't we have the congressional statements read by the
43 lawyer from the Lawyers' Committee, and then we'll go going directly into the first panel. The
44 two statements are from William Lacy Clay from the First District of Missouri and Congressman
45 Emanuel Cleaver from the Fifth District of Missouri.

1 MR. GOLDMAN: Thank you, Mr. Chairman, members of the commission. My
2 name is Jonah Goldman. I'm a lawyer with the Voting Rights Project at the Lawyers' Committee.
3 The first statement is, as the chairman suggested, from Congressman William Clay for the First
4 District of Missouri.
5 Dear National Commissioners on the Voting Rights Act: I am writing this letter to
6 convey my strong support for the Voting Rights Act that was enacted in 1965 Since 1965, the
7 Voting Rights Act has been essential in ensuring that all citizens, regardless of race, ethnicity
8 and language and skills are guaranteed the right to vote. Not only are citizens assured the right
9 to vote by this Act but they are guaranteed that their vote will be counted fairly and accurately.
10 Some may argue that we have come a long way since 1965. They may claim that racial
11 injustice and discrimination are no longer condoned as they once were, and that those dark and
12 disgraceful years of American history are over. These same people might believe that no citizen
13 in America is kept from exercising his or her right to vote by fraud, discrimination, misleading
14 information or unreasonable laws, but they are wrong. Voter disenfranchisement continues to be
15 a national problem.
16 In light of the 2000 elections in Florida, it is absurd to argue that fraud does not exist in
17 our electoral system. When thousands of voters were turned away from voting booths because of
18 their race and their political affiliations and numerous ballots thrown out because they favored
19 one candidate over another, how can we claim that there's no discrimination in the voting
20 process? I believe history will reveal that more should have been done to investigate these claims
21 and bring to justice those persons or groups responsible for the election impropriety.
22 Florida is not the only state that had a breakdown in the voting process. Numerous
23 Missouri voters experienced a similar turmoil. I was quite disheartened by some of the events
24 that took place in Missouri during the 2000 elections. I found it disturbing that St. Louis election
25 officials routinely violated state and federal law in the implementation of Missouri Statute
26 Section 115.195. This statute specifically limits the use of the inactive voter list. It states that the
27 inactive voter designation can only be used to determine the number of ballots to be printed, to
28 compute the proportional cost of elections or to facilitate mailing information to registered
29 voters. The allow does not give election officials authority to purge the names of inactive voters
30 from the election rolls. It is meant to ensure that voters' rights are protected and not denied
31 because the voter has relocated or the U.S. Postal Service has failed to updated its records.
32 St. Louis City and County violated this law by keeping records differentiating between
33 active and inactive voters, and then denying those identified as inactive voters from voting
34 when they came to the polls. Another issue of great concern that undermines voting rights is the
35 use of provisional ballots. I firmly believe that provisional ballots are detrimental to our
36 democracy. A federal judge in Missouri ruled that the state is not required to count provisional
37 ballots if they are cast outside the voter's own precinct. After the 2004 elections, there were
38 reports that poll workers failed to distribute provisional ballots, and that many did not understand
39 the legal issues surrounding these ballots. Clearly the provisional ballot law is confusing. It
40 lends itself to interpretation by ill-informed election officials and must be eliminated. Missouri
41 voters should not be turned away at the polls because of a misinterpretation of the law. Due to
42 the numerous failings that still plague the election process, I strongly believe that the Voting
43 Rights Act is vital to ensure that every citizen has the opportunity to vote and that each vote is
44 counted.
45 According to the Department of Justice, the Voting Rights Act has been called the single
46 most effective piece of civil rights legislation ever passed by Congress. In Mississippi, the

difference in voting registration rates between blacks and whites went from numbers as high as 63.3 percent to 6.3 percent. In Louisiana, this number went from 48.9 percent to negative percent. This is nothing short of a testament to the effectiveness of this Act. Although we have come a long ways since the days of Jim Crow and the grandfather clause, we must realize that there will always be individuals and groups who will try to manipulate the voting process in order to advance their own agenda. We must protect this constitutional right that so many have struggled and died for. We must ensure that the Voting Rights Act is reauthorized. Sincerely, William Lacy Clay, member of Congress. The second statement is from Congressman Emanuel Cleaver from the Fifth Congressional District of Missouri.

I would like to begin by commending the National Commission on the Voting Rights Act for their ongoing struggle for civil rights. Composed of some of the most distinguished contemporary civil rights leaders, the commission provides a sign of hope that voter discrimination will be addressed. It is unfortunate that voter discrimination still exists in this country, but it is imperative that it be addressed head on. I firmly believe no collective body is as qualified to address this issue as the National Commission on the Voting Rights Act. It is an honor to provide my testimony to this commission.

As we all know, the Voting Rights Act was passed by Congress in 1965 because certain people, mainly African-American citizens, were being silenced at the polls. At first the Act only monitored a few Southern states where blatant evidence regarding the disenfranchisement of African-Americans voters existed. These states were required to receive federal approval before passing any election laws, and were forbidden from using eligibility tests at the polls. By 1970, the Voting Rights Act was extended to certain jurisdictions around the entire country, not just jurisdictions within specific Southern states. In addition, the Act was amended enabling private citizens to challenge discriminatory election laws in court. Nationwide, voters were no longer required to take literacy tests before registering to vote and the Act was extended for five more years.

Several adjustments were made to the Act over the following decade. In 1975, bilingual assistance became a requirement at election polls, protecting citizens whose language is not English. Revisions were also made in 1982, including a clause that the administrative provisions of the Voting Rights Act shall expire in 2007. These provisions include the provisions under Section 5 that require preclearance for new or changing election laws. The year 2007 is not too far from now. It is questionable whether the rights of voters are safe from discrimination. Despite the measures of the Voting Rights Act, thousands of people were again denied their right to vote in the 2000 presidential election. Thirty-five years from the passage of the Voting Rights Act, it was mainly African-American citizens who were turned away. An estimated 1.9 million votes were discounted in the 2000 election. One million of those were cast by African-American citizens. Voting discrimination in the 2000 election is perhaps best illustrated by the state of Florida where African-Americans were nearly 10 times as likely to have their ballots rejected. In spite of the revisions made to the original Voting Rights Act, the color of a person's skin is still a deciding factor in whether his or her vote does or does not count in an election.

Growing up in Texas, voting was never discussed because the Cleavers, including my grandfather and great grandfather, were poor. They could not afford to pay the poll tax which African which African Americans were required to pay. While I cannot make up for lost voting years for my ancestors, I can help assure my children that I am working to lessen the barriers. The Voting Rights Act is the mother's milk for African-Americans' political power. It was a milestone in the fight for civil rights, and I strongly believe in its principles of equality and

1 opportunity for all people to voice their opinion, regardless of skin color. It is imperative that we
2 keep these principles alive at the ballot box, and renewal of the Voting Rights Act is critical to
3 preserving those protections for Americans of all races. Various proposals have been made by
4 Congress that would actually serve to undermine the constitutionality of the Voting Rights Act,
5 creating more voting barriers for many minorities across the country. As congressmen I will
6 carefully examine all proposals to renew or alter the Voting Rights Act to ensure all Americans
7 are afforded the opportunity to be part of a free and fair election.
8 CHAIRMAN LANN LEE: Well, Jonah, I hope you will convey to Congressmen Clay
9 and Cleaver our thanks on behalf of the commission. I also understand Congresswoman Gwen
10 Moore of Wisconsin's Fourth Congress District is going to be available sometime today to
11 participate in these hearings I guess telephonically. So we look forward to that. But let's go
12 forward with our panel. The first panelist is Mark Ritchie. He's the executive director of National
13 Voice, a Minneapolis based coalition of nonprofit and community groups working to maximize
14 public participation in the nation's democratic process. In 2004 Mr. Ritchie led a nationwide
15 effort to help churches, businesses, neighbor groups and nonprofit organizations, all on a
16 nonpartisan basis, to increase voter registration, and I understand it resulted in five million new
17 voters.
18 Mr. Ritchie is also the president of the Minneapolis based Institute for Agriculture and
19 Trade Policy, another nonprofit, working to foster long-term economic social and economic
20 sustainability for Minnesota's family farmers and rural communities. Welcome, Mr. Ritchie.
21 Some of us have an earlier version of your testimony and we can -- when we receive your written
22 testimony, you can put that in the record.
23 MR. RITCHIE: Thank you very much, Mr. Chairman, and members of the commission.
24 I want to thank you for coming here and including the Midwest in your deliberations and in your
25 considerations. I felt for a long time as someone who grew up in the South but has lived in many
26 parts of the country that the Voting Rights Act needs to be seen and felt as a national treasure,
27 not as something that was imposed on one region, and so I feel like this is a very important
28 opportunity to nationalize some of those concerns. In my work in the last two years doing voter
29 registration, working with organizations doing voter registration and Get-Out-The-Vote, we had
30 a lot of opportunities to see how far we've come. We've also had a lot of opportunities to see a
31 number of the problems. I don't want to dwell totally on the problems, but that is part of
32 building the record for the reauthorization, so I will address a few of those in my time. There are
33 more in the written testimony.
34 But in our state of Minnesota which I want to focus on specifically, we had about 300,
35 340 organizations that were part of a Minnesota participation project doing voter restriction,
36 specific education in all their communities. In that process, we began to alert local communities
37 and community leaders, be they from the church or the business council or some other
38 organization, about possible or potential problems and about things that they need to be aware of
39 and paying attention to. And it turned out that Minnesota was a target especially of very
40 aggressive challenges in the polling place. We had a very large number of paid challengers who
41 came from outside the state. We had several instances of actual altercations, police had to be
42 called. But one of the -- let's call it a positive outcome of that attempt to intimidate and to
43 discriminate is that our state legislature has, in fact, passed legislation which bars paid outside
44 challengers from future polling places in our state. So we began to see that some of our
45 preparation and our involvement of people in the voting registration process then help build a

more informed and possibly a more, uhm, aggressive in the sense of defending voting rights in the general population, and this was a very important aspect of our work.

But there were other quite visible -- some might consider them quite illegal, but activities that took place that turned out to be forms of intimidation and attempted discrimination. The one that was of particular concern to me, because of watching people's reaction all day, was the posting of signs that came from our secretary of state's office that said, this polling place may be the target of a terrorist attack. This kind of thinking, of course, is, you know, quite common in our country at the moment, but when it is applied very specifically to scaring people about their polling place, I think we've reached a new level, perhaps a new low level in the attempt to use the current national and international security situation to intimidate and discourage voters. And, of course, we're very upset about this, and there's been quite a bit of controversy about that.

There were other specific examples, several occasions where voting election officials of our state government had to be taken to court or to administrative court. Perhaps the most important, and I hope that you'll hear more about this today or we can talk about it more, was the attempt to prohibit the use of tribal IDs in the voting registration process. We were able to successfully challenge our secretary of state on that point, but it was just an example of another thing that was an attempt to be put in front of, put in front of voters to just make it more complicated.

Perhaps our situation in Minnesota in those specific examples is of some use in thinking about the future and some potential changes. But I think there's another set of experiences that we have that I think might be important in shaping a voting rights act and other civil rights legislation going forward, and that's the very fast pace of evolution of our demographics and especially of our languages. We have suburban high schools very near right here where there are more than 40 languages spoken today. I don't think people think of Minnesota this way yet, but, in fact, we are very rapidly changing our community. And in our rural communities there are many rural communities where over half of the kindergarten classes are now not of European origin and there are many languages being spoken from -- really from every continent, from Asia, from Africa, from Latin America.

And this change in our own demographics and rapid change in our language situation is first being absorbed at the level of the schools, the hospitals and law enforcement, because that's the first place where, as a community, we interact with each other and there are, you know, emergency situations or daily situations, that kind of thing. But we're now beginning to face this more and more in our civil organizations, in our trials and our legal affairs and also, of course, in voting.

And so while I think those provisions of the Voting Rights Act have not received perhaps as much attention as they might, and, of course, they have been somewhat limited in the language that's covered and all of that, I believe that our life experience here, and not just in Minnesota, but I believe in the whole region is beginning to push us to say, we have to take this into consideration more directly, and we have to perhaps rethink part of how we imagine the Voting Rights Act working to bring the language provisions much more forward to expand them and then to see what are the triggers or what are the changes.

I believe that most people -- and I have been privileged to be able to meet with many of the county auditors who normally are the election officials at the local level, sometimes it's in a city. They are, of course, concerned about this change happening because, you know, they want to do a good job. They are also aware that there's costs and there's Help America Vote Act implementation for disabilities, there's all kinds of things coming down on the heads of election

1 officials at the local level, and they are being met with extreme cuts in funding assistance from
2 the state. Minnesota, I believe, is not unique in the heavy cutting from state to local. So these
3 two things might make some local election officials perhaps more resistant or feel somewhat
4 pressurized. But my sense is that they want to do a very good job. They need the resources, but
5 having something like the Voting Rights Act, it helps become a more positive, not just a punitive
6 or negative force, might be a way to also engage this conversation more broadly.
7 There have been, of course, Supreme Court and other court decisions that have
8 weakened some components, those kinds of things, that people in this region are not very aware
9 of, but we are aware of the general process by which good legislation can be weakened, can be
10 undermined by certain court rulings in one place or another. And with the new national debate
11 about the Supreme Court and the new justice and all of this, I think people in this region have
12 concerns that need to be expressed about those parts of it.
13 There is another aspect that I believe that our state and our regional experience might be
14 of use in terms of building the records in a very positive sense, and that's that our nation's
15 military, the active, the reserves, National Guard is often and largely drawn from communities of
16 color. It's often from low income communities as well. This is a very big factor in many
17 communities. And at the moment, many of our troops are overseas. And the military in this
18 state, especially I'm most aware of the reserves, which is our largest component, invested heavily
19 in making sure that all of our troops overseas were able to vote. And Major Coulihan who was
20 responsible for that program was the assigned staff for that, was part of a larger team. So there
21 was a tremendous investment of leadership at a time when their leadership staff are quite
22 stretched, and money to make sure that all the troops knew what was going on, how they could
23 vote, just a very tremendous process. Very successful.
24 But it's also a reminder that other parts of our government ought to also be investing in
25 democracy. Military took a real leadership position in our state making this happen, but they set
26 an example that we are now trying to get other parts of the government to understand that that
27 form of investment is what it takes to make the democracy work, especially if your concern is
28 making sure there isn't discrimination. We are going to have tremendous numbers of voters
29 overseas in the military for a long time. Next year's elections will be conducted with many
30 Minnesotans in Iraq and Afghanistan. And so I'm hopeful that our military here will continue to
31 invest, but I'm also hopeful that their example will continue to inspire people in other parts of
32 government to make the same investment. Let me close quickly to stay within my time.
33 CHAIRMAN LANN LEE: Thank you, Mr. Ritchie.
34 MR. RITCHIE: We have five recommendations that I want to draw your attention to at
35 the back. We're not particularly innovative or revolutionary here. We think the Act has been
36 good and needs to be strengthened and renewed. We also think that there are ways that the Act
37 should start to feel more like a national treasure than it has been seen by some as a punitive
38 measure. And finally, we do believe that we were experiencing rapid changes, particularly on
39 the language side, that might imply some changes might be necessary or some supplemental
40 ideas might be necessary going forward. Again, thank you very much for this opportunity. I look
41 forward to any questions and discussions after today.
42 CHAIRMAN LANN LEE: We're going to go ahead now with the testimony of Alice
43 Tregay who's testifying on behalf of Rainbow/PUSH. Ms. Tregay has been a nonstop advocate
44 for positive change through grass root politics, particularly in the Illinois and Chicago area, for
45 many decades. Welcome, Ms. Tregay.
46 MS. TREGAY: Thank you. I really feel like I'm an amateur here but I have been --

1 CHAIRMAN LANN LEE: It is we who are the amateurs.
2 MS. TREGAY: I have been with the Rainbow/PUSH since its inception. And Reverend
3 Jackson has -- for the last six months had petitions out for the Voting Rights Act to ensure that it
4 gets signed. And we're having a rally August the 6th in Atlanta, Georgia and hopefully people
5 will come from all over the country to rally for the Voting Rights Act. Reverend Jackson can't
6 solve the problems of the federal -- that we need at the Rainbow/PUSH, but the federal
7 government offers protection to Americans seeking to vote for officials of their choice. Without
8 legislation such as the Voting Rights Act, we cannot ensure justice and equality for all
9 Americans in the exercise of this constitutional right. The problems concerning districts of the
10 wards of Chicago and barriers to voting access in Chicago illustrates how important the Voting
11 Rights Act is to protecting African-Americans' and Hispanics' right to vote.
12 In the City of Chicago in 1982, they had an alderman named Keane who had gone to
13 prison, but when he got out, they asked him to draw up the map for the City of Chicago. We
14 were 40 percent of the population there. And he decided that we didn't deserve but 17 wards but
15 we really were over 19 wards. And we had to go to court. This is the year Harold Washington
16 was elected. And it took three years before that court case came to bear in the court system, and
17 we got the other two aldermen and we got two more Hispanics. So it does change when people
18 fight for the right for proper representation. And I went all off of this piece of paper.
19 CHAIRMAN LANN LEE: Well, Ms. Tregay, we have your testimony and it will be in
20 the record, so you don't have to feel bound to cover everything that's in the testimony. You could
21 hit the highlights.
22 MS. TREGAY: All right. There's several things that are wrong in, in the city of Chicago.
23 And by the way, one of the aldermen that was elected in that year turned out to be a US
24 congressman. Today he's Luis Gutierrez. It continues, even now, the gerrymandering of the
25 wards. And I brought a map for you all to see. And just, just one ward. And I'm not showing you
26 all of them, just one. This is the second ward. And what they're doing to keep the voting -- wait
27 a minute, I think I have it upside down. This is the second ward in Chicago. This is one ward out
28 of 50, and it goes everywhere. And what they do, and they get the black and the Hispanic
29 aldermen to go along with it because our mayor is a very strong mayor and he keeps them in
30 office.
31 So Hispanics still don't have the correct amount of representation and blacks are down
32 also. So we have to somehow get the people who draw these maps -- this was going on in 1982,
33 again in 2002, so nothing changed. I mean, this is 30 years. Everything is the same. In our last
34 election in Chicago, we had -- in 2004, the primary, 13,424 voters in majority black wards who
35 were incorrectly challenged and took the extra step at the polls to restore their voting right status
36 with 3,700 voters. The majority white wards in 2000 and majority Latino wards, those who did
37 not have enough identification either had to go home or to use provisional ballots. Those
38 provisional ballots were not counted, most of them. They have another way that they do of
39 taking people off the roll. They go and send out -- the ward committeemen send out precinct
40 captains to check to see if you live there. Not only do you live there, I had a six-flat with my
41 name on the front of the building and on the mailbox, and I was taken off the rolls. I had to get
42 myself put back on, and it wasn't hard to do because I have a loud voice.
43 CHAIRMAN LANN LEE: We're aware of that, ma'am.
44 MS. TREGAY: So what we do, we found a whole lot of people. They even took their
45 own employees off the rolls. And they, they were in -- or during my training they said, "They
46 took me off the rolls." And I said, "No, they didn't. You work for the board." But they, they

have all kinds of ways that they want to take people off the rolls. I have a friend named Dorella who's lived in the building for 25 years. And she moved from one apartment to the other, and she changed her address. And then she went down to vote, and they told her she was not on the rolls. When I called the board of elections, she is on the rolls. They said, "We don't understand why they said you couldn't vote."

But she voted twice in the primary and the general, and when they looked her up, her provisional ballot was not counted. I just have last one last thing that I want to say. Somehow or another we need to work on getting the judges who sit there and make these judgments about who can and cannot vote correct. I don't want cheating, I just want them to be correct. And so many times we have the elderly sitting there and they have done things the same way for so many years and things change. They don't change. And we need to get the training done.

Now, we're getting these new machines in and it's going to be really hard. I go to so many homes to help people vote, blind people, paralyzed people. And the last time I called the board of elections because she couldn't make an X, and they told me she couldn't vote. I said "Oh, yes, she can." So I called the executive director and I took it directly to him. But everybody has the right to vote, especially if they're registered. And because she's paralyzed didn't mean she didn't have that right. So we just need to make sure that everything is in order and that everybody has a right to vote. Thank you.

CHAIRMAN LANN LEE: Thank you, ma'am. The next panelist is Ihsan -- I'm sorry if I mispronounce your name, I'm terrible for this.

MR. ALKHATIB: Alkhatib.

CHAIRMAN LANN LEE: Al --

MR. ALKHATIB: Alkhatib. The H is silent.

CHAIRMAN LANN LEE: Well, Mr. Alkhatib will testify, and then we'll have questions from commissioners. The marvels of modern technology. We're going to have to hear from a congresswoman, apparently, right now. Could we ask you to --

MR. ALKHATIB: Yes.

CHAIRMAN LEE: -- to hold that for a couple minutes? I'm sorry to do that. By way of introduction, Gwen Moore is the congresswoman from Wisconsin's Fourth Congressional District. And she, I understand, was newly elected. Since we have this moment, Ms. Tregay, could you give the commission a copy of that, the map that you showed us?

MS. TREGAY: Yes, they can have it.

CHAIRMAN LANN LEE: Thank you very much. It does, in fact, look like a salamander, by the way.

MS. TREGAY: You do have a map of the whole city in your packet, but it doesn't, it doesn't illustrate how pretty that map is. Only that big one shows how pretty it is. This would be a better map too. This is a map of the city in color --

CHAIRMAN LANN LEE: Well, thank you.

MS. TREGAY: -- to see the other wards and how they're drawn.

CHAIRMAN LANN LEE: If members of the public during the break wish to see these maps, they can. They are pretty interesting, actually.

MS. MOORE: Good afternoon.

CHAIRMAN LANN LEE: Congresswoman Moore? Hello?

MR. MOORE: How are you?

1 CHAIRMAN LANN LEE: Congressman Moore, this is Bill Lee. I'm chairing this
2 commission hearing that we're having here, and we miss you, but I understand that we can hear
3 from you today.
4 MS. MOORE: Oh, absolutely, Mr. Chairman, and thank you so much for bringing me in.
5 I know you have a very ambitious schedule, and I appreciate your accommodating me. I did not
6 want to miss this opportunity to weigh in.
7 CHAIRMAN LANN LEE: Well, if you wish, you could give us some of your testimony.
8 We have your written testimony which has not been released, but if you wish --
9 MS. MOORE: And I would like to revise and extend my remarks because we have done
10 this in a hurry, and I do think that there are just relevant things that I would like to submit to you
11 later on this afternoon, if that would be appropriate.
12 CHAIRMAN LANN LEE: Well, that would be wonderful, and, Ms. Moore, you have the
13 floor right now.
14 MR. MOORE: Thank you. First of all, I would like to send warm greetings to the
15 National Commission members in being panelists and attending guests of the National
16 Commission on the Voting Rights Act, Midwest Regional Hearing. I, of course, am unable to
17 appear in person since I must be here today in Washington, D.C., as Congress is in session. I
18 want to commend the Lawyers' Committee for Civil Rights Under Law and the other leading
19 civil rights organizations that created the National Commission on the Voting Rights Act. And
20 since the last reauthorization of the Voting Rights Act in 1982, the tactics used to
21 disenfranchise minority voters has been more creative, and they have sunk to a new and
22 disgraceful level.
23 Milwaukee, Wisconsin is home to a quarter of a million African-Americans, and it has
24 the largest concentration of African-Americans in the state. Wisconsin, of course, in the last
25 two election cycles has been a swing state from a partisan vantage point. As many of you on the
26 commission may recall, in both 2000, in the presidential election of 2000, and the presidential
27 election of 2004, Wisconsin was blinking all night long as a state that took until the wee hours of
28 the morning to determine who was the ultimate winner in our state. That particular situation has,
29 of course, been a breeding ground for many electionary tricks by partisans to disenfranchise the
30 African-American vote which is highly regarded as the swing vote in this state. And I'll give you
31 some examples. Prior to 2000, the Wisconsin state statute enabled election inspectors to
32 challenge electors by asking them questions that had nothing to do with their being eligible to
33 vote. Our state statute provided for questions to challenge electors.
34 In the 1996 Milwaukee mayoral race, an African-American county sheriff, Sheriff
35 Richard Ardisson, who had been the largest biggest vote-getter countywide, challenged the white
36 incumbent mayor, and the election inspectors, under the mayor's authority, literally resurrected
37 these archaic statutes and challenged black voters with, with the questions from the statutes.
38 Inspectors were asking questions like, quote, "Do you plan to file an income tax in this ward,"
39 unquote. "Are you married or do you live with your parents?" They were using these questions
40 from the state statute that were clearly, clearly designed to suppress the voters.
41
42 In my situation, my sons, for example, lived in my home and they were of age. They did not file
43 an income tax and they, of course, would have answered negatively to these questions as the
44 perception clearly would have been they were ineligible to vote.
45 The, the -- fortunately, an election protection organization secured an injunction on
46 election day with poll watchers watching this activity, and it was clearly, clearly a voting

1 suppression strategy. And subsequently as a state senator, I authored legislation to repeal and
2 recreate these statutes to eliminate these unnecessary questions from being asked at the polls and
3 to have more typical questions asked, like are you 18 years of age, are you an American citizen,
4 literally things that were relevant.
5 In the 2004 election with, with George W. Bush, having lost the State of Wisconsin in the
6 year 2000 by a mere 5,000 votes, there were all types of voter suppression fliers, commercials
7 targeted to black voters with misinformation designed to discourage them from voting in
8 Milwaukee, Wisconsin which, of course, comprises most of my congressional district. For
9 example, there was a flier distributed by a fictitious group called the Milwaukee Black Voter
10 League.
11 As Chairman Julian Bond of the -- mentioned in his speech during the NAACP national
12 convention in Milwaukee in 2005 -- in July of 2005 just the other week, this flier told black
13 citizens that they couldn't vote for president if they had already voted in an election in that year.
14 And, of course, there was an overwhelming number of African-Americans who had voted for,
15 for a black mayoral candidate in April of 2004.
16 There was an outpouring of, of ambition on the part of the African-American community.
17 But this flier told black citizens that they couldn't vote in the presidential election if they had
18 already voted in an election in that year. That even traffic violations made them ineligible to
19 vote, and that a condition for anything by anyone in a voter's family made the voter ineligible to
20 vote, and that by violating any of these restrictions, that would result in a prison term and seizure
21 of their children.
22 There was also another flier mailed using the United States mail that included extremely
23 racist remarks toward black supporters of Senator Feingold. The pejorative "N" word, as in
24 psychological warfare, Mr. Chairman, psychological warfare. They used the pejorative "N" word
25 and chided African-American voters for their previous allegiance to the Democratic poll. Clearly
26 a voter suppression tactic designed to make them feel guilty and ashamed of supporting him.
27 Calling them all -- using the "N" word, slime, all kinds of, of negative pejorative terms. Yet
28 another flier urged black voters to vote by noon with a confusing message, an implication that it
29 was not possible to vote if they didn't vote by noon. Such tactics created a divisive and
30 polarizing environment. Racial tensions in Milwaukee drew national attention as partisan
31 combatants vied for the swing African-American votes.
32 Hundreds of thousands of dollars were spent on radio messages to inflame African-
33 Americans about Teresa Heinz's claim that she was an African. The woman, of course, was born
34 and raised in Mozambique, but, of course, neglected to mention that because their point was to
35 create resentment that would discourage them from even bothering to vote. I wanted to add
36 something else here that's not in my written testimony that I think is extremely important.
37 Literally since the Bush versus Gore election in 2000 when Wisconsin delivered the vote to Al
38 Gore by a mere 5,000 votes, there has been an ongoing effort on the part of the state legislature
39 to raise the bar for black voters, you know, by requiring voter IDs; not just any old voter ID but
40 state-issued driver's licenses. And, of course, there are studies that we could provide the
41 commission that demonstrate that there are more suspended -- more blacks with suspended
42 licenses than with driver's licenses. And that the -- that this really amounts to a poll tax that they
43 have been fervently trying to impose upon the black community, hence the reality that, that the
44 swing vote in Wisconsin literally will determine the outcome of a presidential election.
45 We need to track and expose these tactics for what they are in order to continue to prove
46 to the American majority that we are not living up to the true meaning of democracy, and every

1 vote is not being considered or counted. Here we are in 2005, 40 years after the Voting Rights
2 Act was enacted, and these underhanded tactics are still, still being taken to suppress the black
3 vote, which further justifies the need for the Voting Rights Act and its extension. Wisconsin, of
4 course, has never been under Section 5. But here the recent effort over the course of the past four
5 years, the vigilant effort to suppress the black vote, we need to have the Voting Rights Act not
6 only extended but not have it made permanent so that we can continue to review the need for
7 states' blacks votes counted but to come under the purview of the Justice Department. And, of
8 course, the most memorable disenfranchisement of minority voters in the Midwest region
9 recently occurred in Ohio. And that report found that 28 percent of all Ohio voters and 5percent
10 of black voters said that they experienced problems in voting.
11 While we review provisions of the Voting Rights Act that's set to expire in 2007, it's just
12 vital to evaluate our recommendations and their constitutional impact. During the NAACP
13 convention, the Reverend Jesse Jackson noted that it's important for us not to fight to make
14 provisions of the Voting Rights Act permanent. If Congress is forced to go back and review parts
15 of the Act periodically, then we'll always have the opportunity to review and improve these
16 provisions based on the new underhanded tactics that may have arisen since the last renewal.
17 And, of course, Milwaukee, Wisconsin would be an example of that.
18 I'm a strong supporter and advocate of civil rights. I'm a cosponsor of H. R. 39, Count
19 Every Vote Act, and I'm a supporter of requiring a voter-verified paper record, allowing citizens
20 to register on election day. We have same-day registration in Wisconsin, and I think that that
21 should be something that every state should have, improving security measures in voting
22 machines, and require that there be at least one voting machine at every polling station that meets
23 the needs of disabled voters and minority voters and non-English speaking voters. I'm also a
24 supporter of requiring states to act in a uniform and transparent manner with purging voters from
25 registration lists and establishing guidelines to provide for the prosecution of those who engage
26 in deceptive practices to keep people from voting.
27 As a cosponsor of the Democracy Day Act, I'm also in support of making election day a
28 legal public holiday. I want to add here that I am in support of putting our money where our
29 mouth is. It is not enough to espouse our belief that every vote should count and having
30 meaningful provisions in the Helping America Vote Act and then not providing the dollars and
31 creating mandates on local governments that they cannot meet in terms of updating older
32 equipment. Because I have personally experienced these deceitful tactics used to undermine the
33 black vote in my district, and I have witnessed the destruction and racial polarization that these
34 tactics create, and because I passionately believe in the true power of democracy, I will continue
35 to do everything to protect the voting rights of every American.
36 Thank you so much, Mr. Chair, and the commission. And I commend you in your great
37 work, and I'm available here for any questions you may have of me.
38 CHAIRMAN LANN LEE: Thank you very much for being available for questions. I
39 think we'll have just a few questions for you, perhaps one or two. But I did want to follow up
40 with your statement that you would be willing to give us those documents you referred to, the
41 studies, I believe you referred to.
42 MS. MOORE: Yes. One of the studies -- you know, we, we will have to research. I can
43 find the repeal, the purge of that statute. We just needed more time to be able to do that.
44 CHAIRMAN LANN LEE: Well --
45 MR. MOORE: I can also provide you with a study by the University of Wisconsin-
46 Milwaukee, John Pawasarat, which shows that blacks are -- disproportionately don't have driver's

1 licenses. So when you look at all of the legislative initiatives that have been undertaken since
2 2000, you know, to require driver's licenses or ID from the DMV, you can clearly see the link
3 between disenfranchise and black voters and, and these new -- this new bar. And certainly we
4 will provide you with copies of these findings and some of these fliers.
5 CHAIRMAN LANN LEE: Well, thank you very much, Madam Congresswoman, and we
6 look forward to the commission staff getting in contact with your staff. We have a question from
7 Commissioner Joe Rogers, the former lieutenant governor of Colorado.
8 MR. MOORE: Oh, how are you, sir?
9 MR. ROGERS: I'm fine, congresswoman. Thank you so much for appearing with us. We
10 appreciate you joining us.
11 MR. MOORE: Thank you.
12 MR. ROGERS: Congresswoman, I was just curious about several aspects of your
13 testimony, and I wanted to make sure that I asked you directly, if I could, essentially about what
14 happened. You made reference in particular about -- I wanted to try to get a sense about that
15 flier. You mentioned that the fliers would be provided, that you could you provide information to
16 the committee, is that correct?
17 MR. MOORE: Yes, we can find it. This -- literally, there was a flier with all of this
18 misinformation on it, and it was a, a voter suppression flier that was distributed. You know, I'm
19 only pointing out to you the stuff that I can show you.
20 MR. ROGERS: Sure.
21 MS. MOORE: There were so many other things that created a hostile environment, you
22 know, that I can't really prove. But this is a flier that does exist. We will send it to you, and it
23 literally did say, you will have your kids taken from you if you try to vote, and anybody in your
24 family has ever committed any crime or got traffic tickets that you haven't paid, you can't vote,
25 yes.
26 MR. ROGERS: Congresswoman, was there ever an investigation that was done about
27 this? In other words, did the state attorney general or anyone --
28 MS. MOORE: Oh, no.
29 MR. ROGERS: -- bring any action related to this at all?
30 THE WITNESS: No.
31 MR. ROGERS: No?
32 MS. MOORE: No.
33 MR. ROGERS: Were complaints made in particular to the civil rights division of the
34 Voting Rights Act?
35 MR. MOORE: I don't know if there were complaints, but I will tell you what, the -- and,
36 you know, this -- this may sound a little self-serving because my son, of course, is the defendant
37 in this action. The Republicans sort of flipped the script on us. There was an incident on the
38 morning, on election morning where the tires were slashed, where literally the Republicans had
39 rented up all the vans available.
40 And here's what I can't prove, but, you know, from my perspective, it was a voter
41 suppression tactic because they know what Democrats do, they provide rides to the polls. And
42 many of them in the Democratic Party had to travel farther from Minneapolis to Chicago to get
43 vans. So they amassed all these vans. And on the morning of election day, tires -- some of the
44 tires were slashed. And so the immediate outcry was from black Republicans and Republicans
45 saying that Democrats were trying to suppress the vote. And so that was the, the message. And
46 that is where the law enforcement effort went, towards prosecuting young African-American

1 men who were suspect and indicted for felonious tire slashing when all of these other tactics had
2 occurred.
3 MR. ROGERS: And finally, Congresswoman, I wanted to ask -- thank you kindly. You
4 mentioned in particular the -- in terms of the votes or I think you made some reference in terms
5 of what's happening with respect to Congress. I wanted to get your sense. My understanding is
6 that there may be fairly broad bipartisan support as it relates to the reauthorization of the Voting
7 Rights Act. Do you sense that?
8 MR. MOORE: Well, I can tell you that a congressman from my own state, literally a
9 neighbor, who is the chair of the judiciary committee, Representative Sensenbrenner, indicated at
10 the 2005 National Association for the Advancement of Colored People Conference that he was
11 guaranteeing that he would reauthorize the Voting Rights Act. Now, the devil is in the details,
12 because you all know better than I do that, that it could be reauthorized in such a manner that it
13 could be found unconstitutional, provisions stricken. It could be reauthorized in such a way
14 where sections that are truly important to us are not reauthorized. Like Section 5, for example.
15 It could be reauthorized in such a way where there's no enforcement. So the devil is with the
16 details. So there is broad -- so there's bipartisan support reauthorizing it, but what does that
17 mean? I, I would not relax if I were you.
18 MR. ROGERS: Thank you kindly.
19 CHAIRMAN LANN LEE: We appreciate your advice. Mr. Little, do you have any
20 questions?
21 MR. LITTLE: No.
22 CHAIRMAN LANN LEE: Congresswoman, thank you very much for your testimony.
23 Thank you for taking the time from your busy day in Washington to give us those few minutes,
24 and we really appreciate your testimony, and we look forward to getting those materials.
25 MR. MOORE: Okay, thank you. We will work diligently on, on amassing these
26 materials.
27 CHAIRMAN LANN LEE: And congratulations for being there.
28 MS. MOORE: Hey, I tell you, it still wasn't easy. And to the extent they wanted to vote,
29 it was a confused vote. But you know what? I'm there. I'm here. Okay, thank you.
30 CHAIRMAN LANN LEE: Thank you very much.
31 MR. ROGERS: Thank you kindly.
32 CHAIRMAN LANN LEE: Mr. Alkhatib, I apologize for the scheduling difficulty, but I
33 thank you for your patience. Mr. Alkhatib is a practicing lawyer in Dearborn, Michigan, which
34 is the home of the nation's largest Arab-American community. And he graduated from the
35 University of Toledo College Of law. Professor Davidson, I want you to know he is finishing up
36 his Ph.D. program in political science at Wayne State. He's also president of the Des Moines
37 Chapter of the American-Arab Antidiscrimination Committee. Welcome.
38 MR. ALKHATIB: Thank you. Thank you for inviting me. I am the -- I'm the board
39 president and our regional director asked me to appear on his behalf because he was unable to
40 come.
41 CHAIRMAN LANN LEE: If you could pull that microphone closer to you, that would be
42 great. Thank you.
43 MR. ALKHATIB: We as Arab-Americans face discrimination; however, we're not
44 regarded as a minority. But we face all the discrimination that black and other nonwhite
45 communities do face in this country. Discrimination -- we faced discrimination before 9/11, but

1 after 9/1this discrimination intensified. And ADC has a report of the many incidents of
2 discrimination and hate crimes that occurred after the 2001.
3 To the effect of the voting, we had a case in Hamtramck where, where citizens who were
4 not screened and had Arab or Muslim sounding names were discriminated against while trying to
5 vote. Hamtramck is a small city in Wayne County, and Hamtramck has traditionally been
6 Polish; mainly Polish-Americans live in Hamtramck. However, they -- the succeeding waves of
7 immigration were from non-European countries. And now it has a large, a large population of
8 non-European, non-Polish people. It has a lot of Arabs and lot of people from other Middle
9 Eastern communities that are not Arab. However, they do look like Arab and they have Arabic
10 sounding names because they are Muslim. And they have last names like Arahd and Mohammed
11 and names like this.
12 And in the election of 1999, there was a general election for the municipal offices of
13 mayor, city council and city clerk. And under Michigan law, challengers, challengers can be
14 involved in the process where if they suspect that somebody's not eligible to vote, they can
15 approach that person and make sure that they're eligible to vote. And what happened is it was a
16 group called the Citizens For a Better Hamtramck which filed to be involved in the monitoring,
17 stating that they want to keep the election pure.
18 And what they were doing was approaching people on the basis of skin color and on the
19 basis of name that would indicate that they're not -- that they're Muslim or Arab. And about 40,
20 actually 40 citizens were approached. Now, no white citizens were approached and required to
21 conduct an oath of, of citizenship. Actually, despite the fact that a number of these voters
22 presented American passports to prove citizenship, that did not end the inquiry, and it was
23 clearly an attempt to suppress the vote.
24 And actually word, from speaking with leaders in the community, word spread that
25 people attempting to vote from the community were being harassed, and it was, it was difficult
26 to vote. So some people did change their mind about voting because of this. This led to the US
27 Department of Justice being involved in the -- filing an action, and this action was settled. It was
28 brought on the basis of Section and Section 12(d), and this is Page 4 of my testimony.
29 And the action resulted in the city establishing a training program to train election
30 officials and private citizens regarding the proper grounds for election challenges, and training
31 election officials to move challengers who appeared to be discriminating. Third, the city was to
32 provide notices in English, Arabic and Bengali. And the city was to provide bilingual workers on
33 election day.
34 The bottom line of this experience and given the large concentration of Arabic speaking
35 communities in the area, we suspect that this is not atypical, that this does occur in other areas,
36 but given the low numbers, it probably doesn't become a national issue. According to Imad
37 Hamad, who is our Michigan regional director, himself and other people involved in social
38 activism, the involvement of the Department of Justice was most welcome, and it restored the
39 community's faith in the system. It assured them that the right to vote is backed by the
40 enforcement power of the United States.
41 However, at the same time, Wayne County, to look at a accurate state remedy, Wayne
42 County did -- at the time the prosecutor was John O'Hair. And they looked what happened at
43 Hamtramck. They didn't like what happened in Hamtramck, and they looked into how to go after
44 those who, who could -- who interfered in the process to, to make people unable to vote. And
45 from speaking with a prosecutor, who was a young prosecutor at the time, his name is Abed
46 Hamoud, and now he is the lead attorney, he told me that it was difficult to, to find a basis to go

1 after these people who, who did intervene in the process. That they have to, they have to go look
2 through the laws and find a law that would allow them to, to go after those people to make sure
3 that in the future this does not happen, that it does send a strong message that things of this
4 nature would not be tolerated in Wayne County. And finally, we were able to find a provision,
5 actually an obscure, he said, provision in the common law that made a misdemeanor what these
6 people did. So they were charged, they were convicted of -- under that provision.
7 However, to his knowledge, there were no other cases of this nature in, in Michigan, and
8 it took a while for them to be able to, to find some legal basis to go after those people. In
9 conclusion, we do -- we're not classified as an American, and we're not -- as a community of
10 Arab-Americans, we're not -- in Michigan, the area we live in is not covered under Section 5.
11 However, we do support the 1965 Act. We do support the provisions that are set to expire. We
12 hope that they get renewed. We still feel that discrimination is still a reality, that it hasn't ended,
13 and we hope that the law would be made permanent. As has been commented, the rights are nice
14 to read, but the key is enforcement. All the rights in the world are worthless unless there is a
15 strong enforcement mechanism behind it. Thank you.
16 CHAIRMAN LANN LEE: Thank you for that very important testimony. I'd point out
17 Hamtramck was actually the first case that the United States Department of Justice Civil Rights
18 Division filed on behalf of the voting rights of Arab-Americans and Muslim-Americans. Well,
19 we've now come to questions. Joe Rogers, did you want to begin?
20 MR. ROGERS: Yes.
21 CHAIRMAN LANN LEE: While you're thinking, I could ask.
22 MR. ROGERS: Thank you. I'm sorry, Mr. Chairman, I did have a quick question. I was
23 trying to think about this whole issue. I don't know where the designation comes from. As an
24 Arab-American you are classified as being white under what portion --
25 MR. ALKHATIB: Right.
26 MR. ROGERS: -- under what designation of law?
27 MR. ALKHATIB: My understanding is even the census we are considered white, that
28 Arab-Americans are not considered a minority.
29 MR. ROGERS: Mr. Chairman, I have to ask you that. I don't know the answer to that. I
30 don't know about the classification in particular of ethnic minorities and how they're classified
31 for purposes of voter issues.
32 CHAIRMAN LANN LEE: Well, I believe for census purposes, Arab-Americans are not
33 necessarily separately reported. But under some statutes, 1983, I believe, Arab-Americans are
34 considered a protected group under that statute, some of the traditional civil rights statutes.
35 Under the modern civil rights statutes beginning in the 1960s, Arab-Americans are not specified
36 as a protected minority group in the way that African-Americans and Latinos and Native
37 Americans and Asian-Americans are. But I think, I think certainly raising that is an important
38 issue. Certainly after 9/1it's an important issue. But I understand that in Michigan there have
39 been problems like Hamtramck for -- Hamtramck is not singular, is that correct? I mean, you
40 refer to your perception that there was ongoing discrimination against Arab-Americans, and I
41 wonder if you could expand on that actually.
42 MR. ALKHATIB: In the, in the Wayne County area, there is a large concentration of
43 Arab-Americans. And as a new community, as recent immigrants relatively, they feel that there
44 is need to support. However, in the areas where we have low concentrations of Arab-Americans,
45 they are isolated communities and they are afraid to come forth and present. However, our
46 regional office, ADC regional office does receive many complaints about all kinds of

1 discrimination. And if it -- as regards voting, we refer them to the Department of Justice to make
2 complaints.
3 CHAIRMAN LANN LEE: Well, actually, it would be helpful to the commission if
4 maybe our staff could contact your organization and try to get some documentation of the fact
5 that Arab-American and Muslim voters have been having problems and to see what kinds of
6 problems they are and where they occurred. Would it be possible?
7 MR. ALKHATIB: Definitely. Definitely possible.
8 CHAIRMAN LANN LEE: Okay, thank you.
9 MR. ROGERS: Thank you kindly, Mr. Chairman, I appreciate that. That's just helpful
10 there. May I ask questions of the other people?
11 CHAIRMAN LANN LEE: Go ahead.
12 MR. ROGERS: Thank you.
13 Mr. Ritchie, thank you so much for being here. I wanted to ask you a question, if I may.
14 It seems to me that there's this striking this balance, and this whole issue about balance seems to
15 come into play under the Voting Rights Act, in particular as it relates to the preclearance
16 provisions which again deal with essentially what local districts may do with respect to drawing
17 of lines or boundaries.
18 And in particular what's fascinating to me is to hear you talk about essentially how
19 alderman districts were drawn in Chicago. You point to the example, as the chairman notes, of
20 sort of being a salamander example of a district in and of itself. Essentially, you talk about how
21 the black folks are packed into directs, as much as 95 percent of black folks are packed into
22 districts. And then you talk about the fact that essentially we really don't need that many black
23 folks in the district in order to have black representation. What we'd really like to have is only
24 about 65 percent or so in order to have that number.
25 MS. TREGAY: That's correct.
26 MR. ROGERS: It's interesting to contrast your position and opinion, frankly, with the
27 thoughts as articulated by the congresswoman who was on the line about sort of issues related to
28 the, frankly, packing of districts or not having enough minority voters in a district or otherwise.
29 And I'm just wondering if you might expound upon that particular notion. I'm -- what I'm trying
30 to get a sense of, and this has been, no doubt, an issue of some significance, what balance comes
31 into play in terms of minority voters and districts from your perspective?
32 MS. TREGAY: Well, what has happened in Chicago is that we've had a lot of white
33 people leave Chicago. We have -- and what happens is, when they draw these maps, they
34 continue to pack these districts so that we have 95 percent blacks instead of moving where we
35 would have no less of the blacks, maybe 70, 65 or 70 and, and some whites, which would give us
36 additional districts and make the representation fair to the amount of people we have in Chicago.
37 In the 1990 census, we lost 150,000 white people in Chicago. And they still try to keep us
38 down. And I think we have -- the kind of wards that we have with the kind of mayor that we
39 have, who is very strong in support of all the aldermen, they all feel obligated to go along with
40 him 100 percent. And you don't get any resistance. All the resistance comes from the outside. I
41 think that some things are going to change. I think our mayor might be in a little bit of trouble
42 and with so many scandals that are going on in the city of Chicago. But, you know, I don't care
43 how hard we work to do voter registration, they work twice as hard to take the people off the
44 rolls.
45 MR. ROGERS: Do you see this as a partisan issue, because it's fascinating to me because
46 Chicago politics is democratic politics.

1 MS. TREGAY: That's right.
2 MR. ROGERS: Are you talking about essentially the Democratic Party engaged in
3 practices which ultimately deny African-Americans arguably a greater influence in other
4 portions of that city relative to their ability to vote or have votes influence an election?
5 MS. TREGAY: That's correct. And maybe because -- you know, right now we've got a
6 large Hispanic population in Chicago, and we still don't have the correct Hispanic representation
7 that we need. We should have at least 20 wards out of 50 with 40 percent of the population and
8 growing. And we are not getting what we should have.
9 And I think that the good old boy system wants to stay in place that has run Chicago all these
10 years. We had a little break in there with Harold Washington, but it's gone right back to where it
11 was.
12 MR. ROGERS: Thank you.
13 CHAIRMAN LANN LEE: Commissioner Little, do you have any questions?
14 MR. LITTLE: No, I have none.
15 CHAIRMAN LANN LEE: Okay. I would like to ask a question, it's a follow-up to Mr.
16 Ritchie's point about the demographic changes. I notice that in the USA Today that was put at
17 my hotel door this morning that apparently 19 percent of students in the nation's school now
18 speak a language other than English, which is an extraordinary percentage, so I think that sort of
19 backs you up on the point that you're making about seeing changes in the voting, I guess getting
20 a sense of the changes that will come in voting from looking at the elementary school and I guess
21 high school populations.
22 Could you expand a little on what you were talking about in terms of the number of
23 languages, particularly in Minnesota, because we often don't think of Minnesota as a state like
24 California, which I guess, is kind of a rainbow state. The second question I have for you, Mr.
25 Ritchie, is -- actually for probably all of you -- which is do you think it would have made a
26 difference in the situations that you talked about, Mr. Ritchie, in the last election, and Ms.
27 Tregay about some elections over the years, and Mr. Alkhatib in Hamtramck, if there had been
28 federal examiners present during those elections? Mr. Ritchie.
29 MR. RITCHIE: Thank you, Mr. Chairman. We're in the middle of a broad community-
30 wide conversation on the language question because the provisions of the Help America Vote
31 Act, which are mostly being viewed on the question of enabling disabled Minnesotans from
32 voting, bring the possibility of some other options for languages.
33 And I'm meeting with the county auditor in Blue Earth; it's a county fairly nearby. And
34 the possibility that one of the machines they're looking at could handle up to 2languages was a
35 very important point to her. So it seems to me that the problems and challenges that we are
36 seeing in our schools and in our courts and our hospitals, that kind of thing, is generating a
37 conversation, and that conversation is mostly informal and not necessarily led or guided by a
38 civil rights perspective but it is kind of a problem-solving perspective. And, and I think we
39 would -- could find expertise in other community institutions to help think us through this
40 problem. But that being said, the very rapid nature of this change. So, for example, Minnesota
41 was one of the sites where the CIA relocated former allies from Southeast Asia. So we have a
42 very large and now politically active Hmong population. Two elected representatives, fantastic
43 community involvement. But that was a very rapid change. Our Center for Victims of Torture,
44 which is a treatment center here, was a first stop for many coming from Ethiopia, from East
45 Africa as treatment -- a clinic for treatment. But that center then touched off a real joining by
46 families to -- the estimates now, we're somewhere in the 100,000 range of Somalia, Ethiopia,

Eritrya, Aromo, and a very, very rapid expansion in that community. Our expansion of immigrants from Central America during the time of the wars, particularly when it was the most violent, Minnesota had a reputation as a sanctuary, that was a commonly used term, and so there was an attraction. All of these immigrations happened very rapidly. And it's in the rapid nature of them that things happened.

While we're struggling to figure out about perhaps the mechanics of voting and languages, we also note and former Vice President Mondale's institute at the university did a two-year long study of cultural values in Minnesota, especially looking at exurban areas. Very disturbing trends in antiimmigrant feeling often linked to the rapidity of the change. And so we are noting that other problems we will -- we will be facing other problems in addition to just language logistics because of the speed of this change that we, as a community, have to get ahold of. So I think it's not a very commonly discussed subject. And I think we're a state that maybe doesn't talk about all these things. But I think underneath in many institutions, language and other issues linked to immigration and the speed of social change is now coming to the fore. It's being tackled in a courtroom or in an emergency room, in a high school classroom. It's being tackled at the front line first.

It is being looked at by election officials who have a job to do, but I think our political scientists and our political leaders feel it much more in its more darker elements, and they are concerned about what this will do to our whole community. So somewhere in this process, the extension and perhaps enhancement of the Voting Rights Act could play a role in trying to give a more positive and some leadership to this question, but it also could be manipulated as a kind of a tool or a club or something like that and kind of inflame some of these issues. So I don't think we have our solutions here yet, but I think our community is in conversation about them.

And I would, you know, appreciate an opportunity over time to forward to you, for example, the study that Vice President Mondale prepared which I think raises some serious questions about our future, but also some of the creative solutions that some of our counties are approaching right now on the language question. And I'll try to do that very rapidly because I know you're working on this right now.

CHAIRMAN LANN LEE: Well, I wonder, was Hamtramck one of these communities that saw a rapid demographic change?

MR. ALKHATIB: Actually the wave of immigration that began in the -- after the change of the immigration law in the '60s actually led to a different kind of immigration to this country. And the new immigrants were not, definitely not European, not Polish and they are different languages.

And many of them live in communities where actually they -- the, the fact that most Hamtranck people in the community like them who run restaurants and gas stations and things of this nature makes them less able to learn the language, actually. And, in fact, living in an ethnic community makes them unable to learn the language, and therefore when they go to vote, they don't have the language ability to understand.

CHAIRMAN LANN LEE: Sort of like the reservations.

MR. ALKHATIB: I wouldn't call it the reservation.

CHAIRMAN LANN LEE: I meant Native Americans.

MR. ALKHATIB: They, they live there because the new immigrants, they don't know the country too well. They come from the same village, so they think then they get help if they need help and things of this nature.

1 CHAIRMAN LANN LEE: I just wanted to follow up on something you talked about, Mr.
2 Ritchie, talking about what the local election officials need.
3 Is there a role -- is there need for technical assistance and grants and things of that kind,
4 because in a time of rapid change, of course, you have to, I think your budget doesn't go up,
5 necessarily. So maybe you could address that since it sounds like you've been in contact with a
6 lot of local election officials.
7 MR. RITCHIE: Yes, and I will only preface my comments by saying that I am finding
8 that township election officials, the city and the county election officials are an unbelievably
9 positive problem-solving force. And mechanisms that you might have to be in touch with them
10 directly would be, I think, very valuable, because they are -- you know, they're actually the
11 people who run elections in the country. And I have had the opportunity to meet with a number
12 of them and our statewide association, in fact, is meeting next week. And so we've been in
13 conversations about some workshops about the question of assistance and leadership and
14 direction on this question. They are being driven almost exclusively by the disability provisions
15 of the Help America Vote Act. This is the big thing coming down on them. There's quite a bit
16 of federal dollars for some things like equipment purchases, but that doesn't answer the questions
17 of voting in a place that doesn't have electricity or doesn't have heat or if you have 50 voters,
18 how can you afford to reprogram and on and on and on. And so there's kind of a huge flood of
19 money going to come out for equipment, but there isn't a future that explains how that equipment
20 will be handled.
21 And our state has been cutting back local government aid, and in the case of a county I
22 was at last week, 50 percent. And the money for elections is generally coming out of the general
23 budget, so there's that crunch. Now, the leadership part is the most interesting to me because if
24 you can just like hold your breath long enough and look at it, the imposition of some of the
25 requirements around machinery available for disabled voters does create the possibility of
26 language -- addressing some language issue. That doesn't give you electricity or heat or money in
27 the budget, but it gives you a different thing. The second thing is that it raises fundamentally the
28 question of access to voting. Now, you know, that could be a topic of very little interest to most
29 people, but frankly, the 2000 election, the 2004 election and some of the problems we've had
30 here has raised public interest and public concern about these questions. So we have an
31 opportunity when -- it's, perhaps an unfortunate coincidence, but in any case, we now have a
32 higher public awareness that it does matter who is running the elections. It does matter who's
33 sitting in the judge's chair or the challenger's.
34 So leadership that might come from a national level, governmental or nongovernmental
35 organizations or civil rights organizations that say, look, HAVA creates a lot of trouble, it also
36 creates some opportunities, let's try to put that together into something that we might tackle.
37 Because it may be that there's a different kind of trigger that if counties have certain kind of
38 language demographics right now and in the near future, they get assistance to get the kind of
39 equipment and the kind of support that makes handling those language challenges actually
40 possible. Because you could just have a court order that says, the county, you got to provide
41 these things in X number of languages. That's one way to do it. But another way to do it is say,
42 hey, you have this HAVA requirement. You're going to have to replace all of your equipment.
43 Here's a way we can help you with some information, technical assistance and maybe a little bit
44 of money to be able to get the equipment that can give you 20 languages.
45 I was in a county just south of here, Austin, which is famous for Spam and the Hormel
46 Company. Half of its manufacturing base is now all from more or less three villages from

Mohaka. They have to change completely because they vote by paper ballot, except in the city. And so now they have this opportunity. In fact, a very innovative county auditor asked me what I thought -- just, I mean, I was talking to him getting his information -- what I thought about one particular machine. And he said, "I like it because it could give me the language thing I need." So it means that they are thinking about this If they're asking somebody like me who's not an expert in any way. So that says they're open to leadership, would like real information, and are ready to make changes if what change required can be made available to them. So I would urge you to be in touch with that level of election official because I think often folks might talk to secretaries of state. But who really runs elections are township officials, city clerks and county auditors.

CHAIRMAN LANN LEE: Well, actually, I wanted to thank you for reminding us of the importance of townships and some of the smaller entities. We usually think of state, county and city elections but, you know, I think all the testimony has actually been about elections below that level. Of course, we're talking about the city of Chicago --

MR. RITCHIE: Yes.

CHAIRMAN LANN LEE: -- which has its own world. But I had asked this question about the utility of federal examiners, and I wonder if in the kind of incidents you were testifying about whether federal examiners would have made a difference.

MS. TREGAY: Let me just say in Chicago in 2000, we lost more votes than Florida. We were not on the air. Nobody knew how many votes we lost. And it was the same kind of situation in Florida where people voted for the wrong people because the ballots are so close to the names and numbers. But what is really crucial is we had an application that people had to fill out, and if you didn't fill it out correctly, they didn't count your ballot. And we had a lot of those. Over 20 percent of the people didn't fill out the application correctly. The application should not have been that hard.

CHAIRMAN LANN LEE: So what was the disqualification range in, let's say, in the African-American population?

MS. TREGAY: It was over 20 percent for just the applications. But then there were other reasons why they weren't allowed to vote. And supposedly when it comes up again, they're supposed to have it much easier. But this thing that you all have put out that says you have to have a driver's license, everybody doesn't have a driver's license. And it's not because they're suspended, it's because they can't afford a car. So --

MR. ROGERS: What are you suggesting on that? Forgive me, Mr. Chairman. What are you suggesting? People clearly have to have some form of identification to make sure the state --

MS. TREGAY: Then you need to get a state ID down here.

MR. ROGERS: A state ID would be appropriate, you're suggesting?

MS. TREGAY: It's the same -- you get it the same place you get your driver's license.

MR. ROGERS: Absolutely. You're not suggesting that an individual ought to not have identification.

MS. TREGAY: No.

MR. ROGERS: You're just simply saying that the driver's license issue, to require a driver's license as opposed to --

MS. TREGAY: Right.

MR. ROGERS: -- another form of state-issued ID.

MS. TREGAY: You know what? I've been fighting with the board of elections all my life about the social security number, and they've now gone to four. But people, anybody who's had trouble -- my daughter had $100,000 when someone stole her wallet and they had her social security number and they opened up bank accounts. And there's so much that goes on. I mean, it even happened to me. Somebody got ahold of one of my checks and had them printed. What we have to -- you can't use a social security number for identification. I think the driver's license is okay, but everybody can get a state ID. So I mean, I think this is just making it very hard on people like me who do voter registration, and on people that won't give you their social security number and don't have a driver's license.

CHAIRMAN LANN LEE: Any of the other panelists want to address the question about being examined?

MR. ALKHATIB: My understanding is in Hamtramck, for a number of years monitors were sent to watch the election and --

CHAIRMAN LANN LEE: This is after the --

MR. ALKHATIB: -- after the 1999 election. And actually, the city entered into a consent agreement with the Department of Justice that ended in June 2004. I'm not sure how much increase in turnout occurred because of this intervention, but from my involvement in the community, I know that it increased confidence in the process. And the monitors assured people that they would be able to exercise their right to vote without anybody harassing them.

CHAIRMAN LANN LEE: Okay. I'm sorry to monopolize the time.

Ms. Meeks.

MS. MEEKS: All my questions were answered.

MR. CHANDLER: Just one question for Mr. Ritchie. Did I understand you earlier when talking about the problems, for example, of the Hmong, to be suggesting 203 coverage of all or parts of the state of Minnesota?

MR. RITCHIE: Your presence here has touched off a lot of conversations. And my testimony today was the subject of many, many people's inputs, and it has now generated a question about would Minnesota want to try to agitate in some way or how would the trigger mechanism work. And, you know, so far I can't say there's a consensus because there are perceived negative aspects to it. But what has happened is people are saying, we now have to talk about the language elements of voting and start to put forward some suggestion and we need to do it right now.

And so -- I mean, this is, you know, maybe not relevant to your national work, but your presence touches off conversation that then gets to real problems. The language one happens to be one that we are tackling. The problem with the challengers we had to tackle through state law. Maybe there's something in state law that we will do about the languages. But I would say for the moment right now, we are in kind of the discovery stage of what our -- I started asking school districts about languages. And I thought maybe they would say there was a dozen languages, and Anoka-Hennepin said there were 4or 43 languages. So like that's a whole other level, like do we need to look at machines that might handle 100 languages instead of 20. So I don't think we have dealt -- dug deep enough into our own situation to know what might be a proper solution. But we now know that we have a window, and we should address it in a very affirmative way. And we need to also be paying attention to how the reauthorization might have components that might trigger certain things.

And then the final question is, is there another approach where we got more leadership, perhaps money, but leadership and technical assistance from a more national perspective that could help us. Because, you know, we're not -- I mean, San Francisco in California has tremendous experience with multiple languages and elections. I had lived there for 10 years. And it might drive people crazy, but there's many languages available. We need probably expertise from other places first, and then the conversation in the civil rights communities and others might lead us to say, we need some more federal intervention.

You know, it's perhaps -- on the question of would more federal monitors have made a difference here, we, we need to know more about what happens in more isolated, rural communities. Our reservations, our Native Americans are half in the city but half in very isolated places. I think we don't know enough that there may be some situations. But what is changing is that our particularly East African community and our Central American community are now dispersing in rural areas. I don't think we know exactly what, what the future is, but we need to deal with the problem at home first, and then if -- in the future we need to pay attention to that as a potential option for us.

But your presence and this reauthorization, I really appreciated that comment. Perhaps it was Reverend Jackson who said, "By having a reauthorization every X number of years, this conversation takes place." And I will only say in Minnesota your coming here has really opened up conversation that I think will have a very positive outcome at our own level very directly right here in this state.

CHAIRMAN LANN LEE: Well,I want to thank all of the panelists for their insightful testimony. I think it's been very helpful, and we welcome all of your offers to give further documents. It's also my pleasure to announce that we will have lunch now, and we have about 45 minutes. There's lunch in the Seattle Room, which is accessible through the back door. We will start again promptly at 2:00 with the second panel. In the second panel will be the Honorable Michael Murphy, Jorge Sanchez, Ellen Katz, Gwen Carr and Elona Street Stweart. So we hope the panelists will be in their chairs at 2:00. Thank you very much.

(A lunch recess was taken.)

CHAIRMAN LANN LEE: Okay, we're now ready to begin our second panel. And what we're going to do is run through the second panelists. I don't believe we have any congressional testimony coming from afar. So we'll begin with the Honorable Michael C. Murphy. Mr. Murphy is the state representative for the 68th House District representing the greater Lancing area. Prior to being elected to the Michigan House of Representatives, he was the president of Lansing City Council. And last, but not least, he's the pastor and founder of the St. Stephen's Community Church, United Church of Christ in Lancing. Welcome --

MR. MURPHY: Thank you, Mr. Chairman.

CHAIRMAN LANN LEE: -- Representative Murphy.

MR. MURPHY: Thank you very much for this opportunity to come before you and the Commission to make some brief remarks. Being an ordained minister, I don't want to take too long because I know I have several others who want to speak as well. But again, I thank you for this opportunity. I come as chair of the Michigan Legislative Black Caucus, which is a 22-member legislative caucus in the Michigan legislature.

The Legislative Black Caucus was founded in the early '70s to be a voice and to advocate for African-Americans living in Michigan, especially coming out of the late '60s with the Detroit riots. It was at a time when people like Coleman Young, the late Coleman Young, the former mayor of Detroit, was involved in the Michigan senate.

1
2 And our caucus comes from all across Michigan. Twenty years ago there was a time when
3 mostly all the members were from Detroit. Now the Legislative Black Caucus comes not only
4 from Detroit but from Pontiac, Flint, Saginaw, Lancing, Port Huron and Kalamazoo.
5 When you think about Michigan and you think about where the African-American
6 population is in Michigan, I like to talk about the three Is: I-75, I-96 and I-94. When you go
7 down from Detroit to Saginaw along I-75 you come to Pontiac, you come to Flint, you come to
8 Saginaw. When you do I-94, you come to Ann Arbor, Jackson, Battle Creek, Kalamazoo and
9 Benton Harbor to the far west. When you talk about I-96 from Detroit, you're talking about
10 Lansing, Grand Rapids, Muskegon Heights and Muskegon. So that's where the African-
11 American population is concentrated along those particular thoroughfares.
12 Among our issues as a caucus, certainly election reform is on our agenda, although
13 insurance and homeowner insurance reform is a big issue in Michigan when you talk about
14 redlining. Certainly education and -- education, access to health and jobs. Michigan, just as a
15 way of some context, is probably one of the most segregated states in the nation. And I say that
16 not out of -- to be putting that out there lightly, but a recent report shows that five of the 10 most
17 segregated cities are located in Michigan. That's something I'm not proud of, but that speaks to
18 what Michigan, where we are today as a state.
19 It's a Great Lakes state, it's a beautiful state, but yet cities are segregated and there's no
20 indication that that is changing. Just to give you an idea about Michigan, it was said earlier
21 about how some things are being used today. We have what is called the Michigan Civil Rights
22 Initiative, which is not really a civil rights initiative, but is an effort to turn the hands of the clock
23 back by eliminating affirmative action in the state of Michigan. A very controversial issue, one
24 that the State Board of Canvasses earlier this week refused to take up because of the allegation
25 that people were tricked into signing a ballot petition.
26 When you hear Michigan Civil Rights Initiative, you think of something positive and
27 favorable, but it's not. And so it's an ongoing issue in the state of Michigan, and more than likely,
28 it will be on the 2006 ballot. In the report it states, when you look at Michigan, that there are
29 certain -- Allegan County, that location, that locality was not in compliance with the Voting
30 Rights Act, I believe Section 203. And also it was said earlier about Hamtramck. Buena Vista,
31 which is in Saginaw County, is also a locality that is under the Voting Rights Act. In 2002, in
32 my second term as a legislator, we were presented with legislation that would put on the ballot
33 before Michigan voters what is called the voter identification proposal that would outlaw straight
34 party voting. And that measure was defeated.
35 But what that measure would have done essentially would have not only eliminated
36 straight party voting, but also would have required voters who did not -- whose names did not
37 appear on their precinct registration list to show a photo identification.
38 During the 2004 election, there were problems, long lines in Detroit and other cities,
39 denial of provisional ballots. Leading up to that election last year, we had one of our former
40 legislators who made the comment in the Detroit media that we must suppress the Detroit vote.
41 That controversial comment made its way all the way to the New York Times. And this
42 legislator, who was a Republican, denied that it was racially motivated, but it was the buzzword
43 to keep African-American votes, especially in Detroit, at a minimum and to discourage that. That
44 was an issue during that time. There were misleading phone calls made to voters in Detroit,
45 Flint, Pontiac saying that they wouldn't be able to vote at a particular site. There was an incident

with the secretary of state's office putting out a flier that said that people could no longer register to vote because the time had passed, which was not true.

Voter intimidation, off-duty police officers at the polls, particularly in African-American and Hispanic precincts, is something that happens just about every national election in Michigan, and it's something that our caucus wants to address and remove those type of barriers. In closing, let me just say that our caucus is working to remove direct and indirect barriers, and certainly we want to see the Voting Rights Act reauthorized. In April, we issued a resolution that is still pending in the Michigan legislature that would go to congressional delegation members, as well as Senators Levin and Stabenow to make sure that they support the Voting Rights reauthorization.

We are working to make sure to have no reason to have absentee ballots upon request. We're working on other election reforms, such as on-the-spot registration. One of the efforts coalition -- our caucus is involved with and one that I think is so important is coalition building. We're trying to get our resolution passed in a bipartisan way. We're working with Rainbow/PUSH and NAACP, the National Caucus of Black State Legislators, as well as the National Caucus of Hispanic State Legislators, faith-based organizations, as well as neighborhood groups.

We are promoting within the schools. We met recently with our school superintendent of Michigan schools, as well as the Michigan State Bar Association and the Educators Association to begin having more about the Voting Rights Act of 1965 taught in the curriculum in our schools to bring awareness to our young people.

This and other items that we are seeking to promote in Michigan but we encourage you. This needs to be reauthorized and we commend the work that you're doing, and certainly hope that when your report comes out, it will be a strong report and one that the Congress would act speedily. Thank you, Mr. Chair, and commission.

CHAIRMAN LANN LEE: Thank you, Representative Murphy. Our next speaker is Maggie Kazel, an activist from Duluth, Minnesota, a psychology instructor. She writes grants for the Fond du Lac Community College and has worked for Winona LaDuke, and co-founded the White Earth Community Resource Alliance to build safety education awareness for American Indian women and girls. And last year she ran the Voter Education Program as public policy coordinator for Community Action Duluth. Welcome, Ms. Kazel.

MS. KAZEL: Thank you.

CHAIRMAN LANN LEE: Have I mispronounced your name, by the way?

MS. KAZEL: You got it right. And thanks to Jorge Sanchez. I have a long drive ahead of me and he switched places with me. Thank you.

CHAIRMAN LANN LEE: We appreciate your coming all this way.

MS. KAZEL: First to give you a sense of how I view things, I'm not from here. I did -- I was born in the Midwest. However, I spent many years outside of northern Virginia in North Carolina and in South Carolina. And then I moved here in 1975. I stayed in the Twin Cities for 23 years, and then I moved up north for the last 10. When I moved here in 1974, I was shocked. On my first day here I saw only one African-American person. I was amazed, I, I had no idea. I had chosen to come here for college and for the arts. And my response to that was to raise money for the Children's Defense Fund with the Southern Poverty Law Center because it was -- it was just jarring to live in this environment after coming from the East Coast and the South.

And I've continued to find that that's true, especially as I move north. It's geographically isolated. Up north, we used to have more influx of different cultures when the shipping industry

was with us. It no longer -- it's just dwindled to just about nothing. And you take that with the economic depression of the region I come from now in Duluth, and that economic tension is, makes the racial tensions that much greater right now. So last year I was working with a coalition of Get-Out-The-Vote groups in Duluth, and I kept saying, you know, what I'm hearing is that we're going to get challengers, we've going to have a tough time at the polls, and people didn't believe me. I said, "You know, this is what I'm hearing." And they literally said, "No, it not going to happen, it's not going to happen here." And so what we tried to do was a few of us was organized amongst themselves to make sure that the four neighborhoods we were most concerned about had some people ready to vouch. We still didn't have enough. It was devastating what happened at our polls. And right up to the last three days before the election, the secretary of state kept changing her mind, basically, about tribal IDs, which just threw us into a tailspin. You know, we put out one thing and we'd blanket the neighborhood, an amazing number of hours that we would spend trying to say, don't worry about it, you know, bring this.

And the next week, wait a minute, okay, bring that tribal ID, but also if you've got a utility bill. I mean, we, we just kept running back and forth. It was horrible. That was a huge problem. In the 10 years I lived there and voted there, I'd never seen this many people of color come to the polls. It was a sea of white up until this last election literally. And so there was tension in our polls like you wouldn't believe in places.

Our city has received a lot of recognition in the last few years for a monument to lynching victims, the Clayton, Jackson, McGee Memorial. So you would think that with that kind of awareness that we would have more going on. We really don't. There's just sort of this lethargy in the sense that it will be fine, it will be fine. It really wasn't. And I'll read for you what I gave to the state legislator on March 21st. On November 2nd, I witnessed several acts of voter discouragement and harassment. I also witnessed a very calm, prepared Native American by the name of Michael Sayers, who hopefully you'll hear from later today, as he endured tense examination and cross-examination of his people as to their right to vote. Michael had registered hundreds of natives all through our city in the months prior to the election. On the day of election, he gave rides to and from the polls, several times observing, as I did, his people being questioned vigorously and relentlessly over and over. At the Duluth Public Library downtown branch, it was common to see all people of color experience an unusually high level of questioning by judges and mostly by challengers. The effect was chilling. Many were turned away and many more witnessing this decided to avoid being grilled, opting to relinquish their right to vote. Several people broke down in tears as they were questioned, leaving with looks on their faces of shame and humiliation.

At the downtown Duluth Public Library where I personally have voted the last nine years, my worst fears regarding challenger behavior came true. One set of challengers were almost zealot like in their mission. They looked a great deal alike, all Caucasians wearing business suits and trench coats and all carrying cell phones. When questioned as to where they came from, three of them identified as attorneys from the D.C. metro area, northern Virginia to be specific.

We decided to go up and ask them, "Where are you from?" And they said they had been in our city for a week getting ready for this election and paid. These folks stood out very obviously and made a point of walking all of the site frequently. It felt to be intimidating, like soldiers guarding a site. Four separate times at this polling site I served as a voucher, and all four times I went through a challenge. On the last challenge, I clearly irritated one party's challenger beyond her tolerance level. She repeatedly announced her challenge until several election judges

reminded her that I had worked as a family advocate for nearly a decade and knew many people from all walks of life. I knew very well the stakes attached to my oath, but the fine amount of $10,000 was loudly announced as I signed my name, as was the felonious nature of my possible crime. This particular challenger then flipped open her cell phone and basically called in an alarm to her party. Within 20 minutes a group of about 30 to 40 people raucously assembled outside of our library. Their presence, their yelling and their posters posed such an intimidating, harassing presence that the librarians were forced to call the police. The demonstrators were also blocking the polling site entrance. I had a teenager with me. We left by the back entrance because she was frightened. I explained to her that the fear she was experiencing was similar to that of the people now afraid to enter the polling site. I also explained to her that this was democracy being thwarted. And then we discussed the McCarthy era and how similar it was to the menacing tone and presence of certain challengers at our polling place.

When I gave this testimony to our state legislature, they questioned me vigorously, and then decided to add the amendment asking that we make a law saying we can't have challengers from out of state, they at least have to live with us, which I think is fair. And it hadn't occurred to us. I mean, you know, when you're experiencing it, it hadn't occurred to us to say, you know, why you here from wherever you came from. But the first person to walk up and ask somebody was a Moose Lake prison guard, and he decided he was just going to go ask them because he wasn't intimidated by them and many of us were.

Also to note, women from a battered women's shelter. We had a whole group that had to leave because they couldn't prove where they live. They didn't want to say where they lived, so they had to go back to the shelter and then come back again. And what I will term loosely white trash, people who were poor and who were dressed not in middle class clothes were also challenged vigorously. I mean, this was really well organized. And one thing I noted when we came down to the state legislature, someone had done their homework and found that in 1930s in our state the voters' ballots reflected 26 languages. So we do have a history of having done it right. But my concern is that we -- of those three provisions that we really need observers at our polls. Thank you.

CHAIRMAN LANN LEE: Well, thank you very much, Ms. Kazel. Because Ms. Kazel has to leave early, if there are any questions from commissioners, we should ask them now. Ms. Kazel has an arduous drive back home. Go ahead Ms. Meeks.

MS. MEEKS: What percent in that area is Native American?

MS. KAZEL: The registered percent is about percent. I think it's higher because the population moves frequently. And the ways that we document don't always reflect the actual population. There are two -- well, there are really three neighborhoods: Lincoln Park, the neighborhood I live in, Hillside, and a little bit on the east side that are all native neighborhoods. And it's -- I'm sure it's higher, I'm sure it's probably 5 percent.

MS. MEEKS: Do you know what percent of those turned out?

MS. KAZEL: Turned down?

MS. MEEKS: Turned out.

MS. KAZEL: Oh, turned out. Michael would have that. I know that he registered between three and 400 Native Americans, but I don't know the percent.

MR. ROGERS: This problem that you're talking about -- excuse me, Mr. Chair. The problem that you're talking about is largely a problem among new voters and not necessarily voters who have had a history of voting?

MS. KAZEL: The problem is --

MR. ROGERS: The people that you were seeking to get to the polls?

MS. KAZEL: The new voters should have been old voters. The problem is the entrenched racism of Duluth and the economic tension. What I think happened is that the economic tension and the fact that we -- our town has always voted one way strongly the last --

MR. ROGERS: "One way" being which way?

MS. KAZEL: Democratic. That what happened was outsiders were contacted saying, this is a target spot. We need to really target this town. And we, we really took the hit. We've never had a good push to get the native vote out. We've never had a good -- there is NAACP work in our town to get the African-American vote out, but it's not been strong. And then this last year was unprecedented, the amount of effort that went into it. They should have been recruited years ago to vote, but it's that type area.

What most people think of and what I see in the United States is that they think of the South as the place that's the most difficult place to live if you're a person of color.

Living up north, my daughter's half Anishnabe. Her grandmother was killed walking home from work one night just because that was -- that's sport up there at night. And it's just a common sport to amuse yourself, is to open your door as you're driving past an Indian and that's how she was killed. It's, it's really just geographically isolated, and bad economy fuels the racism.

MR. ROGERS: So you'd describe it purely as a problem of racism, in and of itself, essentially whites and their racism towards Native Americans --

MS. KAZEL: I think it was --

MR. ROGERS: -- which cause these problems here.

MS. KAZEL: Yes. It was bad enough to begin. And then you add casino moneys coming in and the economic tension of the fact that we're economically depressed, and, and it's fueled it. It's just really tense.

MR. ROGERS: Were there ever any complaints made to the US Civil Rights Commission about this?

MS. KAZEL: None that I'm aware of, no.

MR. ROGERS: Was the state attorney general ever involved in this process at all?

MS. KAZEL: We tried to contact the attorney general, and we didn't get any feedback through any office, the Community Action Agency.

CHAIRMAN LANN LEE: Just to get the background, what is the racial mix in Duluth?

MS. KAZEL: We have, it's at least -- predominantly Caucasian. We're talking probably 9percent and it's really high. And of that, we have in the last five years a new African-American population that's moving in. We lost a Hmong population due to the AFDC law changes. They all moved back to the cities and it just became horrible to live there. And we've always had a strong Indian population for up north; it remains strong. Like I would say on the rolls it's percent. I would say its probably more like 5 percent.

CHAIRMAN LANN LEE: Any other questions? Commissioner Davidson.

MR. DAVIDSON: Ms. Kazel, you read to us from the statement that you read to the legislature.

MS. KAZEL: Yes.

MR. DAVIDSON: Was that the entirety of your statement that you read to us or are there portions of it that you read to the legislature that we don't have access to?

MS. KAZEL: No, I read you the entire testimony.

1 MR. DAVIDSON: And am I correct in understanding you to say that as a result of your
2 appearing -- at least partly as a result of your appearing that a law was passed --
3 MS. KAZEL: Yes.
4 MR. DAVIDSON: -- by the legislature?
5 MS. KAZEL: Well, I'm sorry, it's still being debated. It's on, it's on the books. It's -- it's
6 not on the books, it's in process.
7 MR. DAVIDSON: Okay.
8 MS. KAZEL: Yes.
9 MR. DAVIDSON: Thank you.
10 MS. MEEKS: Can I just ask?
11 CHAIRMAN LANN LEE: Go ahead.
12 MS. MEEKS: So challengers, I'm not -- they can challenge whether that person is who
13 they say they are --
14 MS. KAZEL: Yes.
15 MS. MEEKS: -- is that it?
16 MS. KAZEL: Yes. And they can challenge the voucher as to -- I was just told that I was
17 lying. And I live in the poorest neighborhood. I've lived there nine years. And I've worked in
18 my neighborhood for nine years. And I just said, "You know, I do know all these people and they
19 all know me." I, I got really grilled because I forgot one lady's last name. It was like, wow, you
20 know, I'm sorry. You know, I'm getting premenopausal here, I have these moments, I can't get
21 always get the name.
22 But by the third challenge, you know, the judges had started checking around to make
23 sure that I was who I said I was. And then the fourth challenge, they did turn to the challenger
24 and said, "She does know what she's talking about."
25 MR. ROGERS: Mr. Chairman --
26 CHAIRMAN LANN LEE: Sure.
27 MR. ROGERS: -- I wanted to get one factual clarification, if I can. What's so important
28 about the Voting Rights Act is to establish not just the partisan nature, sort of Republican versus
29 Democrat stuff, but really to understand the underlying implications related to race, which is
30 really what the Supreme Court has said, so that's really what I'm trying to understand here.
31 THE WITNESS: Okay.
32 MR. ROGERS: The judges presumptively here are both Republican and Democrat, is that
33 correct?
34 MS. KAZEL: Yes, I would think so. I don't know that for sure.
35 MR. ROGERS: I'm nearly certain of the requirement that at most polling sites, the
36 requirement is to have a judge of both parties so that you don't have issues related to one party
37 favoring the other.
38 MS. KAZEL: Right.
39 MR. ROGERS: But yet you described the problem as essentially a problem of judges as a
40 whole, regardless of party orientation --
41 THE WITNESS: Judges --
42 MR. ROGERS: -- thus racism's exercised --
43 MS. KAZEL: Yes.
44 MR. ROGERS: -- by both Republican and Democrat white people.
45 MS. KAZEL: Yes. My -- well, I call them the council of the silver hairs. At my public
46 library, the same troop of little white ladies come in every year to do our deal. And I'm telling

1 you, I find them intimidating. They just like -- you know, want the letter of the law, you know.
2 And if you don't have the right ID, they're just intense. And I think, you know, it's just the way
3 it's been accepted to do it. And I'm assuming they're bipartisan. I don't know. But the racism is
4 in the drinking water really thick up there, and they don't want anybody to get out of line. So
5 they kind of see themselves as, you know, we're going to maintain here, and they do a good job
6 of it.
7 CHAIRMAN LANN LEE: Jon Greenbaum also wants me to point out that the way
8 challenges are done in each state actually differs from state to state, so this is the system that
9 exists in Minnesota.
10 MR. GREENBAUM: I meant poll workers. Joe, it's not necessarily the case. Some states
11 have minimum requirements about Democrats, Republicans. In some states it's not based on
12 party at all.
13 MR. ROGERS: Okay.
14 CHAIRMAN LANN LEE: Okay. Well, thank you --
15 MR. LITTLE: I have one question.
16 CHAIRMAN LANN LEE: Oh, excuse me.
17 MR. LITTLE: Were those discrepancies reported to the department of human rights?
18 MS. KAZEL: We wrote them up and distributed them to department of human rights, one
19 commission that I'm forgetting the name of, and a group called NAPA, which is the group that
20 kind of coordinated our Get-Out-The-Vote effort in Minnesota. Association of Progressive
21 Agencies. And we've, we've been taking our testimonies anywhere we can, so I'm pretty sure it's
22 lodged as many places as we can find.
23 MR. DAVIDSON: Mr. Chairman --
24 CHAIRMAN LANN LEE: Sure.
25 MR. DAVIDSON: -- one more question. Would it be possible for you to give the
26 commission that material that you have, the complaints that you have lodged?
27 MS. KAZEL: Sure, yes.
28 CHAIRMAN LANN LEE: Including the agencies that Commissioner Little mentioned.
29 Well, thank you very much Ms. Kazel.
30 MS. KAZEL: Thank you.
31 CHAIRMAN LANN LEE: Thank you for coming.
32 MS. KAZEL: Oh, glad to be here.
33 CHAIRMAN LANN LEE: And have a good drive.
34 MS. KAZEL: Thank you.
35 CHAIRMAN LANN LEE: Our next witness is Professor Ellen D. Katz. Professor Katz
36 teaches voting rights and elections, property law, legal history and equal protection at the
37 University of Michigan. And prior to the University of Michigan she practiced law as a lawyer
38 at the United States Department Environmental and Natural Resources Division in the appellate
39 section. Professor Katz is well credentialed and has written on voting rights matters. Welcome,
40 Professor Katz.
41 MS. KATZ: Thank you very much. And I want to thank the Lawyers' Committee for
42 organizing this event, particularly Jon Greenbaum for inviting me today. I have the good fortune
43 today to brag about my students, and I'm going to just talk briefly about a project that a group the
44 University of Michigan law students have under way. I know some members of the commission
45 are familiar with it or at least somewhat familiar with the project already. We call it the voting
46 rights initiative as part of the Michigan election law project. And what the students are doing is

1 cataloguing every decision handed down by a federal court under Section of the Voting Rights
2 Act 1982. And the plan is to provide as detailed a portrait of Section litigation as possible using
3 publicly available published decisions.
4 It's our premise that a detailed portrait of this litigation, the core permanent provision of
5 the statute, is essential to the discussion on reauthorization about the provisions that are actually
6 set to expire. So I want to say a few words about sort of what, what we're doing and then some
7 preliminary findings that we have. And they are really preliminary, but we hope to have more
8 complete results by September or so, and then close with just a couple thoughts about why we
9 should care about this. As I said, we're looking at every reported Section lawsuit that's available
10 with a published decision on LexisNexis, Westlaw and that reached what we're calling a liability
11 stage judgment, meaning that one court reached a determination that Section 2 of the statute had
12 been violated or was not violated, that it got past preliminary matters. And we're coding all the
13 cases according to a bunch of factors. The factors the Supreme Court articulated in Thornburg
14 versus Jingles, the so-called Jingles factors, to see whether those are met in any case.
15 And then most specifically the senate factors, which were the factors the senate listed in
16 the amendments of 198to the -- to Section of the Voting Rights Act. Factors the senate said
17 would be relevant in considering whether Section of the statute had been violated.
18 And I don't want to go through all of them, but just, you know, a laundry list of factors, a
19 history of discrimination that affected the rights of members of a minority group to register to
20 vote, racially polarized voting, the use of a candidate slating process for which racial minorities
21 were excluded, racial appeals and campaigns, nonresponsiveness of elected officials and others.
22 And so we're looking to see every time a federal court found the existence of one of these factors
23 or more of these factors since 1982.
24 We'll be able to tell you trends over time. The number of these factors that were found,
25 the number of cases that were found in the early '80s, the mid-'80s, the early '90s and so on,
26 we'll be able to track changes. We're looking at all 50 states, so we're looking at jurisdictions
27 that are covered by Section 5 and those that are not. And we hope to be able to make some
28 comparative statements about the course of Section litigation as a consequence. We're also
29 coding all the cases in terms of the minority groups that are involved, the governmental unit that
30 is being challenged, state, local, county and so forth, and the types of practices that are -- that
31 have been challenged. We have some nifty technological folks working with us, so we're going
32 to put this all together on a Web site that will be publicly available. We'll have the data there, but
33 it will also be available for interested researchers and others to search. If you want to find out
34 how many at-large election practices were challenged in Alabama between 1988 and 1994, you'll
35 be able to do that. If you want to find out about how many cases involved African-Americans in
36 North Dakota or somewhere else, we'll be able to tell you that. Was there racially polarized
37 voting, did a finding of racially polarized voting give rise to violation or was it correlated with a
38 violation of Section and so on, so you'll be able to do your own searches as well as our
39 information.
40 I would have liked to give you the final results. The students have been working hard.
41 We're not, we're not there yet. We've completed the covered states, and we've completed a few of
42 uncovered jurisdictions or partially covered jurisdictions, and we optimistically anticipate having
43 them all by September or October. So I just want to give you a couple. I don't want to bore you
44 with numbers, but I just want to give you a couple of preliminary findings -- or not preliminary,
45 the findings from the covered jurisdictions only. So we're talking about states that are wholly
46 covered by Section 5 of the Voting Rights Act. And in those states, just a couple of numbers,

1 we've identified 133 lawsuits filed under Section 2. And of those, 93 ended with a liability
2 determination, meaning they got past preliminary matters. And 93 lawsuits in these covered
3 states found that Section was or was not violated.
4 And of those are numbers -- 37 percent, 37.6 percent, in fact, found violation of Section
5 2; found that the practice being challenged was discriminatory in result. The next statistic I'll
6 give you is very shaky because it's comparing it to the noncovered states, and we don't yet know
7 -- we don't obviously have the universe of it. This appears to be a far higher number. The trends
8 we're seeing so far bear out that we're finding many more Section violations in states that are
9 covered by the voting -- by Section 5 than elsewhere.
10 Again, I, I pause in saying that because we haven't counted all the other states, but in the
11 noncovered states that we've looked at, we're only finding -- let me get the right number -- 14
12 percent rate of violation where courts have reached a judgment there. The overwhelming
13 number of lawsuits we've found have been brought by black plaintiffs. Ninety, 90 percent of all
14 the lawsuits, 97 percent of the ones have that have gone to judgment. Latino second with 14
15 percent. The numbers don't add up, we realize, because some suits are brought by groups
16 together. And, in fact, in coverage jurisdictions there are no Asian-American lawsuits or
17 lawsuits involving Asian-Americans that went to final judgment -- went to what we're calling a
18 liability stage judgment.
19 Again, just a couple of more, I think, interesting things that are emerging. The large --
20 the, the majority of challenges that we're finding in coverage jurisdictions are to local practices,
21 not to statewide practices. That many, many more of the lawsuits challenge counties, cities,
22 school boards, entities of that sort as opposed to statewide districting practices and the like. So
23 we're seeing it happen at a, at a low level, and we're seeing that in the number of cases filed and
24 in terms of the of ones that actually find violations.
25 The last thing I wanted to sort of give is a little bit of the findings on the senate factors
26 because I think these have bearing to a lot of the issues with the commission that other folks have
27 been talking about today. And so again a few numbers, if you're bear with me. In the 186
28 decisions that we have identified, 104 of them have found at least one senate factor to be present.
29 And of those 84 -- and I can give the commission these pages -- 84 of them found a history of
30 discrimination in voting, the first senate factor to be present. It counted 45 percent of the cases
31 that were filed. And of the cases that ultimately found a violation of Section 2, 76 percent found
32 this history of discrimination to be present. To give you just a few of the other prominent
33 results, racially polarized voting is found in 38 percent of the lawsuits, and 86 percent of the
34 cases in which a violation was, in fact, found. The minority group bearing the socioeconomic
35 effects in discrimination was found in 35 percent of the cases, but 73 percent of the cases was in
36 which violation was found. And the last number I'll give you is the success of minority
37 candidates in getting elected. And there we have 83 percent of the cases in which a violation is
38 found that minority candidates are having a hindered ability to be elected.
39 I just want to say in closing that I think the Section litigation provides an important lens
40 on opportunities for political participation in the United States today. It is the permanent
41 provision of the Act. It's not being expired, it's not subject to expiration. And yet looking at
42 what's going on, it helps us see different opportunities and sort of where problems have been
43 identified and the sort of track record that's been going on. I think if, if we're thinking not just
44 about what can be done but perhaps what -- I'm sorry, what should be done and as well as what
45 can be done and what the Supreme Court would ultimately uphold, I think these factors are

1 relevant and provide a good indicia of, of what's going on on the ground or at least a partial
2 portrait of it. Thank you.
3 CHAIRMAN LANN LEE: Thank you. Our next witness is Gwen Carr. Gwen Carr
4 directs Indian programs for the Wisconsin Department of Commerce providing advice, training,
5 technical assistance and economic development information to Wisconsin tribes, tribal
6 communities and American Indian entrepreneurs. Ms. Carr served as the native vote coordinator
7 for Wisconsin during the 2004 presidential election. Welcome, Ms. Carr.
8 MS. CARR: Thank you very much, Mr. Chairman. Thank you for having me here. I'm
9 very honored to be a part of this event and to appear before all of you to talk about native voting
10 and the, the Wisconsin experience. Actually, Maggie's testimony was very upsetting to me
11 personally because I have seen that not just in Wisconsin but in other areas of the country time
12 and time again in voting.
13 To add to my introduction only for the fact of it speaks to my experience with Indians in
14 voting, I have been involved in voter projects and voting and Native American political trainings
15 and all sorts of things for a number of years and all over the country from Oklahoma to Arizona,
16 California, North Carolina, New York, on reservation, off reservation, so I have a lot of areas of,
17 you know, working with the native communities from all walks of life in city elections and
18 county elections and statewide elections, presidential elections. So I have seen this inherent
19 racism in native communities. That is probably the most consistent thing I have ever seen in
20 native communities, frankly.
21 In Wisconsin in particular, I have been in Wisconsin for about two and a half years. I'm
22 originally from Chicago. I'm a Cayuga from the Heron Clan of New York. But I have been
23 working in Arizona -- not in Arizona, in Wisconsin for a couple of years. I get confused. I have
24 worked in a lot of places. But when I came to Wisconsin, you know, I, I come from Oklahoma
25 where there are 39 tribes and a very substantial Indian commission, very substantial participation
26 both in voting and just engagement with state government with the tribes. And I came to
27 Wisconsin kind of expecting the same dynamic.
28 And there wasn't -- there is no commission in Wisconsin. There is not a lot of formal
29 organizational infrastructure other than the tribal governmental infrastructure in Wisconsin.
30 There is the Great Lakes Intertribal Council which meets once a month, but it basically is a
31 program-related organization talking about various different educational programs, economic
32 programs, et cetera, et cetera, et cetera. It's not anything to do with civil rights, it's not anything
33 to do with voting, it's not anything to do with politics, per se, it is much more of a problematic
34 type of gathering of tribal leaders. So there really -- there's really a vacuum in the area of
35 Wisconsin as opposed to other -- even Minnesota -- as opposed to other states in regard to
36 evidence of discrimination, lawsuits, et cetera, et cetera. And there has not been a lot of
37 infrastructure in voting or voting rights of any sort in Wisconsin for the American Indian
38 community that I could find when I got there.
39 So I started the Wisconsin American Indian Caucus, which is basically an informational
40 and empowerment group to teach native people the importance of voting and the importance of
41 civic engagement and how, how it works part.
42 I mean, that has been the extent of the work that I have done outside of my regular job
43 within the Indian community in Wisconsin, of telling people that yes, you can vote, and, and this
44 is how it works.
45 I put on a number of political trainings for tribal members in various parts of the state
46 over the past couple of years. And at first it was very sparse. I think it had six people at the first

1 training; the next time I had 35, which is a significant increase. And so -- and the questions and
2 the things that I heard, some of the people that would come to the trainings or come to our
3 meetings where we would have meetings about, you know, civic engagement of all sorts looking
4 at various different issues in Wisconsin. There have been a lot of issues in Wisconsin with
5 gaming and the state legislature and there has been lawsuits. There's been a lot of issues about
6 those types of things in Wisconsin that have to do with tribes and native people. So we would
7 meet and talk about all sorts of things. And the kinds of responses that I would get from the
8 individuals that would come to these meetings reflects what Maggie has said. It's, you know,
9 this -- Wisconsin is the land of the spear fishing issue. The northern part of Wisconsin is very
10 much like what Maggie was talking about, Duluth area.
11 I have actually been to the Lac du Flambeau Indian Museum. And at that museum, one of
12 their exhibits is about the spear fishing issue, which is the treaty rights issue in the '70s in
13 Wisconsin, and there are actually beer cans lining the walls that say "Save a fish, kill an Indian.
14 Save two fish, kill a pregnant Indian." Those are the kind of things -- that stuff is alive and well,
15 unfortunately, and living in our country. Not just in Wisconsin but our country, whether it be for
16 American Indians or African-Americans or Hispanics or women or Asian-Americans or Arab-
17 Americans, those things, they live and breath and they affect how we, how we vote and how we
18 live on a daily basis. So these are the kinds of things that I would hear from native people in
19 Wisconsin. There was not a lot of knowledge about why it was important to vote, where you
20 could do it, how you could do it. The mechanics of voting, there was not a lot of knowledge. And
21 frankly, initially there was not a lot of interest.
22 So, you know, there had -- a lot of people had been able to talk of an extended period of
23 time of voting either in their own community, have a lot of examples of things. My time has
24 been spent in the past two and a half years in teaching and reaching Indian people about the
25 importance of exercising their vote. Which is not just to say that, you know, that there are not
26 incidents of discrimination in voting in Wisconsin for Indian people. The other thing that's
27 important to understand with, with regard to native communities is that they don't come forward
28 right away and talk about what happened to them. Part of the, part of the real damage of racism
29 and discrimination is people's acceptance of it, that it is the natural standard operating procedure,
30 and that it will always happen to me, therefore why bother to tell anyone about it again. And I've
31 seen that in, in native communities, especially, especially in very isolated areas. There's no point
32 in telling anyone, if there is anyone to tell, because no one is going to come and help you. I
33 mean, the dynamic of the history of this country is that the actual political and governmental
34 infrastructure of this country that one would think to turn to has actually been the greatest
35 depresser of American Indians out, out of anybody and everybody. It is the, the fundamental
36 racism of this country. This country is founded on racism, and it is founded on those types of
37 principles, and native people are the actual living, breathing witnesses to that and all else comes
38 from there.
39 So in -- but I'm also happy to report there is, there is an upside to what I'm saying here,
40 that we were able to design a, a Get-Out-The-Vote program for native people across the state.
41 You know, we had -- we have 1tribes in, in Wisconsin. They were all involved in it. We had a
42 tremendous amount of interest in voting, interest in the issues, interest in being part of something
43 larger than ourselves. There was also a true sense of hope that was a very deciding factor within
44 the 2004 elections. I can't speak to 2000, I was in another state, so -- but the 2004 elections really
45 did -- there was an energy about them in the native community. We had not only the statewide
46 plan that we did, but we also -- each individual tribe had their own native vote, Get-Out-The-

1 Vote type of program. And to that end, at the end of the day, we had the largest turnout of
2 native Americans in the history of Wisconsin in 2004. We had six out of the 1tribes had 100
3 percent voter turnout when, when measured against voting age members that were enrolled in the
4 tribe.
5 Now, that is an amazing story. But, you know, it is, it's an extraordinary story. It's also a
6 very hopeful story. It's also a very important message to send out to native and nonnative people
7 in, in, in the United States. And so one of the things that was very helpful, and I want to make
8 this recommendation to this commission, is that Wisconsin is a same-day registration voting
9 state. You know, I have worked in many, many states where, you know, that it is not the case.
10 And the barriers to registration of various different dates and this date and that date and then they
11 change the dates, it's very confusing. And I mean, I think that uniformity in some ways is a very
12 good things. I think that -- you know, it seems to work well in Wisconsin to have same day,
13 especially for new voters, especially for shaky voters, you know, never done this before, not
14 exactly sure. Oh, it's okay, you can do it and vote at the same time. It's also -- it's good for
15 communities for a lot of different reasons.
16 I would recommend that that be something that really be stressed in this -- the Voting
17 Rights Act. I really think that it is something that if, if states are really serious about really
18 availing people of the ability to vote seriously and not just talking about it, that they seriously
19 take up that particular issue and make it something that is a great facilitator to voting. So -- but
20 at the same time, we had a number of incidents. And again, it's, it's ironic. Because, because
21 folks knew that I was coming to this particular thing, my phone rang a lot. Right after the
22 election everybody was flat out tired, everybody went to sleep for three months. But my phone
23 started to ring when folks heard that I was coming here to talk to you. And while we did have a
24 voter protection program that was done by the Native American Bar Association, the National
25 Congress of American Indians, we had people, local people within tribal communities and native
26 lawyers in Wisconsin ready to do a lot of the protection program. There were -- again, people
27 didn't tell anyone. So when they found out I was coming, I got a lot of phone calls about some of
28 the things that happened in 2004, even given the great turnout we had. And the fact that people
29 overcame these things this time, as opposed to just turn around and go home, says a lot for the
30 determination of the native community in Wisconsin to have their voice heard.
31 We have -- and most of these things happened -- I'm going to generalize three or four of
32 them. They're in, in my testimony here. But most of these were from either early voters or first-
33 time voters. And one of the dynamics, and you heard it from Maggie, and I'm sure you'll hear it
34 from native people who come before you across the country, you'll hear the same story over and
35 over again because it's true. That most of the most severe discrimination happens right around
36 reservation communities. That's the front line of racism right there. So most of the things that I'm
37 talking about occurred right around the reservation border.
38 And, and so -- and as other people have testified to, Indian people were told, A, the high
39 school students around the Menominee Reservation, which is an entire county in Wisconsin, they
40 were told that they could not vote under any circumstances. High school students that were
41 voting age were told by school officials that they could not vote, period. And then we had other
42 people -- one of the great things, I think one of the greatest successes of our voter turnout
43 program was the fact that we really did go for grassroots people who lived in the community and
44 give them the tools and the ability to do what they do best. So there were a lot of people
45 gathering new voters and taking them for either early voting or on election day. And a lot of the
46 counselors around the Menominee Reservation, the Lac du Flambeau Reservation, Mole Lake

1 Reservation. One county clerk told about 50 people that they could vote at her home, okay? And
2 then -- that they should be there at 5:00. So they bused 50 people, 50, 55 people to this county
3 clerk's home 5 p.m and she never showed up. They waited for three hours. They were not leaving
4 until they saw a person. And finally, you know, she showed up, I think, about 9:00 or so. But,
5 you know, that, that -- those are the kind of things that native people were being told.
6 And then also that a lot of the people who had actually worked on the campaign, the
7 Indian turnout, the Indian vote campaign, they were asked to submit lists of tribal members to
8 county clerks and voting officials, in addition to identifying them verbally. And so -- they
9 wanted to know who the Indians were.
10 And these were in communities that are, that are right on the border or right inside or,
11 you know, right, right around the reservation communities where there is a lot of, you know, bad
12 feeling, animosity and long term. I mean, we're talking, you know, hundreds of years of racist
13 attitudes about native people in particular. So the -- and I also want to just say one thing about
14 Congresswoman Gwen Moore's testimony. I too saw those fliers. And that is -- that was not -- I,
15 I heard a number of radio spots about African-Americans and voting and, and felonies and all
16 sorts of -- it was bizarre. It was about three or four days before election day. So I just wanted to
17 let you know that, you know, in the course of my going out to all sorts of different communities
18 on and off the reservation, I managed to, you know, come into contact with those particular --
19 that particular flier in particular.
20 So anyway, I think that that just about takes care of it. The other -- the only other thing I
21 wanted to talk about for one second is the tribal ID issue. Congressman Sensenbrenner, there's a
22 -- there's been legislation about the national ID. And a lot of the tribal leaders have been talking
23 about the tribal ID issue. And the fact of the matter and whether -- I think one of their greatest
24 concerns is the fact that it -- that they're looking at hooking up all of these various different lists
25 of people with the DMV, and that is a direct abrogation of sovereignty to require tribal IDs to
26 hook up with any other state or federal agency. So, you know, that's -- and that remains -- it
27 remains to be seen how big of an issue that particular one will be in Wisconsin, but folks -- that
28 is one of the things that folks are talking and have been talking about over the past couple of
29 months. So thank you very much. Thank you for giving me the time, and that's it.
30 CHAIRMAN LANN LEE: Thank you, Ms. Carr. With the exceptions we've made, we
31 are holding questions until the end of the panel. So we're going to go on to testimony of Elona
32 Street-Stewart, who is chairwoman of the school board of St. Paul, Minnesota. And she was the
33 first American Indian elected to the board. Ms. Street-Stewart has been very active in the Twin
34 Cities area. She's chair of the Twin Cities Healthy Start-American Indian Advisory Committee,
35 the St. Paul Area Council of Churches, the Department of Indian Work. It's a long list. But thank
36 you very much for coming, and we look forward to your testimony, and we do have a copy of
37 your written testimony.
38 MS. STREET-STEWART: Well, I say miigwetch to the Lawyers' Committee and to
39 Andrea Speck for inviting me here today. In fact, I realize now at the end of the table, so much of
40 the testimony that's been previously shared with you about our American Indian community, I
41 could reflect those same situations without regard to those at home. They will be duplicated
42 across this nation in Indian country and in particular in communities that have border residency.
43 MR. ROGERS: You said miigwetch?
44 MS. STREET-STEWART: Yes, which is -- thank you.
45 MR. ROGERS: Exactly which language?
46 MS. STREET-STEWART: Nishnawbe.

1 MR. ROGERS: Nishnawbe?
2 MS. STREET-STEWART: Uh-huh. Or we can say it a number of other languages.
3 MR. ROGERS: All right.
4 MS. CARR: But it is important, I think, to recognize that there are native languages still
5 in existence and people do use them for conversation and interpretation and definition. My own
6 work, I'm a staff person for the Presbyterian Church in addition to being on the school board.
7 And my specific work area involves racial ethnic ministering in the six upper Midwest states.
8 But I also, because of my work with our Indian communities, I work out in Montana on the Ft.
9 Peck Indian Reservation. So I actually am traveling on these highways and know these
10 communities very well. I know the size, I know the nature of their official protocol and
11 absolutely can, as I said, reflect on the issues of identification and recognition and subrogation of
12 rights.
13 CHAIRMAN LANN LEE: Ms. Street-Stewart, if you could just move -- don't move, you
14 can just move the microphone closer to you.
15 MS. STREET-STEWART: Thank you.
16 CHAIRMAN LANN LEE: We want to catch, we want to get every word on the record.
17 MS. STREET-STEWART: We'll try it there. Maybe I can tilt it.
18 CHAIRMAN LANN LEE: Good, good.
19 MS. STREET-STEWART: Yes, I know that key sections of the Voting Rights Act of
20 1965 are set to expire in 2007. There's an awareness of that, because when I was in high school, I
21 experienced the passage of the Voting Rights Act as a cause for celebration at that time,
22 especially for the African-American community in civil rights organizations across our nation. It
23 now appears, though, that after 135 years after the passage of the 15th amendment to the US
24 Constitution and 40 years since the passage of the Voting Rights Act, the right to vote is not
25 secure for those communities of people recognized by our nation's courts to have suffered racial
26 discriminatory actions prior to 1965. I know also that the issues that are very specific I would
27 say come in the four Rs. It's realignment, redesign, reclassification and race.
28 The results of the 1990 and the 2000 census brought a realignment of voting districts
29 through congressional redistricting processes. For the first time, significant numbers of African-
30 Americans and Latino officials were elected from new districts where there was sizable
31 populations of people of color. However, since then the numbers have not been sustained or
32 increased, nor have elections produced a horizontal widening of the diversity of candidates and
33 elected representatives.
34 And as you know, I can speak of that personally. I'm the first American Indian elected to
35 a public office in Ramsey County. And in Minneapolis, while there have been other Native
36 Americans elected to public office, we have had our first American Indian school board member
37 just elected last year to the Minneapolis Council. The reassigned residents as citizens are not
38 significantly aware or solicited for the strategic planning or comparative analysis of the impact of
39 the changes on district -- or from district geographical dimensions, economic transitions or the
40 demographic variances.
41 I'm also cognizant of the fact that there are likely to be changes of two to three judges on
42 the Supreme Court over the next few years. And since I believe since the court has not always
43 found in favor of minority voting rights, it's important now to address these issues legislatively in
44 order to accomplish fair and equitable protection of the American right to vote by its citizens.
45 And in particular, those citizens that are American Indian, other people of color, those in poverty
46 or those who, through injunctive relief, are eligible individuals having been previously convicted

of criminal offenses. This is very important because those situations affect our American Indian communities especially. I think it is also important to note that American Indicans have, in fact, been told that we are not eligible to vote in local elections. That has been part of, I think, the historical reality, that we can vote for tribal offices so that the tribal elections, which would be specific to a geographic region, are the only place that American Indians see themselves as part of an electorate. They are not seen as part of the citizen electorate of this country.

So I'm going to share with you today an incident that happened in the Red Lake Nation last fall in the 2004 elections. I particularly share this with you because the nation has been very attentive to the needs of the Red Lake Nation recently. We know that because of the school shooting incident and the disaster that has occurred there.

It is important also, I think, to know that there have been a number of persons who will have put this testimony together. The individual that actually compiled it for me is a Mr. Jamie Edwards and he, in fact, provided this. He's a representative to the Mille Lacs Band of Ojibwa. He has provided this as part of a report to a committee that has been chaired by a Representative Keith Ellison here in the Twin Cities area. And so I'll just share with you what happened. Although there were several attempts to suppress Native American votes in Minnesota, what happened in Red Lake was the most blatant.

The Red Lake Nation is the only closed Indian reservation in Minnesota and in theory, anyone who is not a Red Lake tribal member must get permission from the tribe before coming onto their reservation. And we saw that in some of the immediate news response when the school shooting occurred. That was part of the concern, people were not aware that, in fact, you do just not have open access on the reservation.

On election day, that did not happen, and several party sponsor challengers showed up on the reservation before the polls opened. There are four voting precincts on the Red Lake Reservation. The Ponemah precinct is where the major issues occurred. A Republican challenger showed up in Ponemah, started questioning and intimidating the election judges, and then started to intimidate the voters by arbitrarily challenging individuals who were standing in line to vote. Some potential voters left the precinct because of this challenger's antics. The Red Lake Tribal Police Department was called to observe the situation. However, the challenger's behavior worsened once the officers arrived. He continued to disrupt the voting process, and eventually tribal officers were forced to remove him from the precinct and escort him to the reservation's border. A few things to note here. According to one election judge, up until this election, no challenger had ever showed in Red Lake during an election. Two, Red Lake is the only area in the state where all of the election judges are native, and nearly the entire voting population is native.

Three, some of the challengers that showed up in Red Lake were from out-of-state areas, and that was determined by conversations with the election judges. And that the particular challenger at Ponemah was a lobbyist from Washington, D.C., and that's how he identified himself. There were two other challengers identified, one being Republican and one Democrat, that did show up in Red Lake, but they only observed but did not disrupt the voting process.

This incident made national news on CNN. And if you had questions you could contact Louann Crow, who at the time was the Red Lake tribal member and election judge who testified in the senate about this matter. I would add that there's a few other things to note, having heard the testimony of other panelists here.

There has been noted from this incident also that individuals were challenged to the number of persons they could vouch for. And as you heard, community members vouching for

one another may, in fact, be the most easily identifiable way to verify someone. American Indians may also legally have and socially may have more than one name. So that's why it would be important to have a community member vouch for someone. The challenge was that they could only have the opportunity to vouch for one individual, which I understand is not the case.

And that grievance or protest procedures are not clearly posted anywhere. So that if someone was concerned about incidents and witnessed or experienced a violation, there would be no way to determine what they needed to do, in fact, beginning at that moment to proceed to register a grievance. I have also been told just as of last night that there is interest now on proposing a constitutional amendment that will affect the determination that we currently have in the United States that if you are born here in this country, you are issued citizenship. And that there is a growing interest in having an amendment to the constitution where someone who was born in the United States may no longer be offered citizenship if their parents were not legal or if both parents were legal. If their parents are not married, they may be denied citizenship.

I would say in terms of culture communities, and I -- again, I just heard this last night so I could not tell you where this is surfacing, but that for culture communities we have been reclassified by state and federal and local governments consistently, and issues of what makes one a legal resident or, in fact, could identify that your parents have participated in what would be a recognized ceremony of marriage would affect not only our immigrant refugee population but your oldest indigenous population.

We did not, of course, secure citizenship until 1924. Part of the issues that prolonged the recognition of American Indians with the right to vote was that there were several states in the Southwest who continued to reclassify American Indians across the border; either that they were residents from Mexico or that they were residents of the United States. And we know that that in particular happened in Arizona up through the '60s.

So by taking Pueblo populations and not recognizing their cultural traditions of marriage or reclassifying them based on their origin, again American Indians may be redenied the opportunity to vote. And again, we live in no other nation or continent in the globe. It's the only place where we are found. So I certainly would say that I would seek and support reauthorization of all those provisions of the Voting Rights Act, especially those that involve registration, especially those that would determine proof of identity and those that, in fact, would offer the additional training and consistently of training for election judges in managing the environment where the voting occurs.

Thank you very much.

CHAIRMAN LANN LEE: Thank you, Ms. Stewart. Commissioner Meeks is going to begin the questioning, and then I'll follow up, and then Commissioner Davidson and then move to the ever-vocal Commissioner Rogers.

MS. MEEKS: For both Gwen and Elona, on those incidents, then was there a grievance filed with someone?

MS. CARR: No.

MS. MEEKS: And not at Red Lake either?

MS. STREET-STEWART: Well, part of this has been, I think, additional testimony that has been provided to our senate hearings, and it's been in committee structure.

1 But what I don't know -- again, as I mentioned, the procedures for filing a grievance are not well
2 noted in the community.
3 MS. MEEKS: Well, I mean --
4 MS. CARR: Do I have to speak into this thing to be on the record?
5 MS. MEEKS: Probably.
6 MS. CARR: Oh.
7 MS. MEEKS: I think it helps.
8 CHAIRMAN LANN LEE: In your case, I don't think it's particularly necessary.
9 MS. CARR: Thanks.
10 MS. STREET-STEWART: No I, I -- as I said when I was giving my testimony, some of
11 the things that I spoke of this afternoon I heard about literally 48 hours ago. And so one of the
12 things that I would like to go back to Wisconsin with is some ideas of where to take that and
13 what to do with that.
14 MS. MEEKS: Well, I mean, the reason I raise that is actually a point earlier, would have
15 a federal monitor have helped this situation? It seems like it would have if there had been a
16 federal monitor there.
17 MS. CARR: Yes.
18 MS. MEEKS: And isn't it the case that the only time a federal monitor will be sent out is
19 if there was a grievance filed or reported --
20 MS. CARR: If it was a troubled area --
21 MS. MEEKS: Yes.
22 MS. CARR: -- initially? Yeah. And I'm sure -- let me -- I'm sure that we could, in all
23 honesty, in native communities across the country, I think we could use a federal monitor in, in --
24 for a number of different reasons, whether they be in Wisconsin or Minnesota or Arizona or
25 anywhere else.
26 MS. MEEKS: You know, it seems like this hasn't been a problem because in large part
27 Indians weren't voting.
28 MS. STREET-STEWART: Correct.
29 MS. MEEKS: And now that --
30 MS. CARR: It wasn't important.
31 MS. MEEKS: -- it's -- right. And now that there are more and more, the percentage is
32 much higher, you know, I would think that this is going to be an issue. So going forward for a
33 recommendation, you know, I would hope it would be that in, you know, most of the minority
34 areas that a federal monitor could be present.
35 CHAIRMAN LANN LEE: Well, I was -- if I could interrupt --
36 MS. MEEKS: Sure.
37 CHAIRMAN LANN LEE: -- Ms. Meeks.
38 MS. MEEKS: I don't know the answer.
39 CHAIRMAN LANN LEE: In both your testimony and Ms. Kazel's testimony, you
40 referred to the fact that the area outside, immediately outside of reservation areas is sort of the
41 chronic area of tension.
42 And I recall that when I was at the Justice Department, a Justice Department lawyer once
43 mentioned to me that the division had had cases in the Southwest and the Four Corners area that
44 went back many, many years. And that it wasn't just voting cases but that there was this
45 phenomenon you're referring to, which is the area right outside of a reservation. And when I
46 guess the native community collided its interests --

1 MS. CARR: Right.
2 CHAIRMAN LANN LEE: -- with the local white community, there were always, there
3 were always tensions. It does sound like it's the equivalent of what -- the earlier testimony about
4 these new immigrant populations when you had areas of rapid demographic change you saw this
5 kind of phenomenon. But you're -- I guess what you're suggesting is that -- and I guess
6 Commissioner Meeks is agreeing -- that in these areas outside the reservation, they are
7 traditionally areas of some tension.
8 MS. CARR: Absolutely. Absolutely. You will find that to be -- you'll find that to be true
9 virtually across the country, is that the most virulent racism discrimination, violence,
10 discrimination of kids in schools, of just harassment on the street, of gang violence is going to be
11 found right on the border towns of reservation communities pretty much uniformly across the
12 country. It doesn't matter what tribe it is, it doesn't matter how, you know, how long they've been
13 there. It doesn't matter if they're actually indigenous to the area or they're part of some removal.
14 That is the realistic dynamic of living in Indian country. And most Indian people know what that
15 is and know what that is immediately. You will see a lot of heads doing this.
16 MS. STREET-STEWART: I'd also like to recognize, though, that the native population,
17 in fact, while it's growing on the reservation and the median age is very young on the reservation,
18 the majority of your population lives off the reservation and it may be in rural areas and urban
19 but they are off the reservation.
20 So the issue of the tribal identity card when the states were not consistent in determining how
21 that information would be provided and up until the day of registration, there was still not a
22 determination of what was legal proof of one's identity. And especially for the majority of
23 natives living off the reservation, when you're in an area where your identification still may be
24 your Indian identification, that was even, I think, a greater opportunity for the challenge.
25 MS. CARR: Absolutely.
26 MS. STREET-STEWART: Because even though we saw it happening on the reservation
27 areas, clearly off the reservation there was just so much confusion and chaos about the use of
28 tribal identity for someone to register to vote. And Minnesota also has same-day registration. So
29 we were -- I mean, I was literally sitting with a marker changing cards because we were trying
30 not to confuse the population. They were told you can use your identity, you can't use your
31 identity and very, very difficult.
32 CHAIRMAN LANN LEE: I wonder if I could just interrupt.
33 MS. MEEKS: Sure.
34 CHAIRMAN LANN LEE: I gather, Ms. Street-Stewart, that there was some kind of state
35 legislative hearing on some of the issues you were talking about, is that correct?
36 MS. STREET-STEWART: Well, and I think people are even more interested now. As
37 we're moving into another election season and I think our legislative session has finished their
38 economic work, there will be -- what I understand, in fact, from my representative, Keith Ellison,
39 is that he is hoping to establish another community for review.
40 CHAIRMAN LANN LEE: Well, I wonder if -- do you have access to the transcripts or
41 could tell us how to get access to these transcripts or documents or other evidence that might
42 have been given to the commission? It would be very helpful for us to have that. And I noted
43 earlier that you said you traveled around --
44 MS. STREET-STEWART: Uh-huh.
45 CHAIRMAN LANN LEE: -- to a lot of areas. Do you yourself know of organizations
46 that have received letters or complaints and things of that kind? It would be very helpful --

1 MS. STREET-STEWART: Uh-huh.
2 CHAIRMAN LANN LEE: -- to us. And If you could give that -- if you could cover the
3 state of Minnesota and Ms. Carr could cover the state of Wisconsin, you know, with that kind of
4 information, that would be very helpful.
5 MS. STREET-STEWART: We could work to provide that for you.
6 CHAIRMAN LANN LEE: Yes, I think Commissioner Davidson would particularly
7 appreciate it. I'm sorry, Katherine.
8 MS. MEEKS: No, I'm done.
9 CHAIRMAN LANN LEE: Commissioner Little.
10 MR. LITTLE: Did I understand you to say that Michigan is the most segregated state in
11 the country?
12 MR. MURPHY: It's one of -- there was a report that looked at 10, the top 10 most
13 segregated cities in America. Michigan had five, four of which were predominantly African-
14 American, and one of which was predominantly white.
15 MR. LITTLE: It just seems a little bit kind of hard to think of Michigan --
16 MR. MURPHY: I know.
17 MR. LITTLE: -- considering all the things 153 that Michigan is famous for --
18 MR. MURPHY: Yes.
19 MR. LITTLE: -- to being the most segregated state --
20 MR. MURPHY: Yes.
21 MR. LITTLE: -- in the Union.
22 MR. MURPHY: And that is an issue, Mr. Little, that even the Detroit Regional Chamber
23 of Commerce at its annual meeting on Mackinac Island raised as an issue in Michigan that was at
24 the forefront. We, we have a ways to go when it comes to that issue. I mean, Michigan is
25 sometimes a state of contradiction. Back in the '70s, it elected George Wallace in the Democratic
26 primary. And then in the late '80s it elected Jesse Jackson. So, you know, we're, we're trying to
27 change that image. Right now the state is struggling with our economy, the three big automakers
28 as you probably have been reading. But Michigan is the Great Lake state and a place of great
29 hope as well.
30 MR. LITTLE: I think primarily -- I think, when I think of it, I think of Motown.
31 MR. MURPHY: Yes.
32 MR. LITTLE: Ms. Katz, your study, do you intend to give that to -- when it's finished, to
33 give it to the commission?
34 MS. KATZ: Of course.
35 MR. LITTLE: Do you have it -- at this point do you have any idea, have any feelings
36 about how it's going as far as the Voting Rights Act is concerned?
37 MS. KATZ: Well, like I said, I mean, some -- the findings we have so far are preliminary.
38 We have some good indications that there's been successes in various parts of the country and
39 we'll know more by September or October.
40 CHAIRMAN LANN LEE: Commissioner Davidson, I apologize, I skipped over you.
41 MR. DAVIDSON: No, you actually asked the question I was going to ask about the
42 availability of --
43 CHAIRMAN LANN LEE: If anybody has any documents, cough them up, please.
44 MR. DAVIDSON: I'm a documents man.

1 CHAIRMAN LANN LEE: Ms. Katz, I'd like to ask about some -- you said that for the
2 coverage jurisdictions you had 37 percent of the cases finding polarized voting? I was reading
3 38.
4 MS. KATZ: Yeah, in the covered jurisdictions where they found a violation of Section
5 2, 86 percent found polarized voting. But you may be asking something slightly --
6 CHAIRMAN LANN LEE: No, that's what I was trying to clarify.
7 MS. KATZ: Yeah.
8 CHAIRMAN LANN LEE: So it's 86 percent -- I'm sorry, if could you give the numbers
9 again.
10 MS. KATZ: Okay. In, in all of the decisions that we found where there's a liability
11 decision, so there might be more than one in a particular lawsuit, we found racially polarized
12 voting in coverage jurisdictions in 7out of 186 decisions. It's 38 percent of the actual opinions
13 you could find. And of those opinions that found a violation of Section 2, we found 86 percent of
14 those found racially polarized voting. It's hard to find a violation of Section without finding
15 racially polarized voting in a coverage jurisdiction.
16 CHAIRMAN LANN LEE: Well, I guess it's conceivable that you could find racially
17 polarized voting and not find it --
18 MS. KATZ: Well, of course.
19 CHAIRMAN LANN LEE: So the 7out of 108 is the number without the --
20 MS. KATZ: Right, 186 or the total number of cases in which the court said Section is or
21 is not violated.
22 CHAIRMAN LANN LEE: Yes.
23 MS. KATZ: And of those, 7found racially polarized voting. Of the ones that found
24 Section is violated, we got 60 of those decisions, and in those decisions, of -- of the ones with the
25 violation, 5of them found racially polarized voting. If you found a violation of Section 2, you
26 were almost certain to find racially polarized voting. Finding racially polarized voting is not
27 itself sufficient to find violations of Section 2.
28 CHAIRMAN LANN LEE: Right. Well, the existence of racially polarized voting could
29 be of some interest to this commission.
30 MS. KATZ: Of course, yes. That's why we're tracking it under both categories.
31 CHAIRMAN LANN LEE: Well, I guess since you're a law professor who teaches this,
32 do you attach any significance to that number, that percentage, the 7rather than 108? It seems
33 rather high to me.
34 THE WITNESS: I, I think, I think -- well, 38 percent and we're over a 25-year period. I
35 don't have the numbers broken down over time. I wouldn't be surprised if you found more
36 recent cases not having the same percentage. I think it's just consistent with other people's studies
37 about a decline in racial, racial block voting --
38 MS. STREET-STEWART: Yes.
39 MS. KATZ: -- particularly in these jurisdictions. As more minority candidates are
40 elected, we see crossover voting, lots of votes for minority candidates in the -- a breakdown. I
41 would hardly say it doesn't exist anymore, but certainly at the level it once did it's diminished.
42 And we'll have numbers to tell you exactly how many cases in the last five years found racially
43 polarized voting in these jurisdictions. I can't break that down for you now, but I'll be able to do
44 that.
45 CHAIRMAN LANN LEE: I guess it would be interesting to see the finding where
46 racially polarized voting was found among the covered states.

1 MS. KATZ: And again, this is something we're not tracking that I would be interested to
2 know because I think there's a lot of racially polarized voting within primaries, within the
3 Democratic primary itself.
4 And there are courts in Texas in the district -- the partisan gerrymandering case that was
5 decided relatively recently finding that you can't make out a claim under Section because
6 minority groups are voting for different candidates within the Democratic primary. So you see --
7 what you see is racially polarized voting within the primary but not in the general election. So
8 blacks will vote for black candidates, Hispanics for Hispanics, whites for whites. In the primary
9 when it comes time for election day, will they all rally behind the Democrat? And I don't think
10 the Voting Rights Act now really deals with that, or we really don't have a language to deal with
11 what's going on in the primary in the way in which open, closed primaries and different rules
12 would have a -- you know, can affect kinds of racial vote dilution. This is the claim that Cynthia
13 McKenny's supporters made, actually, after she lost that election in Georgia's crossover. This
14 was -- she's back -- this was back in the 200primary where Republicans crossed over, and well
15 within Georgia law which invites people to do so and rallied behind Denise Mayette (spelled
16 phonetically). And she was elected with indisputably considerable support from white
17 Republicans within, within the Democratic -- within that district.
18 CHAIRMAN LANN LEE: Did you want to comment on --
19 MS. KATZ: That's not good or bad, it's just -- it's a part of the electoral process that I
20 don't think has been focused on sufficiently.
21 CHAIRMAN LANN LEE: Did you want to comment on --
22 MR. MURPHY: Yes, just to add to what Professor Katz has said, in the 2000 Democratic
23 primary in Michigan, the use of the Internet became an issue in terms of how voters could vote
24 through the Internet well before the primary date. And our concern is that many urban voters,
25 Detroit, Flint, Lansing, did not have access. And it's well documented, minorities really don't
26 have access or are not up to speed on the use of computers and the Internet for that type of thing.
27 And that was a concern and will probably be a concern in the future as well.
28 CHAIRMAN LANN LEE: Commissioner Rogers.
29 MR. ROGERS: Ms. Katz, I'm curious. What percentage of cases are filed by whites
30 related to the Voting Rights Act?
31 MS. KATZ: You know, I, I don't know the answer to that. I'm not actually, I, I -- in
32 coverage -- I don't know the answer to that. I don't know that we've broken these down by that.
33 I'm wondering here just doctrinally whether white plaintiffs can make out a claim of racial vote
34 dilution because of the senate factors in --
35 THE COURT REPORTER: Can you slow down, please.
36 MS. KATZ: Sure, I'm sorry. I grew up in New York. I can try. I don't know of a case
37 brought by white plaintiffs. I know of a lot of cases in D.C. and elsewhere where white plaintiffs
38 are bringing reverse discrimination claims in, in predominantly African-American cities. I'm still
39 talking fast.
40 Under, under Section of the Voting Rights Act, I can't think -- and maybe Jon knows of a
41 case offhand -- in which white plaintiffs have sustained a claim of racial vote dilution because of
42 the way district lines have been drawn. And one of the reasons I wonder whether they would
43 have trouble is because of the factors the senate has given us in terms of the history of
44 discrimination and, and those other factors where they're at least not traditionally associated
45 with the white majority.

1 But I don't think that would preclude a claim. I just happen -- I mean, I've taught this for a
2 number of years. I can't think of a claim in which white plaintiffs -- I mean, there are all the
3 Shaw cases, obviously, but they're not claiming racial vote dilution, they're claiming something
4 distinct.
5 MR. GREENBAUM: The only case I know of is in Alabama, and it was either
6 Birmingham or Montgomery, and the case was actually settled. But that's the only white vote
7 dilution case that I'm aware of that that's been filed.
8 MR. ROGERS: Thank you kindly. I guess I'd be fascinated to know that. Given the
9 study that you're putting together, there may well be cases that evidence that. Of the arguments
10 that's made about the Voting Rights Act is that -- well, there are two arguments. One, people
11 would argue that it's only an act as it relates to minorities. Others would argue that it really
12 strengthens the entirety of the country, and that its application really is broad in its scope to all of
13 us, including whites, and that it is to the benefit of all of us, including whites. And I'd be
14 interested to know that, and whether or not whites have, in fact, ever filed claims as it relates to
15 the Act in a way that you could argue would extol the virtues of the benefit of the Act as it
16 relates in particular to white Americans also.
17 MS. KATZ: We'll look for that as we look nationwide again. If Jon doesn't know of a
18 case, I'm inclined to think that there isn't a case yet, but there's obviously --
19 MR. GREENBAUM: Michigan State looks at its own published opinions and I don't
20 believe there are any of those.
21 MR. ROGERS: Yes.
22 MR. GREENBAUM: Now, there's another case that's not a vote dilution case that
23 Department of Justice -- it's a pending case that the Department of Justice brought on behalf of
24 white voters who allegedly were intimidated by black Democratic Party officials in the South.
25 And like I said, that case is ongoing right now.
26 MR. ROGERS: Yes. And I wanted to ask a follow-up to that, which really is the essence
27 of that, because I'm trying to get to both of sides of this, if I can, to try and understand the
28 parameters of this Act as it relates. You all -- or mostly for the most part testified regarding
29 essentially practices as engaged by Republicans as it relates to minority voters. And in our
30 previous panel, there was some of this conversation as related in particular by Democrats, for
31 example in Chicago, in terms of practices or policies as they affected minority voters. I'm
32 curious as to whether or not you all could provide this commission information as it relates to
33 practices engaged by Democratic officials in particular which have an adverse impact upon
34 minority voters as it relates to the Voting Rights Act. I'm just curious. I don't know the answer to
35 that but --
36 MS. KATZ: Yes, I'd like to speak to that because I, I don't think that was the -- if I gave
37 that implication, I certainly don't want to suggest that. We're, we're looking at practices adopted
38 by governmental bodies, so they're not clearly Democrat or Republican. There's a huge debate
39 going on long-standing about the Voting Rights Act and the existence of majority-minority
40 districts and whether those districts help Democrats, hurt Democrats, help, Republicans. And I
41 think that's a complicated question, whether the election of a black representative from a
42 majority-minority district is actually well within the interests of the Republican Party. And if
43 we look at a case like Georgia versus Ashcroft, which the Supreme Court decided about two
44 years ago which upheld Georgia's districting plan, if you parse out the political alignments in
45 which you have black voters challenging the unpacking of districts within the state of Georgia,
46 and you have John Ashcroft's Department of Justice --

1 CHAIRMAN LANN LEE: If you could slow down.
2 MS. KATZ: I'm sorry. My students complain about this all the time.
3 CHAIRMAN LANN LEE: Think of us as slow students.
4 MS. KATZ: Hardly. You have John Lewis defending the decision of the state of Georgia
5 to unpack these districts and disperse black voters. And you have the Justice Department saying,
6 no, you can't do that, you have to concentrate that. You have the Republican governor at the
7 time of Georgia saying, let's not fight this anymore. I don't want to fight this claim in the
8 Supreme Court.
9 This very bizarre alignment, I think the politics under Section and Section 5, for that
10 matter, are incredibly complicated, and it's not accurate to say these are Republicans harming
11 African-American voters. I think there's a lot of dispute as to who's hurt and who's harmed. And
12 it may well be that what's in the best interests of African-American voters may not be in the best
13 interests of the Democratic Party at some, at some level at least on certain facts.
14 MS. STREET-STEWART: So that the chronicle of experience also reflects the Native
15 American community. Tribal elections are not partisan. So that the experience of native people
16 becoming part of, as I said, the citizens electorate and identification with partisan politics is
17 something that is much more contemporary. Which is why I think there's the increased attention
18 paid to native communities right now in the primary and general elections. Although many of the
19 incidents, I think, that we heard about would have been on general election today, most native
20 people, if they are not voting in primaries, will arrive at the polls on election days still with that
21 sense of having had to claim party identity.
22 Now, I'm going to give that as a general statement, and I have no figures to, you know,
23 substantiate that. But it is pretty clear that if their previous experience has been tribal elections,
24 whether that's up in Alaska's villages or all the way down here through the States, there has not
25 been a need to be able to identify yourself in terms of partisan politics, which is why again this is
26 such an incredible experience these last few years, because that's a new energy that's been
27 applied to native voters.
28 MR. MURPHY: I think that the comment made in Michigan last year by the legislators of
29 Oakland County that we need to suppress the Detroit vote really reflects some of the politics and
30 thinking going on in Michigan. We have come up -- we have legislation proposed to -- no
31 reason absentee voting, same day registration to open up opportunities, remove the barriers to get
32 more people to vote. And I think there's a concerted effort to contain in Michigan, especially in
33 our urban centers, the vote, especially when you look at statewide and national elections. Local
34 elections are somewhat different. When you look at statewide and national elections, there is
35 that -- that comment pretty much says it all. And I don't think that there have been -- they're
36 successful in changing that perception around.
37 CHAIRMAN LANN LEE: You know, I think it's interesting testimony we've gotten
38 because it's not just Chicago. I think there's some testimony about New York testified.
39 MR. ROGERS: Absolutely.
40 CHAIRMAN LANN LEE: And then I'm not sure. I, I know the political alignment in
41 Hamtramck, for instance, and some of those northeast, smaller northeast cities that we heard
42 about I guess not necessarily with respect to African-Americans but with respect to the Latino
43 populations. So it is an interesting issue that you're raising. It seems to be not one party or the
44 other.
45 MR. ROGERS: No doubt about it.

1 MS. CARR: I think as far as parties go with American Indians that the political parties
2 seem to be much more interested in Indian gaming money than they are in a lot of the voting
3 issues, just from my experience.
4 CHAIRMAN LANN LEE: Thank you for the slap of reality. Mr. Rogers, do you have
5 any more questions?
6 MR. ROGERS: Mr. Chairman, just one final question for the panel. I'm just curious.
7 Let's assume that the Act is not reauthorized, just assume that it's not reauthorized, that a vote
8 fails in Congress next year and the Congress simply says, we will not reauthorize Section 5
9 preclearance, and we will not reauthorize the language provisions. What happens?
10 MS. KATZ: I can just say under Section 2 nothing. Section stays in place, it's a
11 permanent provision of the Act. And I think --
12 MR. ROGERS: No doubt about it.
13 MS. KATZ: -- one of -- well, it does matter in the sense, I mean, when we see what's
14 happening in covered and uncovered jurisdictions, is Section a supplement? I mean, I think the
15 world looks very different after Section 5 -- without Section 5 afterwards. It's very hard to tell
16 what would happen. I would imagine there would be a great rise in the number of Section cases,
17 but it wouldn't be enough to forestall what Section 5 attempts to prevent.
18 MR. ROGERS: You don't think you'd have circumstances -- for example, I'm just
19 thinking of -- let me assume that there's a strong local effort. Assume that states will engage in
20 practices, for example, representative of what you specifically mentioned, is that your legislative
21 bodies specifically took action to try to remedy a problem. If you do not reauthorize the Voting
22 Rights Act or these provisions that we're talking about, would not legislators, if there are
23 problems, seek to, in fact, solve these things at the local level?
24 MR. MURPHY: I don't necessarily think so. I think, first of all, if it fails to be
25 reauthorized, I think perception-wise it's a message to the country, especially to minorities in
26 America, that, you know, this is not important. And I think it opens up the door to return to
27 some of the practices; maybe not right away but over a period of time. And I think that's one of
28 the dangers of not reauthorizing.
29 I think it would have a very demoralizing effect, especially with African-Americans in
30 the Voting Rights Act of 1965 and the Selma rally in March really is symbolic of that victory,
31 and I think it would be a setback. Would local, would state governments take action? That
32 remains to be seen, you know.
33 MS. MEEKS: I would just like to make a comment concerning that. I mean, in states like
34 South Dakota where there's 76 whatever percent Republicans in the state legislature and all due
35 respect to Elona, at least tribes in South Dakota primarily vote Democratic, I don't think there
36 would be any impetus to change that, to make corrections. In fact, I think that the opposite has
37 happened. So -- and I think there's plenty -- I mean, Hawaii is primarily a Democratic state. I
38 think that they have some problems they aren't prone to face either. So I, I absolutely think that
39 these sections of the Voting Rights Act need to be renewed, reauthorized.
40 CHAIRMAN LANN LEE: Well, the job of this commission is to do fact-finding rather
41 than take a --
42 MS. MEEKS: Right, right.
43 CHAIRMAN LANN LEE: -- partisan position on the way there. I would point out,
44 however, that the Civil Rights Division of the Department of Justice is actually a pretty unique
45 institution. There's nothing else like anywhere else in the world. So when you're talking about
46 yes, Section 2 would go on, when you take out Section 5, I think it -- it does remove a big piece

1 of the enforcement mechanisms we have right now. So I think that would be my comment on
2 that.
3 And as far as language, I think, you know, I think we've heard a lot of testimony about
4 the importance of 203, not just the Native American populations but for others, and I think it
5 would just be a world that would be hard to imagine without those kinds of things. With respect
6 to the monitors, I think when the Act was passed, that was a provision that really was very
7 controversial because it meant the federal authority showing up in Alabama or Mississippi. But I
8 think nowadays, I'm not sure that it means quite -- it doesn't have that kind of symbolism in the
9 South or the rest of the country anymore. It wouldn't -- I think having monitors come in,
10 particularly seems to me, and we've heard the testimony about it seems to be a positive way to
11 avoid problems from happening. So I mean, just looking at the testimony, I think that, you know,
12 it seems to me that we've had some testimony that's pretty relevant on this issue. But, you know,
13 I don't mean to jump in and cut you off. Did you want to say something about if 203 was not
14 extended?
15 MS. CARR: Of course. Actually --
16 CHAIRMAN LANN LEE: Why am I not surprised?
17 MS. CARR: -- I'd like to say that my answer is indicative of the dichotomy that is in
18 Indian country. In one respect, Indian people wouldn't ever notice because we have been existent
19 in this way for thousands of years, to a lesser or greater extent intact, our tribal governments, our
20 traditions, languages. There certainly have been many difficulties, I guess, is probably the only
21 way I can say it at this point.
22 CHAIRMAN LANN LEE: Calamities is what you want to say.
23 MS. CARR: Yes, difficulties, whatever you want to call them. So -- but we are living
24 proof that, you know, we have survived. All the native people at this point in the country who
25 walk around, we are the survivors and the children of survivors.
26 So in one respect I have to say to you we would not notice because we have been here
27 forever. Our tribal governments, our tribal, you know, languages, traditions, et cetera, et cetera,
28 would indur as they have endured through the last 500 years of occupation and certainly
29 thousands of years before that.
30 That being said, I think that it would, you know, it would disenfranchise yet another
31 disenfranchised group. And in all honesty, while there has been the, you know, the American
32 Indian Movement et cetera, et cetera, in history, as far as the movement such as the civil rights
33 movement, et cetera, et cetera, with other groups in the country, American Indian communities
34 even today are some of the last at the table, so to speak. Even though we're the first citizens,
35 we're the last at the table. So the things that impact the last at the table, the opportunities, the
36 hope, the participation, the empowerment, et cetera, et cetera, all those things would be
37 challenged tremendously. There would be a great sorrow in the Indian community on or off the
38 reservation. There would be, you know, certainly no protections for the things that you heard
39 today and more. And worse. Unfortunately, people who like to, to perpetrate those kinds of
40 behaviors don't usually get better on their own, they get worse. So if it was the case that these
41 were not reauthorized, we would have, you know, some very -- we would go back to a lot of the
42 things our -- all of our ancestors experienced. And so I think that that's an important thing for
43 each one us to remember, and that we need to do everything that we can to honor our ancestors,
44 whether they be American Indian or African-American, Asian or whatever in making sure this is
45 reauthorized.

1 CHAIRMAN LANN LEE: Well, why don't we give Ms. Street-Stewart the last word.
2 And if that could be a minute, that would help.
3 MS. STREET-STEWART: My answer will be brief. In fact, we are a portion of the population
4 that, of course, has unique access to all levels of government, state, local, county and federal.
5 And I do believe that the political sophistication of the American Indian community and our
6 protection of rights under our treaty sovereignty would, in fact, allow a number of our tribes, if
7 the Act was not reauthorized, I believe that they would continue to explore what might be
8 possible either under their treaty status or again in a protected status because of the trust
9 relationship with the government. So I think we would know that there would be other avenues
10 that we, as a population, could access because of our unique relationship to the government.
11 CHAIRMAN LANN LEE: Well, thank you, members of this panel, and if you have to
12 leave, feel free to do so. We're going to quickly hear the testimony of Jorge Sanchez who has
13 been very nice about being here most of the day and wanting to get to testify now. He has to
14 catch a flight, so we're going to try to hear his testimony right now. Jorge Sanchez is a staff
15 attorney with the Mexican American Legal Defense Fund, MALDEF, in its Chicago office. He
16 was formerly a legislative staff attorney for MALDEF, and he's a lawyer who, among other
17 things, went to Baltimore. But welcome, Mr. Sanchez, and I do apologize that we've kept you so
18 long, and please feel free to go ahead.
19 MR. SANCHEZ: No apologies necessary. I thank the commission for the work you're
20 doing. It's an honor to find myself in such esteemed company. This commission has been given
21 a serious charge and I have to apologize even before I begin my comments that they're far from
22 exhaustive in terms of the information you seek. Clearly we're getting a picture today that is, is
23 still somewhat incomplete about the kinds of things that have gone on in recent memory.
24 And, and certainly when I got the letter from the commission saying that we're looking
25 back through 1982, I was a sophomore in high school in 1982. So I don't have personal
26 knowledge about some of those things that have gone on since then, though, though some about
27 some of the things since then. As to the language provisions found in Section 203 of the Voting
28 Rights Act, many of the covered jurisdictions only became so pretty recently as of the year 2000
29 because of our growing population.
30 MALDEF has found that even sympathetic county registrars and clerks have dragged
31 their feet in, in translating election materials, and have at times failed to understand the needs for
32 all materials to be translated. In Cook County, which is a fairly friendly jurisdiction to both
33 immigrants and Latinos, it was only after litigation that the clerk of the Cook County ordered all
34 materials to be translated. We actually are very, very happy to have Cook County as an example
35 at this point. It allows us to go to other jurisdictions and say, look, Cook County was able to do
36 it, you can talk to them, you can talk to David Ohr (spelled phonetically), ask him who he used to
37 translate these materials. Chances are he'll even give the translation of things he's already
38 translated. So the idea of cost and, and logistical barriers to translation become less so as, as
39 resources are pooled and shared that way.
40 Our experiences with other coverage jurisdictions haven't been as quite as smooth as they
41 have been even with Cook County. After the census numbers were released in 200and
42 jurisdictions became aware of their obligations under Section 203 of the Voting Rights Act,
43 MALDEF met in late 2001 with the King County registrar. It's a jurisdiction to the west and
44 somewhat north of Chicago. The office, the office was made aware of its obligations, and for the
45 next years -- for the next three years did almost nothing to comply with the Section 203
46 provisions to translate its materials. It was only as a result of activism by a statewide coalition

1 and the efforts of MALDEF that we were able to push the jurisdictions -- actually take
2 movement on, on these issues.
3 I mean, and -- in, in '04 when we meeting with them they were saying, "Well, you know,
4 the election's right around the corner. How are we ever going to get this done?" And that's when
5 we went back to our notes and said, "Well, we met with you three years ago." And, in fact, the
6 Justice Department had met with King County at the same time.
7 And so we said, "You all were well aware of your obligations at the time. You know, it's
8 not an excuse now to be saying you don't have enough time to do this." Even after they agreed
9 that they were covered, that they had the obligation to translate everything, we found them
10 fighting about what needed to be translated. Well, does it really have to be everything? You
11 walk into the King County registrar's office and there's absolutely no sign in Spanish of any kind.
12 So someone who's a Spanish speaker comes in and can't even figure out where they have to go to
13 register a vote. There are pamphlets that talked about voting for seniors that weren't translated
14 into Spanish at the time. There, there were pamphlets that were seeking election judges and were
15 seeking to get high school students involved in the election that weren't translated into Spanish.
16 And they thought these thinks were kind of minimal and, and not important.
17 And we said, "You know, this is the whole point. If you're making the outreach to white
18 or English speaking high school students to start getting involved in the election process, what
19 message is it sending to the Latino or the Spanish speaking students who want to be part of this
20 to not even give them the opportunity? Even more striking was a Web site that was quite
21 extensive, no translations at all at the time.
22 They've made quite a lot of progress in King County thanks to our efforts and, and, you
23 know, a recognition that, that it is really only Section 203 that made them do this. I mean, it was
24 the threat of litigation that if you don't comply, you've had a lot of time, we're going to come
25 after you.
26 Another -- a very, a very common problem that we see too is the lack of competent
27 translators to produce intelligible translations. In one of the cases we were involved in in East
28 Chicago, Indiana, they had a clerk translating ballot materials. And so you actually had them
29 making up words that don't exist in Spanish. They had translated the words "ballot" as -- I don't
30 remember. They basically made up a word that was not the word for ballot in Spanish. And this
31 had actually gone out. This was some time ago.
32 But we understand that sometimes the temptation in terms of complying with 203 is let's
33 just get it done as opposed to getting it done well. And there are nationally certified translators.
34 There's court translators in almost every federal jurisdiction. There are qualified and competent
35 people to do this work.
36 I wanted to talk a little bit now about observers. I think it's very important that, that the
37 observers and, and monitor provisions be maintained on the Voting Rights Act. Chicago has a
38 very, very checkered history with elections, and not just Chicago but jurisdictions around
39 Chicago as well. We hear about people being -- voting who are dead, people voting from
40 addresses that are registered -- that are vacant lots, et cetera. And, and similar, as was raised, a
41 lot of times the flash points are places of rapid population growth, or if not of rapid population
42 growth, of growing Latino empowerment.
43 I think of Cicero, Illinois as being one of these places that had election monitors the last
44 time around. And needs them and absolutely needs them. This is a town that was basically Al
45 Capone's headquarters for decades, and organized crime still has a lot of influence in this town.
46 It's a town where -- which is a complete Latino majority in terms of total population, and which

1 only recently saw it elected its first Latino mayor. It's a place where all sorts of shenanigans go
2 on, and we know it and everyone knows it, and the only way to put to a stop to these kinds of
3 things are by having federal monitors there on site.
4 The other thing that's important is the federal monitors actually get out to the polling
5 places. We heard at the last election around that Justice was sending out observers to
6 jurisdictions, and the observers were sitting in their offices unfortunately. This, I think,
7 unfortunately represents more -- is more of a reflection of the administration I, unfortunately,
8 assume than, than the good work that the Justice Department has done traditionally in this area.
9 I'd like to talk a little bit about a case that we still have going on in our Chicago office. It
10 touches upon the appointment of federal monitors and other topics that are germane to this
11 commission.
12 In the May 6th, 2006 mayoral primary in East Chicago, Indiana, a decades-old political
13 machine, in an attempt to regain its waning power, engages in a series of actions aimed at vote
14 suppression, vote stealing, vote buying and vote denial.
15 There was quite a lot of litigation over this, over this primary, and it resulted in a, in an
16 opinion by a district court. And these are the findings that the district court made. After eight
17 and half days of testimony and after hearing from approximately 165 witnesses, the court found
18 that over 155 instances of individual voter fraud existed. The trial court made a number of
19 specific findings, and I'll read some of these. A predatory pattern existed by Pastrick supporters
20 of inducing voters that were first-time voters or otherwise less informed or lacking any
21 knowledge of the voting crisis -- process, the infirm, the poor and those with limited skill in the
22 English language to engage in absentee voting.
23 There was widespread solicitation of people to apply for absentee votes and then a
24 concomitant handling of those ballots or the applications or the -- either the ballots before or
25 after they were voted.
26 There were numerous actions of Pastrick supporters of providing compensation and/or
27 creating the expectation of compensation to induce voters to cast their ballots via the absentee
28 process.
29 The use of vacant lots or former residence of voters on applications for absentee ballots.
30 The possession of unmarked absentee ballots by Pastrick supporters and the delivery of those
31 ballots to absentee voters. I could go on and on. This is -- the court summed up by saying.... I
32 could go on and on.
33 This is a jurisdiction that is about 75 percent Latino and, and had not been able to elect an
34 executive for decades. And, and it's, it's particularly important that these kinds of fraud were
35 aimed at a Latino and in some cases a limited English population and first-time voters. This was,
36 this was completely about taking advantage of the naive voter who, who might not know their
37 rights and, and exploiting that ignorance at every step of the way to the, to the advantage of, in
38 this case, a Democratic machine.
39 There, there's also issues of -- actually, let me read the quote from the court. "The East
40 Chicago Democratic mayoral primary may be a textbook example of the chicanery that can
41 attend the absentee vote cast by mail. "Examples of instances where the supervision and
42 monitoring of voting by Pastrick supporters and the subsequent possession of ballots those by
43 malefactors are common herein. Those illegalities came with a side order of predation in which
44 the naive, the neophytes, the infirm, and the needy were subjected to the unscrupulous election
45 tactics so extensively discussed."

1 And what the court leaves out is it was primarily the Latino population that suffered these
2 indignities. This, this didn't happen without the help of the election authorities. On May 6th,
3 prior to the May 6th election, one of the plaintiffs in the case was a poll judge, and she had
4 attended a training session prior to the election.
5 On the day of the election, she was told incorrectly that she could not help anybody, any
6 Spanish speaking voters, that Spanish could not be spoken in the polling place at all. This was
7 told and, and actually given to her in writing on the day of the election when she sought to help
8 people who actually sought her help to vote.
9 Another difficulty that was encountered in, in this process was that, that if a voter -- oh,
10 when voters showed up who had been sent absentee ballots, they were told they could not vote.
11 So in some cases voters went and got their absentee ballot and said, here, I'm giving it back, I
12 want to vote, and weren't allowed to do so. Then they were told they could only vote if, if they
13 actually went to the county seat, which is 20 miles away. So you could take your absentee ballot
14 and turn it in and vote but only if you went 20 miles away to the county seat to do this. Again, a
15 very clear example of vote denial.
16 And again, this relates back to the observer -- observer and monitoring issue. This is an
17 election that as a result of the litigation in this case, a new election, a special election was
18 ordered by the Indiana Supreme Court and a federal judge appointed federal monitors to oversee
19 this election. In the election, the challenger, a plaintiff, his name is George Pabey, a Puerto
20 Rican native of East Chicago, won by an overwhelming margin in the rerun election. And now
21 they're unfortunately dealing with four decades of utter corruption, of looting the treasury, of
22 casino moneys that were supposed to go to develop the community that instead were used to line
23 the pockets of, of political patronage appointees.
24 I just want to touch a little bit too about the issue of community organizations and the
25 voter outreach programs. Again in Illinois, there's an organization called the Illinois Coalition for
26 Immigrant and Refugee Rights, which undertook a massive voter registration campaign. I believe
27 they registered over 24,000 voters in the state of Illinois. And as part of their registration efforts,
28 they also had done Get-Out-The-Vote efforts and then election day monitoring efforts.
29 And in one jurisdiction in Kane County, the county registrar out there, Willard Helander,
30 initially denied this group the ability to go and observe the election. And, and there were a few
31 precincts in Lake County that they were interested in looking at. The, the reality is there aren't
32 yet a lot of Latinos yet in Lake County, so they're, they're in a fairly small area. And it was only
33 again the threat of litigation that, that opened the doors for this group. And, and the defense that
34 Ms. Helander gave -- first she said this group wasn't registered with the state, which indeed they
35 were registered with the state to be a registrar of voters statewide, and had the proper credentials
36 to, to do the poll-watching as well.
37 But then Ms. Helander was very, very proud of the fact that -- she said, "Well, you know
38 what? I denied the League of Women Voters observing status too, because monitoring elections
39 isn't within their mission statement." And this was the logic that she used to exclude the League
40 of Women Voters, which -- I mean, we all know the League of Voters. But I mean, to me this,
41 this exemplifies the kind of resistance that our communities face as we grow, as we expand into
42 places, and as we start to reach for political empowerment because these communities have
43 largely been there for a long time. It's a growing political sophistication, and the growing
44 activism and registration that's, that's now threatening. And the more that we do it, the more
45 resistance we're going to be met with.
46 CHAIRMAN LANN LEE: Well, thank you. Questions? Commissioner Little?

1 MR. LITTLE: I'll pass.
2 MR. DAVIDSON: Yes, I'm sure that the court reporter is -- I mean, his fingers are a little
3 slower than your speech is, my mind is a little slower than your speech is. And you and Professor
4 Katz are a team, I'll tell you. You -- when you were talking about a jurisdiction that was 75
5 percent Latino and that these fraudulent efforts were aimed at the Latino population, this was
6 East Chicago we're talking about?
7 MR. MURPHY: Yes, yes.
8 MR. DAVIDSON: Okay. And the --
9 CHAIRMAN LANN LEE: Is the Indiana jurisdiction?
10 MR. SANCHEZ: Yes.
11 CHAIRMAN LANN LEE: What's the name of the case?
12 MR. SANCHEZ: It's called Pabey, P-A-B-E-Y, versus Pastrick -- or actually, it's called
13 Gonzalez versus Pastrick.
14 CHAIRMAN LANN LEE: Well, you have the decision, right?
15 MR. SANCHEZ: I don't. This is actually a pleading. It's a draft complaint.
16 CHAIRMAN LANN LEE: Gonzalez versus?
17 MR. SANCHEZ: Gonzalez versus Pastrick, P-A-S-T-R-R-I-C-K. And there's state
18 companion cases that were brought for the new -- to get a new election.
19 CHAIRMAN LANN LEE: Okay.
20 MR. SANCHEZ: I can also provide the commission with copies with more of this
21 information. I, unfortunately, was rushing a little bit.
22 MR. DAVIDSON: If you could do that, and especially the judicial findings --
23 THE WITNESS: Sure.
24 MR. DAVIDSON: -- there --
25 MR. SANCHEZ: Sure.
26 MR. DAVIDSON: -- mentioning the 155 instances of vote fraud --
27 MR. SANCHEZ: Yes.
28 MR. DAVIDSON: -- that would be very helpful.
29 MR. SANCHEZ: will certainly do so.
30 MR. DAVIDSON: Okay.
31 MR. SANCHEZ: Our complaint, actually, many of the facts that I recited when we filed
32 our complaint it was -- there were attachments of the court's decision as well as affidavits from a
33 number of people who were affected. So I will provide all of that to this submission.
34 CHAIRMAN LANN LEE: Well, I imagine that the MALDEF office in Chicago has legal
35 files with the cases it's been involved in.
36 MR. SANCHEZ: We've done a number of Section cases over the years.
37 CHAIRMAN LANN LEE: Well, I think that it would be useful to be able to access the
38 files of those cases.
39 MR. SANCHEZ: Certainly.
40 MS. STREET-STEWART: We should address this.
41 MR. SANCHEZ: And we have a Section case going on right now in Aurora, Illinois
42 where there's a -- it used to be a, an at-large system. They now created a 10-member district
43 system with two at-large seats and, and in, in a city whose population is about 30 percent Latino.
44 They created one safe district and keep fighting where -- well, we just reached summary
45 judgment in that case. So I, I think it's actually a very strong case.

1 And it's indicative of -- I mean, it's one of these jurisdictions, like I said, where the
2 population has turned. And I think it's also the aging of our population. You know, with every
3 year we get more new voters. And so these, so these thresholds, you know, are pretty darn thin.
4 And, and I think that there's that realization out there that, that, you know, that it's a tipping
5 point. And when you get these jurisdictions with huge numbers of Latinos in them, things will
6 change. And I think that there's that realization and there's that resistance that builds to that.
7 CHAIRMAN LANN LEE: Well, I think it would be helpful to get copies of the opinions
8 in the cases that your office has brought. It's a renowned office. And we're hitting a problem in
9 some case -- some number of cases are unreported. And so we figure if we could get someone
10 like to you to make sure that the universe we're looking at is complete, that would be very
11 helpful. So if you could give us, you know, the opinions and the cases that your office has
12 litigated. I hope that isn't too much of --
13 MR. SANCHEZ: No, not at all, not by any means. And, and just one more small point
14 that I did want to make is this rash of voter ID laws that we're seeing all over the country. I
15 mean, that, that is --
16 CHAIRMAN LANN LEE: Do you want to talk about that for a minute?
17 MR. SANCHEZ: Yeah, it's clearly on our radar screen and clearly there, there are
18 situations which -- where disenfranchised poor, primarily minorities, that will -- it will
19 disenfranchise language minorities. The tribal ID issue is something that I've certainty been -- I
20 mean, clearly sovereigns have the right to issue IDs. And Indiana's law, for instance, there may
21 not be a reservation in Indiana, but certainly there are native people that live in Indiana. There's
22 no provision in the Indiana law for the acceptance of anything other than state or federal ID.
23 There's -- you know, most of these -- most of the states have some charge for the provision of a
24 license or, or a state ID card.
25 And, and it's just another hoop you have to jump through. I mean, I think that, that -- you
26 know, people who put together sweepstakes or, or -- will tell you the more steps that people
27 have to go through to get to -- from Point A to Point B, you're going to get dropoff at every
28 single new requirement you add. And this is a big one. It's -- in Illinois we get to show up on
29 polling day, sign our names, and there's two judges who get to look at our names and decide if
30 we're, if, if we should vote.
31 And it may not be a perfect system, but it's worked thus far. And, and to start requiring
32 more from very busy people, from working people, from people who have a hard time getting to
33 the polls as it is on Tuesday is -- it's really marching us down a road of further
34 disenfranchisement of communities that have traditionally been disenfranchised.
35 CHAIRMAN LANN LEE: Well, thank you, Mr. Sanchez, and we thank you for your
36 testimony. And we apologize for holding you unnecessarily and God speed. We will take a 10-
37 minute break at this point.
38 (A recess was taken.)
39 CHAIRMAN LANN LEE: We're going to reconvene and we have Mr. Gregory Moore,
40 executive director of the NAACP National Voter Fund, available telephonically.
41 I will say that Mr. Moore is responsible for the overall national coordination of national
42 programs designed to promote increased voter education and participation among African-
43 Americans and communities of color throughout the United States while promoting voter rights
44 election reform and issues that are important to the NAACP and its chapters.
45 Mr. Moore has been an advocate for many years and has served in the capacity of being
46 chief of staff to John Conyers, the dean of the Congressional Black Caucus, and actually the

1 ranking member of the Judiciary Committee as well. Mr. Moore, you have a long resume, but I
2 won't go more into that. Welcome to the commission hearing on the Midwest, and please feel
3 free to go ahead.
4 MR. MOORE: Well, thank you very much, and I want to check and make sure you can
5 hear me okay.
6 CHAIRMAN LANN LEE: Yes, we can hear you fine.
7 MR. MOORE: Thank you very much. And I want to also thank Marcia for the work in
8 helping me prepare. I apologize that I'm not being there in person. I planned to be on a plane
9 last night and was delayed. I wanted to --
10 CHAIRMAN LANN LEE: If you could speak slowly, Mr. Moore. We're going to turn up
11 the microphones, so if you could just speak slowly. The court reporter is having difficulty getting
12 you down. Why don't you proceed, but if you could proceed slowly.
13 MR. MOORE: All right. I'll go ahead and start. I'll read excerpts from my testimony and
14 not the full testimony in total, and I have submitted it via e-mail.
15 CHAIRMAN LANN LEE: Yes, we have it.
16 MR. MOORE: Oh, well, good. You mentioned I'm the executive director of the NAACP
17 National Voter Fund. And we've been active over the last four, five years, actually, in
18 registering, educating black voters around the country. We're headquartered in D.C., and over
19 the last several years we've coordinated programs in over 25 states.
20 I'm from Ohio. I'm a graduate of Ohio University, and I've spent a good number of years
21 doing work in Ohio, and I thought in this hearing I would primarily contain my remarks in the
22 time that I have -- the short time that I have to focus on some of the concerns I have about the
23 activities taking place in Ohio concerning election reform and how that might impact the whole
24 debate that we're having across the country in terms of election voting and reauthorization under
25 the Voting Rights Act. If you want to take that in conjunction with --
26 CHAIRMAN LANN LEE: Mr. Moore, can you stop for a second?
27 (A discussion was held off the record about sound quality.)
28 CHAIRMAN LANN LEE: Okay.
29 MR. MOORE: Let me just start by reminding the commission here again that we were
30 involved in a registration drive that was historic in 2004 along with several other allied
31 organizations. We were able to register 220,000 voters alone and about three and a half million
32 that we're aware of and with several other partners throughout the country. So there was a
33 dramatic increase in the number of African-American registered voters that we know had an
34 impact on the turnout. We were actively involved with those efforts. We were also seeking to
35 ensure that every voter was fairly counted.
36 We were participants in a number of hearings in November and December of 2004 in the
37 aftermath of the Ohio presidential debacle. And in 2005 we've been closely monitoring the work
38 of the Ohio General Assembly and other state legislators, that they have sought to address the
39 issues that arose out of the problems that occurred throughout the voting process on election day.
40 As we conducted these hearings on -- as you conduct these hearings -- as the commission
41 conducts these hearings, it's important that we hear many of the concerns that are being
42 expressed by voting rights advocates, as you have been doing, as well as specific community
43 groups that know firsthand what went wrong in Ohio and other states as well. We know from
44 Michigan past elections that African-Americans who are first-time voters are more likely to
45 encounter counters problems at the polls, and not just in Ohio but around the country. The
46 NAACP National Voter Fund and NAACP and other organizations at the state and local level

1 have spent years in development of election protection programs designed to ensure full
2 compliance with the Voting Rights Act of 1965. However, these efforts to get disenfranchised
3 voters continues to this day, and it is therefore the challenge of all federal and state lawmakers
4 to ensure that all election-related laws which govern how elections are conducted in states are
5 being drafted and enacted in compliance with the spirit of the Voting Rights Act. That's the
6 primary point I want to make with this sort of testimony. I
7 know that Congresswoman Conyers had planned to be here today, and I know that she
8 will try to speak with you at some point in your calendar of other hearings. But I would refer
9 you all to the Conyers report entitled "Preserving Democracy: What went wrong in Ohio." This
10 is the best publication, I think, that has been written. It gives a detailed account of many of the
11 voting irregularities that took place that impacted African-American voters in Cleveland,
12 Columbus and other counties throughout the state. Now, while Ohio is not one of states that's
13 covered under the Voting Rights Act, I think it's important that states that do have -- that do not
14 have to preclear their voting law changes should be aware and they should actually enact these
15 laws in the spirit of the Voting Rights Act, and also these laws should fall within the letter of the
16 law as well.
17 A number of hearings, not unlike this one today, were held immediately after November
18 2nd. It produced hours of testimony and volumes of firsthand accounts of voter suppression on
19 the part of state and county election officials in urban and minority communities across the state.
20 And I urge the commission and other voting rights activists to monitor the actions of the Ohio
21 General Assembly in particular as they undergo their version of election reform.
22 Based on an in-depth analysis of the proposed legislation being sponsored by the
23 governing party there, it is clear to us and to a number of voting rights activists that the reform
24 language attempts to codify many of the abuses that we saw take place in 2004
25 Today we urge the members of this commission to send a strong signal to Washington
26 and to the state legislative leaders that the commission is willing to submit its findings of all of
27 the recently gathered evidence of voter suppression, voter intimidation and voter
28 disenfranchisement. In fact, any relevant fact or finding regarding current barriers to the full
29 exercise of voting rights should be exposed and taken into consideration before any final
30 reauthorization legislation is passed into law.
31 We also need to take this opportunity of the 40th anniversary of the Voting Rights Act to
32 advance innovative state legislation initiatives that can expand the voting rights where it is
33 needed despite the political consequences that may still exist. Now, opponents of expansion of
34 voting rights are working overtime at state legislatures all across the country drafting up cookie
35 cutter legislation that is increasing imposing mandatory ID requirements, imposing restrictive
36 voting procedures, and will force millions of more voters into this provisional voting status.
37 Likewise, I'd urge the commission to consider the following recommendation that
38 sometimes may go against the conventional wisdom of the current legislative strategies, but these
39 are the issues that need to be addressed now and not after the debate of voting rights after
40 extension. And that, I think, would be in the true spirit of the Voting Rights Act that helps spur
41 this enactment.
42 The election laws that are taking place must have the greatest emphasis on increasing the
43 electorate and not making it more difficult to participate. And so we know that there are laws
44 that may seek to do one thing or have the effect of doing something else. And as these
45 legislatures continue to deliberate on election reform, it's important that the basic principles of

1 the Voting Rights Act of 1965, as well as the National Voter Registration Act of 1993, and the
2 Help America Vote Act of 200are all adhered to.
3 First and foremost, each provision of the new election reform laws must ensure that the
4 reforms will expand the right to vote and not contract it, and that the provisions should be
5 designed to make voting on election day easier, not more difficult. On the question of
6 provisional voting, the NAACP National Voter Fund believes that citizens who vote provisional
7 ballots should have laws that will not penalize them or take away their right to vote simply
8 because they showed up at the polling place or the wrong precinct. And in this case, sometimes
9 the wrong precinct is in the same polling place, and people are denied the right to vote because
10 they effectively stood in the wrong line. The jurisdiction for protecting provisional voters' rights
11 should be as broad as possible, but if they do make a mistake, it can be corrected without sending
12 them through hoops that may ultimately prevent their vote from being counted. On the issue of
13 voting jurisdiction, through a review of the testimony from voters in Pennsylvania and Ohio, we
14 learned that how a state defines voting jurisdictions can have a major impact on the counting of
15 particularly minority voters -- or particularly on minority voters' votes.
16 In an increasing number of states, the voting jurisdiction which governs provisional
17 balloting are precincts. Now, the NAACP National Voting Fund believes that this jurisdiction
18 should be counties and not precincts. This will ensure that the least amount of people are turned
19 away at the polls on election day. This is a major change that we feel must be made for any
20 legislation being considered at the state level.
21 There were many cases in 2004 where provisional ballots were cast and in the correct
22 polling locations, but were not in the correct precinct lines, so those provisional ballots in too
23 many cases were never counted. Now, this accounts for over 92,000 ballots in the 2004 election
24 in Ohio where the election was decided by just over 118,000 votes.
25 The Help America Vote Act designated the voting jurisdiction as the entity that oversees
26 an election. So in Ohio, this is the Board of Elections, which is usually based on counties. And
27 if Ohio and other states are to embrace the true spirit of the Voting Rights Act, it should
28 designate counties as the jurisdiction to govern provisional voting, thereby dramatically
29 decreasing the number of voters whose votes would not be counted in future elections. Our
30 overall goal must always be to pass laws which would decrease the number of people who
31 should vote provisional ballots and not increase the number.
32 On the issue of voter registration expansion, again, as I mentioned, we have historic
33 levels of voter engagement in 2004. And it was a breakthrough from decades of neglect of
34 potential voters not being registered on behalf of African-American and Latino and low income
35 communities. I think -- you know, I do not have exact numbers, somewhere in the neighborhood
36 of 300,000 new voters were registered across the state.
37 Now, in Ohio, again, hundreds of thousands of minority young voters found that when
38 they got to the polling place, there were long lines of people who were forced to wait anywhere
39 from two to nine hours to vote.
40 There were also intransient election officials and offensive poll watchers who challenged
41 their right to vote because they made honest mistakes on their forms in their efforts to find the
42 right polling place.
43 In Ohio, over 35,000 registered voters were placed on a statewide list to be challenged at
44 the polls by partisan party operatives. Over 150,000 were not able to participate in our elections
45 due to administrative and sometimes political barriers that occurred on election day. For that one
46 day they became second-class citizens, and the term "provisional" was stamped on their right to

1 vote and we believe nullifying their right to vote. Now, contrary to popular beliefs, voter --
2 mandatory ID requirements for all voters are not required under HAVA, and it is only required
3 for those new registrants who did not provide either their social security numbers or driver's
4 license on their original mail-in form. However, Ohio and many any other states have gone
5 further and taken steps to require all voters to show ID. NVF strongly opposes these efforts that
6 are under way to add this new provision to the state election codes. These requirements are
7 opposed by not only NAACP but many other civil rights organizations because of the well-
8 known barriers that it creates for low income, homeless, and people of who are statistically less
9 likely to have a voter -- a photo ID.
10 There was a study that was released in May of 2005 by the Ohio League of Women
11 Voters that revealed that over 357,000 voters, a disproportionate number of minority voters,
12 could be disenfranchised in the state of Ohio were this provision to be added, and would set back
13 years and years of progress that has been made to increase voter participation, particularly
14 among traditionally disenfranchised communities. By the same token, we oppose any efforts
15 that would weaken laws that provide -- weaken or repeal laws that allow ex-offenders to regain
16 their right to vote after they've served their time. Since a high portion of these voters affected
17 would be African-Americans and other men and women of color, we need to monitor these
18 efforts and these changes to ensure that they are not contributing to the increased state-sponsored
19 minority voter dilution. Ohio and Pennsylvania has one of the best laws in the nation regarding
20 restoration of voting rights and led the way for other states. But both legislative bodies, we are
21 urging them to resist temptation to repeal this law in the wave of reform. If anything, these states
22 should be doing more to help young men and women regain their full citizenship rights.
23 An ex-offender who is registered is more likely -- is much less likely to return to a life of
24 crime than a person who remains politically estranged from their community. So in 2005, as we
25 commemorate the 40th anniversary of the Voting Rights Act, we need to be breaking down
26 barriers and not erecting new ones. Many --
27 CHAIRMAN LANN LEE: Mr. Moore --
28 MR. MOORE: -- of these regressive reforms that are being promoted in the name of
29 stopping voter fraud are not doing that, they're actually creating more voter disenfranchisement.
30 The League of Women Voters study again and COHIO reveal a startling revelation that only four
31 cases of voter fraud could be documented out of 9 million votes cast in Ohio since 2002. And I'll
32 repeat, only four cases of voter fraud has been documented in a survey of all 88 counties of Ohio
33 out of 9 million votes in 2002.
34 CHAIRMAN LANN LEE: Mr. Moore, I wonder if you could try to finish up in the next
35 two minutes.
36 MR. MOORE: Sure. So in summary, I just want to say that we think that what failed on
37 November 2nd and all across the country was the election apparatus was not prepared to
38 accommodate a large outpouring of democratic participation. Any time you have a large
39 registration campaign, the election officials at the state and local level, we actually have a
40 concern that they can accommodate those voters. You know and I know that this hearing is
41 focused on the reorganization of the Voting Rights Act, but I appreciate the ability to talk about
42 how these other statutes that we've also worked on, the National Voter Registration Act and the
43 Help American Voter Act, are all extensions of the Voting Rights Act. And that we know there's
44 not going to be many opportunities for people to focus on voting and the voting rights and the
45 voting laws that are affected.

1 And so even though it may create some complications on the part of some people, it's
2 important that we let states know and let people who would attempt to weaken the Voting
3 Rights Act or weaken the ability of people to be engaged in voting know that we are also
4 interested in these provisions, which is why I put so much time into trying to focus on those
5 things.
6 In Ohio, as well as other states, we know that there are several things that are wrong, but
7 I hope that as we finish this discussion and we talk about the reorganization of the various
8 sectors of the Voting Rights Act that there is a place for those conversations to take place. And I
9 think this commission is the only place to do that, and we will hopefully get some of that
10 feedback from people throughout the country. I appreciate the ability to be a part of this hearing,
11 and I apologize for not being able to be more engaged, but I look forward to whatever
12 deliberations might come through as a result of these hearings, and will be glad to stay involved
13 in the process.
14 CHAIRMAN LANN LEE: Well, Mr. Moore, I think we have a question or two. But I just
15 wanted to be sure that you would get us copies of the Preserving Democracy report and the
16 report of the Ohio League of Women Voters.
17 MR. MOORE: Yes. In fact, I would have submitted those two for the record, but I want
18 to make sure I get those to you because those two documents are very, very good studies of some
19 of the things that we're talking about here today.
20 CHAIRMAN LANN LEE: Okay. Commissioner Rogers, and then if you have any
21 questions, Mr. Davidson.
22 MR. ROGERS: Yes, Mr. Moore, thanks so much. It's good to hear from you and your
23 testimony. I did have one quick question for you. I know that you served as former chief of staff
24 to Congressman Conyers on the judiciary committee, is that right?
25 THE WITNESS: That's right.
26 MR. ROGERS: I know that you've taken a look at where the votes are and -- or got some
27 sense about where votes are going to be with respect to the reauthorization. Can you just give us
28 a quick sense of where things stand on the political front as relates to reauthorization?
29 MR. MOORE: Well, I really couldn't because I'm not on the Hill anymore. I'm a full-time
30 director of the Voter Fund, so I'm not there much. But my understanding is that Congressman
31 Sensenbrenner at our convention least week came and announced that he was co-sponsoring his
32 version of the reauthorization. We were not shocked by that, but we were surprised that he chose
33 that location to do that.
34 Mr. Conyers had a bill in draft form for several, several months in conversation with
35 many members of the voting rights committee. I understand that there's going to be efforts to
36 make sure that Sensenbrenner's bill is the vehicle --
37 MR. ROGERS: It is.
38 MR. MOORE: -- and we do what we can to strengthen it to make sure --
39 MR. ROGERS: Do you know or do you have an idea of when you can expect to get a
40 draft of whatever his bill is going to be?
41 MR. MOORE: I'm not sure exactly. I think it may have just been introduced just recently
42 as a result of his speech at the -- at our convention last week. But my guess is that it's very soon,
43 and I'm sure that they will probably have something introduced in the next few weeks.
44 MR. ROGERS: One of the things that the chairman and I spoke about yesterday was
45 looking at to the extent that there is bipartisan support related to reauthorization of this act that
46 there may be some things that we want, want to point to to strengthen the provisions of the act.

1 That might be the subject of amendments or otherwise or some thought we might add with
2 respect to reauthorization or as it relates to this act, period. So it sure would be wonderful, to the
3 extent you have thoughts in that regard, if that information could be provided to the commission.
4 MR. MOORE: I would like to do that. And at some point in the future I know that
5 everyone is concerned about this being there. But I do think we, we don't have any opportunities
6 to have a bipartisan bill passed. And I am certain there will be Republican amendments to that
7 bill that will do things we won't like. So I think we should keep our powder dry, keep our options
8 open when it comes to possibly strengthening amendments. So again, I'm not sure how
9 everybody feels about that thought, but that's just my own view, but I think that is something we
10 should pay attention to because it has been talked about for a long time.
11 CHAIRMAN LANN LEE: Commissioner Davidson, do you have any questions? Well,
12 Mr. Moore, we don't have any more questions for you. Thank you very much. Thank you for
13 your patience in particular because of the audio difficulties.
14 MR. MOORE: Well, I appreciate your taking the time. And again, thank you for doing
15 what you're doing with these hearings. It's really useful for everybody I've talked to who's been a
16 part of it; they've been really happy to participate in the process. Thanks.
17 CHAIRMAN LANN LEE: Mr. Sayers and Ms. Robideau, thank you for being patient. I
18 wonder if we could start with Mr. Sayers because we started earlier talking about Duluth and
19 perhaps we could finish talking about Duluth before we start talking about Missoula, Montana.
20 Mr. Sayers, I compliment you on pulling the microphone closer to yourself. Mr. Sayers is a
21 Native American activist in Duluth and has been involved with nonprofits and tribal activities for
22 a number of years. And he is going to give us more information about Duluth. MR. SAYERS:
23 Yeah, I'm employed by the Red Lake Band of Chippewa Indians as urban liaison for Duluth,
24 Minnesota. And I also worked with Native Vote 2004 last year in the 2004 elections. And I'm
25 also on the indianslist.org as a state director. It's a political organization.
26 CHAIRMAN LANN LEE: Mr. Sayers, if you'd just pull the microphone as close to you
27 as you can get it.
28 MR. SAYERS: It's an organization that's targeting Native American candidates. We're
29 looking at getting more Native Americans involved in the political process and running for state,
30 federal and local level offices. Last year at the 2004 elections, I did voter mobilization and voter
31 registration in the Duluth area. I work primarily in Native American and predominantly black
32 neighborhoods in Duluth where the voter turnout has been pretty low for the last several years.
33 And I couldn't figure out why people just weren't voting. You know, we got out and talked to
34 people and, you know, find out why they weren't getting out the vote. And then we tried to work
35 on issues that would, you know, make them more comfortable voting. And one of the things we
36 found is that, you know, they, they just felt displaced at the polls, and they felt that, you know,
37 that their vote didn't really matter, so we gave them a lot of good reasons last year why we turned
38 out the vote.
39 We turned out the Native American vote. In Duluth we had 96 percent. And, and I know
40 we got commendations from around the state. We were one of the highest, highest turnouts.
41 But we did run into a lot of problems with Republican challengers who openly engaged
42 in voter suppression. And myself, I live in a predominantly white neighborhood of Duluth, and
43 when I went to vote, there was poll challengers at the polls. And I have other friends and other
44 colleagues that work in and live in white neighborhoods in the Duluth area and, you know, they
45 observed the same thing. And you go to the inner city where the population is predominantly
46 black and Native American, there was poll challengers at every polling place. And the

1 Republican challengers were all from Washington, D.C. and were all attorneys. Now, you know,
2 it's one thing I couldn't understand, is how can you be a poll challenger in a community if you
3 don't know the people in the community that you're challenging votes in. I mean, you couldn't
4 come up to somebody and say, you can't vouch for this person because you don't know that
5 person. How would you know that if you're not from that community? And it doesn't make sense
6 to bring someone in from out of state to do that in a community where you don't know anybody.
7 So we, we ran into a lot of problems. We had Republican poll challengers who openly
8 threatened people. At the Duluth Public Library, I personally brought down several individuals
9 from a halfway house, and they were all Native American. Only one had an ID, and he was
10 going to vouch for six other, six other residents of the halfway house. Now, the poll challenger
11 let the first five through. And when the sixth, the sixth voter registered and cast his vote, the
12 Republican challenger jumped up to the other guy, "Okay, you just vouched for this man. You
13 know, you're subject to a $10,000 fine, 10 years in prison for each illegal vote that went through
14 here." And, you know, he said it loud enough for everybody in the whole, you know, in the
15 whole polling place to hear him.
16 And so then I stepped in and said, "No, you're wrong. He can vouch for as many people
17 as he knows. He can vouch for anyone as long he knows them, knows where they live, and, you
18 know, that's, you know, that's the way the law reads." So the republican challenger said, "No
19 you're wrong. If, if any one of them is an illegal vote, he's subject to a $10,000 fine and 10 years
20 in prison." And I said, "Well, no, if you're, if you're going to challenge his vote, you need to take
21 the election judge aside and in private say you're going to challenge that vote. You can't openly
22 threaten someone with prison time or, you know, monetary damages for something like that.
23 That's voter suppression, and you can't do that. And you do it again, I'm going to call the police
24 myself and have you removed from this polling place." So we didn't have any more problems at
25 that area. So I went up the hill and I took some ladies from a battered women's shelter to another
26 polling place. And they also had an attorney that was a poll challenger.
27 And we brought the ladies in. Now, the ladies in a battered women's shelter, they're in a
28 domestic violence situation. There's federal and state laws that, you know, govern what
29 information they can put on their, their voter registration cards. They can tell the election judge,
30 you know, this is my situation, this is why this -- this is why this information is missing. There's
31 confidentiality rules. And the poll challenger challenged every one of them; demanded -- he
32 wanted each and every one of them's addresses.
33 And I said, "Well, you know, you're potentially putting these women at risk by trying to
34 put this out as public information when they're in domestic violence situation and there's federal
35 laws that govern that and you can't do that."
36 And so he was adamant that, "Well, then they can't vote. You know, we can't allow you
37 to vote. The election judge should not let you vote because you're not putting an address down."
38 So I told the ladies to go ahead and vote. If he's going to challenge the votes, we would actually,
39 you know, bring its attorney over to actually discuss it with him. Which they have an attorney on
40 site at the federal women's shelter.
41 So those five ladies got to vote in the end, but we just felt that, you know, that's, you
42 know, that's a statement, voter suppression to, you know, try to -- any little, any little thing that
43 they could use to try to keep people from voting. And it was pretty blatant that they were only
44 minority communities in the Duluth area. You know, there wasn't poll challengers in the white
45 communities. You know, and I know that firsthand because I voted, you know, in a
46 predominantly white neighborhood.

1 CHAIRMAN LANN LEE: The incident you just referred to involving the ladies from the
2 battered women's shelter, is that the same incident that Ms. Kazel earlier testified about?
3 MR. SAYERS: No.
4 CHAIRMAN LANN LEE: It's a different situation?
5 MR. SAYERS: It was a separate issue. There was -- they, they have a separate -- there's
6 three battered women's shelters in Duluth, and the one I was working with is a shelter for Native
7 American women. The one she is talking about is a separate -- it's a whole separate incident.
8 CHAIRMAN LANN LEE: Thank you.
9 MR. SAYERS: There was several incidents like that in Duluth last year. So, you know, it
10 wasn't just, it wasn't just the one incident, there were several incidents in downtown Duluth and
11 the Central Hillside community which is predominantly community. And the surrounding
12 communities, predominantly white neighborhoods, there was no incidents but there was quite a
13 few in the Central Hillside community. So there was more than the ones I, I witnessed.
14 There was another fellow from Mille Lacs that was doing pretty much the same work I
15 was doing, and we kind of, you know, touched base with each other throughout the day. And he
16 related about 1or 12 different incidents at the polling places he was working at. So there were
17 several incidents in Duluth last year with voter suppression. So I just feel that, you know, it was
18 pretty blatant in the Duluth area. And Red, Red Lake, you're going to hear from a lady later on
19 this evening, and she's going to -- she's got a real horror story for you. And that's -- I mean,
20 you're going to be surprised at what actually went on there.
21 CHAIRMAN LANN LEE: What are the names of the minority areas in which these
22 efforts were undertaken?
23 MR. SAYERS: Well, just the Central Hillside.
24 CHAIRMAN LANN LEE: Central Hills?
25 MR. SAYERS: Central Hillside community in Duluth.
26 CHAIRMAN LANN LEE: Okay.
27 MR. SAYERS: It's probably a mile and a half long by -- Duluth is a -- it's a port town and
28 it sits on the hill. So the area below the Central Hillside are, which overlooks downtown, and
29 that's mainly where all the minorities have, you know, congregated as, you know, the house --
30 the rents are cheaper. The, you know -- I mean, the buildings are older and they can afford to live
31 there, in that area. And it's closer to shopping, it's more convenient for a lot of these minority
32 community to live there.
33 CHAIRMAN LANN LEE: Well, thank you, Mr. Sayers. Now, we have testimony of
34 Janet Robideau.
35 MR. SAYERS: Oh, before --
36 CHAIRMAN LANN LEE: I'm sorry.
37 MR. SAYERS: -- I'm done, I just had another issue about the Minnesota governor
38 appoints the secretary of state. And last year Mary Kiffmeyer, just before the election, was
39 going to not allow tribal IDs in the state of Minnesota. Now, the Voting Rights Act directly
40 relates to that because if it weren't for the Voting Rights Act, they wouldn't have a leg to stand on
41 when they took her to court. And the state supreme court overruled her and allowed tribal IDs.
42 Now, the party that's in -- that's in power at the time is allowed to make the choice on who's the
43 secretary of state for that state. The secretary of state, in turn, enacts the election laws. So if it's a
44 Republican governor, they're going to lean towards the Republicans as far as what the election
45 laws are going to be for that state for that year. And, you know, if it weren't for the Voting Rights

Act, I think that, you know, that there would be a lot more abuses than there were in the past. It's a pretty important point.

CHAIRMAN LANN LEE: Okay, thank you very much.

TELEPHONE OPERATOR: Carol Juneau from Montana is on the line.

MS. JUNEAU: Okay.

CHAIRMAN LANN LEE: I'm sorry, could you repeat your name again? MS. JUNEAU: This is Carol Juneau from Montana. I'm on the line. I was told to call in about this time.

CHAIRMAN LANN LEE: You're on the phone right now, but we're going to --

MS. JUNEAU: Yes.

CHAIRMAN LANN LEE: -- we're going to, if we can, Representative Juneau, could we ask you to wait a couple of minutes because we have --

MS. JUNEAU: I certainly will. I'd be happy to do so. It's been great listening.

CHAIRMAN LANN LEE: Well, I want you to know you're deferring to another Montanian.

MS. JUNEAU: A great lady. I heard her name.

CHAIRMAN LANN LEE: Okay. Well, Ms. Robideau is a member -- I'll just introduce her and then she's going to testify for a few minutes --

MS. JUNEAU: Wonderful.

CHAIRMAN LANN LEE: -- and then you will follow. Janet Robideau is a member of the Northern Cheyenne Nation and a resident of Missoula, Montana. She is a longtime activist, as well as the executive director of the Montana People's Action MPA and Indian People's Action organizations. IPA I guess is the last one. And these organizations fight for social, economic and racial justice using a direct action organizing. Welcome, Ms. Robideau.

MS. ROBIDEAU: Thank you. And I'm glad to be here, and I don't talk fast and I talk loud, so, okay.

CHAIRMAN LANN LEE: The court reporter appreciates that.

MS. ROBIDEAU: As you stated, I am the executive director of Montana People's Action and Indian People's Action. We organize low income people in our urban Indians. And our Montana stats are pretty much par for the course for that area of the US. The population of white people is at 9percent. Indian people are 7.7 percent of the population, and all other groups of color comprise the remaining 1.3 percent.

The largest other non-Indian groups are -- we have a large Hmong population. We have a large Hispanic population in Billings. And also in Missoula, in addition to the Hmong, we have a number of Belarussian immigrants. There are roughly 70,000 people in the state of Montana, a quarter of which are children, not of voting age yet.

Half of us live in the urban areas, and I just brought a, a picture, it's on a shirt that we distributed for voting stuff. But we have 1tribes and seven reservations -- you'd think I'd know that by heart right now -- and five urban areas that we as Indian People's Action serves. And just -- and I've been working in this total arena since the early 90s, and I've been an activist since 1973. I do -- I did want to comment earlier about what three of the other people had said talking about border town violence, an enormous amount of border town violence, those little towns and bigger towns that surround our seven Indian reservations. This last election cycle we encountered a number -- there were rumors floating about that the cops were going to pull over Indian people, Indian drivers and check for insurance and driver's license. And, of course, if we don't have that, we're breaking the law.

1 So a number of our folks were reluctant to go out driving. My organization provides
2 rides to the polls. We work and we make sure that people are registered and educated and we
3 mobilize them. We got a number of calls from people who did not want to drive because they
4 don't have insurance, they're poor, they can't afford it, and it's against the law if we don't have it.
5 I find that the racism in our state is especially rampant against Indian people. People feel
6 quite free and comfortable doing things to us that they would not ordinarily do to other people of
7 color. And their attitude is, well, just an Indian, you know, who cares. Why are you taking up for
8 that person, that's an Indian.
9 Our governor has been called an Indian lover because he has appointed a number of our
10 Indian people to various posts within his administration.
11 And we talked about complaints, and we basically feel like complain to who, who's going
12 to listen, who really cares, although that is changing, and it continues to change over the years
13 because we're, we're letting our Indian people know that you have to be vocal about this. You
14 know, people don't really understand that this is going on, and if we don't speak up, it's never
15 going to change.
16 People feel that they're not going to be believed, and so it takes time to get people to get
17 to that level of trust. So when they're targeted as they go to vote, they're not -- I mean, what we
18 encounter is not so much at the polls, it's what happens as we go in and, and we try to get people
19 registered to vote.
20 So we encounter clerks who don't want to give us voter registration cards. They -- and
21 they're actually very nasty about it. They say, "Well, we'll give you 10, we're not giving you
22 100." In Missoula, we registered over 2,300 people for this last election. We had to go in and get
23 cards 10 at a time because these folks refused to give us the cards because they -- you know, I'm
24 not sure what's -- you know, why. We did actually go over their heads. We were told, we talked
25 to attorneys and they said, "Call the state office."
26 And so they sent us this huge box of voter registration cards so that we could register
27 people to vote.
28 Then when -- every Friday we took our cards to the county elections office, and they
29 were outrageously rude to our folks. We had to send our nicest, most mellow folks to go and
30 deal with the county clerks because they would literally like throw cards. They were upset.
31 They, you know, they didn't want to -- they didn't want to deal with us.
32 And we were very careful about explaining to people how they should fill out these cards,
33 because we would encounter such rudeness at the -- from the county clerks which, you know,
34 they ultimately deny.
35 During election 2000, we worked really hard to get absentee ballots in. You know, vote
36 early, vote often. But we, we ended up getting a large number of people to do their absentee
37 ballot voting, and during that session, in the 200session, our esteemed legislators from not the
38 Democratic Party voted, they passed a law that made it illegal for us as community activists and
39 social justice organizations to take those absentee ballots.
40 And we understood, you know, there was a worry about fraud, but we couldn't even take
41 them to the people that we visit. And we'd go door knocking, we'd go door to door in the
42 community.
43 So they didn't even want us handing the ballots. We had to go through this elaborate way
44 to make sure that people would -- we did it all over the phone. So we were still able to do it, but
45 they continued to put up these barriers.

And then finally just the tribal IDs, there was some -- like my tribe, the Northern Cheyenne, we don't have a picture on our ID. I just have a sheet of paper that says I'm an enrolled Cheyenne and I have a number. I don't have a picture.

I've been able to use that, you know, at banks and for other things and I have a driver's license, but they could not -- and this -- for the first time we had to present IDs. We've never had to before. I mean, you're talking about a state, we don't even have a million people, we got 950,000. We have a nice big state.

But with the tribal IDs, some tribes have pictures and others don't. There needs to be some sort of uniformity, some consistency across there. And finally, I think just that, you know, we in Montana work really work hard to get our Indian people out to vote. And for the powers that be to continue to put up these barriers, you know, just makes it harder for us to convince people that they need to get out and vote. But it doesn't stop us. We're going to continue to knock down these barriers. And if we, you know, if we can let people know what's going on then, you know, we have a greater chance to have a voice in the decisions that are made that directly affect our lives. Thank you.

CHAIRMAN LANN LEE: Ms. Robideau, you said "vote early," and then I think you paused and rolled your eyes and said, "vote often."

MS. ROBIDEAU: Yes.

CHAIRMAN LANN LEE: When you roll your eyes, it doesn't appear in the transcript. Did you mean to say vote often?

MS. ROBIDEAU: Yes, and I was joking. I apologize.

CHAIRMAN LANN LEE: Okay.

MS. ROBIDEAU: I was using an old union phrase, but, no, you only vote once.

CHAIRMAN LANN LEE: Why don't we go to Representative Carol Juneau. Are you still on?

MS. JUNEAU: I certainly am.

CHAIRMAN LANN LEE: Okay. And then what the commission will do is follow up with questions for the both of you at this point. And if Mr. Sayers comes back we can include him in the questions. Let me introduce you. The Honorable Carol Juneau of the Montana House of Representatives is a statewide leader for Indians in Montana, and an educator for legislators not familiar with the issues facing the state's tribes. She's a native of South -- of North Dakota, rather, and a member of the Mandan-Hidasta Tribe, and Representative Juneau is in her fourth term representing the Blackfeet reservation of Browning, District 85, in Northern Montana. Welcome, Representative Juneau.

MS. JUNEAU: Thank you very much. Am I speaking to Mr. Lann?

CHAIRMAN LANN LEE: This is Bill Lee.

MS. JUNEAU: Bill Lee, okay.

CHAIRMAN LANN LEE: We also have Commissioner Joe Rogers, Commissioner Matthew Little, Commissioner Elsie Meeks.

MS. MEEKS: Hi, Carol.

MS. JUNEAU: Hi.

CHAIRMAN LANN LEE: And Commissioner Davidson.

MS. JUNEAU: I've got written testimony that I e-mailed earlier today. Maybe -- I don't know if you got it by now. They can copy it off and give it to you and --

CHAIRMAN LANN LEE: We have the testimony --

MS. JUNEAU: -- and you can follow along.

1 CHAIRMAN LANN LEE: We have the testimony and you can feel free to give us
2 highlights.
3 MS. JUNEAU: I will. Okay, thank you very much. As I said, my name is Carol Juneau,
4 for the record, and I currently serve as state representative for House District 16. The Blackfeet
5 Indian Reservation makes up the majority of my house district. I'm an enrolled member of the
6 Mandan and Hidasta Tribes of North Dakota, and I've been active in the political empowerment
7 of Indian people for many, many years.
8 And I think that the previous person that testified, Janet Robideau, I would say ditto to
9 almost, you know, almost everything she said. She's absolutely right on here in the state of
10 Montana. I was a plaintiff in the Old Person versus Cooney, later called Old Person versus
11 Brown, voting rights case that was filed after the 1992 redistricting process, and we spent many
12 years on that case.
13 But after the 2003 redistricting plan was approved here in Montana, it really made our
14 issue moot. So I would just really encourage the commission to take a look at that particular
15 case, the issues we raised in terms of the dilution of the Indian vote in Montana.
16 Also, I wanted to ask the commission to include as part of your record the report that Dr.
17 Janine Pease did for Yale University called Voting Rights in Indian Country, Lessons from the
18 Past, Prospects for the Future. This is a real good comprehensive report on the history of voting
19 rights here in Montana, as well as elsewhere, and so it would be a good document for your
20 review.
21 Montana has had a long history of voter rights activities, such as voter registration drives,
22 voter education projects. And we also have a long history of voter litigation that helped move us
23 forward over the last probably 20 years. And the redistricting that was done after the 2000
24 census has allowed the opportunity for Montana to have eight American Indians serving in the
25 state legislature at this time, six in the house, two in the senate. And we hope by 2006 to have
26 three in the senate, so we would have a representation of nine Indians in the state legislature.
27 One of the issues, I think the issue of proportional representation for American Indians in
28 the state legislatures throughout the United States, as well as proportional representation in the
29 county, city, school boards and other local government systems needs to be addressed by this
30 commission which deals right directly with voting rights. The progress that's been made in
31 Montana in voting participation has not been without challenges or without very hard work by a
32 lot of people who had to dance through a lot of hoops, as Janet Robideau talked about, placed in
33 front of them by clerks and recorders, or laws passed by our state legislature on voting
34 procedures.
35 Most recently in Blaine County in Montana, which includes the Fort Belknap
36 Reservation, there was an election legal challenge filed by some Indian people in that community
37 and they won. For 80 years, there has never been an Indian county commissioner elected, and
38 that went to court. They got a district in the Fort Belknap community, and an election was held
39 and a new district was added, that new district, and an Indian was elected, and so we're real
40 proud of that action.
41 And in preparing this testimony, members of the commission, I did ask people in
42 Montana to share some of their ideas and some of the concerns with me and I'll do that at this
43 time. Dr. Janine Pease, she's a Crow Indian educator and voting rights activist, and has four
44 issues for your attention.
45 In one of them she talks about the rural locations in reservations. Many reservation
46 communities are rural and they don't have addresses. And so one of the things that the county

clerks require is specific addresses on voter cards or also section, township, and range where people live, and not very many people know that, so that is an issue. And if the people don't put their correct address down, the clerk and recorders will toss the card officially and the people lose the right to vote. So that specific issue is something of concern. Janine also says the elections schemes in Montana are at-large systems, and most Indian voters are unaware that the election scheme dilutes their strength and make it nearly impossible to elect school board commissioners, county commissioners water board commissioners, city mayors and more. American Indian voters desperately need the chance for representation. And until American Indian people have a clear path to representation, many of these governmental entities will continue their practices that tend to exclude American Indians.

Gail Small from the Northern Cheyenne Reservation, who has been a voting rights activist for many years, stresses the importance of bilingual Cheyenne and English speaking people needed at the polls there in the Northern Cheyenne Reservation. She talks about a disenfranchised population who are already hesitant to vote due to backlash, and they have maybe one or no people who can speak the tribal language at the polls.

And some of our tribes in Montana have retained their language more than other tribes, and that's probably true in the United States, so that need would vary, I would imagine. But she talks about during the 2004 election they had a hard time with the bilingual issue in the Lame Deer community, the Lame Deer elections. She says it's very important for interpreting and explaining the numerous ballot initiatives that people had to vote for, so she explained them to her mother and then her mother went in with the tribal elders and spoke in Cheyenne to them about the issues of coal bed methane, about the issues of medical marijuana. And how to explain that in native language is a difficult process that we have to think about.

Anita Big Springs from the Flathead Reservation, who's been working issues for many years as well, brought some specific examples out at what happened on the Flathead Reservation in 2004.

And again, going back to clerk and recorders, that relationship, excluding our community, the clerk and recorders continues to be an issue. She said the clerk and recorder from Lake County, when they took in some voter cards due to changes of address, they said, "Oh, you moved again? We can't keep up with you."

And they sent -- in the voting they sent a Kootenai elder on a wild goose chase to vote. She went -- the elder went to Dayton to vote, which is a small community there. She was told to go back to Polson to vote. She went to Polson to vote, another community, and Polson told her to go back to vote in Dayton. So Anita called the clerk and recorder, and there was a reply that said, "That was my fault, Anita. She should be voting in Polson. And Polson sent her out a new card this morning."

And that was said on election day. And no election judge offered this lady an opportunity to vote provisional status, which she could have been provided that opportunity. Another thing that Anita brought up is election judge ID discrimination and not following the appropriate voter protocol, not asking their friends or relatives or community people for IDs and letting them vote. And that's one of the requirements here in Montana under HAVA. When an Indian went to vote who had been voting in the same precinct for 30 years, he was asked to produce an ID.

One of the things -- again sending people to different precincts because the voter card was wrong. They also -- Anita also raises the issue of not having election judges who can speak the native languages to people and not recruiting minorities to serve as election judges. One of the issues that I found out in Lake County, they had late voter registration lists. That is one of the

1 things when you work voter participation, you need a voter list as soon as you can to work on
2 getting people out to vote, and they had a difficult time getting election -- a current voter
3 registration list there.
4 She recommends that chief election judges have more training in the Voting Rights Act
5 just as a general thing because a lot people weren't familiar with provisional status or how to do -
6 - what to do with spoiled ballots.
7 One of the things again, and it comes up and Janet brought it up, is that we get voter
8 registration cards from the clerk and recorders maybe 20 at a time, maybe 10 absentee ballot
9 requests at a time, telling them they don't like to use the kind you can download from the Net or
10 the ones that are provided in the phone book because it does not fit into our their card file and it
11 creates more work for them. Polling places was an issue of concern. There was a precinct who
12 had 4non-Indian voters, and they had their own polling place.
13 Also on the Flathead, there was a district where there was 28voters with an Indian
14 minority who had to travel 60 miles to vote.
15 Then, of course, there was the issue on the Flathead Reservation of mismarked ballots,
16 what to do with them. And it's a big issue that created a lot of interest here in Montana. There
17 were seven ballots that Anita Big Springs did go to court on and disputed, but in the district court
18 they brought up 70 ballots that were mismarked, 70 ballots -- or 77 ballots should have been
19 thrown out that were counted.
20 And so there has been in this state HAVA and the traditional ballot, voter -- the clerk and
21 recorders, those kinds of barriers continue to make it difficult for Indian people to participate
22 fully. I think we've come a long ways here in Montana, we still have a long ways to go, and so I
23 do really appreciate this opportunity to testify before you and wish you the best with your work.
24 CHAIRMAN LANN LEE: We just have a brief round of questions. Commissioner
25 Meeks.
26 MS. MEEKS: Carol, do you know if there were federal monitors at any of these polling
27 places?
28 MS. JUNEAU: I believe that -- one of the things that I know, there was a lawyer's group
29 that brought in a number of lawyers to Montana at the various polling places, and I'm not certain
30 where they all went. We had a couple here in one of our big group things on the Blackfeet
31 Reservation that was just observers. And I don't know how but we did have -- I can't remember,
32 from some lawyers group that said, "You know, we're available if you want us." And I know
33 some of the reservations called and asked them to come in and be an observer. So we did have a
34 couple of law students that came in from the University of Montana and observed here.
35 MS. MEEKS: Okay. But no one from the Department of Justice --
36 MS. JUNEAU: I'm not sure how many were on the other reservations.
37 MS. MEEKS: But no one was sent out by the Department of Justice.
38 MS. JUNEAU: Not that I'm aware of.
39 MS. ROBIDEAU: I got a call from the National Congress of American Indians who
40 asked if I thought there should be federal monitors. I said, "If there's any place you should have
41 them, it should be Lake County." And so I never did find out if they sent a federal person to
42 Lake County because that's -- that place is right in the middle of the Flathead Indian Reservation
43 and Lake County is one of the most racist in the state.
44 MS. JUNEAU: One of the difficulties, Elsie, is that there's so many voting precincts on
45 some of these reservation communities.
46 MS. MEEKS: Right.

1 MS. JUNEAU: You'd have to have a large number of monitors available, you know, just
2 even to our state with seven reservations. As an example, on the Flathead reservation, for the
3 number of precincts that are on the reservation itself, there's 1voting precincts. On the Blackfeet
4 there's 10.
5 MS. MEEKS: Right.
6 MS. JUNEAU: And if you only -- if you were going to cover the Blackfeet and the
7 Flathead Reservations, you would have to have been, you know, accounting for every precinct,
8 you'd have to have 20 people or so. It makes it difficult.
9 CHAIRMAN LANN LEE: Well, thank you, Representative -- I'm sorry, Commissioner
10 Davidson does have a question.
11 MR. DAVIDSON: I would just like to know whether you feel Section 203, the language
12 assistance provision, has been of any use to Indians in your state.
13 MS. JUNEAU: Tell me what specifically that provides.
14 MR. DAVIDSON: That provides language assistance for people whose first language is
15 not English.
16 MS. JUNEAU: I think one of the things we see from the Northern Cheyenne comments
17 and I think the Flathead Reservation comments, two of the reservations that I asked information
18 on, and I think Crow as well, there has been attempts made to have maybe at least one person, I
19 think, in the precinct that knows the native language. In some of the precincts I think it's still a
20 weakness. I think it's very helpful to have a Native American that people recognize, more than
21 one Native American that people recognize in the voting precincts that can speak the language of
22 that reservation community or that tribal group, and to give voters a sense of ease when they
23 show up to vote, particularly probably new voters and particularly our older voters that, you
24 know, should be made welcome in that. So I do think it's very helpful, but we need more of it.
25 MR. DAVIDSON: Thank you. I just note for the record that Montana has bilingual
26 election material requirements in Big Horn County and Rosebud County for the Crow and for the
27 Cheyenne populations.
28 CHAIRMAN LANN LEE: Okay. Well, if there are no other questions, I'd like to thank
29 Ms. Robideau and Representative Juneau. Thank you very much.
30 MS. JUNEAU: Thank you for allowing us to testify.
31 MS. ROBIDEAU: Thank you.
32 CHAIRMAN LANN LEE: We'll just take a break for just a second.
33 MS. MEEKS: Is someone else coming?
34 MR. GOGGLES: Patrick Goggles from Wyoming.
35 CHAIRMAN LANN LEE: Mr. Goggles. And I understand Judson Miner is also on?
36 MR. MINER: I am.
37 MS. JUNEAU: I'm going to disconnect now.
38 CHAIRMAN LANN LEE: Okay, thank you, Representative Juneau.
39 MS. JUNEAU: Thank you.
40 CHAIRMAN LANN LEE: Mr. Goggles. Is it okay with you if we hear Mr. Miner's
41 testimony first?
42 MR. GOGGLES: That's fine with me.
43 CHAIRMAN LANN LEE: Okay, thank you. It's my pleasure to now introduce Judson
44 Miner. He's a partner in the law firm of Miner, Barnhill & Galland which has offices in Chicago
45 and Madison, Wisconsin.

1 And since the firm was founded in 1971, it has done a lot of work in civil rights and
2 neighborhood economic development. And it's also been Mr. Miner's counsel -- former
3 colleagues, both African-American senators from the state of Illinois. Mr. Miners is a very
4 well-known voting rights lawyer, and during his administration of Harold Washington he was the
5 corporation counsel for the city of Chicago. Welcome, Judson Miner.
6 MR. MINER: Thank you.
7 CHAIRMAN LANN LEE: One of the ground rules are if you could just testify for five or
8 10 minutes, we could have a quick line of questions and then move on to Mr. Goggles.
9 MR. MINER: Well, I can make my presentation short. To be honest, I was gone all week
10 and I just got back in my office, so five minutes is plenty. But I --
11 CHAIRMAN LANN LEE: We've had a long day too.
12 MR. MINER: Pardon?
13 CHAIRMAN LANN LEE: We've had a long day too.
14 MR. MINER: I do think what I have to contribute is from the perspective of a person
15 who has been litigating cases under the Voting Rights Act, principally Illinois, over the past two
16 decades. And for someone who doesn't know much about Illinois, it is a state in which we have
17 large ethnic racial minorities but they are very segregated. It's a state which, notwithstanding the
18 fact that we have two elected African-American senators, on the local level is and remains very
19 heavily polarized.
20 And our governmental structures of choice are single member districts. We have decades
21 of tradition in Illinois of drawing wards and district boundaries in a way that creates or
22 minimizes minority voting strength. And minimizing is an overstatement. Throughout the '80s
23 and through the '80s and into the '90s, the tradition in Illinois was that you drew a map that
24 created the smallest number of districts in which minorities could elect candidates of their
25 choice. It was not until special elections were held in the mid-1980s that required a significant
26 redrawing of districts that Hispanics obtained their first representatives in Elkton, Illinois and in
27 Chicago, despite the fact that they had quite substantial populations. And, indeed, in the '90s the
28 first Hispanic congressional district.
29 The process has been corrected, to the extent it has been corrected, only through
30 litigation. In the 1980s, there were -- there was litigation over the congressional redistricting in
31 which efforts were made to again create two African-American congressional districts in a
32 jurisdiction in which it took a tremendous amount of energy to draw anything less than three
33 districts. It was only after litigation that we succeeded in creating three districts that what we
34 have today, in terms of litigation in Illinois in the '90s, was to create a Hispanic district. In the
35 local scene in Chicago in the 1980s, it took four years of litigation to address a map that had the
36 smallest number of African-American and Hispanic districts that could possibly be created. In
37 fact, the city is so segregated that you were able to draw a boundary throughout the city that ran
38 on both sides of the existing boundaries that would include potential populations that could have
39 been put into a majority black ward or majority white ward.
40 In the 1980s, blacks in that area were 34 times as likely to be placed in majority white
41 districts than whites were to be placed in majority black districts. And this area is due to
42 virtually the penalty of whites in majority in minority districts. And it rarely happens unless it's
43 absolutely necessary.
44 The result of the 1980 remap litigation ultimately led to special elections in which the
45 city was required to redraw six of its 50 wards, and those six all elected minority representatives.
46 And the consequence of that was quite profound in local government in that it created a total

swing in our city council in Chicago and permitted Harold Washington to govern the city for two years, mostly being beaten up by the other forces.

Again in the '90s, the same thing happened, although in a much smaller scale. But once specific steps are taken to correct the imbalances, it's hard to go backwards in jurisdictions. There were still population shifts, and then the city was reluctant to make in this case even minor adjustments that would have provided equal voting opportunities for African-Americans. In this case, the City of Chicago, in an effort to prevent any increase in minority representation, was willing to spend $16 million in litigating its map. It ultimately lost.

The Tenth Circuit ordered a rehearing on a very limited issue of how many more districts had to be drawn. As a result of that, there was a redrawing and there were special elections in Chicago.

So that has been our history. And the hope is that because of the Voting Rights Act, these problems would slowly become less severe. And it is clear that the forces that are responsible for engaging in the redistricting process are well aware of what is required of them and increasingly becoming sort of mindful of this obligation. And the hope is that we will see much less of these problems.

CHAIRMAN LANN LEE: Thank you, Mr. Miner. We have a round of questions. Joe Rogers.

MR. ROGERS: Absolutely. Mr. Miner. Thank you for being with us. I had a very general question that I had for you because I'm curious. Illinois is a state that has elected two African-Americans to the United States Senate. And it was mentioned about your association with both, with Representative Carol --

MR. MINER: The law firm has produced two-thirds of all African-American senators since reconstruction.

MR. ROGERS: Absolutely. Absolutely.

MR. MINER: We're mighty proud.

CHAIRMAN LANN LEE: We detect a note of pride in your comments.

MR. ROGERS: I have to ask a broader question because I think there are implications as it relates to the Voting Rights Act, but I'm curious about this.

Given, as you're mentioning, a series of polarizing politics as they take place essentially with respect to Chicago and perhaps some areas of the state, one might argue, well, how is it possible that Barack Obama, for example, would be elected to the United States Senate out of Illinois, or that Carol Moseley Braun would have been elected out of Illinois given the history and practices related to racial discrimination as they exist in Illinois overall. Can you more broadly comment about dynamics as they take place in Illinois given, as your testimony indicates, problems with respect to racial discrimination and particularly voting in the state?

MR. MINER: Oh, sure. The simple answer to that is that the problems are most profound at the most local level. It's one thing to be addressing this issue in a city government where these racial concerns are created mostly. The next level is the state level where the districts are much bigger and it is, it is still severe but not quite as severe.

When you get to the national level, you're dealing with a whole range of different issues. And you have also have to keep in mind that when African-Americans win, it is -- on occasion there are factors that obviously come in. When Senator Braun won, there were multiple candidates, there was a division of votes, and that was very helpful to her. And the simple answer with Barack Obama is that Barack Obama is extraordinary. So that any white in the state of Illinois who has any thoughts that he or she could vote for an African-American and didn't vote

for Barack Obama would really have to examine themselves again. So he's very, very special. But he also ran in a race with seven candidates.

So I think the dynamics that goes on at the most local level is really much different. And there's much greater concern in the city of Chicago over whether we're going to be governed by an African-American mayor or non-African-American mayor, and who's going to be controlling the city government and the jobs and the services and so forth. So I think that race plays an even greater role at that level.

MR. ROGERS: And that race is such that you directly state that it's essentially whites who do not want African-Americans elected or representing them.

MR. MINER: Well, I think that's right, particularly at the local level. They play a more effective role in that process.

CHAIRMAN LANN LEE: Commissioner Little.

MR. LITTLE: No.

CHAIRMAN LANN LEE: Commissioner Davidson?

MR. DAVIDSON: No.

CHAIRMAN LANN LEE: Well, thank you, Mr. Miner.

MR. MINER: Thank you for having me.

CHAIRMAN LANN LEE: And actually I do have a question before you run off.

MR. MINER: Okay.

CHAIRMAN LANN LEE: I understand that you've actually litigated cases in Missouri.

MR. MINER: I did bring a case in St. Louis.

CHAIRMAN LANN LEE: Could you talk about that and particularly the issues that were raised?

MR. MINER: Well, the issue -- you know, that was a case that -- I was brought into a case that someone else had started. I can tell you about the problems that exist there. We never got that case back on track. The case had been dismissed when I got in and had been appealed, and it took an unfortunate course, and the state court had reversed it and we couldn't get it back to the trial level.

But in truth, the situation in St. Louis in the 1990 redistricting was indistinguishable from Chicago. They had drawn a map in St. Louis. St. Louis had many of the demographic characteristics that Illinois had. It was an incredibly segregated city with blacks living on one side, the whites being the other, and a small area in the middle that has overlapping racial communities. And they had drawn a map that had the smallest number of African-American districts that you could possibly draw. And, you know, unfortunately by the time we were asked to get into the lawsuit, the case had been dismissed, and the court had gone off on a proportionality theory that the supreme court rejected but we never got it back to the trial level. So the problems were, were indistinguishable. The degree of racially polarized voting was profound. The use of manipulating ward boundaries to absolutely minimize minority voting strength was -- seems to be the routine. But that is really all I can attribute to that situation.

CHAIRMAN LANN LEE: You know, just reflecting on your -- the colloquy you had with Mr. -- with Commissioner Rogers, I guess your answer for -- at the local levels should be that you have -- in the city of Chicago, as well as, I guess, St. Louis -- racially polarized voting.

MR. MINER: Correct.

CHAIRMAN LANN LEE: And you may not have it at the higher levels, at the statewide levels for instance.

MR. MINER: Well, I think that's clearly the case. All of our data shows that voting is far more polarized as you get into lower levels of government where people are more concerned about who's going to be their neighbor, what will be the consequence if they don't continue to control their local unit of government. Some of those concerns aren't quite as severe, don't dominate quite as much as you up the political process. I think there's -- I wouldn't be surprised if there's still polarized voting at every level in Illinois.

As I say, there are always exceptions, and Barack Obama is such an exception that it's hard to use him as a model to determine whether voting is traditionally polarized.

MR. ROGERS: Mr. Miner, I want to follow up on that point because that begs a couple of different questions. In essence, what you're saying is that Barack Obama is such an extraordinary human being that white people, of course, could not vote for him, in essence, because if they didn't vote for him, then they're, in effect, yielding to their most base instincts as racist human beings. However, with respect to local political personalities or at the more level, are you suggesting, in effect, that the individuals at the more local level are not as strong or capable or otherwise as articulate or compelling personalities, such that whites would not vote for individuals at the local level?

MR. MINER: All I can say is when you get into local politics, race becomes more important, seems to be. All of our voting analysis shows that race plays a more predictable, profound role in determining how people vote.

In biracial elections in Chicago, whites virtually never cross over and draft African-Americans at the local level.

MR. ROGERS: Let me ask you --

MR. MINER: That was true of Harold Washington who won an election with 36 percent of the vote, and it was virtually all of the black vote and didn't touch a white vote. It would have been interesting, had he not passed away, to see whether that might have changed, if there was someone on the scene who had been successful and had an opportunity to convince the white community that he could be an effective representative.

Harold used to go around the city, and he loved to say that "You can run and hide from me, but we're going to find you and we're going to be fair to you." And if he had had the opportunity to do that for another term, it may well be that it would have been less racially polarized voting. But as soon as he passed away, the voting in Chicago became as racially polarized as it was before.

MR. ROGERS: Let me ask you the question slightly differently Mr. Miner. If Barack Obama were running at the local level as opposed to the United States Senate, are you suggesting that he would not have been elected by white votes?

MR. MINER: Oh, you know, that's a very tough question. If Barack Obama had decided to initiate his political career at the local level and he had run in a white district against a white ethnic candidate, I think his chances would have been, he would have been lost.

MR. ROGERS: Thank you kindly.

CHAIRMAN LANN LEE: Well, thank you, Mr. Miner, and thank you for spending part of your Friday afternoon with us here. And if you need to go, you're free to do so.

We're going to move on to W. Patrick Goggles. Mr. Goggles is a member of the Arapaho Tribe and a member of the Wyoming House of Representatives where he is, I believe, the first Native American since Mr. Ratliff to be elected to the Wyoming legislature. Welcome, Mr. Goggles.

MR. GOGGLES: Thank you.

1 CHAIRMAN LANN LEE: If you could testify for about between five and 10 minutes,
2 that would be very helpful.
3 MR. GOGGLES: I would be glad to.
4 CHAIRMAN LANN LEE: Before you testify, let me just say I understand Kat Choi is on
5 the line.
6 MS. CHOI: Yes.
7 CHAIRMAN LANN LEE: So if you could be ready to testify after Mr. Goggles, that
8 would be helpful also. Is that okay?
9 MS. CHOI: Okay.
10 MR. GOGGLES: Mr. Lee.
11 CHAIRMAN LANN LEE: Yes.
12 MR. GOGGLES: For the record, my name is W. Patrick Goggles, Representative W.
13 Patrick Goggles. I'm a representative for House District 33 which includes the County of
14 Fremont and the Wind River Indian Reservation in the state of Wyoming. I'm currently the
15 executive director for Northern Arapaho Tribal Housing in Wyoming. I
16 was elected in November of 2004, and as you mentioned, I actually am the second
17 Native American elected to the Wyoming legislature. Mr. Scott Ratliss was elected in 1980 and
18 served until 1992. However, I am the first Native American residing on the Wind River Indian
19 reservation.
20 CHAIRMAN LANN LEE: Mr. Goggles --
21 MR. GOGGLES: Yes.
22 CHAIRMAN LANN LEE: -- we're having some transmission difficulties. This
23 transmission is not coming across loud enough for the court reporter to get your testimony.
24 We've had this difficulty before, and I just wondered is there any way you could pump up the
25 volume?
26 MR. GOGGLES: I've got it pumped up all the way as far as it will go.
27 CHAIRMAN LANN LEE: If you could --
28 MR. GOGGLES: And it's right on the phone.
29 CHAIRMAN LANN LEE: Okay. My apologies, Mr. Goggles. We're having some
30 difficulties at our end. And whatever you could do to increase the volume would be great.
31 MR. GOGGLES: All right. I'll speak as loud as possible if that's better. Are you hearing
32 me any better at all?
33 CHAIRMAN LANN LEE: Yes, we are.
34 MR. GOGGLES: Like I said, my name is W. Patrick Goggles. And I am the
35 representative for House District 33 for the state of Wyoming. I currently am the executive
36 director of the Northern Arapaho Tribal Housing. And as you mentioned, I am the second
37 Native American elected to the Wyoming legislature. Mr. Scott Ratliss served as the first
38 Native American, as a Shoshone tribal member from 1980 to 1992. However, I'm the first Native
39 American residing on the Wind River Indian Reservation to serve in the Wyoming House.
40 House District 33 is a very rural district in a very conservative Republican state of Wyoming.
41 All of my success was because of the 2000 census redistricting which allows Native
42 American voters the probability of electing a Native American representative. However, up to
43 that time many voters were not registered and many voters were complacent and had not voted in
44 many years. The last election in 2004, with the help of Fremont County and their election clerk
45 who was a Democrat, allowed us to register voters at the polls in our very rural district. And I
46 have 10 precincts in my district, three of them are on the Indian reservation and seven are outside

the boundaries. We registered a total of 898 new voters in our, in our district with a voter registration project. The Fremont County election office allowed us -- he recognized tribal identification as part of this process.

Now, that process recognized the tribal ID. We use a digital format here. The digital format meets the elements for a Wyoming driver's license. So we didn't have really much of a problem in dealing with election judges.

We were also able to have election judges from our native communities as observers and as leaders to help elders that didn't understand what they were voting for. So we did get some help from the Fremont County election clerk. She basically followed the elements of the Voting Rights Act which allowed tribal members to register at the polls on election day. As a matter of fact, we had one precinct where people voted until 9:00 that night. They had to close the doors at 7, but we had people inside the building and they were allowed to vote until 9:00.

The Fremont County clerk allowed that allowed -- they set up a registration date on our reservation and at our tribal facilities for tribal members to register. But that is not to say that this is a very rosy picture, because it's been a long struggle to get to this point. And I would like to echo the sentiments expressed by Ms. Juneau and Ms. Robideau and the struggles they continue to have in Montana. There are barriers and there are dilution of Native American voters.

One of the barriers in my locality is the Fremont County Commission. All the people are at large and it's virtually impossible for Native Americans to elect a commissioner. And some of the other barriers that we run into, some of our tribal members do not live on the reservation, they live in border towns. And they do find some problems with election clerks. The problems are not as significant as you heard from Mrs. Juneau and Mrs. Robideau, however.

But we did -- we did use our voting rights -- I mean our voting registration, a project to help educate those folks on what they needed to do to register to vote. And we encouraged them to vote early. You know, to vote early in the day rather than waiting until 6:30 to go to the polls. But fortunately many of our tribal members did do that.

In my precinct, I was able to defeat the incumbent. The reservation precinct, I had a 74 percent advantage to my incumbent 26 percent votes received on the reservation from non-Indians residing on our reservation.

Let me say a few other things about the Voting Rights Act. I believe the Voting Rights Act has been implemented well in Fremont County and has allowed tribal members to participate in voting. However, it's really incumbent upon the tribal members and leadership to get those voters out to vote and get them to understand what the franchise means to them. My election did pretty much that. We had many voters that didn't believe their one vote could make a difference, but, however, in this particular election it did through a voter registration drive mounted by the two tribes, Eastern Shinbone Tribe and the Norther Arapaho Tribe. And we canvassed the entire reservations for voters, many that were young and many that were old, and many that had not voted for years because of the complacency of not seeing their vote count in terms of a Native American candidate. But also a candidate makes a big difference as to how that person's going to be received.

I did receive approximately, I think, 38 percent of the precincts outside of the Wind River Indian Reservation. I did receive 38 percent, I received several crossover votes, and I received votes from many Anglo Americans living within the area. So by my election proved that the Voting Rights Act does work, that it should be maintained. And I would particularly stress that Section 5 needs to be reauthorized, and that was my purpose in calling. If you have any questions, I will end my testimony now. Thank you.

1 CHAIRMAN LANN LEE: Okay. Questions? Commission Chandler Davidson.
2 MR. DAVIDSON: Representative Goggles, I have a couple of questions for you, and I'm
3 just trying to get my facts straight. I'm not perhaps as good a note-taker as I should be, but I
4 believe you said that the 2000 redistricting enabled the -- was it the first election of a Native
5 American representative on a reservation?
6 MR. GOGGLES: On the reservation.
7 MR. CHANDLER: Okay. And the second otherwise.
8 MR. GOGGLES: Yes.
9 MR. DAVIDSON: How do you explain -- and so you see this as a favorable -- a
10 redistricting that was favorable to Native Americans.
11 MR. GOGGLES: Absolutely.
12 MR. DAVIDSON: How do you explain that? Was it the result of a lawsuit or was it just
13 the conservative Republican legislature acting on its own?
14 MR. GOGGLES: Actually, there were several members of the legislature and those
15 several members appointed to the redistricting of the boundaries that actually looked at the Wind
16 River Indian Reservation as part of a district.
17 And yes, there are many conservative folks in Wyoming. And I believe and -- you know,
18 I'm not real sure about this, but I believe because of the complacency issues that many Native
19 Americans didn't vote, that many people thought that it really didn't matter whether they made
20 the reservation a district or not because many of the Native Americans wouldn't vote anyway.
21 MR. DAVIDSON: I see.
22 MR. GOGGLES: But this year was a different year. We got many young people out to
23 vote. A lot of college age Native Americans, single mothers, young families.
24 MR. DAVIDSON: Could you tell me what percentage of your district is composed of
25 Native Americans?
26 MR. GOGGLES: Well, out of the 10 precincts, three of those precincts are on the Wind
27 River Indian reservation. The total elected -- the total vote on the reservation was right around
28 2,000 to 1,955. And there were a total of 3,197 votes, and the vote off the reservation was 1,419.
29 The numbers, you know, really tell the story here. The postelection -- or the preelection
30 there were only 1,057 voters compared to the postelection which there were 1,955 voters. So we
31 did a lot of work in registering voters to vote, especially Native American voters, but we didn't
32 forget about the Anglo American voters out there; we included them in our drive to vote as well.
33 MR. CHANDLER: I see. So you're saying that the majority of the voters in that election
34 in which you were elected were Native Americans?
35 MR. GOGGLES: Yes, for the first time --
36 MR. CHANDLER: Okay.
37 MR. GOGGLES: -- in many years.
38 MR. DAVIDSON: Thank you.
39 CHAIRMAN LANN LEE: Well, thank you very much, Representative Goggles for your
40 testimony. And thank you for helping our court reporter.
41 MR. GOGGLES: My pleasure.
42 CHAIRMAN LANN LEE: Thank you. The next speaker is Kat Choi who is -- excuse
43 me, I just have to get my papers. She's with the Korean American Resource & Cultural Center in
44 Chicago. The center was founded in 1995 to empower Korean Americans in the greater Chicago
45 area through community education, collaboration and organizing. And so I'd like to welcome

Ms. Choi, and please feel free to testify. I would like to just ask if Representative Thomas Van Norman is on the line? Okay, not. Okay, Ms. Choi, please go forward.

MS. CHOI: Okay.

CHAIRMAN LANN LEE: Welcome.

MS. CHOI: Good afternoon. The 10 of you -- is it loud enough?

CHAIRMAN LANN LEE: We're having some odd audio again. Let me just ask the court reporter.

(A discussion was held off the record about sound quality.)

CHAIRMAN LANN LEE: Why don't we take five minutes. Ms. Choi, can you wait a couple minutes before testifying?

MS. CHOI: Yeah, sure.

CHAIRMAN LANN LEE: Okay, thank you very much. So we'll take a break for five minutes.

(A recess was taken.)

CHAIRMAN LANN LEE: Thank you for bearing with us. We have our court reporter back and you're coming through clearer. So we thank you for your patience and please feel free to go ahead.

MS. CHOI: Okay. So good afternoon. My name is Kat Choi. I'm the director at Korean American Resource & Culture --

CHAIRMAN LANN LEE: Ms. Choi, the court reporter is saying that you need to slow down. If you could speak slowly, that would help him. Your testimony is being transcribed and put in the public record.

MS. CHOI: Sure.

CHAIRMAN LANN LEE: But thank you for bearing with us.

MS. CHOI: Okay. Hi, my name Kat Choi. I am the director at Korean American Resource & Cultural Center. We are based in Chicago. And let me give you a brief outlook about Korean Americans living in greater Chicago area. So according to 2000 census --

THE COURT REPORTER: I'm not understanding her.

(A discussion was held off the record about sound quality.)

CHAIRMAN LANN LEE: What we're going to do is record your testimony because -- well, it's too long to explain. But we'll record your testimony and do our best to get it transcribed.

MS. CHOI: Okay.

CHAIRMAN LANN LEE: So if you could speak slowly, that would be helpful. Thank you.

MS. CHOI: Okay. So let me talk a little bit about Korean Americans living in greater Chicago area.

So according to 2000 census, there are about 60,000 Koreans living in greater Chicago, and about, approximately about 7,000 registered voters live in Cook County. Cook County is a northwest suburb including the Chicago area. So since its inception in 1995, the Korean American Resource & Culture Center's central activities have been to provide comprehensive education for Korean American voters through registration campaigns, publications of voter guides, distribution of candidate sheets, and community workshops.

THE COURT REPORTER: Can we stop for a second?

CHAIRMAN LANN LEE: Ms. Choi --

MS. CHOI: Yes.

CHAIRMAN LANN LEE: Could you hang on just a second?

(A discussion was held off the record about sound quality.)

CHAIRMAN LANN LEE: Just continue. Again, I apologize. We're just trying to get the record made. The court reporter is struggling to get this. So if you could just continue.

MS. CHOI: Okay.

CHAIRMAN LANN LEE: Thank you.

MS. CHOI: So I'll go on. And so one of the activities we have dealt with a lot is for the last November election in 2004 which includes voter registration and also get-out-the-vote campaign for over 3,000 members in the community. And also exit surveys from five polling sites in the suburbs and Chicago area with assistance from Asian-American Legal Defense and Education Fund. While the numbers of Korean voters in Cook County has increased significantly over the last decade, there has been little bilingual materials available to Korean voters. It's also an expansion of Section 203 of the Voter Rights Act, so there is a trigger of 10,000. So only where there are more than 10,000 registered voters in certain counties speaking bilingual, the county clerk or county office is mandated to provide bilingual materials for those voters. But currently Cook County does not.

So last year for the first time, KRCC helped the Cook County clerk's office publish the very first voter registration brochure in Korean language provided by the county. But it was not widely promoted or distributed by, by the office. Also, that was the very first time voters have language in Korean, but it was only available on election day. As one of the most recent immigrant groups, Korean voters with limited English capacity face significant barriers to exercise their voting rights and to have their votes count.

So the following events were recorded by Korean voters in the greater Chicago area. So first, a lack of election judges providing bilingual assistance. All the cases had been made for other agencies to help recruit or promote election judges who speak Korean. And so in due time they were not really to be able to help out the voters in trouble. Also, the other thing that was noted was even though Korean voters have -- go to the right polling sites, and even though voters have all the right required information, including voter registration cards, so sometimes they were asked to vote by provisionary ballot instead of the usual ones.

And the third one is lack of sample ballots in Korean language, so that kind of impeded Korean voters to be able to choose -- vote candidates in their districts because they are not given information about candidates in -- for positions and what they run for in their districts. So as a recommendation, we propose for the commission to continue Section 205 of Voter Rights Act, and moreover expand Section 203 by lowering current trigger of 10,000 as it fails to include underrepresented migrant communities. So that was testimony. Thank you.

CHAIRMAN LANN LEE: Thank you, Ms. Choi. Do we have any questions from the commission members? Ms. Choi, thank you very much.

MS. CHOI: Okay, thank you.

CHAIRMAN LANN LEE: And we appreciate you putting up with the technical difficulties.

MS. CHOI: That's fine.

CHAIRMAN LANN LEE: We're now going to go to the panel with -- hello.

MS. CHOI: Hello?

CHAIRMAN LANN LEE: Hello? Is that you, Ms. Choi? Okay. We're now going to go into the panel with people from the public who are testifying. And the first speaker is Kathy

1 Dopp, who is going to talk I guess about the Open Voting Consortium and the National Election
2 Data Archive. Is that correct?
3 MS. DOPP: That's correct.
4 CHAIRMAN LANN LEE: Welcome.
5 MS. DOPP: Thank you.
6 CHAIRMAN LANN LEE: Thank you for your patience.
7 MS. DOPP: Oh, thank you for having this hearing here. My name is Kathy Dopp. I have
8 a master's degree in mathematics with graduate level computer science studies. And I am
9 president and one of the founding trustees of an organization newly formed since the November
10 '04 election called US Count Votes.
11 And we're a group of primarily mathematicians and statisticians. And we think we can
12 apply our talents to solving any problems with elections systems in America today.
13 So I'd like to tell you why we need a nationwide database of mathematical -- of detailed
14 election results data so that we can analyze it and what, what some of things we can do to help
15 correct the problems of voter disenfranchisement and incorrectly counted elections in America.
16 With a nationwide database of detailed precinct level data, we could analyze the various rates of
17 provisional balloting in different counties and precincts, and the rate at which those provisional
18 ballots got counted and show if there was some abnormalities in certain precincts of counties that
19 were, you know, had a much higher rate or not counting their provisional ballots.
20 We could also collect and analyze demographic data so that we could tell if these trends
21 were, you know, being -- going along racial lines or not. Mathematical methods can be used to
22 do redistricting. Instead of the current system, we could minimize boundary perimeters of
23 districts and make sure that redistricting was done in a mathematical formula that was fair to
24 everyone. Our group, US Count Votes, has studied voting machine allocation and found that it
25 does suppress voter turnout in places like Ohio.
26 All the mathematical studies we do, and we can produce court-worthy evidence for
27 lawyers that is irrefutable. Some of the exit poll analysis that our group has done so far has yet
28 to be refuted by even one Ph.D. statistician or mathematician in America at any major university.
29 And we've got a group of about 24 Ph.D. mathematicians and statisticians at universities all
30 across America that are associated with our group. We have analyzed data in New Mexico, for
31 example. We can do analysis of whether machines with high error rates are deliberately allocated
32 to disadvantaged or -- excuse me, certain ethnic groups or not.
33 And in New Mexico, it looks like machines that had extremely high error rates of
34 undervotes in past elections were deliberately -- may have deliberately or were allocated to
35 minority districts.
36 MR. ROGERS: These are computerized machines?
37 MS. DOPP: Yes.
38 MR. ROGERS: Interesting.
39 MS. DOPP: New Mexico is really interesting because it shows why you need to get the
40 detailed election data that no state is currently releasing or will tell you. Because in New Mexico
41 there were -- in just the presidential race alone, there were 2,000 more votes that were counted
42 than were actually cast in the absentee ballot category.
43 But the way the data is normally reported, these were added together with the election
44 day results. And election day voting on these electronic ballot machines with no paper had a very
45 high rate of no votes registering for the presidential candidate in, in the election. In other words,
46 supposedly up to 105 voters went to the polls on election day and voted for the downstream races

1 but not for the presidential race, which is very suspicious. But when you report data the way
2 election officials normally do, they add these together and then report them, and so you can
3 essentially today -- in today's election reporting system, you can pad votes for one candidate in
4 one vote type while you're simultaneously subtracting votes for a different candidate in a
5 different vote type. And when you add them together and report them, neither problem is in
6 evidence.
7 And I'm only picking on New Mexico because I'm very happy to report that the New
8 Mexico governor and chief election official actually has made this data available. So this -- we
9 have no idea of the extent of these kind of problems until we are able to build the system,
10 collecting and analyzing this data in other states as well. Another thing that a group of
11 mathematicians and statisticians can do to help achieve election integrity is to show -- in one of
12 the handouts I have here shows how surprisingly good a probability you would get of catching
13 any miscounted precincts if you conduct random routine audits in randomly selected precincts. In
14 just a small percentage of precincts, it gives you a very hight rate of detecting vote miscounts,
15 especially when it's a small amount of vote counts spread out among precincts.
16 CHAIRMAN LANN LEE: So what you're saying is anomalous results stick out?
17 MS. DOPP: Yes.
18 CHAIRMAN LANN LEE: When you do -- right after you do the random sampling?
19 MS. DOPP: Well, how the --
20 CHAIRMAN LANN LEE: Or the outliers, I guess.
21 MS. DOPP: I'm actually talking about two different approaches, building a nationwide
22 database and analyzing it mathematically for election results.
23 And also doing on the local level routine audits of randomly selected precincts, counting
24 the paper ballot in, you know, maybe to 5 percent of the precincts. And by routinely auditing the
25 paper record, you can catch -- if you -- you can -- if you detect a miscounted precinct, that should
26 trigger a countywide recount of all the ballots. So in other words, you would randomly select
27 maybe two small -- maybe to 5 percent of the precincts to hand-count, and then that would give
28 you, depending on how you design your audit, maybe a 90, 95 percent chance of catching any
29 miss -- miscounted precincts if there were some. And that would enable you to easily catch any -
30 - especially vote counts that were strewn among all the precincts.
31 And the database of election results, when you collect those and analyze the detail
32 election results, that would enable you to catch and detect any statistically anomalous results. So
33 you might not catch a really small distributed result like you would with the paper audit, but
34 you would catch anything that was, you know, really striking or statistically significant.
35 Like, for instance, in New Mexico it was very statistically significant, the fact that the
36 counties in New Mexico that were counted with op-scan paper ballots had a very normal low
37 percentage of undervotes in a presidential race. In other words, everyone -- less than -- fewer
38 than percent on average went to the polls and neglected to cast a vote for president. Whereas if
39 you voted in counties using the DRE electronic ballot machines, you had this very high rate, and
40 it was -- and those machines were allocated more -- they -- the rate was particularly high of
41 undervotes in the precincts where you had minorities, a higher portion of minorities. Another
42 thing you can detect with statistical -- you know, a mathematical analysis of the election data, for
43 instance in Florida in both the 2000 and 2004 election, the op-scanned counties looked like they
44 were miscounted, the electronic miscounts.
45 A lot of you may remember that if Gore had requested a recount of all the counties in
46 Florida, including the op-scan counties, he would have won Florida, because the Miami Herald

1 recount of the op-scan ballots showed that enough votes shifted in the recount from Bush back to
2 Gore that Gore would have won Florida.
3 What a lot of people don't realize is that the Miami Herald did a recount of 2.7 of the op-
4 scan counties after the 2004 election, and in their own characterization of their report, they said it
5 was an insignificant number of votes shifted back from Bush to Kerry. But some
6 mathematicians in my group actually looked at the number of votes that shifted back from Bush
7 to Kerry, and they found that enough votes shifted back from Bush to Kerry, those 2.7 counties
8 that they counted, that if you multiplied that out based on a proportion of the population, Kerry
9 would have won Florida again in 2004.
10 But that kind of gross calculation doesn't necessarily -- you know, isn't necessarily valid,
11 so that this is not something that would, you know, necessarily mean that Kerry would have won
12 Florida. But in the 2000 election in Florida, there was a very high rate of ballot spoilage or
13 overvotes where, you know, there was more than one, you know, ballot -- ballots were spoiled
14 because too many people were chosen for the same race on the ballot.
15 You know, what I find really interesting about that is supposedly this ballot spoilage rate
16 was much higher in precincts where there was a high number of minority voters. And a lot of
17 those precincts had precinct-based op-scan systems where supposedly you stick the ballot into
18 the counter at the precinct and it spits it back at you if there's an overvote, so there should have
19 been no overvotes in some of those districts. And so how did those overvotes get there? You
20 might wonder if maybe, A, the, the feature that caught and detected and warned the voters of
21 overvotes might have been turned off on those machines, or perhaps there was some insider that
22 was spoiling the ballots after the fact.
23 CHAIRMAN LANN LEE: Yes.
24 MS. DOPP: We don't know.
25 CHAIRMAN LANN LEE: Ms. Dopp, I think if you could try to conclude your
26 testimony, that would be great. But I'd say generally that I think what I would do -- what I will
27 do is ask the staff if they could talk to you because I think the purpose of our hearing is slightly -
28 - is somewhat different.
29 MS. DOPP: Yes.
30 CHAIRMAN LANN LEE: But it obviously is germane to the intense public interest
31 about voting integrity and the use of these machines. And I, I think that --
32 MS. DOPP: Well, I think your focus is more on the Voting Rights Act --
33 CHAIRMAN LANN LEE: Right.
34 MS. DOPP: -- and minority groups. And, you know, I apologize. I'm in town --
35 CHAIRMAN LANN LEE: No, no.
36 MS. DOPP: -- for a NASS conference and so I thought --
37 CHAIRMAN LANN LEE: It seemed a natural.
38 MS. DOPP: Yes.
39 CHAIRMAN LANN LEE: I think what I would do is have you wind up. But also suggest
40 that maybe the staff could identify some venues for, for these very important kinds of issues that
41 you're raising, you know, because it's not quite germane.
42 MS. DOPP: Okay, well --
43 CHAIRMAN LANN LEE: But it sounds like it's very important and should be brought to
44 light.
45 MS. DOPP: Well, that was my first point, that we need to create this nationwide
46 database at precinct level elections to help identify all these issues. And --

1 CHAIRMAN LANN LEE: Yes, I know exactly what you're proposing. You're proposing
2 that there are certain mathematical ways to address these issues.
3 MS. DOPP: Right.
4 CHAIRMAN LANN LEE: Because statisticians deal with anomalies all the time.
5 MS. DOPP: Right. And they can provide court-worthy evidence that is irrefutable if we
6 have the right data. And the second --
7 CHAIRMAN LANN LEE: Well, it would be important for secretaries of state to maintain
8 integrity of their state system.
9 MS. DOPP: Well, unfortunately not one state in America makes this data available right
10 now, so that's why I'm --
11 CHAIRMAN LANN LEE: Right.
12 MS. DOPP: -- attending the NASS conference to try to see if --
13 CHAIRMAN LANN LEE: Okay. So you're already working on this.
14 MS. DOPP: Yes. The second thing that we need to do that we haven't done enough in terms
15 of -- you know, I guess I'm dealing more with the issues that disenfranchise not only minorities
16 but all voters. And what I have seen a huge lack of is that people are not turning to the Ph.D.
17 computer scientists that are voting systems experts, and therefore when they author legislation or
18 try to, you know, fix the problem.
19 And that there's this group called the Open Voting Consortium, which is a group of Ph.D.
20 computer scientists, who have been working since the year 2000 to develop better voter systems,
21 and they have excellent recommendations and would be happy to help anyone with respect to
22 legislation to fix voting systems.
23 And the third idea I have is -- you know, it's very timely right now -- I don't know how
24 much time we have -- is that the Help America Vote Act funds, it actually turns out that the less
25 expensive voting equipment is also much more trustworthy, the op-scan voting equipment that
26 produces a paper ballot that's hand-countable and auditable. And the more expensive voting
27 equipment is the, you know, electronic ballot voting that is the also not -- slightly trustworthy
28 and can be easily used to embezzle elections or just any kind of error can cause election failure.
29 And so if we could convince states to save money, they would have lots of Help America Vote
30 Act funds left over to do things like hire experts to ensure that the electronic voter registration
31 databases are handled correctly so that voters are not disenfranchised like they were in Florida.
32 And they could also create Web-based Internet databases that would keep voters, election
33 officials and poll workers up to date on all the rules, regulations and procedures related to voting
34 in their locales. And there would be a lot of other things that this money could be spent on that
35 would really help solve a lot of the problems. And I guess my main points are that Get-Out-The-
36 Vote efforts, although I think they're great, but in my opinion today from the mathematical
37 analysis that my group has done, we find that there's so much evidence of vote miscounts that is
38 so widespread around the country in many, many states that you could probably put out all the
39 voters you ever wanted to to vote and you still might not be able to influence the results of an
40 election until we fix election integrity that's disenfranchising everyone.
41 And that after decades of never doing any independent audits of our voting systems to
42 check for accuracy, we've essentially given unlimited freedom to anyone on the inside to tamper
43 with our vote counts. And we must, you know, do -- take these few actions to fix it, create the
44 nationwide database, start consulting with computer scientists and, you know, require voting
45 equipment that has voter verifiable paper ballots that are hand-countable and independently
46 auditable. And I'm sorry if I'm a little off topic, but good luck with all your issues.

CHAIRMAN LANN LEE: Well, no, I think you're adding a dimension --

MS. DOPP: That's right.

CHAIRMAN LANN LEE: -- that's actually not been raised in the public debate about integrity. I think it's only been about verifiability. It's not really been about the kind of issues you're raising.

MS. DOPP: Right, which I think are important.

CHAIRMAN LANN LEE: Do you have any questions, Charles? Well, thank you very much.

MS. DOPP: Thank you.

CHAIRMAN LANN LEE: We're going to move to have some testimony from some ACORN activists. Shade Buyobe-Hammond.

MS. BUYOBE-HAMMOND: Yeah, my name is Shade, S-H-A-D-E, Buyobe-Hammond. Buyobe, it's spelled B-U-Y-O-B-E Hammond, H-A-M-M-O-N-D.

MR. ROGERS: Where did you get that, where did you get the name Buyobe from? What is the origin?

MS. BUYOBE-HAMMOND: Shade Buyobe is my African name that I was awarded in -- like about 25 years during Kwanza, and I've used it ever since.

MR. ROGERS: Okay, thank you.

MS. BUYOBE-HAMMOND: I want to thank you for having us come tonight and testify from ACORN.

ACORN is an acronym that stands for Association of Community Organizations for Reform Now. We are a membership driven organization, and we focus on the issues and concerns of low and moderate income people. We are a national organization as well as an organization here in Minnesota, and nationally we are 34 years old, and in Minnesota we are just about 24 years old.

We're going to talk to you a little bit about voter intimidation which is a serious thing in our community. We have found that during the election -- the last election in 2004 that there were numerous problems around the state, challenges among the party that were harassing people of color. And this was an attempt to discourage voters from actually, you know, casting their ballot as well as -- in the city as well as in the Duluth and the Indian reservations that this was experienced.

ACORN, we supported efforts at the state level to require that challengers be Minnesota residents, not outstate people, and that the people making the challenge do that challenge in writing. Those are now part of the state law, but we're concerned that these protections are not being enforced. Shortly before the election, the secretary of state's office put out a ridiculous notice to county officials about how to spot a terrorist on election day. This is a disturbance to the well-being of the voting public, and therefore it could cause more misidentification, disturbance of the voting public coming in to cast their votes and disturbing the nature of the other vote. We need to be encouraging people to get out to vote and not scaring people without any reason.

The vote is a very basic unit of power in this country, and we're -- and ACORN is an organization that is about building power for our community so we can change the quality of life that we have in our community, so that we can lift our voice and be heard. It's important that the Voting Rights Act states about the past history of discouraging potential voters, getting approval from the US Justice Department before making any significant changes in how they administer

the election. We're interested in maintaining our democracy, and the vote is key to making that happen. I appreciate your letting me make these comments. Are there any questions?

CHAIRMAN LANN LEE: I have a question. Do you have a copy of that notice that the -- about the terrorist.

MS. BUYOBE-HAMMOND: I don't have it with me, but I'm sure I could get it.

CHAIRMAN LANN LEE: Yes, I think it would be very helpful if you could provide that to the commission. Sunday Alabi?

MR. ALABI: Yes.

CHAIRMAN LANN LEE: Okay, thank you.

MR. ALABI: Sunday is like the Sunday, and the last name is A-L-A-B, as in boy, -I. I'm an ACORN member for quite a long time, and the most immigrants, especially in Minnesota here, live in the city. And I'm very interested to make sure that they don't treat the immigrants like they treat the people in the city, because it just takes for me two or three times to be frustrated and before you become nonvoters again.

And when you don't vote, the politicians don't listen to you. And when they don't listen to you, they do things to us -- it's like a dominos theory that, well, the politician will do whatever they want and do anyway. There's no need for me to vote. I've seen that in Minnesota here. When the immigrant first come, everybody's happy to vote. Some people are voting for the first time. I mean, it's an empowering situation that yes, you are the one who is picking the president of the United States. And it really gives you the power.

But when -- I remember this very well, because in the last election when ACORN registered over 36,000 new voters in Minnesota, we went and negotiate with the -- I mean, I actually talked to the secretary of state.

And he gave us the, the new registration form with so many duplications. You are to provide your travel license. You are to provide -- and if you move, if you move from where you live before -- I mean month before this, you get a new driver license, your ballot won't be counted because your address will be different from what is on your driver license. So there's so many obstacles that the secretary of state was trying to put in front of us, which is mostly is going to affect the immigrant mostly because a lot them aren't driving.

And when we talked to her, she said that, "well, that is the way it is." I told her that Minnesota has to take the secretary of state to court to stop that, that practice. And I think it really helped tremendously. I would really dare to say that maybe they should take the voting registration out of the secretary of state's hands and put it on national level where there would be one person who makes the final decision for the whole country and it not depends on the political whim of the secretary of state. That's my feeling.

And if you look at the light rail construction in Minnesota, actually it is -- they have it in English, in the Hmong language and in Somali language. Buy why can't we -- there shouldn't be any question about voting ballots also, it should be in the non-English languages those who cannot speak the English. Thank you very much for allowing me to speak here today. And I think it's very important we maintain these Voting Rights Act, that our rights are the same, all starting with and continue with a new immigrant who really wants to vote, who want to be part of the -- a society and want to contribute.

CHAIRMAN LANN LEE: Thank you very much, Mr. Alabi. Are there any questions?

MR. ROGERS: I did, actually. As you were speaking, I was punching something up on the Web because I was triggered by a thought. It's a very general thought. Some of the complaints that people might have about not reauthorizing the act is essentially this: why bother

1 reauthorizing the Voting Rights Act if you don't vote anyway? I mean, if you look at the core --
2 if you look issues related to minority voters in particular, what you find across the country are
3 poor registration rates of eligible voters and then poor turnout rates of those who are eligible to
4 vote.
5 MR. ALABI: Yes.
6 MR. ROGERS: And I'm just very curious in a broad sense, what would be your response
7 to a person who would say that?
8 MR. ALABI: You know, you see, that's --
9 MR. ROGERS: Why bother?
10 MR. ALABI: -- it's like what comes first chicken or the egg. You know, I mean, when
11 you -- I totally -- I was thoroughly impressed in the last election that it taught to me a lesson that
12 after we registered 36,000 new voters, we find a politician coming to our ACORN office for
13 endorsement. And some of them never kept their promise to us. They never kept their promise.
14 So we told them that "The next election we are not voting for you." That, including our
15 present mayor in Minneapolis here. He didn't keep it, he didn't that promise. And since we have
16 a large number of voters, I'm sure the next time, once we get one out of office, we, we assume
17 that they will listen to us.
18 But why would anybody want to vote? When you vote, the person promised you, they
19 didn't do what you -- they asked you to do. You know, it's just sort of ridiculous to expect me to
20 come and put all my efforts and energy to come and vote next time after I voted this time. You
21 didn't do what you told me you're gonna do. What's the point of coming again next time? And
22 when you do this to me two or three times, I'd be a fool to come and vote next time. And that's
23 what politicians want us to do. And then people sit and complaining saying, well, if you don't
24 vote. Why should I vote if it doesn't make any difference? Discouraging because it -- because
25 people don't vote.
26 CHAIRMAN LANN LEE: Thank you. I think you have something to say?
27 MS. BUYOBE-HAMMOND: Well, I just wanted to add that that's the rationale, is to say
28 that these are communities that have low voter registration. But you can't -- or low voter turnout.
29 You can't say you want it and not -- you know, you can't justify one when you don't have the
30 history behind that happening. With the disenfranchisement of these communities over and over
31 again, of course they're going to have that.
32 But then you have the compilation of the people that are in power. Are they to widen the
33 power? Is this supposed to be a democracy to all people of the country can participate and have a
34 voice or is it just for a select few? That's not the tenet of our country. That's not the direction of
35 our country. All people are created equal. Therefore, all the residents of this country have a right
36 and responsibility to be able to participate in the political system by the way of having one vote
37 per person. And taking that away is beginning to tear away from the building blocks, the very
38 foundation of what this country stands for and which makes it free.
39 CHAIRMAN LANN LEE: Thank you, Ms. Hammond. Our last speaker is Sherill
40 Morgan-Spencer. I was just pausing because I just wanted to know if you were ready to testify.
41 MS. MORGAN-SPENCER: I am ready.
42 CHAIRMAN LANN LEE: Okay. Thank you very much.
43 MS. SPENCER: Thank you for having me.
44 CHAIRMAN LANN LEE: Thank you for the testimony from ACORN.
45 MS. MORGAN-SPENCER: As I said, my name is Cheryl Morgan-Spencer, and I'm here
46 speaking on behalf of the Minneapolis Urban League. The Minneapolis Urban League has a

1 proud history of civil rights here in the great state of Minnesota. And we have just celebrated our
2 75th -- 76th anniversary, we're getting up there, and that's where I work. And over the last
3 several years I've been fairly involved with voter registration.
4 And I guess my comments this evening are fairly succinct and they have more to do with,
5 I think, just maybe three things I'd like to urge the commission to do. And one of them has to do
6 with more community education around the Voting Rights Act itself. I think that more and more
7 people -- I get many, many calls from people saying, African-Americans are going to lose the
8 right to vote in 2007. We are angry, we are upset, what is going on. And so I think that more
9 community education needs to happen around the special provisions of the Voting Rights Act
10 that do guarantee African -- well, of course, the 15th amendment does, but I think a lot of folks
11 don't understand that. And so it's -- this is more of a community education issue.
12 I think that clarification is very critical, particularly for communities of color,
13 particularly for our immigrant communities, people who may just not just understand how the
14 Act -- you know, how it works. Does that make sense?
15 CHAIRMAN LANN LEE: Yes.
16 MS. MORGAN-SPENCER: And then my only other comment --
17 MR. ROGERS: Just a quick thought on that.
18 MS. MORGAN-SPENCER: Yes.
19 MR. ROGERS: I'm sorry.
20 MS. MORGAN-SPENCER: Yes.
21 MR. ROGERS: How is that rumor being spread for the most part?
22 MS. MORGAN-SPENCER: I think --
23 MR. ROGERS: Rather than disk jockeys on radio stations.
24 MS. MORGAN-SPENCER: You know, I've heard -- a woman called me and said, "I just
25 heard on the radio that African-Americans are going to lose the right to vote in 2007."
26 CHAIRMAN LANN LEE: This has been around for quite a while.
27 THE WITNESS: It has been.
28 CHAIRMAN LANN LEE: When I was at the Justice Department, we had to put
29 something on our Web site.
30 MS. MORGAN-SPENCER: And I have it here.
31 CHAIRMAN LANN LEE: Because it was so current, and that was, that was 19 --
32 MS. MORGAN-SPENCER: '98.
33 CHAIRMAN LANN LEE: -- '98.
34 MS. MORGAN-SPENCER: I have it.
35 MR. ROGERS: I heard it was radio stations --
36 MS. MORGAN-SPENCER: Yes.
37 MR. ROGERS: -- particularly in Minnesota.
38 MS. MORGAN-SPENCER: The radio stations, you get people, you know, who call
39 intentionally trying to intimidate or to razzle you, to get you to respond a certain way by saying
40 mean things. But -- so I think that that is something that really we collectively, I think, need to,
41 to work on that issue because more and more people are confused. And then the only other thing
42 that I really wanted to add, and maybe I can take my time because I'm the last one. I wanted to
43 make sure that I made a comment about the use of the optical scan machine in terms of voting,
44 and that was the machine we used here in Minnesota, and I wanted to support the comments of
45 the first lady that spoke.
46 CHAIRMAN LANN LEE: Catherine Dopp.

MS. MORGAN-SPENCER: Right. And say that we got reports people were mostly satisfied with the use of that machine. And not only folks from communities of color but also people from our disabled communities as well. And those are my comments. They are brief, they are succinct, and I am done. Thank you.

CHAIRMAN LANN LEE: We thank you for your testimony. We thank you for your succinctness. Any other questions? Actually, Jon, I think I neglected to ask Kathy Dopp for -- she did mention the study of the data voting data in New Mexico. You might want to --

MR. GREENBAUM: Okay.

CHAIRMAN LANN LEE: -- give her a call to see what it is. But I think that's the data that supports your statement.

MS. MORGAN-SPENCER: Uh-huh.

CHAIRMAN LANN LEE: We should take a look at it.

MS. MORGAN-SPENCER: We would recommend, I -- I would recommend that, that the optical scan machine might be the primary choice in elections.

MR. ROGERS: You found its accuracy to be --

MS. MORGAN-SPENCER: The reports that I've read and what people say is that they're more comfortable with that machine, and it has less, less errors.

CHAIRMAN LANN LEE: Are you able to get a verification of your vote?

MS. MORGAN-SPENCER: I'm sorry, I can't hear you.

CHAIRMAN LANN LEE: After the use of that machine, do you get a verification?

MR. GREENBAUM: You don't need to.

MS. MORGAN-SPENCER: You don't need to because you feed it into the machine.

CHAIRMAN LANN LEE: Oh, really.

MS. MORGAN-SPENCER: Right.

CHAIRMAN LANN LEE: So folks have a better sense --

MS. MORGAN-SPENCER: Right.

CHAIRMAN LANN LEE: -- of what's happening.

MR. GREENBAUM: It's like saying --

MS. MORGAN-SPENCER: It's optical scanner.

CHAIRMAN LANN LEE: Oh, I got it.

MS. MORGAN-SPENCER: Yes.

CHAIRMAN LANN LEE: Okay. And it's cheaper too.

MS. MORGAN-SPENCER: That's what they say.

CHAIRMAN LANN LEE: Well, as the chair, I'm going to dispense with any closing comments I have.

MR. ROGERS: Also, yes.

MR. LITTLE: Ditto.

MS. MORGAN-SPENCER: I would also like to -- excuse me. I'm sorry, Mr. Little. It's just wonderful to see Matt Little. Here he's such an icon in our community. I would also like to take this opportunity to let the commission know that in the future if you should like to hold hearings, we have a wonderful facility at 2100 Plymouth Avenue North here in wonderful Minneapolis that you are welcome to use at any time.

MR. ROGERS: You are in the Urban League Building?

MS. MORGAN-SPENCER: That's right. 2100 Plymouth Avenue North 55411.

CHAIRMAN LANN LEE: Commissioner Davidson, any closing remarks?

MR. DAVIDSON: Yes, I have a prepared 30-minute statement. Just kidding.

1 MS. MORGAN-SPENCER: Thank you, gentlemen.
2 MR. ROGERS: Thank you kindly.
3 CHAIRMAN LANN LEE: Thank you. That's it.
4
5 (The hearing was concluded.)
6 * * * * *
7
8
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10) SS:
11 COUNTY OF HENNEPIN)
12
13
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43

ORIGINAL

IN RE: VOTING RIGHTS ACT

Public Hearing, taken before a Commission Panel; reported by Yvonne D. Law, Certified Court Reporter, State of Georgia; Certificate Number B-830; taken at Sumter County Courthouse, Americus, Georgia, beginning at approximately 4:40 P.M. on August 2, 2005.

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Yvonne D. Law, CCR. B-830

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1 SENATOR BROWN: Good afternoon, I'm Robert Brown,
2 Community Connections Committee Chairman, Georgia
3 Legislative Black Caucus, on behalf of Stan Watson, who's
4 the Chairman of the Caucus.
5 I want to extend a welcome to those of you who
6 traveled on the Commission to join us this afternoon. And
7 we're very pleased that you would take the time out to come
8 here for this what we think is going to be a very important
9 hearing on the renewal of the Voting Rights Act.
10 And we're not going to at this point be that formal in
11 terms of how we will proceed.
12 We would ask Jon Greenbaum and then following that the
13 hearing officers to make some opening comments and then
14 we'll have a panel that will start our discussion on the
15 issues as we see them here in this state and to some extent
16 we'll probably talk somewhat about some things that we've
17 noticed on the recent poll, but for sure we're going to be
18 very particular to what's going on in the State of
19 Georgia. And with that, I'll ask Jon to have some comments
20 and encourage everyone to when you speak, make sure you
21 speak directly into the microphone or at least loud enough
22 so that the court reporter can hear you cause we want to
23 make sure that all of the proceedings are accurately

1 transcribed, so Jon?
2 MR. GREENBAUM: Thank you Senator Brown. This is an
3 unusual hearing for the National Commission.
4 Most of the time, we do a lot of legwork in terms of
5 putting these hearings together. When Senator Brown called
6 me a couple of months ago and said will I come down to
7 south Georgia and I said, well, we'll probably get a couple
8 of Commissioners to come down here with me, but you have to
9 do all the work, which he agreed to do and he has done all
10 the work.
11 I'm very appreciative of Senator Brown for putting
12 together this hearing, and we're very appreciative also of
13 the people who are here today and traveled to testify and
14 to listen to the problems that have gone on in south
15 Georgia, as well as the rest of Georgia and other areas of
16 the south.
17 One of the reasons why Senator Brown chose Americus is
18 the history of discrimination building in voting in south
19 Georgia that some people consider it to kind of be the
20 birthplace for where the movement for voting civil
21 rights began. And we're quite honored to be here.behalf of
22 the National Commission, the Commissioners are going to
23 talk a little bit more about the purpose of the Commission
24 which is basically designed to look at the current state of
25 discrimination in voting and its relevance to the upcoming

1 efforts to reauthorize the Voting Rights Act.
2 And I'm going to introduce each of the Commissioners
3 and give a short introduction.
4 We have two of our Commissioners here today.
5 Chandler Davidson is one of our Commissioners who's
6 here today who is perhaps the foremost political scientist
7 in the area of voting rights. He was the former Chair of
8 the Sociology Department at Rice University. He is a
9 renowned author and is co-editor of perhaps the seminal
10 work on voting rights in the last couple of decades. Mr.
11 Chandler also was very involved in 1982 authorization of
12 voting rights and in fact testified before Congress in
13 relation to that.
14 MR. DAVIDSON: Thank you, Jon, Senator, Mayor Griffin
15 and Representative James; Ladies and Gentlemen, it's a
16 pleasure to be here today. I'm honored that I was asked to
17 come down and listen to you give testimony on the subject
18 of Voting Rights Act.
19 I've now been at several hearings that the Lawyers
20 Committee has sponsored around the country, Montgomery,
21 Phoenix and New York City and most recently Minneapolis and
22 I've been struck by the diversity of the audience and by
23 the diversity of the voting problems that racial and ethnic
24 minorities in this country continue to face; and I've
25 learned a great deal by listening to elected officials and

1 also activists and simply men and women in all walks of
2 life who have chosen to come forward and give testimony,
3 and so I'm pleased to be here and look forward to hearing
4 what you have to say.
5 MR. GREENBAUM: Another Commissioner that's here today
6 is Joe Rogers. Joe is the former Lieutenant Governor for
7 the State of Colorado. He was elected in 1998 and served
8 through 2002. He was the only fourth African American to
9 serve as a Lieutenant Governor in all the states of this
10 country. And Joe was in fact President of the Lieutenant
11 Governor's Association during his time that he served as
12 Lieutenant Governor. Joe is an attorney who is a noted
13 speaker. He does a program called "Keep the Dream Alive"
14 where he speaks to audiences throughout the country about
15 the legacy of Martin Luther King and civil rights. Joe.
16 MR. ROGERS: Thank you, Jon. First of all, it's
17 just a delight to be with you all, and I'm so glad that you
18 are here today and I'm very pleased Senator, that it will
19 be to some extent informal in terms of our time together.
20 That's wonderful frankly to give us an opportunity to speak
21 with you very frankly and to get some sense of the
22 substance that not only you all experiences as it relates
23 to voting, but your thoughts and perceptions in terms of
24 what's going on here, obviously in this most critical
25 region of the United States.

1 And Representative and Mayor, it's just a delight to
2 be with you all.
3 In particular, I just mention the history as you all
4 well know. There are so many of us that come from other
5 parts of the world. Ionamin (Phonetically), Colorado. Have
6 you all ever been there before?
7 SENATOR BROWN: Yes.
8 MR. ROGERS: You all have been there. Well, as I've
9 commented previously we call it God's country in Colorado,
10 and I know you all have certain claims here in Georgia.
11 MR. BROWN: We're reserving claims --
12 MR. ROGERS: Absolutely. Well, we call it God's
13 county for a little different reason. We're actually at
14 the highest elevation state in the United States of
15 America, as you all well know. And so we are different.
16 We're a little closer to the good Lord, but it's a pleasure
17 to be with you all here and obviously the substance in
18 terms of Americus and Albany, this region of the United
19 States being so central frankly to all of us throughout the
20 country.
21 I am uniquely aware that I would never have been
22 elected to serve the people of Colorado which is miles away
23 from here were it not for so much that took place here in
24 this region and that obviously helped it to develop so much
25 of the substance in the civil rights movement and the

1 Voting Rights Act in particular.
2 And so it's just a delight to be with you and we'll
3 look forward to your thoughts and testimony.
4 SENATOR BROWN: Thank you. With that, we will move
5 directly to the panel.
6 But just before doing that, I want to say, in Georgia,
7 it's kind of like the best of times and the worst of times.
8 We in this state have probably the largest African
9 American caucus in the State Legislature of any in the
10 states, all 50 states. That is certainly the good side.
11 Yet, we are also a state where we recently have seen
12 the law passed that's one of the restrictive laws in the
13 nation as far as voter identification is concerned. And we
14 really are concerned that without the Voting Rights Act
15 being renewed, that we will see even more injurious and
16 onerous kinds of legislation that will be passed but
17 certainly if they would chance a pass of this kind of
18 legislature while the Voting Rights Act is in force or
19 enforced, it certainly would stand to reason that they
20 would go even further if we did not have the Voting Rights
21 Act.
22 So we want to make sure that that point is impressed
23 upon all who will listen.
24 At this time, we have panel members and with us is Ms.
25 Tallman, Mayor Griffin and Daniel Levitas, and we'll go in

1 that order.
2 And as we do that, I want to also point out that
3 Georgia is rapidly becoming one of the most diverse states
4 as far as ethnicity is concerned. We're no longer just
5 black and white, and again as we look at the provisions of
6 the law that affect language minorities, we are going to
7 have to be more sensitive to that.
8 Unfortunately, as I sit in the legislature, I see us
9 becoming more sensitive to it but in the wrong direction.
10 We are seeing people, we expect for example in this next
11 legislative session to see some of the most virulent anti-
12 immigrant legislation of anywhere in this country, and
13 frankly the voter ID bill or voter restriction bill
14 probably was more directed at Latinos and others than
15 African Americans, but it certainly would have a negative
16 effect on us and so with that introduction, I'll ask the
17 panel to start as I suggested and state something about
18 themselves individually and then provide whatever testimony
19 they would like to.
20 My name is Ms. Tallman and I'm the Southeast Regional
21 Counsel involved with Mexican American legal defense.
22 My name is Floyd Griffin. I'm the Mayor of the City
23 of Milledgeville, Georgia and I'm a former State Senator
24 and, Lieutenant Governor, as you well know, ran for
25 Lieutenant Governor the same year that you did out in

1 Colorado. I'm also a retired Army Colonel and I'll talk
2 about my experience.
3 I'm Daniel Levitas with the American Civil Liberties
4 Union Voting Rights Project based in Atlanta.
5 MS. TALLMAN: I'm very honored to be here and I'd
6 like to personally thank Senator Brown for inviting us here
7 to Georgia Legislature Black Caucus for recognizing that
8 there are some issues that are very new for the first time
9 in the south as we it relates to the Latino community.
10 I'm very thankful for having that opportunity.
11 I know that the Commission has heard some examples
12 already. Some specifically from Georgia; one of the
13 representatives from my office presented in Alabama.
14 I do want to briefly go over those scenarios again because
15 we do have some updated information regarding the progress
16 of those investigations and I also want to briefly talk
17 about North Carolina because I don't believe it's yet been
18 covered. A particular incident that we were involved with
19 prior to the General Election.
20 I think what's really important for us to think about
21 as we enter the debate for the reauthorization of the
22 Voting Rights Act as to whether or not communities of color
23 have obtained equal access in voting. And I believe that
24 the examples that have been presented to the Commission
25 throughout the country and as you continue to hear examples

1 that we have not yet achieved equal access in voting and of
2 particular stories that I know, some of which you have
3 heard, implicate certain provisions that will specifically
4 be up for reauthorization in 2007. And I do believe that
5 some of things that I'm going to be talking about is
6 particularly relevant to the reauthorization of that
7 important Act.
8 In Georgia, we were asked to come to the aid of
9 particular voters and it was very similar in two counties
10 in Georgia, Long County and Atkinson County, Georgia. And
11 then something similar was about to happen in Alamance
12 County, North Carolina. We were able to head off that
13 particular example.
14 But what happened in Long County, Georgia is prior to
15 the primary election some individuals came to the
16 Registrar's Office in Long County and requested a list of
17 all registered voters. From that list, the names of
18 Latinos only were taken off of that list and were
19 challenged. Nearly, two-thirds of the Latino voter
20 registration list was in fact challenged in Precinct One.
21 Just by way of background, as of August 2004 in Long
22 County, there were 122 registered Latino voters. In
23 Precinct One, there were 64 registered Latino voters. Of
24 the 64, 46 were challenged. They were challenged based on
25 citizenship, but the only indication we have of evidence

1 that was ever presented to the Registrar's Office is simply
2 the Latino surname. Of the 46 challenged, what happened
3 next is the Registrar's Office sent out notices to the
4 challenged registered Latino voters stating that they had
5 to show up at a hearing and prove their citizenship. Of
6 the 46 that were given notice of a hearing, six attended
7 the hearing. Another two showed up at the polling place to
8 vote. We don't have any indication of what happened to the
9 other two but we do know that out of 46 challenged voters,
10 64 registered voters, only ten voted in the primary. We
11 will never know the complete chilling effect that these
12 challenges had on the community, but we certainly do know
13 that the numbers of these indicate that there may have been
14 a chilling effect by this process. We believe that this
15 process was in violation of Georgia law and potentially in
16 violation of Section Two of the Voting Rights Act.
17 As soon as we heard of the incident which was
18 following the hearing or following the primary election, we
19 alerted the Secretary of State's Office that we believe
20 that the Registrar's Office did not act according to
21 Georgia statute and potentially contrary to federal law
22 that the hearing should not have been called at all, that
23 the individuals who challenged the registered voters based
24 on citizenship solely on a surname should have been
25 required to show some type of evidence or present any type

1 of statement regarding why they believed the targeted
2 voters to not be U.S. citizens. That to date we do not
3 have any evidence that anything was required of them.
4 Despite our complaints following the primary, Atkinson
5 County had a similar incident arise just before the General
6 Election, and in Atkinson County as of October of 2004,
7 there were 121 registered Latino voters. Of the 121
8 registered Latino voters, 96 were challenged very similar
9 in regard to percentages of the registered Latino voting
10 population in Long County and in Atkinson County.
11 In Atkinson County what transpired was a little bit
12 more disturbing in that the individuals who made the
13 challenges simply asked for the Latino registered voter
14 list. They did not ask for a standard list, but they
15 specifically asked for the registered list to be
16 desegregated, specifically requesting the Latino list and
17 from that list we know that the 96 were challenged, and we
18 believe that it was solely by surname but no evidence once
19 again was required of them, so we do not know if there was
20 anything other than that.
21 We do know that the Registrar's Office provided that
22 list to the citizens that were making the challenges and we
23 have the specific notices that went out of the specific
24 challenges that were made.
25 We know that the challenge that was presented in the

1 Registrar's Office simply stated, we the undersigned
2 registered voters of Atkinson County challenge the
3 registration of and then the name was placed in the center
4 and request the removal of this name from the voter's list
5 in this country. The next sentence stating, this request
6 is based on the U.S. Citizenship requirement before
7 registering to vote.
8 And that was all that was presented by way of proof by
9 the individuals who were challenging the voter registration
10 of these individuals.
11 What we also know is that even though the procedure
12 that was followed was one of two procedures under Georgia
13 statute, the challenges were made to look like they were
14 challenging the application of the registration of the
15 individuals. Yet, we know from registered voters that we
16 spoke with that many of them had been registered for many
17 years and had voted in Georgia for many years, so they
18 weren't actual applicants to the registration process.
19 And then we know because we do have the actual form
20 letter that was sent out by the Registrar's Office that
21 everyone received the same notice. It was in English and
22 in Spanish, and it stated that they needed to show up at
23 a hearing and that they had to bring evidence to prove
24 their citizenship.
25 Yet once again, we know that no evidence was ever

1 presented by the person who was making the challenges that
2 the individuals were not U.S. citizens. Yet, the burden
3 shifted and the individuals were supposed to bring proof at
4 the hearing that they were U.S. citizens. Once again, we
5 spoke with individuals in Atkinson County and because we
6 were made aware of Atkinson County before the hearing
7 transpired, we had more contact on the ground than for
8 example, Long County that we heard of after it had
9 happened. But in Atkinson County, for example, we know the
10 individual who was born and raised in Texas and moved to
11 Georgia several years ago had been voting in Georgia for a
12 number of years was challenged simply because of his last
13 name. We know that a pastor and the pastor's two brothers
14 were challenged simply because of their last name. And
15 these are small communities. These are not large
16 communities. Individuals know each other in these
17 communities and we also know that I believe in Long County
18 specifically there had been newspaper articles that had
19 described the tension between the white community and the
20 Latino community, and members in the Latino community
21 believe that this type of action that typically it was
22 allowed to take place by the actions of the Registrar's
23 Office just contributed to the tension that already existed
24 in the community. And they felt not only as a challenge to
25 their right to vote as U.S. citizens, but as a challenge to

1 their community for simply being Latino and living in
2 Georgia.
3 We do know that Georgia has had an exponential growth
4 in our community for the first time in this part of the
5 country, but we also know that we had a second and third
6 generation Latinos who have made this their home and it's
7 not recently that they've made us their home. They have
8 been in small numbers but they do live here and they are
9 similarly threatened by what has transpired which we
10 believe to be intimidation and harassment of our community
11 for the purpose of preventing them from accessing their
12 rights to vote. And we know a right that was fought for.
13 Certainly, the African American community contributed
14 substantially to that fight and have lost lives in the
15 process and we know that on the 40th anniversary of the
16 Voting Rights Act, we need to acknowledge that. We also
17 need to acknowledge the fight that was launched in the
18 southwest to preserve and to protect the rights of Latinos
19 who are now residing in this part of the country.
20 So you know this is something that we can reduce it to
21 numbers, we can reduce it to facts, but I don't want the
22 stories of the individuals who are directly impacted by
23 these circumstances to be lost. We do know that they will
24 be struggling for years to come with what was allowed to
25 transpire in these counties.

1 We also know that the same time Atkinson County was
2 happening, a sheriff in Alamance County, Sheriff Terry
3 Johnson, decided he wanted to engage in similar conduct.
4 My office in particular had had previous dealings with this
5 sheriff because of other instances that occurred in this
6 county. So we were made aware of what was going on right
7 away because of our prior contact in Alamance County, North
8 Carolina.
9 But what had happened and this is documented in
10 newspaper articles that the sheriff decided that he was
11 going to enlist the assistance of the County Attorney in
12 receiving the Latino registered voters list and he did
13 obtain it from the County Attorney. And with that list, he
14 publicly stated that he was going to go door to door to the
15 house of every single registered Latino voter and to
16 determine whether or not they were U.S. citizens and to
17 systematically arrest every single person he did not
18 believe to be a U.S. citizen.
19 Certainly, these acts are extremely disturbing but
20 because they were made public, we will have no idea of what
21 type of impact this may have had prior to the general
22 election in Alamance County and in North Carolina. We
23 found out about what had transpired and we intervened and
24 we notified the Department of Justice. Again, I believe it
25 was a direct result of the publicity in this matter and

1 involvement of non-profits and the government alike that
2 this was stopped before it started. But unfortunately,
3 that didn't happen in Long County or in Atkinson County.
4 However, just by way of followup, what we do know that
5 happened in Atkinson County is at the hearing and I want to
6 point out that the hearing was not canceled but the hearing
7 did take place, but at the hearing in dramatic fashion, a
8 speech was read by the county and they stated that there
9 would not be a hearing and that the electors had not met
10 their burden of proof and that everyone was allowed to go
11 home. However, it remains our contention that there should
12 not have been a hearing to begin with, and certainly we
13 won't know the impact of that.
14 I recently just last week testified before or made
15 public comment rather before the State Election Board in
16 Georgia regarding the Long and Atkinson County matters.
17 I'm very disturbed that nothing has still been done to date
18 in regards to action by the State of Georgia.
19 Following the Long County incident nothing has happened.
20 We made contact with Registrars' Offices all across Georgia
21 by letter and we tried to make some phone contact as well.
22 There was nothing delivered by the state to the Registrar's
23 Office regarding the clarification of what needed to be
24 done in these instances and there was no guidance to our
25 understanding presented to Atkinson County prior to the

1 action that was taken by Atkinson County and following
2 Atkinson County.
3 We still believe that nothing has happened following
4 both of these instances, and we have urged the State
5 Election Board and the Secretary of State to try to remedy
6 the situation by guidance, do what needs to be done in
7 order to ensure that this doesn't happen again and if it
8 happens again for Registrars to know what to do in the next
9 instance to preserve the right to vote of our Latino
10 community.
11 At the State Election Board, one thing that did come
12 out of it following my comments regarding these instances
13 is there was a vote by the Board and the Board decided to
14 have the State Attorney General's Office do an
15 investigation of the actions of the Registrar's Office and
16 also more specifically Long County and Atkinson County but
17 also to send an investigation to generally determine or try
18 to determine what the Registrar's Office has done in the
19 past or may do in the future regarding these type of
20 challenges. And certainly we plan on following up.
21 We've been in contact with the Department of Justice.
22 I know that the Department of Justice is still continuing
23 to investigate what happened in Long County and in Atkinson
24 County, and we hope for a good resolve out of both of these
25 instances.

1 But once again, we will never know the full impact of
2 what was allowed to transpire.
3 Thank you.
4 MR. DAVIDSON: May I ask a question or should we go
5 ahead now and hear other people testify before questions
6 are asked? Do you have any preference there?
7 SENATOR BROWN: Why don't we go forward.
8 MR. DAVIDSON: Okay.
9 MAYOR GRIFFIN: Once again, my name is Floyd Griffin,
10 the Mayor of the City of Milledgeville, and I want to thank
11 you all for coming down here in south Georgia today to get
12 testimony from us concerning the Voter's Rights Act and
13 some of the things that's taking place here in Georgia.
14 Let me kind of set the stage a little bit about before
15 I really get into the meat of my testimony.
16 I served in the Georgia Senate and I was the first
17 African American in modern times to serve in a majority
18 white rural legislative district and when I was elected
19 Mayor of the City of Milledgeville, I was the first African
20 American to be elected in the city in 199 years' existence
21 of Milledgeville at that time.
22 Now, Milledgeville is the old capital of Georgia. It
23 was the capital of Georgia for some 63, 65 years prior to
24 the Civil War and after the Civil War, the capital moved to
25 Atlanta. So it's a lot of history there in Milledgeville

1 and Milledgeville is my hometown. I grew up there and left
2 and went off to college and came back 28 years later. So
3 I've been back in Milledgeville about 15 years and got
4 involved in politics.
5 But I want to give you some personal experience from
6 the standpoint of why our Voter's Rights Act is important
7 and especially in this case I think, Section Five, and it
8 needs to reauthorized and it needs to be strengthened,
9 needs more strength to it and the Justice Department needs
10 to enforce the section, enforce what they are doing and we
11 have seen in recent years that that has not been done
12 especially under the present administration.
13 I ran for Mayor four years ago. Milledgeville had a
14 strong Mayor system. During that election, two, the
15 incumbent and another young white person ran. The
16 incumbent is white also or the incumbent was white. And
17 one of the issues in that election was changing the form of
18 government to a management form of government from a strong
19 mayor form of government. And I was for maintaining the
20 strong mayor form of government with a City Administrator.
21 And the non-incumbent was for a management form of
22 government. He lost in the runoff to me and I won by 21
23 votes. Now, you got to kind of look at the situation
24 here. There was three of us in the election.
25 Milledgeville is a majority white district, not city,

1 about 43, 43, 44 percent registered black votes. So I had
2 to get white votes to be able to win, not only in that race
3 but also in the Senate race. So that's not the main
4 question. I missed winning without a runoff by 78 votes
5 okay. But now we go into the general election with the
6 runoff at least and I win by 21 votes.
7 So you can basically see what had happened there.
8 It's basically along racial lines, and I had to get some
9 white votes to win. And some of the blacks didn't vote,
10 all the blacks didn't vote for me and I understand that.
11 It's never going to happen that way.
12 But nine months after being in office, the Council
13 voted to change the form of government and it went to the
14 legislature and the legislature approved that under the
15 local legislation rules in Georgia, which is basically by
16 virtue of serving in the legislature, you know if there is
17 no problems with the local legislative delegation it's
18 voted on on the floor of the Senate and the House without
19 debate. So I understand that so I'm not concerned about
20 that.
21 And in Georgia, because of a change like that, it had
22 to go to the Justice Department, and the Justice Department
23 re-cleared it you know. Now, on the Council is three
24 blacks and three whites, and it was unanimously approved.
25 So the three blacks went along with the three whites.

1 But some of the things the Justice Department looked at is
2 you know you had the three blacks going along with it. Well
3 as we all know with the history of this country and blacks
4 in this country, we've had a number of blacks to go along
5 with whites anyway. So that should not be a major factor.
6 It should be a major factor that the Justice Department
7 should take a very close look at this because where blacks
8 are voting with whites in certain instances like that
9 doesn't mean that it's right.
10 But the main thing here is that in my opinion we had
11 an election. The election was overthrown because the
12 people voted for me under a certain set of circumstances,
13 and that circumstances was a charter that was in place that
14 a strong mayor concept that had been in place for 199
15 years, that form of government and there was no referendum
16 or anything of that nature.
17 So I filed two lawsuits. I filed a lawsuit in a
18 Federal Court and that lawsuit pretty much dealt with you
19 know the Voter Registration Act and I lost at the Federal
20 Court level. But I did not appeal because first of all I
21 didn't have the money and secondly, the issue was not
22 necessarily, although the issue was the Voter's Right Act
23 but the issue was that the Georgia legislature also should
24 not have had the right to change the form of government
25 during my administration. Not that they didn't have the

1 constitutional authority to change the form of government,
2 but I'm not during my administration.
3 We also filed a lawsuit in the Georgia Court System,
4 and at the Superior Court level. I lost and I appealed to
5 the Georgia Supreme Court where it is now and it's being
6 taken under consideration and once again, we are only
7 challenging the right for the Georgia legislature to change
8 the form of government during my administration after I had
9 gone in office because you know I had people voting for me
10 based on the campaign we ran and the set of the
11 circumstances in the charter.
12 And one of the things in the charter, we don't
13 understand why the Justice Department did not take a very
14 close look at this, is the charter states that, in part,
15 that council and the Mayor, in the same oath of office at
16 least that we will uphold the charter and other things in
17 that charter, you know, the ordinances and et cetera
18 during the ensuing term. Now, how can you uphold the
19 charter, a new charter when you never was sworn in under
20 the new charter; two different circumstances.
21 So that's where we are now. The Voter's Right Act
22 definitely needs to be extended and reauthorized and then
23 extended. That is extremely important.
24 This is just one case. This is my case but it is a
25 personal situation that has cost me a lot of money, costing

1 me a lot of money, paying for it myself and hopefully the
2 Georgia Supreme Court is going to rule in my favor and
3 I'll get my money back.
4 Secondly, we have individuals who voted for me
5 questioning whether they should continue to vote or not
6 because their vote didn't count. You know, and so one vote
7 and one person kind of situation and they voted for the
8 person they wanted to vote for. It has caused a lot of
9 unnecessary problems in our community, emotional problems
10 and other problems for people who was in support of our
11 candidacy and it has not been a good three years from that
12 standpoint.
13 So are there any questions of me before I have to take
14 off? I'm sorry I have to do this.
15 MR. DAVIDSON: Yes, Mayor, I have a couple of
16 questions.
17 Could you tell me how the Council is elected? Is it
18 elected from districts or at large?
19 MAYOR GRIFFIN: Districts.
20 MR. DAVIDSON: Districts.
21 MAYOR GRIFFIN: Districts. And by the way, the Mayor
22 and the Council are elected at the same time.
23 MR. DAVIDSON: And do I understand you to say that you
24 were the first African American elected to the Mayorship in
25 Milledgeville in 199 years and shortly after you were

1 elected, the Council voted to abolish the strong Mayor
2 system?
3 MAYOR GRIFFIN: Yes. They started working on it in
4 nine months after -- well, they probably started thinking
5 about it before then -- but they voted to recommend to the
6 legislative delegation to change the form of government
7 about nine or ten months after I was elected or went in
8 office.
9 MR. DAVIDSON: In your opinion, was there a group or
10 a person on the Council that took a leadership role in
11 pushing for that change?
12 MAYOR GRIFFIN: Yes. I think it was a conspiracy from
13 day one. From the time that I decided to run for Mayor and
14 this is just my theory is, that the white community,
15 individuals in the white community, knew that I had a 50
16 percent chance of winning this because of my background and
17 experience of being in the legislature, running for
18 Lieutenant Governor, a business person. We have a family
19 business which is in funeral service, and I had been very
20 much involved in the community so I had a good chance of
21 winning this.
22 So I think it was somewhat of a conspiracy from the
23 beginning, in case he does win, then we'll take away all of
24 those powers from him and make him more of a figurehead
25 which the Mayor is now pretty much a figurehead. We have

1 a number, there are still responsibilities of the Mayor
2 that doesn't make it truly a figurehead, a ceremony, but
3 not the authority to carry that out. The charter is a very
4 bad charter.
5 MR. DAVIDSON: During the campaign for your election,
6 I believe you said that one of the candidates advocated a
7 different form of government?
8 MAYOR GRIFFIN: Yes.
9 MR. DAVIDSON: One of the white candidates who was
10 defeated?
11 MAYOR GRIFFIN: Right.
12 MR. DAVIDSON: This was the challenger to the
13 incumbent white --
14 MAYOR GRIFFIN: Yes.
15 MR. DAVIDSON: -- candidate; is that right?
16 MAYOR GRIFFIN: Right, and he was also, the incumbent
17 lost in the General Election so the person that we're
18 talking about was in the runoff with me.
19 MR. DAVIDSON: Okay.
20 MAYOR GRIFFIN: And one of the major topics and matter
21 of fact, basically his only topic was or issue was a change
22 in the form of government, but he lost.
23 MR. DAVIDSON: What was the primary reason or the
24 reasons that were given by the incumbent Council once it
25 was elected for changing the form of government other than

1 the form of Mayorship?
2 MAYOR GRIFFIN: Well, I think there were a number of
3 reasons.
4 One of the reasons was they didn't like the Mayor.
5 This particular Mayor and the extent I came in with an
6 agenda. I was not a part of the good-old boy system and
7 you have to understand to some degree that -- okay, on the
8 Council there are six members, five of those members had
9 been there, was in office, was re-elected or they didn't
10 have opposition. There was only one new member on there.
11 That new member had been in the administration or worked
12 for the city for I don't know 15 or 20 years before she was
13 fired. Okay. And so she ran for office so she knew a
14 little bit about the strong Mayor form of government and et
15 cetera.
16 So the primary reason in my opinion is that they did
17 not like the fact that this African American Mayor had all
18 of this, the same level of responsibility and powers that
19 the other Mayors had. Here I am making the type of
20 decisions that you make under a strong Mayor situation and
21 they wanted to do like some of them had done before,
22 instead of being policy makers, they wanted to be executors
23 in the administration side of the house, and I would not
24 allow that to happen.
25 MR. DAVIDSON: They didn't say that, I mean, they

1 didn't say publicly that the reason that they wanted to
2 change the form of Mayorship was because you were elected.
3 They must have had some other reasons that they
4 stated for --
5 MAYOR GRIFFIN: Well, their basic reason is that they
6 just wanted to change to a manager form of government
7 because they felt that would be a better form of government
8 in carrying out the responsibilities, the day-to-day
9 responsibilities of the city.
10 MR. ROGERS: I'd like to follow up on what Chandler
11 just mentioned. What was vote of the Council that approved
12 the change?
13 MAYOR GRIFFIN: Unanimous.
14 MR. ROGERS: Was it a unanimous vote?
15 MAYOR GRIFFIN: Right, yes.
16 MR. ROGERS: It was a unanimous vote.
17 MAYOR GRIFFIN: Correct.
18 MR. ROGERS: And you said each of those members of
19 Council elected by individual districts?
20 MAYOR GRIFFIN: Yes.
21 MR. ROGERS: And I am right in presuming that the
22 African American members of the Council, three of the six,
23 were elected from majority African Americans?
24 MAYOR GRIFFIN: You're absolutely correct, yes.
25 MR. ROGERS: But they had been on Council for years?

1 MAYOR GRIFFIN: Two of them; well, one of them had been
2 on for several years, maybe 12 or 13 years. One of them
3 was in the second term and then one of them was in the
4 first term.
5 MR. ROGERS: All right. So the bottom line argument
6 to the Department of Justice and everybody is that they
7 said listen, this is arguably race neutral.
8 MAYOR GRIFFIN: Right. Absolutely.
9 MR. ROGERS: Essentially what we have here was a
10 change in form of government that they argued takes place
11 all the time and it's unfortunate that in this case you had
12 to have been the person who's the victim of this change,
13 but they said essentially no problem essentially as it
14 related to race?
15 MAYOR GRIFFIN: Yes.
16 MR. ROGERS: Essentially that's what they came down
17 with?
18 MAYOR GRIFFIN: Basically, yes.
19 MR. ROGERS: It's fascinating to me because it's a
20 classic case from your point of view and having run for
21 office, and I understand exactly where you're coming from,
22 it's sort of that classic notion of okay, I won playing by
23 the rules. Now that I've won, now you change the rules
24 which is a sort of a classic notion to how things work or
25 play.

1 I had mentioned to you previously when we were talking
2 that I was aware of a similar circumstance that occurred
3 with respect to the Lieutenant Governor of Alabama who was
4 elected I believe the same year I was elected back in 1998.
5 And as soon as he was elected to office -- the Lieutenant
6 Governor in Alabama essentially had the power position in
7 the state in terms of legislation and what happened in
8 terms of the agenda of the state. As soon as he was
9 elected into office, he was stripped of all power as
10 Lieutenant Governor.
11 In that case, he's white and he was a Republican who
12 was elected into that position and was stripped of power by
13 the Democratic legislation. And the question in that case
14 was, I don't know that the Voting Rights Act claim arose as
15 a basis for that, so I guess I was curious to some extent
16 about how your Section Five claim was articulated, how you
17 articulated the Section Five claim.
18 MAYOR GRIFFIN: How did I articulate it?
19 MR. ROGERS: Yes.
20 MAYOR GRIFFIN: And their response to it?
21 MR. ROGERS: How you in particular framed it as a
22 Voting Rights Act issue in particular to the Department of
23 Justice.
24 MAYOR GRIFFIN: Okay. I understand. Well, we framed
25 it in a couple of instances. One is that it was over --

1 and I'm not maybe using the exact word cause I haven't
2 looked at this in quite awhile.
3 MR. ROGERS: Sure.
4 MAYOR GRIFFIN: It's been about two years now. But you
5 know, there was no referendum you know by the people to
6 change this form of government because we went into the
7 office with one set of circumstances, then it was changed.
8 It was overthrown in election. The citizens didn't get a
9 chance to speak to you know this issue and those kind of
10 things. That was basically it.
11 MR. ROGERS: Okay. Thank you.
12 MAYOR GRIFFIN: Okay.
13 SENATOR BROWN: Thank you Mayor.
14 MAYOR GRIFFIN: Thank you very much. I hate to leave
15 but I need to move on out. Thank you.
16 MR. ROGERS: I know you're getting ready to leave
17 and I don't want to hold you more than a minute or so.
18 MAYOR GRIFFIN: That's okay.
19 MR. ROGERS: I am curious though. I wanted to get
20 your own perspective. How far have things come so to speak
21 in terms of Georgia in your perspective in terms of -- you
22 mentioned and I am curious about this Senator -- you
23 mentioned this -- that you have the largest contingent of
24 African Americans who serve in the state legislature
25 presumably as a percentage of any state in the country, but

1 I am correct in presuming that they represent a majority
2 African American districts or am I not correct in that
3 assumption? Do you have African Americans here that
4 represent in fact white citizens essentially or a majority
5 of white districts here?
6 MAYOR GRIFFIN: Well, I'm also the President of the
7 Georgia Conference of Black Mayors. We have approximately
8 40 black mayors. I say that because they kind of change
9 every so often on me.
10 MR. ROGERS: All right.
11 MAYOR GRIFFIN: But look at this way. I think we've
12 come a long way in Georgia. But then again, maybe we
13 haven't come as long as I alluded to. Okay. Out of the 40
14 black mayors, we may have two or three that represent
15 majority white citizens. All of your large cities,
16 Atlanta, Albany, Savannah. I'm not sure about Augusta now.
17 We do have a black mayor in Augusta who was elected within
18 the Council because the mayor resigned who happened to be
19 a Republican going up to Washington to do some things. But
20 all of your big city mayors except maybe Augusta because
21 Augusta is a consolidated city. Augusta, what is that,
22 Chatham County, not Chatham. Richmond County.
23 But we only have a couple of black mayors like myself
24 who represent majority white citizens. Okay. Now, most,
25 and I can't verify this, but I would think that most of the

1 great majority of your city council and county
2 commissioners which most cities and counties are by
3 district, they represent majority white districts. Now, I
4 didn't tell you that I ran, the first office I ran for when
5 I came back to Georgia was the county commissioner's seat.
6 The district I lived in was something like 75 percent
7 white, and I missed winning that by about 68 votes. But
8 it's very difficult for a black person to get elected in a
9 Georgia white environment in Georgia unless you can get
10 that black voter registration up to about -- what did we
11 say, Robert, about 38 or 39 percent -- then you have a shot
12 at it. That was the reason I wanted a Senate seat.
13 MR. ROGERS: Is that an assumption that you're
14 carrying what, roughly 35 to 40 percent of the white vote?
15 MAYOR GRIFFIN: Right.
16 MR. ROGERS: Is that what you had to carry.
17 MAYOR GRIFFIN: Yeah.
18 MR. ROGERS: You have to carry roughly --
19 MAYOR GRIFFIN: That's right.
20 MR. ROGERS: So in other words you can lose roughly
21 60 percent of the white vote as long as you carry roughly
22 35 to 40 percent of the white vote, you can win.
23 MAYOR GRIFFIN: And you get something like 90, 95
24 percent of the black vote too, yes.
25 MR. ROGERS: Yes.

1 MAYOR GRIFFIN: You had to get the black too then.
2 MR. ROGERS: Absolutely.
3 MAYOR GRIFFIN: Yeah.
4 MR. DAVIDSON: Okay. And you said that the majority
5 of Commissioners in this state represent majority white
6 districts.
7 MAYOR GRIFFIN: And Council persons.
8 MR. DAVIDSON: And Council persons.
9 MAYOR GRIFFIN: Right. County Commissioners and city
10 council persons. I would say and I couldn't put a
11 percentage on it but I would say, I think I would be
12 correct if I said 80 or 90 percent represent majority black
13 districts. I'll put it this way, I do not know and I know
14 a lot of elected officials. I do not know, personally I do
15 not know a County Commissioner or a city council person who
16 represent a majority white district.
17 MR. DAVIDSON: Okay. Okay. Again, I'm sorry I was
18 hearing two different things. Now, you're saying that
19 that's the majority of African Americans that serve as
20 County Commissioners or council persons represent majority
21 black districts --
22 MAYOR GRIFFIN: Yes.
23 MR. DAVIDSON: -- not majority white districts?
24 MAYOR GRIFFIN: Yes. Okay.
25 MR. DAVIDSON: And you cannot think of an African

1 American who represents a majority white district who is
2 presently serving as a County Commissioner or a councilman?
3 MAYOR GRIFFIN: Or City councilman.
4 MR. DAVIDSON: Okay. Okay.
5 MAYOR GRIFFIN: And when I served in the Senate, I was
6 the only out of, I think at that time we had 13 African
7 American I think. I'm not sure, 11 or 13. I was the only
8 one that represented a majority white Senate district and
9 in the house I think it was one over there, Keith Heard, at
10 that time. And it's about the same thing now. I don't
11 think -- do you have a black Representative in the Senate?
12 SENATOR BROWN: I think there may be two up on the
13 House side.
14 MAYOR GRIFFIN: But not in the Senate. There's not one
15 in the Senate, the Georgia Senate.
16 MR. DAVIDSON: Do you have any and this is concluding
17 and I don't want to hold you up --
18 MAYOR GRIFFIN: Now, go right ahead. This is
19 important. I can stay. Let's get your questions answered.
20 MR. DAVIDSON: I did want to get a sense because to
21 begin the reauthorization of this Act is not going to take
22 place for a number of years. The last reauthorization was
23 a 25 year period. If I were to ask you to look in your own
24 perspective at essentially Georgia 15 or 25 years from now,
25 does that situation change? Do you have a situation here

1 in Georgia in which African Americans can be elected
2 essentially to represent white citizens here in majority
3 white districts? Will that happen?
4 MAYOR GRIFFIN: I think it will as long as the Voter's
5 Registration Act is in place. I think if we don't get
6 reauthorization on that, we're going to see a significant
7 decrease of black elected officials just in black
8 districts. Okay. I think that we will see our
9 Congressional, we are four black Congress persons now and
10 I think we'll see that drop down to one, maybe two, but
11 definitely down to one.
12 You know, this is really serious business. I know you
13 all understand this and you heard, getting a lot of
14 testimony, but this is really, really significant that we
15 get this reauthorized. And I'm glad to see, Joe, I'm glad
16 to see you on this Commission as a Republican, too. You
17 know, I know you're African American and you're a
18 Republican but sometime we all lose sight, we can lose
19 sight of what's going on and see I'm a child of the Civil
20 Rights years.
21 I went to Tuskegee back during the 60s and marched in
22 Tuskegee, was on the march from Selman to Montgomery and so
23 you know and I understand and appreciate where we have come
24 from, but we still have a long ways to go and if we start
25 taking away some of the remedies that are put in place to

1 help try to make the field level, then we're going to be in
2 tough shape and I really appreciate and understand what the
3 Latinos are going for and the things that you talk about.
4 It's absolutely ridiculous.
5 Now, you take the voter ID situation in Georgia.
6 Let's assume that if the Justice Department approves that
7 and I understand they're probably going to extend their
8 deliberation until about another 60 days but let's assume
9 that they do it on the 15th of this month and I run for
10 office again. I won by 21 votes last time and the next
11 election will be close also. With that voter ID situation,
12 I probably will lose the election because we would have at
13 least 21 black poor people, including white. This is not
14 all about black now, would not be able to get the proper
15 identification for a number of reasons.
16 One of them is birth certificates. In Georgia, you
17 have to have a birth certificate to go to the Motor Vehicle
18 office to get a driver's license and to get the ID. We
19 have people in Georgia who don't have birth certificates.
20 They were born way back when before they issued birth
21 certificates.
22 MR. DAVIDSON: Thank you kindly, Mayor.
23 MAYOR GRIFFIN: Yes, sir.
24 MR. DAVIDSON: And I know you need to go now but I
25 appreciate it.

1 MAYOR GRIFFIN: All right. If you have any additional
2 questions, I'll be glad to stay to answer those because
3 this is important.
4 SENATOR BROWN: Any more questions?
5 MR. DAVIDSON: I think that pretty well exhausts my
6 questions, Mayor. Thank you very much.
7 SENATOR BROWN: I also thank you, Mayor, for taking the
8 time to join us. Before the next speaker, I also want to
9 give Dr. Johnny Vaughn an opportunity -- he's also going to
10 be a presenter and give him an opportunity just to identify
11 himself and then proceed.
12 MR. VAUGHN: I'm Johnny Vaughn from Dublin, Georgia.
13 I am the President of District One Voter's Association. We
14 are presently chartered in five middle Georgia counties.
15 MR. LEVITAS: Good afternoon. I want to echo the
16 comments of the previous panelists and thank the Lawyers
17 Committee for Civil Rights for organizing this hearing,
18 Senator Brown for bringing us all together and especially
19 to you Lieutenant Governor Rogers for traveling so far to
20 be here.
21 I want to do a number of things today, offer some
22 brief comments about the significance of the Voting Rights
23 Act, highlight specifically the issue of municipalities and
24 counties here in Georgia utilizing at large voting as a
25 deliberate mechanism to dilute the effectiveness of the

1 minority community in seeking political representation.
2 I want to comment on the direct relationship between
3 Section Five enforcement here in Georgia and the need to
4 restore or repair some of the original intent of Section
5 Five of the Voting Rights Act as we approach renewal and
6 also summarize overall some larger recommendations for what
7 we at the American Civil Liberties Union Voting Rights Act
8 believe Congress should do. But let me first begin with
9 a brief story.
10 I moved to Georgia in 1989 to work for a nonprofit
11 civil rights organization whose mission was to assist
12 people who were victims of racial violence and I received
13 a phone call at the office one day from some folks who
14 lived not too far from here, about an hour south of here,
15 from Early County from the town of Blakeley and they told
16 me in quite frank terms that they needed help because the
17 Ku Klux Klan was running the fire department in their town
18 and had what they believed was a habit of letting homes in
19 the black community burn for an unexcusably long period of
20 time before they intervened. We investigated. To make a
21 very long story short, we interviewed members of the Klan
22 who provided to us and to me personally the membership
23 records of the Klanmen; we subpoenaed subject to the
24 Federal District Court Civil Rights lawsuit filed in the
25 Southern District of Georgia, the telephone records of the

1 firechief and we proved in fact that the city firechief,
2 a man by the name of Franklin Brown, was indeed a dues
3 paying member of the Ku Klux Klan, that he had hired other
4 Klan members to run and worked in the Fire Department and
5 what was notable about this case was that the city put on
6 an extraordinarily vigorous defense and retained none other
7 than the President of the Georgia Trial Lawyers Association
8 to defend the city and during depositions, one in which I
9 was present, during a break in depositions, the President
10 of the Georgia Trial Lawyers turned to our counsel and said
11 well, the way I see it the black folks have the NAACP and
12 the white folks have the Klan and that's about equal.
13 The city vigorously defended this gentleman Franklin
14 Brown until the telephone records that we produced by way
15 of subpoena proved they had the unfortunate habit of making
16 frequent phone calls to the state headquarters of the
17 invisible empire Knights of the Ku Klux Klan and their
18 defense fell apart. The result was the Klan was purged
19 from the Fire Department and as part of that case, the
20 American Civil Liberties Union through cooperating
21 attorney, Christopher Coates, who now works as the Deputy
22 Chief of the voting section in Washington of the Civil
23 Rights Division created single member districts int he City
24 of Blakeley.
25 So we not only succeeded in purging the city of the

1 Klan running the fire department but in a political change
2 which resulted in the creation of black representation on
3 the city council. I also mention that Blakeley happens to
4 be the hometown of former Secretary of Health and Human
5 Services Lewis Sullivan who took an interest in this
6 situation. Now, this was admittedly some years ago, 1990,
7 but it was not 1970. It was not 1950. This was in the
8 modern era here in the State of Georgia, and so I want to
9 kind of begin by highlighting the fact that clearly the
10 Voting Rights Act has been one of the most successful
11 pieces of Civil Rights legislation ever passed. You've
12 heard as members of the Commission I know in previous
13 places the statistics that at the time of its passage,
14 there were only about 300 African American elected
15 officials throughout the nation, virtually none in the
16 south. Today there are more 9100 black elected officials
17 nationwide, 43 of whom serve in Congress and important to
18 note if you subtract the 43 from the 9100, I believe its
19 actually quite higher than 9100 but the Joint Center for
20 Political and Economic Studies is doing an update of the
21 data. If you subtract the 43 from the 9100, you still have
22 more than 9000 elected officials such as yourself or County
23 Commissioners or Mayors or State Senators such as Senator
24 Brown here and others and point of fact, one of the
25 greatest if not the greatest impact of the Voting Rights

1 Act has actually been at the local level, at the county
2 level, at the municipal level. We sometimes get distracted
3 by the big ticket items of federal representation and big
4 fights over U.S. Congressional redistricting but really one
5 has to focus on the light and the tempo of political change
6 as it affects people where they live and work in places
7 like Americus and places like Milledgeville.
8 Toward that end, I want to share with you some
9 examples of some of the litigation that our office has
10 brought. The Voting Rights project of the ACLU has only
11 four full-time attorneys, eight full-time staff. I am not
12 one of the attorneys. And we have filed since 1982 since
13 the last reauthorization more than 300 separate legal
14 actions to enforce the 1965 Voting Rights Act.
15 Considerably more than the three dozen or so attorneys of
16 the U.S. Department of Justice voting section.
17 Considerably more legal actions that the entire U.S.
18 Department of Justice.
19 So the first point I want to bring out is that as we
20 look at the significance of the Voting Rights Act and its
21 impact, we have to realize that the overwhelming bulk of
22 enforcement and the burden and cost of that enforcement has
23 fallen to private organizations like the ACLU, like MALDEF,
24 like the Lawyers Committee for Civil Rights under law, like
25 the NAACP Legal Defense Fund and others. We have --

1 MR. ROBERTS: Let me interrupt you for a second?
2 MR. LEVITAS: Yes.
3 MR. ROBERTS: What percentage of those cases are
4 Section Five or Section Two cases?
5 MR. LEVITAS: I don't have that specific breakdown
6 right now, but I do have some additional data which we will
7 present to you but many of them involve both Section Two
8 and Section Five claims and clearly, I mean, of the 300 I
9 would say there are at least 150 or so involve Section Five
10 claims, Section Five enforcement actions. So what I'm
11 speaking about here in this litigation is directly relevant
12 to reauthorization.
13 As we know Section Two is a permanent provision and
14 does not expire. Unlike MULDEF, which has brought
15 litigation under the language minority provision, Section
16 203, that's not something that we have specialized in and
17 I know the panel has heard previous testimony about this in
18 other places, but it is clear from recent surveys that
19 close to half of all the Section 203 jurisdictions in the
20 country, and there are 466 of them locally, at least half
21 of them are out of compliance with the mandate of the law.
22 And that data that has been presented previously and will
23 be presented additionally I'm sure. But --
24 MR. ROBERTS: But you said you all had not filed
25 Section 203 --

1 MR. LEVITAS: Section 203 enforcement action.
2 So these 300 cases that I'm describing are a mixture of
3 Section Two and Section Five cases, the bulk of whom have
4 been in the south. Most recently, many of them have been
5 from your part of the country in the west and South Dakota,
6 particularly, where since 1995, we have filed seven cases
7 on behalf of native American voters, which we have won
8 five. And one is on appeal and the seventh is pending.
9 But to not get too far afield and to zero on here in
10 Georgia, and this is simply data from 1974 to 1990, we sued
11 57 counties in Georgia. And Georgia has 159 counties, so
12 to sue 57 of them in order to force the change from at
13 large voting to single member districts and we sued 40
14 cities in 41 cases from 1974 to 1990. I don't know exactly
15 how many municipalities there are in the state, but those
16 are a lot of cases and I would argue that it was only if
17 the action of bringing such a large volume of cases were we
18 able to voluntarily force compliance upon the balance of
19 the remaining jurisdictions but as was pointed out by the
20 previous testimony just looking at the City of
21 Milledgeville, the creation of those six single member
22 districts were the product of a lawsuit brought by the ACLU
23 in 1983. And it resulted in a consent decree which created
24 the single member districts.
25 But I want to back up a little bit and highlight a

1 dynamic here which does follow a bit on the previous
2 testimony, that of the majority line jurisdictions changing
3 the rules in the middle of the game specifically with the
4 intent of depriving minority voters of access to political
5 power when they see the tools like the Voting Rights Act
6 enable them to have more of a voice.
7 And I'll use a brief example that is outside of
8 Georgia, but there are other examples relative to Georgia
9 I'll touch on, but this is a case that we brought in
10 Edgefield County, South Carolina. It went all the way to
11 the U.S. Supreme Court. The lawyers here and the
12 litigators here are familiar with it, *McCain v. Lybrand*.
13 I won't bore you with the disposition on the history of
14 Edgefield County but if one reads any history of
15 reconstruction in the State of South Carolina, the
16 descriptions of the mob actions, the terrorism, the
17 lynching and the unbelievable racial violence in Edgefield
18 County will really make your blood run cold. This was a
19 place where mobs of armed white people were in paramilitary
20 brigades, forget about the Ku Klux Klan, pre-dating the
21 formation of the clan, to murder black voters and freed
22 slaves in scores to intimidate them from going to the polls
23 in the presidential elections during the entire period of
24 reconstruction. It was the site of some of the most
25 vicious racial violence.

1 And it would come as no surprise that in 1966 after
2 the Voting Rights Act was passed, the white power structure
3 of Edgefield County went from single member districts to at
4 large voting, specifically for the purpose of depriving the
5 large African American population there from accessing the
6 political process. This is a county which is 50 percent
7 black. So there were single member districts, never a
8 black person serving, the Voting Rights Act is passed, the
9 county fathers turn around and vote into at large voting.
10 We filed a lawsuit in 1980 and after four years of
11 litigation, five single members districts were created and
12 black candidates won three Council seats and ultimately in
13 1987 even though the defendants vigorously contested it, we
14 finally won our attorney's fees in that case and today
15 Edgefield County is tremendously transformed. The chair of
16 the County Commission there is African American. The City
17 Manager is African American. The City Manager in Edgefield
18 County had been the leading defendant in a libel case
19 brought against him by the school board because in his
20 grassroots efforts to promote equal opportunity in the
21 school, he held meetings and rallies where he criticized
22 such things such as the playing of Dixie during high school
23 athletic events, and in response to this, the county sued
24 this gentleman for libel. And as an irony, he ended up,
25 Mr. McCain, he ended up being actually the County Manager

1 and one of his allies became the Chairman of the County
2 Commission.
3 We have seen these kinds of things time and time
4 again in Georgia. In Putnam County, we filed suit to
5 challenge at large school board and County Commission
6 elections.
7 In 1978, following the 1982 election under a new
8 redistricting plan a total of seven African Americans were
9 elected to three governing bodies.
10 In 1984, we brought suit challenging at large voting
11 in Mitchell County, and the Board of Commissioners entered
12 into a consent decree. Five single member districts were
13 created, of which two were majority black and two African
14 Americans were elected to the Commission. Those were the
15 first African Americans elected in that century to the
16 Mitchell County Commission, so this is not again a
17 phenomena of something happening in the 1960s or the 1970s.
18 It was not until 1984 that you see a single African
19 American being elected to the position of county government
20 in a place like Mitchell County.
21 Some of these counties had substantial black
22 population. In *Boddie v. Hull*, we filed a lawsuit in 1982
23 challenging at large elections for the Baldwin County
24 Commission and the Board of Education. This is a county
25 which is more than 37 percent African American. No African

1 American had ever served on the Board of Commissioners.
2 There had only been one African American serving on the
3 Board of Education. The case was resolved with the
4 creation of two majority black districts.
5 In 1983, we filed a lawsuit challenging at large
6 voting in Johnson County, both for the Board of
7 Commissioners and the Wrightsville City Council, and
8 Wrightsville I might mention in the early 1980s for those
9 of us who are native Georgians might remember there was a
10 considerable amount of Klan activity. There was racial
11 violence. The Klan was confronting black children as they
12 would get off the school bus. Klan members were sued and
13 found guilty of criminal violations of peoples' Federally
14 protected civil rights and monetary judgments entered
15 against them. So the climate in Wrightsville was not one
16 of racial harmony, and the black population of Wrightsville
17 was 38 percent African American. Despite 31 percent
18 African American population in the city and the county, no
19 black person had ever served on either governing body.
20 Wrightsville also had a unique, I would say, situation. It
21 was one of a few jurisdictions in the state where the
22 school board was appointed by the grand jury, and the local
23 grand jurys were all white at that time. We also sued
24 under the Georgia Constitution, I mean this was a
25 constitutional provision that allowed the appointment of

1 school board members by grand juries. And we also sued to
2 challenge that.
3 As a result of all this litigation, the city agreed to
4 create three single member districts, including one
5 majority black district, which for the first time in the
6 history of Johnson County resulted in an election of an
7 African American.
8 Now, these problems were not limited simply to small
9 towns or rural communities. In 1983, we became engaged in
10 efforts to encourage the City of Decatur which was then and
11 still is probably the second largest metropolitan area, the
12 second largest city in metropolitan Atlanta, to change from
13 an at large election system to single member districts. We
14 didn't have to sue. Ultimately, the local legislative
15 delegation saw the handwriting on the wall, and they
16 created a plan which ultimately resulted in a two-seat city
17 Commissioner district which was majority African American
18 and another two-seat city Commission district which was
19 white.
20 I want to turn you now to some more recent examples.
21 This is not just a phenomena from the early 1980s, and
22 looking at the record that we need to create and support
23 the call for reauthorization of the Voting Rights Act, we
24 should look at present day examples, such has been cited by
25 my colleague from MULDEF here.

1 In 1993, we brought suit on behalf of the residents of
2 Terrell County, Georgia. Forty percent of them are African
3 American. Both the County Commission and the Board of
4 Education have five members each and only one African
5 American has ever been elected to the County Commission,
6 and there has never been more than one African American
7 serving on the school board. Now, I don't have the
8 statistics here right in front of me, but I'm sure as an
9 elected official who's been involved in questions of public
10 education, you know that it's axiomatic that the public
11 school population tends to be disproportionately minority
12 to the overall population. So if you're talking about a 40
13 percent African American population in the county as a rock
14 figure, it wouldn't surprise me if 60 percent of the
15 children in the school district would be black and yet you
16 only have one African American serving on the school board.
17 The litigation ultimately was brought. It was settled
18 and a racially fair plan was adopted.
19 In 1994, the ACLU brought suit in Soperton, Georgia
20 which resulted in the creation of equal populace districts
21 with African American majorities in two of the five
22 districts. Prior to bringing this suit, there was a
23 deviation of as much as 46 percent between districts. That
24 means that if you had a you know a one county Commission
25 district with a thousand people, you can have another

1 county Commission district with 1,460 people with that
2 being the majority black district so that you were
3 essentially packing African Americans in one district
4 instead of spreading those voters fairly around to allow
5 for greater African American representation.
6 Finally, I mean, I could go on. I don't want to bore
7 you, but just finally, in 1996, we brought suit against the
8 City of Douglasville, which is now part of the growing
9 Atlanta kind of metropolitan area if you will. It sits to
10 the west of Atlanta. And for the city's failure to comply
11 with Section Five by enacting a series of annexations that
12 resulted in the severe malapportionment of city election
13 districts. Again, the significance of the Voting Rights
14 Act, you know, being at all levels, but when you look at
15 Section Five with pre-clearance and you look at what local
16 officials do, the majority white community, they see a
17 growing African American population. Oftentimes, their
18 solution to that is to look to the white part of the county
19 so they can then annex that and increase the population and
20 thereby dilute the potential political influence of black
21 voters. This is what was going on in Douglasville. We
22 brought suit. The litigation ultimately resulted in the
23 protection of two of the majority minority districts that
24 were there.
25 Let me conclude by offering some broader comments

1 about the Voter Right E-bill and then what we need to see
2 in terms of change.
3 So I just want to highlight you know for the
4 purposes of the record, and I know that some panelists have
5 this but can share it with you; that is, the copy of the
6 letter that was sent by the ACLU and others on behalf of 25
7 different organizations to the U.S. Justice Department
8 urging them to not pre-clear this photo identification
9 bill. Some of the concerns have previously been expressed,
10 but you know, under Section Five, it is the jurisdiction
11 that bears the burden of proof to show that the change is
12 not retrogressive and yet somehow we've entered into this
13 Alice in Wonderland world where these jurisdictions now
14 submit changes for pre-clearance and don't even bother to
15 present evidence that recognizes their obligation to bear
16 the burden of proof that they're not entering into a
17 discriminatory voting change.
18 We have 159 counties in Georgia, only 100 Department
19 of Motor Vehicle Service Centers, so that leaves 59
20 counties without a Department of Motor Vehicle Service
21 Center and would you believe it, Mr. Rogers, the City of
22 Atlanta does not have a single Department of Motor Vehicle
23 Service Center within the city limits of Atlanta. Did the
24 State of Georgia provide a racial or demographic analysis
25 of the population served by the 100 Department of Motor

1 Vehicle Service Centers to show that it was non-
2 retrogressive to force people to go and get this photo ID.
3 Absolutely not. Did the State of --
4 MR. ROGERS: You're saying that the City of Atlanta
5 does not have a Motor Vehicle Department?
6 MR. LEVITAS: A county, that's right, Fulton County
7 has one. But that Motor Vehicle Service Center is not
8 located within the city limits of the City of Atlanta.
9 They recently announced their intention to open a service
10 bureau in the city, but there is not currently a -- cause
11 it's organized by county -- and that one is in Fulton
12 County, but it's not within the City of Atlanta.
13 And of course, I think you might have heard the
14 statistics already, African Americans in Georgia according
15 to the U.S. Census are five times less likely to have
16 access to a motor vehicle, which means they're less likely
17 to have a driver's license, even though the law, the
18 legislation provides for a free photo ID, you have to sign
19 an affidavit where you declare yourself a pauper. You have
20 to humiliate yourself by declaring yourself a pauper in
21 order to qualify for the free photo ID and if you don't
22 want to humiliate yourself, you have to pay what is it
23 $8.00 or $10.00 for the non-driver's license ID which we
24 will argue in Court that if the DOJ does not pre-clear it,
25 it is nothing more than the equivalent of a modern day poll

1 tax.
2 Finally, if my mother was serving as a poll watcher
3 and I walked into the polling place as a local election
4 official and I walked into the polling place without my
5 photo ID and she knew who I was, she would have to deny me
6 the opportunity to vote under that law if I didn't have an
7 approved form of voter identification. We contend that
8 that would be a violation of the 1964 Civil Rights Act,
9 specifically provision 1971B, which says that no voter can
10 be denied the opportunity to register or vote based on an
11 immaterial defect in the voter registration or election
12 process, meaning, it used to be the old trick. You know,
13 if you didn't sign in black ink, we wouldn't accept your
14 voter registration or you know some other ruse to throw out
15 the registration or disqualify the voter. That was why the
16 Civil Rights Act contained that provision.
17 So state legislators who enacted this bill had this
18 information in front of them. They knew that they were
19 passing legislation which was going to be challenged as
20 racially discriminatory. There was a strong record made at
21 the time of racially biased concerns and yet they went
22 forward.
23 In closing, let me highlight. In 1982, litigation
24 that we brought where we represented members of the Georgia
25 Legislative Black Caucus. It was a Section Five issue and

1 they had intervened in a pre-clearance lawsuit filed by the
2 state seeking approval of the Congressional Reapportionment
3 Plan in 1982. And at that time, Congressman John Lewis was
4 not serving in the United States Congress and the
5 Congressional redistricting plan that was drawn was drawn
6 to create a majority black district in the City of Atlanta,
7 Georgia U.S. District Five, in which John Lewis was going
8 to run. During the redistricting process an incumbent U.S.
9 Congressman by the name of Joe Matt Wilson declared
10 publicly and on the record, I'm not going to draw a Negro
11 District and he did not use the word Negro.
12 The U.S. Federal District Court in reviewing this
13 made the unusual finding (quote), "Representative Joe Matt
14 Wilson is a racist". In overturning the original plan and
15 in embracing ultimately the plan in which he did create a
16 majority black district which did allow that John Lewis
17 will be elected. Now, we want to highlight that because
18 this is a case where you have a redistricting plan, when
19 you have clear evidence of racially discriminatory intent,
20 clear evidence of racial bias in the redistricting process
21 but there are no African American representatives serving
22 in that particular area, and so you are not by failing to
23 draw the majority black district, you're technically not
24 hurting the black community. You are not retrogressing
25 them, right. Because they had no black representatives in

1 that particular -- there were African Americans I believe
2 serving in Congress at the time -- but you weren't lowering
3 the total number of African Americans so you weren't
4 putting them in a retrogressive position.
5 Wisely, the U.S. Department of Justice intervened.
6 Wisely, the Courts upheld our legal intervention and said
7 basically that there was racially discriminatory intent and
8 where you have racially discriminatory intent, you should
9 not pre-clear such a plan.
10 John Lewis was elected to Congress from that majority
11 black district and tying into something that you had been
12 discussing earlier what you end up with today is a
13 situation where Congressman Lewis can win in that district
14 with substantially fewer African American voters.
15 But as was stated earlier, the overwhelming majority,
16 and we can get these numbers for the panel if they would
17 like, of African American representatives at the state and
18 county municipal level here in Georgia serve from majority
19 minority districts. Simply put, in the southern United
20 States today, you cannot get elected to serve at the
21 municipal county or state level without being from a
22 majority black district you know overall in the majority;
23 in as place as cultured and supposedly enlightened as
24 Charleston County, South Carolina, the location of the
25 Spiledo (Phonetically) Arts Festival and everything else.

1 The Federal District Court has entered findings which show
2 in 2002 that 90 percent of white voters vote white and 90
3 percent, 85 percent of black voters vote black. The level
4 of racially pulverized voting in the modern era in the
5 south in so many places is so high as to virtually preclude
6 the possibility of black political success without either
7 a) a majority black district or without either b) the long
8 term value of incumbency as voters you know get to know you
9 over time. I point to *Busby v. Smith*. This case that I
10 mentioned in which the finding was made that Representative
11 Joe Mack Wilson was a racist because it ties directly to
12 one of the most important changes we need in the
13 reauthorization and that is the repair of the Bossier
14 Parish decision coming out of Louisiana where you had a 12-
15 member school board all white, a 20 percent black
16 population in 1990, the ability to add two African
17 Americans to that school board so that there could be some
18 black representation but because no African Americans had
19 ever served on that school board, it wasn't retrogressive
20 to keep that school board all white. But there was
21 evidence of racial intent, so thankfully the U.S. Justice
22 Department interposed an objection and said this is not
23 right. There is racially discriminatory intent here even
24 though there isn't retrogression per se and do you know
25 that the U.S. Supreme Court ruled in that case in a five,

1 four decision that because there was not an intent to
2 retrogress, right, you couldn't intend to make things any
3 worse for black people because they didn't have any black
4 representation to begin with so that decision should be
5 pre-cleared.
6 So we're now faced with the truly bizarre and
7 nonsensible proposition that when whites or blacks, whoever
8 they might be, in control and in political power act with
9 deliberately discriminatory intent, as long as they don't
10 make things worse for minority voters, those changes should
11 be pre-cleared. Yet that --
12 MR. GREENBAUM: Excuse me one second, please?
13 MR. LEVITAS: Yes.
14 MR. GREENBAUM: Is that one of the cases you handled?
15 MR. LEVITAS: Yes.
16 MR. GREENBAUM: You argued that case?
17 MR. LEVITAS: I did not argue in Court but
18 I wrote the brief for the District Court when I was at
19 the Justice Department.
20 And so just to conclude, if that logic had been
21 reigning today, Congressman John Lewis, one of the
22 stalwarts of the Civil Rights movement, one of the most
23 articulate spokespersons in favor of these issues, would
24 likely not be an elected Federal official.
25 There are other Supreme Court decisions which need to

1 be repaired. Section 203 needs to be reauthorized.
2 You asked about the timeframe. I would argue that just as
3 Congress in a bipartisan fashion with strong Republican
4 involvement in the last reauthorization did so for 25
5 years, Section Five and Section 203 should be reauthorized
6 again for 25 years. James Sensinbrier (Phonetically), a
7 Republican of Wisconsin, has indicated that it's his intent
8 but the devil will be in the proverbial details.
9 And in closing, I apologize for taking so much time.
10 I would close by citing the remarks of Dr. Martin Luther
11 King upon his addressing President Lyndon Johnson declared
12 in the wake of bloody Sunday, March 7th, 1965, that he
13 would pursue a strong Voting Rights Act and that we as a
14 nation should overcome.
15 As Dr. Martin Luther King said of that commitment it
16 was indeed a shining moment in the conscience of man and
17 that shining moment, it's our obligation to continue to
18 illuminate it.
19 Thank you very much.
20 MR. LEVITAS: Pardon me?
21 MR. DAVIDSON: How close are you working on
22 investigative information?
23 MR. LEVITAS: Well, we're working very closely. It's
24 a question of timing and time table but everything that I
25 have cited, these individual cases, the records, the

1 comprehensive data, that will all be provided to President
2 Davidson and to Mr. Greenbaum and the Commission.
3 MR. DAVIDSON: Will the comments that you have made
4 today be available to us in hard copy?
5 MR. LEVITAS: I can try and do that for you, yes.
6 MR. DAVIDSON: Thank you.
7 SENATOR BROWN: Any other questions?
8 MR. ROGERS: Actually, I do have some other
9 questions. Can we do that now? Are we okay in timing now
10 or do we want to go forward with Johnny in terms of his
11 statement?
12 SENATOR BROWN: Either way. If you want to
13 go directly to him? Yeah, let's go directly with him and
14 then we'll move to --
15 MR. ROGERS: Absolutely. Can you give me your last
16 name again?
17 MS. TALLMAN: T-A-L-L-M-A-N.
18 MR. ROGERS: Thank you. First of all, I'm delighted
19 with your testimony. It's remarkable. Thank you kindly.
20 I had several questions. What is the percentage of
21 the Latino population that exists here in Georgia?
22 MS. TALLMAN: Six percent.
23 MR. ROGERS: Six percent. Ten years ago, you were
24 roughly two percent of the state's population.
25 MS. TALLMAN: I believe there's been a 400 percent

1 increase in the last five years.
2 MR. ROGERS: What percentage of those account for
3 people who are legally versus illegally?
4 MS. TALLMAN: It's difficult to say because there
5 isn't anything that's been done -- it's very difficult to
6 measure the Latino population and there hasn't been
7 any
8 studies in Georgia that's attempted to do that. I do
9 though, I'm uncertain.
10 MR. ROGERS: I've seen a range of numbers, and I
11 don't know what they are but I'm hearing that the numbers
12 can be as high as 40 percent or so. And I don't know about
13 this region in particular, but I do know that you've had a
14 huge increase in particular of Mexican immigrants to the
15 United States who have made Georgia and portions of the
16 south increasingly home, substantial portions of which are
17 not necessarily here documented or illegally in the United
18 States.
19 MS. TALLMAN: Sure.
20 MR. ROGERS: But you're not sure exactly what that
21 number is. I heard the number may be as high as 40 percent
22 but I don't know.
23 MS. TALLMAN: Well, let me give to you these
24 statistics.
25 MR. ROGERS: Sure.

1 MS. TALLMAN: And we do have regular contact with the
2 Mexican Consulate and I do know that the Mexican Consulate
3 has a very different idea of how many people may actually
4 be living in Georgia who are not, and we do believe that
5 the numbers change every single day. And we are halfway
6 through the last census so the last numbers we have aren't
7 completely accurate to date, even though we think that they
8 weren't accurate to begin with. I believe it's estimated
9 that there are approximately 300,000 Latinos living in
10 Georgia. However, some people have estimated that it might
11 be double that, and we do know that there are particular
12 counties and cities that have extremely large population of
13 Latinos. In Dalton, Georgia is a perfect example of that
14 where we believe about 20 percent was the last given
15 statistics on the population of that particular community.
16 We believe it's even more than the 20 percent.
17 And one example of how we know that the numbers are
18 large and that the Secretary of State's Office is concerned
19 with that in regards to Section 203 is that even though
20 Georgia does not have one single Section 203 jurisdiction
21 currently and that's why there are no Section 203 lawsuits
22 in this part of the country. The Secretary of State's did
23 a pilot project in Dalton where they did use ballots i n
24 Spanish and English and I believe largely in preparation
25 for perhaps a Section 203 jurisdiction in Georgia with h

1 next census.
2 We also know that the Carolinas and Alabama do not
3 have Section 203 jurisdiction. The last census, my
4 jurisdiction consists of 11 states from Arkansas to Florida
5 up to Maryland. Within that jurisdiction, there were only
6 two counties in the southeast that were added as Section
7 203 jurisdictions. One was Montgomery County, Maryland and
8 the other I believe was Broward County, Florida. So with
9 the exponential growth of our community, we do believe
10 there are going to be a number of Section 203 jurisdictions
11 added, assuming that we get reauthorization in the next
12 census and you know some Secretary of State offices are
13 already thinking of that, are moving towards that.
14 It becomes even more critical as we look at cases of
15 registration pending in Congress in regards to immigration
16 reform or special populations with immigration reform with
17 the agricultural sector, or our children, the Dream Act.
18 And jobs under the Dream Act and also to some legislation
19 that is currently, that's pending that has been introduced
20 -- assuming that we get immigration reform any time in the
21 near future, Section 203 is going to be extremely critical
22 to preserving --
23 MR. ROGERS: You mean, amnesty essentially opening
24 up. Okay, amnesty provisions that allow for folks who are
25 illegally to become citizens?

1 MS. TALLMAN: Correct.
2 MR. ROGERS: Okay.
3 MS. TALLMAN: And even assuming that we don't have
4 comprehensive immigration reform we just know that there
5 will be immigrants who are currently here, unlawfully or
6 not who will find some means whether it's through family
7 sponsorship or employment sponsorship, as difficult as it
8 may be for the majority of these immigrants, we will be
9 looking at them eventually getting on a path towards
10 becoming United States citizens. So certainly, Section 203
11 is going to be an issue for many, many years to come as our
12 immigrant population continues to increase and grow in the
13 southeast.
14 MR. ROGERS: And I understand some groups take the
15 position and I don't know if all of them take the position.
16 Do you all take the position that people who are here
17 illegally in the United States should be able to vote?
18 MS. TALLMAN: We have not taken a formal position
19 although we are quite aware of the issues that have been,
20 particularly out in New York City of the noncitizen voting.
21 Certainly, it's something that we continue to look at and
22 an important issue for everyone to be looking at and
23 addressing and we know that there has been a number of
24 resolutions that there are -- Tacoma Park, Maryland is a
25 perfect example of how individuals are allowed in specific

1 elections to vote who are not citizens. And that's just a
2 recognition that people are being taxed and aren't being
3 represented, because we do know that there's a good
4 majority of our Latino population that pays some type of
5 taxes. And they do because of a case that MULDEF litigated
6 that went to the Supreme Court in 1982, have children in
7 schools so certainly school boards is something
8 that the movement towards allowing for at least municipal
9 or school board voting.
10 MR. ROGERS: You all have not taken a position yet
11 on that?
12 MS. TALLMAN: Not taken a formal position.
13 MR. LEVITAS: If I could add Mr. Rogers, a historical
14 perspective it sometimes quite interesting on this issue
15 because you know there was a time when many places
16 throughout the United States not only allowed noncitizen
17 voting but political officials vigorously encouraged it
18 that that is because in the late 19th Century with the
19 large population of immigrants it was very much in the
20 interest of political losses, for want of a better term, --
21 MR. ROGERS: Sure.
22 MR. LEVITAS: -- in urban areas, like Chicago and New
23 York and other places, --
24 MR. ROGERS: Sure.
25 MR. LEVITAS: -- to encourage these various immigrant

1 and ethnic communities to vote and particularly to vote
2 locally, never really in Federal elections, but to vote
3 locally and the trend against noncitizen voting in local
4 elections according to the people who are experts on this
5 issue, coincided very directly with anti-German sentiment
6 during World War I and you saw a dramatic decline and a
7 repeal of noncitizen voting in local elections, but it's
8 funny today it's kind of a hot button political issue,
9 noncitizen voting, where people stand on it, but in the
10 past it was something that was actually much more of kind
11 of a mainstream initiative. And the point that's made
12 about even if people are here on an undocumented basis, we
13 still have the 14th Amendment to the Constitution which
14 guarantees citizenship to persons born within these United
15 States and so if you have adult parents who come here be it
16 illegally and convert the children here who are in the
17 school system, what are the consequences of the
18 disengagement of those parents in a school board situation
19 where they might want to become involved in decisions that
20 directly affect their children.
21 MR. ROGERS: Sure. Well, --
22 MS. TALLMAN: And there are an estimated 1.3 million
23 U.S. citizens born to undocumented parents.
24 MR. ROGERS: Absolutely. Very familiar with the
25 issue.

1 I have one last question. I just wanted to get your
2 sense of -- you all describe it particular as a chilling
3 process essentially. You essentially say okay, to the
4 extent that we're required to come down and provide you
5 with kind of information that is a chilling effect
6 essentially on us voting, in effect, and would you describe
7 that in particular. It's one thing to state that, but I
8 think for purposes of our developing the record, it would
9 be much more helpful to have, if you will as succinctly as
10 possible a statement about what the nature of that chill is
11 and how that takes place.
12 MS. TALLMAN: Well, I'd like to --
13 MR. ROGERS: I mean, basically what one might argue
14 is, you don't have anything to worry about, why in the
15 world would it be chilling to you at all?
16 MS. TALLMAN: I'd like to take it one step back if I
17 may before we get to that point and that's just the fact
18 that only Latinos were challenged based on U.S.
19 citizenship, and the way I described this with the State
20 Election Board is when you identify people solely based on
21 their last name and only challenge them, nobody else. We
22 know there are undocumented people here who are not
23 Latinos, yet this is the only thing that we've seen. When
24 I testified before the State Election Board, I said you
25 know we have a name for that and that's call racial

1 profiling, and we don't allow it in criminal law and we
2 can't allow it in our election process either. When you
3 identify individuals solely because of their heritage for
4 the purpose of challenging the right that they have been
5 given by virtue of being a U.S. citizen and that in and of
6 itself was from, to have happened and then to have been
7 given credit by the Registrar's Office as something that's
8 valid that should warrant going on further with the first
9 thing, and I think that shouldn't have happened. But when
10 you get to the point where --
11 MR. ROGERS: Let me interrupt you.
12 MS. TALLMAN: Sure.
13 MR. ROGERS: Cause I want to play a little bit of a
14 devil's advocate because I want to ask you the question in
15 another way. If you know that you have a substantial
16 portion of people who are illegally in the United States
17 who are participating in elections and you know that those
18 folks who are participating in elections are largely of
19 Latino descent and you guesstimate that number is as much
20 as 90 percent or so of the folks that are in the area doing
21 that, how else are you able to determine whether or not the
22 folks are or are not here in fact, in other words, how are
23 you able to make the challenge except by the basis of a
24 person's last name? How else can you do it?
25 MS. TALLMAN: That's the same argument --

1 MR. ROGERS: If you were allowed under the
2 Constitution to make the challenge, how else are you able
3 to make the challenge?
4 MS. TALLMAN: There's a reason why we have burdens,
5 we have burdens of proof. We have standards. We have
6 procedures. There's a reason why we have those. It's
7 guaranteed in the United States Constitution. It's due
8 process. If an individual is here and has a constitutional
9 right to vote and there's a due process by which people
10 must follow, the state officials must follow prior to
11 depriving someone of the ability to vote, and there is a
12 procedure set up in Georgia. There are two procedures set
13 up depending on the circumstances. The burden is on the
14 person making the challenge and in these particular
15 instances they were never held to any burden. All they had
16 to do was request a list, make a challenge to two-thirds of
17 those individuals and say it's based on U.S. citizenship.
18 They never had to provide anything, never have to say
19 anything, never have to swear or attest to anything --
20 individuals who have fought hard for the right to vote and
21 voted time and time again, who've always been nothing but
22 U.S. citizens, in particular that have been impacted by
23 what transpired. It was a huge impact on them for them to
24 have to prove that they are U.S. citizenships because
25 somebody down the street decided that their last name was

1 reason enough to doubt their Constitution. The
2 Constitution would guarantee the right, and that had a huge
3 impact on those communities. The individuals in the
4 community were challenged, were fearful that this may
5 transfer into other areas of their life. They felt
6 harassed and singled out which --
7 MR. ROGERS: What do you mean by transfer into other
8 areas of their life?
9 MS. TALLMAN: That they may be more susceptible to
10 harassment at work because they're Latinos or at school --
11 their kids at school -- because they've been identified as
12 Latino and different and held to a different standard. If
13 an individual were to request a list of registered voters
14 and decided that they were going to identify and we can
15 identify people by surname in regards to ethnic or racial
16 heritage. If they decided that they were going to go down
17 a list and we know that there are Canadians who are here
18 undocumented, if they decided to try to identify all of the
19 Canadians on that list and would challenge them solely
20 based on their name, for some reason I think it's sometimes
21 difficult to articulate and sometimes difficult for people
22 to understand that identifying someone simply because of
23 their last name is what we call racial profiling and
24 especially in regards to a constitutional guaranteed right,
25 it's extremely offensible and extremely chilling.

1 And in the particular instance of Long County, we know
2 that only ten people out of 64 registered Latino voters
3 actually voted in the primary. Those numbers in and of
4 themselves without obtaining any voter information is quite
5 significant and quite alarming. And I don't know that
6 we'll ever know completely the chilling effect that it's
7 had but certainly the individuals of those communities feel
8 like they were singled out simply because of who they are
9 and where they came from.
10 MR. ROGERS: Sure.
11 MS. TALLMAN: And who knows what type of impact it
12 will have for decades to come in regards to the U.S.
13 citizens that reside in those particular jurisdictions.
14 And we're really afraid of the copy-catting as well, and we
15 do know that in this work -- I opened the office three
16 years ago and we are not short on work, and I would
17 constantly have to prioritize but one thing that we have
18 noticed is whether it's in election protection issues or
19 it's in employment discrimination issues or it's in racial
20 profiling by law enforcement agencies, immigration
21 enforcement by law enforcement agencies, we know that once
22 something happens in one place in the south, we know that
23 it's going to happen in other places in the south unless
24 the message is sent by way of a state official coming down
25 and saying no this is wrong or maybe by a court ruling

1 because certainly when one county is able to do things one
2 way, we know that it is seen in other places especially if
3 the individuals get away with what is happening.
4 One of the things I told the State Election Board
5 that's so important because one member of the Board was
6 talking about election fraud and the likelihood of a
7 documented individual person committing election fraud.
8 One, we do not have any documented incidents of election
9 fraud and we know that there have been some incidents that
10 have been incidents that we can count on one hand that were
11 brought to the attention to the Secretary of State and the
12 State Election Board but there have been no findings to
13 support them.
14 But even if we had findings of election fraud, what
15 becomes so important that we remember that we have to do in
16 this process is preserve the process that has been
17 established because preserving the process preserves the
18 right of everyone who is eligible to vote to vote. In my
19 organization and the organizations like mine
20 are here to ensure that that process is preserved so that
21 the people who fought hard to obtain the right to vote
22 continue to have that right to vote and that for the future
23 of individuals who might be here who are not U.S. citizens
24 or they become U.S. citizens, they have the ability to
25 equally access their right to vote.

1 MR. ROGERS: Thank you.
2 MS. TALLMAN: Thank you.
3 MR. DAVIDSON: I'd just like to ask I guess one,
4 possibly two, questions to you.
5 MS. TALLMAN: Certainly.
6 MR. DAVIDSON: I'm correct, aren't I, in understanding
7 you to say that in Long County and in Atkinson County,
8 there were no challenges made to voters aside from those
9 with a Hispanic surname?
10 MS. TALLMAN: Correct.
11 MR. DAVIDSON: And this was in the 2004 election?
12 MS. TALLMAN: That's correct.
13 MR. DAVIDSON: Do you have any idea of whether the
14 people who asked for and obtained those lists of Spanish-
15 surnamed voters, who they were or was it an organized
16 group, or was it some organization that took it upon
17 themselves to enforce election integrity?
18 MS. TALLMAN: We do have that information but I don't
19 know that I have it readily available. I do know in
20 Atkinson County that there were three individuals and they
21 were individuals who were I believe elected officials.
22 MR. DAVIDSON: I'm sorry. They were individuals who?
23 MS. TALLMAN: Who were elected officials who had been
24 elected to some type of office.
25 In the Long County matter, I believe they were

1 individuals that were running for office who were defeated
2 in the primary and that's my best recollection. And I
3 apologize that --
4 MR. DAVIDSON: That's okay.
5 MS. TALLMAN: -- but we can provide information.
6 MR. DAVIDSON: Okay. And my last question is the one
7 that I asked Mr. Levitas; will we have access to a printed
8 copy of your testimony here today?
9 MS. TALLMAN: I will provide a summary fashion of it.
10 MR. DAVIDSON: Thank you.
11 MR. ROGERS: You know, I'm going to ask you the same
12 general question that I asked previously cause I am curious
13 about your perspective. Here in south, here in Georgia,
14 how long have you been here did you say you'd been?
15 MS. TALLMAN: I've just been here for three years.
16 I came here when I opened my southern office.
17 MR. ROGERS: Where did you come from?
18 MS. TALLMAN: I came from the mid-west.
19 MR. ROGERS: Mid-west; you were up in Ohio or some
20 place?
21 MS. TALLMAN: I was last in Minneapolis.
22 MR. ROGERS: Minneapolis and you had just left
23 there.
24 And you moved back here, Daniel, is that correct? You
25 moved back to Georgia you said?

1 MR. LEVITAS: No, the first time I came here was in
2 1989. So I've been here for 16 years.
3 MR. ROGERS: For 16 years.
4 MR. LEVITAS: And prior to that I was in Iowa for
5 eight years, Michigan and then New York.
6 MR. ROGERS: You briefly talked a bit toward the end
7 of your testimony about essentially the perspective on John
8 Lewis and whether or not he would have been elected here or
9 not.
10 I did want to get some perspective from you about
11 that. You mentioned obviously a number of cases in and of
12 themselves as we can tell from your testimony was very
13 helpful. In terms of a general perception about
14 essentially the voters crossing the lines, voting in
15 various fashions.
16 MR. LEVITAS: Right.
17 MR. ROGERS: You essentially indicated the blacks,
18 90 percent of blacks were voting for blacks and 90 percent
19 of whites were voting for whites. That seemed to be a
20 little bit different from the testimony as articulated by
21 the Mayor who seemed to indicate and Senator did I hear you
22 to state that roughly, you roughly need roughly 40 percent
23 or so of whites to vote for you in order to succeed. Are
24 those roughly the margins that are generally existing for
25 African Americans who run for office in Georgia? Can you

1 expect if you were a good candidate in Georgia running for
2 public office to receive roughly 35 or 40 percent of the
3 white vote or is it lower?
4 SENATOR BROWN: It varies. It's probably lower, but we
5 have somewhat of a unique situation here in Georgia in that
6 we do while we on legislative districts and city council
7 districts and you know other local districts have that
8 phenomena. On the other hand, we have four African
9 Americans who were elected statewide. We have an Attorney
10 General who was elected statewide. We have the Chief
11 Justice of the Supreme Court, an African American female
12 who was elected statewide, a member of the Service Public
13 Commission who was elected statewide and the Labor
14 Commissioner who holds a statewide office. So there is
15 some indication that you know that whites will vote for
16 African Americans, but the point that I would make about
17 all this is that that is after they have had an opportunity
18 to demonstrate their capacity to govern.
19 MR. ROGERS: Sure.
20 SENATOR BROWN: And you often don't get that
21 opportunity except for starting in a predominantly African
22 American district. Michael Thurmond who is the State Labor
23 Commissioner is somewhat of an anomaly in that sense in
24 that he was initially elected from a majority white
25 legislative district. But that district is somewhat unique

1 in that it has the University of Georgia population which
2 tends to have a more progressive electorate around it. The
3 Chief Justice was initially appointed by the Governor, so
4 she had an opportunity to perform in the position and then
5 be elected. Thurgood Baker who is the Attorney General was
6 elected from a predominantly African American district but
7 he also had a very high profile as the floor leader for
8 Governor Zell Miller who initially appointed him and then
9 he was elected. And so those paths, there is some
10 exceptions to having to have a predominantly black
11 electorate in order to be elected but the general path to
12 that is you initially have to have that opportunity that
13 comes almost exclusively from a predominantly African
14 American base and that holds true for even the
15 Congressional district. We now have a -- well, Cynthia
16 McKinney really does not have an overwhelmingly African
17 American district now, but when she was initially elected,
18 she had an African American district and when she was re-
19 elected prior to this election now, once the district was
20 changed she only had about a 49 percent POP district but
21 she was able to I think be elected by that time because she
22 had had that experience and that profile and that exposure
23 of having come from the predominantly African American
24 district. The same percent for Sanford Bishop. Sanford
25 Bishop currently represents a predominantly white district

1 but he had the opportunity initially that came from a
2 predominantly African American district, and so your
3 question also earlier about how do you see this going
4 forward, that's why I think it's important to have it
5 renewed because we're at a point now where we've made
6 significant progress under the process that we have now,
7 but I'm afraid that if we cut it off at this point that
8 those opportunities for African Americans would be
9 diminished and so you would not get the future statewide
10 elected officials, the future Congress people who would
11 have that experience of that opportunity to show their
12 capacity to govern because if they relied solely on coming
13 from these districts that were not African American, the
14 chances would be significantly diminished as demonstrated
15 by the record here in Georgia.
16 MR. LEVITAS: If I might add briefly. Each
17 legislative district is in many cases unique and the facts
18 specific to the ability of minorities to succeed depend on
19 particular histories and contextual evidence which is why
20 when one is bringing for example a Section Two lawsuit, one
21 has to invest considerable resources in bringing forward
22 factual evidence about the totality of circumstances and
23 the history, even in discussing something like Cynthia
24 McKinney's district and pointing out the fact that it is
25 now not majority black. I believe if you look at the data

1 and recent turnout one will still find that Cynthia
2 McKinney was elected with a majority of African American
3 voters because her presence is such a, she's a particularly
4 charismatic and galvanizing figure in the African American
5 community and so even though the black voting in each
6 population is in the minority, the turnout and the
7 excitement and the energy that she attracts as a candidate
8 offsets the white antipathy towards her candidacy. And in
9 fact, too complicated to get into now, when one looks at
10 data regarding her race in the primary, the Democratic
11 party primary, subsequent elections and the general
12 election, there is strong evidence of racially polarized
13 voting in her Congressional district over the past four to
14 six years.
15 I used the example --I wasn't saying generically
16 everywhere across the south 90 percent of whites vote
17 white, 90 percent of blacks vote black, I specifically said
18 in Charleston County, South Carolina, this is the data you
19 know that was found. But if you look at these
20 jurisdictions where there has been litigation in an effort
21 to create majority black districts and to do as Senator
22 Brown indicated, give African American officials t h e
23 opportunity first to serve, one finds extraordinarily high
24 levels of racially polarized voting and even when one talks
25 about people like Thurgood Baker or Michael Thurmond our

1 Labor Commissioner, those gentlemen were elected at a time
2 of democratic Partisan here in the State of Georgia where
3 once they were able to win in a primary context, they
4 achieved higher office on the coattails of an
5 extraordinarily popular Governor at first, you know Roy
6 Barnes and also Zell Miller and what you have now in
7 Georgia is an increased Partisan development where race is
8 becoming quite a Partisan tool and I think that in fact it
9 would be if you had an open seat for statewide office
10 currently in Georgia, I think it would be extraordinarily
11 difficult for an African American to succeed witness the
12 fortunes of Denise Majek who ran for United States Senate
13 in Georgia just recently.
14 And so these are complex matters but sadly we can't
15 overlook the cooling and heating effect that when African
16 Americans or Latinos or Asians see that the political
17 process of native Americans is open to them whether it's by
18 virtue of Section 203 language minority assistance or
19 whether it's by virtue of seeing people that look like them
20 in political office, that in turn inspires them to become
21 more involved, to turn out, which helps elect more minority
22 officials which gives them the record which then enables
23 more whites to feel more comfortable electing them. But if
24 you begin to take away these incentives and allow the
25 barriers if you don't have Section Five pre-clearance as a

1 deterrent, you allow these barriers to come in place, I
2 believe without question you will see the opposite. You
3 will see the cooling effect, participation, uninvolvement
4 and indeed a diminution. You know, we once had large
5 numbers of African Americans serving in the United States
6 Congress and in state legislatures from the south during
7 reconstruction and that ground to a screeching halt in 1901
8 with the last African American elected to Congress from
9 North Carolina and it took 71 years for Barbara Jordan and
10 Andrew Young to be elected in 1972 you know to serve once
11 again; Andy Young, the first African American elected Mayor
12 of a major city in the south. Maynard Jackson 1973 and
13 one should not assume that simply because we've made this
14 progress it would not be possible to you know it will begin
15 to systematically eliminate 43 African American members in
16 Congress or the 27 now Latino members serving in Congress.
17 Those numbers could well turn backwards without the
18 protection of the Voting Rights Act.
19 MR. ROGERS: That's very helpful.
20 SENATOR BROWN: If you don't have anymore immediate
21 questions, I'm going to ask Dr. Vaughn.
22 DR. VAUGHN: Mr. Davidson, Mr. Rogers, Mr. Greenbaum
23 -- I hope I pronounced that right -- thank you for giving
24 me this opportunity. I wanted to give you a couple of
25 scenarios which are personal and by no means -- I am a lay

1 person -- I am not an attorney so therefore.
2 Back in 1993, I subjected my family to I guess you
3 would say humility and some problems because of the a
4 little law that the Voting Rights Act that I was reading
5 one day and I discovered that based on what I was reading
6 concerning the Voting Rights Act and there was a little
7 that stated that if we have a certain amount of, a
8 percentage of a certain amount of blacks in the community
9 then we should have an extra district and with my being a
10 lay person I called Chris Coates and I gave Chris Coates
11 the percentage and he said hey you're supposed to have two
12 districts based on the population, a County Commission
13 district.
14 And I said well, what is my next step. He said,
15 under the Voting Rights Act, I believe we have a pretty
16 good chance if you want to be the plaintiff and file a
17 lawsuit against your county, so why not.
18 So we filed a lawsuit and of course because of the
19 Voting Rights Act, there was a little known law in there
20 based on the percentages, we were victorious under Judge
21 Baldwin over here in Savannah, Georgia, we won the case.
22 The Laurens County presently have two black County
23 Commissioner districts. Notwithstanding, the lines were
24 redrawn again later; basically the Justice Department drew
25 three maps to accept and we looked at them accordingly and

1 we finally accepted one of the maps. We was tricked into
2 accepting the map and that's why I'm into this thing now
3 because we looked at the percentage. We didn't look at the
4 voting percentage, the old trick, the numbers were there
5 but the voting numbers were not there and we suffered from
6 that one. But notwithstanding we do have two districts.
7 That's one scenario why we need to keep the Voting Rights
8 Act.
9 The second one is certainly one that I was involved
10 in, a city election where I won in District One by 16
11 votes. Notwithstanding I had earlier walked into the city
12 clerk's office and said now are there any new laws I need
13 to know about over the voting procedure, and of course, he
14 said no not that I know of. And so we went out and of
15 course we worked diligently and I won by 16 votes and they
16 had a recount and they had another recount and they counted
17 the absentee ballots and then they reached under the table
18 and pulled out a bag of votes and said these look, oh,
19 these were the early votes, the early votes? But my job
20 then was to get my people out to the polls because they was
21 given a little heated there. My people failed and I
22 believe they failed too but they was denied the right to
23 vote because what I did again of course my family, I talked
24 to my family, we sued. I sued them myself. I sued the
25 city, the city clerk and in fact anyone else I could think

about suing we sued them.

And basically, we went to Superior Court and the Superior Court Judge stated that there was no case law. The Clerk of Court of course he stated that he had no right to tell the public about the early voting. This was the first time it was used. So he had no right. What I'm saying if you're not going to tell them who is going to tell us. Of course, now everyone in Laurens County knows about early voting and in fact, the last election we just wiped out everything with the early voting, that's why I believe they came back with this new ID, identification voting, because we did such a tremendous job in Laurens County from this last election. We do need the Voting Rights Act. Of course, I lost by 31 votes when they pulled the bag out from up under the table of course. I lost also in Court. Then they sued me and wanted me to pay their, the city wanted me to pay their legal fees. And so I went back to Court and of course I won that case. I didn't have to pay their legal fees of course, but we need the Voting Rights Act from the Federal government. We need it because history has taught us that state rights will not be in our favor. History has taught us that but certainly in the city election, the people in rural areas -- and I'm from a rural area -- are being cleared from the list on a daily basis, misinformation concerning votes who have been

1 incarcerated. And once you're incarcerated, you can never
2 vote again. We do need that because certainly we do not
3 have to go to litigation. We can just threaten to go to
4 litigation and they'll come to the table but without this
5 vehicle, without this vehicle, we have no recourse.
6 There's no recourse anymore.
7 Of course, I've listened to the young lady and young
8 man over there. I think, I can't call his name but I've
9 seen them in Dublin of course. Certainly, we must
10 understand that in Georgia our legislatures in Atlanta in
11 order to get minorities and everyone I guess to participate
12 in the election process, initiated a policy of law where it
13 was called early voting so we can participate more you know
14 because most people today are working two or three jobs and
15 of course that would help the participation which it has.
16 And then we turn right around or the legislature that has
17 governed Georgia for so many years who saw nothing wrong
18 with the way we was being identified at the polls
19 especially in a rural area where I'm from because most of
20 the poll workers we know. Everybody know everybody you
21 know. I can't speak for the municipalities in Atlanta, but
22 in the rural areas. And if there was something wrong with
23 the process of identifying one, I believe the state
24 representative that's been there so long years ago would
25 have discovered it. I'm a little skeptical about how it

1 came about. We have a Republican administration there and
2 all of a sudden there's something wrong with the
3 identification, the way we cast our ballots.
4 Now, I could have went along with it had they spoke
5 about the absentee ballot. Now, that's the process that
6 might possibly could be compromised, the absentee ballots,
7 but it wasn't even in the equation. That's five pieces of
8 ID, identification, we're going to have to have. We need
9 the voting Rights Act. Just on this case alone, five
10 pieces of identification. I believe it's driver's license,
11 the military ID, passport I believe it is and there's one
12 more. There's one more there. I can't call it. I had it
13 on the tip of my tongue. But can you imagine, they told me
14 earlier that in the City of Atlanta there's no State Patrol
15 office. Can you imagine an 85-year-old lady standing in
16 line in Fulton County waiting to get an ID card where
17 you're standing in line waiting to get a driving license.
18 So certainly, we need the Voting Rights Act to be extended.
19 Our organization is basically an organization of
20 information. We do not endorse campaigns. We say meet the
21 candidate of course. We will provide transportation for
22 the candidate to all five of our counties, which consists
23 of Twiggs, Johnson, Treutlen, Laurens and Emmanuel
24 Counties. Of course, we try to look at the main
25 information as simply we're going to introduce this fellow

1 or this lady to you all. You make your decision. Voter
2 participation during election, of course, we do our best to
3 transport people to the polls there. They vote for w h o
4 they want. But we want to make sure they're not hindered
5 by transportation. Laurens County remember is one of the
6 largest, third largest county in the State of Georgia.
7 It's a rural area and certainly we do need this Federal
8 Voting Rights Act to be extended because without it you
9 know and I know state rights will not work. It will not
10 work. Let's not fool ourselves here.
11 Thank you.
12 MR. ROGERS: Thank you.
13 SENATOR BROWN: At this time, we're almost at the end
14 here if there are any members of the audience who have two
15 or three minute statements that they would like to make we
16 will entertain that at this point.
17 MR. ROGERS: Thank you, sir.
18 MR. ROGERS: Mr. Vaughn, I wanted to ask you a
19 question if I may. And I almost feel like I'm in this
20 devil's advocate role to some extent and I know I am to
21 some extent, but I wanted to ask you about the -- when you
22 all got sort of duped into accepting that plan in
23 particular you said you looked at essentially the
24 percentage of the population. My guess is you all
25 probably looked at the listings and the districts were

1 divided based upon race. You saw the racial components and
2 said ooh, that looks good. But then when you looked at the
3 voting numbers, you saw what is a reality frankly all over
4 the United States and that is that despite the existence of
5 this Act, the sad reality is that many of us as African
6 Americans in particular do not vote, don't register to
7 vote, and don't engage in the process of voting on election
8 day.
9 And as elected officials and certainly you know this
10 Senator, our job is try to drive people out to vote. You
11 try to get as many people as you can to show up to vote for
12 you and there can be nothing more disconcerting to a person
13 who's running for office, than to go to people, ask them
14 for their vote. They say amen, hallelujah, thank you
15 Jesus. And half of them don't even bother to vote or show
16 up to vote for you. That is a sad reality that also
17 existed in terms of this Voting Rights Act and so I mention
18 that in the context if you're looking at the map and then
19 having been sort of duped into accepting it if you didn't
20 look at the voting patterns.
21 There are naysayers out there that would in effect say,
22 listen, you had your shot. You wanted to act in a place
23 that guarantees you the right to vote when you don't vote
24 as a practical matter anyway, and I'm just very curious as
25 a general matter what your response would be to that person

1 who articulates that point of view. Not that anybody would
2 necessarily do so. But I am curious as to what you know
3 given the fact that --
4 DR. VAUGHN: They wouldn't necessarily, Mr. Rogers,
5 they wouldn't necessarily do so. Yes.
6 We changed our attitude. Before we would say to one
7 like that if you don't vote, you have no complaints. We
8 have a new slogan now that we use. We don't ask them to
9 vote initially. We ask them will you help us to help us.
10 And it disarms them and the first thing that, well, they
11 say well, I don't have any way to vote, but will you
12 register to vote. Oh, yeah, I'll help you do that. So the
13 old way doesn't work anymore. It's the new way. You have
14 to let that individual know that you're helping us to help
15 us. And with that statement, I can make that same
16 statement in a trailer park at the white community, will
17 you help us to help us. And I can make it at the country
18 club, will you help us to help us.
19 SENATOR BROWN: Thank you. Mr. Sumblin.
20 MR. SUMBLIN: Yes, sir. Well, good afternoon
21 everyone. And let me just especially thank Senator Brown
22 and his colleagues and the Black Caucus of the Legislative
23 Body of Georgia, and this distinguished panel of
24 facilitators from Washington or wherever you're from who
25 are concerned about the national Voting Rights Act.

1 My name is Charles Sumblin and I'm here to give testimony
2 on a report of discrimination in voting experienced by
3 minority voters or impediment to elect candidates of our
4 choice. As the past President of SCLC City of
5 Wrightsville, Georgia and you've heard a little bit about
6 Wrightsville, Georgia tonight. And Johnson County, and as
7 past President of the NAACP of Johnson County,
8 Wrightsville, Georgia, now as the Chief Information Officer
9 of District One Voting Association under the leadership of
10 Dr. Vaughn.
11 I am vested with a wealth of experience and knowledge
12 of various acts of racial discrimination that have existed
13 over the years here in middle Georgia as it relates to the
14 voting rights of minority citizens. For starters, a few
15 years ago while serving as President of Johnson County
16 SCLC, I qualified and ran for the Mayor of the City of
17 Wrightsville, as a black candidate in the city that had
18 experienced the last large scale civil rights demonstration
19 in recent history. That's the one that the lawyer was
20 talking about about the Klan and what happened. Well, I
21 was one of those people there in 1982. I was one of the
22 leaders on the front line that was beaten and jailed under
23 the Sheriff Attaway over there because we were standing up
24 for civil rights in Johnson County. Well, let me say this;
25 I nearly became the target of large scale acts of racial

1 discrimination. The most critical of all was the
2 unjustified and illegal use of the system of Absentee
3 Voting that became the deciding factor in the most
4 publicized runoff election in middle Georgia. I made the
5 runoff in that election.
6 The minority voter turnout and voter participation in
7 that election was admirable but the illegal use of the
8 absentee votes was rampant and widespread. A letter o f
9 complaint from the Local Chapter of the SCLC and myself as
10 a candidate did not result in any corrective action on the
11 part of Election Division of the State of Georgia. As the
12 Chief Information Officer for District One Voter
13 Association, I am committing all of my interest and effort
14 to the agenda of the Georgia Legislative Black Caucus and
15 its stand against the injustices upon us by the remaining
16 barriers that are before us as the result of the unfinished
17 business of the 1965 Voter Rights Act.
18 And I say in conclusion that we need to preserve not
19 only the Act but the integrity of the Act. We need to
20 extend the Act and we need to make sure that the Act is
21 properly enforced. I am saddened by the fact that even now
22 we live with the question of whether or not the Justice
23 Department is going to embrace or endorse the newly passed
24 legislation on voter reform in Georgia that requires all
25 these different pieces of identification now in a state

1 that has 159 counties and 59 of those counties there's
2 nowhere to go to get that ID made. So what I'm saying is
3 that in closing is that we are facing very difficult times
4 now. If Dr. King were living today, it is no doubt in my
5 heart and my mind cause I marched with him that he would be
6 organizing demonstrations and boycott all across the State
7 of Georgia because of this injustice that has been put upon
8 the people by the legislative body of the State of Georgia
9 under the leadership of Sonny Perdue. It is despicable.
10 It's unbelievable that they would try to undo all the hard
11 work that that has gone into voter rights and just make a
12 mockery of the lives of all those people that died for
13 voter rights here in the State of Georgia and across this
14 country by passing such a silly and ridiculous set of bills
15 and laws. It's unbelievable and that's why we, it's not a
16 matter of do we want to preserve or continue the Voters
17 Right Act, we must in order to save the integrity of this
18 nation and this state.
19 Thank you very much.
20 MR. DAVIDSON: Mr. Senator, I have some questions but
21 you feel free to -- I believe Mr. Vaughn may have
22 answered this question that I'm going to ask you, but I
23 take it that the new voter ID law would not have in any way
24 prevented this absentee voting fraud that you referred to
25 earlier, is that correct? if it were to occur now once that

1 voter ID law has gone into effect?
2 DR. VAUGHN: Well, as a matter of fact, the issue of
3 course on the absentee ballot, it was not even considered
4 in the implementation of the new Voter Reform Act in the
5 State of Georgia. We raised complaints back in back when
6 I ran for Mayor of Wrightsville --
7 MR. DAVIDSON: When was that, sir?
8 DR. VAUGHN: I believe it was '96 I believe. Yeah,
9 it was '96 I believe. But we filed complaints with the
10 State of Georgia, even the Justice Department. They came
11 out and did an investigation and they concluded that yes,
12 there are discrepancies in the law and its implementation.
13 But we don't have anything to say it's illegal because the
14 law itself is written so loosely, you know.
15 But you know in other words what we're saying in the
16 civil rights community is that that was news to me to
17 question the integrity of a voter's honesty in identifying
18 oneself at the poll. That has not been the problem. The
19 problem has been the rampant misuse of the absentee ballots
20 where a given candidate can go into the Registrar's Office
21 and just grab a handful of absentee ballots and go back
22 home and fill them out and turn them back in.
23 MR. DAVIDSON: Do you still have in your files a copy
24 of the complaint that you made in this regard?
25 DR. VAUGHN: It's with the SCLC Office in Johnson

1 County and I could make it available for you.
2 MR. DAVIDSON: It would be very helpful if you could
3 send that. You can ask Mr. Greenbaum where to send it but
4 I'd like to get a copy of that if I could.
5 DR. VAUGHN: Okay.
6 MR. SUMBLIN Mr. Davidson?
7 MR. DAVIDSON: Yes, sir.
8 MR. SUMBLIN: To answer the question would this new
9 ID law have made a difference, no because it does not
10 address absentee ballots at all. So this new --
11 MR. DAVIDSON: It will in effect would allow you to
12 vote absentee without identification?
13 MR. SUMBLIN: Yes.
14 DR. VAUGHN: Oh, yes, absolutely.
15 MR. SUMBLIN: Yes. Yes. It was definitely. It's
16 out there.
17 DR. VAUGHN: Absolutely.
18 MR. SUMBLIN: So therefore we feel that there are
19 some, it appears and I've stated before the absentee
20 process, a possibility could be compromised but it was
21 never addressed in the new identification. You can
22 continue to vote absentee as business as usual.
23 MR. DAVIDSON: I want to make sure about this because
24 I'm a little confused about that. I want to make sure I
25 understand that. You were telling me that you can vote

1 absentee ballot in this state under this provision that is
2 proposed --
3 MR. SUMBLIN: With no identification --
4 MR. ROBERTS: -- without identification
5 for purposes of going to vote, physically going to
6 vote, live, as opposed to mailing in your ballot --
7 MR. SUMBLIN: You need no identification.
8 MR. DAVIDSON: -- there's no requirement of
9 identification?
10 MR. SUMBLIN: None whatsoever, sir.
11 DR. VAUGHN: That is correct. That is correct.
12 MR. DAVIDSON: Senator, I'm curious; is that accurate?
13 SENATOR BROWN: That is accurate. Not only can you
14 mail it in but you can fax it in and request an absentee
15 ballot and the ballot will be sent out to you.
16 MR. DAVIDSON: But it has to be sent to you as a
17 registered voter?
18 SENATOR BROWN: Yeah.
19 MR. DAVIDSON: So in other words, proof has already
20 been made that you are in fact a registered voter?
21 SENATOR BROWN: Yes. Right. The proof is that you are
22 a registered voter as you are listed on the voter rolls,
23 yes but there is no proof that you are in fact that
24 registered voter --
25 MR. DAVIDSON: The one casting that ballot?

1 SENATOR BROWN: -- who was casting that ballot.
2 MR. DAVIDSON: Oh, okay, but that problem -- help me
3 out here cause I'm trying to understand the difference --
4 that problem is true virtually everywhere you have absentee
5 ballots. There's no guarantee that you send the absentee
6 ballot to my home and my son is also 18, the voting age.
7 He's a eligible voter. He's a registered voter. There's
8 no guarantee that I'm not filling out his ballot and
9 turning it in. As long as he's a registered voter in the
10 state, that can happen anytime anywhere.
11 SENATOR BROWN: Sure.
12 MR. DAVIDSON: Are you talking about something other
13 than what would normally occur?
14 SENATOR BROWN: No. No. We're not talking about
15 something that would normally occur, and as a matter of
16 fact, in Georgia, in order to, prior to this law, in order
17 to vote absentee, you had to give a reason.
18 MR. DAVIDSON: Oh, you did.
19 SENATOR BROWN: But now they've removed that provision
20 and just have --
21 MR. DAVIDSON: And just have early voting?
22 SENATOR BROWN: -- early voting by absentee ballots.
23 As a matter of fact, they extended the period of time by
24 which you can vote absentee which is not entirely bad.
25 MR. DAVIDSON: Right.

1 SENATOR BROWN: But the point about the ID issue is
2 that if you can accept the possibility of someone not being
3 legitimate with an absentee ballot, you certainly should be
4 able to accept someone in the rural district where a poll
5 worker is likely to know that person --
6 MR. DAVIDSON: Oh, sure.
7 SENATOR BROWN: -- walking into the polls.
8 MR. DAVIDSON: And you don't have a practice in
9 Georgia whereby the poll worker can't attest to the
10 voracity or what word am I looking for?
11 MR. GREENBAUM: Identity.
12 MR. DAVIDSON: Identity essentially of the person?
13 There is no process? You don't allow for that?
14 SENATOR BROWN: As long as the proposal that's now the
15 voter ID law does have a provision that you can go ahead
16 and vote but you will have 48 hours to go --
17 you will have 48 hours to come back and present with a
18 photo ID.
19 MR. DAVIDSON: Sure of yourself.
20 SENATOR BROWN: If you're living in a rural Georgia
21 county, where you don't have the MVS office, it's not
22 likely you're going to be able to get back in 48 hours with
23 proof of an ID.
24 MR. SUMBLIN: Let me just say in conclusion --
25 MR. DAVIDSON: Yes.

1 MR. SUMBLIN: -- cause I raised this concern back in
2 the '90s. The question of absentee voting in Georgia is an
3 area that the state has systematically stayed away from.
4 I don't know why. I don't know why, but no one wants to
5 deal with it and it is the greatest infringement on the
6 rights of the voters that you can speak of in the body of
7 politics. There's nothing any more serious. Nothing any
8 more unjustified and abused as the absentee voting process
9 in the State of Georgia. And they know it. They know it.
10 But see, it's just something that everybody can benefit by
11 who are already in office if they use it to their own
12 advantage. And I really do wish that the Federal
13 government at some point would take a strong look at the
14 State of Georgia and its abuse of the absentee voting
15 process.
16 SENATOR BROWN: I think we're close to the end here.
17 And again, I want to thank the Commission for coming here.
18 I think you've gotten a good sense of where we are in
19 Georgia in terms of some of the issues that we're concerned
20 about. I'm going to encourage members of the panels as
21 well as others to submit additional materials to you, some
22 of which you've requested and some will be in addition to
23 others that we're aware of. I am kind of encouraged by the
24 fact that in Georgia, as I said earlier, resulting from the
25 Voting Rights Act, we've had this tremendous increase in

1 African American and to some extent a few other minorities
2 elected to office. We have expanded to that extent but I
3 am also equally convinced that if we do not have the
4 continuing protection of the Voting Rights Act, that we
5 will see those gains eroded, if not immediately but
6 certainly in very short order.
7 We see much evidence of that in terms of the last
8 redistricting process that we just engaged in, and
9 historically Georgia has had some problems with the
10 redistricting process but usually we try to resolve it at
11 the time every ten years and exceptions to that have been
12 that we've had some problems that were identified with the
13 Department of Justice or some litigation. This last
14 session of the legislature we saw redistricting at the
15 Congressional level that was done for purely political
16 reasons and when we look at the, not only the political
17 aspect of it, but what happened in those non-majority
18 African American districts, those districts that we have
19 identified as influence districts, you will see that those
20 districts, the influence of African Americans in those
21 districts were ostensibly diminished.
22 The Court has not been very clear about defining the
23 influence districts and how they should be determined but
24 we think if the Voting Rights Act remains in place, that we
25 can eventually force that issue to some greater clarity and

1 that is again the results of some of the Congressional
2 elections in Georgia where there was significant African
3 American populations, we were able to have some gains not
4 just in terms of African Americans but in electing the
5 candidate of choice by African Americans.
6 So that's a little aspect that we have to keep in mind
7 here because one of the questions that was raised earlier
8 had to do with whether there were African Americans who
9 represented predominantly white districts and there are a
10 few, but there are also some predominantly African American
11 districts that are represented by whites. And they've had
12 significant challenges from high caliber or high quality
13 African American candidates but African Americans in those
14 districts for whatever reasons have decided that they
15 wanted to have representation that was not African American
16 and that is I think essentially what this whole thing is
17 about is for people to have an opportunity to elect a
18 candidate of their choice, no matter who that may be.
19 And so that's why I think it's also important for us
20 to keep that in focus as we move forward and retain the
21 Voting Rights Act.
22 MR. ROBERTS: You know, Senator, that's a good point
23 actually that you just made there because it's fascinating
24 to me. It can be articulated by others that essentially
25 the Voting Rights Act is solely tailored to protect the

1 interests of only of minorities to the exclusion of whites.
2 And I think another argument could arguably be made that
3 that is that the entire culture benefits from the existence
4 of this Act and which you just indicated there to the
5 extent that you have majority black districts that in fact
6 have whites who represent those districts in and of
7 themselves. We have not heard --
8 SENATOR BROWN: I can give you another kind of
9 antidotal facts that support the notion that the whole
10 culture benefits. I represent I guess you'd call it a
11 small city, rural district. Macon, Georgia is a city of
12 about 90,000 to 100,000 people and I have all of that city
13 in my district. I also represent Twiggs County and about
14 two-thirds of Wilkinson County that are really rural areas
15 and I guess somewhere in-between, I think it's Irwin County
16 and an area over in Houston County. Almost at least on a
17 monthly basis, I will, through the constituency service
18 work with someone who is not African American and in many
19 cases I will have that person say to me, you have been more
20 responsive to me than my other representatives or
21 legislatures have been in the past. I tend to, in other
22 words, if you come in and you were having a problem that
23 many would characterize as something that really is more of
24 a property issue than a government issue, I'd give you just
25 as much attention as I would someone who would come in with

1 a business interest, someone who was interested in trying
2 to get some exemption, a tax exemption for a business, I
3 would give just as much attention to that person who would
4 come in and say, look I'm having a problem with the tax
5 assessor with my property. I feel that I'm not being
6 equally treated on this particular issue. And I've found
7 that many white individuals will say to me that they've
8 been trying to get through to their legislative white
9 colleague of mine prior to that when they've never been
10 able to do so; and that is what I mean by eventually as
11 African Americans have more opportunity to serve and
12 demonstrate the kind of constituency service that applies
13 to everybody, then eventually we'll get to that point where
14 there will be less of a consideration for race. But we're
15 not there. We haven't had enough of a history and not of
16 enough of experience with it in order for us to say that
17 you know let bygones be bygones and let's start all over
18 and cause everybody's now on an equal playing field.
19 And I think we're years away from that being but it's
20 coming as a result of the kinds of things that I just
21 described.
22 MR. DAVIDSON: Senator, could I just say by way of
23 thanking you for letting us down here that we are more than
24 receptive for anything that you or people in the community
25 want to send us by way of documentation, newspaper

1 clippings, official documents, anything in your files that
2 go to the question of vote discrimination. We don't have
3 to get it here today.
4 SENATOR BROWN: Sure.
5 MR. DAVIDSON: You can send it in to us. It will be
6 put to use.
7 SENATOR BROWN: Anybody else have any -- Thank you very
8 much for this opportunity.
9 (HEARING CONCLUDED).
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1 CERTIFICATE OF REPORTER

2 GEORGIA, BIBB COUNTY:

3 I, Yvonne D. Law, Certified Court Reporter, State of
4 Georgia, Certificate Number B-830, CERTIFY that acting in such
5 capacity on August 2, 2005 I reported the foregoing hearing and
6 on the foregoing pages 2 to 102 have transcribed a true and
7 correct transcript thereof.

8 I FURTHER CERTIFY that I am not counsel for nor related to
9 any party to the above case nor am I interested in the event or
10 outcome thereof.

11 WITNESS my hand and official seal as Certified Court
12 Reporter, State of Georgia this 30th day of August, 2005.

13

14 _____,CCR

15 Certificate No. B-830

16

17

80th ANNUAL CONVENTION OF
NATIONAL BAR ASSOCIATION

RE: NATIONAL COMMISSION ON THE VOTING RIGHTS ACT

Orlando, Florida

August 4, 2005

9:55 a.m.

TRANSCRIPT OF PROCEEDINGS

TRANSCRIPT OF PROCEEDINGS held on
Thursday, August 4, 2005, beginning at
9:55 a.m., at the J. W. Marriott Hotel,
4040 Central Florida Parkway, Palazzo
Salon F, Orlando, Florida, before Dawn R.
Matter, Electronic Reporter and Notary
Public, State of Florida at Large.

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MS. ARNWINE: Good morning. Good morning. We're going to start. Please feel free to come to the front. We know people are going to have to come and go during the day. We're aware of that. You should make yourself comfortable. Please grab a seat. We know that with the party last night, that it was going to delay our starting somewhat, but we know people will trickle in as the day proceeds.

I wanted to start off by just thanking you all for coming. It's a real pleasure for you to be here. There's nothing, I think, right now in our country more important than the reauthorization of the Voting Rights Act, and this panel, this distinguished commission has started this very critical process of hearings throughout the country.

Good morning, ladies and gentlemen. I am Barbara Arnwine, Executive Director of Lawyers Committee for Civil Rights under Law. On the eve of the 40th anniversary of the Voting Rights Act, I want to start by thanking everybody for coming to visit, the Florida hearing of the National Commission on the Voting Rights Act.

In particular, I want to extend a heartfelt thanks to the National Bar Association for hosting this hearing. I really think that's outstanding.

[Applause]

MS. ARNWINE: I also want to thank the co-sponsors of the National Commission, including the Congressional Black Caucus Foundation, the Leadership Conference on Civil Rights, the National Coalition on Black Civic Participation, the Rainbow Push Coalition.

I just did a radio interview with Reverend Jackson this morning on the march that's going to be held on Saturday and Rock the Boat. It is this coordinated effort on behalf of the civil rights community that helps the National Commission to accomplish its task.

We will introduce John Greenbaum who will introduce all of the commissioners, so I want you to please join me in recognizing these outstanding commissioners who have traveled already. This is the sixth hearing they have traveled all over the country and they have four more hearings to do and they are doing this unpaid. So please join me in thanking our distinguished and honorable commissioners.

[Applause]

MS. ARNWINE: I am always amazed everytime I come to the NBA to see our Congressmen and Congresswomen who join us, and I have been just delighted throughout this conference to have with us the presence of Congressman Bobby Scott of Virginia.

[Applause]

MS. ARNWINE: And testifying today is one of my favorite people, someone who I worked with for years in North Carolina, the Honorable Congressman G. K. Butterfield of North Carolina.

[Applause]

MS. ARNWINE: As I mentioned, this is the National Commission's sixth hearing since it was formed in the beginning of 2005. Its mission is to identify the continuing problems of discrimination in voting as Congress begins to consider the re-authorization of the key provisions of the Voting Rights Act. The findings of the National Commission hearings, their intent and plan is to write a report primarily authored by Dr. Chandler Davidson. Dr. Davidson, please raise your hand so people will know you.

[Applause]

MS. ARNWINE: Dr. Davidson will Chair today's hearing. This report will offer a comprehensive picture of the evidence uncovered through the hearing processes, as well as through studying the historic work of the Department of Justice and its voting rights enforcement responsibilities, cases filed by the files of individual voting rights attorneys like our distinguished guest commissioner, Fred Gray.

[Applause]

MS. ARNWINE: We notice that litigation has been done coast to coast for many years, and other relevant data that will help paint a complete picture of the role of the Voting Rights Act and how it is played in combating discrimination in voting during the past 40 years and how minority voters still depend on its protection to assure that everyone has equal access to the political process. And this report will be released in January 2006. The evidence we have collected so far is both hopeful and disheartening.

During the Commission's first hearing held in Montgomery, Alabama, during the 40th anniversary commemoration of Bloody Sunday, practitioners, advocates, educators, experts and citizens gave testimony about the all-too-familiar legacy of voting discrimination in the south.

We heard from citizens who have been active for over 40 years in a struggle to guarantee that African-American citizens can exercise the right to vote free of intimidation, administrative obstacles, and deliberate manipulation of the electoral system.

And, in fact, I remember one gentleman -- hearing the testimony of one gentleman from that time who came to that hearing in Montgomery and testified about how he used to have to help with the literacy test for the people in his area. That is the legacy that we're confronting.

We also heard from practitioners who were instrumental in the development of the Voting Rights Act and its implementation on the past for 40 years. We heard from citizens and experts who gave anecdotal and statistically significant evidence that proves that the Voting Rights Act, particularly Section 5, one of the central provisions of the Voting Rights Act that must be reauthorized, has been responsible for providing a voice to a formerly voiceless community.

Unfortunately, though, we also heard from advocates and citizens chronicling the continuing disparities in the voting experience between minority voters and other voters. Clearly work on the Voting Rights Act, while dramatic and powerful, is not completed, is not done.

This continuing disparity was highlighted again in our subsequent hearing in Phoenix, Arizona, where the Commission held a second hearing. We examined the legacy of obstacles to the ballot box that voters in the southwest faced. We heard from leaders and activists from Indian country who told stories of a dreadful lack of resources, including language assistance and culturally sensitive poll workers in the polling places of our first Americans.

The Commission also took testimony from experts, academics, voting rights practitioners and others in the Latino community who told of how Section 203 in the Voting Rights Act, another of the provisions up for reauthorization which requires certain jurisdictions to provide multi-lingual assistance to voters, has allowed many American citizens who speak Spanish to participate in the process.

Both of these groups told of the historic significance of the historical institutional discrimination in a process that is not set up for the demands of minority communities and illustrated that the Voting Rights Act has been central in addressing many of these concerns. But its work -- its work, it's critical work, once again, is not completed, is not done.

During the northeast regional hearing held in New York City, we heard again from a diverse array of witnesses representing the African-American, Asian and Latino communities who discussed again how the lack of proper assistance at the polls have hampered the ability of minority voters to gain full access to the polls.

We also heard about the difference that the Department of Justice objections under Section 5 in the application of needed resources at the polls can make and align minority voters full access to the electoral system.

We heard of intimidation. We heard testimony regarding New Jersey where an Asian-American candidate was running for office and how these DJs got on public -- I mean, got on radio and spoke about how these people were trying to take over and how good white Americans were losing their place in America.

This is, once again, the attitudinal and the intimidation factors that are so critical to keeping minority voters from exercising their full rights.

During the midwest regional hearings in Minneapolis, Minnesota, we heard about the new techniques used to disenfranchise minority voters such as deceptive flyers aimed at African-American voters in Milwaukee and challenges used to intimidate African-American voters in Ohio and American Indian voters in Minnesota.

Two days ago -- two days ago, this distinguished Commission held a hearing in Americus, Georgia. This hearing proved that powerful insights can be gained from an examination of the legacy of the Voting Rights Act in a region steep in the history that made the Voting Rights Act a reality.

Today we will hear from policymakers, advocates, activists and attorneys and many others who will detail the role of discrimination in voting here in Florida and throughout the country.

I look forward to hearing today's testimony and adding it to the already impressive record of this August body. When we put together this impressive group of commissioners, we did so knowing that theirs was not an easy task. What we were asking them for was nothing short of assessing the continuing importance of arguably the most important piece of civil rights legislation that ever passed Congress. They have responded with distinction.

I am proud to see this process unfolding and to have the opportunity to work with such a distinguished group. I am delighted that we have our distinguished guest commissioners, none less than the outstanding President of the National Bar Association, Kim Keenan.

[Applause]

MS. ARNWINE: As many of you will know -- will note that on Monday Kim Keenan filled the heart of Lawyers Committee by presenting us with a check for $10,000 which was absolutely outstanding.

[Applause]

MS. ARNWINE: I cannot begin to thank her enough, but I wanted everyone to know that that $10,000 will help to support the work of this Commission and the report of the Association and that we are so, so delighted.

[Applause]

MS. ARNWINE: The NBA is a powerful organization. Yes. You have vision and leadership and energy in your presidents. We can all make a difference. And this Commission and this joint hearing is yet another example of the kind of work that we can do, the kind of action that we could put into place as lawyers to transform our nation into guaranteed equal protection for our most distinguished citizens.

I will now turn this process over to the Commission's director, the project director for the Voting Rights Project of the Lawyers Committee for Civil Rights Under Law, Jon Greenbaum.

[Applause]

MR. GREENBAUM: Thanks, everyone. Thanks, Barbara. Good morning, everybody.

IN UNISON: Good morning.

MR. GREENBAUM: I want to echo Barbara's sentiments about the NBA. This is the second year that I've been the Director of the Voting Rights Project for the Lawyers Committee and I can only say that the NBA has come through for us in the most amazing way.

Not only have we gotten the financial support, but in addition to that, the NBA volunteers really were the backbone of our election protection program recruiting process last year and I really felt like this convention last year was almost a turning point for us in terms of being able to recruit the thousands of volunteers that we use for election protection.

And the same is true in terms of today, the NBA agreeing to allow us to come in here and hold the joint hearing with it. Mavis Thompson did an incredible job of putting together panels.

[Applause]

MR. GREENBAUM: You're going to see those panelists in this afternoon's panel which was pretty much put together by Mavis. And Kim's leadership has been amazing. She spent a lot of time with us last year with the election protection and, you know, in addition to having a law practice, we're very appreciative.

And now I want to introduce -- the Chair of the Commission, Bill Lann Lee, would love to be here with us today, but he's decided to brave the jungles of Peru instead and that's why he's not here. In his stead, presiding today is going to be Chandler Davidson who is going to talk in a little bit more specifics about what the Commission does, what the provisions of the Voting Rights Act that are scheduled for re-authorization and how the Commission's work folds into that.

Chandler is -- he's a retired professor of sociology at Rice University where he was a Radislaw Zanoff professor. He was the former chair of the sociology department and he is, in our view, the leading academic in the field of voting rights.

Chandler co-edited what's often thought of to be the seminal work on voting rights in the last two decades, Quiet Revolution in the South, and in addition to that, Chandler has been a text

expert in several cases going back all the way to the 70s in voting rights, and he also testified before Congress in the 1982 reauthorization. Chandler Davidson.

[Applause]

CHAIRMAN DAVIDSON: Thank you, Jon. Good morning.

IN UNISON: Good morning.

CHAIRMAN DAVIDSON: On behalf of the National Commission on the Voting Rights Act, I welcome you today to the sixth of ten public hearings that the Commission will be conducting. This regional hearing will look at the state of voting discrimination in two states, Florida and North Carolina, and it will hear from NBA practitioners around the country who have worked on behalf of minority voters.

Today's testimony will examine the experience primarily of African-American and Latino voters in Florida, Georgia, Louisiana, Mississippi, North Carolina, Ohio and Texas.

The Voting Rights Act was signed into law in 1965 by President Lyndon Johnson in response to voting discrimination encountered by African- Americans in the south.

When Congress reauthorized the Voting Rights Act in 1975, it made specific findings that the use of English-only elections and other devices effectively barred minority language citizens from participating in the electoral process.

In response, Congress expanded the Act to account for discrimination against such citizens by enacting the Minority Language Assistance Provision found in Section 203.

The right to vote of African-Americans and other minorities is guaranteed by the 15th Amendment and this right is permanent. Further, permanent provisions of the Voting Rights Act ban literacy tests and poll taxes, outlaw voter intimidation, authorize federal monitors and observers and create various mechanisms to protect the voting rights of racial and language minorities.

However, several temporary provisions of the Voting Rights Act will expire in 2007 unless they're reauthorized by Congress. In particular, Section 5 of the Act requires certain states, counties and townships with a history of discrimination against minority voters to obtain approval or pre-clearance from the United States Department of Justice or the U.S. District Court in Washington, D.C. before making any voting changes.

These changes include, for example, redistricting, adoption of new methods of election and polling place changes.

Jurisdictions covered by Section 5 must prove that the changes do not have the purpose or effect of denying or abridging the right to vote on account of race, color or membership in a language minority. In Florida five counties are covered by Section 5: Collier, Hardy, Hendry, Hillsborough and Monroe Counties.

Second, Section 203 of the Act requires that language assistance be provided in communities with a significant number of voting-age citizens who have limited English proficiency. Four language groups are covered by Section 203: American Indians, Asian-Americans, Alaskan Natives and Latinos.

Covered jurisdictions must provide language assistance at all stages of the electoral process. As of 2002, a total of 466 local jurisdictions across 31 states were covered by these provisions. Ten of Florida's counties are subject to Section 203 requirements.

Third, Sections 6B, 7, 8, 9, and 13A of the Act authorize the Attorney General to appoint a federal examiner to jurisdictions covered by Section 5's pre-clearance provisions on good cause, or to send a federal observer to any jurisdiction where a federal examiner has been assigned.

Since 1966, 25,000 federal observers have been deployed in approximately 1,000 elections.

Let me say a few words now about the folks on this dies. The Lawyers Committee for Civil Rights Under Law acting on behalf of the civil rights community has created this non-partisan National Commission on the Voting Rights Act to examine discrimination in voting since 1982.

The Commission is composed of eight persons, including voting rights advocates, academics, former elected officials and civil rights leaders who represent the diversity that is such an important part of our nation.

The Honorary Chair of the Commission is the Honorable Charles Mathias, former Republican Senator from Maryland. The Chair is Bill Lann Lee, former Assistant Attorney General for Civil Rights who is, as was said, in Peru right now.

The other National Commissioners are the Honorable John Buchanan, former Congressman from Alabama; Dolores Huerta, co-founder of the United Farm Workers of America; Elsie Meeks, first Native American member of the U.S. Commission on Civil Rights; Charles Ogletree, Harvard law professor and civil rights advocate, and the Honorable Joe Rogers, former Republican Lieutenant Governor of Colorado.

In addition to myself, Commissioners Buchanan and Rogers are present today. We are also very fortunate to have as guest commissioners, Kim Keenan, President of the National Bar Association, and Fred Gray, a senior partner at Gray, Langford, Sapp, McGowan, Gray & Nathanson.

The Commission has two primary tasks. First to conduct regional hearings such as this one across the country to gather testimony relating to voting rights, and as Barbara said, to write a comprehensive report detailing the existence of discrimination in voting since 1982, the last time there was a comprehensive reauthorization of the temporary features of the Voting Rights Act. The report which will be released in January 2006 will be used to educate the public and policymakers about the record of racial discrimination in voting.

There will be three panels of speakers today. The first two panels will be composed of members of Congress, leading voting rights practitioners, and members of the community who have been active in voting rights issues. Each panelist will provide a five-to-ten minute presentation.

After all of the members of a panel have spoken, the Commission will address questions to the panelists. Because of time constraints, I urge panelists to stay within their time limits. If they do not, I may, in the gentlest and most encouraging way possible, ask them to hurry along.

We encourage members of the public who are here today to share their voting rights experiences in our third and final panel. If you would like to participate in that panel, please speak with a staff member in the back. If you would like to share your testimony, but cannot stay, please see one of the staff members in the back who will take your statement so it can be included in the record.

I will now introduce each of the commissioners present who will make a short opening statement. First, Commissioner John Buchanan on my left, is a Baptist minister who has served churches in Alabama, Tennessee, Virginia, and Washington, D.C. Commissioner Buchanan also represented Birmingham, Alabama, in Congress for 16 years. While in Congress, he was instrumental in the passage of Title IX, and also was a strong proponent of full voting representation in Congress for the District of Columbia.

After leaving Congress, he chaired the Civil Liberties Organization, People for the American Way.

Congressman, do you care to say a few words?

CONGRESSMAN BUCHANAN: Thank you, Mr. Chairman. As the Chairman has just said, I am a white, southern Republican who used to represent Birmingham, Alabama in the Congress. It might make you wonder, what in the world I'm doing sitting here. I will tell you.

I had just turned 21 and I just graduated from college. I went down to the courthouse, Jefferson County Courthouse in Birmingham to register to vote. When I walked into the room, I saw a group of black Americans sitting around a table all pouring over a thick tome. And I picked up a copy and began to read it, and to my dismay, I found that I'd need a Master's degree in political science and history and Lord knows what else to be able to pass a test on that tome.

I walked up to the registrar and I said: Sir, I just graduated from college and I can't even answer or pass this literacy test.

He said: Who was the first president of the United States?

I said: George Washington.

He said: You just passed the test.

That's how it was. I didn't know whether to walk out or register, but I decided it would not help anybody for me not to register, so I did.

I told that story when we were trying to reauthorize the Voting Rights Act in 1982 and I was speaking on a radio hookup statewide and afterward the people called in.

And one fellow called in and said: Well, you just proved we shouldn't have elected you to Congress or paid any attention to you because you just admitted you can't pass a literacy test.

I have a friend whose name is George Hughes, a lawyer and a civil rights advocate, who said something that I believe is worth listening to. He said: What we're trying to do in the United States in the Civil Rights Movement is to make the promises on paper of the Constitution, the Bill of Rights and the Declaration of Independence realities in the world for all Americans.

In 1965 -- I left out that I'm a slow learner. I didn't like this bill that was written. I was in Birmingham, Alabama, as a freshman the first month I was in office and
I co-sponsored with Gerry Ford, the minority leader, a version that would have made everything national, no double standard, tough provisions that would not have done what Sections 4 and 5 do. I want to tell you here today we were wrong in that version and the version as passed was right for the historic circumstances.

[Applause]

CONGRESSMAN BUCHANAN: And our job is to determine now from these hearings and these witnesses what is needed in this historic circumstance to continue to fulfill that proposition that George Hughes talked about.

If there's anything that a democracy, the world's greatest as we believe, owes its people, it is the right of all Americans to vote in free and fair elections. And we need to establish in these records whether or not that is happening and whether we need the provisions about to expire in 2007 to make sure it keeps to happening in the years ahead.

Thank you, Mr. Chairman. I apologize if I run over my time.

[Applause]

CHAIRMAN DAVIDSON: Thank you, Congressman.

Commissioner Joe Rogers completed his term as the Lieutenant Governor of Colorado in 2003 where he held the distinction of serving as America's youngest lieutenant governor and only the fourth African-American in U.S. history ever to hold the position.

He served as founding chairman of the Republican Lieutenant Governors Association and served on the Executive Committee of the National Conference of Lieutenant Governors. Mr. Rogers created the acclaimed: I Keep the Dream Alive program in dedication of the memory and legacy of Martin Luther King, Jr. and the leaders of the Civil Rights Movement.

Governor Rogers.

MR. ROGERS: Absolutely. Thank you, Chandler. Thank you so much. You all doing all right this morning? I understand you all partied a little bit last night so I understand there may be a little straggling.

I was bragging last night at dinner about how I was going to join you all at that party and I went to the room, hit the remote control and just went right to sleep. I don't know what happened. But it's a delight to be with you all here today. It really is. And I'm honored to join, obviously, the National Bar Association and Kim to be with you all here today.

We're here to get a census as clearly as has been articulated about the substance of testimony related to voting in the United States. There is no doubt without hesitation that I'm honored to be here on this distinguished panel; in particular, to be here with Fred Gray.

You all know Fred and there's going to be a wonderful event that's going to take place a little bit later here today, and you all know that Fred was so key in the context of the movement and working closely obviously with Martin Luther King, Jr. and so many key people throughout the movement, representing Rosa Parks and frankly, all of the great things that he has done throughout the years that helped to lead to opportunities for so many of you all who are here today, and certainly in terms of my election to serve the people of Colorado.

Now, I know when you all hear that I was elected to serve the people of Colorado in particular, you all might say: Well, wait a minute, Joe. You were Lieutenant Governor of Colorado. We didn't know there were black folk in Colorado.

I know that some of you all might say so. Believe it or not, there are. And you all may know there's a unique history to the western part of the United States. You all might know this, one out of every three cowboys in the United States was an African-American.

In the particulars, people left the south, in particular, and headed to places like California and otherwise Colorado was a stopping point along the way.

So my family has a long history in terms of the west and I'm deeply honored to be here with you today and to hear this critical testimony related to voting in the United States.

[Applause]

CHAIRMAN DAVIDSON: Commissioner Kim Keenan is the President of the National Bar Association, which is hosting its 80th Annual Convention here this week, in case you weren't aware of that fact. Ms. Keenan is a senior trial attorney at Olender & Associates and has settled and won malpractice cases for sums up to $10 million.

Ms. Keenan is the former President of the Washington Bar Association and former President of the Trial Lawyers Association of Metropolitan Washington, D.C. President Keenan.

MS. KEENAN: Thank you. Well, on behalf of the National Bar Association, I am extraordinarily proud to be able to say that we were able to host the Florida Hearing of the National Commission on the Voting Rights Act.

This year our theme has been building on the legacy equalizing justice for all. And as we all know, nothing has gone further to equalizing justice for all than the Voting Rights Act. But all too few people understand that the Voting Rights Act was born out of Bloody Sunday. And people died before people realized that this was such a fundamental right.

So when we think about the reality that we're living every day, we have to remember that while it's not Bloody Sunday any more, we still live in a country where we all think of the Voting Rights Act as one person, one vote, with the goal of making as many Americans as possible have the opportunity if they're eligible to simply be able to vote.

And as a person of color, as a lawyer, as a woman, as an American citizen, I want to make sure that we have done everything as a Bar Association to make that a reality because it is a fundamental American right to be able to vote.

When you think of America and you think of something uniquely American, you think of each person having the right to vote. It is very important that we get this right because people are watching us all around the world. And when we export our democracy to others, when we give people constitutional rights to one person, one vote, they're looking at us and they're saying: Well, if you're a person of color, you may be told the wrong date to vote; if you're a person of color, your machines may not work; if you're a person who speaks a different language, you may not be given the information that you need in the language that you speak even though you, too, are an American.

People are watching us. We have to get it right. We have to get it right because we know the American that we can be. Thank you.

[Applause]

CHAIRMAN DAVIDSON: Commissioner Fred Gray is a senior partner, as I said, at Gray, Langford, Sapp, McGowan, Gray & Nathanson in Alabama. His legal career spans over 50 years beginning with his representation of Mrs. Rosa Parks in the Montgomery bus boycott, and his position as Dr. Martin Luther King, Jr.'s first civil rights attorney.

Mr. Rogers filed suits that resulted in the integration of all of Alabama state colleges and universities, and the vast majority of Alabama's elementary and secondary schools. Mr. Gray also served in the Alabama legislature and as a former National Bar Association president. Mr. Gray.

MR. GRAY: Thank you.

[Applause]

MR. GRAY: Thank you, Mr. Chairman, and fellow commissioners, ladies and gentlemen. Let me first acknowledge the presence of my law partner, Ernestine Sapp, who is here.

[Applause]

MR. GRAY: She helped to make it possible for me to be here and to do the things that I do and I appreciate Ernestine being here. She's an outstanding lawyer in her own right and served as the Alabama State Bar Association representative to the House of Delegates of ABA, a position to which she was appointed and later ran and was elected, so let's give Earnestine a hand.

[Applause]

MR. GRAY: I was born in Montgomery, Alabama, and now live in Tuskegee. We have officers in both of those cities and for the past 50 years, I have practiced law in and around Central Alabama. I'm not going to be a national lawyer. I'm an Alabama lawyer. And most of that practice, or a substantial part of it, has been devoted to civil rights.

I'm honored and humbled by the National Committee on the Voting Rights Act to serve as one of your guest commissioners today. Having been just recently appointed, you may consider me as a young kid on the block. I'm honored that I happen to be sitting next to John Buchanan, who I have heard about and read about for many years but have not had the privilege of personally meeting him.

As an Alabamian, and as one of the architects who planned and assisted in initiating the Civil Rights Movement as it evolved from Montgomery in '55, and even before -- and even before December 1st, I bring to this Commission a different perspective than the other commissioners.

And it may take me a little longer to let you understand my perspective because I think it's relevant as to why we need to extend the Voting Rights Act.

I'm a lawyer today because when I was a junior at Alabama State College for Negroes -- and that's what the name of it was in 1947 in December when I enrolled -- as the historic black institution that's still in Montgomery, I lived on one side of town, the west side. Alabama State was on the east. I worked with a newspaper and we had a real problem even then in '47 of having unfairness on the buses in our city, so it was a very soul item.

Out there with everything Alabama at that time was completely segregated and I made a secret commitment that I kept secret for some years; that is, I was going to leave Alabama, go to law school -- couldn't go to the University of Alabama because of my grades -- return to Alabama, pass the Bar exam and destroy everything segregated I could find.

[Applause]

MR. GRAY: Now, for a young Alabamian in Montgomery from the ghettos, that was almost unthinkable. But I love Alabama. I went to Western Reserve University, now Case Western in Cleveland, enrolled in September of '51, graduated in three years.

And there's a judge sitting back there from Cleveland who was a senior in the class at Case Western or Western Reserve then when I was a freshman. And so was her husband. They weren't married then. But he tells the story, I was just a little boy running around and none of

them thought I had any chance of being much of anything. But there's someone who is back there and we're happy to have her with us today, too.

[Applause]

MR. GRAY: When I finished Reserve in June of '54, out of an overabundance of caution, I stopped by Columbus and took the Ohio Bar examination and in July I took -- I mean, I took the Alabama Bar in July, and was licensed to practice in both of those states in August and September, respectively. And Since September 8th of '54, I continuously have practiced in Alabama.

Now, my first case -- and I was then ready to go back to Alabama to begin doing what I had planned, and there were many people who were -- belonged to the Civil Rights Movement who got caught up in it, who were there. They happened to have been at a certain place at a certain time and because of that, they became involved.

But my involvement in civil rights was planned and I began to execute that plan once I got back.

And while all of you know about the Rosa Parks case and Dr. King and about Bloody Monday, most of you don't know about Claudia Carvin. Claudia Carvin was a 15-year-old African-American girl that I represented nine months before I represented Rosa Parks, so on March the 3rd, 1955, she was arrested under very similar circumstances and we came to her rescue.

We were talked out of receding at that time. But she was a model of courage to Mrs. Parks and to Joann Robinson and to myself. And Rosa Parks was a personal friend of mine. She lived about three blocks from the church that I attended. She worked a block-and-a-half from my law office.

She sometimes served as a part-time secretary to me. And we would have lunch every day. And I had lunch with her on December 1st, 1955, and probably was the last person who had a conversation with her before the arrest on that afternoon, even though at the time of her arrest, I wasn't even in town.

But I said that to you to let you know that there were things going on in Montgomery.

But I realized that long before Rosa Parks and long before Bloody Sunday, there were African- Americans in Macon County, Alabama, Tuskegee, who were highly educated. Some had two or more degrees but they couldn't become voters and they started filing lawsuits as early as 1945 and then later, even before even the Civil Rights Act was passed, were able to get the federal government to file some cases involving voter registration in Alabama at that time.

So this question of voter registration and what we're doing in Tuskegee now is in order to preserve some of this history and let people know about because most people don't know about it -- and they don't know about it because the folks involved were either at Tuskegee Institute, now Tuskegee University, who were getting annual appropriation from the legislature and if word got out, they would no longer have received it, or they worked at the VA Hospital which was then completely segregated and operated by African- Americans.

So we had a background and even before the Voting Rights Act of '65, the first Civil Rights Act in 1957, it was persons -- and I testified before the committee when they were -- when the bill was in the planning, and it was people from Tuskegee and from Macon County who really laid the foundation to show in documents what had happened in Alabama.

So, let me answer them and say if you want to know then what goes on and then later on you find out that in addition to voting registration, we had the privilege of filing suits in the healthcare field, you name it. During the last 50 years if it's something dealing with discrimination in Alabama, we had something to do with it. And all of it was a part of eradicating the effect of discrimination, really eradicating segregation.

The question you raised is: Commissioner, what in the world does all that have to do with the Voting Rights Act extension? It has everything to do with it. And I'll tell you why it has everything to do with it. It shows that we cannot rely upon -- Alabama I know about. These other states I read about. We cannot rely upon the power structure of the State of Alabama to protect the rights of African-Americans. They never have. There should have been no need for it in the first place once the 15th Amendment was adopted, but we cannot depend upon that.

So then if we're going to leave it up to the State of Alabama to decide and, you know, the Act that's helped us so much, and I was the one when they were beaten back on Bloody Sunday, I was called and went to Selma that night.

And in less than 24 hours, we filed a case of Jose Williams vs. George Wallace to make them protect the individuals.

So then what I'm saying to you, as a result of these provisions of the Act, when I served in the Alabama Legislature with Tom Reed from 1970 to 1974, I was the first African-American to serve in the Alabama legislature since reconstruction. We've come a long way.

We now have in Alabama more black elected officials than any other state in the nation.

[Applause]

MR. GRAY: And our legislature reflects the composition of the population of our state. We have African-Americans who head the finance committee in both the House and the Senate in Alabama.

And the only reason we have that is because of the Voting Rights Act they have now pending and it was just filed a few weeks ago by some Republicans in Alabama, as you probably know, to get the redistrict in the legislature. The whole purpose of it is to get some of those black votes out.

So I'm saying to you, if we don't have an extension of the Voting Rights Act, then we are at the mercy and we're going backwards and not forward and I certainly think that that needs to be extended. And I apologize to Mr. Chairman for taking this extra time. Thank you.

[Applause]

CHAIRMAN DAVIDSON: Thank you, Mr. Gray. Apology more than accepted.

The National Commission thanks the National Bar Association for hosting this hearing in such a wonderful setting and for all of its support. We also thank Bingham, McCutcheon for the excellent work of its associates in preparing the report for this hearing.

We're now ready to hear the first panel and if those panelists will come and take their seats, I'd appreciate it very much. That includes Debo Adegbile, Honorable G. K. Butterfield -- is that Marytza, Marytza Sanz?

MS. SANZ: Marytza.

CHAIRMAN DAVIDSON: Marytza Sanz and Courtenay Strickland, if I'm pronouncing that correctly, and Regine Monestime.

Let me introduce the panelists. Debo P. Adegbile is the Associate Director of Litigation at the NAACP Legal Defense Fund, Legal Defense and Educational Fund, Inc. Bertie works for the Director of Litigation to oversee the organization's legal program while remaining actively engaged in voting rights litigation and advocacy.

Mr. Adegbile's voting rights experience with LDF encompasses constitutional cases and actions arising out of the Voting Rights Act and other federal and state statutes.

Recently he served as lead counsel for African-American Intervenors, the Louisiana House of Representatives versus Ashcroft, et al. The litigation resulted in the settlement through which Louisiana withdrew a redistricting plan that would have diminished the voting strength of its African-American citizens and adopted a plan that preserves their voting strength.

Congressman G.K. Butterfield represents the First District of North Carolina in the U.S. House of Representatives, the eastern part of the state, he tells me. He currently serves as a member of the House Committee on Agriculture and the House Armed Services Committee.

In addition, Butterfield also served on the prestigious Democratic Steering and Policy Committee. Prior to running for Congress, he served as a resident Superior Court Judge for 12 years before being appointed to the Supreme Court of North Carolina by then Governor Michael Easley.

Butterfield is a past president of the North Carolina Association of Black Lawyers and has filed several successful voting rights lawsuits that resulted in the election of black elected officials in eastern North Carolina.

Regine Monestime currently heads her own law firm, focusing on appellate and real estate law. Prior to this, she served as an Assistant Attorney General in the Criminal Appeals Division before the Eleventh Judicial Circuit, Third District Court of Appeals, the Florida Supreme Court, and the United States District Court for over two years. Ms. Monestime then joined the City of Miami's attorney's office where she was chief appellate counsel in the litigation division.

For the past five years she has been a core member of the Haitian Lawyers Association serving in numerous capacities and is currently the immediate past president of the association. She has volunteered in local, state and national elections to ensure that voting rights, particularly those of in the Haitian-American community in South Florida, are preserved.

Marytza Sanz is a President and CEO of Latino Leadership located in Orlando, Florida. Latino Leadership is a non-profit, non-partisan, community-based organization working to guarantee the welfare of children by pursuing the development of a strong, vibrant Hispanic community for Central Florida through leadership development and empowerment, education advancement and economic community development.

Courtenay Strickland is the Director of the Voting Rights Project of the American Civil Liberties Union of Florida. She is responsible for coordinating the Florida ACLU's legal, legislative, and grass roots efforts on a number of election reform issues. In 2001, she co-founded the Miami-Dade Election Reform Coalition, a leading advocate of progressive voting practices, particularly with regard to voting machine technology.

In addition, Ms. Strickland is the primary organizer of the ACLU's campaign to restore the voting and civil rights of its 600,000-plus citizens of Florida who have lost their rights due to a past felony conviction.

In that capacity, she founded the Florida Rights Restoration Coalition, a statewide group of nearly 40 local, state and national organizations dedicated to bringing an end to Florida's unjust voting ban through a state constitutional amendment.

What I'm going to do is to ask each of the panelists to give their statement and then after all of the panelists have spoken, the Commissioners will have a chance to pose questions.

So why don't we begin with Congressman Butterfield.

CONGRESSMAN BUTTERFIELD: Thank you very much, Mr. Chairman, and the other Commissioners. Thank you for inviting me to share in this program this morning and to talk about the extension of the Voting Rights Act.

First, let me bring greetings to you from the 43 men and women who comprise the Congressional Black Caucus. I want you to know that we're unanimous in our support of the extension of Section 5 of the Voting Rights Act and so I start by bringing greetings to you from the Congressional Black Caucus.

[Applause]

CONGRESSMAN BUTTERFIELD: Thank you. It is good to be at this program today with my colleague, Bobby Scott, from Virginia. Bobby serves on the Judiciary Committee along with three other CBC members, Maxine Waters, John Conyers , also serve on the Judiciary Committee there in the House of Representatives.

I represent the First Congressional District of North Carolina. The First District is the 15th poorest district in the nation and we're located in northeastern North Carolina.

When the Voting Rights Act was enacted in 1965, we had virtually no black elected officials in my Congressional district. Today, I'm happy to report to you that we now have 261 African- Americans serving in public office in my Congressional district alone. That includes five members of the general assembly, 14 judges, 51 county commissioners, some 80 or 90 municipal officials, 18 mayors, four sheriffs, three registered CBs [ph], two or three clerks of court. We have 261 black officials serving in my district and so we've come a long way since 1965. But this change did not come without a price. Most of this progress that we have benefitted from in northeastern North Carolina has resulted from voting rights litigation.

When I came out of law school, I had the same passion that Fred Gray had when he returned back to his home community. I had the strong desire to challenge the system and to improve electoral opportunities in my community. And so then when I went back to my home community, the first thing we recognized was that we had 23 miles of unpaved streets in the black community, one-half of a mile of unpaved streets in the white community.

My law firm did not have the financial ability to bring a lawsuit to challenge the unpaved streets and so we brought in the Lawyers Committee for Civil Rights Under Law and they filed the lawsuits and every street in my home community was paved within two years.

And so as I make my comments today, I just want to give kudos to this great organization because, but for this organization, it would not have happened.

[Applause]

CONGRESSMAN BUTTERFIELD: And then after we challenged the unpaved streets, we next were interested to challenge the system of election for county commissioners, the city council and the board of education. We knew about the Voting Rights Act, but we did not have a full appreciation of how to utilize the Voting Rights Act and to make change happen.

And so we called in the NAACP Legal Defense Fund and Julius Chambers and others came to our rescue and came in and provided much needed resources.

And we filed a lawsuit against the county challenging at-large elections and in so doing, we discovered that there had been three changes in election procedures that had not been pre-cleared by the Justice Department. And so not only did we file a Section 2 claim, but we also asserted a Section 5 claim.

And because of the far-reaching effects of Section 5, we were able to stop the elections of the county commissioners and the Justice Department came in and objected to the changes that pre-dated our lawsuit and because of that, we were able to win the lawsuit and now we have three African-Americans on that board out of seven. The chairman is also an African-American.

And so we have come a long ways in the evolution of voting rights in eastern North Carolina. But I want you to know and I want you to understand that there continues to be great resentment among the white power structure in eastern North Carolina to the Voting Rights Act.

And I can assure you that if Section 5 is not extended, there will be a rush to change district elections back to at-large election systems. And so it is vitally important that we maintain and enhance Section 5 in every way that we can.

I know that Congress is going to be looking at evidence from 1982 forward, but I suggest that you cannot evaluate whether or not we need to continue Section 5 without looking at the period from 1899, which is when George White was in Congress. And incidentally, I represent the same district that George White represented at the turn of the century.

You cannot look at contemporary evidence without looking at the historical evidence. And from 1899 all the way down through the years to 1982, there was pervasive discrimination in voting in my Congressional district; not only my district, but throughout the State of North Carolina.

To give you an example: My father was elected as the fourth black elected official in North Carolina in 1953, the first in eastern North Carolina. How did it happen? He was a community activist. He was a dentist by profession. How did it happen?

Well, we had district elections in my home town in 1953 and they got busy and registered large numbers of African-Americans to vote in Ward 3, and he ran in 1953 and it was a tie vote and his name was selected from a hat and he was declared the winner.

Prior to the next election, my family was on vacation in New York, and while we were away, the city council called an emergency meeting and changed -- Fred knows what I'm about to say -- from district elections to at-large elections. And so at the next election he was defeated. Had we had a Section 5, that would not have happened.

And so I say all of that to say that if we eliminate Section 5, you will begin to see a mass movement to revert to at-large elections in the south. And at-large elections would, I suppose, be fine if we did not have racially-polarized voting.

But racially-polarized voting continues to be a very, very serious problem in the rural south. And so I want to thank you very much for the work that you're doing. I want to help you make a record for the extension of Section 5 because it is certainly needed. I will be delighted to answer any questions that you have.

I was in the Senate gallery in 1982 when this great debate was taking place and I saw my senator from my home state, Senator Jesse Helms, and the other Senator, John East. I saw them

on the Senate floor doing everything within their power to keep this Act from being extended and to keep Section 2 from being amended to a result standard.

I saw that. I saw it personally and I know that there is a willingness and a desire on the part of local officials to revert to at-large elections if we just give them that opportunity. We've come a long ways in North Carolina. 261 black elected officials in one district is a phenomenal story and we're going to be celebrating that on August the 20th.

We're going to have the Voting Rights Act celebration and John Lewis is going to be our keynote speaker and we're ready to celebrate this progress, but we have a long ways to go. And we have 25 African-Americans serving in our general assembly. We have 53 judges in North Carolina.

When I was in law school 30 years ago, we had none. Today we have 53 African-American judges serving in our state. None on the State Supreme Court, I might say. We have an all Republican State Supreme Court except for one, and it's an all-white Supreme Court. We're going to work on that, but we have judges at all levels of government.

So thank you. Thank you very much for the work that you're doing. I look forward to working with you as we work to extend the Voting Rights Act.

[Applause]

CHAIRMAN DAVIDSON: Thank you, Congressman.

Ms. Sanz.

MS. SANZ: Good morning to the Chairman and all the Commissioners. I am honored. I am honored to be here with all of you and I am going to be talking from my heart.

I am a resident of this community for 19 years. I moved from San Juan, Puerto Rico. And I came to a country that elections were supposed to be easy and very fair for all. I come from a country that our main board is politics, elections. Everybody goes out and votes. We have our stores closed. Everything is stopped in the island for everybody to be able to go and vote because they understand the importance of that.

When I moved here, I started out as a community activist registering people to vote because I saw that the Hispanic community were not understanding why it was important for them to vote. Understanding that only you have a voice when in the numbers they show how many of your people came out and vote, and I took that as our flag and I said, everybody is going to be registered and everybody is going to vote.

The sadness of that is that after you motivate the people to come out and vote, it happens the thing that they're not in the list. They change automatically the place where they were supposed to go and vote. They vote and the votes, nobody knows where they went.

In this past election, people that were in line two and three hours, after they got there to the voting polls, they say: You're not supposed to be here.

So imagine if you're working for 6.15 an hour and you have to lose one full day of work. Do you think that you're going to be motivated to go back to another poll? It's going to be very, very devastating for the people.

Another thing that we have seen is that once that we teach the community the rules, an invisible hand of the good old boy system always change the rules. When everything -- we think that everything is going okay. We train our people everything is okay. Suddenly the hands, they change.

We have a people agent here in Florida and here in Osceola County with a single member district. How come a community that has 46 persons of Latino, they don't have one elected official there? They were able to vote by district and suddenly they changed and this is something that we have heard through the presentation of some of you that has been happening.

Here that is happening in Osceola County. And when we motivate the people to come out and vote, they tell you: Why do I have to go and vote if it's not going to be counted, if I am not going to be taken in consideration?

Another thing, we understand that the Hispanic community is a new community that has been growing very fast. We have been always in existence, but the thing is that we were a silent lion. Now, we're waking up and we are letting people know that not everybody that moves into their country, they're not undocumented.

Here in Central Florida, the majority of the community is a Puerto Rican community. They can come, they move, they register and they vote in the election. They don't have to wait for a long process. So that is something that we have to take in consideration.

The paper trail for these elections to come, I think that is something that is a big concern of our community. We see that the people say, how come we are going to vote? If you go to McDonald's and you receive a receipt, how come you're going to vote? That is something that's so important and you're not going to be receiving anything.

I please ask you that, I understand that we cannot change everything to accommodate maybe the diversity of nations that we have around the nation. But we understand that facilitating in the language of the people, the ballot, the material is going to really make a big difference. And it's not a big expense.

I think that if we all get together, we can get those expenses covered, and something that we have been observing here in Florida, our law is going to change in registration.

I am the president of a non-profit organization and those of you know about the non-profit organization. We have to be asking for dollars all the time. You're looking for money. In this new law, what it's telling you is that if you register a person and that person when he goes to the voting place and the name is not seen on the list, I can be fined as a non-profit organization.

What is that going to go? What it's going to do is that it's going to hold me back of me going out and doing voting registration and voting education because I will understand that I will be penalized.

So those are the things that are happening here in Florida, and I think that we are all the ones that are here from Florida. We have discovered that Florida is a state that everybody in the nation knows where it is around the country.

I was on vacation out of the country and what they told me, oh, you come from Florida. Do you still believe in the government? That is very sad.

So I ask for all of you to help us because the mighty dollars are the ones that are taking charge of the elections of the nation, and we want to give the voice because we understand that the voice is a vote and we need everybody to understand that and to help us bring that message out.

Thank you very much.

[Applause]

CHAIRMAN DAVIDSON: Thank you very much.

Ms. Monestime.

MS. MONESTIME: Good morning, Chairman. Thank you so much for inviting me to be here, and I'm particularly pleased to be here. I represent the Haitian-American community in South Florida and I'm so happy that we have a voice at this table and to allow our concerns to be heard.

I'd like to focus my talk on the Section 203, the language assistance part because I think for the Haitian-American community, that's most relevant aside from the other issues that face other minorities.

And I'd like to just -- so that we are all on the same table, just to talk about, you know, what is the spirit behind this section and why it is so important for it to be extended. The guidelines start by saying, jurisdiction should take all reasonable steps to enable language minority voters to be effectively informed of and participate effectively in voting-connected activities.

The guidelines also say that a jurisdiction is more likely to achieve compliance if it has worked with the cooperation and to the satisfaction of organizations representing members of the applicable language minority group. So who are these minorities? Who are these South Florida Haitians?

A recent poll from the Sun Sentinel in Broward has stated that we have approximately two to 300 documented Haitians in that area. 91 percent of them are Haitian-born, seven percent are born in the United States, 67 percent of Haitians arrived in the United States in the '80s and '90s, 75 percent of them prefer to speak Haitian Creole, 60 percent of them live in Miami-Dade County, and the other 40 percent live in the surrounding counties, 26 percent of them have completed grade school, 22 percent have attended high school, 18 percent graduated from high school, 11 percent attended college, and 9 percent of Haitians have actually graduated college.

You know, these people, and it's important for us to understand who they are, come from a poor nation, indeed, the poorest nation in this hemisphere where over 90 percent of the country is illiterate. They do not read in their own language, Haitian Creole, much less the English language.

And it's because, particularly because of the political turmoil that has faced Haiti for so many years, they have a general distrust of politics and politicians. So that's the background and the backdrop for who they are and how they vote in the United States.

So why the need for this reauthorization given all of this? I think we need to again start talking about what are the conditions for the last three reauthorizations and whether those conditions still exist. I think that it's plain to see that, yes, they do, and I'm going to give you some personal experiences that I've had in helping and volunteering in elections as a member of the Haitian Lawyers Association.

You know, we all know that there's a need for a diverse elected official body. We all know that there's a need for us to be civically engaged in politics and so forth.

In Miami-Dade County where the Haitian- American community is most strong, we are so proud to have six Haitian-American elected officials and one Haitian judge. In the other counties, however, where the presence, and particularly in the political power, is negligible, we have none. So we need to have eyes on those counties.

We need to understand what are the more sophisticated ways that racism and discrimination persists.

From my organization, we've seen when we are in the polls, as either poll watchers or outside of the polls, Haitians don't have the education and because the language issue is so great, they oftentimes do not understand the basics.

Yes, they can tell you that they're going to vote for George Bush or Gore or whomever, but they're not going to understand a ballot question about transportation and whether gambling should be legalized or whether we should have a constitutional amendment about privacy if it's not in their own language. They don't understand that you can actually have someone come with you into the poll and assist you in translating.

One of the major problems that I found is that the poll workers themselves are not -- either are not educated about what their responsibilities are or just fail to adhere to the rules because I've seen where the poll workers have denied Haitians from allowing them to bring their son or their daughter or their cousin to help them translate the ballot.

And myself, as an advocate, I have to go through the steps of calling the State Department and calling, you know, making the requisite calls, and then finally after 30 minutes, one hour, you may get some assistance. But these people who do not speak the language are not sophisticated enough to do this. So absolutely, yes. We need to have this extension.

You know, Haitians again, they feel very intimidated by the entire process. They feel as though if someone questions them about how long have you been here, who are you voting for, they're going to naturally tend to shy away. There's not enough pre-election materials in Haitian Creole to inform them, this is the date that you're supposed to vote; this is the place where you're supposed to go.

The precincts may have changed or not and this information needs to be both in English and in Haitian Creole. It's not just a ballot at the time of the election, but they need to know where to go and what the rules are surrounding them. They don't know that they can ask for help. They don't know that the poll workers inside are there to assist them, rather than just to ensure that, you know, they cast their vote.

The other big issue that we have is many poll workers do not speak their language. So, again, it doesn't help them if they go into a poll even if they have someone that assists them, but if there's not poll workers that are able to translate and are able to tell them, this is where you go and this is how you punch it, it's really -- it's more than a chilling effect that you're effectively denying their right to exercise their constitutional right to vote.

So for all of these reasons and so many more -- I know I'm over my time -- I absolutely insist that we extend this Section 203.

[Applause]

CHAIRMAN DAVIDSON: Thank you very much. You weren't over your time.

MS. MONESTIME: Oh, okay. Thank you.

CHAIRMAN DAVIDSON: Ms. Strickland.

MS. STRICKLAND: Thank you very much, Mr. Chairman. And thank you to the commissioners in this body for holding these very important hearings and taking and end-up at this issue.

As I pondered exactly what to bring here to you today given all the voting problems that Florida has experienced in recent years, I thought to look specifically at Section 5 and Section 203 and the important roles that those sections have played in very recent years.

We've all heard of the various problems that have occurred in Florida in recent elections, and we know that in Florida, it's not just about the machines.

In various elections, voting technology has gotten a lot of press. But as we've heard here today in testimony in 2000, in 2002, in 2004, there have been problems with identification requirements, problems with precinct changes without proper notice to the voters, problems with language.

We certainly received complaints from Osceola County, for example, in the 2000 elections where at the time, Osceola was not a language minority jurisdiction because the new census figures had not been calculated, and yet over one-third of the population was Hispanic and it was very obvious from a pure logic standpoint that the information for voting should have been available in Spanish as well as English.

Now, Osceola is a language minority jurisdiction and those requirements are in place. But it's clear that those sorts of actions cannot be assumed to happen without the legal requirements that they do so.

In Miami-Dade County you saw similar concerns where signs about where to park were posted in English and Creole, and yet you enter the polling place and the ballot itself was not available in Creole.

Fortunately that, too, has been corrected. Now, the trilingual ballot is available not just in a few dozen native precincts as it was at the time, but in all precincts in Miami-Dade County. The problem with assistance and having all voting materials in a trilingual format is another issue. But nonetheless, this headway could not have been made without the pressure put on our officials by legislation like the Voting Rights Act and Section 203.

I'm not going to get into the disproportionate ratio impact that so many of the voting problems that have occurred in Florida has had. The U.S. Commission on Civil Rights has documented that extensively. You know, certainly it is the case that problems with identification requirements have existed in part because people within minority communities tend to move more often within the same county, which can lead to a host of problems at the polling place because people do not have to re-register if they move within the same county.

But they may, for example, show up at the wrong precinct, which can have implications if they're given a provisional ballot and all sorts of issues depending on that county's particular voting rules.

People within minority communities, likewise are more likely to be renters, which can also lead to increased moves and problems at the polling place. And certainly they're disproportionately represented among the impoverished who are also less likely to have things like photo identification which have been required at the polls.

As a result of all these problems, the State of Florida and its 67 counties have embarked on a number of changes. And with this push for better elections have come big opportunities; opportunities to make massive improvements and also opportunities to do damage. After the 2000 election, for example, the Florida Election Reform Act of 2001 contains some very problematic provisions about which the ACLU submitted comments to the Department of Justice

after they were submitted for pre-clearance. For example, the Florida Election Reform Act of 2001 requires a posting of a list of voter responsibilities in every polling place.

Number one on this list was that each registered voter in the State has the responsibility to study and know candidates and issues. Well, this -- mind you, this is posted in the polling place at the time the person has already arrived to cast his or her ballot.

This is not something that's posted along with the mail order that goes out to alert you to where your polling place is or something like that. This is after the person has already arrived, and certainly can act as a large deterrent; in fact, someone not familiar with the process or could be misused by poll workers, for example, who seek to prevent certain voters from voting.

The Florida Election Reform Act of 2001 also included among these responsibilities for the voter to know his or her precinct and its hours of operation. In 2000, it certainly was very difficult for many voters to know that information despite their best efforts.

It also included to bring proper identification to the polling station which certainly at that time was a misstatement of Florida law because it was an affidavit process by which, if there was no other problem with your registration, one could fill out an affidavit and register to vote. And a whole list of other things.

We submitted comment to the Department of Justice confirming the voter responsibility list concerning the new felon purge process that was enacted as a part of the reforms in 2001, concerning the list maintenance procedure and the disqualification process for provisional ballots, by which if a person votes a provisional ballot in the wrong precinct, that provisional ballot is rejected as illegal and the person's choices, even in the races for which they would have otherwise qualified are not counted.

Despite the fact that the Department of Justice did pre-clear these very provisions to which we objected, the process was useful because in some cases they did so with the express understanding that the new laws would be implemented in such a way as to address many of the concerns that had been expressed by our group and others in as best a way possible given the law.

The request for more information on some of these laws also put the state and counties on notice of possible concerns in their implementation. With the passage of the Voter Responsibilities List, we also sued in a lawsuit that contained VRA Section 2 and Section 5 challenge over the Voter Responsibilities List.

And while the solution did not ultimately come through the courts, the Florida Legislature later went back and amended those voter responsibilities. They still may not meet exactly what we would want, but now posted in every polling place is the requirement that each registered voter in the state should, which is an important change in wording, familiarize himself or herself of the candidates and issues. It still says bring proper identification to the polling station.

Unfortunately, there no longer is an affidavit process. But importantly, at the very bottom of the sign it says, note to voter: Failure to perform any of these responsibilities does not prohibit a voter from voting.

That was a very important addition that was made precisely as a result of claims that were brought under the Voting Rights Act -- I should say, arguably, as a result of claims brought

under the Voting Rights Act and of various pressure put on the state lawmakers to make those changes.

So those are just a few, I hope, fairly concrete examples of how these sections have helped. We now have two brand new election reform laws that have recently been passed, including House Bills 1567 and 1589, which have now been signed by the Governor.

And given some of what I've just gone over from reforms after 2000, I hope that it's certainly clear that these laws should be assessed and analyzed for any possible retroaggressive impact that they might have on minorities, and that given what we've seen happen in 2001, that certainly the time has not passed for that sort of scrutiny to occur in pre-clearance jurisdictions in Florida and elsewhere.

So with that, I will conclude. I think that Section 5 and Section 203 and the Voting Rights Act as a whole are as important now as they have ever been, and that Section 5 perhaps is absolutely crucial at this time, given the number of voting changes that are occurring around this entire country.

Thank you.

[Applause]

CHAIRMAN DAVIDSON: Thank you, Ms. Strickland. And now Mr. Adegbile.

MR. ADEGBILE: Thank you, Chairman Davidson. Good morning. I'm Debo Adegbile of the NAACP Legal Defense and Educational Fund and it's a pleasure to deliver testimony this morning before the National Commission on the Voting Rights Act. LDF has been a pioneer and leader in the efforts to secure and protect minority voting rights in the United States and especially those of African- Americans.

LDF has played a major advocacy role in working toward the enactment of the VRA of 1965 and has been involved in every major legislative and administrative voting rights since, including the development, passage, implementation and defense of the 1982 amendments to the VRA.

A central question presented by the renewal of the expiring enforcement provisions of the VRA is whether recent experience within covered jurisdictions justifies the extension. A thorough review of that experience strongly suggests that it does.

Accordingly, for purposes of today's hearing, I will focus my testimony on the experience under the VRA and Section 5 in particular in the State of Louisiana since the time of the 1982 renewal. Although Louisiana has a very well-documented history of voting discrimination against its African-American citizens, the scope and persistence of those practices since the last renewal stand as powerful evidence of the pressing need for continued protection.

I believe that any fair reading of the experience makes it plain that voting discrimination in Louisiana persists and that if Section 5 is not renewed, the state will experience a sudden and avoidable reduction of African-American access to the political process at every level of government.

66 percent of the objections interposed under Section 5 in Louisiana have occurred since the 1982 renewal. These block changes have impacted every aspect of African-American voting, including redistricting, polling place relocation, changes in voting procedures, voter registration, annexations, and other alterations of elected bodies, and even an attempted suspension of a presidential primary election.

Discriminatory changes were proposed at every level of government, including the state legislature, the state court system, the state board of education, parish councils, school boards, police, juries, city councils, and boards of Aldermen.

In Louisiana, attempts to dilute black voting strength have been widespread. 33, more than half of Louisiana's 64 parishes and 13 of its cities and towns have proposed discriminatory voting changes since 1982, many more than one time.

The DOJ was also compelled to object 17 times to attempts by the state itself to make changes that would set back minority voting rights in congressional, state legislative, state board of education, and state court elections. And in a stark, statewide illustration of the persistence and hostility toward equal African-American participation in Louisiana's political process, since the VRA was passed in 1965, every proposed Louisiana State House of Representatives' redistricting plan has been objected to by the DOJ, including three since 1982.

No great progress has been made by black voters and elected officials in Louisiana due in significant part to the protections afforded by Section 5. The job is far from finished. As experience in Louisiana since 1982 shows, voting discrimination in that state remains entrenched and many white officials remain intransigent, refusing to provide basic information required under Section 5 to the Department of Justice, repeatedly excluding black communities from local decision-making processes and even retaliating against black officials who advocate for non-discriminatory changes.

These consistent efforts to diminish black voting power are not inconsequential remnants of the past that should or can be ignored. Beyond familiar Section 5 objections involving the failure of the state or its sub-jurisdictions to demonstrate the absence of discriminatory effects, Assistant Attorneys General in each of the past three decades have consistently noted evidence of Louisiana officials continuing intent to discriminate, including rejection of readily available non-discriminatory alternatives, inconsistent application of standard, drastic voting changes immediately following attempts by black candidates to win public office, and even candid admissions of racism by state and local officials as recently as 2001.

As Assistant Attorney General John Dunne said at the 1991 redistricting plan for the Louisiana House of Representatives: The departures are explainable, at least in part, by a purpose to minimize the voting strength of a minority group.

Although Louisiana is not alone in this regard, it is in part the persistence of purposeful discrimination in the state that requires continuing vigilance of Section 5.

The magnitude and breadth of objections is great, but the need for Section 5's ongoing protection is further enhanced when one considers that awareness of Section 5 has likely deterred even greater levels of voting discrimination.

This is because the rational public official is less likely to discriminate if he or she knows that they will be called upon to publicly explain and justify what it is they have done.

In a sense, Section 5 has served to clear away the weeds in Louisiana, but there is a strong likelihood that any lapse in its protection would let those weeds grow back from the roots and, once again, choke off meaningful political opportunity for African-Americans.

I want to pick up on what one of our distinguished commissioners said in his opening remarks and what the distinguished Congressman said and just share a word about Louisiana's

history because we can't understand what occurs today without understanding where we've been in that state.

Louisiana's constitutional interpretation test was only one development in a long history of vote denials, suppression and dilution.

Until 1868, the state constitution simply limited the vote to white males. Following the Civil War, there were no legal impediments to black voting and black citizens made up 45 percent of the state's registered voters as compared to 29 percent at the time of the 2000 census.

But in 1898, Louisiana pioneered the use of the Grandfather Clause, which imposed complicated education and property requirements only on registrants whose fathers or grandfathers has not been registered to vote before January 1st, 1867.

I could go on with his history, but I want to bring it up to the contemporary because we are living history in Louisiana. Many of Louisiana's white officials have continued to be committed to repeated efforts to minimize black voting power.

From the first Section 5 objection until the most recent reauthorization in '82, the DOJ objected 50 times -- sorry, 50 attempts by state and local authorities to implement voting changes that would have diluted black voting strength.

Attempts at discrimination have not slowed since then. Indeed, it was a case involving a Louisiana parish school board that prompted Justice Souter of the United States Supreme Court to note in 2000, that 35 years after the enactment of the VRA, Section 5 must continue to be interpreted to prevent jurisdictions from pouring old poison into new bottles.

Against the backdrop of this legacy of discrimination, in the context of Section 5 litigation, Louisiana unsuccessfully attempted to win approval for its state legislative redistricting plan in 2002.

I had the opportunity to depose the Speaker of the House in that case and I had the opportunity to ask him whether Louisiana had ever passed laws that sought to diminish the opportunities of African-Americans to participate in the political process.

His response was: I wouldn't think.

Voting discrimination in Louisiana has been adaptive and persistent and that reality in Louisiana and elsewhere gave rise to Section 5 pre-clearance.

Notwithstanding this history, optimism, skepticism, or recent Supreme Court decisions cause some to ask whether the Section 4 coverage formula has grown stale. The original coverage formula was a legislative proxy designed to reach jurisdictions with some of the worst traditions of voting discrimination.

Section 5, in turn, provided a powerful remedy in recognition of the fact that these traditions were deeply rooted.

In the case of Louisiana, the history has proven to be a strong predictor of the present. A period of 40 years of VRA protection has been insufficient to erase the effects and ongoing practice of voting discrimination. Consequently, Louisiana strongly suggests that what the Section 4 coverage reached, the contemporary record continues to justify. The post-1982 renewal experience in Louisiana with Section 5 supplies important proof.

Since 1982, Section 5 objections have helped prevent discriminatory changes in every aspect of Louisiana voting. Section 5 has not only allowed the DOJ to nullify specific discriminatory changes, but has also helped to check the practices that some white officials use

to promote such changes, including secrecy, exclusion of minorities from decision-making processes, manipulation of standards, invention of new strategies; pouring new poison into new bottles and persistent attempts to revive old diluted strategies.

Most of Louisiana's 96 Section 5 objections since 1982 have involved redistricting. Officials have time and again attempted to limit black voters' political influence by over-concentrating them into a few districts packing or fragmenting them among several majority-white districts to prevent them from achieving a majority that provides the opportunity for communities to elect candidates of their choice even in the face of extreme racial bloc voting cracking. This second generation form of discrimination known as vote dilution is designed to cabin minority voting power and pick up where the more outright vote denial left off.

Significantly, multiple Assistant Attorneys General have also noted the persistence of racially polarized voting in the state, most recently in April 2005. The state itself acknowledged the persistence of racial bloc voting in 1996, the same year that a Federal District Court in Louisiana agreed that racial bloc voting is a fact of contemporary Louisiana politics.

In 1993, the Bossier Parish School Board had cracked black population concentrations so effectively that the parish had no majority-black districts at all, despite a black population of 20 percent, a 12-member school board, and the availability of an alternative plan that would have drawn two compact majority-black districts.

The story of the Louisiana House of Representatives' conduct with respect to drawing district lines for the state legislature reflects some of the most flagrant instances of minority vote fragmentation and the lasting commitment to voting discrimination. In 1982, even as Congress debated the continuing need for Section 5, the Louisiana House submitted a redistricting plan that was crafted with the purpose of reducing black voting power in New Orleans.

Then Attorney General William Bradford Reynolds noted that the unexplained elimination of a majority-black district in New Orleans left only one majority-black district and four majority-white districts in a ward that was 61 percent black.

Violating purported traditional redistricting principles, white officials resorted to drawing a non-contiguous district in uptown New Orleans in order to dilute the black vote there. Louisiana again failed to gain pre-clearance for its House redistricting plan in 1991 when, despite intensive dialogue with the DOJ and the existence of alternative plans by the Legislative Black Caucus, state legislators insisted on submitting a plan that minimized black voting strength.

But I want to speak just quickly about a case that I litigated that I've alluded to before. The post-2000 census of the House of Representatives redistricting plan followed the familiar pattern except that Louisiana, in this case, opted to pursue a declaratory judgment before a three-judge panel in the D.C. District Court as opposed to seeking administrative pre-clearance which had been their previous pattern.

The DOJ, under the leadership of John Ashcroft, Ashcroft opposed Louisiana's efforts to obtain pre-clearance. And my organization, on behalf of a bi-racial coalition of voters and the Louisiana Legislative Black Caucus, intervened and litigated in cooperation with the Department of Justice.

The conduct of the Louisiana House during that redistricting litigation further illustrates its pattern of cloaking discrimination with pretextual justification. In that litigation the state

sought Section 5 pre-clearance of its House of Representatives' plan and through plaintiff's Speaker Pro Tempore Charles Emile "Peppi" Bruneau sought to cover its tracks by improperly withholding documents that evinced the House's purpose to retrogress in its redistricting plan.

LDF secured a court order to require Bruneau and other plaintiffs to produce versions of the redistricting guidelines that were distributed at the outset of the line drawing process to facilitate their work. These documents revealed the Bruneau had overseen the process that culminated in the removal from the guidelines of a provision that reminded legislators of their obligation to comply with the Voting Rights Act.

Bruneau and other witnesses for the Louisiana House explains that they removed the provision, which had been included in the guidelines for decades before the process began, in order to make the guidelines, quote, plain and understandable to a layman. Of course, Bruneau himself understood that the plan that he ushered through the House eliminated an African-American opportunity district from Orleans Parish, despite growth in the black voting-age population percentage there.

Faced with a strong Section 5 defense by DOJ, LDF and others, the Louisiana plaintiff settled that case on the eve of trial by agreeing to restore the eliminated Orleans opportunity district, among other favorable concessions for Louisiana's minority voters.

The court's order that brought Louisiana to the settlement table in this statewide redistricting case read in part: Louisiana has, quote, subverted what had been an orderly process of narrowing the issues in this case by making a radical mid-course revision in their theory of the case and by blatantly violating important procedural rules.

I will direct the panel also to a section in the testimony about repeat offenders. The concept explored in that section is that many of the same jurisdictions resubmit changes that are inadequate even after they've been told that they're inadequate. They persist and it is in part that persistence which slows the pre-clearance process.

One of the claims made is that pre-clearance takes too long. A careful review of the record, most recently, the Georgia voter ID measure will show that it is often deficiencies in the state's submissions in the first instance which adds to the time in pre-clearance.

And so I won't share it orally right now, but it's in the written testimony so that I can move forward.

CHAIRMAN DAVIDSON: Okay. If you would move forward fairly quickly, we'd appreciate it.

MR. ADEGBILE: Okay. This is the conclusion. While black voters and candidates have made tremendous progress since 1965 in Louisiana and elsewhere, progress is not simply attributable to a change of heart in the practice on the part of white decision-makers. Rather, it has come about through the determination and hard work of African-American communities, their advocates, and the continual intervention by the federal government.

If Section 5 had not been renewed in 1982, 96 attempts to dilute black voting strength since then would have had the force of law in Louisiana, leading to the deprivation of our most fundamental right to tens of thousands of African-Americans.

The record shows that the need for Section 5 coverage in Louisiana has not declined since 1982. In fact, the average number of objections per year actually increased from 3.8 before 1982 to 4.2 since.

Examining Louisiana's conduct with regard to the House of Representatives redistricting plans from 1965 through the present, can be viewed as an unbrokable line of the pattern of discrimination. The record shows that President Johnson's 1965 challenge to change the attitudes and structures from which voting discrimination arises, is far from being met. Intransigent officials and elected bodies throughout the state at the highest levels of power are common and persist across the decades.

I would like to leave the panel commending them to look at the Appendices that I have included in my testimony which go through in detail some of the stories that underlie the numbers that I've shared with you today. And thank you for your time.

[Aapplause]

CHAIRMAN DAVIDSON: I want to thank this panel for giving us very interesting and diverse testimony and concrete examples of some of the problems that minority voters are facing, and I would now like to ask if any of our commissioners have some questions that they would like to direct at particular panelists and I'll start with Mr. Gray.

MR. GRAY: I think the panel has done a good job. I have no questions, Mr. Chairman.

CHAIRMAN DAVIDSON: Okay. Congressman?

CONGRESSMAN BUCHANAN: It's a pleasure to say amen to Mr. Gray, but -- since I'm both a preacher and a politician, I will.

Congressman Butterfield, you and your colleague I know and Tatum both talked about the importance of looking at the whole historic scene, you said, from 1899, not just the more recent history.

It seems to me that looking upon that scene in 1965 and '70 and '75, the posture of the federal judiciary -- and this will be a bad question to ask to lawyers and I apologize -- the posture of the federal judiciary is clearly on the side of protection of the rights and extending the rights of citizens and it's pretty clear in the history of that period that just as I saw in my district and you've seen in yours, that Ahab in terms of a power structure of a place like in the south like I see in Birmingham, it would appear to me that there may be a different situation in the federal judiciary now and perhaps even more so in the future.

I wonder if you have any comment to make about the weight of responsibility you as a legislator and your colleagues might have to make the law clear, firm, soundly based on the constitution, especially in light of the fact that as a people's representative, you may be the primary ones to look to preserve their rights in the years ahead.

CONGRESSMAN BUTTERFIELD: Well, I think you're exactly right. We cannot look at the post-1982 period in isolation without looking at the pre-1982 era. During the '80s and '90s, we had pretty good support from the federal courts. The Federal District Court judges were willing to entertain our claims and litigate them and give us favorable results. But the evidence was so overwhelmingly against the defendants.

In so many of our counties we just had pervasive discrimination and we were able to present that evidence to the court.

I'm not so sure that district judges who serve now on the federal bench will be inclined to give favorable rulings as we got in the past. I have not litigated a voting rights case in many years now, but I suppose that the mindset is now against voter rights claims.

The thought is that the problem has been resolved, but it has not been resolved. So I think with strong advocacy, you're going to see the Section 5 extended. We have dialogue that's ongoing and I hope that something good will come out of it and hopefully we will see it extended. But I don't want to depend on the federal courts entirely on our protection.

CHAIRMAN DAVIDSON: Thank you, sir. Any other comments?

CONGRESSMAN BUTTERFIELD: I had intended to tell a brief story about Halifax County, North Carolina, and I can do it in 30 seconds or less, I think.

Halifax County was one of the counties that we sued in North Carolina. No African-American had served on the Board of County Commissioners since reconstruction, and as a result of that voting rights lawsuit, we now have six single member districts in the county; three African-Americans, three whites.

The white chairman of the county commission has recently retired. The question now becomes, who succeeds him as chairman? And so there's a loggershead of opinion on the Board. The longest serving African-American wants to be the chairman and he only has the support of the African-American members on the Board.

The three white members of the Board wanted a white Republican to be chairman and two of the three white members are Democrats. And so --

MR. ADEGBILE: A very good example of polarized voting.

CONGRESSMAN BUTTERFIELD: Yes. That is another example of the hard attitudes that we face.

CONGRESSMAN BUCHANAN: Thank you. One more thing on Section 2. Our country's not only a melting pot. It's the originalization for the world's peoples' cultures and faiths, and it appears to be increasingly so. It turns out it will make your people, the Europeans, and like me, a distinct minority before too many years have passed.

Hence, if we're going to have a true Democratic society, we have to think about things like Section 2. You've made a very clear case and I appreciate that for Section 2, as well as Section 5. I thank all the members of the panel for their very clear and strong testimony.

[Applause]

CHAIRMAN DAVIDSON: Congressman Butterfield, with regard to the lawsuits that you and fellow voting rights lawyers have brought in North Carolina, would it be possible for you to supply this Commission with a list of those cases in the not too distant future?

MR. BUTTERFIELD: Absolutely. I'll be delighted to do that. Legal defense fund had its0 hands in most of those cases, the most notable of which was Jingles versus Edmundson, which integrated our general assembly. Yes. I'll be delighted to get those to you.

CHAIRMAN DAVIDSON: Thank you very much.

MR. BUTTERFIELD: Yes.

CHAIRMAN DAVIDSON: Governor, would you like to pose some questions?

GOVERNOR ROGERS: Sure. Thank you kindly.

Congressman, I wanted to get a perspective from you in terms of -- because this is obviously coming up for a vote that will take place in the House and the Senate.

You've had some chance to discuss this among your colleagues. You mentioned in particular, unanimous support in terms of the CBC. I understand that also that the Chairman -- forgive me. Jon, give me the Chairman's name.

MR. GREENBAUM: Sensenbrenner.

GOVERNOR ROGERS: Yes. Chairman Sensenbrenner, I think, has -- the Republican Chairman, in particular, of the House -- is that the judiciary?

MR. GREENBAUM: Judiciary.

GOVERNOR ROGERS: Judiciary committee -- has indicated that he is making the Voting Rights Act a priority, a priority in terms of the judiciary committee, in terms of its passage.

Can you give me some sense about the bipartisan support that may exist in terms of the House with respect to Section 5 and Section 2 in terms of reauthorization?

CONGRESSMAN BUTTERFIELD: Back in January the Congressional Black Caucus went over to the White House and met with President Bush in a very private discussion and during that meeting a question came up about whether or not the Voting Rights Act should be extended, and the President told us at that time that he did not have much knowledge about Section 5, but he would get -- start looking into it and see what he could find out. We were very disappointed with that response.

We felt that the President in a second term at least should know something about the Voting Rights Act. But be that as it may, I do not serve on the Judiciary Committee. We have four CBC members who do. The ranking member is John Coggins and Bobby Scott, Mel White and Maxine Waters.

And I can tell you that the four of them are actively pursuing this extension. I don't know the nature of their discussions. I don't want to second-guess what is going on. But I do know that they are being very proactive at this time.

GOVERNOR ROGERS: Absolutely. So your sense is essentially that you believe that we will have passage with respect to the two provisions?

CONGRESSMAN BUTTERFIELD: I think it's within the realm of possibility. Sensenbrenner made a speech at the NAACP convention a few weeks ago in Milwaukee and he did indicate that he has support for strong voting rights and I believe that at the end of the day there will be some type of bipartisan effort to extend the Voting Rights Act.

GOVERNOR ROGERS: When you look in particular on the horizon the basis for objection as may be expressed by some members of Congress as it relates to Section 2 -- excuse me, 203, the language provision perhaps or Section 5, what do you see in terms of the outlook?

CONGRESSMAN BUTTERFIELD: One debate is whether or not to simply extend it as it now exists without making any amendments, without making any modifications whatsoever to the Act, or whether or not we have got to open it up for discussion and add some provisions that don't exist at the current time.

I think there will be some amendments and I think at the end of the day they will pass. Not serving on the Judiciary Committee, I don't have the inside information that my colleague, Mr. Scott, may have, but except to say that there are discussions that are ongoing.

GOVERNOR ROGERS: One of the things that's been fascinating to some extent as we've traveled throughout the country is that some of the objection, if you will, is expressed regarding the Voting Rights Act. In particular with respect to Section 5, the pre-clearance provisions have come, I understand, from white Democrats who are, to some extent, upset with

either how things are taking place in terms of the south or perhaps some of the districts that they've been drawn or otherwise. Have you heard that, sir?

CONGRESSMAN BUTTERFIELD: Well, I think there's resistance on both sides of the aisle to the extent of the Voting Rights Act. I cannot say that it's primarily coming from the Democratic side. The Democratic Caucus wants this Act extended. Congressman Claiborne is going to be the chairman of our caucus starting next year. He's an African-American. He's from the south, He's from South Carolina.

And I can virtually assure you that the Democratic Caucus will nearly unanimously support the extension. I cannot imagine that it would not.

GOVERNOR ROGERS: Absolutely. One final question, if I may and this is a very general question.

Debo, I was curious about your testimony in particular because you really mention Louisiana as really being the central point of your testimony and that being significant problems. In particular, you note the fact that there had been objections by the Department of Justice in each circumstance in which a plan has essentially been submitted.

When you talk about sort of the entrenched nature of sort of -- not sort of, but at the end of the day problems related to race in Louisiana, can you give us some perspective about how far things had come in terms of progress and where you see things going in terms of the future?

MR. ADEGBILE: Certainly. There has been progress. I don't think anybody who does the work that we do is not prepared to accept that there has been progress. Because of the Voting Rights Act and the sacrifices of brave individuals, legislatures, and legislative bodies, and courts have been diversified across the deep south.

And as we've heard some people say, many of the southern jurisdictions have the highest percentage of serving African-Americans in their legislatures, school boards and congressional delegations. So in terms of representation, the progress has been measured.

The central question, I think, for purposes of the renewal is, how has that progress come about and whether or not that progress can follow what's been the historical pattern of reverting back to a previous situation or circumstances, and I think the experience in Louisiana and in many other jurisdictions is that, that is a real possibility, which is not to suggest that murder would be the tactic or that violence would be the tactic.

But I think my testimony sets out that one of the problems with voting discrimination is that it's persistent and adaptive. It finds a new way to achieve the same end.

And so as we celebrate the progress, which is important for all of us, and it's not just an African-American story, obviously, my brothers and sisters in the Latino community and Asian communities, the whole country has benefitted from the Voting Rights Act and we celebrate that collectively. But we have to be vigilant and make sure that we look to continue these protections. Particularly, I think it's fair to say at a time when our country is suggesting that democracy is an important answer worldwide, we have to first protect our democracy at home and make sure that the promises of the Constitution continue to realized and not simply words on a piece of paper.

[Applause]

MS. KEENAN: I just have one follow-up question. I knew they were coming for me and I tried to wait, but I have one follow-up question to the excellent questions asked by the Governor.

I have great concern -- and I think the Congressman talked a little bit about this -- in May the National Bar Association hosted the Coalition of Bars of Color at their annual meeting in Washington, D.C., and one of the things we did was to go up on the hill and we met with the Attorney General.

We met with various members of the Senate staff, the judiciary staff, and we also met with the Deputy General Counsel for the White House, and when we posed this question just in May of this year, we received a similar response. And that question was, you know, what is the President going to do about the Voting Rights Act? And the response -- and I will say I took responsibility for raising this issue -- but the response, which was very troubling, was that they didn't know, and that they had no sense from the President and that they did not -- they didn't have any response.

In fact, when I pointed out to them that, you know, it could be a great legacy of the President because he has no further elections to run in and certainly this issue is as American as apple pie, if you will, and he has an opportunity to leave a legacy to all Americans that will certainly make a lasting difference, they simply reported to me that they would share my concerns with the President.

And so I said to them: But you know we've given constitutional rights to vote in Iraq and we've given them state-of-the-art voting rights in Iraq, and it would just be, oh, so lovely if we could have those here in America.

[Applause]

MS. KEENAN: My parents are from the south. I was very gracious when I said that. I was smiling.

And they indicated to me that -- I think at that point, they really said, we really will share your concerns with the President.

So I guess my question for the panel and any panelists that would like to respond: What can we do to make sure that the White House has the message that Americans all over the country of all colors are very concerned about this issue?

And that it is something that they need to put on their priority list and that it's something that they should focus on so that when people ask these questions -- because I confess to you that as an attorney and certainly as a leader of a national organization, I was deeply concerned that that was the best response that they could provide me in May of this year, 2005, when this issue is so close at hand.

So what can we do? I think that sometimes we ask so much of everybody else, but what can we do to make this issue more a focus of the administration?

CHAIRMAN DAVIDSON: Ms. Sanz.

MS. SANZ: From the grassroot aspect that is the one that I represent, I think that we have to go back in those times of the phones and sending mail and sending e-mails and sending faxes. We can do a very great campaign if everybody starts sending faxes the same day. We will be heard and I think that we have to call our Senators, our local Senators, our Congressmen, I think that the whole community because this is not something about being Democrat or being

Republican. And I think that that is a fairest message that we have to bring. This is about our rights.

[Applause]

CHAIRMAN DAVIDSON: Thank you.

MS. SANZ: Thank you.

CHAIRMAN DAVIDSON: Godspeed.

MS. SANZ: I'll be back.

CHAIRMAN DAVIDSON: I have one question that I would like to pose to the Floridians on the panel. I gather that the Justice Department has recently filed a Section 2 vote dilution case in Osceola County. Would someone like to simply speak to that fact?

MS. SANZ: This has been something that in 1990, we had in Osceola the first commissioner elected. And after he was elected, it was a Mr. Bob Gavida [ph]. He's not any more with us, the totally -- the law changed there in Osceola. It was a threat about the growth of the Hispanic community.

We in the Hispanic community, we see it that that was just changing the rules because the community was changing too fast. Just now we saw an election for the mayor of the city and we saw the same discrimination that we had before and it's very sad that at this time this is happening. This started in 2000 when the Justice Department, they saw what was happening and they were investigating it. It took a little bit of time, but we are happy that it was not too late, that we are right now with a lawsuit there in Osceola.

So I think that it's going to be a big change because it's not mainly Osceola the only one that is going through this. This lawsuit is going to wake up other counties or maybe other districts that are going through the same thing and they didn't know how to change that process.

CHAIRMAN DAVIDSON: Thank you. Barbara Arnwine?

MS. ARNWINE: Yes. If I may, there's a gentleman here who'd like to give a few more details on that.

MR. BOSQUE: Yes. Basically, my name is Jose –

CHAIRMAN DAVIDSON: Would you please state your name?

MR. BOSQUE: Jose Bosque. It's sad. It's sad, but we are in the year 2005 and what we're dealing is Alabama 1950 here. That's what the Justice Department just found out. They sued Osceola County Commissioners and like Marytza said, we've been years trying to move ahead with this and we always been limited. Now the Justice Department is giving us a hand and while we need some national attention because our county is growing real fast.

The Osceola County, Polk County, Orange County areas are full of Hispanics. The City of Kissimmee is 40 to 50 percent Hispanics and there's a lot of taxation, but representation is what we don't have. And we need support in that area. Right now the media is helping us out. The local media is helping us out, but we need to reach on a national level so we can get some help and some support with the other citizens of the United States because, again, it's Alabama 1950 here.

CHAIRMAN DAVIDSON: Thank you so much. Would you please give your name to the court reporter so it's spelled correctly, please.

MR. BOSQUE: Jose Bosque.

CHAIRMAN DAVIDSON: Before we break for lunch, it has been called to my attention that the NBA President-Elect Reginald Turner is present in the room and we would like to recognize him. Would you please stand.

[Applause]

MR. TURNER: I plan to testify at 2:05 this afternoon, but thank you very much for your work and I appreciate your presence here today.

CHAIRMAN DAVIDSON: Thank you.

Thank you very much for appearing on this panel and to those of you in the audience for being here and providing encouragement. We will break for lunch and reconvene at 12:45. Thank you.

[Whereupon, a luncheon recess was taken, after which the following transpired:]

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AFTERNOON SESSION

CHAIRMAN DAVIDSON: This is the second panel of our hearing this day. I would like to begin by welcoming the panelists and I'm going to introduce you to them.

Meredith Bell Platts has been with the Voting Rights Project of the American Civil Liberties Union since 2001. As staff counsel, she litigates cases surrounding the redistricting of congressional, state legislative, county and city councils, and school boards.

One of her current projects concerns monitoring parts in redistricting which remained a threat to the maintenance of gains achieved in minority representation, a project that has led her to pen a Law Review article, "Extreme Makeover. Racial Consideration and the Voting Rights Act in the Politics of Redistricting", to be published this fall in the Stanford Journal of Civil Rights and Civil Liberties.

May I congratulate you on that title.

MS. BELL PLATTS: Thank you.

CHAIRMAN DAVIDSON: Bradford Brown, Ph.D. Dr. Brown has been a civil rights activist for over 40 years in Alabama, Oklahoma, Massachusetts, and Florida. He is currently the Political Action Chair of the Miami-Dade branch of the NAACP and the immediate past president.

Throughout his career as a civil rights activist, Mr. Brown has served on the Oklahoma, Massachusetts and Florida advisory committees to the U.S. Rights Commission and remains on the Florida committee.

He also currently serves on the Board of Directors of Hope, Incorporated, a South Florida fair housing organization.

Reginald J. Mitchell is the Florida Legal Counsel in Tallahassee, Office Director of People for the American Way and People for the American Way Foundation. He is a registered lobbyist with the Florida legislature and a licensed Florida attorney.

He was formerly the Florida Election Protection Director of People for the American Way Foundation and previously served as an associate at Parks and Crump, L.L.C.

Constance Iona Slaughter-Harvey. Is that correct, Iona?

MS. SLAUGHTER-HARVEY: Yes. It is.

CHAIRMAN DAVIDSON: Ms. Slaughter-Harvey is an adjunct professor at Tougaloo College and currently serves as the President of Elections, Incorporated. She was the first

African-American woman to receive a law degree from the University of Mississippi on January 27, 1970.

Upon graduation, Attorney Slaughter-Harvey joined the Lawyers Committee for Civil Rights Under Law as a staff attorney and worked there until 1972 when she returned to Forest and established her private law practice.

She was Executive Director of Southern Legal Rights and later became Director of East Mississippi Legal Services in 1979.

Among her many accomplishments, Constance Slaughter-Harvey is a past president of the Magnolia Bar Association, a current president of Scott County Bar Association, a 1999 Mississippi Bar Foundation fellow, and vice-chair of the Mississippi Supreme Court Gender Task Force. She is also a member of the Eighth Judicial Circuit, District 14.

And we don't have a bio for Mr. Goodwille Pierre. All I can say about him is that he's a fellow Houstonian. I've known him in many different circumstances and I can speak highly of him and glad he's here.

We will follow the same procedure this afternoon as we did this morning. We're going to ask each of the panelists to make a statement and then I will ask our commissioners if they have any questions to pose. So let's begin with Meredith Bell.

MS. BELL PLATTS: Thank you very much for allowing me to come and speak to you this afternoon about the continuing need for Section 5 of the Voting Rights Act. Mr. Gray, I have to tell you that I am truly a case baby. Both my parents went to school there and saw the first year of my life drooling on my father's law books, so I think a little bit of osmosis might come into play today.

I joined the ACLU Voting Rights Project which has brought over 300 voting rights lawsuits since the last re-authorization in the fall of 2001. And a large portion of my earliest responsibilities included monitoring redistricting efforts throughout the country, particularly in South Carolina and in Georgia.

In the interest of brevity today, I will address matters dealing with voter intimidation and willful attempts to restrict black political matters -- black political power in South Carolina. However, I just as easily have given examples and provide more examples from Georgia and the other states that I have looked at.

I also wish to focus on matters that did not lead to litigation, emphasize that one benefit of Section 5 has been the deterrent effect and mediation against changes that would have an immediate and lasting impact on black voting strength.

One can easily imagine what the delay and expense additional lawsuits would mean to communities that are already under-served and with so few resources. These examples demonstrate that much work still remains to be done in the counties, towns, cities, school boards and other localities throughout the so-named New South.

New South. In almost every community I visited since moving to Atlanta, the self-proclaimed capital of the New South, I've been educated on how much progress has been made in race relations. We've all heard of the great changes, the quiet revolution that has taken place in minority representation due to the Voting Rights Act. I have also observed, however, how much work remains and how discriminatory tactics may be less overt, but no less palpable today.

South Carolina found itself at the center of the clash of the New South mantras and the old Confederate history during a heated debate and boycott over the display of the Confederate flag on the State Capitol.

The conditions of blacks in South Carolina, however, remain disturbingly worse than those of their white neighbors. In every socioeconomic indicator reported in the 2000 census, every single one, blacks lagged far behind their white counterparts. The median income for a black family is slightly greater than one-half that of a white family.

And 26.4 percent of blacks live below the poverty level compared to 8.3 percent of whites.

Furthermore, as was reported by our experts in the case of Colleton versus McConnell, which was a three-judge panel, they have reached an impasse over the redistricting of South Carolina and so we were in federal court under malapportionate grounds to get them to redistrict their legislative and congressional districts.

Our expert, Dr. John Ruth found that South Carolina elections are marked by high levels of racial polarization. Black voters are very cohesive and white voters almost always voted blocks in opposition to black candidate choices.

Furthermore, black voters are rarely able to elect their candidates of choice in majority-white districts. In the face of such evidence, legislative Democrats led by then Governor Jim Hodges argued that black percentages in majority-black senatorial districts could be reduced in order to ward off further electoral failures for the Democratic party in senatorial elections, a position that was specifically rejected by this three-judge court.

Furthermore, during the trial it was reported that a collection of citizens in Lexington County, South Carolina, which is slightly outside the City of Columbia, informed one of their Republican representatives that they didn't want any, and they used a racial epithet, the "n" word, on the Lexington County delegation, referring specifically to a plan that had drawn a black representative into portions of Lexington County.

Our expert found that no black candidate of choice of black voters was elected in contested general elections to the general assembly from a district that was less than 43 percent non-white.

Indeed, South Carolina's Republic Governor Mark Sanford was asked in May of this year about the prospect of blacks winning a statewide office in South Carolina. He responded, quote: I don't think there never will be; end quote.

This was said with the recognition that South Carolina has one of the highest percentages of black population in the nation at just less than one-third of all residents. It is in this such new southern climate that I will discuss two compelling cases, one in Sumter County, South Carolina, and the other in Greenville County, South Carolina.

The City of Sumter, South Carolina's website greets visitors with the following: Welcome to the City of Sumter. Nestled in the heart of South Carolina, Sumter offers the best tradition of both the Old South and the New. It's a community where neighbors still greet each other from shaded front porches, high tech industries rise alongside the cotton fields and the iced tea is served sweet, which I appreciate.

I have a very different opinion, however, of Sumter during the last redistricting efforts for its County Council. Sumter County is 46.7 percent black. 12.3 percent of its black residents are

unemployed, which is about four times that of whites, and a quarter of the households are below the poverty level.

Again, the median income for blacks is about half of what it is for whites.

Sumter has other disturbing traditions; namely, a history of Section 5 objections and intentional retrogression. In 1984, the District Court for the District of Columbia denied pre-clearance to a proposal to adopt an at-large method of electoral representatives to the County Council.

It found that Sumter County had failed to carry their burden of proving that the legislative did not pass their Redistricting Act in 1967 for a racially discriminatory purpose at the insistence of the white majority in Sumter County because the at-large method of voting may have diluted the value of an increasingly -- increasing voting strength for the black community.

It may have prevented the formation of a black majority senate district, and probably prevented apportionment -- prevented appointment, I'm sorry, by the Governor of blacks to the Sumter County Council. Sumter today remains a seven-person board now elected from single member districts, however.

In 1992, DOJ entered another objection to the redistricting efforts and I monitored the 2000 round of redistricting for the County Council. Either due to slightly greater increase in black population relative to white population and/or to the fact that housing remains highly segregated in Sumter County, the benchmark found in the 2000 census data show that Sumter had gained an additional majority-black district on County Council, increasing the number of majority-black districts from three to five.

In other words, there would be more majority-black districts on a seven-member plan than there would have been before.

Furthermore, there were partisan problems since the three black districts were represented by black Democrats and then the four districts that were majority-white previously were represented by white Republicans. District 7, the newly emerged majority-black district, had a black voting age population percentage of 58.6, and was almost at perfect population, meaning there was no need whatsoever to tinker with that district at all. At the outset of the redistricting efforts, white council members stated that they were going to create a plan that only contained three majority-black districts, three majority-white districts, and one, quote, even district.

The Department of Justice denied
pre-clearance, and previously I sent copies of that letter to the Commission. I have extra copies if you did not receive them and I'll provide them afterwards.

Following DOJ's denial, politics on County Council became tense. County elections were fast approaching and the current plan was
mal-apportioned.

County Councilman Rudy Singleton advocated that the Council take their position to the Supreme Court, challenging the constitutionality section by application here, claiming that the Constitution states: The majority will rule.

The sentiment was reiterated at council meeting I attended in 2003 when the council decided to consider redistricting yet again. The County offered up compromises claiming that black voters who are majority of District 7 should be content with a minor variation on the County's already original three-three-one plan, the one I was describing earlier where you had

three majority-white districts, three majority-black districts, and one, quote/unquote, even district.

County Councilman Burr refused to vote for any plan that included in the four majority-black districts. More than a dozen proposals were reviewed by the community and County Council. Robbie Evans, the editor of the local newspaper, said, quote: The very fact that voting rights must be determined by race is inherently an insult to every Sumter resident who queues up at a polling place each November.

What it states bluntly is that 200 years after Abraham Lincoln, we, blacks and whites, still are unable to see past the color of a candidate's skin, unquote.

Following the Council's refusal to allow certain black citizens to speak during public comments, two black citizens from District 7 showed up at the next council meeting holding a sign saying, quote: Don't reduce the black vote. Chaos resulted with certain council members just getting up and leaving. A Sumter County resident yelled at council, quote: I didn't even know the NAACP was going to run it; meaning the meeting.

Councilman Burr tried to have the citizens forcibly removed from the chambers. Councilwoman, now Chairwoman Sanders, stated: They can remain.

Sumter County Council finally approved a plan that preserved District 7 at the majority-black district, and the DOJ granted pre-clearance. Sumter County now has four black council members and the representative for District 7, you might ask? The gentleman who fought so hard to speak to County Council, who carried protest signs into the Council meeting, is now known as Councilman Eugene Baker, representative for District 7.

And in the interest of time, I'm going to skip my Greenville example, but I can provide written remarks so that you can read that.

CHAIRMAN DAVIDSON: Good. Thank you very much.

[Applause]

Dr. Brown.

DR. BROWN: Yes. I want to thank the Leadership Conference on Civil Rights and the Commission for the opportunity to speak here today.

President Keenan reminded us earlier this morning of the central role of Bloody Sunday in the 1965 Civil Rights Bill. I vividly remember spending an afternoon with Reverend James Reed just before he went to Selma to be assassinated, and so I speak here today for him and for all of those who are no longer alive and gave their lives so that we could be able to vote freely today.

I believe the extension effort needs not only to look at continuing the current bill, but also to add areas to it and I want to give Miami-Dade County as an example of one that should be considered in this light.

Few locations have been identified in the national conscience with voter rights obstructions as Miami-Dade County, Florida. The travesty of the 2000 election, the debacle of the 2002 primary and the immense effort on the part of white strong organizations in the 2004 election is overwhelming.

The 2000 election resulted in hearings of the U.S. Commission on Civil Rights in Miami, a consent decree entered into with the U.S. Justice Department by the county and a suit by the

AACP and supporting organizations against Miami-Dade County, which also resulted in a consent decree.

Since that time, a new threat to black voting empowerment has occurred. In the 1990s, a voting right suit was filed in federal court and a court decision rendered and upheld by the Eleventh Circuit, that declared that the at-large elections to the Miami-Dade County Commission deprived minority voters of their right to representation.

Now, there is a referendum to go before the voters to amend the County charter, to remove the executive powers of that Commission and give them to the County Mayor.

A simpler example of the impact will suffice. There are over 100 advisory boards and committees in Miami-Dade County, ranging from the community relations board to the hospital trust. The Mayor would be the sole selector of all these positions. This removes the ability of the current four black out of 13 total commissioners to ensure that their constituents have a voice.

Currently, their efforts to adjust the Commission numbers and boundaries to enable Haitian-American and non-Cuban Hispanic representation, but the strong Mayor would greatly dilute their impact. As the County Manager would then become essentially a staff assistant to the Mayor no longer reporting to the commissioners and the Mayor, rather than the County Manager, would have the power to hire, supervise and remove all department heads.

To understand how the situation came about, a little history is necessary. Through much of its life Miami-Dade County was predominantly an old south area despite the presence of tourism. Segregation was law and custom. The Ku Klux Klan rose to discourage black voting, including a major effort as late as 1939.

With this background, one might wonder why it did not meet the criteria for inclusion of Section 5 of the Voting Rights Act in the first place. In the years following World War II, Miami boomed with persons moving to Miami, many of whom served part of the war there. Tourism expanded and the middle class grew more affluent.

With the rise of the 1960 Civil Rights Movement, Miami powers-to-be decided that if it followed the example of the Birminghams to the south, their growing tourism industry could be greatly damaged.

As a result, the Community Relations Board was established and desegregation tokenism was quickly agreed to, although not without a few bumps and disruptions. The civil eruptions in the black communities of Miami came in the 1980s, much later than other areas. However, the Anglo hegemony that ruled Miami in the '50s and '60s is gone.

The Cuban refugees began arriving in the 1960s and after a hiatus in the '70s, exploded again in the '80s and continues to this day. More recently the immigration of non-Cuban Hispanics has increased. Today the approximate population is 40 percent Cuban-Americans and the remainder divided approximately equally between non-Cuban Hispanics, blacks and Anglos.

The black population has shifted and now has large Caribbean components from both Haiti and English-speaking islands.

When the City of Miami district was filed, Anglos still had a controlling vote. Now, there are two Anglos, four black, and seven Cuban commissioners. Both of the mayors elected under the current executive mayor system have been Cuban-Americans. The residential

segregation of Miami is such that the western half of the county is heavily Hispanic and tends to vote Republican, while the black population is primarily in the eastern part.

Highlights of the consent decrees following the previous election are constructive. The county agreed to an equitable distribution of laptop computers amongst polling place. This arose because telephone access to check on registrations so individuals could be directed to correct polling places was essentially non-functional in the black areas, while in the Hispanic-dominated western areas, every precinct had a laptop computer with immediate access.

Another agreement stated that duly qualified officials would be stationed at the end of the line at poll closing time so that every voter would be given the opportunity to vote who was already in line.

The closure of polling places in 2000 arbitrarily eliminated persons who'd been in line prior to closing. This took place predominantly in black precincts as with the increase of registrants and turnouts brought members of the election department was unprepared to handle, the lack of laptops, again, and computers.

In Hispanic areas, they did prepare for the increase due to persons becoming citizens, but not in the black areas. The problem was exacerbated in the Haitian areas because of the failure to provide assistance in Creole and the prevention of persons taking someone into the polling place to assist them.

The election department also agreed not to place signs stating that a photo ID was required to vote, and again, as we've seen elsewhere, photo IDs are less frequent in low-income black areas and Miami is noted as one of the poorest cities in the country.

An outreach in education effort was also agreed to and in 2004, did take place. However, it was not done fully in the manner I believe the consent decree called for; namely, a specific effort involving the NAACP named in the decree and others to request specific input as per the decree and to any proposed changes.

Also not fully carried out in our opinion were the efforts to contact persons who filed incomplete registration forms and those who have been wrongly removed from the voting lists by the state in 2000 under the rules of removing
ex-felons.

These examples clearly indicate the differential treatment of black voters by Miami-Dade County election operations. The consent decree ends May 15, 2005. The consent decree with the Justice Department was based on allegations that Creole-speaking voters at several precincts were denied assistance from persons of their choice, and oftentimes the poll workers providing assistance did not speak Haitian Creole.

Initial concern in the termination of this agreement, which ends on December 31, 2005, is the spreading and increasing Haitian population and the increasing number of precincts becoming Haitian precincts. Of course, it was recognized that consent decrees make no stipulation of guilt.

Since 2000, the Miami Election Reform Coalition was founded and it concludes the NAACP and it continues to work today. The 2000 primary was a debacle as the new machines failed and the County Manager and the County Commission under pressure from citizens took the authority away from the Department of Elections and put the County Manager in charge.

America is very much involved in that effort. In addition, there was a significant election protection effort carried out on Election Day by the NAACP and People for the American Way. The County Manager then removed the Director of Elections and hired a replacement approved by the County Commission.

In the 2004 election, there was a massive election protection effort. Teams of lawyers were poised to act immediately on any violations. The Justice Department was also in town to monitor their consent decree. As a result, things generally went smoothly on Election Day, but there were issues in early voting.

Early voting resulted in extremely long lines and these seemed to be worse in black areas, so precise data are not available.

In one early voting site in a predominantly Haitian area, spurious challenges were made concerning persons giving assistance to voters, and held up voting so long that numerous persons left before voting. The Justice Department intervened and resolved this issue and the problem did not reoccur.

Nevertheless, there were enough issues that the County Manager has since removed that Director of the Elections Department and replaced her with, again, with the approval of the County Commission.

It should be noted that in most Florida counties, the Supervisor of Elections is an elected official, but in Miami, a single member district commission assures that the department director can be held to be responsible to all areas.

But in the future the Miami Election Reform Commission has been successful, but how long rely strictly on citizen volunteers. The tremendous election protection effort in Miami with volunteers coming in from all over the country, especially lawyers, is certainly not sustainable given country-wide demands.

Now, the county is faced with a referendum that will destroy the executive power of the County Commission. History has shown that left alone as it was in 2000, the Election Department will concentrate on the majority, now predominantly Hispanic Cuban areas, to the detriment of minority-black voting precincts, particularly Haitian precincts.

The results have shown that thanks to the presence of single member districts and the power of the four black commissioners, this emphasis can be shifted to better perform minority efforts when there's enough citizen pressure and continual vigilance.

Our citizens would be even more effective if the Justice Department were an ongoing presence. This would occur if Miami-Dade was added in counties covered under the extension of the expiring provisions of the Voting Rights Act.

We in the Miami-Dade NAACP believe that if we were currently covered by pre-clearance, the obvious removing of black voting power provided by the single member districts would compel that the Justice Department intervene. In the worst case scenario, if the referendum passes, there would even be more need for the Justice Department to pre-clear future changes.

Having the mayor elected countywide for black focus, a distinct minority would remove any significant influences of black votes. The polarized voting in the first executive mayor's race where a strong black candidate who was a Republican was defeated by a solid Cuban vote, which normally votes Republican, supports this.

In addition, with our current executive Mayor, the NAACP still has not been able to achieve a meeting. A new strong mayor with not all the checks and balances of the Commission is just a county executive mayor, and the new mayor would hire and fire and supervise the director of the Election Department.

Human nature and history makes it obvious over time that the emphasis of the Election Department would be in providing efficient services to the majority and not in protecting the rights of black voters. And that is exactly why the voting rights bill was put into power in the first place. Thank you.

[Applause]

CHAIRMAN DAVIDSON: Mr. Mitchell.

MR. MITCHELL: Thank you very much. Mr. Chairman. I'd like to thank the Lawyers Committee for Civil Rights Under the Law and this illustrious Commission for taking the time to deal with so important a subject at these incredible times in terms of voting power.

My name again is Reginald Mitchell and I'm a former Florida Election Protection Director of the People for the American Way and the People for the American Way Foundation.

I was introduced to election protection in a non-partisan effort to make sure all persons can vote in the 2002 elections as a volunteer. I then came on board with People for the American Way in 2004, and on a daily basis saw in the State of Florida all efforts and all challenges to voting in the State of Florida.

You would think that we should not have to talk about such an important subject in light of the 2000 and the 2004 elections. But we're constantly reminded every day in doing election reform or election protection, election reform after the November elections and everyday efforts to make sure citizens can vote, that the Voting Rights Act is a very important and integral part of voting for all citizens in this country, and particularly in Florida.

The VRA is an important symbol of the inclusiveness of the right to vote.

I'm reminded on a regular basis, we get the Internet e-mail of the urban legend which says that we will lose our right to vote in 2007, and as false as that statement is, and as many both Congressmen and Senators and groups have gone to great lengths to try and dispel that myth, I'm reminded as a former adjunct professor and a person who studied the Constitution that, you know, the 15th Amendment was voted upon a long time ago in the 1890s and there were a lot efforts despite the plain language of the 15th Amendment that says we have the right to vote, there were great lengths taken in times when it was very open and very clear, racial discrimination was being tolerated to prevent people from having the right to vote.

So sometimes I do believe, even though I suggested that statement as false, the premise of it has some merit to it.

The right to vote is a federal right that should be zealously guarded, but as we were reminded on the floor that sometimes that right is based on a state privilege, and many times the Voting Rights Act prevents very obstructive efforts of very specific acts that still where we see there are constant measures taken on a regular basis to prevent the right to vote and sometimes turning it into a privilege that's not yet always honored.

Florida Secretary of State Glenda Hood, who is the Secretary of State that reports to the Governor, constantly makes the claim that, despite my learning in law school that the right to vote is a right to vote, is a fundamental right, one that orders liberty could not exist without the

right to have, she reminds us that it's a privilege in each state and sometimes that privilege can be taken away, and it is often taken away in the State of Florida, and it should not be granted based on a lot of contributing factors.

Some of those contributing factors that take away this right to vote can be race, the past commission of a felony, the neighborhood that one lives in, a person's economic class, the economic state of the county that they live in, the language they speak and their understanding of technology.

So to elucidate further, just as my wife generally urges me on today, our 15th anniversary, of the need to recommit to that sacred institution and to commit to our family, that we need to renew our vows and recommit to everything that we do. I'm reminded to the time that we need to recommit to the Voting Rights Act and not only just add further foundation to it as she urges me to do with our wedding rings, to talk about some of the things that need to be included in the Voting Rights Act. I'll talk about that briefly.

I would like to urge this Commission, thank you, to urge Congress to renew its commitment to the Voting Rights Act and to the minority voters it was intended to protect. I would urge the continued Section 5 pre-clearance of voting plans. I would continue to urge Section 2 of the requirements of language materials that we see very clearly in the State of Florida and we've had, you know, very recent incidents with the language materials in the State of Florida that I'll talk about briefly.

Continued Section 69 provisions for federal poll monitors that have been very instrumental in election protection in the State of Florida, and the urging of more carrots to protect race neutral obstacles that are not covered in the Voting Rights Act, but seemingly have a desperate impact on minorities in the State of Florida.

In terms of Section 5 pre-clearance, the general premises is that the minority voting strength should not be diluted.

Election protection that we worked in the primary, the general election, and we had public hearings in Orlando on January 27th, Jacksonville on February 1st, and Miami on February 3rd, time after time again we heard through incidents in election incident reporting systems that there were tremendous obstacles on racial lines and other factors to prevent the right to vote.

A lot of what we heard at those hearings with the Lawyers Committee, the NAACP, and People for the American Way and other groups, were some of the same things that we heard in many previous elections. Polling places are moved without prior notice; increased police presence at or near polling places.

I remember specifically in Jacksonville, Duval County, with Marcia Johnson Blanco connected to my hip, that all of a sudden it was amazing how in a number two African-American precinct, all of a sudden on Election Day there is this urge to pass out tickets and to have increased police presence at the voting places.

When asked -- we met at several meetings at the sheriff's office and the highway patrol, we were always assured that it was either -- obviously had nothing to do with race, but that there were other explanations for why this needed to occur, such as stop running a red light, traffic day, national holiday, or some other explanations. And so we constantly had to meet with law enforcement officers to make sure that this didn't pose an incidence of intimidation.

And also with the incidents of prevention of terror at schools where many of our polling places are located. There was an urge -- even though state law requires you to be back 50 feet from the polling place to pass out election protection materials, and under the guise of protecting children, election protection folks were sent hundreds of yards away from the polling places.

And so that generally has nothing covered and dealt with, but we were able to reach tacit agreements with law enforcement officials and school officials on this issue. But that needs to be looked at carefully to protect the First Amendment right to simply pass out materials that if some voters were not to receive.

Sometimes language materials are not made available, people's understanding of their right as a voter, what ID requirements are provided since ID requirements was very disseminatorily enforced in Florida, those became a problem in election protection and other folks need to be able to get to the polling places to inform voters of their rights.

But other general things like voter intimidation, redistricting in Florida is a major issue that's coming up on our November 2006 ballot issue. There is a committee for fair elections that proposes to say that districts should not be drawn based on furthering the position of incumbents.

And everybody agrees that no one party should have the power to just perpetuate itself forever, that the voters ought to have the right to vote. Even though the People for the American Way likes to do things in a non-partisan fashion and to promote opportunities for voters to have as much access as possible, there is concern that redistricting plans does not dilute current minority voting strength in Florida.

And so when talking with folks that represent the Committee for Fair Elections, they talk about redistricting in Florida that may or may not be a good idea. When asked how can they ensure that voters' minority strength is not diluted, they simply say: We will comply with current federal law, which includes the Voting Rights Act.

So those preventions are not there, that case level is away and it's important that those provisions be retained.

In terms of felon restoration, as you probably heard, I saw Courtenay Strickland and other folks representing the Florida Felon Rights Restoration Coalition, probably spoke at length to you.

It is a problem of felon restoration, of folks having their right to vote being restored. We saw in 2004 -- excuse me. In 2004, there was a conscious effort to, along racial lines -- well, I should say ethnic lines, to continue a suspect felon list that had many African-Americans that were included on the list, but to exclude Hispanic-Americans on the voting list who were also guilty of a felony.

It's almost -- as terrible as that was, the suspect felon list was thrown out because it was clearly -- went along racial and ethnic lines, but it has brought new attention to the problem of felons not having their right to vote restored.

In Florida we have a tremendous problem with clemency. Of the 50,000 felons that do not have the right to vote, about 80 percent of 40,000 still cannot continue to vote and there's all kinds of backlogs, and I'll send written materials on the statistics related to that. But that's a problem with folks having their rights restored and we know this traces back to the 1800s when African-Americans -- attempts were made to keep African-Americans from voting.

So lastly, language assistance materials. The People for the American Way supports under-represented groups, African-Americans, Hispanic- Americans, and Afro-Caribbean Americans to have language materials. And to the credit of the Justice Department, they have been great enforcement in this area of making sure that poll monitors are not using racist tactics to keep Hispanics from voting and other minorities from voting.

But the Voting Rights Act, however, does not include Creole, and we saw with the growing Creole population in Florida that that language either ought to be added to the Voting Rights Act or just provisions for any type of languages of minorities that enter this country where they are provided the language materials for Creole-Americans and other Americans.

In Dade County they have passed an ordinance to provide for that, but it does not include other counties, such as Broward County, Palm Beach County, Orange County, which has a large Haitian population, and since that's not covered under the Act, we have talked to as many of these counties to pass an ordinance just to say it, but it ought to be included in the Voting Rights Act.

And finally, poll monitors. I cannot overemphasize the tremendous help we've had from poll monitors in enforcing all of this, but that continues to be included. Many of the dirty tricks and the police presence we were able to nip in the bud through the assistance of poll monitors in Florida. I see my time has passed and so I'll be happy to answer any other questions about this issue. Thank you, Mr. Mitchell.

[Applause]

CHAIRMAN DAVIDSON: Ms. Slaughter-Harvey.

MS. SLAUGHTER-HARVEY: Mr. Chairman and Commissioners.

CHAIRMAN DAVIDSON: Could you bring that up just a little bit closer, please, for the court reporter there.

MS. SLAUGHTER-HARVEY: Is that better?

Well, first of all, I thank you for taking the time to share with us this commitment and your interest in areas that have occupied most of my life. I was introduced to problems in voting when I was in the eighth grade. I was cleaning out my father's wallet, without his permission, of course, and came across a poll tax receipt, and it bothered me.

I have the poll tax receipt in my office now and it's been with me since I graduated from law school in 1970. Everytime I look at that receipt it reminds me that I have work that still needs to be done.

I am really concerned and I have prepared a lot of materials, none of which I'll touch. I'm really concerned that we are involved in a very serious, serious survival game, and at my age, I have decided that I'm going to leave it to the younger man to come up with the means of responding to what I perceive as an attack on the sanctity of the ballot.

I started out practicing law with the lawyers committed to Civil Rights Under Law in 1970 and I inherited Conner versus Johnson. I left the lawyers committee in 1972 because I had some real serious problems with my own identity and what I could do to change our environment.

I entered the practice of law at home in Forest, Mississippi, and stayed there for almost eight years, and then I got an opportunity to work with legal services. I worked there and then

got an opportunity to go to the Governor's office. I went there and each step I took, I became more disillusioned with meaningful participation in the democratic process.

I took a dare and accepted a challenge and became Assistant Secretary of State for Elections in 1984. And I prayed that I could make a difference and be true to Medgar Evers, who was one of my heroes, and try to make certain that I could do something individually that would give some credence and some support to all of us being citizens. I was, again, very supportive.

Legislation was hard to get through it and every case that we won, Marvin versus Elaine, and everybody suing Elaine and Henry Kirksey coming in doing what he could do, everything was -- nothing was really making a difference until we got an opportunity to be involved in judicial redistricting in Mississippi and we now have 25 African-American judges, and that to me was really the start of a real revolution. And I noticed that one of my heroes, Mr. Gray, this morning said that Alabama had the largest number of black elected officials.

Now, I've never disagreed with anything he said, but today Mississippi has the largest number of black elected officials.

MR. GRAY: I stand corrected.

MS. SLAUGHTER-HARVEY: I think he's right when it comes to legislators. You all have more than we do. But I say that to say that I started off practicing law and trying to bring about changes. That didn't work. And I went to the political process and as Assistant Secretary of State, we made some changes in the policy. We eliminated dual registration.

We made some changes and I felt pretty good about that to the point that I returned home to practice law in 1997. I am probably more disturbed now than I've ever been in my life as to what's happened. There's an effort now to change all election laws in the State of Mississippi in a very subtle way. There's a serious attack on the present judicial structure that we have. People are looking very seriously at redistricting certain judicial areas.

And I am the type of individual who never gives up. But at this point in time, I'm going to pass the baton on to young people so that they can come up with some suggestions as to how we best can preserve the victories that we put in our column of accomplishments in life.

I was asked to read several statements, and I'm not going to read those statements. I'm going to make copies and provide those to you for the President of the Magnolia Bar Association, J. Rupert Hill, Henry J. Kirksey, the man that I consider to be Mr. Voting Rights in Mississippi, Carol Rhodes, who is one of the renowned attorneys in the area of voting rights, Ellis Turner as well.

I ask you to use all of your influence and call on people who owe you across the aisle and ask them to re-authorize the Voting Rights Act. But also appeal to their spirit and ask them to do what is right.

And I applaud each of you. I checked your background because I did not talk to people who were just here. All of you gentlemen and the ladies who are not here have a record that you do care, and with that kind of commitment, I feel confident that we can make a difference, and that the Voting Rights Act will be re-authorized.

But I'm concerned about pre-clearance from an administration right now that bothers me. There's too much of a good-old-boy relationship between the Mississippi Gubernatorial Office and the Presidential White House.

I'm genuinely concerned about that, and to ask you to ask them to re-authorize the section that deals with pre-clearance, I'm not really that comfortable that someone who's now in a position to oversee the states, particularly the State of Mississippi. I'm not really comfortable that the fox can accurately and honestly guard the chicken house. So I'm in a dilemma.

But I do pray that we will do what's right and I know that with your leadership and with the leadership of the Lawyers Committee, that things will have to get better. I appreciate it.

[Applause]

CHAIRMAN DAVIDSON: Thank you very much.

Mr. Pierre.

MR. PIERRE: Good afternoon. My name is J. Goodwille Pierre and I'm honored to be not only here, but on the panel with such wonderful, esteemed and very intelligent people. I want to echo once again the sentiments of all my fellow panelists, thanking the Lawyers Committee on Civil Rights and the Law, National Commission, on the Voting Rights Act as well as every one of you for taking the time out of your busy schedule and also for your continuing fight and quality of law.

When I think about working with each of you directly, Mr. Gray, John and Ms. Davis on different things not knowing how -- not knowing we will come to this particular point and never think about, I think about the collective collaboration of many, many different things that I've done over the past two years, and it's amazing how it comes to this particular point where you have to recall collectively all the things that you have seen and witnessed.

Briefly, I'm a licensed attorney, licensed with the State Bar of Texas, Southern District of Texas, and United States Patent Trademark Office. I am currently president of the Houston Black Lawyers Association. I'm Chair of the African- American Lawyers Section of the State Bar of Texas, and as of last Monday or Tuesday, I'm the director of Region 5 of the National Bar Association which composes -- consists of the regions of Texas, Louisiana and Mississippi.

I have worked as district director for the Honorable Congresswoman, Sheila Jackson Lee; deputy director for the Texas People for the American Way and People for the American Way Foundation. Also in that capacity, director for the Texas vote -- part of the right-to-vote program and coordinated the State of Texas election protection project 2004 where during that time we educated over 300 lawyers in the State of Texas on election law and election protection.

I was reminded prior to the start of this by my esteemed colleague, Ms. Harvey, of how young I am, how very young I am in the practice of law. And, you know, whereas I gladly accept that, I've done a lot, but it's quite disturbing that in 2005 all the things that we've attained that we are sitting debating on reorganization of the Voting Rights Act.

When I do public speaking and talk to young people, I often say that you should -- we should -- you should stand on the shoulders of your predecessors. And what I mean by that is for you to stand taller on the foundation that they've established and retire, and as you retire, everyone grows.

But it seems that we are constantly falling off those shoulders to fight those same fights that our foundation of those who have laid the paths has fought and it's quite disturbing. It's continually disturbing.

And in the very short time, I've experienced quite a few things all connected and I'm just going to communicate just a number of examples to you and then I'll be available, of course, for questioning and also to present anything that I've stated in writing.

In my capacity of service with the National Bar Association and the affiliate chapters, and I do want to thank the National Bar Association, again, for providing this day and for responding to the clarion call of Barbara Arnwine.

It's always been a concern for me that the lawyers, especially African-American lawyers, are not so much -- are too in tune of what goes on around them, and with the aid and collaborative effort of the Lawyers Committee on Civil Rights and the leadership of the National Bar Association, we are changing that, and I'm excited to be a part of that change.

But in my capacity in Texas, I've been the person who most people call for answers, and most of the time I don't know and I'm so glad that I can pick up the phone and get the answers to some of those election law questions.

But I have had the experience of seeing certain things through my life over the past three years that have been quite disturbing and it should be evidence enough that the Voting Rights Act, including Section 5 pre-clearance should not be disturbed. If anything, they should be tightened and enforced even more.

I want to start off, my term and my tenure with Congresswoman Sheila Jackson Lee close to the end of that tenure in 19 -- excuse me, 2003, I've dealt a lot with redistricting as it was reported by the panel and in that process in Texas it's unique because the impetus for redistricting comes from Congressman Tom DeLay who is in Texas.

And although it happens that election protection as stated by Reginald so eloquently is supposed to be non-partisan, a lot of the acts of the redistricting was created so that it could extend to a particular type of political party and, therefore, it could maintain power.

And so from that, and then my springboard to working with People for the American Way, I was immediately thrust into an incident in which was very disturbing and which from that and getting the phone call from students, I immediately communicated counsel, not only with People for the American Way, but also with Lawyers Committee on Civil Rights, and it's through that working with John Greenbaum and Lawyers Committee on Civil Rights and People for the American Way we found ourselves having to fight a fight that's been decided many times over, and that is where students have a right to vote on their college campuses where they have residence.

The District Attorney of Waller County, Oliver Kitzman, felt that he had to legislate policy from his position, insinuating that students who are at a predominantly black college, A&M University, did not have the right to vote because they were actually residents of their hometown. He also articulated, also in writing, has published on several occasions that most of the students were being misled by those individuals wishing to win their vote by providing them with CDs, barbecue sandwiches and other trinkets so that they could be misled to vote in a particular way and as a result, that they could not be trusted in voting. And if anyone should register to vote and actually vote, they would be duly arrested.

With that charge, the Lawyers Committee on Civil Rights and the Law immediately descended upon the State of Texas and Houston to assist with a lot of other civil rights activists to, not only march, but also file a lawsuit against the District Attorney of Waller County, Waller County, on behalf of the National Association for the Advancement of Colored People on the campus of Texas University, and won the lawsuit in the end through settlement and through the efforts of also Weil Gotshal.

But my concern with that is, one, it took a very, very long time for individuals in Waller to realize their error, if they ever did realize it. And, two, the fact that we had to call on so much power to do something which fundamentally is right.

And that is protecting the right of students to vote on college campuses. It was so disheartening being a lawyer practicing brand new, 39 years old, to still see this. Because it's such a distraction when there's so many other things going on.

If that wasn't bad enough, I was Director of Election Protection in 2004 and in my association with the minority bar counsels in the state as well as in the City of Houston and the other cities, including San Antonio and Dallas, I also had to mobilize the non-lawyers to be poll watchers and monitors, and I did this alongside with Houston Urban League and other people, so I was like the center of the wheel of the coordination effort for a lot of different things.

And while we were doing this for -- because we haven't gotten to Election Day yet, there was an incident occurred by one of -- a young gentleman who was empowered with helping register younger individuals to vote through Rock the Boat and it was a particular incident in October in Beaumont, Jefferson County, where he was -- and along with Rock the Boat, was doing a concert to register people to vote.

The election secretary was there. A lot of dignitaries were there to register to vote and what they normally do and did after it was over was take all the registrations that he received to bring them back to Houston so he could -- so that they could coordinate and tally the database and then send it in.

In the State of Texas, especially between Beaumont and Houston, the counties are so -- Jefferson County and Harris County are so close that they do have a relationship with each other that you can coordinate registration.

So it's not like a far out county where you have to submit it right there. They will accept Jefferson County registrations and then pass them onto Harris -- in Harris County pass them onto Jefferson County.

Well, the secretary, as he was leaving told Reginald Barclay, who was coordinating these efforts, that he could not leave with the voter registrations that were filled out and he communicated to him that, you know, he could and this is what he would normally do and he proceeded to get in his car. And she called the sheriff.

Then what happened was that while driving, Reginald, along with three other young ladies, all under the age, I believe, of 24, were pulled over by three Jefferson County Sheriff's vehicles, handcuffed to the steering wheel.

First they were taken out, frisked, handcuffed to the steering wheel, and then their voter registrations were removed from the trunk and they sat there on the highway for about three hours. I immediately received from the vice president of the Houston Urban League as I normally do, saying: What's happening? What's going on?

Got on the phone with several other people, Gary Bledsoe, the state NAACP director, Melanie, I can't think of her last name, out of D.C. --

MS. ARNWINE: Melanie Campbell.

MR. PIERRE: Melanie Campbell, yes. Claude Foster with the NAACP National Voters, and we were on a five-way phone call trying to see if we could resolve this while at times talking with Reginald. They allowed him to use the phone.

Well, actually he couldn't, but a young lady was on the phone. Reginald put her on the phone and they just did this to Reginald and, mind you, they did not handcuff or accost the women. They just did this, directed to the only black man in the vehicle.

To make a long story short for time, we had to call on -- of course, I called my former boss, Sheila Jackson Lee. She made a phone call. But Nick Lansing actually called. He was Congressman at the time prior to redistricting and because of relation they had, he ordered, demanded that they release him.

They released him actually with no apology, but just a threat, saying to him: Go straight --and they kept the registration cards, the registration material. Of course, they were very, very nervous. That incident rattled him. It was the first time that those individuals have experienced anything like that. They were very mean. They were not treated very well and it really put a negative image on the whole process in their mind.

The last thing I want to talk to you about is -- there's just a couple of things in my experience with Election Protection 2004, and also as pertains to my position: Unlock your Vote. Unlock your Vote, and Honorable Gray will attest to this, and his dealings with them was a process just like in Florida to give, alert formerly incarcerated persons and let them know they had a right to vote in Texas once they were off of probation or parole.

Well, in Texas, although they have the right, a bill to educate, mandatory education once it released, was vetoed by Perry, who came after Governor Bush, who's now our President.

And what this caused us to be on a mad scramble to make sure we alerted and reminded and educated not only those individuals who were formerly incarcerated, but individuals in the county because county officials did not know, even though they were officials responsible for the manning or doing an election or registering, did not know that former incarcerated people had the right to vote in Texas.

I always tell myself there's no way that people could not know. There is no way that people could not know. And I was reminded on a regular basis that I had to educate from lawyers to judges that they had the right to vote. And there were incidents in many different counties where so many formerly incarcerated persons were not allowed to vote.

I see my time is out and I'm allowing any questions you may have to continue. Thank you.

[Applause]

CHAIRMAN DAVIDSON: Thank you. We'll go down the line again like we did last time.

MR. GRAY: Mr. Chairman, I want to express my appreciation to the panel and I'm glad that our president-elect has come in and I know he is on the next panel.

The National Bar Association, as one of its past presidents, I've always been interested in voter registration. My becoming involved in the political aspect of NBA occurred when Arnette

Hubbard became the first female president and I was tending to my business in the lobby of the hotel. She came up, told me she wanted me to be one of the presidential assistants.

At that time we had a voice, but not a vote on the board and she asked me to come up with a voter registration plan so that we, as lawyers across the country, would be able to help to get people registered to vote. And we came up with such a plan.

So my question to you is, what do you believe that members of the National Bar Association can do in their respective states to assist in getting Congressional approval for the extension of these provisions of the Voting Rights Act specifically?

MR. PIERRE: Well, as you know, being the past National Chair, National President, the lifeblood of the National Bar Association is in its chapters. This is where, not only where the dues come from, but where the message of the National Bar Association in the man and woman power to advance its ideas are thrusted. Without the affiliates, you know, the NBA couldn't exist.

Now, it's incumbent upon the affiliate chapters, those who get their benefit of being part of the National Bar Association, to become more responsible in nurturing and coordinating their members around the state.

Not only members of the National Bar Association, but also to be aware of the current events that are going on. The reality of being a lawyer, a young lawyer, the reality is that dealing with life, with family, it's very difficult to multi-task on different things outside billable hours or trying to get paid. So the leaders step into a leadership role.

As an affiliate chapter president, I've taken on the responsibility, the burden, to make it my job to bring the information to my fellow attorneys in my area. That is my role. That is my job. If I can't do it, then I don't need to be president. And it's through the power of a coordinated voice of lawyers in the affiliate chapters in the region that strengthen that voice, echoing out to particular leaders to come meet.

And have the database of knowing -- the fact that I know that I have 1,258 licensed attorneys in the City of Houston; I have a database that I can shoot out e-mails to them at a press, and excuse me, Senator Kay Bell Hutchison, you don't want to talk to us? I think that is one way to do it.

What it is, you're building a relationship, you coordinate, and you make these attorneys feel closer. Without communication, they feel distant, and they feel distant. They don't feel attached and they don't feel like they're part of the solution.

CHAIRMAN DAVIDSON: Do you want to add to that?

MS. SLAUGHTER-HARVEY: Yes. We've already started the State of Mississippi through the National Bar Association. We have Republicans and Democrats who are members of our organization and we challenge them to be responsible for delivering both sides of the aisle.

In addition to political conversation, we are also viewing options in the legal world as to lawsuits. So we've already started to accept the challenge.

MR. MITCHELL: Just quickly. I think through the civil rights action and through the bully pulpit of the president himself, the motto last year the day before the 2004 elections was election protection straight from the President's office. You can't exactly mandate to attorneys to

do a certain thing, but I think it was unanimous consent that that was an important thing to do and through the affiliate chapters, through the civil rights law section of the National Bar Association, they came up with all kinds of plans to implement election protection and I see the same thing happening already.

This forum today is an example of that, and because of organizations like the Lawyers Committee for Civil Rights and the Law, People for the American Way, ACLU, NAACP Legal Defense Fund, all of those groups are members. You know, they have members who are actively part of those organizations and members of this organization. They can use the resources that they have on a day-to-day basis to implement good-working solutions to implement this.

MS. BELL PLATTS: I'd just like to add that lawyers wear many hats and I always consider us, you know, quasi-public servants. And while we might be lawyers, we're also church members. We're leaders in the community. It's on us to go out and educate people about the importance of this issue and bring that message from the ground all the way up to the halls of Congress.

And letter writing, you know, someone talked about that this morning, letter writing, phone calls, we can help people craft the message that reaches the people who are going to make these decisions and with so many affiliated offices of the NBA, there's a lot of work to be done, but I'm confident that it can be done.

CHAIRMAN DAVIDSON: Congressman?

CONGRESSMAN BUCHANAN: Mr. Chairman, I, too, want to join Mr. Gray welcome you and thank you for the contribution you've made to this hearing. Our job is to compile a record to provide Congress with the information they need and the records they need to determine whether those provisions from '82 forward and the situation from '82 forward would give us a reason to continue those provisions that do expire in 2007. I think you -- felt you made a very strong case in that regard.

Mr. Mitchell, as you may know, I'm a charter member for the chair of your organization. I want to express appreciation to you and your colleagues and the NAACP, ACLU, and the Lawyers Committee for what you have done in this area in the State of Florida. I think the effort has been outstanding.

And Commissioner Gray has rightly raised a question that I think -- it appears to be the case. It will take a maximum effort to continue the protections of voting rights in the years ahead and lawyers, as they have in the past, especially are going to be important and I'm sure you would agree.

Your wife sounds like mine as well. If nothing else in the world, I'm a women's rights activist. That's because I listened.

[Applause]

CONGRESSMAN BUCHANAN: I listened first to my mother, but then I married my wife and she made it abundantly clear what the evils are of sexist thinking and what the personal consequences are and my continuation in that process.

Anyway, I do thank you for your testimony and especially for what you do. I would just raise a question. Your organization has not, as I understand it, taken a position on the present Supreme Court nominee, per se, but has urged that his record and that of any such nominee be

very thoroughly searched and the Senate be very careful to look at anything that might impact questions like voting rights –

MR. MITCHELL: Exactly.

MR. BUCHANAN: -- in that record and I was thinking about he's going to be faced with questions in that area. Do you have any comments you want to make in that area, any of you?

MR. MITCHELL: Again, you know, I've been introduced to -- we have a very able person, the assistant dean, that's over the Supreme Court nominee effort by the -- I think, the National Bar Association also has taken the same position, the National Coalition for Fair and Independent Judiciary. And I think it's very critical that you not jump out there early and take criticisms against the person.

We understand the President has the right to make the nominee, but it's the constitutional job of the U.S. Senate to explore the record thoroughly and make sure that this person is ably qualified, not just in terms of qualifications and credentials, but in positions that they may take. And so we are encouraging folks to explore the full record and make a decision at the time of the judiciary hearings, when I guess this will start September 6th or so, around that time.

But there have been cases where they talk about restricting the Voting Rights Act that I hear of, and the positions taken as an Assistant Deputy Solicitor General and assistant to the President's office where the case is made like it was made previously, that, well, I was just -- you know, that wasn't necessarily my personal opinion. I was advocating for my client.

So we think it's important to explore the full record to get to the bottom of whether or not things like the Voting Rights Act and other federal acts will be the right of Congress and if necessary, proper clause can implement those kinds of federal acts and protect the rights of all Americans.

CONGRESSMAN BUCHANAN: Thank you.

Anybody else on that subject? The posture of the federal judiciary obviously is the other thing that has great weight on what happens in voting rights –

MR. MITCHELL: Absolutely.

CONGRESSMAN BUCHANAN: -- and I think Congress is going to have to do this job right to make sure that protection continues.

Thank you.

CHAIRMAN DAVIDSON: Governor.

GOVERNOR ROGERS: Thank you kindly, Mr. Chairman.

Meredith, I wanted to ask you a question in particular. You were focused in particular on South Carolina. We are not holding hearings in South Carolina, but your focus was to some extent on South Carolina and on Georgia. And you were talking about your experience in both areas and the contrast essentially that exists there.

We were just in Georgia two days ago. We were over in Americus, Georgia, and part of the testimony that we received had indicated sort of a split, if you will, a dichotomy. There was some talk about sort of what happens at the local level and then what happens on a statewide basis.

You commented specifically that in the State of South Carolina, the ability of an African-American to be elected statewide is, I think you commented, that the Governor has indicated that that's not a possibility.

Georgia has four African-Americans that are elected statewide in George. And you've had an African-American who was the nominee of the Democratic Party for the United States Senate in Georgia, for example, also.

I'm just curious given the fact that we won't be in South Carolina, you mentioned that Georgia, and Atlanta, in particular, was sort of the model of the New South. I guess in a very short manner, if you could, describe for me the difference between South Carolina and Georgia from your point of view in terms of sort of this whole issue as it relates to the Voting Rights Act.

MS. BELL PLATTS: Well, some of it, I was saying, still has come down to partisanship. I think there's still some viability of the Democratic Party and white Democrats specifically in Georgia.

In South Carolina, the flight from the Democratic Party has sort of complicated matters where you don't have -- it is true. Racial-polarized voting, black candidates get black votes, white candidates, white votes. And if there are no whites in the Democratic Party fighting for that white candidate, they very often lose as you move from the primary to the general election.

So it's very hard to be more specific because so much of this is local. I can point to many places in Georgia, you know, maybe not statewide but at least at the local level, where you have the exact same problems that you have in South Carolina. And that's sort of why I took my focus back down to the local level.

And I don't know that Sonny Perdue has ever come out and said anything like Governor Sanford has done in South Carolina, but I think partisanship has something to do with it. I think voter registration rates are considerably different between those two states. I don't have the numbers with me. And voter turnout efforts are quite different in South Carolina than they are in Georgia, and I think all of those factors interact with each other.

And the fact that South Carolina is considerably more rural and more dispersed than -- you don't have a City of Atlanta, for instance –

GOVERNOR ROGERS: True.

MS. BELL PLATTS: -- in South Carolina. Columbia and Charleston are there, but they're not quite the same. You don't have that locus of concerted effort. I mean, that would be my best evidence on that point. It's very local.

GOVERNOR ROGERS: Okay. Mr. Brown, I want to ask you in particular. You were commenting essentially about the dynamic as it takes place in particular with Hispanics and African-Americans. You know that particularly that here in Florida, essentially Hispanics were taken care of. They weren't problems in significant measure in terms of Hispanic areas, but you're talking about a discrepancy that existed among African-Americans.

The leadership, in particular, in Miami-Dade County is fairly significantly Hispanic in terms of its leadership base.

I want to get your comment, in particular, as it relates -- what you're essentially talking about is practices engaged by Hispanics which are adverse to African-Americans. And I'm curious about that, in particular, because our classic scenario is to talk about this issue as it relates to whites, in particular, and their adverse actions as it relates to blacks. But in this case, you're talking about the actions of Hispanics and the adverse impact of those actions upon African-Americans.

MR. BROWN: Right. Well, first let me just relate it a bit to the problems we heard earlier at the first panel about Hispanics in the central area of Florida.

GOVERNOR ROGERS: Yes.

MR. BROWN: And, unfortunately, just like my colleague said here, it does get mixed up with partisan politics. In this particular area, many of the Hispanics are non-Cubans. They tend to be predominantly Democrat and they are receiving the kind of treatment that we heard about this morning.

In Miami, we have the dynamic of the power of the Cuban hegemony of Miami. Out of 13 county commissioners, you have a Cuban majority. You have a Cuban mayor. And it's predominantly the well-off Cuban areas that control the county and it's those areas that were taken care of appropriately well by the voting registration department, just like they used to take care of the well-off white areas when it was a white hegemony that ran in the county.

So -- but it also coincides with, in general, the Cuban voters are Republican and the black vote tends to be Democrat, except when we had one of the most powerful black political figures in the county who happened to be a Republican and happened to serve as an Assistant Secretary of Transportation in the Reagan administration and chair in the county, too.

He lost because the Republicans wouldn't vote for him.

GOVERNOR ROGERS: Yes. Those were the Hispanics Republicans who would not vote for an African-American.

MR. BROWN: The Hispanics Republicans voted for a Hispanic who was a Democrat. Again, illustrating the polarization that, yeah, party is important, but it also tends to be that ethnic. And unfortunately, the plurality right now, there's still going to be some issues with non-Cuban Hispanics because things get subtle when you're moving in.

We have a very large growing Mexican American population which is very much politically powerless in Miami-Dade County. So it's typical of what you get. Majorities that have affluence and power, they act like majorities who have affluence and power to keep that power.

GOVERNOR ROGERS: Absolutely. But it's a dynamic that is rarely discussed. It's essentially competition as it exists among Latinos versus African-Americans and how that even plays. And, in effect, what you're talking about is Latinos as you've just described it engaging in exactly the same conduct essentially as whites have engaged with respect to African-Americans, but Latinos doing the same as it relates to practices here in South Florida, and that is a dynamic that I don't think we quite hear about as much in terms of -- well, at least we don't hear it articulated. It goes unspoken.

MR. BROWN: But not articulated.

GOVERNOR ROGERS: Okay. Thank you kindly. One last question, if I may, Mr. Chairman.

Constance, obviously I'm fascinated, first of all, by your experience and your background. I know about the substance in terms of your life and all the good things that you've done. I was struck, though, by your comment. I mean, you essentially said at the end of the day, I am more concerned now than at any point in time in my previous history.

Now, what I was concerned about is, I'm wondering whether you consider that to be an overstatement on your part or whether you consider that to be -- and I don't mean that to be

anything other than -- I mean, I'm dead serious about it because you've been through extremely difficult times as we talk about the creation, in particular, of the laws related to the Voting Rights Act, and in your description of it being you're most concerned about it now than in years past.

And essentially what you said is, you're concerned about the fact that you got Haley Barbour sitting in the Governor's office there and his relationship with the President and that that forms the basis of your concern. But I'm wondering if there are other dynamics that are in place.

I guess I was struck by several things. On one hand you said, listen, Mississippi has got the highest registration and, I think, the highest number of African-American officials elected in the United States.

Of course, you've got the largest black population of any state in America also in terms of population, period. You've had extraordinary gains that have taken place in Mississippi as a result of the Voting Rights Act, but I'm curious about your comments because you say -- I mean, you said it directly, I'm concerned now more than ever.

MS. SLAUGHTER-HARVEY: And I mean it.

GOVERNOR ROGERS: And I want to get someone to explore that, but we seem to be short of time so I don't want to ask you a long question, Mr. Chairman. Forgive me for doing that.

CHAIRMAN DAVIDSON: That's okay.

GOVERNOR ROGERS: I'm asking you because I'm struck by that. And I'm struck by your comment in that regard, and I'm assuming it goes beyond partisanship, this sort of Republican/Democrat stuff and all that kind of thing, but I'm wondering what the answer to that is.

MS. SLAUGHTER-HARVEY: Well, I guess I proved my point. I am truly frustrated. I feel now more pain than I felt when I went to the University of Mississippi School of Law and I was called a nigger.

I feel more pain now than when a judge called me a nigger from the bench in 1970. I feel pain because I sense that young African-Americans who are my age that's saying -- think that we have overcome. And I'm disturbed because I see so many young African-American lawyers who think that they've made it big time. And they tend to say, they have problems talking about our own people.

I'm disturbed because I see young black lawyers becoming members of predominantly white law firms who think that they are white. And I don't say it in a negative, mean spirit. I'm saying that I am so, so hurt.

And I think that I participated in that game. I fought and sacrificed and cried and cursed in order that young African-Americans would not have to endure the pain and indignities that I endured. And I see them now forgetting about the shoulders that we're talking about.
I see them saying: Those people have problems. Those people don't vote. Those people have children and they're not married. Those people are shiftless. Those people are lazy.

Yes. I'm hurt. See, when I was in Florida I understood that the Klan does not have to wear a sheet. I knew that. Now, I'm not certain young folks understand that you don't have to wear a sheet. It ought to be that God made a difference in his creation. So yes, at my age, I'm 58 years old and I have never been more concerned about the survival of this country and the mean-spiritedness that's hit. I am disturbed about Haley Barbour. Yes. I am. That bothers me. And

when Haley can sit there and talk about being a Christian and then turn off poor people, black, white, old, young, children, and then to have young black people embrace him and saying the Governor, it bothers me. And then to see that Haley and the President can be friends and both of them to me have absolutely no heart when it comes to poor people.

Yes. It bothers me. And I think I'd rather go back to the days of Ole Miss when I was called a nigger because then I never slept. I had one eye always on you, but I did my thing. Now, I don't know who to watch.

And these young folks who are coming along who want to try to make a difference and they're black and they may forget that I'm black. I'm just really -- I'm glad that you sense my frustration. I just don't know what in the world to do. And that's why with you men, I know your background. God knows I hope you can tell us how to do it.

[Applause]

MR. GRAY: Mr. Chairman. I share Ms. Harvey's concern. I've been involved in it a little bit longer and -- but there is, and I say it all the time, that we are probably at the most critical point in the history of our nation from both black folks and white folks, respectively. And now I speak to almost as many white folks as I do black folks.

The white people, I have to educate them over why and how we have gotten to where we are and why it's necessary to be doing what we're doing.

And then I look at my own brothers and sisters, particularly lawyers who think they are so great and they enter these big law firms and they're making money and they're living high and they think they are there because they are bright and brilliant and owe nothing to nobody.

[Applause]

MR. GRAY: And it is frustrating. And what I told them is, they don't know it, but you're not as brilliant as you think you are, and if you don't believe it, let something happen in that law firm and there has to be a cut-back or something else, and you're going to be without a job and you're going to have to start all over somewhere working for somebody else.

So we have a two-fold issue and to have an administration -- and it's frustrating to have an administration who isn't sympathetic towards working people, poor people and people who need health care at all. And to look at the federal judiciary panel, when I came along, we had some hope with judges like Frank M. Johnson. But now we have district courts, courts of appeal, the Supreme Court packed basically with young white, male, high-income persons who have no knowledge and no concern about people. They are only there basically because of shear power.

So I think somewhere along the line -- and it's not just a racial matter and just not a political matter, it's a matter that you have a whole generation coming up without any concerns about anybody hardly other than themselves and what they can get out of it with power I have that I can exert.

[Applause]

MR. GRAY: But I don't want you to get discouraged. I've decided there's certain things I can do and certain things I can't. I don't worry about anything. I'm going to do the best I can in situations and do as you have said, tell these young people, I tell them that economic discrimination is one of the worst things in the world now.

There's a difference between the haves and have-nots and it's getting wider. I don't know the answer. But your bright Harvard and Ivy school graduates, black and white, ought to have enough sense to do something about it if we and our peers have come along who had all these adverse circumstances and be able to survive. So just hang in there.

[Applause]

CHAIRMAN DAVIDSON: We really need to get on to the next panel. We're running behind. I want to thank this panel. I want to thank the commissioners who have interacted with it. I think, in particular, the combination here of youth and age on this panel has held it together in a very interesting and productive way.

And so we're going to get right on with the next panel at this point.

[Applause]

CHAIRMAN DAVIDSON: Welcome. We're pleased to have you here this afternoon and I believe I have a word or two to say about everybody on this panel here in terms of what I've got before me. Iris Green is a member of the National Bar Association. Monica Dula -- is that pronounced correctly, Dula?

MS. DULA: Correct.

CHAIRMAN DAVIDSON: -- is a staff attorney with the Criminal Defense Division of the Legal Aid Society. Before joining that society, she worked for the U.S. Equal Employment Opportunity Commission and the U.S. Environmental Protection Agency.

Ms. Dula is currently the Vice President for Membership of the Metropolitan Black Bar Association of New York and recently served as the Chair of the Election 2004 Task Force of the National Bar Association.

Reginald Turner has already been introduced today. He's an NBA president-elect. And Marlon Primes has served as an Assistant U.S. Attorney in Cleveland for the past 13 years and is an Adjunct Professor at the University of Akron for the past five years. He's a National Vice President of the National Bar Association, a Master Venture in the William K. Thomas chapter of the American Ends of Court, a former chairman of the Cleveland Bar Association, Justice for All Committee, a former member of the Cleveland Bar Association Board of Trustees, and a member of their foundation.

So, again, we're very pleased --

MS. ARNWINE: Yes. Before you proceed, I just wanted to say that saying Iris Green is a member of the National Bar is like saying the President's a good guy.

Iris Green is, in fact, a former Justice Department attorney. She is also the chair of the NBA Civil Rights Section and she is responsible for most of the good civil rights learning and teaching and seminars that are held here every year. And I just want to give her her due.

[Applause]

CHAIRMAN DAVIDSON: Thank you so much, Barbara.

Ms. Dula, would you care to begin?

MS. DULA: Thank you very much.

When I was asked to speak, I thought about the topics that I would like to cover and the topic that I chose was felon disenfranchisement. It's a topic that oftentimes gets little, if any, attention. Today's felon disenfranchisement stands as the biggest threat to the voting rights movement in decades.

The voting rights movement was birth during the time of poll tax, literacy tests and good old-fashioned racism. Today, the fight for full suffrage takes us to fighting for the rights of those who were previously incarcerated, are currently incarcerated, or will be incarcerated in the future.

Today, there are over four million individuals who are disenfranchised from their right to vote because of felony convictions. There are currently over two million individuals incarcerated today and over 600,000 of them are African-Americans.

In Florida alone there are over 800,000 convicted felons. In order for a convicted felon to be able to vote again, the Florida Board of Clemency must restore the right to vote.

In 1999, 54,661 felons completed supervision, but only 2,155 had their voting rights restored. Only 15.2 percent of those who received full restoration were African-American. The Governor and his cabinet constitute the Clemency Board, and as we all know, Jeb Bush does have his own interests.

The Governor has the ability to deny clemency, but a vote of the Governor and three cabinet members are required to restore voting rights. Voting rights in Florida can be restored in two ways.

First, the convicted felon could have their voting rights restored by submitting an application to the Clemency Board without a hearing.

If three or more members of the Clemency Board object to automatic restoration, then the individual must pursue restoration with a hearing. The $1,000 penalty and liability bar has since been amended and does not serve as a bar to restoration without a hearing as it did at one time.

Secondly, those convicted of certain drug offenses and those who do not meet the initial eligibility requirements must endure the hearing process.

Felon disenfranchisement statutes were first enacted in 1868 and the long-term effect of the enactment has disproportionately affected the African-American community. In 1968, the Florida Constitution was re-enacted.

During the 1960s, the rate of incarceration in the United States never rose above 200,000. Today the United States has one of the largest rates of incarceration in the world. There are over two million individuals incarcerated in the United States today. That is an approximately 900 percent increase.

In Florida over 48 percent of all convicted felons are African-American. These numbers beg the question: What does all of this disenfranchisement do to the impact that the African-American community has on the political process of the larger community?

From the beginning, felon disenfranchisement was well rooted in racism, the objective being to suppress the political power of newly freed slaves. In 1968, the law was re-enacted again to disenfranchise African-Americans right after newly won civil rights were gaining a foothold. Today Florida stands as only one of seven states who permanently disenfranchised felons.

The impact on my community will lead to the dilution of the voting power of the African-American community in Florida. And this is not just something that happens in Florida; it happens across this country.

When the Florida African-American community is analyzed, the picture of a largely poor, under-served, disadvantaged community is vividly drawn.

In 1990 over 40 percent of African-Americans over the age of 25 had not graduated from high school or achieved the equivalent. This compares to 23 percent of others. Less than 10 percent of African-Americans age 25 or over had received a college degree or higher, almost half the rate for non-African-Americans.

More than one in four African-Americans age 18 or older were living below the poverty line. That number is almost three times higher than other Floridians. In sum and substance, this is not a community that has been a beneficiary of all the privileges and gains of the Civil Rights Movement.

And we must be mindful of the fact that there are more African-American men going to prison than to college, and that means that more and more of the African-American communities will not be able to vote in Florida and around the country.

What are some of the things that we need to look at in terms of changing the laws on felon disenfranchisement? First, individuals who are convicted of crimes should be able to vote in all elections even while they are incarcerated.

Under Section 2 of the Voting Rights Act, we must look at the totality of the circumstance test to determine if the state enacted a law of any qualifications or prerequisites to vote that results in denial or abridgment of the right of any citizen of the United States.

Clearly, being a convicted felon prevents that individual from voting and there are so many convicted African-American felons who are unable to vote, no other conclusion can be drawn but that the state has engaged in vote dilution. This position may be uncomfortable for some in power. Reality has to dictate that we must move beyond our discomfort and think about the community at large.

The gains that we made during the Civil Rights Movement are now at stake and, unfortunately, there doesn't seem to be a steep decline in the number of felons in the future.

Second, not only should they be able to vote, but their vote should be counted in the community they come from. For example, if they are sent to a prison close to Tallahassee, but they come from Miami, then their vote should be counted in Miami.

This will allay the fears of those in largely non-minority communities where prisons are located who fear that minority members of the prison population will try to take over the political process. We must ensure that the right to participate in the political process is preserved at all cost.

I come from the State of New York and today in the State of New York there are 126,000 felons in prison and on parole. That's 126,000 people who cannot vote. If current trends continue, three in ten black men will be disenfranchised from their right to vote at some point in time in the State of New York.

80 percent of the prisoners in New York State prisons come from Harlem, Washington Heights, the lower east side, south Bronx, east Bronx, central Brooklyn, east Brooklyn, and southeast Queens. Those are predominantly African-American communities.

87 percent of the New York State prison population is African-American and Latino, and it begs the question: What impact does that have on the census?

The people who are incarcerated in upstate rural communities, these communities largely being white, are counted as part of that community, even though they have no roots there and they gain nothing from being incarcerated in rural upstate New York communities.

In conclusion, the African-American community has not fared so well since the gains that were made during the '60s. We see more and more African-Americans going to prison and fewer going to college. I don't see that trend being reversed anytime in the near future. That means that the African-American community will continue to lose its impact on the political process as more and more African-Americans are unable to vote because they are convicted felons.

I would hope that this Commission would have the courage to take the position that convicted felons should never lose their right to vote, and that those who are convicted have their vote counted in the community in which they resided before incarceration. This will prevent the dilution of the gains of the civil rights struggle. Thank you.

[Applause]

CHAIRMAN DAVIDSON: Mr. Primes?

MR. PRIMES: Good afternoon. My name is Marlon Primes and you know my background. I'm originally from Akron, Ohio, and practice now in Cleveland, Ohio.

Before I touch base about my experience in working with election protection and a number of issues that arose in Ohio, I certainly would be remiss without giving proper kudos to the Lawyers Committee and the effort that they took in the State of Ohio, particularly Northeastern Ohio.

They had a command center there and it was beautiful in the sense that we had a large cross-section of community that volunteered to participate in this effort and work at various polls, places in East Cleveland and a number of community in Northeastern Ohio, and certainly we're very appreciative of that effort by Vicki Beasley and Barbara Arnwine.

In terms of the actual problems that took place in Ohio, prior to the election the affiliate chapter of the National Bar Association, normally that's Miami [ph] Bar Association, was mobilized in conjunction with the NAACP local chapter because immediately prior to the election, a number of African-American voters received postcards indicating that the election was held several days after it actually took place.

In addition to that activity, there are a number of concerns that a number of us noticed that were involved in the election protection effort specifically regarding the issue of provisional ballots and the issue of challenges.

I think you're all aware of the lawsuits that were filed and the very confusing issues regarding provisional ballots and challenges that took place in the State of Ohio. But I want to just focus my testimony and the observations that I made while serving as an election protection monitor with respect to those two particular issues.

And also I want to note that I'm testifying in my personal capacity and these are my particular views, and my particular views only.

I arrived at my particular station at 6:00 a.m. and I was stationed in East Cleveland, Ohio. And East Cleveland is one of the poorest communities in Ohio and probably one of the poorest communities in the United States.

A large portion of the population is on public assistance and that was a center of a number of our election protection efforts also in the east side of Cleveland which is predominantly African-American.

One of the things that I noticed and a number of the other volunteers noticed is that we had an extremely heavy turnout in the early morning hours of November 2nd, 2004, in those

particular areas. We all communicated via cellphones so we're aware of the activities in our particular precinct and also at various precincts where equal protection workers were stationed.

One of the things we also noticed in addition to a very heavy turnout, we noticed later on in that afternoon that there were a significant number of provisional ballots in minority districts.

And a number of us began scratching our heads about this phenomenon and soon we learned that one of the potential reasons for this is that in East Cleveland, a number of the very poor communities, there are a large number of individuals that are renters and they move frequently during the election cycle. And fortunately in Ohio, there was an edict that was pronounced prior to election that if you cast a provisional ballot in the wrong precinct, your provisional ballot would not be counted. And I believe this had a substantial impact on minority voting districts because of the transient population and something that should be noted as well.

I think also one of the problems with respect to that is that with respect to the turnout, you had a large number of individuals that really had not participated in the process and that came with great hope that their vote would be counted and they truly would be able to make a difference on a very important election.

And I guess we'll never know until later in time whether or not these people will totally check out of the process. And the problem will be, what impact that would have on the rest of us in terms of willingness to participate in jury trials. Of course, if they're not registered, they can't participate as a juror. They can't participate in the process of electing law enforcement officials to ensure that they're representative juries.

Finally, I want to just touch base on the issue of challenges and just give you a few anecdotes based on my observation as an election protection worker. The election protection volunteers were a cross section of our community, not only African-American, but all types of races and backgrounds.

And one of the things that we noticed and shared amongst ourselves were the placement of challenges in election precincts.

I had the occasion of taking a break and going to my official site in Cleveland Heights, Ohio, which is predominantly an African-American site where there were a number of challenges inside the booth. And in sharing conversation with a number of election protection workers and also just touching base with other lawyers on cases that I was involved with and trying to handle during my course as a volunteer, I soon came to realize that they did not have a similar experience as those that were in less adverse precincts.

In fact, one lawyer commented to me on the telephone during a conference call that he had called a number of his friends and predominantly white communities and they all indicated that they had not seen any challenges, and it was totally different from our experience in Cleveland Heights and many of the other African-American communities in East Cleveland and Cleveland, Ohio.

With that, that concludes my testimony.

[Applause]

CHAIRMAN DAVIDSON: Ms. Green.

MS. GREEN: Good afternoon. I'm Iris McCullen Green and what you don't know is, I served as the civil rights attorney in the U.S. Department of Justice Civil Rights Division for 11

years. So if you care to ask me if I have any personal thoughts on the recent nomination, feel free to do so.

That said, I also want to commend the Lawyers Committee and People for the American Way for their excellent job in posting the non-partisan election protection effort. And I was privileged to work in that effort this past November, and I just want to relate to you some of my experiences while I was manning the hotline.

Even though I was stationed in Washington, D.C., I am a member of the Washington Bar Association and we were vigorous in that effort. Even though we were in Washington, D.C., I got quite a few calls from the State of Florida. One in particular came from a Florida A&M student, in fact, a number of students who, even though there was a polling place on the campus of Florida A&M, they were told that they were to vote someplace that was off campus.

They went to the polling place that was off campus only to be told that, no, your polling place is the polling place, the precinct on the Florida A&M campus. They came back to the Florida A&M campus and were once again told, no, your polling place is off campus.

By that time, they were really, really frustrated and desperately wanted to vote. For most of them, it would be their first time ever voting in a national election.

CHAIRMAN DAVIDSON: Are these predominantly African-American students?

MS. GREEN: Absolutely. Florida A&M is a predominantly African-American institution.

But since we had people located on the ground, I referred them to our local persons on the ground and hoped that they were able to help them. But those students were being denied the right to exercise their franchise, and they were right there on the campus where they had a polling place.

And these were not students who lived in the city. These were students who actually lived on the FAMU campus. There still exist many, many impediments to voting and the Voting Rights Act should be strengthened along with being extended.

Another call that I got also came from Florida, a gentleman whose house bordered two counties. He paid real estate taxes to one county and his trash was picked up by another county.

He received a letter in the mail telling him that he could no longer vote in the county that had been designated as his precinct. So he went to the other county and they told him, no, you can't vote in this county. So he was in a
no man's land. And the interesting thing about that is, he was married and his wife did not have a similar problem.

So, once again, we referred him to our persons on the ground in Florida.

Another individual also in Florida, this gentleman called to say that he had registered no fewer than three times and had received a letter from the same individual each time telling him that he was not on the rolls, that he could come down and re-register.

And after that happened to him three times, he didn't know what else to do. So we called the election officials for him and hopefully it was resolved. Since we were in Washington and he was in Florida, we could not see it through, but I hope he got to vote.

I also got calls from Arizona. One lady had recently moved from one county to another county in Arizona, and there was a deadline for registration for voting in the new county. But she had apparently delayed attempting to register for more than 30 days after she moved to the

new county, and she was told that because she had been moved from the new county for more than 30 days, she could not vote in the old county and she couldn't vote in the new county because she was not registered. So where was she to vote?

She and I had a private conversation about what she should do, but I do think she got to cast her vote.

Another problem was long lines, and even in Washington, D.C. we had a problem with long lines. I got a call from Ohio's Will Marlin from a nurse who said she had stood in line for several hours, including extra time that she'd been given to vote, and had not been able to advance far enough along in the line to cast her vote before she had to leave. And she said she did surgeries. So she had scheduled surgery, that she could not wait any longer and she had to leave.

And her fear was that she would not be able to get off soon enough in the afternoon to get back to vote before the polls closed. So what was she to do?

So I think I can say that there are a number of impediments that need to be addressed along with extending the Voting Rights Act so that some of these artificial impediments are removed.

The right to vote is a constitutional right to everyone and we really shouldn't have all of these state regulations that prevent a person from voting when all they should have to do is to show up and prove who they are by whatever means of identification they have and cast that vote. So those are a few of the instances that readily come to mind, and I just want you to pay attention when you are getting ready to extend the Voting Rights Act that perhaps you should write into the extension some provisions that will take care of some of these other artificial impediments.

Thank you very much for listening.

[Applause]

CHAIRMAN DAVIDSON: Mr. Turner.

MR. TURNER: Thank you very much, Mr. Chairman. I would like to thank all of the members of the National Commission on the Voting Rights Act for taking this time to spend with us here at the National Bar Association's annual convention. Your presence here is really a statement about the importance of the work that we all must do in order to fully understand the factual predicate for renewal of the provisions of Section 5 and Section 203 of the Voting Rights Act.

And this is really, I think, an excellent means to go about building the record that will be required, and so you are to be commended and you have our gratitude.

[Applause]

MR. TURNER: Also, of course, we have to pay homage to the Lawyers Committee for Civil Rights Under Law.

[Applause]

MR. TURNER: The long-time partnership between the National Bar Association and the Lawyers Committee is too rich to detail in the brief time that we have here. However, I would like to say that Barbara Arnwine has been of singular importance in maintaining --

[Applause]

MR. TURNER: We are extremely grateful to her and to all of her colleagues at the Lawyers Committee for Civil Rights Under Law. Extension of the Voting Rights Act of provisions of Section 5 and Section 203 are absolutely essential to protection of the democratic principles that are the bedrock of our Constitution. The right to vote is precious and should not be denied on any basis.

Unfortunately, although we have heard much about problems relating to interference with the right to vote in our southern states, the problem is not unique to the south. My own experiences in Michigan have demonstrated to me that wherever there are people of color who seek to exercise the franchise, there will be efforts to block those attempts to engage in participation in our democracy.

Although in Michigan only a small part of our state is covered by Section 5, we understand the critical importance of the pre-clearance provisions and there has been activity on the part of the Department of Justice with respect to Southwest Michigan in ensuring that election practices there are consistent with the Voting Rights Act and avoid both pollution or unnecessary packing with respect to voters of color.

Section 2 has also played a significant role in Michigan. I was involved in legislative redistricting and congressional reapportionment of litigation in 1992, and in the course of that, it became very clear that as we built the record in those cases, that Michigan has a significant problem with respect to racially-polarized voting.

And the other jingles factors having been met, we were able to convince both the federal court in the congressional case and the state court in the state legislative case that the interests of voters of color, African-Americans with respect to congressional districts and African-Americans and Latino voters with respect to the state legislative districts, should be protected on the basis of the satisfaction of the jingles factors in those cases.

And so Michigan, we strongly need the extension of the provisions of the Voting Rights Act and as my colleague, Iris Green, my esteemed colleague, our leader on civil rights issues in the Bar Association indicated, any modifications to the Voting Rights Act as it is being renewed should actually strengthen the Act to make clear that voter intimidation in any form will not be tolerated.

It should be made clear -- it should be made clear that attempts to block the exercise of franchise through arbitrary photographic ID requirements and other means of essentially reinstituting the old poll taxes and literacy tests of the Jim Crow era should not be tolerated, cannot be tolerated, and violate these bedrock constitutional principles to which I already referred.

Just recently again in my own State of Michigan in the so-called sophisticated north, we have a legislator, Chris Ward, who sent this letter to our Michigan Attorney General, and this letter is being made part of your record as well as the testimony by remarks about it.

The Michigan House Majority Floor Leader is a Republican from Livingston County, which is the headquarters for Klan activity in the State of Michigan.

It was written to Attorney General Mike Cox seeking to overturn a legal opinion issued by our former Attorney General, Frank Kelley, and renewed by our most recent Attorney General who's now our Governor, Jennifer Granholm.

He's requesting that a state statute signed by the former Republican Governor, John Engler, which required all voters in Michigan to present photo identification cards be implemented. He's requesting that that be implemented although it had been found to be unconstitutional in the opinion by Attorney General Frank Kelley.

We believe very strongly that this photographic identification requirement would severely and negatively impact the rights of voters of color. Those who do not drive, those who are poor, those who are handicapped, those who are homeless, those who are senior citizens and in nursing homes, and all of these categories are predominantly in Michigan are populated by people of color, in which people in these categories, people of color, are significantly over-represented.

The argument being advanced by Representative Ward that this photographic identification requirement is required -- is necessary in order to prevent fraud is absolutely invalid.

Michigan already has numerous statutory provisions to protect the integrity of the electoral process and protect against voter fraud. This voter fraud myth has been used repeatedly as a cover for efforts to suppress the vote.

In 2004, another Republican legislator in Michigan, John Papageorge, made clear that the Republican strategy in the 2004 election cycle would be to suppress the vote. He was widely quoted in the media, national media and international media, with his statement, and I quote: We are going to have a tough time if we don't suppress the Detroit vote.

Efforts to intimidate, coerce and otherwise restrict minority voters in the exercise of franchise are not limited to the south and they're not always limited to exercise by people of European descent. Make no mistake about it. In the National Bar Association, we don't care whether people's ancestors are from Europe, from Asia, from Africa, from Central America, from South America.

If they are attempting to suppress the rights of people of color, or any American, to vote, then in our view, they have violated the basic constitutional principles and the Voting Rights Act should not only be extended, but should be amended to make very clear that these efforts are illegal and not to be tolerated and sufficient criminal penalties should be put into place to deter this kind of activity from taking place in our nation.

And in response to -- further response to a question raised by Commissioner Gray who is also, of course, a distinguished leader of the National Bar Association and a hero of the --

[Applause]

MR. TURNER: -- I would just say that we will be lobbying at the local, state and federal level, to ensure that our representatives in Congress have an understanding of the issues that we are presenting to you today, the issues that you have taken this time out of your schedules to hear today because we want to make very, very clear our position that the Voting Rights Act is essential and we will be transmitting information through our esteemed vice-president for regions and affiliates, the former chair of our civil rights section, Mavis Thompson; Mavis, who helped to coordinate our election protection effort last year.

We will be encouraging our affiliates across the nation to make clear through their representatives in Congress in several states that our position is fully in support of renewal of Sections 5 and 2003, and fully in support of strengthening the provisions of Section 2 to reduce

the trend toward packing minority voters into too few districts to elect a sufficient number of candidates of their choice and dilution of the minority vote.

Thank you very much.

[Applause]

CHAIRMAN DAVIDSON: All right. We will once more exercise our duty to ask a few pointed and succinct questions to the panelists and then move on. Mr. Gray.

MR. GRAY: Mr. Chairman, I don't think based on the testimony we've heard here today we have anyone who feels that the Voting Rights Act and its provisions obviously should not be extended. I think we all are in agreement on that.

My question to the panel is, considering the opposition that you may have in terms of strategy, do you think the primary effort should be to get the Act extended or should we use as much effort in getting it extended as we would to have to decide on these issues that you would want amended?

And even between testimony here today, I think there may be some differences of opinion about how far or exactly what area, if there are going to be some amendments, how far they should go.

MR. TURNER: If I may respond. Commissioner Gray, in my opinion, the transformation of federal judiciary from the era of the Warren report to the era of the Rehnquist Court has caused a truncated interpretation of the breadth of the Voting Rights Act in such a way as to allow practices to continue, which in my view as I just indicated unduly diluted minority voting strength or which packed minority voters into districts in ways that reduce the number of minority candidates who are present in our state legislatures and on our city councils around the nation.

To give you an example. In and around the City of Detroit, the majority of the state legislative districts for which there are African-American elected officials have as much as 90-95 percent minority voters in those districts.

By simply taking those districts down to 65-70 percent voting age population, you can create at least two additional legislative districts in which minority voters would have a significant chance of electing candidates of their choice because the other jingles factors are satisfied and do apply.

But unfortunately, the federal courts have not been willing to find this level of packing to be in violation of Section 2 of the Voting Rights Act. And we think the Act should be strengthened, and I should say, in my personal opinion, the Act needs to be strengthened in order to make clear that that kind of packing of minority voters in order to reduce the number of minority elected officials is illegal.

In addition to that, again, we think that these photo ID requirements which are being imposed, which have been successfully attacked by the Justice Department in pre-clearance jurisdictions, should have -- should require provisions that apply national such that it would be unlawful to impose a photo ID requirement in such a way as to restrict the ability of voters of color, of those folks that we just talked about, the least of these are senior citizens, are homeless, are handicapped, are poor, from full participation in the electoral process. And so, therefore, those are two issues that I think need to be addressed immediately and effectively.

MR. PRIMES: I would concur in those comments, and I think as a result of, you know, what I testified to before, there is a problem in terms of the acting, narrowly construed and there being different interpretations and different jurisdictions. So my personal opinion, I think we need to look at the problems that took place in 2004 and try to find solutions to those particular issues.

Particularly troubling is the issue of provisional ballots. Some interpretations are whether or not we should count a particular ballot if it's cast in the right county as opposed to the right precinct. National standards should really give us a clear understanding of that issue. I think it would be very helpful.

And as I testified before, voting is just very important and we want to make sure, particularly in contested -- how to contest the elections like we had in 2004, the people that do take the time to participate in the process for the first time aren't discouraged from the process.

So I think we need to do all that we can to address those concerns. If new legislation strengthen the Act, it's something that I believe that we need to do.

MS. GREEN: I concur both with Reggie and Marlon. And I think we should do something about registration, requiring advanced registration. It should be possible to register, if not the day of, up to the last minute to vote so that people are not turned away simply because, oh, you moved 30 days ago, 31 days ago, not 30, and now you can't vote.

And all of those artificial impediments -- I call them artificial impediments because they're just means to keep people from voting -- while I know we need to put our energies in extending the Act, I think at the same time at this stage in the game, we also need to write in as many national protections as possible.

And each state and each locality almost has a different rule on what one needs to do to be able to vote, and we should nationalize those things to make it uniform across the country. That, I believe, would enable more people to vote.

MR. GRAY: Mr. Chairman, I want to follow up with this. And that is, do you believe there should be some unified effort made about these proposed amendments so that when the bill is really presented, we will have, at least among ourselves, agreed upon the areas where we want it amended.

MS. GREEN: Certainly. I think we need to start talking about exactly what those are so we'll know we can present the package with a unified voice. And I think that's going to require a lot of discussion. I'm just touching on it now because those are some thoughts that readily come to mind. But there are a lot of areas out that that we need to look at so that we can remove the impediments to voting.

MS. DULA: If I can just say one thing. The dynamics of voting have become very sophisticated at this time and age. There are two states in this country that allow felons to vote no matter what. They never lose their right to vote in Vermont and Maine. Across the country there's some states where you will never get your right to vote back. There's some states where you can once you completed your probation or your parole.

There are four million disenfranchised people in this country. To me, this is the crux of the Civil Rights Movement at its worst. I mean, this is really the critical issue. People don't want to talk about it. People don't want to deal with the impact that it's happened on the African-American and Latino communities, to what point, eight million Latino and African-American

voters are disenfranchised. And I think we already do think about amending the Act so that these people have the right to vote. And the numbers are only going to increase.

So there is going to be no regression from felons being disenfranchised. So I would hope that you'd consider an amendment to address that issue. Thank you.

CHAIRMAN DAVIDSON: Congressman.

CONGRESSMAN BUCHANAN: I gather that it would be your testimony that upon firm foundation of the 15th Amendment which is very clear about voting rights, you could find a basic constitutional argument for whatever may be in the Voting Rights Act or whatever amendment you may propose to it. You feel that it is strong enough from a conservative judicial point of view to give you a firm constitutional strength. I use the word conservative. I don't even know what that means.

MR. TURNER: I think I understand what you mean. I think we're all aware of the transformation again from the Warren era of the Supreme Court to the Rehnquist era of that court in terms of the narrow interpretation of the impact of the reconstruction era amendments to the United States Constitution and, in fact, turning the 14th Amendment on its head to a certain extent, particularly with respect to educational issues.

And so your question is a difficult one in the sense that a court that has essentially taken the 14th Amendment and turned it from a shield to a sword might very well find insufficient basis in the 15th Amendment to the Constitution to justify the provisions that we suggest need to be enacted to strengthen the Voting Rights Act and make clear that some of these practices which severely and negatively impact the right to vote as a color should be illegal.

I mean, those statutes make it clear that you can't pack 95 percent districts in order to reduce the number of minority legislators, making clear that you can't implement photo ID requirements that are onerous and burdensome on people of color, on homeless people, on handicapped people, people with disabilities.

I mean, these are not principles that are difficult or controversial principles for most people, but the fact is that people are getting away with violating the rights and truncating the ability of minority voters to vote in this nation almost at will.

Because my colleagues covered the election protection effort so much, I did not touch on it in my remarks. But I will say that I was involved in the initial planning with the National Bar Association and the coalition of organizations on election protection. I withdrew from that process when I was named as Michigan counsel for the Kerry/Edwards campaign because I was then engaged in a partisan role which would make it inappropriate for me to work with this non-partisan effort of the National Bar Association.

But we were monitoring the very same things and we saw an unprecedented effort by lawyers, staffed for the Republican party, in precincts in Detroit, in Pontiac, Michigan, in Flint, Michigan, in Latino areas, in the suburbs of Detroit, intimidating voters of color asking for identification outside polling locations, interfering with elections inspectors as they sought to move voters through lines in an orderly process, which greatly contributed to the lengthening of lines and discouragement voters from waiting two, three, and four hours in order to vote.

These kinds of practices should be patently illegal. I mean, these aren't close questions. Anybody has the right to vote is so fundamental to our American democracy, that any intent to restrict the rights of voters of any color by anyone of any color, should be illegal.

CONGRESSMAN BUCHANAN: Thank you very much. Thank you, Mr. Chairman.

CHAIRMAN DAVIDSON: Mr. Primes.

MR. PRIMES: I just want to briefly add that if you look at the text of the actual amendments and the discussion and debate historically as it relates to your particular argument, the whole basis was that you can't give someone citizenship without protecting their right to vote. So I do think there's a constitutional basis for advocating an amendment.

And also I think you have to look at the testimony, not only from this panel, but other panels and panels across the country about the problem. So you couple that with the text of the amendment, the discussion, when it was enacted, I do believe there's a constitutional basis for trying to promote legislation to deal with the problems that it addressed.

CONGRESSMAN BUCHANAN: Thank you.

CHAIRMAN DAVIDSON: Governor, do you have some questions?

GOVERNOR ROGERS: I do. I guess I have more of a question than a comment to some extent. The job primarily of this Commission is a job of being a fact-finder, and not an advocacy role. Our job is literally to try to provide as best we can -- excuse me, I'm sorry about that -- essentially a record that would be made available obviously to the members of the House and Senate and to the extent that it's scrutinized by the Supreme Court, a record that essentially indicates the facts as they are.

Our job is not to be an advocacy body, but really to be a fact-finding body that simply presents the evidence as we find it to exist throughout the country, and I certainly want to encourage you all to the extent that you all take an advocacy role to the extent that the NBA takes the position or your various organizations are taking positions to advocate changes or other kinds of things with respect to the Act itself. I certainly want to continue to encourage that.

But one thing I would be cautious of, to be frank with you, Mr. President-Elect, is that you're going to want to make sure that to the extent that you're taking an advocacy role, you have a House and a Senate that are both governed by Republicans essentially. And the arguments have to be made in such a way that, obviously, your job is to persuade enough people.

You've been successful throughout that in the course of your career. And the ability is going to have to be to present those arguments in such a way that you are compelling to both political parties in that regard.

We heard testimony earlier in this day that indicates it clearly is going to be bipartisan support for the passage of these provisions, both 203 as well as Section 5, but there may well be strong bipartisan support that exists in that regard. So I just want to encourage you to the extent that the NBA takes a position in that regard, that you're cautious to make sure that you are taking a bipartisan to some extent position. I would encourage you in that role.

MR. TURNER: Thank you, Governor Rogers. We certainly appreciate that. The National Bar Association represents lawyers of both political parties and some minor parties as well.

And we certainly understand that the National Bar Association is not a partisan organization in any sense of that word. We have officers who belong to both political parties and my remarks in identifying the political party affiliations of some of the folks, the actors in a couple of the stories that I told, were not intended to suggest that only Republicans have ever

interfered with, restrained, or coerced voters in the exercise of the right to vote. That is certainly not my experience nor my opinion on the basis of information and belief.

So I want to make that very, very clear. In fact, I think I did say, and I would say again, that whether your ancestors are from Asia, from Africa, from Europe, from Central America, from South America, or whatever your party affiliation, if you're interfering with the rights of people to vote, then you are, in our view, violating the Constitution of the United States and there should be clear provisions in law to prevent such interference and restraint. And that's not partisan. Those principles should be easily accepted and not controversial among Republicans and Democrats.

GOVERNOR ROGERS: Absolutely.

MR. TURNER: And we hope that there will be bipartisan support in the U.S. House and Senate for not only renewal of the provisions that are immediately at issue, but also a very careful review to outlaw these practices that continue to exist in the north and in the south, unfortunately, which seem to be intensifying rather than abating in our nation.

These practices should be ended and should be clearly in violation of the law, and we hope there will be bipartisan support for those changes.

[Applause]

GOVERNOR ROGERS: Thank you. Thank you, Mr. President, for pointing that out and I couldn't agree with you more. The whole tension, as you well know, in terms of voting in the United States has existed because of essentially a massive shift that's occurred in the United States. Elections are now closer than ever before literally because the country is literally, if you look at sort of a split along lines of being more to the right or more to the left, there's just been -- this energy at the middle, if you will. The realities are that elections are closer than ever so that's why there's so much focus, if you will, on this process of voting.

Elections are increasingly coming down to just a few. As you well know, Florida decided by 540 votes out of six million votes cast in the state. I mean, so you have these things that are going to take place all over the country.

I did have one question though, and it doesn't relate at all directly to what this Commission can do, but I'm fascinated by the subject, and that was, to some extent, this issue of identification.

Having been responsible for governing the state, there's no doubt that we have to protect, and I only say this from the standpoint of having governed. We want to be sure that people that are voting are, in fact, eligible to vote, registered to vote, and are properly voting. I mean, that's something that's important to do from a state level.

And in terms of responsibilities of individual states, each one of our states does, in fact, set its own policy related to voting because it recognizes the uniqueness, if you will, of individual states in this country. And to some extent, there's no doubt that I've been an advocate, having governed the state, of the ability for Colorado to set its rules rather than having the federal government necessarily dictate those things.

But I am concerned to some extent about -- we heard all throughout the country the issues related to this identification issue, and problems related to identification and otherwise. There seems to be mixed testimony around the country. People don't seem to be advocating the idea

that nobody ought to be able to present an ID; in short, to be able to identify who somebody is to the extent that they're voting.

But when you hear your testimony as far as -- you don't necessarily qualify it that way and you all have not qualified your testimony by saying that you believe it's important to identify voters, that a person's properly identified as Iris Green showing up to vote, Reginald Turner showing up to vote, that you're showing up to vote, Mr. Primes, I mean, if that is taking place.

So I think that's important to qualify that I don't think you are meaning that you don't want us to properly identify people. You may have some differences as to how you believe it ought to happen, but identification, I believe, from a state standpoint, and looking at our election process, is critical to understand who is voting and making sure that we got a proper vote count.

MR. PRIMES: You're right, Governor Rogers.

MS. GREEN: I believe I did say exactly that, that a person should be able to present whatever kind of identification he has that properly identifies him, not specifically a driver's license or some other government-issued ID.

As you know, when you take an airplane nowadays, you've got to have a government-issued ID before you can board that plane. That discounts all other kinds of identification that a person might have that might properly identify him because so many people don't drive and don't bother to go down to get a non-driver's ID or have some other kind of acceptable government form of ID.

But there are other kinds of identification. Don't ask me to name them at the moment, that a person, as long as they can identify themselves, maybe two pieces of ID. You got a water bill and something with your name on it to show that you are you.

CHAIRMAN DAVIDSON: May I interject here just for a minute? This is a topic that we can talk at length about because it's an important topic. It's been called to my attention that there is another group that is waiting outside to occupy this office, this room, and they've given us five minutes.

MR. PRIMES: We're scheduled for 2:45. We're scheduled for 3:30, I'm sorry. We're scheduled for 3:30.

CHAIRMAN DAVIDSON: If you can make a quick comment totaling altogether here about five minutes, I would appreciate it. Mr. Turner?

MR. TURNER: Thank you. Go ahead, Marlon.

MR. PRIMES: I just want to make a point, and I think it relates to what I had said before. I think when we think about rules, we have to also remember the least of those, particularly about the issue of provisional ballots. Sometimes we forget about the people that move frequently and may not understand what precinct they're at, and I think the same could be true with respect to the IDs. I mean, there are some people are just living on the edge and this may present a problem.

I think the overall goal is to ensure that people have the opportunity to participate in the process pursuant to their constitutional rights. So there has to be special attention made, not only to how it affects middle class Americans, but how it affects the least of those.

MR. TURNER: Agreed. Agreed. And I agree with the comments of my colleagues on the panel with respect to the ID requirements. This is a balancing test and as with any pattern or

practice that would have impact on the fundamental right, one must lead to show that there's compelling governmental interest in maintaining the practice at issue.

And what has happened in my view is that the photographic identification requirement is distinguishable in such a way, or being proposed in such a way, it kind of has to, I think, go beyond the government's compelling interest and certainly it's not narrowly tailored to achieve that compelling interest in ensuring the integrity of the voting process because for many, many years, identification means other than a standard driver's license or state ID card, or in the case of this proposed national ID card, that's never been required.

It's never been necessary in most states in order to maintain the integrity of the voting process. And in my view, there is no new -- no evidence of any new fraud or types of fraud that would mandate this heightening of the requirements in ways that would negatively impact upon the poor, on the disabled, on people of color, on those without driver's licenses, et cetera. So that is the basis. And certainly we understand that the voting process must proceed with integrity, but we also believe that it's important not to unduly impinge upon the rights of voters. And so --

[Applause]

MR. TURNER: -- in conclusion, I would just like to say on behalf of our panel and on behalf of the National Bar Association, again, we thank you very much for your work in building this record, this factual predicate for a determination by Congress of the renewal of the Voting Rights Act.

Your time is very valuable. You're all eminent people in your respective fields and we know how hard you're working to ensure that this record is built and we thank you very much.

CHAIRMAN DAVIDSON: Let me say two things because I have not been as tough on enforcing time constraints as I implied this morning that I might be. I will take full responsibility for the fact that we have gone over a little bit. I recognize the possibility that those of you on the panel may still feel that you want to elaborate on your answers to the questions that were raised by the Governor here, and if you wish to do that, you're certainly free to send to us via the staff here any further comments that you want to make on the subject.

Along the same lines, I notice that some of you have typed prepared statements and others have handwritten prepared statements. We would very much like to get copies of all those statements, and if some of you want to type out your written statements and get them to us, we would really, really appreciate getting those.

And finally, the plans of this Commission were to hear anybody from the public-at-large who wish to make a statement. And we're not obviously able to do that in this venue. But if there are those of you in the audience who would like to meet with us, with the staff outside, we would be happy to tell you where you may direct personal statements that you would like to make that focus on voting discrimination against minority voters. That is the primary purview of this Commission.

Once again, thank you very much for being with us today and for inviting us to come and giving us the amazing testimony that you have.

[Applause]

[Whereupon, the foregoing proceedings were concluded at 3:45 p.m.]

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CERTIFICATE

STATE OF FLORIDA:
COUNTY OF SEMINOLE:

I, Dawn R. Matter, Electronic Reporter and Notary Public, State of Florida at Large, do hereby certify that I was authorized to and did report the above and foregoing proceedings at the time and place aforesaid, and that the pages numbered 3 through 221, inclusive, prepared under my direction and supervision, constitute a true, complete and accurate transcript of said proceedings to the best of my skill and ability.

WITNESS MY HAND AND OFFICIAL SEAL this 6th day of September 2005.

DAWN R. MATTER,

_____
Marge Raeder Court Reporter, Inc.
Electronic Reporter and Notary
Public, State of Florida at Large

1 TRANSCRIPT OF
2 THE SOUTH DAKOTA HEARING IN FRONT OF THE
3 NATIONAL COMMISSION ON THE VOTING RIGHTS ACT
4
TAKEN AT
5 THE JOURNEY MUSEUM
222 NEW YORK STREET
6 RAPID CITY, SOUTH DAKOTA
SEPTEMBER 9, 2005
7
8 A P P E A R A N C E S
9 NATIONAL COMMISSIONERS:
Elsie Meeks
10 Joe Rogers
11 GUEST COMMISSIONERS:
Hon. Thomas Daschle, Special Policy Advisor,
12 Alston & Bird
Jacqueline Johnson, Executive Director,
13 National Congress of American Indians
Hon. Chris Nelson, Secretary of State,
14 South Dakota
Jennifer Ring, Executive Director, ACLU of the
15 Dakotas
Jon M. Greenbaum, Director, Voting Rights
16 Project
17 SOUTH DAKOTA PANELISTS:
Panel 1:
18 Dan McCool, Director, American West Center,
University of Utah
19 Bryan Sells, Attorney, ACLU Voting Rights
Project
20 Raymond Uses The Knife, Cheyenne River Sioux
Tribe
21 Hon. Theresa Two Bulls, State Senator, South
Dakota
22 Panel 2:
Craig Dillon, Councilman, Oglala Sioux Tribal
23 Council, LaCreek District
Richard Guest, Staff Attorney, Native American
24 Rights Fund
Adele Enright, County Auditor, Dewey County
25 O.J. Semans, Rosebud Sioux Tribe
Jesse Clausen, Oglala Lakota Tribal Member

1 (The hearing was called to order at 11:10 a.m.)
2 MR. GREENBAUM: Good morning, everybody. Thank
3 you for coming out this morning to come to the seventh
4 hearing of the National Commission on the Voting Rights
5 Act. My name is Jon Greenbaum. I'm director of the
6 Voting Rights Project for the Lawyers' Committee on Civil
7 Rights Under Law in Washington, D.C., and the Lawyers'
8 Committee created the National Commission on behalf of
9 the civil rights community to examine the issue of racial
10 discrimination in voting.
11 It's particularly relevant now because Congress
12 is beginning to go through the process of reauthorizing
13 the Voting Rights Act, or at least the temporary
14 provisions of the Voting Rights Act which you're going to
15 be hearing a little bit more about in a couple of
16 minutes. And for Congress to reauthorize those temporary
17 provisions in a constitutional way, it needs to make
18 certain factual findings showing that those temporary
19 provisions are still needed.
20 So the Commission's task has been to conduct
21 hearings across the country, and in addition to that, to
22 conduct research and get material on its own, and then in
23 January of next year, the Commission will be issuing a
24 report.
25 In a minute you're going to be hearing from
26 Elsie Meeks, one of our commissioners who strongly
27 encouraged us to come out to South Dakota and do a
28 special Commission hearing here. Most of the Commission
29 hearings we do are regional, but to do one focused on South Dakota
30 because of the issues having to do with the
31 voting rights of American Indian citizens in the state
32 which, you know, have been a major issue.
33 And over the past -- in particular, over the
34 past several years, some of the most active litigation as
35 well as some of the most active voter engagement has gone
36 on concerning the Indian community itself here in South
37 Dakota, and we're very interested in hearing from people
38 on it today.
39 We have two of our national commissioners here.
40 Elsie Meeks, who was -- who I'm going to introduce right
41 now. Ms. Meeks is the first American Indian member of
42 the United States Commission on Civil Rights. She's also
43 -- runs a nonprofit on behalf of the Oglala Sioux Tribe
44 -- no? Let me --
45 COMMISSIONER MEEKS: That's okay. It's a
46 national.
47 MR. GREENBAUM: It's a national nonprofit,
48 First Nations Oweesta Corporation, a national financing
49 intermediary that assists native communities in
50 establishing community development financial
51 institutions. And Elsie is going to talk a little bit
52 more about the Commission's charge as well as introduce

1 the other commissioners, and we have five -- we have one
2 of our national commissioners here with us and five
3 really tremendous guest commissioners who a lot of you in
4 the room know who you're going to be hearing from as
5 well. Thank you.
6 COMMISSIONER MEEKS: Thank you, Jon. My name
7 is Elsie Meeks. Good morning. And just so that people
8 aren't confused, the U.S. Commission on Civil Rights is a
9 different position than this Commission, and I am not on
10 the U.S. Commission on Civil Rights anymore, but I am
11 serving on this Commission, so I hope that really cleared
12 things up.
13 I want to welcome you all today to this seventh
14 of ten public hearings that this Commission has and will
15 be conducting. As Jon said, the goal of the National
16 Commission is to examine the record of discrimination in
17 voting since the last major reauthorization of the Voting
18 Rights Act in 1982. We're here today in Rapid City, and
19 it was at my request, to hear about the American Indian
20 experiences when voting and to examine the extent of
21 discrimination encountered by -- or non-extent of
22 discrimination encountered by American Indian voters in
23 South Dakota.
24 In our previous hearings, we've heard some
25 compelling testimony about voting discrimination in
26 various parts of the country and the impact of the Voting
27 Rights Act on minority voters in the South, Southwest,
28 Northeast and Midwest, and specifically, Georgia and
29 Florida. Today the focus is primarily on American Indian
30 voters in South Dakota, although we will hear testimony
31 about the challenges Indian voters face generally.
32 A little background about the Voting Rights
33 Act. It was signed into law in 1965 by President Lyndon
34 Johnson to enforce the Fifteenth Amendment in response to
35 voting discrimination encountered by African Americans in
36 the South. The Act is made up of both permanent and
37 temporary provisions. When Congress reauthorized the
38 temporary provisions of the Voting Rights Act in 1975, it
39 made specific findings that the use of English-only
40 elections and other devices effectively barred citizens
41 who primarily spoke a language other than English from
42 participating in the electoral process. In response,
43 Congress expanded the Act to account for discrimination
44 against these citizens by enacting the Minority Language
45 Assistance Provisions found in Section 203.
46 Before discussing the expiring provisions of
47 the Act in greater detail, I want to explain what is
48 scheduled to expire in 2007 and what's not The right of
49 minority voters to vote free from discrimination is
50 guaranteed by the Fifteenth Amendment and it's permanent.
51 The permanent provisions of the Act include the
52 prohibition against denying or diluting the rights of

minorities to vote, a ban on literacy tests and poll taxes, the outlawing of intimidation, authorizes federal monitors and observers, and creates various mechanisms to protect the voting rights of racial and language minorities.

However, there are some temporary provisions of the Voting Rights Act and these will sunset in 2007 unless they're reauthorized by Congress. So the expiring provisions are these: There's three major protections under the Voting Rights Act and they will expire unless reauthorized. First, there's Section 5 of the Act that requires certain states, counties, and townships with a history of discrimination against minority voters to obtain approval or pre-clearance from the Department of Justice -- U.S. Department of Justice or the United States District Court in Washington, D.C., before they can make any voting changes. These changes include redistricting, changes to methods of elections and polling places.

Jurisdictions covered by Section 5 must prove that the changes do not have the purpose or effect of denying or abridging the right to vote on account of race, color, or membership in a language minority. Two counties in South Dakota, Shannon and Todd, are covered by Section 5.

Second, Section 203 of the Act requires that language assistance be provided in communities with a significant number of voting-age citizens who have limited English proficiency. Four language groups are covered by Section 203: American Indians, Asian Americans, Alaska Natives, and those of Spanish heritage.

Covered jurisdictions must provide language assistance at all stages of the electoral process. As of 2002, a total of 466 local jurisdictions across 31 states are covered by these provisions. In South Dakota, 18 counties are subject to Section 203.

Third, Section 6B, 7,8, 9, and 13A -- you'll all remember that -- of the Act authorizes the Attorney General to appoint a federal examiner to jurisdictions covered by Section 5's pre-clearance provisions on good cause or to send a federal observer to any jurisdiction where a federal examiner has been assigned. Since 1966, 25,000 federal observers have been deployed in approximately 1000 elections.

The Lawyers' Committee on Civil Rights Under Law, acting on behalf of the civil rights community, created this nonpartisan National Commission on the Voting Rights Act to examine discrimination in voting since 1982. The National Commission is comprised of eight advocates, academics, legislators, and civil rights leaders who represent the diversity that is such -- that is so important to being part of our nation. The

1 Honorary Chair of the Commission is the Honorable Charles
2 Mathias, former Republican senator from Maryland. The
3 Commission's chair is Bill Lee, former Attorney General
4 for Civil Rights during the Clinton Administration.
5 The other five national commissioners are the
6 Honorable John Buchanan, former Congressman from Alabama,
7 Chandler Davidson, scholar and co-editor of one of the
8 seminal works on the Voting Rights Act. Dolores Huerta,
9 co-founder of the United Farm Workers of America.
10 Charles Ogletree, Harvard law professor and civil rights
11 advocate. And the Honorable Joe Rogers, former
12 Republican Lieutenant Governor of Colorado, and myself,
13 first American Indian to serve on the U.S. Commission on
14 Civil Rights; it's written right here.
15 Today Commissioner Rogers and I are fortunate
16 to be joined by guest commissioners, and we are indeed
17 fortunate. We have Senator Tom Daschle who needs no
18 introduction. Jacqueline Johnson, the Executive Director
19 of the National Congress of American Indians. Jennifer
20 Ring, Executive Director of the ACLU of the Dakotas.
21 Chris Nelson, of course we can't forget Chris Nelson,
22 Secretary of State of South Dakota.
23 The Commission has two primary tasks. First to
24 conduct hearings, as Jon said, such as this one, across
25 the country to gather testimony relating to voting
26 rights, and second, to write a comprehensive report
27 detailing the existence of discrimination in voting since
28 1982, the last time there was a comprehensive
29 reauthorization of the Voting Rights Act. This report
30 will be used to educate the public, advocates, and
31 policymakers about the record of racial discrimination in
32 voting.
33 We will have three panels today. The first two
34 panels will comprise of scholars, voting rights
35 attorneys, and members of the community who's been active
36 in voting rights issues. Each panelist will provide a
37 five to ten-minute presentation. After all the members
38 of the panels have spoken, the Commission will address
39 questions to the panelists.
40 We encourage members of the public who are here
41 today to share their voting rights experiences in our
42 third and final panel. If you're interested in doing so,
43 please speak with a member of the staff who are -- if you
44 could just wave your hand or stand up, if you're
45 interested in speaking on the third panel. If you would
46 like to share your testimony but can't stay, please see
47 one of the staff members who will take your statement so
48 that it can be included in the record.
49 I'm now going to introduce each of the
50 commissioners present today and ask that each one of you
51 make a short statement about your interest or whatever it
52 is you want to make a statement about.

1 Commissioner Joe Rogers -- I'll just read a
2 short bio -- completed his term as the Lieutenant
3 Governor of Colorado in 2003 where he held the
4 distinction of serving as America's youngest lieutenant
5 governor and only the fourth African American in U.S.
6 history to ever hold that position. He served as
7 founding chairman of the Republican Lieutenant Governors'
8 Association and served on the Executive Committee of the
9 National Conference of Lieutenant Governors. Joe Rogers
10 created the acclaimed Dream Alive Program in dedication
11 to the memory and legacy of Martin Luther King and the
12 leaders of the Civil Rights Movement. Joe?
13 COMMISSIONER ROGERS: Why, Elsie, thank you so
14 much. Are you all doing all right this morning? Well,
15 good. I'm glad to be with you and I'm so glad to have
16 been invited. It's good that we're here in the West. As
17 we've been traveling all throughout the United States, I
18 remind folks that much of the heart of America is really
19 where we are, as you all well know, here in the western
20 United States. And given our special relationship with
21 each other in particular, you all being here in Rapid
22 City and South Dakota, we know you all venture through
23 Denver on quite many occasions at least when you're
24 heading out of town or traveling throughout the country.
25 So it's just a delight to be here with you today.
26 We're excited frankly to hear your testimony
27 and to get some sense about how these issues, in and of
28 themselves, play out here in South Dakota, frankly, all
29 sides of issues and how they play out. What's so
30 important in terms of the Commission, as Elsie has
31 already specified, is that we obtain the record in
32 primary part because the Supreme Court of the United
33 States has basically said this: Because you are dealing
34 with issues that relate to race, essentially the standard
35 of review of any law as it relates to race is the highest
36 standard of review, and it's called strict scrutiny. And
37 as a result of that, it's so important that to the extent
38 that legislation deals with issues related to race, that
39 there be a foundation to establish a basis for that
40 legislation.
41 And as you all well know, the Civil Rights
42 Act -- in particular, the three seminal pieces of
43 legislation, the Civil Rights Act of 1964, which during
44 the time of Martin Luther King, Junior, sought to lead
45 and create hope and opportunity for so many people
46 throughout the country. And as you well know, the Voting
47 Rights Act is thought to be perhaps the most effective
48 piece of civil rights legislation in United States
49 history. So we're here to make the record, we're here to
50 receive your testimony, and just delighted to be with you
51 all here today.
52 COMMISSIONER MEEKS: And Commissioner Tom

1 Daschle needs no introduction, but just to let people
2 know, he is the Special Policy Advisor at the law firm of
3 Alston & Bird, and for 25 years, as we all know,
4 represented the people of South Dakota in the U.S. House
5 and the U.S. Senate and did that very well. In the
6 Senate he served ten years as the Democratic leader, the
7 second longest serving Democratic leader in history.
8 Tom?
9 SEN. DASCHLE: Well, Elsie, thank you. I want
10 to join with you in welcoming our fellow commissioners to
11 this important hearing today and thank them very much for
12 taking time out of their busy schedules to do this.
13 We're very appreciative of the opportunity to share our
14 stories and your recognition of the need to hear and
15 address them.
16 I also want to thank all of the panelists who
17 are coming to testify today. I know many of them, and it
18 is a very important aspect of the success of this hearing
19 to hear directly through people with the experience that
20 they will share. It's an unfortunate distinction that
21 the people of South Dakota have a great deal to
22 contribute to this project. However, we are aware that
23 it is only through firsthand accounts of discrimination
24 that we can educate policymakers and the public about the
25 importance of reauthorizing the Voting Rights Act.
26 And as the Supreme Court has made clear, a
27 detailed record showing discrimination in voting since
28 its last reauthorization is necessary for future
29 reauthorization to withstand a constitutional challenge.
30 I know that the report the Commission will put together
31 will not take any position concerning whether the
32 expiring provisions of the Voting Rights Act should be
33 reauthorized or what the reauthorized act should include.
34 Instead these hearings will detail the facts so that they
35 can be utilized as reauthorization is considered.
36 With that understanding, I want to share one
37 thought that has been on my mind a lot lately. Forty
38 years ago, this legislation was an integral part of
39 forming that, quote, more perfect union our founders
40 envisioned. I always found that wording from the
41 Preamble to the Constitution prescient; that a perfect
42 union may be out of the reach of each generation, but a
43 more perfect union was something that could be achieved
44 with each successive generation.
45 Those who came before us certainly did so in
46 writing and passing the Voting Rights Acts, and I and
47 many of my fellow South Dakotans are here today because
48 that work, like the work of America, remains unfinished.
49 I'm grateful that we have the chance to continue that
50 work today.
51 Before talking about our experiences here in
52 our state, let me just say a couple of words about the

1 Voting Rights Act itself. It is a product of tremendous
2 bipartisan cooperation as well as the blood, sweat, and
3 tears of civil rights workers across this country.
4 Many of us reached adulthood in a country where
5 poll taxes were collected, where grandfather clauses were
6 imposed, where literary tests were actually allowed.
7 Forty years ago America put a stop to it. The Voting
8 Rights Act delivered the knockout punch to Jim Crow. It
9 is universally recognized as one of the most successful
10 pieces of civil rights legislation enacted in all of our
11 history. My votes in favor of reauthorizing the Voting
12 Rights Act in 1982 and ten years later in '92 are among
13 the votes of which I am most proud, and while they're not
14 here today, I would venture to say that Senator Mathias
15 and Congressman Buchanan feel exactly the same way.
16 I also believe it is needed every bit as much
17 today as it was 40 years ago on August 6 of 1965 when it
18 was signed, as Elsie noted, by President Johnson. Over
19 the years the Voting Rights Act has become an important
20 institution in America's democracy. As we are learning
21 daily, outside the United States from Moscow to Baghdad,
22 no matter how strong the idea of democracy, it will not
23 succeed without the institutions to sustain it. People
24 disenfranchised by discrimination must be ensured that
25 their vote is both uninalienable and enforceable.
26 The Voting Rights Act has done just that for
27 two generations of voters, deepening confidence in a
28 democratic system and serving as a vehicle for resolving
29 conflicts as it did in the closest presidential election
30 in our country's history in 2000.
31 Parts of our great state have been subject to
32 three expiring provisions in this Act, as Elsie noted.
33 Those provisions, among other important actions, have led
34 to something of which I think all South Dakotans can be
35 proud: a steady increase in the percentage of Native
36 American participation in federal elections. In 2004 we
37 saw Native Americans vote at a rate about 30 percent
38 higher than in 2000, during the previous presidential
39 contest.
40 In that context, it is important for the
41 Commission to know that each of the expiring provisions
42 has been exercised in South Dakota in the last several
43 elections. The pre-clearance provision in Section 5 have
44 helped ensure the changes to election law and procedure
45 not discriminate, either overtly or subtly, against
46 Native Americans.
47 Additionally, I can personally attest that the
48 requirements for minority language protections have been
49 widely exercised. That provision ensured that hundreds
50 of Lakota-only speakers were able to participate last
51 time in the election.
52 And in our most recent federal elections in

1 2002 and 2004, the Department of Justice sent examiners
2 and observers under Section 6 through 9 provisions. I
3 need not speak to the findings of those delegations as I
4 am sure they will be produced in documentation about
5 their trips that ought to be made available to the
6 Commission. But the mere fact that the delegations were
7 dispatched is, I believe, evidence of concern both on the
8 ground in South Dakota as well as in the federal
9 government in Washington.
10 Unfortunately, while the percentage of Native
11 American voters is increasing, it is still well below the
12 national average and even further below what we wish
13 participation were for all voters, minority and
14 otherwise.
15 So I look forward to hearing from the
16 distinguished members of this panel this morning. We've
17 come a long way in this country when it comes to the
18 right to vote. Forty years ago those who marched for it
19 were met with violence. Today that is not our fear. The
20 fear is that those who seek to strengthen and extend the
21 Voting Rights Act will be met by silence.
22 I'm confident that your knowledge and the
23 experiences will help the Commission hear our concerns
24 and in so doing, be able to provide Congress with a
25 comprehensive report on discrimination in voting since
26 the last reauthorization of the Voting Rights Act. Thank
27 you very much.
28 COMMISSIONER MEEKS: Thank you, Senator. My
29 next guest commissioner is Chris Nelson, and he is
30 currently serving as South Dakota's Secretary of State,
31 and we're very happy that he joined us.
32 He was elected in the 2002 general election.
33 His responsibilities include overseeing the conduct of
34 elections for South Dakota and a job that he takes very
35 seriously. Prior to becoming Secretary of State, Chris
36 held the position of State Election Supervisor in the
37 Secretary of State's office for 13 years and was the
38 Uniform Commercial Code supervisor in the same office for
39 two years. Chris?
40 MR. NELSON: Thank you, Elsie. Good morning,
41 and I would just like to first thank Jon Greenbaum and
42 the folks at the Lawyers' Committee for Civil Rights for
43 inviting me to participate in these proceedings as a
44 guest commissioner. Having worked in election
45 administration since 1989 and having been the Secretary
46 of State since 2003, I think I bring perhaps a different
47 perspective to this panel than the other panelists and
48 one that I hope is helpful in the proceedings today.
49 I see my job as Secretary of State to oversee
50 the election process in South Dakota and make sure that
51 that process is free and fair for all candidates and all
52 voters. As the senator has noted, the last four years

1 have seen tremendous positive change in voter
2 participation by Native Americans in South Dakota, and I
3 want to give you just a couple examples, some numerical
4 examples of that.
5 When we look at the increase in the number of
6 people that have voted in the 2004 versus 2000 election
7 in South Dakota, that increase was about 23 percent.
8 When we look at the increase in the counties covered by
9 Cheyenne River and Standing Rock, the increase is between
10 40 and 57 percent. When we look at the increase in
11 Shannon County, 122 percent, and in Todd County, 139
12 percent, now almost six times the increase that we've
13 seen elsewhere in the state.
14 When measuring the percentage of voting age
15 population that's registered to vote, five of the top six
16 counties in South Dakota are Native American counties and
17 we see similar positive things for the voter turnout
18 rate. Of the eight predominantly Native American
19 counties in South Dakota, six of those have turnout rates
20 higher than the state average, and so we've seen some
21 good things happen.
22 Those positive changes are the result of
23 changes in state election law primarily in the area of
24 absentee voting and also the efforts of a lot of private
25 organizations to encourage voter turnout among Native
26 Americans.
27 It's my understanding today that the goal of
28 this Commission is to document voting discrimination in
29 light of the upcoming reauthorization of the
30 pre-clearance, the minority language, and the election
31 observer provisions of the Voting Rights Act. My
32 interest today and my questions will primarily focus on
33 the impact of these provisions on Native American voters
34 in South Dakota. And in light of that, there are two key
35 questions that I would hope each of the panelists today
36 would answer during their presentation.
37 The first of those questions specifically is
38 how has the Section 5 pre-clearance requirement impacted
39 on the ability of voters in Todd and Shannon County to
40 participate in the election process? And the second
41 question is how have the minority language provisions
42 impacted on Native American voters across South Dakota to
43 participate in the election process?
44 With that, I look forward to each of the
45 presentations today, and again, thank you for allowing me
46 to participate.
47 COMMISSIONER MEEKS: Thank you, Chris. I am
48 very happy to introduce Commissioner Jacqueline Johnson
49 who's the Executive Director of the National Congress of
50 American Indians, the oldest and largest tribal
51 governmental organization in the United States. Before
52 joining NCAI in 2001, Ms. Johnson, Jacque, was the Deputy

1 Assistant Secretary of the Native American Programs in
2 the U.S. Department of Housing and Urban Development.
3 And on a personal note, I'd just -- Jacque is
4 someone that I know there's two things that she really
5 cares about developing in Indian country and that's
6 voting and financial literacy, and we work very hard on
7 those issues together. So thank you for joining us.
8 MS: JOHNSON: Thank you, Elsie. (Speaking in
9 Native language.) I'm a Tlingit from Alaska. My Tlingit
10 name is Ku seen. I'm from a village in Haines, Alaska
11 called Dei Shu. I come from the Raven House, and I would
12 like to thank the rest of the guest commissioners for the
13 honor of being here today and the commissioners and also
14 thank the National Commission for the hard work that they
15 have done going from hearing to hearing to put together
16 this very, very important record that I think will help
17 us reconfirm the issues not only for Native Americans,
18 but also for other minorities in this country as we try
19 to address the important privilege that we have which is
20 the right to vote.
21 Elsie said that the National Congress of
22 American Indians is the oldest and largest advocacy
23 organization in Washington, D.C., and recently we felt it
24 very important for us to engage the Native vote, and we
25 worked very hard across the country in many, many tribal
26 communities to try to urge our citizens to exercise their
27 right to vote and to get them out to the polls and to
28 deal with just the whole engagement of getting out the
29 vote, but also the protections, the voting protections
30 rights to ensure that we had proper representation. Some
31 of our friends who are part of this panel in the ACLU
32 were very helpful in trying to make sure that we had the
33 right protections in each of our communities as we
34 continue.
35 And the other thing we're working on is trying
36 to get more Natives to run for vote -- elections, local
37 elections and national elections. So this project is not
38 a one-year or two-year project for us. This is an
39 ongoing project for us, and we're committed to helping
40 our Native citizens engage in the political environment
41 of this country.
42 Native Americans have had a long history of
43 disenfranchisement, and we don't need to go through that
44 history here today, but I want to just remind us of a
45 couple things. That in, you know, 1924 when we were
46 granted full citizenship rights, it took nearly 40 years
47 for all 50 states to give Native Americans the right to
48 vote. And then many of those states still had civilized
49 standard tests. Sometimes it was a poll tax, sometimes
50 it was a literacy test, sometimes through other kinds of
51 intimidation. Many, many times you had to leave your
52 reservation and your community to show that you were

1 truly civilized before you had the right to vote.
2 And then -- you know, and then after we
3 disengaged with that citizenship test, we still dealt
4 with the same issues that many minorities in this country
5 continue to face having to deal with voting. And so as
6 we're here today, we're particularly interested in
7 hearing the Native Americans' ongoing concerns with the
8 right to vote. And I'm sure that we'll hear testimony
9 not only from South Dakota, which I want to also note
10 that in 1983 -- 1985, excuse me, three years after the
11 last reauthorization of the Voting Rights Act, only 9.9
12 percent of Native Americans in South Dakota turned out to
13 vote or engaged in voting and -- were registered, excuse
14 me.
15 As we know and we heard from the Secretary of
16 State and Senator Daschle, Native Americans in this state
17 as well as throughout the country have really stepped up
18 those numbers. And in the past 20 years, and
19 particularly in South Dakota in the last federal
20 elections, we have seen a tremendous turnout of Native
21 Americans, and I think part of it is because of the
22 Voting Rights Act and the ability it allows for us to
23 continue to encourage our communities.
24 So I'm looking forward to today. I'm looking
25 forward to the panelists and seeing what we can learn
26 about the message that we can help with -- to continue to
27 engage in our effort to reauthorize the Voting Rights
28 Act. Thank you.
29 COMMISSIONER MEEKS: Thank you, Jacque. Guest
30 Commissioner Jennifer Ring, we thank you for being on
31 this. She is the Executive Director of the ACLU of the
32 Dakotas, and before joining the ACLU in 1999, she served
33 for five years in the North Dakota State Legislature and
34 was a field representative for the North Dakota Public
35 Employees' Association, and she's been a real advocate
36 for voting rights issues, and I'll let her give her
37 statement. Thank you, Jennifer.
38 MS. RING: Yes. Thank you. I really want to
39 thank the Commission for coming out here. This is a
40 population that I deal with that have been waiting a
41 long, long time to get their voting rights. I get a lot
42 of calls and complaints from around the states, and when
43 you go and find that somebody has a school board that is
44 completely unresponsive to the Native community and yet
45 the Native community is the majority in the school
46 district, you have to wonder why. When you find a county
47 Commission that is completely unresponsive and yet the
48 Indians are the majority in the county, you have to
49 wonder why.
50 I don't need to go over the long history of how
51 Native Americans have been legally discriminated against.
52 What I do want to say is a little bit about the local

1 history. The Lakota, Dakota, Nakota people who are the
2 majority Native American population of South Dakota have
3 a long and proud history of serving this country. Every
4 time this country has called, they have answered from the
5 Lakota Code Talkers all the way to the military serving
6 currently in Iraq and Afghanistan. And yet when they
7 come home, they come home to a state that, in general,
8 barely acknowledges their existence and local communities
9 in particular that do not want them to, in any way, shape
10 or form, participate in their community.
11 I want to acknowledge the presence in the room
12 here today of several witnesses who, in my opinion, are
13 heroes. They have fought for their voting rights when it
14 meant facing official police intimidation to do so, and
15 they fought for their voting rights against communities
16 that would use any means possible to shut them down, and
17 I thank you for coming and I thank you for hearing their
18 stories.
19 COMMISSIONER MEEKS: Thank you, Jennifer. The
20 National Commission is pleased, very pleased to be here
21 at the Journey Museum. I think it's a great venue for
22 this. And we also want to thank the National Congress of
23 American Indians for all it's done to assist us in
24 planning this hearing.
25 So we're now running just a little bit late,
26 but we're ready to hear from the first panel. So if Dan
27 McCool, Bryan Sells, Theresa Two Bulls, and Raymond Uses
28 the Knife, is that all -- would like to come forward?
29 Oh, and Laurette Pourier, too, please.
30 We're very thankful for the people who have
31 agreed to come give their testimony. It's your voices we
32 want to capture in this report. I do want to remind the
33 witnesses if they would try to keep their remarks to
34 about ten minutes or so. And I also want to remind
35 people that if you have cell phones, please put them on
36 quiet or vibrate. I know it's always a reminder that I
37 like, so thank you.
38 I'm going to --
39 COMMISSIONER ROGERS: Chair Meeks, may I
40 interrupt just briefly? It just occurred to me that
41 there's something that's happened that's critically
42 important. This is the first time that the Commission
43 meeting -- that this National Commission has actually
44 hosted a hearing since the circumstances that have taken
45 place with Katrina and the devastation that that's caused
46 here in the United States, and as you all well know, that
47 is the single worst disaster in the entire history of the
48 United States of America.
49 And with thousands of our fellow citizens that
50 have died, in particular, and the search still going on
51 obviously in terms of survivors even today, I think it's
52 appropriate that in light of our national role and the

1 import to the role that we have throughout the entire
2 country that we take just a moment in advance of the
3 formal starting of the hearing, if we can, in
4 recognition, a moment of silence, perhaps, in their
5 honor. Would you all just join me in standing for a
6 moment in a brief moment of silence?
7 (A moment of silence was observed.)
8 COMMISSIONER ROGERS: Thank you very much.
9 COMMISSIONER MEEKS: Thank you, Joe. That's
10 very appropriate. I am going to read the bios of the
11 panelists that are on this panel, and then let -- then
12 we'll start at this end.
13 Dan McCool is the -- is currently a professor
14 of Political Science at the University of Utah and serves
15 as the Director of the American West Center and the
16 Environmental Studies at the University of Utah.
17 Mr. McCool's research focuses on Indian voting rights,
18 Indian water rights, water resource development, and
19 public lands policy. He has appeared as an expert
20 witness in several Indian voting rights cases and has
21 written and published extensively on the subject.
22 Mr. McCool is the co-author of a book manuscript
23 currently under contract titled, I'm Indian and I vote:
24 American Indians, the Voting Rights Act, and the Right to
25 Vote.
26 His additional body of published work includes
27 Native Waters: Contemporary Indian Water Settlement in
28 the Second Treaty Era; Command of the Waters: Iron
29 Triangles, Federal Water Development, and Indian Water;
30 Staking Out the Terrain: Power and Performance Among
31 Natural Resource Agencies; and Public Policy Theories,
32 Models and Concepts. Mr. McCool received his Ph.D. from
33 the University of Arizona in 1983.
34 Bryan Sells is currently staff counsel for the
35 Voting Rights Project of the ACLU and specializes in
36 Native American voting rights and ballot access
37 litigation. In his five years with the ACLU, he has
38 represented tribal members in more than a half a dozen
39 notable cases in South Dakota, including Quiver v.
40 Nelson, the largest voting rights lawsuit in history.
41 Mr. Sells received his undergraduate degree from Harvard
42 and law degree from the Columbia School of Law.
43 The Honorable Theresa Two Bulls is a state
44 senator from South Dakota. In a legislature where both
45 women and American Indians are in the minority, Theresa
46 Two Bulls, one of the four Indian lawmakers in the entire
47 legislature, stands out as the first Indian woman to
48 serve as a state lawmaker in South Dakota. Ms. Two Bulls
49 is a member of the Oglala Sioux Tribe. After serving as
50 tribal secretary from 1990 to 1998, a job she did very
51 well, and vice-president from 2000 to 2002, Ms. Two Bulls
52 took a sabbatical from her post as tribal prosecutor to

1 serve in the Senate. She represents the Pine Ridge
2 Reservation and currently serves on the Health and Human
3 Services and Local Government Committees.
4 Raymond Uses the Knife is the Tribal
5 Vice-Chairman for the Cheyenne River Sioux Nation in
6 South Dakota, currently serving his fourth term on the
7 tribal council. Ray's been selected by his colleagues to
8 serve as Vice-Chairman of the Cheyenne River Sioux Nation
9 in South Dakota. He serves on the Claims and
10 Legislations, Economic Development, Environment and
11 Natural Resources, Health, and Wolakota committees. In
12 addition, Ray also serves on the Voting Rights
13 Commission.
14 And Laurette Pourier who was a recent -- we're
15 very happy that she agreed to testify. I don't have her
16 bio, but I can tell you anything you want to know about
17 Laurette. She is the Executive Director or the Chair of
18 SANI-T which is the Strengthening --
19 MS. POURIER: Society for the Advancement of
20 Native Interests - Today.
21 COMMISSIONER MEEKS: That's right. Thank you.
22 And she has been an advocate for domestic violence and
23 has been a community developer for many, many years. So
24 thank you for all being here. Dan, would you --
25 MR. McCOOL: Thank you, Elsie. It's a pleasure
26 and an honor to be here. It's rather difficult to sum up
27 everything in ten minutes, but I'll do my best. We just
28 finished a book manuscript on voting in Indian country.
29 Most of the book is about the Voting Rights Act. That's
30 because the Voting Rights Act has had a profound impact
31 on the ability of Indians to vote.
32 We started with the history of Indian voting
33 and things really pick up when the Voting Rights Act is
34 passed. We collected every case we could find in Indian
35 Country having to do with voting rights and we came up
36 with a list of 66 cases which is far more than we had
37 even anticipated when we started.
38 Let me just note that of those 66 cases, the
39 Indian plaintiffs only lost four of them, and one of
40 those is on appeal. So by and large, American Indians
41 win voting rights cases, and I think that's a telling
42 fact, in and of itself, that there is a problem out
43 there, and the Voting Rights Act, including its renewable
44 provisions, is the way to address those problems. 21 of
45 the 66 cases involved the renewable provisions, Sections
46 5 and Sections 203. And South Dakota is tied with New
47 Mexico for the greatest number of cases; they both come
48 in at 17.
49 The book also includes a final chapter that
50 looks at the elections of 2002 and 2004 to see if all the
51 problems have been resolved and everything's working
52 well. And the investigation of our -- myself and my two

1 coauthors indicates there are continuing problems
2 including the number problems in South Dakota. So we see
3 some problems have been resolved and other problems
4 continue to arise, and there are still challenges to
5 American Indians in their efforts to try to vote.
6 There were also a number of widespread
7 accusations about, quote, Indian voter fraud which proved
8 to be inaccurate, and I think the level of accusations is
9 indicative of the level of animosity and the hostility
10 that has been created when American Indians register and
11 try to vote.
12 I've also served as an expert witness on a
13 number of cases and I'd like to just generally talk about
14 the things that I've discovered in my work as an expert
15 witness. When I do reports, I interview a lot of local
16 people, both Anglo and Indian. I go through U.S.
17 Commission on Civil Rights reports, court cases, the
18 local newspapers, state and local law, state attorney
19 general opinions, state constitutions, so I take a
20 careful look at the entire context in which Indian voting
21 takes place.
22 And in South Dakota, there is still a high
23 level of racial polarization in a number of areas. It's
24 not true everywhere, but it is true in a number of areas
25 where there's a large number of Indians and they're
26 attempting to vote. Polarization is still there. And,
27 of course, this is especially true when Indians run
28 against Anglos, we see a spike in that.
29 And there's a lot of racial animosity and it
30 goes both ways. There's a lot of feelings of prejudice
31 and a lot of feelings of -- that people feel like they're
32 not being treated fairly, and again, it's both Anglos and
33 Indians that are experiencing this. Once again, I think
34 it's indicative of the level of polarization and
35 hostility we see in some of these election environments.
36 There is still a widespread perception that
37 Indians shouldn't even be allowed to vote especially in
38 state and local elections. A lot of discussion among
39 non-Indians that if they, quote, don't pay taxes -- which
40 of course is not true -- but if they don't pay taxes,
41 they should not be allowed to vote. So that's another
42 level of resistance to Indian voting.
43 And there's still language barriers. There is
44 still a significant portion of American Indian people who
45 do not have the language skills to engage effectively in
46 the political process including voting.
47 And there's a host of sort of practical
48 problems that Indians have to face that makes it more
49 difficult for Indians to vote: Long distances to polling
50 places, often over bad roads; polls that are not located
51 conveniently or not on Indian reservations; hostility
52 among election workers and public officials; the purging

1 of voter lists; a poor understanding of election laws and
2 procedures; difficulties and resistance when attempting
3 to register to vote; and efforts to dilute the impact of
4 Indian voting. We see a whole series of Section 2 cases
5 in that regard, and, of course, the language problems
6 that I alluded to earlier.
7 In conclusion, let me -- let me just make four
8 general points about what I've seen in 25 years of
9 research in this area. Indian people still face
10 significant hurdles when they try to participate in the
11 electoral process. In some places it's much better.
12 They're achieving remarkable gains in some areas, but
13 there are still significant hurdles that are not faced by
14 other people.
15 The Voting Rights Act and including Sections 5
16 and 203, that Act has played a pivotal role in providing
17 American Indians with an opportunity to vote and elect
18 candidates of their choice. The impact is enormous.
19 Probably 90 percent of our vote -- our book on Indian
20 voting is about the Voting Rights Act because that's
21 what's happened. That's where the action is. That's
22 where Indians have been effectively empowered; it's
23 through the Voting Rights Act including the renewable
24 provisions.
25 And I think, as we all know, Indians have
26 played an important role in a number of recent elections,
27 and I think the Voting Rights Act has helped them achieve
28 that and helped empower them.
29 And finally, let me just say the Voting Rights
30 Act has really given meaning and substance to democracy
31 on the reservation. It's helped American Indians fulfill
32 the most basic element of the American dream and that's
33 the right to vote and have an impact on one's government
34 through the electoral process. Did I finish in time?
35 COMMISSIONER MEEKS: You were just fine.
36 MR. McCOOL: Okay.
37 COMMISSIONER MEEKS: I'm going ask the
38 commissioners to hold votes until after all the testimony
39 and then we'll be able to ask questions, but one thing I
40 did want to ask Mr. McCool is if you would provide info
41 about the 66 cases you mentioned to the Commission as
42 part of the record so that they could have it as part of
43 the record.
44 MR. McCOOL: We compiled them in a spreadsheet
45 and I'd be most happy to share those with you. However,
46 we are under contract with Cambridge University Press, so
47 technically I'll have to get clearance from them, but
48 with their permission, I'd be most happy to provide that
49 to you.
50 COMMISSIONER MEEKS: Thank you. Bryan?
51 MR. SELLS: I, too, would like to thank the
52 Commission for the honor of being here today and for

1 coming out to South Dakota. I agree with those who have
2 come before me who have said that it's important to be
3 out here. I'd also like to thank each of the
4 commissioners for their personal service on this
5 important Commission.
6 As was mentioned in my introduction, I am a
7 staff attorney with the Voting Rights Project with the
8 American Civil Liberties Union, and over the last six
9 years, the Voting Rights Project has represented tribal
10 members in seven voting rights cases here in South
11 Dakota, and I have been lead counsel in six of those
12 seven cases.
13 I'd like to recognize Patrick Duffy of the
14 Rapid City law firm of Duffy and Duffy who has been our
15 local counsel in all seven cases at great personal and
16 professional sacrifice. He's sitting right back there
17 and deserves a lot of credit for the work that we've been
18 able to do here in this state.
19 Our clients' litigation has challenged
20 virtually every level of government in this state from
21 the state legislature and the Secretary of State on down
22 to county commissions, city councils, and school boards.
23 To date, our clients have prevailed in five of the seven
24 cases with one case still pending before the District
25 Court and one case now pending before the United States
26 Court of Appeals.
27 Together, these cases and the volumes of
28 evidence that they have generated offer a compelling
29 demonstration of the present-day violations of the Voting
30 Rights Act and the need to renew and restore those
31 important provisions of the Act which are set to expire
32 in 2007.
33 Any discussion of Section 5 compliance in South
34 Dakota has to begin with William Janklow. On August 23,
35 1977, then State Attorney General Janklow issued an
36 official opinion in which he assailed Section 5 as a,
37 quote, absurdity, end quote, that imposed an unworkable
38 solution to a nonexistent problem. Janklow advised the
39 South Dakota Secretary of State, Lorna Herseth, that he
40 intended to pursue both litigation and legislation that
41 would exempt South Dakota from the Voting Rights Act and
42 that Herseth should therefore disregard the pre-clearance
43 mandate in the meantime.
44 Janklow never did file a bailout lawsuit.
45 Legislation was never passed exempting South Dakota from
46 the Voting Rights Act, but Secretary Herseth and her
47 successors in office followed Janklow's advice for more
48 than a quarter century.
49 My office first learned of the state's
50 intentional noncompliance with Section 5 in early 2002,
51 and we spent the next six months identifying more than
52 600 unpre-cleared voting changes at the state level.

1 When we brought suit in August of 2002 on behalf of four
2 tribal members, including Senator Two Bulls to my left,
3 in a case entitled Elaine Quick Bear Quiver versus
4 Secretary of State Joyce Hazeltine, that case was
5 described as the largest voting rights case in history.
6 The State initially denied the plaintiffs'
7 allegations. Secretary Nelson, who was then the
8 long-time supervisor of the elections department within
9 the Secretary of State's office, was quoted in the media
10 as saying that his office was in full compliance with the
11 Voting Rights Act, something that turned out not to be
12 true.
13 The parties negotiated a consent order and a
14 remedial plan in which the secretary eventually admitted
15 to more than 800 separate violations of Section 5, and
16 Secretary Nelson has been in the process of bringing the
17 state into compliance with Section 5 for those past
18 violations over the last three years.
19 Although he has made a lot of progress toward
20 that goal, Secretary Nelson has twice been cited by the
21 Court for noncompliance with the terms of the consent
22 order. Just this year, the Quiver plaintiffs had to
23 return to court after the Secretary refused to comply
24 with the consent order with respect to a new law passed
25 at the 2005 legislative session in response to our
26 seventh lawsuit on behalf of Indian voters.
27 On January 27, 2005, the Voting Rights Project
28 filed suit on behalf of four Native American voters in
29 Charles Mix County alleging, one, that the county
30 commissioner districts in Charles Mix County were
31 malapportioned in violation of the one-person-one-vote
32 standard. Two, that the commissioner districts had the
33 effect of diluting Native American voting strength in
34 violation of Section 2. And three, that the commissioner
35 districts were adopted or are being maintained for the
36 purpose of discriminating against Native American voters.
37 That lawsuit is known as Evelyn Blackmoon versus Charles
38 Mix County.
39 And in response to that lawsuit, members of the
40 Charles Mix County Commission asked their state
41 legislators to introduce emergency redistricting
42 legislation that became House Bill 1265. House Bill 1265
43 enables counties to redraw the boundaries of their county
44 commissioner districts more than once per decade under
45 certain circumstances, but only after obtaining
46 permission to do so from the governor and the Secretary
47 of State. House Bill 1265 was designed to change the
48 existing law which permits a county to redistrict only
49 once per decade and only at the county commission's
50 regular meeting in February in a year ending in the
51 numeral 2.
52 House Bill 1265 passed both houses of the state

1 legislature despite vociferous opposition from Native
2 Americans who testified against the bill. The governor
3 signed the law on March 7, 2005, the same day on which
4 the Blackmoon plaintiffs filed a motion for summary
5 judgment on their one-person-one-vote claim. Because
6 House Bill 1265 contained an emergency clause, it went
7 into effect upon the governor's signature, and Secretary
8 Nelson began to implement the law immediately.
9 That is when the Quiver plaintiffs returned to
10 court. They obtained a temporary restraining order
11 enjoining the Secretary from implementing House Bill 1265
12 absent compliance with Section 5 of the Voting Rights
13 Act, and a three-judge court later turned that temporary
14 restraining order into a preliminary injunction. In its
15 unanimous decision issuing the injunction, the
16 three-judge court noted that the state's -- noted the
17 state's history of intentional noncompliance with the
18 Act, including the Secretary of State's refusal to seek
19 pre-clearance for the state's 2001 legislative
20 redistricting plan, and the Court described House Bill
21 1265 as, quote, a rushed attempt to circumvent the Voting
22 Rights Act. Secretary Nelson has appealed that decision
23 to the Supreme Court, and the Blackmoon case remains
24 pending before the district court.
25 Because my time is short, let me tell you about
26 one more case just briefly. In 2003 the Voting Rights
27 Project filed suit on behalf of three members of the Crow
28 Creek Sioux Tribe in a challenge to the county commission
29 districts in Buffalo County, South Dakota. The case was
30 known as Crystal Kirkie versus Buffalo County. The
31 plaintiffs alleged that the districts were malapportioned
32 in violation of the one-person-one-vote principle and
33 were adopted or maintained for the purpose of
34 discriminating against Native American voters.
35 Buffalo County, which according to the 2000
36 census is the poorest county in the United States, has a
37 population of approximately 2100 people, 85 percent of
38 whom are Native American. The county commission's three
39 districts which had been in use for decades contained
40 populations of approximately 1700, 300, and 100 people
41 respectively. Virtually all of the 1700 people in
42 Commissioner District 1 were Native American while not a
43 single Indian lived in the underpopulated District 3.
44 The result was that the county's minuscule non-Indian
45 minority had effective control over the county
46 commission.
47 The parties settled the case in early 2004.
48 The county agreed to redraw its commissioner districts
49 and to hold a special election for two of the three
50 seats. The county also agreed to relief under
51 Section 3(c) of the Voting Rights Act, which effectively
52 means that Buffalo County is now subject to the

1 pre-clearance requirements of Section 5 along with
2 Shannon and Todd Counties in South Dakota.
3 The Kirkie case is unique not only because of
4 the severe extent of the malapportionment or the fact
5 that the plaintiffs got relief under Section 3, but also
6 because the case literally caused a revolution in control
7 at the county commission. Most of our seven cases are
8 simply about giving Native Americans a place at the
9 table. But given the demographics of Buffalo County,
10 justice required more in that case. The Kirkie case was
11 about giving Native Americans the full opportunity to
12 elect representatives of their choice, and that has
13 resulted in control of the table. I'm pleased to report
14 that a -- that Native American voters have elected
15 representatives of their choice to two out of the three
16 seats on the Commission with a third up for election next
17 year.
18 In closing, let me just list the remaining
19 casing that I won't have an opportunity to discuss so
20 that you can ask me questions about them, if you're so
21 inclined. Emery versus Hunt was a successful challenge
22 in 2000 to the state legislature's decision in 1996 to
23 abolish a single-member house district on the Cheyenne
24 River Reservation that was specifically created in 1991
25 to avoid minority vote dilution.
26 Weddell versus Wagner Community School District
27 was a successful challenge in 2002 to at-large school
28 board elections in Charles Mix County, South Dakota, that
29 resulted in the adoption of a cumulative voting scheme by
30 consent of the parties.
31 Bone Shirt versus Nelson was a successful
32 challenge to the state's 2001 legislative redistricting
33 plan. The plaintiffs prevailed on both their Section 5
34 claim and their Section 2 claim, and the District Court's
35 144-page decision on the Section 2 claim is nothing short
36 of historic.
37 And finally, Cottier versus City of Martin is a
38 vote dilution challenge to the ward boundaries in the
39 reservation border town of Martin, South Dakota. That
40 case is currently on appeal after the District Court
41 found that the plaintiffs had not satisfied the third
42 Gingles factor required to prove a claim under Section 2.
43 And I want to leave you with this: Perhaps the
44 person whose words best capture the state of Indian-white
45 relations in South Dakota, in my view, is State
46 Representative John Two Bull whose comments were cited in
47 the Bone Shirt decision as part of the plaintiff's,
48 quote, overwhelming evidence of the legislature's
49 unresponsiveness to Indian concerns.
50 During the 2002 legislative session,
51 Representative Two Bull made a lengthy speech in
52 opposition to a bill which would have required state law

1 enforcement officers to collect data on racial profiling.
2 He said that he would be, quote, leading the charge to
3 end racial profiling, to reduce alcoholism and poverty on
4 the reservations, and to support Native American voting
5 rights when Indians decide to be, quote, citizens, end
6 quote, of the state by giving up their tribal sovereignty
7 and paying, quote, their fair share of the tax burden.
8 Rather than face censure from his colleagues for such
9 openly hostile remarks, Representative Two Bull's
10 colleagues elected him to the House Republican leadership
11 in the following session.
12 That attitude toward Native American voting
13 rights, I'm sad to say, is still shared by many in
14 positions of power in this state. Until those attitudes
15 change, Native Americans will continue to need every bit
16 of protection that the Voting Rights Act affords to them.
17 COMMISSIONER MEEKS: Thank you, Bryan. I'm
18 sure there will be plenty of questions. Senator Two
19 Bulls?
20 SEN. TWO BULLS: Good afternoon. It's an honor
21 and a pleasure to be here today. The reason why I'm here
22 today is to maybe open a few eyes and some ears to the
23 problems that we have faced on the Indian reservations in
24 South Dakota.
25 I guess you could label me as an old-timer.
26 I've been involved in registering voters since 1980 when
27 there was just a handful of us going across the
28 reservation to get our people interested and to have them
29 get involved in the state elections and the federal
30 elections.
31 The first problem that I came across was why?
32 Why should we vote? They don't listen to us. We don't
33 get anything from them anyway. And I told them, that is
34 not what we're about. We have a voice and our voice
35 needs to be heard, regardless.
36 And I've come across prejudice, discrimination
37 when I was registering voters. There was discrimination
38 from the county officials. They put roadblocks up for us
39 saying that we had to have limited cards. They had to be
40 notarized. They gave us time frames which I felt was
41 only imposed on the Indians in the counties and the
42 state.
43 I think the first thing that we have to do, and
44 it's continuing and I've been saying over and over, is
45 that we have to educate the State of South Dakota about
46 Native Americans. As Native Americans, we have always
47 been taught to respect; to respect each other and
48 yourselves, and that also means respect other
49 nationalities, but first of all, to respect yourself.
50 I become involved in this voters' rights
51 because I felt that even though we're a minority, we do
52 have a voice. Our votes do count. Whatever decisions

are made on the federal and the state level also affect the Native Americans in the State of South Dakota. I even came across comments made to me when I got elected into the State Senate that I -- why are you -- why did you run? What are you going to do in this state? And my thinking is, once our people step off the reservation, the state laws kick in. They have to abide by the state laws also, so we have to have input on the state laws also that's not going to discriminate against the Native Americans. So that was one of the main purposes.

And another was to bring education to the State of South Dakota, to the legislators that we are here, we're the first occupants, and we're not going away. We're going to always be here. This is our homeland from the very beginning, and we want to be heard, and we want to be treated equal and right just like everybody else. We want those rights that everybody else gets to have. We're no different than anybody else. We're Native Americans. We're educated. We have people that are educated.

We have our 18-year-olds coming up that are able to vote now, and I've seen them really being enthused about wanting to vote, wanting to get involved. That was a big issue that we had was getting our people involved because they didn't want to. They didn't trust the State of South Dakota. They didn't trust the United States Government because of all the sanctions, all the roadblocks they put on us on welfare, education, healthcare, all those blocks that were put -- that are still here today.

We're witteling away -- on these lawsuits that Bryan mentioned earlier, we're witteling away at these blocks, and we hope to get rid of them once and for all like they did the Berlin Wall. Let's get rid of all of that. Let's all work together. Let's work in a partnership. Let's work together and make life better for all the citizens. They include the Native Americans as citizens in the State of South Dakota. Let's make life better for everybody in the State of South Dakota. Let's don't discriminate. Let's don't be prejudiced. Let's just work together because we have future generations to look at to make sure that their lives are going to be fair and just, that they're going to live a good life here in the State of South Dakota.

I was -- I was honored to be asked to be part of these lawsuits because I am an advocate for the Native Americans' rights. We have rights. If I can be a voice anywhere, in any place, I'm going to be there to speak up that we have a right also and we have a right to be heard. We have younger generations coming up who I hope that would get involved in the state legislation, get involved in what's going on in federal government, and

let's change these. Let's turn times around. Let's don't live in the past. Let's look at the future, what it's going to hold for all of us.

I think the rude awakening, I hope it is to everybody, is Nine Eleven. This world can be blown up in a matter of seconds and we're all going to be gone. Why not let's get together now. Let's get together and let's work with these laws. I'm for Section 5, Section 2 to be reauthorized. It has made a big impact on the elections, especially this last election, having our full-blooded Lakota people being able to finally understand why they are going to the polls and what they're voting for because they had people there that speak the language that can explain it to them. That has never happened before. That's why I think a lot of them stayed away because they didn't understand what was going on.

The polling places, yes, they changed some of that. They did allow some of the polling places to be put up so that it would be more accessible to the people, but that took, like, pulling teeth out to the county officials to even agree to put different polling places up so that our people could have easy access to them.

I really feel that this redistricting needs to be really looked at. We do -- as Native Americans, we do need more representation on the state level. Four of us today is not enough. We need more, and if everybody is saying that they want to work together, they want to make a difference, give us leeway. We have given leeway so many times before in the past and today, but yet, we're not given leeway in return.

It was stated earlier about the percentage of increase in the voting, and that goes back to the redistricting. We need to be redistricted. We need to have more positions in the counties that are 90 percent Native Americans. There's no harm in giving us another position. It's just to make us -- to assure our people that our -- we can be heard. Our concerns, our issues can be heard, and they will be -- laws will be implemented or created for our concerns. I really believe that we need to educate our people in the State of South Dakota and maybe in all the other states that have Native Americans in their state.

I want to tell you a story. I was -- I had the opportunity to have a little seventh-grader -- or a second-grader from Madison, South Dakota, she adopted me as her senator and she wrote me a letter. She pulled me up on the Internet and saw who I was, and she wrote me a letter, and it had "Wow" just written big on my letter, and it said, "Wow, you really are Indian," you know, and it made me think that, yes, they do need to be educated. They need to know who we are, what we're about. We're not here to cause problems. We're not here to disrupt

anything. We just want to be a part. We want to be a part so our concerns and our issues can be dealt with.

I really feel bad that the -- after all these years that there's still prejudice and discrimination, but that also goes back to the person who feels the prejudice, who's showing the discrimination, that maybe something happened in their life that they haven't dealt with and they're taking it out on other people, but it isn't right to be taking it out on Native Americans just because we're a minority.

So there's a lot of education that needs to be done. I've been on this issue since 1980. I've tried to be involved as much as I can. Being on the state Senate was an eye-opener for me. It showed me that there's a lot to be learned out there, not only in the white society, but the Native Americans also on why this needs to be done, why we're talking about the voting rights today, why it's so important to the Native Americans, and important to the other minorities in the other states.

I'm not really sure what I was supposed to say, but this is what I'm saying from my heart. This is what I feel, and I just hope that you do reauthorize these sections. That we do need them. We do need the redistricting, the elections, the polling places, the language.

We did have poll watchers there, but even discrimination was there also. Our people were turned away. They weren't given reasons; they were just turned away. They set time limits. There was just -- it's still ongoing today in 2000 in the 21st century, and I think we need to change that. So I encourage the Commission to really take to heart what is being said here today, not only here, but the other places that you've attended and heard testimony, and we need to be just fair -- be treated fair and just. Thank you.

COMMISSIONER MEEKS: Thank you, Senator. Raymond Uses the Knife?

MR. USES THE KNIFE: Yeah. My name is Raymond Uses the Knife. (Speaking in Native language.) Friends and relatives, I want to thank you for allowing me to speak, and I want to welcome the Commission to Lakota Country. You've probably heard the term Sioux. Lakota is who we are, and we have seven bands of the Tetonwan Oyate and I represent four of them: Mnicoujou, Sihasapa, O'Ohenumpa, and Itazipco of the Cheyenne River Sioux Tribe. And also remember that the Cheyenne River Sioux Tribe, we're not Cheyenne. The river Cheyenne is what we were named after, so just some of the things I wanted to make clear.

I represent probably 19 communities on my reservation, and there are many, many communities and Eagle Butte is the hub of the reservation. That's where

1 the Indian Health Service, Bureau of Indian Affairs and
2 the tribal headquarters as well as many of the economic
3 enterprises on the reservation are there.
4 It's sad to say, though, a lot of the testimony
5 here given already is very true. Economics is one of the
6 biggest problems that we're facing. Because of the
7 economic stress, and you probably know about the gas
8 gouging, I call it, going on here, everywhere. It's
9 causing a lot of our people a lot of stress. So I'm glad
10 that we're not right now in a current election year
11 because it would have been pretty humbling for the
12 leadership to try to get the folks to even a voting poll.
13 Voting polls on the reservation are again, as
14 was mentioned, very limited. Accessibility is not there,
15 and a lot of the issues pertaining to language
16 proficiency is very, very real. A lot of my people are
17 Lakota speakers. Lakota is our number one language and
18 English is our number two language. So when it comes
19 time to vote and you come to the voting poll and you
20 don't understand the English, you want to ask questions,
21 and the representatives from the poll watchers are there
22 from the county governments or their representatives are
23 there, and you want to know what's going on, it's
24 sometimes -- sometimes you're made to feel like you have
25 no business there, and sometimes you're made to feel like
26 you're taking up too much of their time, you know. Wait
27 in line, stand in line.
28 And I've also witnessed one of our tribal
29 members didn't know how to read or write and he needed
30 help from his wife. His wife was proficient in the
31 English language, and that's what his request was, but it
32 was denied. So he was so upset with this situation that
33 he picked up his ballot and just tore it in half and
34 threw it in the trash can. He said this is the second
35 time that this is the way he was treated at the polls.
36 Another elderly woman, one of my aunts, the
37 oldest living relative of mine in my tiospaye -- tisopaye
38 is extended family where there's many of us, four or five
39 hundred of us. And I remember she called and wanted to
40 vote. So I said, "Okay. Can I help you in any way?"
41 She said, "I can't get out of my bed." "Okay. So let me
42 see if I can bring a ballot to you and see if the
43 representatives from the poll can bring the ballot to you
44 for you to vote."
45 But the poll watchers told me through -- told
46 her through me that she has to -- "you're going to have
47 to wheelchair her to the parking lot so we can bring out
48 a ballot for her to vote." And this was very distressful
49 for her at the time because she wanted to exercise --
50 simply exercise her right to vote, but was denied. So
51 things like this are going on on the reservations.
52 And language -- the limited language

1 proficiency also causes a lot of our people to have
2 mistrust in the non-Native elections. A lot of the
3 comments that I hear is that our Lakota people feel that
4 they have no chance in the system that is there already,
5 whether it's the state system or the federal system.
6 And I know Chris has been there -- Mr. Nelson's
7 been at Cheyenne River working with us, and he's offered
8 his hand to help us to work some of these things out, so
9 I'm glad to see that, and these are some of the positive
10 changes that I wanted to mention.
11 We also have the Cheyenne River Sioux Tribal
12 Voters' Rights Commission that was established just
13 within the last three years. I've been on the tribal
14 council that was mentioned four terms now; that's going
15 on 16 years. And there, I noticed that a lot of my
16 people are telling me that we need a change. We need to
17 do something because it's not -- nothing's happening in
18 Indian Country. What happened 10 years ago, what we were
19 fighting for 10, 20 years ago, we're still fighting for
20 today: our health issues, economics, voting rights
21 issues.
22 So I asked tribal council to implement a Voting
23 Rights Commission. The languages, we're still working on
24 it, but the commission has been active now for three
25 years, and we've been involved in the last election in
26 2002, trying to educate our people. That's the -- our
27 main focus in the commission is to educate our people
28 because, as was mentioned earlier, our people feel
29 disenfranchised, and they feel they have no say-so in the
30 governments. They may have a -- they feel they may have
31 a little say-so in the tribal governments because they
32 get to vote for their tribal officials every two years,
33 but they feel that the state elections and the county
34 elections, sometimes they call it these are white
35 elections and they don't belong to us. So this is the
36 education that we have to do amongst our own people.
37 And limited tribal resources is another issue.
38 Some of the ways that we thought that we could help our
39 people is to get out into the communities and try and
40 work -- try to have some visibility in the community so
41 that our community representatives, the Lakota speakers
42 can ask us questions, but because of our limited
43 resources, it's hard.
44 When election time comes, people can't find
45 rides. A lot of our people don't have transportation so
46 it's known that it's a common fact that it costs $50 just
47 to get a ride to the hub of the reservation some places.
48 80 miles from Bridger to the middle of the reservation,
49 Promise, Black Foot also 80 miles to the central
50 reservation. Lack of transportation, lack of transit
51 systems, you name it.
52 One of the good things that we have coming for

1 us, though, is our ability in communications. We own our
2 own Cheyenne River Sioux Telephone Authority, and there
3 we also own our Lakota Network. Our -- we're an Internet
4 service provider for the communities. So a lot of the
5 communications happened just recently through electronic
6 communications now. And so a lot of things are opening
7 -- the doors are opening now for us where we can try to
8 get our communications out there, but we're still limited
9 in a lot of areas.
10 One of the things that we have done was we have
11 changed our Tribal Constitution to allow for the national
12 elections to coincide with our tribal elections. This
13 really puts an effort in not only the tribal leadership,
14 but also the state representatives and the county
15 representatives, the federal representatives. We've had
16 examiners come out, thankfully, to the reservations
17 helping us, letting us know what our rights are -- what
18 our rights are under the Voters Rights Act.
19 And we need to support the Commission here in
20 trying to keep these provisions alive and to work very
21 hard not only with our communities there and our tribal
22 governments and representatives such as the ACLU and the
23 -- our state legislators to try to get the word out that
24 we need to keep these provisions there so that we can be
25 assured of our right to vote in national elections and
26 county elections and state elections. I think my time is
27 up. Thank you.
28 COMMISSIONER MEEKS: Thank you very much.
29 Ms. Pourier?
30 MS. POURIER: Hello everyone. Thank you,
31 commissioners and representatives for our people, for
32 being here. Thank you to the National Commission for
33 hosting this, and thank you, it's an honor for me to be
34 here, and I really don't know why I'm here. Yes, I do.
35 I believe in speaking for the people and for the people
36 to have the rights that we deserve.
37 As Elsie mentioned, I am the cofounder of an
38 organization called SANI-T or the Society for the
39 Advancement of Native Interests - Today which we founded
40 in 2002. We met for an entire year planning how to run
41 that organization. It's a grassroots organization made
42 up of Indians and non-Indians. It's patterned somewhat
43 after the NAACP. However, we operate totally with
44 volunteers and with absolutely no budget, so it's a
45 little bit hard to do the things that we dream of doing
46 for the people.
47 The organization believes in acting peaceful,
48 constructive, and professional in every case that we
49 handle. Since 2002 it's come to our awareness that
50 racism in Rapid City and in South Dakota is rampant when
51 actually you consider the years and the time that's gone
52 by and education, that there should be some movement on

1 non-Indians' part to accept us as people. And I could
2 tell you stories that are absolutely horrible of reports
3 that we've had. The areas of most concern in Rapid City
4 are with law enforcement, medical treatment, in our
5 education system, and voting rights.
6 So I just wanted to tell you a little bit about
7 what we do. I had the opportunity to work with the
8 Native Vote Project in South Dakota for the last
9 election, and so what I am going to talk about is just
10 personal experience in doing that, but I was one of 77
11 Native American poll workers that were placed in Montana,
12 South Dakota, and North Dakota through the national Help
13 America Vote Program. So that appealed to me when I was
14 asked to do that because as a voter myself, what I had
15 experienced when going to vote was being confronted by
16 little old white ladies -- excuse the term, not to offend
17 anyone, but that's what I saw -- and being questioned and
18 being treated poorly.
19 And so when I was asked to participate or to
20 volunteer, I was glad to do so to be -- and we just
21 spread the word amongst the people, the women that were
22 doing it, is we're going to be the little old brown
23 ladies sitting there and at least make a statement that
24 way. But our purpose was to help the Native American
25 voters feel more comfortable, to have a recognizable
26 friend or at least a greeter that they'd feel okay about,
27 that they wouldn't have to be afraid or nervous.
28 So I guess I acted as an observer before that
29 and -- at one precinct, and my experience in doing that,
30 I did it for one full day, and, of course, the little old
31 white ladies that were there gave me attitude, and I --
32 that's the only way to say it, and it was attitude.
33 There wasn't specific words of put-downs or anything, but
34 it was in a look or a gesture or a tone of voice.
35 And being somewhat frustrated by that and
36 talking about it later, I told one of the other workers,
37 I said, "You know, but it's nothing -- yes, it was
38 racism, but it -- you know, it's nothing tangible that I
39 can actually document." There was nothing that you can
40 document.
41 And then we went back to what my friend Carol
42 Maiki always told us, a friend and mentor who is now not
43 with us any longer, but she always said to me, "If you
44 feel it, it's real," and she was -- we were talking about
45 racism. So it was definitely there.
46 As an observer, we were whispered about, told
47 that we shouldn't be there. If -- you know, you sit
48 close to the table where they announce the names, and you
49 record that. They spoke quietly so that we couldn't hear
50 them. They formed a huddle in the corner and were trying
51 -- and then one came over to talk to us to tell us that
52 they decided that we had to leave. So it was -- it took

1 courage to be there, I guess, but we did it.
2 And then as a greeter in another precinct, I
3 just -- I took a few notes of what I could observe when I
4 wasn't busy, but I know that it was the same attitude,
5 not on every worker's part, but there just seemed to be
6 an attitude toward Native people, Indian people when they
7 came in, and -- and some of them had a terrible time
8 trying to vote. There was one voter that was from Lakota
9 Homes that he had gone to one precinct. They sent him to
10 the precinct -- they sent him to the courthouse, and then
11 they sent him to the precinct I was working at, and they
12 still denied his right to vote. And I don't know what
13 that issue was. I think it was a discrepancy in his name
14 and how it was spelled or something.
15 I know that there were three, at least, Indian
16 voters who were registered, but they could not find their
17 names in the registry so -- and they were not given
18 provisional ballots. Now I went through the training to
19 be a poll worker, and I think that they were supposed to
20 have -- be allowed to have provisional ballots.
21 Then there were people who -- let's see. Oh,
22 about the provisional ballots, they were told they can
23 vote provisional ballots, some people. However, later I
24 was told that those provisional ballots, that our local
25 auditor makes the decision whether or not those votes are
26 counted. The people are not informed of that, if that's
27 the case. It's hard for me to believe.
28 There seemed to be -- oftentimes there was
29 confusion between and among the people working at the
30 voting table and checking the registry and the people
31 handing out ballots, and the big confusion, I think, was
32 around provisional voting and soiled ballots. So a lot
33 of times, because of their confusion, there were people
34 that were not allowed to vote.
35 There was one person that had signed up
36 previously for an absentee ballot, but had cancelled it.
37 She explained that to the people, but she was still not
38 allowed to vote.
39 Those are the things that I observed, and I
40 questioned my reason for being here because it doesn't
41 seem like a lot, but it's my own experience. I guess
42 that's all I have to share.
43 Oh, I wanted to ask Theresa about the
44 translator at -- was that on the reservation?
45 SEN. TWO BULLS: Yes.
46 MS. POURIER: Oh. Because it seemed odd to me
47 because we did not have translators in Rapid City, and
48 Rapid City's population is 10 percent Indian, and in
49 light of the fact that at least -- almost 60 percent of
50 the Native American population are now urban residents,
51 it seems that they should have translators in the cities
52 also.

1 Another thing that causes concern among the
2 people that I know is requiring picture IDs. So many of
3 our people do not have picture IDs, and it's a real
4 hardship on them to get them.
5 I guess the -- my comment about the voter --
6 the reports of voter fraud, I think that it was a
7 campaign to discredit Indians, and it was just taken and
8 run with by the media, and it discredited Indians to the
9 utmost. So I think that's all.
10 COMMISSIONER MEEKS: Thank you. Thank you.
11 We'll take questions now for any of the commissioners, or
12 I can start to my left and work down.
13 SEN. DASCHLE: I want to thank all of our
14 panelists for your testimony and for sharing your views
15 with us in such an eloquent way this morning.
16 I have two questions. First, you all have
17 articulated a number of ways that the current system
18 isn't working as well as it should. Either through
19 personal experience or through your research, you have
20 acquired an understanding of the current circumstances
21 that I think exceeds that of most people.
22 I guess the question is, have you come to the
23 conclusion whether it is a matter of enforcement or
24 whether new law has to be created beyond the renewable
25 provisions of the Voting Rights Act to deal with the
26 circumstances that you have all outlined? In other
27 words, where is the law deficient if it's not just a
28 question of enforcement?
29 MR. SELLS: I have a couple of answers to that
30 question, Senator Daschle. I think enforcement is a --
31 of the current law is a huge part of it, and we're doing
32 everything that we can to do that. But I'm just one
33 person. I've got the able assistance of Mr. Duffy and --
34 but still, it's just a few of us doing the enforcement
35 work. The Department of Justice hasn't been out here
36 doing that work. They joined our lawsuit in 90 -- in
37 2000, but since then, they have not joined our other
38 litigation. So I think enforcement is key.
39 The one gap that I see over and over again in
40 South Dakota is that there -- Section 5 doesn't cover
41 enough places. As you know, there was a -- a formula, a
42 coverage formula based on the Census and turnout in a
43 presidential election. Well, as a result of federal
44 policy, there was an exodus of Native Americans from the
45 reservations at that time. There was also an undercount
46 in the Federal Census, and as a result, places like
47 Bennett County, Buffalo County, Dewey County, Ziebach
48 County, which probably should have been covered if the
49 formula were applied fairly, are not, and that would save
50 us a lot of headaches.
51 Just for example, in Bennett County, the county
52 commission this year has chosen to decrease the number of

1 polling places so that Native Americans in Batesland have
2 to drive all the way into Martin to cast their votes, and
3 they drive right past a polling place on the other side
4 of the street. And so it's that sort of a change that I
5 think should be covered. It's not so much a new -- a new
6 provision, but it's just an expanding coverage of the
7 current provisions, and I know I'm a bit of a heretic for
8 saying that, but that's what I think is needed in South
9 Dakota, based on my experience.
10 SEN. DASCHLE: Thank you, Bryan.
11 MR. USES THE KNIFE: My answer is money.
12 SEN. DASCHLE: Money.
13 MR. USES THE KNIFE: I wanted to mention that I
14 know -- I know about unfunded mandates, and a lot of
15 times when Tom was a senator, we went to him many, many
16 times to help us with funds. But if there could be new
17 language to allow for funds that could be accessed by
18 tribes who have limited resources where we could contract
19 these funds and maybe try to get some educational
20 programs going on the reservation, is one thing.
21 MS. POURIER: In my opinion, along with
22 enforcing the current law, education is where it's at.
23 Education for all the people that work the elections,
24 work in the polls, have any contact at all with Native
25 American voters, and that would be around cultural
26 competency, getting to know who we are better, to
27 eliminate that feeling that we're so different. So
28 education.
29 MR. McCOOL: May I say that I think it's
30 important to look at the history of the Voting Rights Act
31 as it was passed. Racists proved to be ingenious people
32 when it came to trying to figure out ways to get around
33 the actual impact of the minority voters. And as they
34 developed schemes to essentially deprive the Voting
35 Rights Act of its power, the Act was amended to
36 essentially plug those holes.
37 And what gives the Voting Rights Act power
38 today is that it has all these various sections. Each
39 one is designed to come at this at a different angle to
40 keep people who, for one reason or another, do not want
41 minorities voting, and it's designed to try to prevent
42 them from doing that. That's why it needs to be
43 considered as a whole, and that's why renewing the
44 renewable sections is so important because that is part
45 of the whole of the Act designed to prevent people from
46 finding new ways to stop minorities from voting.
47 SEN. DASCHLE: One other question. I know that
48 -- oh, I'm sorry, Theresa, go ahead.
49 SEN. TWO BULLS: Yes. I wanted to answer in
50 regards to the enforcement. I think the clarification --
51 clarification needs to be given to the county officials
52 or the other entities that are -- that have these -- this

voting because they seem to interpret the laws the way they want to interpret them when we as Native Americans, we abide by the laws. We try to do what they ask, like, getting picture IDs or making sure we're at the right polling places and stuff.

So I think the enforcement part of it, the shoe's on the other foot where it's the Native Americans that are trying to abide, but it's the officials that aren't abiding and interpreting the laws the way they want them in order to put barriers before us.

SEN. DASCHLE: I'm on a commission on election reform, and one of the things that has been discussed and proposed by some in Washington is a national picture ID requirement for all who vote. Laurette mentioned the impact that that has in the Native American community in particular, but I think other minorities might have similar concerns. But could you just elaborate, anybody, a little bit about the implications for a national picture ID and how it would affect people, especially the elderly on reservations?

MR. USES THE KNIFE: I could answer a little bit about that, Tom, because on Cheyenne River, when we heard news that -- or it was a -- I think it was a -- they told us -- I think, Chris was there at the meeting when we asked this question. I think it was a Congressional act that changed the laws and the voting laws, and so this -- so this picture ID was required.

And so a lot of our Lakota people didn't have picture IDs, and it became such an issue again, when some of the people are on limited fixed income again, and if they don't have $5 for a picture ID, they're not going to vote, okay? Simple as that. So it did have a very big impact on us, and I think a lot of people didn't vote because of that requirement, and they just threw up their hands again. Another roadblock for the Lakota people; that's how they took it.

And what we did at Cheyenne River to try to address the issues, we made free photo ID cards for any tribal member who registers in the national elections, and that's how we were able to address some of these issues.

MS. POURIER: I think part of the hardship, too, is not just monetary, but according to a person's beliefs. And for myself, I feel like it's kind of a contradiction to my rights and what I choose to do, but I do have a photo ID.

I do know several people who are friends or acquaintances that just refused to vote and it was their way of protesting the way the government has treated Indians, but also in all these little obstacles to vote. So they just said, "I'm not going to vote," and there was -- that was, like, about seven people. It makes a

1 difference.
2 SEN. TWO BULLS: In regards to the picture IDs,
3 like Mr. Uses the Knife stated earlier, there probably is
4 no money. Sure we have an enrollment office who offers
5 -- gives us picture IDs, but we have to pay $8. I took
6 my grandson to the motor vehicles yesterday to get a
7 picture ID for him so he could present it at the airlines
8 to get to school in California, and all I had was a
9 photocopy of his birth certificate, and they refused to
10 give us an ID because the birth certificate needed to be
11 an original and it's $15, and I think for the State of
12 South Dakota it's $8 to get an original birth
13 certificate.
14 And so the one issue is getting the money not
15 only to the elderly, but from the 18 on up, those who are
16 eligible to vote. So that needs to be looked at as to
17 how we could take the dollar signs away so they can get
18 their IDs.
19 SEN. DASCHLE: Thank you very much.
20 COMMISSIONER MEEKS: Can I interrupt just to
21 make sure that the witnesses speak into the microphones.
22 MS: JOHNSON: I, too, have a couple questions.
23 My first question, and I'd like to ask Bryan, if you
24 could talk a little bit about redistricting, we know
25 that's an important part of the Voting Rights Act, the --
26 to be the oversight of that issue, and it's certainly
27 something that Indian Country globally hasn't probably
28 paid attention to as much as it impacted us, and I know
29 with the Bone Shirt case, that was an important case
30 along those lines. Could you talk a little bit about
31 what you see for Indian Country as far as the issues
32 around redistricting and some of the challenges?
33 MR. SELLS: Well, I think the one challenge is
34 knowledge and information. Oftentimes redistricting does
35 not go on under the brightest of lights. In South Dakota
36 there are publication requirements, but, for example, in
37 Buffalo County, the county chose a newspaper that wasn't
38 even widely distributed on the reservation, so the
39 publication there didn't help. And it's only when you
40 change them after you have to publish it anyway, so a lot
41 of people don't know where district lines are. They
42 don't know what the populations are within the -- within
43 the district lines.
44 One of the things that I do -- that's
45 challenging with what I do is people don't know when
46 their rights are being violated by things like
47 redistricting, and that's hard oftentimes to overcome.
48 We provide technical assistance to any community that
49 asks, by and large. We'll analyze maps. We'll help draw
50 new maps, but getting the word out there to folks is
51 tough. That's the big challenge that we face with
52 redistricting.

1 And then the process -- even if a community is
2 active and has the information, the process is often --
3 often doesn't allow a lot of room for public input.
4 Indian communities can propose maps, but there's nothing
5 other than a long and expensive lawsuit that is available
6 to them to get the power structures to adopt those maps.
7 And oftentimes what we've experienced in South
8 Dakota is we propose a map on behalf of a tribe or tribal
9 members, and the redistricting bodies simply ignore them.
10 It happened at the state level where amendments that we
11 helped Indian legislators to propose were voted down.
12 It's happened at county levels, and it's happened at city
13 levels as well. Does that answer your question?
14 MS. JOHNSON: Yeah. I guess the other point
15 that I was curious about is the pre-clearance
16 requirements, and although we know in many cases, you
17 know, South Dakota hasn't always felt the need to comply
18 with those, currently I'm expecting that, you know, those
19 are. What would happen if we lost the pre-clearance
20 requirements that the VRA requires?
21 MR. SELLS: Well, then states would be free to
22 retrogress to make things worse. The State of South
23 Dakota would be free to do that in any covered
24 jurisdiction: Buffalo County, Shannon County, Todd
25 County. Now there is Section 2, but it's quite possible
26 with computers these days to draw districts in such a way
27 that they will be hard and expensive to challenge under
28 Section 2, but which would be clearly retrogressive under
29 Section 5.
30 So Section 5 is absolutely critical in South
31 Dakota and, I believe, across the country to maintain the
32 gains that we've achieved through these lawsuits. Bone
33 Shirt we filed in 2001, and we just got the remedial
34 order about two weeks ago, and if we had to do that every
35 time, it would not only deprive South Dakotans of a lot
36 of budget money that could be used for better things like
37 teachers and firemen, but frankly, it would be exhaustive
38 for us as well.
39 MS. JOHNSON: Okay. Many of you mentioned
40 education as being a major issue, and we see, you know,
41 nationally I'm concerned about the information or how
42 informed the Native voter is on their rights. I guess I
43 would like to -- a few of you to perhaps respond to how
44 informed do you think your community is on the rights?
45 What do you think that's in the VRA reauthorization
46 having to deal with the education components? What are
47 some of the areas that we should look to? Or is there
48 any recommendations that you could give to us that could
49 help us with just the basic education of what the voter
50 rights are?
51 MR. USES THE KNIFE: Some of the areas that --
52 I know it's ladies first, but I wanted to answer. Some

of the education that you mentioned is very important because some of the media that's there on the reservations, their television, newspapers, whatever's there, they feel -- the Lakota people feel they're left out of the whole picture against mainstream America.

And the impediments that are there because of the lack of information that's provided by the county governments, so to speak, to the people, there's a big gap there. No education between the grassroots people and the county governments, and thereby we in the commission, some of us who are trying very hard to make that connection.

COMMISSIONER MEEKS: Raymond, can you speak into that microphone?

MR. USES THE KNIFE: Yeah, some of us are trying very hard to make that connection and bring that gap a little closer. A lot of the pamphlets and literature, the maps, the maps are so, so discriminatory because you don't know where -- which precinct you're in. They tell you which one you're in, and when it changes, you have to find your right precinct again. I think in one county, there's 15 precincts.

So this is a big problem, this education. The counties need to get out there into the communities in an off-election year. Let's work on that because we're trying to do everything in a bottleneck fashion. We're trying to educate people two, three weeks just before election, and if we can make that change, that would really, really help. Off-year elections, if we can emphasize some of the impediments that we've had, minority voters, I think we can make big advancements.

MS. POURIER: You know, the Native Vote Project that worked here in Rapid City and actually used the SANI-T office worked long and hard, but again, it was too little too late. It would be nice to see some education that started sometime before election time, you know, and to see how many people it could reach, but there are many, many of our people who need education about what's going on and that can be around language barriers, but also some people don't have telephones, some people don't have televisions, some people don't have transportation. So I don't think that our country really realizes what poverty is like here.

Yeah. So I guess that Native Vote Project helped, but it was funded by a private foundation. So is that something the government should look at in educating voters? Thank you.

MR. McCOOL: Perhaps we can address the question of education on a broader level. In the political science literature, there's a very powerful correlation between income level and education level. So at an elementary foundational basis, educating people

1 empowers them to take the next step and get involved, and
2 it's voting, but it's all forms of political
3 participation.
4 Ideally one encompasses this whole panoply of
5 political action from voting to participating in
6 elections and running for office, and that is very
7 education-dependent. So you've raised a really important
8 point. It's a great place to start, and it helps people
9 realize how to get involved and, you know, why they need
10 to get involved.
11 COMMISSIONER MEEKS: I want to make sure that
12 people speak into the microphones so people -- I noticed
13 when I was walking by that people behind us really can't
14 hear if you don't speak loudly into the microphone.
15 Chris?
16 MR. NELSON: I've got several questions and
17 it's kind of a compilation of everything you all have
18 told us this morning, and I've got a few comments also.
19 The first question is in the area of the language
20 barrier, and I think almost every one of you have
21 mentioned that. And for my information, do you perceive
22 -- is the language barrier because so many of the Lakota
23 people speak Lakota fluently or is it more a case of not
24 being able to speak English well? Which of those two is
25 it or is it a combination of both? And I'd take an
26 answer from whoever or everyone.
27 MS. POURIER: Oh, I just naturally think it's a
28 combination of both of those, and I think, Theresa?
29 SEN. TWO BULLS: That's what I would state,
30 it's a combination of both. They feel more comfortable
31 speaking and being talked to in their own language, and
32 we have to realize that especially our elderly don't
33 speak English good or fluently, so they're kind of
34 embarrassed about it, and so they don't want to speak at
35 all. So it's a combination of both.
36 MR. USES THE KNIFE: I think if we had all
37 Lakota speakers in the polls 100 percent, that would make
38 a big difference, but then we'd have to be translating to
39 the non-Lakota speakers, so that might be the next
40 problem. But I think it would be a good idea to have a
41 good percent of the Lakota speakers in the polls.
42 Assurance of that would probably really help.
43 MR. NELSON: If I could follow that up with
44 looking ahead in 2006, the Help America Vote Act that was
45 referenced earlier is going to require every polling
46 place in America to have a touch screen voting machine,
47 and that will certainly happen in South Dakota. The
48 particular machine that we're going to be using in South
49 Dakota will have the capability for -- not only to see
50 the ballot on the screen, but also for the ballot to be
51 heard. A person would be able to put on headphones and
52 have the ballot read to them either in English or Lakota,

1 and in the Lakota areas we're going to have that option
2 available. With the language problem we've talked about
3 today, do you foresee this machine-type solution helping
4 that or do you foresee people being scared of it perhaps?
5 MS. POURIER: I guess just my idea there or
6 thoughts is that they would be maybe freaked out by it.
7 However, I think it's a good idea and something that
8 would really help if people will approach and try it.
9 Perhaps there's a way where there could be a person
10 stationed there to help --
11 MR. NELSON: Yes, yes.
12 MS. POURIER: -- to help them, you know, get
13 acquainted with the technology.
14 MR. USES THE KNIFE: If you brought a bunch of
15 video machines out to the reservations, maybe we can all
16 learn how to gamble at the same time. But the touch
17 screen that you're talking about would be a good idea,
18 but again, if you brought it out there two weeks before
19 the election, you know, she mentioned freaking out, you
20 know. Maybe that -- that's going to be the case, so if
21 you're going to bring it about this election year, I
22 would caution you, you know, wait till the next -- next
23 go-round, you know, but in the meantime, have some
24 educational things going out there, you know.
25 MR. SELLS: Yeah. I want to commend you,
26 Secretary, for choosing a machine that has that
27 capability. I think it will help, as you've heard,
28 particularly with the ballot issues. South Dakota's one
29 of those states that seems always to have a handful of
30 ballot issues, and talking with some folks just this
31 week, translating those has been the biggest -- where the
32 biggest need for language assistance comes in. So I
33 think that if you can get over the hurdles that have just
34 been described of familiarity with the technology, those
35 new machines will be of tremendous benefit, provided that
36 there are enough of them that -- so that there aren't
37 long lines at the polls, but I think that can be managed.
38 But I want to emphasize that that's just one
39 step in the process because language assistance is
40 needed, based on my experience and the people that I've
41 spoken with, at every step in the process. It's when you
42 come up and talk with the little old white ladies all the
43 way till you get to the polls and then get home. And so
44 it's not a substitute for in-person language assistance,
45 but it's -- I think it's going to be a tremendous
46 benefit.
47 MR. NELSON: If I could move on to the next
48 question and it deals with your repeated mention of the
49 need for educational efforts, and I certainly would agree
50 with that. During the last election year, I made an
51 offer to go out to -- and I made this to all the tribal
52 chairmen, to go out and do a presentation on it because

we'd had a lot of election law changes. And Mr. Vice Chairman of the Cheyenne River invited me to come up there, and I think we had a good meeting and we probably should have had maybe more than one, but we had a good meeting.

As we look at educational efforts for 2006, would you foresee those being most effective between my office and individual tribes, or do they need to come from the local county auditor to tribal governments? What's going to be the most effective way of making that happen?

MR. USES THE KNIFE: I think for me it's fairly simple. I think if you had some folks on the reservation working with the people directly. Let's say, for instance, the Voting Rights Commission authorized individuals on the reservation to help the State of South Dakota get some education out there, that would probably work the best because we could hire our own Lakota language speakers to help be the mouthpiece, I guess, for the commission. Through our commission, we could do that.

MS. POURIER: Well, I just need to say one thing: That you focused on the reservations and tribes -- tribal entities, and please don't forget about the urban Indians.

MR. NELSON: Okay.

MS. POURIER: There's a big population here, and there's a lot of community organizers, Indian that would help do that.

SEN. TWO BULLS: I want to thank you for putting that before us. I think that's a good idea. This is why I talked earlier about partnership, working together so -- for this voting to be worked out, and it could be good for the people. I stated earlier there's a lot of dishonesty, and I think by working together and using our own people and your office, it could become a success.

MR. NELSON: Thank you.

MR. McCOOL: When I've interviewed people in various locations where these cases occur, it seems to me that when we talked about voter education, we're usually talking about educating American Indians about the process. There also needs to be an education process for non-Indians. A handout or a pamphlet that explains, yes, Indians do have a right to vote, they do pay taxes, and explain to them what treaty rights are because there's a basic misunderstanding out there among a lot of people about the basic rights of American Indians to vote. Yes, they are citizens. They're citizens of the state as well as the nation. A lot of people don't understand this, and there might be less hostility to American Indians

1 voting if people had a better understanding.
2 MR. NELSON: If I could just make one comment,
3 I know our time is moving on, but during Mr. Sells'
4 presentation, he and I have been on the opposite sides of
5 issues going back too long, but I'd just like to make a
6 couple comments based on the Section 5 issues that he and
7 I have been going back and forth on.
8 The implementation of House Bill 1265 that he
9 talked about, we have not in any way attempted to
10 implement that in Shannon or Todd County, the two covered
11 counties. Our attempt to implement that was solely in
12 Charles Mix County, a non-Section-5-covered county, and
13 that is the current issue of dispute between us, whether
14 or not Section 5 can be extended to that other county.
15 And so for those of you from Shannon and Todd County, be
16 assured, we have not attempted to implement it there.
17 The other comment and the last one that I will
18 make, on the Quiver case that was brought in 2002, over
19 the last two and a half years, I have worked diligently
20 to bring up the 30-year backlog of pre-clearance items to
21 the Department of Justice, and over the last two and a
22 half years, we have pre-cleared 2300 election law
23 changes. That's significant.
24 I also need to mention that we have not been
25 denied pre-clearance on a single change over the last two
26 and a half years. And so what that means is that the
27 Department of Justice has not found any of those 2300
28 changes to retrogress the voting rights of Native
29 Americans in Todd and Shannon County. And those 2300
30 include all of the general election laws for the State of
31 South Dakota, and I just wanted to throw that into the
32 record. With that, we'll move on.
33 COMMISSIONER ROGERS: Ready for me?
34 COMMISSIONER MEEKS: Yeah.
35 COMMISSIONER ROGERS: Thank you. I have just a
36 couple of questions, but I'm trying to make sure I get
37 the facts, if I can. Senator, you may be most helpful on
38 this in particular. I'm trying to get a sense of the
39 demographics here. I do not know them here in South
40 Dakota, but I'm trying to get a sense about voting
41 patterns in particular. Whites in large part, white
42 citizens account for nearly 90 percent of the population
43 here in South Dakota?
44 SEN. DASCHLE: (Nodding head up and down.)
45 COMMISSIONER ROGERS: What's the typical voting
46 pattern of white voters here in the state? What
47 percentage vote Republican versus Democrat?
48 SEN. DASCHLE: I think Chris can answer that.
49 MR. NELSON: You know, I don't break those down
50 by race and so I don't have those. Now I suspect in some
51 of the litigation that we had, that's probably part of
52 the record, at least in the counties that were in

1 question, but I don't have that.
2 COMMISSIONER ROGERS: Professor, would you know
3 that by chance?
4 MR. McCOOL: I don't know that.
5 COMMISSIONER ROGERS: In particular, there was
6 a comment that was made regarding race bloc voting, so
7 I'm trying to get a sense about what the patterns are in
8 particular. Among Native Americans voters here in the
9 state, what percentage vote typical Republican versus
10 Democrat?
11 MR. NELSON: You're saying there was a comment
12 from the audience?
13 MR. SEMANS: It's nine to one.
14 COMMISSIONER ROGERS: A nine to one. So 90
15 percent of Native Americans will vote for a Democratic
16 candidate; ten percent roughly will vote for the
17 Republican candidate?
18 MR. SEMANS: Yes.
19 COMMISSIONER MEEKS: We can't hear you without
20 the microphone.
21 COMMISSIONER ROGERS: Okay. So in terms of the
22 voting in terms of white voters, you all do know what the
23 numbers are in terms of white voters in the state and how
24 they split the votes, one way or another?
25 MR. McCOOL: I made a reference to racial bloc
26 voting because it's well-documented in the cases that
27 I've worked on, both in my expert witness reports and the
28 quantitative analyses done by other professors. So
29 there's a well-documented record of racial bloc voting in
30 specific areas of South Dakota.
31 COMMISSIONER ROGERS: Okay. And by that racial
32 bloc voting, you're not talking about exclusively because
33 it sounds like among Native Americans, there's
34 significant voting among -- obviously in terms of the
35 Democratic party versus the Republican party, and you're
36 saying that essentially the same thing exists among white
37 voters. Is that pattern typically Republican voting here
38 in the state or is it split? I don't even know what your
39 the numbers are. Are your governor, your Secretary of
40 State is obviously Republican. Is the treasurer
41 Republican? Is it a generally Republican state in terms
42 of the legislature?
43 MR. McCOOL: It's hard for me to respond to
44 that in regard to the entire State of South Dakota
45 because the work I've seen is specific to the areas
46 affected by these cases.
47 COMMISSIONER ROGERS: Okay. Okay.
48 MR. SEMANS: I think the last time we checked,
49 it's about 65 to 70 percent of the non-Indians vote
50 Republican.
51 COMMISSIONER MEEKS: From the audience, you're
52 going to get a chance to testify and you're not hooked

1 into a speaker, so we're going to limit the answers to
2 the panel.
3 COMMISSIONER ROGERS: And thank you and I
4 appreciate it. I understand that you all may not know
5 this information. I was trying to understand the
6 substance of your --
7 MR. SELLS: I might be able to add a word of
8 clarification. I think it's -- if you want to make
9 general statements, South Dakota is a very red state.
10 The legislature is overwhelmingly Republican, but I think
11 certainly in the areas that we have seen voters, both
12 Indian and non-Indian, will cross party lines for certain
13 candidates. Senator Daschle had a long history of
14 getting a lot of Republican votes in this state, I think
15 it's fair to say, or else he wouldn't have been elected.
16 In Bennett County, for example, the Indian
17 activist group that I've worked with has endorsed
18 Republican candidates, and Bennett County is also known
19 as a Democratic candidate -- county among white voters.
20 COMMISSIONER ROGERS: Yeah.
21 MR. SELLS: So the partisan lines in South
22 Dakota, I think, are not as clear as your question may
23 suggest or as may be the case in other states.
24 COMMISSIONER ROGERS: Thank you. That's very
25 helpful. I did want to get a sense because the tone of
26 your testimony, in terms of everybody's testimony, I was
27 writing down the remarks and I was trying to get a sense
28 about essentially what's happening here in South Dakota
29 because that really is important and that's the reason
30 we're here is to get a sense of what's happening here.
31 The terms as used by a number of you all
32 described it as essentially a hostile race environment.
33 Another person said essentially it's disturbingly bad in
34 terms of the relationships between whites and Indian
35 people here. I heard obviously comments about
36 essentially -- Laurette, you were talking about
37 essentially they're not necessarily spoken, but it sort
38 of goes unspoken here in terms of sort of attitudes or
39 beliefs --
40 MS. POURIER: Uh-huh.
41 COMMISSIONER ROGERS: -- and the situation
42 regarding race and race relations here.
43 MS. POURIER: Yes.
44 COMMISSIONER ROGERS: I guess what I'm really
45 trying to get at at the end of the day is to try to get a
46 real core sense from you all about the consciousness of
47 the race environment as it exists in South Dakota. I
48 mean, your comments, in and of themselves, evidence or
49 seem to indicate that this is a fairly hostile place in
50 terms of relationships between white people and Native
51 Americans. I mean, you all don't seem to differ in that
52 perception or thoughts about that. Senator, is that also

1 your perception?
2 SEN. DASCHLE: I think there is a good degree
3 of discrimination that exists, and I think you've seen
4 evidence from the witnesses today that address it very
5 well.
6 COMMISSIONER ROGERS: And I guess in that
7 sense, because the substance of the Voting Rights Act at
8 the end of the day goes to -- it deals with two aspects:
9 intent and effect. We live in a world nowadays in which
10 essentially unless somebody's burning a cross or
11 otherwise engaged in saying certain things, you have a
12 tendency not to believe that somebody is invoking race as
13 a basis for treating you wrong. In other words, it must
14 be just something -- your sixth sense must be picking it
15 up, but that may not be accurate, so to speak. You know,
16 some people might argue that to be true, but I am trying
17 to get that sense about at least how you all describe the
18 overall consciousness regarding race and race
19 relationships and how that plays out in everything from
20 the districting decisions here, obviously, and voting
21 patterns and the cases that you've filed in particular
22 and how that all plays out.
23 So the general description of this being
24 hostile, as you describe it generally as an environment,
25 you all generally stand by and do not move away from that
26 general position?
27 MS. POURIER: (Nodding up and down.)
28 SEN. TWO BULLS: (Nodding up and down.)
29 MR. SELLS: Absolutely.
30 MR. McCOOL: Could I just respond that
31 documenting racial hostility is not like counting
32 widgets. As a researcher, it requires a considerable
33 effort to document it. So we typically look at
34 everything from hard data to implications of racism in
35 written documents, in presentations, as well as
36 interviews.
37 When I interview leaders in a community and
38 both the white people and the Indian people tell me
39 there's a lot of animosity here, there's a lot of
40 hostility, and then I see that reflected in other
41 sources, in comments made in newspapers or comments made
42 in hearings, after a while all this cross-validation of
43 different sources leads me to the same conclusion, that
44 there's a lot of racial hostility here, and that's what
45 I've found in my research.
46 COMMISSIONER ROGERS: And it -- okay, yes.
47 MR. SELLS: I'd like to share just a couple of
48 anecdotes with you that may get at your question. In one
49 of my cases, Cottier versus City of Martin, one of the
50 largest landowners in the city, Dale McDonald, was on the
51 stand and he owned up. He adopted his deposition
52 testimony in which he described Indians as lazy, dirty,

1 and irresponsible freely on the stand in federal court.
2 So the sorts of taboos that we in South where I'm from
3 now, in our discussions of race, haven't yet kicked in in
4 parts of this state, anyway.
5 I hate to keep bringing the discussion back to
6 Secretary Nelson, but in our Bone Shirt case, the state's
7 main defense was the same defense that was used across
8 the South in the early '80s: Blacks don't care about
9 voting. That was the state's defense in the Bone Shirt
10 case. Indians don't care, so it was appropriate for the
11 legislature to pack a district with 90 percent Indian
12 voters. That's a defense that they made with a straight
13 face and quite vigorously, and the Court rejected it as
14 such, noting the parallels to Alabama in 1984.
15 And I think Senator -- excuse me,
16 Representative Two Bulls' comments that I quoted in my
17 testimony harken back to those days. If he were to give
18 that speech on -- in the Georgia Legislature and
19 substitute African American instead of Indian in those --
20 in his comments and maybe draw on some of the black
21 stereotype instead of the Indian stereotype, he would be
22 immediately censured for such comments, I have to say.
23 COMMISSIONER ROGERS: But yet that same
24 environment does not exist here in South Dakota such that
25 that censure would be taken seriously, if it is
26 expressed?
27 MR. SELLS: I think a censure would be taken
28 seriously if one were forthcoming, but I think my point
29 is that it's not forthcoming because that level of
30 hostility is tolerated yet by the people who are in
31 power.
32 COMMISSIONER MEEKS: Jennifer, I'll give you
33 the first chance to ask questions of the next panel, but
34 this time, I'm going to limit this to five minutes to
35 finish the questioning because we're running fairly late
36 at this point.
37 MS. RING: Thank you. I will have to limit the
38 questions I ask. I wanted to ask very briefly, Ms. Two
39 Bulls and Mr. Uses the Knife, let's for the moment
40 exclude the young people, so let's look at people 30 and
41 over which is, in most parts of the country, the heaviest
42 voting bloc anyway. What percentage of the population on
43 your two reservations in that age group are more
44 comfortable speaking Lakota and more able to understand
45 what somebody says to them if they are told that in
46 Lakota?
47 MR. USES THE KNIFE: I would say predominantly
48 the Lakota speakers are probably -- I always use my
49 generation as a -- as the point where I'm kind of in
50 between. The younger generations from me are having a
51 hard time with the language, the Lakota language, of
52 course, but the older population are very fluent in

1 understanding the culture and the ways.
2 MS. RING: Would you say 40 percent, 60
3 percent, 80 percent of them are more comfortable in
4 Lakota?
5 MR. USES THE KNIFE: I would say -- I would say
6 80 percent would be more comfortable if the -- if the
7 literature was in Lakota and the education was in Lakota.
8 MS. RING: Thank you. Ms. Two Bulls?
9 SEN. TWO BULLS: I think I'd have to agree with
10 Mr. Uses the Knife. Our elderly from 40 on up would be
11 kind of a high percentage that they do understand and
12 speak the language.
13 MS. RING: And they're more comfortable with --
14 SEN. TWO BULLS: Yes, they're more comfortable.
15 MS. RING: And they would understand better
16 what somebody says?
17 SEN. TWO BULLS: Yes, they would.
18 MS. RING: Thank you. I guess I'll ask the
19 same question of Ms. Pourier. For the older population
20 of Sioux Falls who are Native American, what percentage
21 would -- I mean Rapid City, what percentage would you say
22 are more comfortable in Lakota?
23 MS. POURIER: That would really be difficult
24 for me to say. I'm just going to guess maybe 40 percent.
25 But as we talk about language here, it's bothering me
26 because I think the majority of Lakota people speak
27 English. However, the Lakota language, what they --
28 which they may have grown up with is so different and
29 white people don't understand that that one word in
30 Lakota can mean a whole paragraph of meanings in English
31 and be descriptive of so many things, you know. So
32 that's hard to say. And so even though we speak English
33 or they -- you know, the speakers speak English, many
34 many things are hard to understand.
35 MS. RING: Yes. Thank you. My next question
36 is for Mr. Sells. The Secretary of State raised the
37 issue in his comments that pre-clearance on the bill out
38 of the last session, that it was not implemented in the
39 two covered jurisdictions; that it was only implemented
40 in another one. Can you address a little bit the equal
41 protection issues involved in having certain election
42 laws only apply in portions of the state and not others?
43 MR. SELLS: I can and I'll try and be very
44 brief. Bush versus Gore, if it says anything, says you
45 can't apply different voting laws in one county versus
46 another county, and that's precisely what the state was
47 hoping to do by pledging not to implement House Bill 1265
48 in Shannon and Todd Counties, but going ahead and
49 implementing it elsewhere.
50 The Secretary's also glossed over the
51 distinction between enabling legislation, which is House
52 Bill 1265, and particular implementing the legislation.

1 Enabling legislation applies at once to the entire state
2 and not -- and that's separate and apart from individual
3 efforts to implement it in a county. If Pennington
4 County were to implement this law or Charles Mix County,
5 those are not covered counties, but the power to do so
6 applies statewide. So when you turn that power on,
7 that's the change that needs to be pre-cleared.
8 And state law, the State Constitution, would
9 not allow the sort of patchwork implementation of the law
10 that the state proposed, and certainly Section 5 doesn't
11 allow them to override state law to that extent. So
12 those were our --
13 MS. RING: I have one other question, if I've
14 got time. Professor McCool, in your interviews with
15 people, either through your personal knowledge or through
16 your interviews, can you speak about intimidation efforts
17 aimed at voters or at people encouraging or working on
18 the Native American vote? Thank you.
19 MR. McCOOL: Intimidation has become a much
20 more subtle activity, and a number of people that I've
21 interviewed felt intimidated. People are not usually
22 standing out there with torches or burning crosses or
23 hoods on their head, but they engage in a more subtle
24 form of that. It's episodic and it still happens, and
25 again, it's one of those things that is often difficult
26 to quantify, but I still hear repeated references to it,
27 so it's happening.
28 COMMISSIONER MEEKS: Thank you. I apologize
29 for having run late, but this was very good testimony and
30 very good discussion. So thank you all for coming. I
31 want to say that we're inviting all the commissioners and
32 panelists to join us in the library for lunch, and we
33 will return for the second panel at 2:15, if that's okay
34 for the people on the second panel. Senator Daschle has
35 to leave us, I believe, before lunch?
36 SEN. DASCHLE: I do, unfortunately.
37 COMMISSIONER MEEKS: But we really want to
38 thank you for taking part in this and being a guest.
39 SEN. DASCHLE: Thank you.
40 COMMISSIONER MEEKS: Thank you very much.
41 (A recess was taken from 1:32 to 2:20.)
42 COMMISSIONER MEEKS: Okay. I think we'll go
43 ahead and get started again. Thank you, panelists, for
44 being here. I'm going to introduce them and tell their
45 bios, and then I'm going to let Richard Guest start, and
46 then we can ask questions of him directly because he has
47 to leave. I mean, he may be able to stay for a while,
48 but I want to give him time to -- time for us to ask
49 questions.
50 I'm actually going to start with introducing
51 Craig Dillon because it's first on my list. Craig is a
52 councilman from the Oglala Lakota Tribe in LaCreek

1 District in South Dakota. In 2002 Craig helped organize
2 the LaCreek District Civil Rights Committee, a movement
3 that's registered thousands of Indian voters and one that
4 has since emerged as a major factor in state and national
5 elections. Prior to his voting rights work, Mr. Dillon
6 worked as a tribal officer and deputy sheriff for 15
7 years and later served in South Dakota's Social Services
8 and Economic Assistance Office for six years. In 1999,
9 Mr. Dillon was elected to the Oglala Sioux Tribal
10 Council, the position he currently holds. So thank you.
11 Adelade Enright is the county auditor in --
12 MS. ENRIGHT: That would be Adele.
13 COMMISSIONER MEEKS: Oh, Adele, I'm sorry.
14 Since 1987 Ms. Enright has served as the Dewey County
15 Auditor of which some of her duties include maintaining
16 voter registration records and conducting elections.
17 Over the years, she has been a strong advocate for Native
18 American Indian voting rights, working to ensure that
19 translators are available at polling places and on the
20 Cheyenne River Reservation, and that the recruitment of
21 Native American poll workers has increased.
22 O.J. Simmons -- Semans, I'm sorry, is a member
23 of the Rosebud Sioux Nation. He's a member -- and lives
24 on the Rosebud Reservation. He's a field director for
25 Four Directions, a nonprofit group focused on Indian
26 voter registrations and rights, a committed activist for
27 Native American voter rights since 1984. Mr. Semans has
28 testified extensively before the South Dakota State
29 Senate Committees on proposed laws that would adversely
30 affect the voting rights of Native Americans. Mr. Semans
31 has continuously worked on increasing voter turnout
32 throughout the State of South Dakota and contributed to
33 the 117 percent increase in voter participation of Native
34 American Indians during the 2004 elections.
35 And, Jesse Clausen, I don't have your bio, but
36 I know Jesse personally, and I know he's a businessman
37 and a voting rights activist as well as a civil rights
38 activist from Bennett County, so that alone probably
39 speaks for itself, but if you want to say more later, you
40 can.
41 Richard Guest is currently a staff attorney in
42 the Native American Rights Fund (NARF) in Washington,
43 D.C. Prior to joining NARF, Mr. Guest was a senior
44 associate with Troutman Sanders, LLP, in their Indian law
45 practice, focusing on environmental issues, energy
46 projects, economic development, financial institutions,
47 and telecommunications services in Indian Country.
48 Previously, he served as the on-reservation tribal
49 attorney for the Skokomish Indian Tribe and worked as an
50 associate attorney for Morisset, Schlosser and some other
51 guys located in Seattle, Washington.
52 Mr. Guest has represented Indian tribes on a

1 broad range of issues in federal, state, and tribal
2 forums. He has provided legal counsel to tribal leaders
3 and administrative staff in government to government
4 proceedings including co-management of fish, timber, and
5 wildlife, as well as the development of intergovernmental
6 agreements on jurisdiction over natural resources, law
7 enforcement, taxation, and social services.
8 So thank you, panelists, for being here. And,
9 Richard, I'll let you start the testimony.
10 MR. GUEST: Thank you, Elsie. On behalf the
11 Native American Rights Fund and the National Congress of
12 American Indians, I would also like to thank the National
13 Commission on the Voting Rights Act for holding this
14 important hearing to examine the degree of racial
15 discrimination in voting and the impact of the Voting
16 Rights Act since 1982.
17 Again for the record, my name is Richard Guest.
18 I'm a staff attorney with the Native American Rights Fund
19 in the Washington, D.C., office, and I work -- in that
20 capacity, I work very closely with Virginia Davis,
21 Assistant General Counsel for NCAI on the Native Vote
22 Project.
23 We are honored to join together with other
24 distinguished witnesses to provide a perspective from
25 Indian Country on the need to strengthen and extend the
26 most effective civil rights law in U.S. history. Since
27 1944, the National Congress of American Indians has
28 worked diligently to strengthen, protect, and inform the
29 public and Congress on the governmental rights of
30 American Indians and Alaska Natives. NCAI is the oldest
31 and largest national organization addressing American
32 Indian interests, representing more than 250 American
33 Indian tribes and Alaska Native villages.
34 Since 1971 the Native American Rights Fund has
35 provided legal and technical services to individuals,
36 groups, and organizations on major issues facing Native
37 people. NARF has become one of the largest Native
38 nonprofit legal advocacy organizations in the United
39 States specializing in Indian law, dedicating its
40 resources to the preservation of tribal existence, the
41 protection of tribal natural and cultural resources, the
42 promotion of human rights, and the accountability of
43 governments to Native Americans.
44 Now as you've heard from other witnesses today
45 of the tremendous struggle of Native Americans to
46 exercise their right to vote, having experienced a long
47 history of disenfranchisement as both a matter of law and
48 practice. Although the Indian Citizenship Act of 1924
49 declared all non-citizen Indians born in the United
50 States to be citizens, you have heard how many western
51 states actively resisted granting suffrage to Indian
52 people.

1 Some states required that Indians be civilized,
2 renouncing their tribal membership, moving away from
3 their reservation communities before being permitted to
4 vote, and when permitted to vote, Indian people faced the
5 same discriminatory mechanisms that kept many African
6 Americans and other minorities from exercising their
7 right to vote, including poll taxes, literacy tests, and
8 acts of intimidation.
9 This discrimination in voting persists.
10 Following the dramatic electoral results in Washington
11 State in 2000 and the similar results in South Dakota and
12 Arizona in 2002, Native Americans became aware of the
13 power of the Native vote in American government. By
14 exercising their right to vote, Native Americans realized
15 that they could have a say in who makes the laws, sets
16 the policies which affect their everyday lives.
17 In 2004 the National Congress of American
18 Indians spearheaded a groundbreaking campaign to register
19 and turn out a record number of American Indians and
20 Alaska Native voters. Through Native Vote 2004, NCAI in
21 collaboration with National Voice, Native American Bar
22 Association, the Native American Rights Fund, various
23 regional organizations, local tribal governments, urban
24 Indian centers and most important, many grassroot
25 organizations throughout Indian Country, coordinated an
26 extensive national nonpartisan effort to mobilize the
27 Native vote and to ensure that every Native vote was
28 counted.
29 The culmination of the efforts of Native Vote
30 2004 on November 2nd was a resounding moment for tribal
31 governments nationwide as it empowered Native voters and
32 raised the profile of Native issues in the eyes of
33 politicians. In appendices to our testimony that I have
34 provided to each of you, we have included two reports
35 which were published shortly after the November 2004
36 elections. The first, "Native Vote 2004, a National
37 Survey and Analysis of Efforts to Increase the Native
38 Vote in 2004 and the Results Achieved," and the second
39 report, "Special Report: Native Vote 2004 Election
40 Protection Project."
41 To our knowledge, these reports are the first
42 of their kind in Indian Country. We anticipate that the
43 substance of these reports will provide in part the
44 evidentiary basis underlying the need to strengthen and
45 extend the Voting Rights Act.
46 The rest of my testimony is simply a summary of
47 these two reports, and the first, The Native Vote 2004
48 Survey and Study was conducted to examine the state of
49 Native participation in the American electoral process
50 generally and the specific impact of the efforts of
51 Native Vote 2004 to dramatically increase that
52 participation.

1 The primary data was collected from the U.S.
2 Census Bureau, individual Secretaries of States' offices,
3 and county auditors which provided the numerical
4 underpinnings for this study, while secondary sources
5 including tribal leaders and activists provided
6 background and anecdotal information. The purpose of the
7 report is to educate Native Americans about their role in
8 determining who makes the rules and sets the policy and
9 to encourage their full participation in the American
10 electoral process.
11 Traditionally, election turnout by Native
12 Americans has always been among the lowest of all
13 communities within the United States. Many factors
14 already discussed here today have had an obvious
15 influence on that result. What this study reveals is
16 that while registration and turnout by Native American
17 voters is still below non-Native averages in many parts
18 of the country, many Native communities saw increases of
19 50 to 150 percent in their turnout.
20 Further, while Native -- while many Native
21 favored federal candidates lost their races, many Native
22 and pro-Native candidates fared far better in their local
23 races. The tremendous success of Native candidates
24 elected to the Montana State Legislature is testament of
25 the power of Native voters in the communities.
26 The research conducted for this report shows a
27 direct correlation between focused localized commitments
28 to increasing participation rates in Native communities
29 and the actual increases that result.
30 This study provides background information,
31 Native voter participation data, and election results for
32 eight states: Alaska, Arizona, Minnesota, Montana, New
33 Mexico, South Dakota, Washington, and Wisconsin. Each
34 assessment -- each individual assessment provides
35 invaluable information regarding how the Voting Rights
36 Act is working within Indian Country and the challenges
37 which still lie ahead.
38 The second report, "Native Election Protection
39 Project", was a legal component of Native Vote 2004. The
40 primary goals of the Election Protection Project were to
41 ensure that each state's voting rules were fair for
42 Native voters, that every Native voter who was eligible
43 to vote was -- who was eligible to vote was able to vote
44 and to have their vote fairly counted. The election
45 protection was active in 13 states: Alaska, Arizona,
46 Colorado, Michigan, Minnesota, Montana, New Mexico, North
47 Dakota, Oklahoma, Oregon, South Dakota, Washington, and
48 Wisconsin.
49 Now the level of presence ranged from
50 comprehensive coverage of poll precincts on or near
51 Indian reservations in states like Minnesota to a single
52 representative available by phone for emergencies in

1 states such as Oregon where votes are cast by mail-in
2 ballots. A state-by-state breakdown of deployment
3 strategy is included in the special report at pages 8 to
4 11.
5 For purposes of this hearing, I would just like
6 to quickly draw your attention to three problem areas
7 identified in the special report, and they've been
8 touched on today already; the allegations of voter
9 intimidation and fraud. And the examples here in South
10 Dakota, the lawsuit that was filed against one senatorial
11 campaign by another campaign based on reports that
12 non-Indian volunteers were following cars of Indian
13 voters and writing down their license plate numbers.
14 On one reservation in Minnesota, tribal police
15 were forced to eject a partisan poll watcher based on his
16 ongoing intimidation of poll workers and voters.
17 Other reported incidents include photographs
18 being taken of Native voters by poll watchers, Indian
19 voters in border towns being told by non-Indians to go
20 vote on the reservation, Indian voters being told to wait
21 while non-Indian voters were helped with their
22 provisional ballots, unsubstantiated charges that Indian
23 voters were being paid for their votes.
24 A second problem area was the area of absentee
25 ballots, and just very quickly, the area of concern that
26 we're focused on is in the State of Alaska where we're
27 investigating allegations that state election officials
28 placed insufficient postage on absentee ballots. Over 65
29 percent of the calls on election day from Alaska Native
30 voters to the Election Protection Hotline were complaints
31 regarding absentee ballots that were never received. The
32 issue is whether Alaska Native voters were
33 disproportionately impacted.
34 In other reported incidents, Native voters who
35 did not recall requesting an absentee ballot, as in many
36 states, were marked as such on voter rolls and then
37 experienced trouble in being allowed to vote.
38 The third final area of our concern is
39 discriminatory election laws. NCAI and NARF both filed
40 separate lawsuits, one in Minnesota, one in New Mexico,
41 basically forcing the Secretary of State in the State of
42 Minnesota to enforce tribal -- the use of tribal IDs both
43 on and off the reservation. The second in New Mexico had
44 to do with a county clerk who, in contravention of the
45 Secretary of State's interpretation of law, decided that
46 he was going to force photo ID requirements on first-time
47 voters in the state.
48 Just in closing, as Jacque mentioned earlier,
49 the Native Vote Project is a permanent project now within
50 NCAI and NARF. Our next step is to protect the
51 incredible strides that we have made and to be proactive
52 in our approaches. With each new election cycle, we're

1 required to mobilize or get out the Native vote in our
2 election protection efforts.
3 We look forward to working cooperatively with
4 secretaries of states and election boards to maximize
5 accessibility to the polls. We're heartened by our court
6 and legislative victories that guarantee the right to use
7 tribal ID to vote. But as other witnesses have testified
8 here today, our work is just starting. Despite our
9 efforts, discrimination in voting persist. The
10 reauthorization of the Voting Rights Act is an important
11 component of the Native Vote Project and a necessary step
12 to maximize the power of the Native voice in American
13 government. Thank you for your time.
14 COMMISSIONER MEEKS: Thank you, Richard. Any
15 questions?
16 MS. RING: Yes. Thank you, Mr. Guest. You
17 deal with tribes all across the country, correct?
18 MR. GUEST: That's correct.
19 MS. RING: One of the things that has been
20 mentioned here today and certainly in the work I'm doing
21 that has come up prior is the issue of the photo ID
22 requirement and the alternatives to the photo ID
23 requirement in terms of evidence that you actually live
24 somewhere as real problems for people on the reservation.
25 I'm wondering how broad you think that problem is in
26 Indian Country. Specifically how many places -- how many
27 tribes do you think it's going to be difficult to prove
28 -- for a significant number of people to prove that they
29 live at a place, and in how many tribes do you think
30 there's likely to be some objection, maybe spiritual or
31 religious, to the photo ID?
32 MR. GUEST: Well, I think that there are
33 several layers to the concerns regarding photo
34 identification in voting. I think that on one level,
35 Indians are generally placed in the -- you know, in the
36 same place as others are with respect to photo IDs.
37 Those of low socioeconomic means may not be able to
38 obtain photo identification simply based on the cost.
39 But as we go deeper into the layers, we see
40 that there may be cultural reasons for Indians, Native
41 Americans, Alaska Natives to not want to have a photo ID.
42 Again, there may be others of a religious nature that are
43 non-Indian who for religious reasons don't want to have a
44 photo ID.
45 We're going to have to take a look at whatever
46 circumstances in each individual situation. The
47 situations that we've confronted thus far, as you've
48 indicated earlier, there are equal protection concerns
49 where there are tribal ID photos -- photo IDs available,
50 but where the states have chosen not to permit their use
51 on the same basis that other photo IDs from college
52 universities, military IDs, even library cards could be

1 used, but not tribal IDs, or they would not accept a
2 tribal ID, and in many cases for reservations, if the
3 tribal ID did not have a street address on it, then you
4 would bring a utility bill. Well, many utility bills go
5 to P.O. boxes on reservation. They don't have street
6 addresses for mail. That presents a problem.
7 I think that what we look forward to, again as
8 I said at the end of my comments, is working with
9 secretaries of state, working cooperatively ahead of time
10 to address these issues with state election officials so
11 that we can find the resolution, not have, you know, us
12 filing lawsuits the day after election when the votes
13 weren't counted. You know, our purpose is to get the
14 votes counted. So we look towards a more cooperative
15 resolution as opposed to seeking redress through the
16 courts after the fact.
17 MS. RING: Thank you.
18 COMMISSIONER ROGERS: Yes, Mr. Guest, thank you
19 for your testimony, but just a very basic question. Just
20 assume this: Given your experience and background and
21 looking at issues throughout the United States, if the
22 provisions of the Voting Rights Act are not reauthorized,
23 what happens, in your opinion, and why?
24 MR. GUEST: Well, I think the impact would be
25 the same in Native American communities as it would in
26 other minority communities is we would see retrogression.
27 We would see a withdrawing by state if the state's not
28 required to provide language assistance.
29 If there is no pre-clearance requirement, that
30 we start seeing the states, not necessarily
31 intentionally, but just as a matter of fiscal policy, you
32 know, why spend the money to pay for translators, you
33 know, in the voting, you know, in the polling places if
34 it's not required?
35 And we would see a -- you know, Professor
36 McCool and I were talking about this earlier is what
37 would the effect be? You know, I said, "Well, it would
38 be a slow erosion," and he said, "No, I think it would be
39 a quick erosion." It depends. It depends on the state
40 you're dealing with. A good example in New Mexico. New
41 Mexico is now held up in the Section 203 context as the
42 model. They have an entire program set up under state
43 law where under state law, a language interpreter is in
44 every polling place. That's required under state law
45 where they have an agency that's staffed that's specific
46 to target Native American communities for education.
47 It's staffed by Native Americans, and it was all the
48 result of the lawsuits that were filed in the mid-1980s
49 around language assistance.
50 Now would those programs continue to exist if
51 they weren't required? Well, our problem is is that they
52 would be at the whim of who's ever in the governor's

1 office or of the makeup of a particular legislature, and
2 that's where the danger lies is that we would start to
3 have inconsistency. We believe that they would -- you
4 know, that they would begin to erode. The rate of
5 erosion depends on the state, depends on the
6 circumstances.
7 COMMISSIONER ROGERS: But you seem to describe
8 it, as you said, not necessarily as a matter of intent,
9 but you describe it as a -- it was kind of interesting to
10 hear your analysis there because in essence you said, it
11 may be fiscal concerns or perhaps it's partisan concerns
12 or who's sitting in the governor's chair, but as it
13 relates to the issue of intent, which was to some extent
14 the subject of the first panel talking about a hostile
15 environment that may well exist here in South Dakota as
16 it relates to Native Americans. That was not necessarily
17 the focus of your comments.
18 MR. GUEST: I think that I would leave that --
19 you know, the issue of the hostility, we certainly
20 experience, you know, throughout Indian Country, here in
21 South Dakota, in the State of Alaska, in New Mexico, in
22 Arizona, wherever you go in Indian Country, there is a
23 level of hostility that exists based on many factors.
24 I'm not an expert in terms of evaluating why that level
25 of hostility exists. Merely to say that in general,
26 whenever we deal across the table with individuals, in my
27 capacity as a tribal attorney sitting in a major water
28 adjudication with non-Indian farmers and non-Indian
29 county commissioners and state representatives, nobody
30 has hostility there with respect to an individual that
31 they don't like, and whenever we can work through our
32 issues together, we seem to be able to come to a general
33 consensus and a resolution that works for everyone.
34 The kind of hostility that we experience here
35 based on lack of understanding, fear, you know, it's
36 something that again I don't know that I would
37 necessarily characterize it, but I'm still an optimist
38 and idealist, as intentional, but that it is still a part
39 of the system. It's structural. It's just in the
40 structure, you know. It's in the institutions, you know,
41 and it's something that is very much present, but I still
42 hold out that it's -- you know, that it's not necessarily
43 intentional.
44 COMMISSIONER ROGERS: Okay.
45 MR. NELSON: Just one question. In your
46 handout, there are a couple of incident reports from 2004
47 from South Dakota. Who put these together? Who made the
48 documentation?
49 MR. GUEST: Well, the Native Vote Project was a
50 part of the larger Election Protection Project that was
51 coordinated through the Lawyers' Committee on Civil
52 Rights. We did not have a direct presence with Native

1 Vote in South Dakota. We were not coordinating, but we
2 had a number of grassroots organizations here in South
3 Dakota. There were a number of other organizations who
4 came in from out of state to monitor and to offer poll
5 watchers.
6 So we just asked folks who had participated in
7 election protection efforts in the State of South Dakota
8 to forward, you know, their statements of incident
9 reports. We provided them with copies of what we had
10 used as a part of Native Vote in the other states, and
11 they responded and returned them. They were just
12 individuals who had volunteered their time as a part of
13 Native Vote or as a part of other election protection
14 efforts.
15 MR. NELSON: Thank you.
16 COMMISSIONER MEEKS: You know, this is to
17 follow up on Commissioner Rogers' question and he asked
18 it earlier to the panel before, about this hostility
19 that, you know, people were pretty free about talking
20 about. And I don't want you guys, the other panelists
21 to answer this right now, but to be thinking about it
22 later, but I want to address it specifically to Richard
23 right now, and that is -- so I was thinking about this
24 and there is this hostility. I mean, I've been in South
25 Dakota all my life, and I just wonder what you think that
26 because so many people in South Dakota really -- Native
27 Americans are the only minority that they have to deal
28 with, and so they're really not as exposed to African
29 Americans or Latinos or -- and so therefore, haven't
30 learned to be as tolerant of other types of people, and
31 if you see that, you know, in other states like Arizona
32 where there's, you know, a pretty good mix as opposed to
33 South Dakota or other rural states like South Dakota?
34 Did I make my question clear?
35 MR. GUEST: I didn't catch the thrust of your
36 question.
37 COMMISSIONER MEEKS: Well, I'm just wondering
38 if you see the sort of hostility that was talked about
39 today in other states with Native American populations?
40 I'm really trying to answer this question of why is there
41 so much hostility in South Dakota?
42 MR. GUEST: Well, I spent election day in New
43 Mexico off of the Navaho Reservation in border towns
44 monitoring the poll watchers there. I was chasing down
45 report after report of pickup trucks with armed ranchers
46 sitting outside polling precincts. You know, we caught a
47 number of reports. The reason why they don't appear is
48 because we were never able to confirm those reports.
49 Absolutely. I think that, again, one of the
50 major areas of concern and focus for us are the border
51 towns, you know, the towns that -- the communities that
52 have sprung up on the reservations, those that have

1 sprung up just off the reservations where at least within
2 the confines of those border towns, the majority
3 population is non-Indian, but there is a large portion of
4 Native Americans, and we see the hostility.
5 Now again, I think that the point that has
6 already been made here is that hostility oftentimes is
7 more subtle. It's not as direct. It exists, there's no
8 doubt about it, but how far -- you know, I think again,
9 the other panelists are in a better -- are in a better
10 position, you know, to evaluate that than I am sitting in
11 Washington, D.C., you know, being out, you know, in
12 Indian Country on election day.
13 COMMISSIONER MEEKS: Thanks, and I will ask
14 that question --
15 MS. JOHNSON: I'll pass since he's testifying
16 on behalf of both of us.
17 COMMISSIONER MEEKS: I guess that's it. Thank
18 you very much. Craig? Make sure that you all are
19 speaking into the microphone.
20 MR. DILLON: Okay. I guess I don't know where
21 really to start because I am from a border town. I know
22 that -- what exists out there. I had a black gentleman
23 in 1990 talk to me one day when I was a deputy sheriff,
24 and what he said to me woke me up, but it took ten years
25 to actually really wake up as a result of that
26 conversation. He said, "Do you know that you people are
27 really segregated in this town?" And I'd lived there all
28 my life, and I couldn't figure out what he was talking
29 about.
30 But that stirred something inside me, and over
31 the years I've realized that I didn't see the forest
32 because of all the trees. I accepted being oppressed.
33 It was part of life. It was part of our mother -- or my
34 mother's life, my grandmother's life, and that was just
35 to be subservient and not question anything that happens
36 in a border town because that's the way it's always been
37 and that's the way it always should be.
38 Over the years, however, I've changed. I've
39 learned to question these issues. I've learned to
40 question why we don't have Indian candidates that get
41 elected in these elections in our hometowns. I question
42 why we have elections on days when there's a winter storm
43 when nobody can get out and travel. And there's low
44 voter turnout for school board election, but they go
45 ahead and have it anyway. That's because they wanted to
46 maintain status quo. They wanted to keep in control, and
47 that's the key to the whole election process, in my
48 opinion, is control, be it a state election, a national
49 election, or a city/county election.
50 And it scares me because for so many years, we
51 let this happen, and my -- my view of the future is kind
52 of foggy yet because I'm waiting for more laws to come

1 out, I guess, that will impede the process of being able
2 to get out and vote. And the reason I say that is
3 because we've made some steps, some great, great steps in
4 South Dakota, I think, and I think Chris has been part of
5 that. And I think that to really -- to change our
6 process in South Dakota, we're going to have to do it on
7 a legislative level instead of a court level because
8 courts, to me, build animosity. They build hard
9 feelings, and we have enough of those in Indian Country
10 to go around for generations yet.
11 I just hope that someday we can all be equal.
12 All sit at a table and have common goals that we can
13 reach. But I don't -- again, I said my view of the
14 future is somewhat foggy yet. I'm afraid for my
15 children, for what I have done, and stood up and then
16 said, "Hey, I'm not taking this anymore." I'm afraid for
17 my friends that are on the commission, and I would like
18 to say that -- I mean, on our LaCreek District's Civil
19 Rights Committee. I would like to feel that this group
20 of people that we put together changed Indian Country and
21 America forever, this little ragtag group of people that
22 came together, and I'd like to name them for you, the
23 individuals today: Jess Clausen, Alice Young, Sandy
24 Flag, Valentina Janis, Leonard Janis, Donald Cuny,
25 Charles Bettelyoun, Joe Bettelyoun, Charles Cummings,
26 Agnes Cummings, Bob Fog, and Jeb Bettelyoun.
27 This group of individuals, to me, have changed
28 South Dakota forever. It's the LaCreek District Civil
29 Rights Committee and what happened is this is a result of
30 an individual who was appointed sheriff in Bennett
31 County, Russel Waterbury. And what happened is Russel
32 was acting inappropriately for the sheriff of a small
33 mixed community like we had. A number of individuals
34 came to us and expressed concerns why they're being
35 stopped and why their vehicles were being searched.
36 Records -- I mean, warrant checks being done on them.
37 They were pulled to the side of the road. A lot of times
38 for up to and over an hour, they had to sit while warrant
39 checks were done. They had to have their license plates
40 right, they had to have their insurance.
41 And what happened is the people came to us and
42 wanted answers. So we formed this group, and we went to
43 the city fathers, city council, we went to the county
44 commissioners, we went to anybody that would listen to
45 us. The Department of Justice sent out a mediator, and
46 what was really strange about that, we were the ones
47 crying for change, and they went and met with the City of
48 Martin. It's strange that we're the ones that were being
49 oppressed, but they went and met with the oppressors, in
50 my opinion.
51 Well, all we wanted was equal justice, equal
52 time, and just to be heard, our concerns heard. A lot of

1 people were affected by Mr. Waterbury in negative ways.
2 We have individuals who lost their businesses as a result
3 of joining our committee. We have an individual who gave
4 up a career in the Indian Health Service so he could run
5 for county commissioner.
6 But we've made some headway. We've made some
7 headway in our election processes, and I would like to
8 think that we helped Tim Johnson get elected in 2002,
9 this little group of people that came together and, in my
10 opinion again, changed South Dakota forever.
11 And it's my sincere hope today that this
12 Commission will continue to support the law that is in
13 effect and that we can maintain that for generations to
14 come because racism doesn't just die. First and
15 foremost, we have to all admit that we are biased. We
16 have racism in us and that we're willing to change. And
17 the biggest part of my life, I think, now is that I know
18 I have prejudice. I know I have shortcomings, but I'm
19 willing to work on those and change, and it's my hope
20 that South Dakota will be a better place for everybody in
21 years to come. Thank you.
22 COMMISSIONER MEEKS: Thanks, Craig. Jesse?
23 MR. CLAUSEN: Good afternoon. It's an honor to
24 come here, to listen to all this testimony, and to see
25 something finally starting to happen after years of
26 trying to find some solutions to some of the problems
27 that we see going on right in front of our faces to our
28 families, to our friends, and if we don't do things to
29 change it and work at this thing, to our children.
30 Me and Craig has worked together on these
31 issues down in Bennett County and it's spreading out into
32 the rest of our reservation, the Pine Ridge Reservation,
33 and going over when we can to help the Rosebud or the
34 Yankton Sioux Reservation or wherever else we're asked to
35 go to help. We were forced into it. We -- Craig didn't
36 hit on all the stuff.
37 Bennett County is part of the Pine Ridge
38 Reservation. Federally it's recognized as the Pine Ridge
39 Reservation. State-wise it's not recognized as the Pine
40 Ridge Reservation, and then we lost jurisdiction; it's
41 state jurisdiction there, and it really become a huge
42 huge mess. My ancestors were all born in Bennett County,
43 my Native American ancestors. The graveyards in Bennett
44 County are full of my ancestors.
45 COMMISSIONER MEEKS: Could you hold up one
46 second? I think your microphone isn't on. Sorry about
47 that.
48 MR. CLAUSSEN: Most of the time I don't need a
49 microphone anyway. But after all that history of my
50 family's, my great-grandparents and further back living
51 in that county, I was finally forced out of the county
52 last year for my political beliefs. My thought was that

1 by getting out and helping our people vote, we could stop
2 sheriffs like we had in Martin from killing our own
3 people right there in front of us. We had four Native
4 Americans die at the hands of this Sheriff Waterbury.
5 We had 27 different individuals have their
6 homes ransacked and stuff without search warrants,
7 without any regard for their civil rights. I mean, we
8 were forced to have to do something. We couldn't just
9 sit there and let our people be terrorized on a daily
10 basis. It wasn't weekly or anything; it was daily. The
11 sheriff's department just got away and was running wild.
12 Like Craig said, when we went to the county
13 commissioners, when we went to the city council, we got
14 fed lip service. We worked for a week and put together
15 packages and mailed them off to every possible address we
16 could get ahold of: the Department of Justice, the ACLU,
17 to your office, Elsie, and your office responded.
18 Everybody -- after all that work, and it takes a long
19 time, we did get the Department of Justice to not only
20 send out mediators, but to come out and have two days of
21 hearings. Their people that came out said they'd never
22 been to a place anywheres in the United States, down
23 South with every populations with all their racial
24 problems, everywheres else in the country they've ever
25 been to, they'd never been to a place where people showed
26 up to these hearings at such a high rate per capita. I
27 mean, people just would, a day or so's notice, would come
28 to these hearings and five, six percent of the county
29 showed up to these hearings to testify about the racial
30 profiling and the stuff that was going on in Bennett
31 County. So the good point is is we were forced into
32 doing something. We had to. Your lives were at stake --
33 or our lives were at stake.
34 Then when you get involved and started into
35 that, then you run into the politics. The big thing in
36 the -- in our community -- it's not a border town, it's
37 Pine Ridge Reservation. The big deal in our community
38 was they did not want to let go of the political control
39 that they had a stranglehold on since maybe back in the
40 early 1900s. When we tried to take a little bit of that
41 back, we become public enemy number one, public enemy
42 number two of our county and of our place where we was
43 born and raised and where our ancestors were born and
44 raised.
45 With that, we were attacked every possible way
46 they could think of. We'd have a meeting out at my
47 place. As soon as it even started, a sheriff's car would
48 pull in over on the top of the hill and they would sit
49 there taking pictures, watching us through binoculars
50 every time, too. This went on week after week. When
51 people would leave my place to go home, they would be
52 stopped before they could get to their homes or back out

of the community. We were stopped ourselves numerous times, ticketed for real petty things or whatnot.

And finally, that wasn't doing enough to shut us up. We just kept on going year after year. It finally got to the point for myself, to shut me up, the city fathers of the Bennett -- or the city fathers of the town are also the board of the bank in Martin where I did my business at. I'd done business there for years, but to shut me up, they foreclosed on a bank note of $120,000 where I had $350,000 in contracts in hand at the time. They was sitting on top of $650,000 worth of my assets, and they still foreclosed on me, drained my checking account, drained my savings account and put me out of business and forced me from my home. I now live in Kyle, South Dakota because the Bank of Martin has my home because of my political beliefs.

You know, that's my opinion, too. If you ask the president of the Bank in Martin and that board of directors of that bank over there, they'll say, "No, it was the way he was handling his business" and whatnot and stuff. The problem is is I believe it's a case that needs to go to court, but when you get drained totally and you want to go back and fight, you don't have the resources to get back in there and hire the attorneys it takes to fight a big major battle like that.

I wasn't the only person that got harmed in this. Everybody I did business with. The 50 employees I used to employ all don't have them jobs anymore. The other suppliers and other businesses I did business with all got hurt and stuff all over politics. Now that's intimidation to the maximum.

You know, Craig didn't bring up this deal. We had times in Bennett County where we'd have poll watchers. Our poll watchers was like Charles Bettelyoun, 67 years old, little old gray-haired man. His brother Joe Bettelyoun, another little old man. Alice Two Bulls, a 70-some-year-old lady would sit and do poll watching and let us know which of our people came and which hadn't so we'd know who to go hunt for to try to beat the rush and get them to the polls.

On the other hand, on the non-Indian side of the deal, Danny O'Neill, which makes me look real scrawny, Bob Bucholz, which makes me look scrawny again, five or six of these guys standing at the door of the polling place, and when our people came in, they had to say, "Excuse me," and then they wouldn't move; they'd have to walk around them. When the white people come in, it's, "Hi, how you doing?" shake their hand and step aside and let them come in. That was just blatant intimidation.

Other times we had people come there to do exit polling and stuff. We had people attacking these people,

1 non-Indians that came from outside the area that were
2 trying to help us with the ACLU or whatnot. We had city
3 councilpeople pulling up in vehicles and stopping them
4 people -- or stopping the guy and not wanting to let him
5 to get back to the polling place.
6 Me and Craig had to leave. We was organizing
7 and calling people on the phone tree and calling our
8 workers and sending them here and there and whatnot and
9 stuff like we always do. Me and Craig had to jump in my
10 vehicle and beat it down to the polling place as fast as
11 we could and rescue this gentlemen, a little elderly
12 white gentleman that was down there. I mean, we seen a
13 lot of intimidation. The stories could go on and on. We
14 could spend the rest of the day just telling you these
15 stories, you know. And that goes on to this day. It may
16 be the worst in Bennett County, but not just in Bennett
17 County.
18 When I worked in other parts of the
19 reservation, some of the same stuff was happening across
20 the Pine Ridge Reservation. I'm sure it happened on the
21 Rosebud Reservation, the Eagle Butte Reservation, and the
22 border towns around them places. And I guess my time is
23 up. Thank you.
24 COMMISSIONER MEEKS: There will be questions.
25 Okay. Adele?
26 MS. ENRIGHT: My name is Adele Enright. I've
27 been the Dewey County auditor for 18 years. During that
28 time, I've conducted nine June primaries, nine general
29 elections, plus early presidential primaries and various
30 special elections as needed for a total of at least 23
31 elections.
32 Since I took office in 1987, the number of
33 registered voters was 2960. It is now 4240. My first
34 election there were 11 precincts. We currently have 14.
35 Of those 14 precincts, the three newest ones were put in
36 as a result of redistricting of commissioners and due to
37 tribal requests for more precincts. Of the 14 precincts,
38 five do not have interpreters, a/k/a translators.
39 And I should point out, I'm not an activist
40 like these other people. I'm just an auditor doing
41 elections, so I don't have any -- you know, I don't have
42 any real strong opinions one way or the other. Well, I
43 do, but that's another issue.
44 Of the 14 precincts, five do not have
45 interpreters. All of these five are in the northern end
46 of Dewey County which have either a small Native American
47 population or no Native Americans in their precinct.
48 Only four of the precincts had no Native American polling
49 place workers, and two precincts had all Native American
50 polling place workers.
51 I was invited here to talk about my work in
52 recruiting Native American poll workers and interpreters.

1 First of all, I do not specifically recruit poll workers
2 by racial makeup. I'm looking for competent, reliable
3 poll workers I can trust to do the best possible job.
4 To do that, I started first using the pool of
5 workers in place as used by the previous auditor. Since
6 her hand-picked people -- and by the way, she was a
7 Republican and she hated everybody -- had conducted the
8 election that put me in office, I figured that made them
9 honest and very capable. When some of those people were
10 unwilling or unable to work later, I looked at the list
11 for each precinct and started calling friends and
12 acquaintances on those lists. Those people either agreed
13 to work or suggested friends and relatives who would
14 work, and that's how I got my current pool. I also keep
15 a list of people who come through the courthouse and
16 mention to me that they're willing to work elections. I
17 refer to that if needed.
18 But to the racial part of this, I live and work
19 in Dewey County; been there all my life. 2000 Census
20 says we have a population of 5972 people. According to
21 that Census, 4429 of them are Native American. Obviously
22 the majority of the people that I know are going to be
23 Native American. I've been very fortunate in having good
24 friends become faithful election workers and have
25 election workers become good friends. Together we've
26 gone through some very trying times, but we're just
27 ordinary people taking part in an extraordinary process,
28 and we do the best we can to conduct elections.
29 In the time that I have been in office, when I
30 started, every office-holder in the courthouse was a
31 Republican. They are now -- now there's only one
32 Republican left in there. At the time that I started,
33 there was one Native American county commissioner. There
34 now are two of those, and our state's attorney is Native
35 American as well. I can't say I personally accomplished
36 this, but, you know, things have turned around, things
37 are changed, people have come forward. I think we're
38 making progress where we're at.
39 But we are not a border town. Our entire
40 county is on the reservation, and there's dual
41 jurisdiction -- not really dual, but the tribal
42 government has jurisdiction over the tribal members, the
43 sheriff county officials have jurisdiction over every
44 non-tribal family. And I hope and I think that we're
45 working well together. I hope we are. Now I'm starting
46 to wonder. As I listen to everybody else, I'm getting
47 bad vibes.
48 But before I talk about the process of finding
49 the interpreters, when I started as auditor, I had no
50 idea there was a Voter Rights Act, let alone that it
51 covered what I was doing. My first clue was when I got a
52 letter from the chairman of the tribe, Greg Bourland.

1 That letter was dated November 6, 1991. He told me I was
2 required to provide forms and assistance to voters in the
3 Lakota language, and I was horrified that I was supposed
4 to be doing this and it wasn't being done.
5 After researching it, I found the South Dakota
6 law S.D.C.L. 12-3-9 defining Lakota as an unwritten
7 language and saying that it's basically impossible to
8 provide forms in an unwritten language. After we
9 discussed that, we decided, okay, we weren't going to do
10 that, and I discussed that with the tribal officials.
11 I immediately began the process of finding the
12 best Lakota speakers and, most importantly, finding
13 people who felt they spoke the language well enough to
14 interpret complicated ballot issues into Lakota while
15 still keeping the text as confusing in that language as
16 it was in English. Most people were reluctant to serve
17 as interpreters because they did not feel they were
18 competent enough in Lakota, first of all, to give an
19 unbiased translation because that's hard to do if you
20 feel strongly about an issue.
21 They also worried that there were no words in
22 the Lakota language for the language of some of the
23 issues raised. The people who worked for me early on
24 were the elderly, and they had the strong work ethic, and
25 they were not comfortable accepting pay as they said they
26 were not asked for assistance, and several of my
27 interpreters questioned my authority to spend the
28 county's money like that.
29 As the years have gone by, though, I have found
30 willing workers who can do the polling place work on --
31 sit on the actual polling place board and have Lakota
32 language skills. This is the best solution for all.
33 In some precincts, I do still need to have
34 interpreters on hand to fill in as needed, and I get
35 these names from friends and from contacts in tribal
36 government. Finding Lakota-speaking people seems to get
37 more challenging as the best speakers were the elderly
38 and many have now passed on.
39 The past general election brought a new
40 challenge as I was required to provide election notices
41 in Lakota in an audio version over the radio. I found
42 Mr. Leonard Curley at Eagle Butte and he was willing to
43 help me. He and I worked together. He'd tape my notices
44 in Lakota, I took them to the radio station where a
45 gentleman there helped us clean our background noise off
46 of it, and I put an introduction on it, and we were able
47 to get those out on the radio. Dewey County paid for the
48 ones that were on the private radio stations and KLND and
49 some of those radio stations used them as public notices,
50 and basically that was not a terribly expensive process.
51 It was interesting to me, though, that the
52 Indian community and the white community both had pros

1 and cons. Some of each thought it was good, some of each
2 didn't like it. The pros and cons were about equal in
3 both areas, which I thought that was interesting.
4 We also had early voting at the courthouse this
5 year. That was an exceptionally good deal. A lot of
6 people came in and voted for the very first time, and we
7 were able to, when they brought them in, especially
8 before the voting deadline had come about, we were able
9 to register them if they weren't, we were able to change
10 them into the correct precinct if that needed to be done.
11 We looked at their photo IDs. If they didn't have a
12 photo ID, we used the little certification process where
13 basically you sign your name, you say, "I certify I am
14 who I say I am," and it really isn't a problem.
15 The main reason -- the main focus of our photo
16 ID thing was we have had people come in to South Dakota
17 and specifically to Dewey County registering voters,
18 getting paid by the voter registration and setting
19 somewhere and making up -- making up actual fake people,
20 and I do still have a list of those people. I realize
21 that lady was not charged, but I'm holding a grudge and I
22 am keeping my materials, and I don't think that's right
23 to do to anybody.
24 I feel we don't have any problem with the
25 pre-clearance part of this and as far as with the
26 language part of it. If we need to keep doing it, we
27 will keep doing it. I wouldn't want to take a chance
28 that anybody needed it and didn't get it, but I also
29 think -- excuse me, I'm having voice problems. I also
30 feel that the observer and examiner part of this law is
31 very important because we have had a lot of problems with
32 stories showing up long after elections of alleged
33 incidents that happened in our polling places. Since
34 we've had the observers and examiners, we have
35 implemented a sign-in sheet where if you're an observer,
36 an examiner, a poll watcher, anybody hanging around, we
37 have them sign in, give us a name and address so later on
38 if one of these alleged incidents comes about, we know
39 whether that person was actually in the polling place in
40 Dewey County, we know where they were, we know who they
41 talked to, and it's gone very well for us that way.
42 Unless there is something in some of these reports that
43 I'm not aware of, I think we got by pretty good in 2004.
44 And I guess that's really about all I have to say. Thank
45 you.
46 COMMISSIONERS MEEKS: Thank you. I want to
47 take this time, Jacqueline Johnson has to leave and --
48 MS. JOHNSON: I apologize.
49 COMMISSIONER MEEKS: Yeah, she has to go back
50 to D.C., so I want to thank you for sitting in on this
51 and helping us plan this. We very much appreciate it.
52 MS. JOHNSON: Thank you, and I'd like to thank

1 the panelists. Although I didn't get to ask any
2 questions, the information that you have shared -- and
3 I've talked with O.J. before, but the information you
4 have shared has been just really valuable, and I really
5 appreciate the effort and am very interested in how do we
6 make the poll watching and the other work, you know, the
7 things that happen on the ground work. I appreciate the
8 work that you've done. It certainly is a model to be
9 replicated. Thank you.
10 COMMISSIONER MEEKS: O.J.?
11 MR. SEMANS: Thank you. First of all, I'd like
12 to welcome you to Paha Sapa. (Speaking in Native
13 language.) That means I wish you all health and help.
14 There's some of you that aren't from here and that's one
15 of our greetings; we wish everybody health and help.
16 That's just part of our culture. We want everybody to
17 get along and have a good life. So on behalf of the
18 Dakota, Lakota, and Nakota people, we welcome you here.
19 What is kind of funny is that where you're
20 actually sitting, I used to live. Back in before the
21 Rapid City flood, my house was located here, so you're
22 probably in my living room, so it's just a coincidence, I
23 guess.
24 But I just want to say that racial
25 discrimination in South Dakota is alive and well. It's
26 not divided by political parties, whether it's a Democrat
27 or whether it's a Republican. Since becoming involved in
28 this, I have butted heads in Charles Mix County, a
29 Democratic stronghold, and we've butted heads in, you
30 know, Republican strongholds. It don't matter what party
31 you're in or who you are when it comes to discrimination,
32 racial discrimination. There's no party lines. Don't
33 think there is because instead of black and white, in
34 South Dakota it's black and red.
35 And, you know, we had a lot of problems here in
36 2002. After the election of Senator Johnson which, you
37 know, the Native American Indians never labeled Senator
38 Johnson as the Indian senator. That was from different
39 news media outlets throughout the United States. But we
40 realized that once he was elected and Native Americans
41 Indians were identified as being part of the people that
42 elected him, that we would receive some type of backlash
43 from the State of South Dakota.
44 You know, I want to tell you something and I'm
45 kind of using it as two things that really, really hurt
46 Native American Indians are circumstances and perception.
47 Any time laws are passed in South Dakota, it's because
48 the circumstances are different for us and the perception
49 that we give other people require new laws to be made.
50 Well, every Native American Indian in the State
51 of South Dakota did not want to have photo IDs. Now
52 there's some that it really didn't matter or whatever,

1 but the basic cry from every reservation in the State of
2 South Dakota is, "We do not want to have photo IDs."
3 They went and sent letters and they -- to the governor's
4 office, I believe, at that time. I testified before the
5 Senate Committees on the tribal IDs. We said that it was
6 going to do nothing but turn away Native American voters
7 and disenfranchise them more so than they are now. We
8 said that it would create problems and -- but we also
9 knew it was coming because of the 2002 election.
10 Now the State of South Dakota basically changed
11 that on the Help America Vote Act which doesn't require
12 photo IDs under the Help America Vote Act because
13 basically what happens is if you give somebody or require
14 somebody to have an ID to vote, you're causing them to
15 pay to vote. And so they threw in this little line at
16 the very end of it saying, "or file an affidavit." But
17 that filing of an affidavit was the very last line of the
18 law in very small print, as far as I'm concerned.
19 And so what happened was is in 2000, the June
20 election and the special election in 2004, we had
21 individuals putting up different signs saying you needed
22 to have a photo ID in order to vote. These signs were
23 posted, and they weren't uniform signs. They were
24 different individuals that put up signs, and we presented
25 that to the State of South Dakota when we testified on
26 this matter.
27 And again, in some circumstances it might have
28 been a lack of knowledge, but in a lot of circumstances,
29 it was to keep Native American Indians from voting. That
30 was the sole purpose, and that's my feeling, and that's
31 the feeling of people I've talked to throughout the
32 reservation and the State of South Dakota.
33 So what happened was is the special election
34 happened. We had -- and again, we got affidavits on this
35 and we turned it in to the State of South Dakota and I
36 believe we turned in anywhere from 12 to 14 affidavits of
37 Native American Indians that were refused the right to
38 vote. And, you know, people say, "Ah, just 14?" One
39 person not allowed to vote in this country is against
40 everything that this Constitution and this country is
41 based on. So finding 14 people that would fill out an
42 affidavit and saying, "You know what, they wouldn't let
43 me vote," I think is a major, major, issue.
44 I will give to you letters from the
45 Sisseton-Whapeton Sioux Tribe, a resolution from the
46 Rosebud Sioux Tribe on the latest bill passed by the
47 South Dakota State Legislatures, HB 1085, which basically
48 says that -- it's going to describe how people can be --
49 can haul voters to the polls. And let me -- in case
50 you're not aware of it, the only thing that Native
51 American Indians in South Dakota fight over is who's
52 going to be in the top ten poorest in the United States

1 in counties. That's the only thing that we can actually
2 fight over. If it isn't the Oglala in first place, it's
3 Rosebud, and if it ain't Rosebud, it's Buffalo County.
4 In South Dakota our reservations are always in the top
5 ten poorest counties in the whole United States. And so
6 our people going to vote sometimes had to travel over a
7 hundred miles to vote, and this is part of the testimony
8 before the state.
9 The absentee voting has really changed things
10 so it's better for us, but you have to understand this:
11 Every household has three to four families in it. One
12 household, I can tell you right now, in St. Francis alone
13 has 22 people living in one house. Of every three
14 houses, you have one car. So what you have here is you
15 have not only people that can't afford to buy an ID, but
16 they can't afford to put gas in the car they don't even
17 have to go to vote.
18 And so what we did through different projects
19 with Jesse and Craig and different ones back there, Tom,
20 different advocates to try to get Native Americans to
21 vote is we took people to the polls to vote. Well, the
22 State of South Dakota perceived that we were being
23 fraudulent in doing so, and they passed a bunch of laws
24 basically saying, "Well, if you Indians are going to take
25 people to vote, you're going to have to pay them the way
26 we want you to pay them."
27 So I'm going to give to you a couple of
28 articles from the Rapid City Journal. Also the letter
29 from the Sisseton-Whapeton Sioux Tribe and the resolution
30 from the Rosebud Sioux Tribe opposing HB 1085 and that's
31 basically directed at Native Americans. The person that
32 introduced that legislation basically said that there was
33 no wrongdoing as far as Native Americans were concerned,
34 but we could be perceived as creating fraud or committing
35 fraud, so therefore, we're going to pass a law in the
36 perception that you guys are creating fraud. And it
37 passed.
38 And as far as -- I'll hit the provisions real
39 quick here. Can you imagine what it would be like if we
40 didn't have the Voting Rights Act? I mean, the State of
41 South Dakota alone with it didn't submit 2300, that we
42 know of, ordinances for pre-clearance. What would it be
43 like if the government wasn't there saying, "You have to
44 do this"? It wouldn't be 2300; it would be 23,000. This
45 would affect every Native American, not just in South
46 Dakota, but throughout the United States. We are less
47 than one-tenth of 1 percent of this population, and yet,
48 we are looked upon for every law that's possibly created.
49 It used to be that they didn't feel that Native
50 Americans, we existed. I think most people can look at
51 us as a drawing from Remington where you see that one
52 lone Indian on a hill. Well, after 2002 they looked over

1 that hill and they saw there was actually thousands, if
2 not thousands and millions of us, our grandpas, our
3 grandmas, our grandchildren, and we do exist. And once
4 we started to be recognized as existing, the law started
5 changing to try to keep us from voting.
6 This act, the Voting Rights Act is detrimental
7 if it is not put back into law. We have so far used the
8 pre-clearance. We have used the people coming here. We
9 have used the language barriers. We've used everything
10 that's in this, and it is very important to give our
11 people, again who's less than 1 percent. If we don't
12 have it, we're not going to vote, and you are going to
13 lose a part of -- a part of that actually as the founding
14 of this country. Thank you.
15 COMMISSIONER MEEKS: Thank you. Thank you.
16 Jennifer?
17 MS. RING: Yes.
18 MR. SEMANS: And that time really goes fast.
19 MS. RING: Thank you. I have a question for
20 Mr. Dillon and Mr. Clausen. You're both members of the
21 LaCreek District Civil Rights Committee. One of the
22 things that I wish you would -- well, first of all, I'll
23 ask you a very brief question. In your opinion, do most
24 Indian voters vote based on party or based on their
25 perception of whether the candidate will be responsive to
26 Indian issues?
27 MR. CLAUSEN: I believe traditionally, and I'm
28 one of them, my mother years ago worked at voter
29 registration trying to mobilize the vote years ago, and
30 so my mother registered me as a Democrat. I didn't know
31 the difference. And then whenever they caught me and
32 made me go vote, I went and voted or whatnot. I always
33 tried to, you know, think that, you know, my mother
34 probably had some insight that I didn't, but the problem
35 is, like in Indian Country, when you're out there working
36 day after day trying to get people to register to vote,
37 and then they want to know why, then you've got to go
38 into a voter education. This is, you know, kind of what
39 the different parties represent or whatnot and giving
40 them examples and whatnot and stuff like that.
41 So, you know, like a lot of the people I talked
42 to didn't have really an idea. They -- a lot of people
43 wanted to go and register as an Independent or whatnot,
44 and then you tell them, "Well, then you can't participate
45 in the primary if you register that way." They didn't
46 under -- but they didn't want a Republican and they
47 didn't want a Democrat, either one. To them, almost all
48 the politicians were bad or whatnot, and that's just due
49 to -- when you ain't got a loaf of bread in your
50 cupboard, what difference does it matter which politician
51 is sitting in Washington, D.C.? None of them are helping
52 you get that loaf of bread there, and that's gone on for

1 decades.
2 So the way I've seen it, most of the time you
3 got to do a lot of voter education to start with, just to
4 teach them, you know, if you want to look at maybe lower
5 taxes like the big Republican sales pitch, lower taxes,
6 less government, maybe that's the way you want to vote.
7 If you want to look at more social aid and stuff, more
8 help with our federal programs here on the reservation,
9 maybe you want to look at the Democratic party and just
10 little things like that.
11 But a lot of the people just don't know, you
12 know. They've never -- and, you know, like, you know
13 some of our stats down in Bennett County. We were --
14 we're 66 percent of that county, but yet we was only
15 about 15 percent of our whole population registered to
16 vote. We went to work back in 2000 and started on that
17 and started registering voters clear for the 2002
18 election. I mean, we worked on it over a year in
19 advance, and so when it finally come time to go to the
20 polls, we were well registered to vote, and all of a
21 sudden, we shot from, like, 180 voters or so in that
22 county, Native American voters in that county to over 800
23 which kind of alarms people, you know, when you're
24 starting to do four, five, 600 percent voter increase in
25 one election cycle in 2000 and 2002.
26 And with that, you know, we've gotten national
27 coverage and all kinds of different things happen because
28 of that. We ousted in one -- in a primary election we
29 ousted a mayor, three county commissioners was the top
30 vote-getters for the sheriff and all kinds of different
31 things all just at one time and we just set all different
32 kinds of alarms and stuff off down in Bennett County.
33 And then we got all the other stuff going on.
34 But back to your question, Jennifer. I think a
35 lot of times that our Indian people -- and I've said this
36 myself and I've heard this one more than anything, "I'm
37 Oglala first, and then I'll worry about being a Democrat
38 or Republican depending on the situation when that comes
39 to us."
40 MS. RING: Okay. That was a bit of a lead-in
41 to -- I would love for you to tell this panel what
42 happened in that first election with the Democratic
43 primary and the Democratic District Chair of Bennett
44 County. I think that's an important story for this panel
45 to hear.
46 MR. DILLON: What happened in the primary
47 election was that two incumbents, Democratic candidates,
48 were unseated, and the Democratic chair at that time,
49 Gary Nelson from Martin, actively went out and recruited
50 individuals to get on the -- as Independents to run
51 against the Democratic candidates that had won the
52 primary election.

1 MS. RING: And what race were the primary
2 victors?
3 MR. DILLON: They were -- who were they, is
4 that what your question is?
5 MS. RING: What race?
6 MR. DILLON: It was in the county commission
7 race.
8 MS. RING: No, no, what racial group?
9 MR. DILLON: Native Americans.
10 MS. RING: And the people he recruited to run
11 against them were what race?
12 MR. DILLON: They were Caucasians, whites.
13 MS. RING: Thank you.
14 MR. DILLON: And it's well-documented and --
15 that this did happen so we're not just making this up as
16 we go.
17 MS. RING: Let's be clear. The Democratic
18 District Chair recruited Independents to run against the
19 Democratic nominees for the offices, correct?
20 MR. DILLON: Yes.
21 MR. CLAUSEN: Jennifer, in that June primary,
22 we had six candidates for three positions.
23 COMMISSIONER ROGERS: They want you to pull the
24 mic a little closer.
25 MR. CLAUSEN: Excuse me. We had six candidates
26 for three county commissioner seats. All six candidates
27 were Democrats, but three of the candidates were Indian,
28 three were white. In the primary, we just blew them
29 away. They came out of the primary without a candidate
30 for a county commissioner, and so after the primary, then
31 you can go back and -- and pull a ballot as an
32 Independent for the general election. So Gary Nelson,
33 the county chair, went out and recruited more candidates
34 to come back against us in the second go-round, and
35 actually any other time, if it would have been any other
36 kind of situation, our candidates that made it through
37 the primary should have just already went on to the
38 general election unopposed.
39 COMMISSIONER ROGERS: Thank you. Forgive me,
40 Madam Chairman. The one thought that's going through my
41 mind consistently as I'm listening to you all on this
42 particular panel -- and first of all, I'd like to
43 compliment you as a panel and individually just in terms
44 of your testimony. I've just found it to be compelling
45 in many respects to hear your individual stories about
46 the circumstances related to voting here.
47 I was struck also, Mr. Clausen and
48 Mr. Dillon -- Mr. Dillon and Mr. Clausen. I'm sorry, I
49 crossed the two of you. Forgive me. Mr. Dillon, you had
50 mentioned a particular circumstance where you said
51 essentially life for you growing up was a little
52 different in that you sort of accepted things, and then

1 over the course of times, things essentially changed for
2 you here where you really gained an activist instinct and
3 role as it related to Indian people here in this state.
4 I'm just curious overall, based upon the
5 entirety of your testimony as a panel, how does this
6 translate with respect to young people, and in
7 particular, among children in particular? As they become
8 of voting age, do you see the same level -- I know this
9 may not be directly related, but I just wanted to ask the
10 question. Do you see a level of activism among your
11 children or other young people in the community overall,
12 or is there generally a level of apathy among young
13 people in the Native American community overall here in
14 South Dakota?
15 MR. DILLON: I think that with what's happened
16 in the past and the changes that have taken place, I
17 think our younger people now are going to get out, and
18 there's an awakening that it's okay to be an Indian.
19 It's okay to vote. You know, we stress this. Every
20 place I go and talk to, I stress the importance of
21 voting. I think that the Indian people out there are --
22 it's an awakening, and I think our youth, and we've had
23 -- we had our last tribal election and we actually had
24 18-year-olds who had set up panel discussions and stuff
25 and wanted to talk to the candidates at the tribal level.
26 COMMISSIONER ROGERS: Yes.
27 MR. DILLON: And to me, that is the most
28 powerful thing that's happened in a long time is that
29 these young people are taking an active role in politics.
30 And I think and I hope that it's going to spread, you
31 know; that they're going to stay active, and they're
32 going to want to have a voice in government, both state,
33 tribal, and federal government.
34 COMMISSIONER ROGERS: Let me ask another
35 question, if I can. In terms of its implications to the
36 Voting Rights Act, you all seem to be supportive of
37 expanding -- excuse me, supportive of reauthorization of
38 the Act, in and of itself. And we've heard testimony
39 that indicates essentially if you do not pass this Act,
40 then you have retrogression that you think largely
41 occurs. I'm curious about your perspective if this is
42 passed, we do reauthorize, Congress reauthorizes, the
43 Supreme Court approves, the Act is reauthorized for
44 another 25 years.
45 Twenty-five years from now when we come back to
46 South Dakota, just 25 years from now, what will happen as
47 a result of passage, indeed reauthorization of the Act?
48 Will we be talking about these same problems? And I
49 mention that in particular in light of your testimony.
50 You've said, Mr. Dillon, that you felt that things were
51 foggy at best. Ms. Enright, you testified essentially
52 that the circumstances -- you're fine with compliance

1 with the Act, you're fine with complying with the various
2 provisions, you believe that it's helpful in terms of the
3 individuals that come into -- in the process of voting?
4 MS. ENRIGHT: I'm not really sure that I'll be
5 able to comply with the interpreter part of it very
6 easily. I'm having more and more problems with that as
7 these elderly people pass away.
8 COMMISSIONER ROGERS: Yes.
9 MS. ENRIGHT: But on the other hand, I think
10 first of all, the people that grow up anywhere on the
11 reservation or in South Dakota are going to schools that
12 are predominantly English-speaking, so I think you're
13 going to see -- unless something changes with the way
14 they preserve the Lakota language, you'll see less and
15 less need for an interpreter. I can't see it going any
16 other way.
17 COMMISSIONER ROGERS: So in 25 years, less need
18 for interpreters?
19 MS. ENRIGHT: I would think so.
20 COMMISSIONER ROGERS: So the provisions of
21 203 --
22 MS. ENRIGHT: I would think there would be. I
23 was particularly disturbed by their idea that the elderly
24 started at age 40. So really I think people -- people
25 that I think of as elderly Lakota speakers, I'm thinking
26 of age 75 on up would be my perception of the elderly
27 speakers who that was -- that is some of the people that
28 work for me are in that age group, and I don't see much
29 -- not many people come to me and request assistance that
30 are younger than that so -- and maybe they just don't
31 come to me. You know, that's possible.
32 COMMISSIONER ROGERS: Okay. And in terms of
33 that -- and forgive me, I don't want to belabor this at
34 all. I really don't want to, but we hear so much
35 testimony as it relates to what happens if we don't do
36 it, but I'm absolutely curious about what you say happens
37 if reauthorization does happen? The end goal of this
38 legislation, and it was described by Madam Chairwoman in
39 particular as the most successful piece of legislation in
40 civil rights, meaning that we have come from somewhere.
41 We're not quite where we were. We're not at the place we
42 were back in '65 when this Act was passed. Things are --
43 have progressed, to some extent, and what will happen as
44 a result of the reauthorization?
45 MR. DILLON: I've got a comment. You know, we
46 never had interpreters at our polls until 2002. So see,
47 my fogginess is is this is just hitting home on the Pine
48 Ridge Reservation, in my opinion. You know, we've never
49 had interpreters. We've never had any -- until 2002
50 people didn't care if the Indians got out and voted at
51 all. I'm being totally honest with you. And I think
52 anybody that's been active in voting registration and

1 stuff prior to 2002, it was hit and miss. If you voted,
2 fine. If you didn't, fine. The state wasn't in
3 compliance with this at all, and it's as a result of the
4 2002 election when the Indians showed up and voted that
5 it's finally taking place that it's going to be a part of
6 the election process from that point on. Am I right,
7 O.J.?
8 MR. SEMANS: Yep, yep. Well, and one other
9 thing, too, is somewhere along the line, and I think
10 earlier they talked about it as far as --
11 COMMISSIONER MEEKS: Please use the microphone.
12 MR. SEMANS: -- including additional laws or
13 strengthening the law itself. Somewhere in there is --
14 Native American people are a different ethnic group. We
15 are treaty -- most of us are treaty tribes where we
16 signed treaties with the United States.
17 And I guess what I'm getting at is that under
18 the pre-clearance, I know my tribe and other tribes have
19 submitted to the Justice Department their opposing of a
20 state regulation or a state law and basically is not even
21 given the time of day. And I think somewhere in there
22 that the tribes within the State of South Dakota or other
23 places need to be given some type of consideration when
24 they are opposing a law passed by the state. And I don't
25 know if that can be in there or not, but something where
26 the minority issues that they feel are going to affect
27 them can actually be addressed and heard.
28 And, Jennifer, I'm not sure if that's actually
29 going in place now because I know on this photo ID deal,
30 we opposed -- our tribe opposed it, Pine Ridge opposed
31 it, and we have to produce IDs. And so basically that
32 tells me that the input by my tribe and by the Pine Ridge
33 Tribe didn't matter; it was the state. And although
34 pre-clearance can get through there and it doesn't, you
35 know, keep it from going to court, we can't afford it.
36 We cannot afford to fight the State of South Dakota. We
37 as tribes, Indians, our Indian tribes cannot afford to
38 fight the State of South Dakota over every law.
39 COMMISSIONER ROGERS: Sure.
40 MR. SEMANS: I mean, we just can't afford it,
41 and so we need somewhere where it's recognized. Sorry.
42 COMMISSIONER ROGERS: That makes sense, but if
43 I can follow it up, I wanted to ask you this: Why are
44 you not saying in response to that question -- as
45 directly as I can state it, why are you not saying,
46 "Twenty-five years from now, we'll have expanded
47 opportunities in terms of Native Americans voting in this
48 state. You're going to see an increase in terms of
49 participation of people showing up to the polls. You're
50 going to see a dramatic increase in the number of people
51 who will serve as everything from county commissioners
52 here in this state to people elected to the legislature

1 to people elected to the Senate of this state and perhaps
2 on to statewide offices or federal offices."
3 Why aren't you saying at the end of the day --
4 and maybe forgive me for asking it this way, but why are
5 you not saying at the end of the day that as a result of
6 this legislation, a series of things happened which are
7 its goals, its goals being expanded opportunity, full
8 presence, full participation in the culture, a reduction
9 in terms of discrimination, full access to opportunity to
10 vote for either Indian people or non-Indian people? Why
11 aren't those things expressed by you, because I
12 understand clearly what you're saying when bad things
13 happen that we don't like. These incidents are being
14 done to us. It shouldn't happen this way, but to the
15 extent that reauthorization happens, then you're happy.
16 You're excited. We got what we wanted. What's the end
17 result of that?
18 MR. SEMANS: I apologize because I didn't
19 answer the question right, and you're 100 percent right,
20 and we can show you from 2002 to 2005 with this Voting
21 Rights Act that we have increased voter turnout on Indian
22 reservations by 133 percent; unheard of in Indian
23 Country. And it's because of this law, and this law,
24 like Craig said, we're not going back 25 years. We're
25 going back to 2002. We're going back three years. Look
26 at the progress under this -- the Voting Rights Act that
27 we have made in three years. I dare you to give us 25.
28 We may have this country back.
29 MR. CLAUSEN: Mr. Rogers, I had one comment to
30 kind of add to O.J.'s, but he about hit the nail on the
31 head there. This is a new process for our people. Ten
32 years ago we were such a low percent at the polls, nobody
33 even cared, you know, and nobody ever said nothing. But
34 when you have issues, you want to address them issues,
35 and you go to elected officials, but you're not voters.
36 I did that. I went to the mayor of Martin, South Dakota
37 and I told him our concerns. He said, "Well, bring me a
38 petition of registered voters." It wasn't just -- I
39 couldn't go out and get 500 signatures. I had to go out
40 and register people, then get them to sign the petition,
41 then go back to him. So we was forced in to have to
42 doing something at that time. And then you go out and
43 you start, "Are you registered to vote? Could you sign
44 this petition?" And you're getting one out of every 10
45 or 15 people you talk to.
46 So then you go get a bunch of voter
47 registration cards, then you get them to register to
48 vote, then you get them to sign the petition. But again,
49 that was the time we was fed lip service, too. And so
50 after we got the petition, they still didn't do nothing.
51 So then the next election come along and we ousted him.
52 We got rid of him as a mayor with our voter registration

1 efforts and stuff.
2 But it's a learning process and with this short
3 period of time -- and then when -- just about the time we
4 think we're going to take a step forward, then a bunch of
5 new legislation is passed in the state with the photo
6 IDs, and to me, the early elections was really a bad deal
7 because what happens out on our reservation is they pick
8 and choose days. They'll come to Kyle from 10 in the
9 morning until 2 that day, and it'll change from one week
10 to the next. One week it's Tuesday and Wednesday. The
11 next week it's Thursday and Friday. And so you can't
12 really plan and schedule around that and try to get
13 advertisement out and say, "People come out and try this"
14 or whatever.
15 Now if you're back over in Martin where the
16 courthouse is open from 8 to 5 every day, early elections
17 work. Then you can go gather up people and try to get
18 them up to early vote and stuff. Out in Kyle or over at
19 Manderson or Porcupine or across the reservation, it
20 don't work for us, and so I believe the early voting was
21 another attempt at countering our Indian vote here in the
22 state. So that's just my belief, but I know a lot of
23 other people that agree with that on the Pine Ridge
24 Reservation, anyway.
25 MS. ENRIGHT: May I speak about that?
26 COMMISSIONER MEEKS: I would actually like to
27 go on with some other questions and get through this
28 because we're running behind. Sorry.
29 MS. ENRIGHT: In that case, if there's not
30 going to be anything further from me, am I --
31 COMMISSIONER MEEKS: Well, actually I do have
32 one question for you, but --
33 MR. NELSON: As do I.
34 MS. ENRIGHT: Yes. Okay.
35 MR. NELSON: If I might, Adele, if I understood
36 correctly, you've got nine precincts where you've got
37 interpreter services available, correct?
38 MS. ENRIGHT: Yeah, that's right.
39 MR. NELSON: How many voters did those
40 interpreters assist in 2004?
41 MS. ENRIGHT: To my knowledge, it was minimal.
42 I don't know. I don't have a list. They don't keep a
43 list of who they assist. I assume that's probably a
44 privacy issue anyway, but it's minimal.
45 MR. NELSON: Thank you. The other question,
46 you mentioned that when you were putting the ads on radio
47 in Lakota, you had some Native Americans that thought it
48 was good and some that thought it wasn't good. Why would
49 any think it wasn't good?
50 MS. ENRIGHT: Well, they thought it was
51 unnecessary for -- you know, they didn't feel it was
52 needed. They felt that KLND had had me come up there,

and we had done several discussions. We did a discussion of over an hour of issues in English, and we have had -- we had had several open meetings with tribal members and myself and anyone who was interested in coming, and they didn't feel it was needed. I don't really -- you know, I don't really understand all the ramifications why they didn't think it was necessary, but --

MR. NELSON: Okay. Thank you. Mr. Clausen, one question: Did I understand you correctly that you feel that the ability to vote early absentee without giving a reason is not positive for Native Americans?

MR. CLAUSEN: Yeah, because over on the reservation, it isn't handy enough for our Indian people to do it. Now in Shannon County, the bulk of the Pine Ridge Reservation, our reservation, the county seat is clear back in Hot Springs.

MR. NELSON: Right.

MR. CLAUSEN: From where I live at now in Kyle, South Dakota, it's over a hundred miles to go early vote, except for the days that they come out to Kyle and set up out there. And back in 2004, that changed days. You know, the first day they was -- I think it started off they went to Pine Ridge Monday and Tuesday, then they came to Kyle Thursday -- Wednesday and Thursday or something like that, or Pine Ridge Monday, Tuesday, Wednesday and Kyle Thursday and Friday. And then something happened to their schedule so a week later or two weeks later it changed and they flip-flopped that around.

And then also it was from 10 in the morning, because they had a long ways to drive from Hot Springs down to Kyle, it was from 10 in the morning till 2 in the afternoon and then they leave. And so it ain't the same level playing field for the non-Indians sitting there as what it was for the Indians.

Now like over in Bennett County, though, you could go into Martin and vote, okay, but if you lived in Allen or a community in Bennett County, you had to drive to Martin and vote so it wasn't convenient for our Indian people. Now Allen's 90 percent Indian population. Martin's about split. So one of our big voting precincts coming in from Allen to early vote didn't happen. We got buses. We went out and tried to haul them in and get them to early vote and did all kinds of stuff, paid people to -- knocked on doors and make people -- tell them how important it was to try to get a jump start, to try to come in there with three or 400 votes before election day. You know, we tried all kinds of stuff, but it just didn't work. It was too hard. It was too much of an inconvenience to give up three or four hours of your time to go in to early vote. You take a bus out, you load 20 people on it or whatever. You finally get

1 them loaded up, head into Martin, they all go in and
2 vote, then they come out, then you take them back. So I
3 think it's a hardship against us Indians.
4 Now for the non-Indians over in Bennett County,
5 it's a convenience, and me and Craig both early voted.
6 We went up and did it together to make sure the system
7 works or whatnot. We walked in and we had no problem.
8 And I think Craig even made them let him do the affidavit
9 deal. "I don't have an ID." He does, but he made them
10 do it just to make sure that was going through, too.
11 MR. DILLON: Tested the system.
12 MR. NELSON: Thank you. Just one last
13 question. Mr. Semans, would you share that
14 characterization or do you have a different view on that?
15 MR. SEMANS: Well, I can understand what
16 Jesse's saying, and first of all, we were responsible for
17 getting the satellite voting stations in Pine Ridge and
18 in Kyle. We paid the county commissioners for the
19 auditors to be in those places. Unfortunately, we
20 weren't -- we didn't have the money to put them in both
21 places, one in Kyle and one in Pine Ridge. I would have
22 liked to see satellite clinics in Allen, in Kyle, and in
23 Pine Ridge, but we couldn't afford to have auditors at
24 that time.
25 Absentee voting turned voting around in Indian
26 Country. In Todd County I think 46 percent -- I could be
27 wrong -- of our people voted before election day. And
28 one of the things that I see is the fact that, you know,
29 when you live on an Indian reservation, you don't know
30 one day from the next what is going to happen, and so on
31 election day, which by the way when the election falls on
32 either the 2nd or the 4th, we're talking social service
33 days where people are going to get their groceries,
34 people are going to be hiring people to pay their bills
35 because that's the only time they get it in 30 days, so
36 they're not going to vote, and early voting enabled them
37 to take care of voting prior to any social service day
38 where they got their one month time to get their
39 groceries and pay their rent and leave. So in a sense, I
40 disagree, but I understand what he's saying. There
41 wasn't enough people there to make it really work there.
42 MR. CLAUSEN: You know, and he mentioned Kyle
43 and Pine Ridge, but we also got Porcupine, Batesland,
44 Manderson, Wounded Knee, Oglala, Red Shirt, Cuny Table,
45 all brother communities across -- Potato Creek, Wanblee,
46 all brother communities across the Pine Ridge
47 Reservation. And so, you know, it don't help the people
48 over in Wanblee or wherever else, Manderson or wherever
49 they put an early voting poll in Kyle when you still --
50 for somebody to get over to Kyle is still a long ways
51 away for them.
52 MR. SEMANS: I agree.

MR. CLAUSEN: And if it was fair and right, made it so it was convenient for all of our people, then it -- and maybe at a future point, that could happen. That's a deal to work for, a goal to look at and stuff.

COMMISSIONER MEEKS: Well, I want to thank this panel. I actually am going to not ask my questions in the interest of time because the last panel is -- we need to take a real short break, and then get the other panel up here.

MR. DILLON: Can I say one thing?

COMMISSIONER MEEKS: Yes, Mr. Dillon, you may, one short statement.

MR. DILLON: Yes. You know how I believe my future -- that fog could go away is if we leave the Voting Rights Act as it is and that we can expand upon it in Indian Country because my beliefs are is when something's working good in Indian Country, it gets changed, you know, and it's my hope and dream that we'll leave it the way it is and hopefully the next 25 years, and then you can come back and we'll discuss how it improved Indian Country. Thank you.

MR. SEMANS: Thank you.

COMMISSIONER MEEKS: Thank you very much.

(A recess was taken from 3:49 to 3:57.)

MR. KATUS: I'm Tom Katus. I'm a second generation settler on Standing Rock, noted activist, and sometimes folks in Rapid City don't want to note me at all. I was going to talk to some of the demographics that Mr. Rogers asked about. I'll try to do that quickly, the voting trends going back a full century here. Native Americans have always been engaged at a much greater level than most white folks think even now.

I'd like to talk a little bit about the Contract with Native America. The Native Americans themselves developed an issues forum, nonpartisan, to keep elected officials and candidates honest.

And then finally I'd like to talk about the HAVA Project because we've had some real successes in this region, but we really need some help from South Dakota yet, Chris.

I was born and raised on the Standing Rock Sioux Reservation from a settler family. My father was actually the campaign manager for a young man by the name of Lloyd McLaughlin in 1932. While he happened to be the only college graduate, homegrown in Corson County first, he also happened to be an enrolled member of the Standing Rock Sioux Tribe.

He was elected to county register of deeds in at that time about a 90 percent white electorate because Native Americans had only become citizens in '24, but there hadn't been an established voting record, but because of the Roosevelt landslide in part, he won

1 handily with the poor settler villages to the west,
2 Morristown, McIntosh, etc., and the Native villages to
3 the east, Little Eagle, Kenel, etc.
4 We were up against the more established
5 "Rooshans," they're called affectionately, the German
6 Russians, the settler farmers, who were rock grip
7 Republican and normally controlled the county. This was
8 also the county of E.Y. Berry who later became a
9 Congressman.
10 In any case, while he won in 1932, made my
11 campaign manager father his deputy, got tired of white
12 man's politics, resigned. My father came in on his own
13 right, got reelected with the same constituency. The
14 poor white eastern European settler communities and the
15 Native American communities. And then E.Y. Berry comes
16 to him and said, "Hey, you're a young man on the go, but
17 you're in the wrong party, and you ought to be a Mason."
18 Well, my dad was a Wisconsin Synod Lutheran. My mother
19 was --
20 COMMISSIONER MEEKS: Tom, I hate to interrupt,
21 but is this going to get to your point?
22 MR. KATUS: Well, it may not. In any case,
23 long and short of it, he was defeated by three votes.
24 E.Y. Berry bought off Little Eagle Village with
25 half-pints; that's how it was done in the 1930s. And as
26 we grew up as kids, there were good Indians, bad Indians,
27 good white folks, bad white folks. Then there was those
28 darn Little Eagle Indians and that SOB E.Y. Berry. So
29 that's just the background, but I've been involved my
30 entire life.
31 Demographically, O.J. was right. When you come
32 back in 25 years, this is likely to be a near Native
33 state. I track demographics. The pace is very rapid.
34 The population has doubled. The Indian population in all
35 three states in the last 30 years, the percentages have
36 doubled. Any decent demographer, if they're following
37 the trends, will indicate that South Dakota probably will
38 be majority Native Americans, not in 25 years, but in
39 about 50. So clearly things are changing very rapidly.
40 I give a presentation called "The Browning of America
41 with the Reddening of the Northern Plains." It's
42 happening very, very rapidly, and we're just starting to
43 see the tip of the iceberg.
44 Voting-wise, Native Americans have always been
45 engaged in local politics here. It's kind of a myth that
46 it's only been since 2000. In my own lifetime, you go
47 back to '72, they were the swing vote for Jim Abourezk,
48 for McGovern, for Daschle, for Johnson, and even the
49 occasional decent Republican. They were solidly behind
50 George Mickelson because George Mickelson was a decent
51 guy and reached out. So the Native vote has been a
52 continuous growth pattern and yes, it's spiked in the

1 last couple of years, but it's been there a long, long
2 time.
3 Way back in '78 was the largest voter
4 registration drive in the history of the state. For the
5 first and only time, the state became a majority
6 Democratic party, and that was the result of the
7 Democrats working, but especially the nonpartisan Native
8 groups working, not in coordination, you can't do that,
9 but working the same constituencies. 15,000 people were
10 registered statewide; 10,000 of those were Native
11 Americans. So that was way back in '78 and that was the
12 biggest best ever.
13 The gap now is 40,000 between Republicans and
14 Democrats, so if Mr. Rogers were here, the only way a
15 Democrat gets elected in this state, those of us who know
16 it, is by the skin of your teeth, and then with
17 incumbency sometimes. Thus, a Johnson, thus a Daschle,
18 thus a McGovern, thus an Abourezk. But clearly this is
19 Republican country and is likely to be in the foreseeable
20 future, except for Native Americans, and this is where
21 demographics could change dramatically.
22 Already there's been a number of Native
23 American elected officials. Ben Riffel was a Congressman
24 for ten years, Republican. Ron Volesky's been Democrat,
25 Republican, elected sometimes, not elected, has already
26 declared for governor this next time around, Native
27 American. So Native Americans are coming into their own,
28 and they're coming quickly.
29 We have worked, the Rural Ethnic Institute, for
30 20 years in nonpartisan voter registration. I am a
31 Democrat. I used to be a real active Democrat, but got
32 very turned off with the party because the party would
33 always promise, especially during election time, and then
34 for the most part, not deliver. Now that has changed in
35 more recent years, especially as the vote's been
36 building. So you find Tim Johnson, a very good supporter
37 of Native American issues. John Thune, who never even
38 visited the reservations in that race in 2002, made 29
39 appearances this time around; cut his losses.
40 Nonetheless, Daschle got 4000 more votes statewide in
41 Indian Country than Johnson did two years ago. So it was
42 the white reaction, especially in Minnehaha and here,
43 that put John Thune in.
44 So you're getting increasingly a polarized
45 electorate. Whites tend to be conservative Republican,
46 Natives overwhelmingly Democrat, probably even more so
47 than blacks historically, and it's going to continue.
48 But the dynamic is that the Native population is growing
49 very, very rapidly. So those Democrats, whether they're
50 white or Indian, the only future they're going to have in
51 the state is if, in the future, they're working closely
52 with the Native candidates.

1 Our nonpartisan effort is a regional one,
2 Northern Plains Tribal Voter Education Project. It's
3 been going for ten years. We've worked for 20 years in
4 nonpartisan efforts. So we get to see what happens in
5 Montana, get to see what happens in North Dakota, get to
6 see what happens here because we've always worked in
7 those states simultaneously.
8 And believe you me, I was born just barely in
9 South Dakota in Corson County on Standing Rock. Bismarck
10 was my big town, and I always say when I'm in North
11 Dakota, I quite prefer the weather, the physical weather
12 of the Black Hills, but I quite prefer the political
13 climate of North Dakota because it's a much more
14 progressive state.
15 And we have in this room today -- she's
16 probably a little embarrassed -- but Danette Odenbach is
17 the HAVA coordinator for North Dakota. And I'll bet you
18 she's probably the top HAVA coordinator in the entire
19 United States. She put together an education program
20 that enabled Native Americans to receive $53,000 to
21 educate their own people, go out into the reservations
22 and, I believe, spent a total of about 200,000.
23 Underserved other groups also received this support. In
24 Montana, the same quantity was spent, but done
25 differently. They gave small grants here in South
26 Dakota. We did nothing, but we did get a national HAVA
27 college grant.
28 You saw Laurette Pourier earlier. Laurette was
29 one of the people that was trained as a poll watcher. We
30 had 77 people that we were able to train and place in a
31 month's time because that program wasn't even signed off
32 till the 1st of October. Adele Enright who you saw was
33 our star auditor. She was just wonderful. And for the
34 most part, the county auditors in all three states were
35 very responsive to having someone help them identify and
36 bring into the polling places Native Americans so that no
37 longer did folks have to deal with just the little old
38 ladies in blue hair, I call them.
39 And I've covered a lot, probably wasted too
40 much time. One final thing, I'm always on the
41 reservations during election day. I was on Pine Ridge in
42 a number of precincts, and in a Porcupine precinct, you
43 had tribal elections going simultaneously with federal
44 elections to align and get better turnout, but we had two
45 separate polling places, one for tribal elections three
46 blocks away, one for state and federal. Not
47 surprisingly, you had a great deal of dropoff between the
48 tribal election polling place and the state and federal,
49 and I sure hope in the future, we can align those.
50 That's just absolutely crazy. It just defeats the whole
51 purpose of trying to align elections.
52 And, Chris, I sure hope that we can get some

1 HAVA funding educationally for all our people in South
2 Dakota, not just Native Americans. But listen, if North
3 Dakota can lay out 200,000 and Montana can lay out
4 200,000 for underserved groups, it's about time South
5 Dakota did the same. Thank you.
6 COMMISSIONER MEEKS: Thank you. I will let --
7 MR. KATUS: I've also got a lot of research
8 material to leave with you, but you'll read about the
9 demographics, Mr. Rogers. It's all there.
10 COMMISSIONER MEEKS: I actually did not catch
11 your name and so if you want to introduce yourself.
12 MS. BLUE ARM: Brenda Blue Arm.
13 COMMISSIONER MEEKS: Brenda Blue Arm, okay,
14 from Cheyenne River. Okay.
15 MS. BLUE ARM: Yes, I'm Brenda Blue Arm from
16 the Cheyenne River Reservation, and I've been working
17 with the tribe. I've been Tom Van Norman's campaign
18 manager, and I've gone door-to-door on the reservation.
19 And I'm sorry, I have to apologize, but I need to say
20 something in Lakota. (Speaking in Native language.)
21 Thank you.
22 And I went door-to-door and I speak Lakota, so
23 I explained everything I could to whomever I'd find and
24 gave information out explaining about Democrat and
25 Republican and the difference of how they could go and
26 vote for the Republican or the Democrat, but I told them
27 it was a choice and -- which was very hard to do, but I
28 had to let them know that they have a choice. And a lot
29 of them were confused because they've never had to vote
30 before. And I told them, I said, "You don't have to vote
31 now, but I think you should, and that's my opinion, but I
32 think it's very important that you do vote."
33 And I explained a lot of things to them and
34 they were questioning why they were so in the dark all
35 the time. Nothing was ever brought to their homes. So I
36 would explain to them, you know, because the power was
37 held by Republicans in the state legislation. And I'm a
38 lobbyist, too, for the Cheyenne River Sioux Tribe, and I
39 explained to them that nothing was ever passed down to
40 the reservation and nothing was ever explained because we
41 never did have an office. And the county -- my
42 understanding is the county has this responsibility, and
43 they never did. They never went out to the districts and
44 explained things because we do have district meetings.
45 Nothing was ever explained.
46 And when I first walked in to county, I ran
47 into Adele and I said, "Can I have this?" or "Do you
48 think I could get a copy of this stuff?" And I just had
49 to tell her that I'm here. I'm here to stay. I'll be
50 back. We need to work together.
51 And so a lot of things were so negative when I
52 first started working in that area because even our

1 enrolled members, some of them have been brought up to be
2 prejudiced against their own culture, their own
3 nationality, you know. And so this is where the -- I
4 think the Republicans come in because they taught. Most
5 of them were the teachers in the schools, and so I think
6 a lot of this came about.
7 But when I started campaigning for Tom Van
8 Norman, I would go back every week and say, "Well, this
9 happened. This happened." And he would say, "Okay.
10 Okay. Well, see if you can get more information with
11 Adele." So I'd go back and visit with Adele, and it was
12 really hard; it was so hard. And then I went before
13 legislation, and I told legislation, I said, "You know
14 what," I said, "this is as high as you go. This is the
15 highest you go," I said, "and you've kept us people in
16 the dark. Why?" you know.
17 And the prejudice is still going on here in the
18 State of South Dakota, and I said, "That really makes me
19 unhappy," I said, "but I live in it so I'm more or less
20 used to it, you know, but I recognize it, I pick up on it
21 so much more."
22 But we are trying to start an office on
23 Cheyenne River, an ongoing office. It's going to be
24 called the Voter Rights Commission, and we're trying to
25 find monies within our own group there. And I go way out
26 to the districts so I'm even asking for a car, you know,
27 but -- and equipment, but they -- they're working with
28 me. They are -- they're trying to find something, even
29 an office space so that we can have an ongoing office
30 because we want to keep track of all of our votings that
31 go on on the reservation, like the school board and the
32 county commissions and all of that, and we've been having
33 meetings to try to put our own people into county
34 offices. And we're doing a lot of work, and it's --
35 right now it's all kind of volunteer work, and we just
36 want to have this reorganization act come about. Maybe
37 the next 25 years it will be different. Hopefully it is,
38 and I think it will be if we all stay working together.
39 Thank you.
40 COMMISSIONER MEEKS: Thank you. Thank you.
41 Patrick?
42 MR. DUFFY: My name is Patrick Duffy, and when
43 I woke up this morning, I had absolutely no idea I was
44 coming here, and as I waited, I had absolutely no idea I
45 would be called upon to speak.
46 A quick biography. All four of my grandparents
47 got off the boat from Ireland -- which explains all my
48 hair and rapidity of my speech -- and homesteaded here in
49 South Dakota. I'm educated here in South Dakota. I left
50 South Dakota, became a Russian linguist for the Navy. I
51 went to the Naval Academy Prep School, attended the
52 United States Naval Academy, graduated from South Dakota

1 State University, attended Harvard for a couple of summer
2 sessions. I was the editor-in-chief of my Law Review in
3 college -- or in law school.
4 I get to say the one thing I always wanted to
5 say, and for any of you on the panel who are lawyers, you
6 know how hard it is to say, I'm a trial lawyer. That's
7 what I do. I have participated in every voting rights
8 case in South Dakota. I've tried the two longest voting
9 rights cases in the country's history. I have had the
10 privilege, and I say privilege, distinct privilege of
11 cross-examining Chris Nelson. I say it's a privilege
12 because Chris, particularly when he worked for Joyce
13 Hazeltine, was the most knowledgeable person about voting
14 matters I have ever encountered. He is almost honest to
15 a fault.
16 But I want to point out with the only way I
17 suppose a trial lawyer can, some stories, lay out a
18 couple of vignettes to confirm some of the things that
19 you've heard here today.
20 First of all, I want to drive home what I think
21 was the ghastly significance of the Gary Nelson story.
22 You've heard it once and I want to tell it to you again.
23 When the Indians finally mobilized themselves and won
24 seats, it did not take -- this is not -- Mr. Rogers, this
25 does not come down to partisan politics alone. This
26 isn't just Republicans and Democrats.
27 When Indians finally got their hands on a
28 little bit of power, and we're not talking about a very
29 much, it did not take the Democratic establishment in
30 Bennett County, it did not take them a week, and it
31 wasn't limited to Gary Nelson, to go out and recruit a
32 whole slate of white people to run against those folks.
33 The story isn't completely told, however,
34 because that just wasn't it. You just didn't need white
35 people to run. You needed to start what you always need
36 to start in a race campaign. You needed a whispering
37 campaign, and the whispering campaign, of course, took
38 the form that it always takes in South Dakota, and that
39 is, if you let these Indians on the county commission,
40 are they going to put all our land into trust? They're
41 going to break us. Crazy stuff like that.
42 Moreover, two of those candidates, one of them
43 was his own client; he's an insurance man. He
44 specifically filed complaints with the federal government
45 under the Hatch Act alleging that they could not hold
46 their jobs as custodians and run for public office at the
47 same time. One of them, Jeb Bettelyoun, God bless him,
48 gave up his job to serve. Another one just couldn't do
49 it. You've heard about the poverty endemic in Indian
50 Country. That's one story.
51 The second story that I want to tell you is the
52 story of Steve Cole. You think you've seen anything,

1 folks? You've just fallen down a rabbit hole, those of
2 you who have come here from out of state. You think
3 you've seen anything? If you watched the movie Walking
4 Tall, go back and watch it again.
5 Steve Cole sat outside the polling places in
6 Martin, South Dakota, working for us, working for me,
7 doing an exit poll, and a couple of crackers in those big
8 pickups that everybody seems to get to drive now drove up
9 and squealed their tires and flipped off the young Indian
10 women who were working with him and harassed them. And
11 then they chased him as he walked back to his hotel and
12 screeched those pickups up and stopped him in the parking
13 lot of his hotel and got out and demanded to know who he
14 was, what he was doing. "We want your name. We want to
15 know who you're working for."
16 This stuff happens in the United States of
17 America today. I've been all over the country. This
18 would -- if you do this in Atlanta, you pull these kind
19 of shenanigans any place else in the United States,
20 you're going to get your clock cleaned, but Indians have
21 to take it.
22 Now why am I so interested in this? Why do I
23 seem passionate about it? I don't -- I'm not a wannabe
24 anything. I'm passionate about it because to the extent
25 we do this, this whole state diminishes itself. Every
26 single one of us lose a tiny little bit of something that
27 ought to sit in our throats and it sits in mine and makes
28 us feel sick to our stomachs.
29 The comments of Representative Two Bull were
30 loathsome. There are even more, and you know who they
31 are. We all know who they are. I won't even name names.
32 Some of them are philanthropists. Some are people who
33 masquerade as pseudo-liberals, but you get them loose on
34 the floor of the South Dakota State Legislature and
35 they'll say just about anything like, "Maybe we don't
36 want those kind of people in the polling booth."
37 Craig Dillon asked me to tell a story that he's
38 so embarrassed about or so emotional about that I
39 elicited from him during these two cases where Martin --
40 Bennett County used to have one heck of a football team,
41 big football team, and they used to all go over to the
42 house of the president of the bank and hang out and do
43 what Indian kids don't get to do very much, and you know
44 that I'm telling the truth when I say this: play a
45 little pool, go to the refrigerator; it's got all kinds
46 of stuff in it, and just hang out.
47 About three, four days after the first hangout,
48 he gets a call from the father. Wants him to come on
49 down to the office, wants to talk to him. And as he
50 said, it's about halfway through that interview, he
51 realized he was getting interviewed to see if he was the
52 right kind of Indian to be able to come over to his

1 house.
2 That stuff happens over and over again, but for
3 me as a trial lawyer, a lot of this is my involvement.
4 The Janet Speidel incident. I hope it gets back to her
5 that I've testified this way. Janet Speidel, the auditor
6 down in Bennett County, perjured herself on the stand,
7 clearly. The judge found she perjured herself, scolded
8 her before she left. She was a liar. She should have
9 left in shame. People from Bennett County should have
10 covered their heads in shame. Oh, no. Within six weeks
11 they had -- the mayor declared it Janet Speidel Day.
12 Back at you.
13 The racial tension in South Dakota that still
14 exists is unlike anything anybody from the outside
15 looking in can imagine. To come here, I almost didn't
16 come because the whole idea of not reaffirming the Voting
17 Rights Act to me just seemed utterly insane. I'm also
18 general counsel for Four Directions. Thank God for the
19 people at the Department of Justice who helped us set up
20 those satellite voting offices, and thank God for Chris
21 Nelson who helped us do it, too. But without the Voting
22 Rights Act, without my friends at the ACLU, and to be
23 really honest with you, without a heck of a banker
24 because I've gone eight years now with this, without one
25 heck of a banker, we couldn't get anything done.
26 If anybody with some libertarian notion of law
27 and order thinks that the engines of change are not trial
28 lawyers, they've got another think coming. If they think
29 that even somebody like me can accomplish anything
30 without a little bit of legal wind at my back, they've
31 got it wrong. Without the Voting Rights Act -- without
32 the Voting Rights Act in South Dakota, we're not going to
33 retrogress 10 years or 15 years or 20 years. We're going
34 to go back to 1957 when it was a felony for an Indian man
35 to marry a white woman. We're going to go back to 1923
36 when Indians, after having sent boatload after boatload
37 of Indians to die in France and other places, were denied
38 citizenship, and it's all just that close to happening.
39 Finally, without the Voting Rights Act in this
40 state, the most powerful card that can be played
41 politically in South Dakota is the race card. It is
42 waiting to be picked up. Bill Janklow played it like a
43 maestro and others came in behind him. I don't care if
44 Bill knows that I say this. I'd like to cross-examine
45 Bill sometime. But the truth of the matter is, the God's
46 Gospel truth of the matter is there's a whole deck of
47 race cards waiting to be played. Time's up. Can you
48 give me one more minute to finish up?
49 COMMISSIONER MEEKS: One more.
50 MR. DUFFY: There's a whole deck of race cards
51 waiting to be played, and they work and they get votes,
52 and whether it's Thune-Johnson or Thune-Daschle, the poor

1 Indians once again are compressed right in the center,
2 and the demographics are such they will be compressed in
3 the center politically for a long time.
4 Without the Voting Rights Act to protect
5 Indians, this state is in trouble, and I don't just mean
6 in terms of voting. I can't believe that the political
7 structure of this state is so committed to freezing out
8 such a tiny fraction of the population from meaningfully
9 participating in the political process. It makes
10 absolutely no sense. You can't draw on the same kind of
11 sense you could in Atlanta or L.A. or Chicago or God only
12 knows any place else where at least you can talk about
13 economic competition as a basis for it. This is just a
14 straight freeze-out. It's wrong. It should make us all
15 feel bad. We should all try to redress it, but we ain't
16 going to redress anything if the Voting Rights Act
17 disappears. Thank you for letting me speak.
18 COMMISSIONER MEEKS: Thank you, Patrick. Any
19 questions?
20 MS. RING: I always have questions.
21 COMMISSIONER MEEKS: Okay. We'll start with
22 Ms. Blue Arm.
23 MS. RING: Ms. Blue Arm, I understand that
24 you've worked on Representative Tom Van Norman's
25 campaigns?
26 MS. BLUE ARM: Yes, yes.
27 MS. RING: And just so the panel is aware,
28 Representative Van Norman represents a single-member
29 house district, does he not?
30 MS. BLUE ARM: Yes.
31 MS. RING: Which was achieved by a lawsuit of
32 which Mr. Duffy, I believe, was one of the attorneys
33 involved.
34 MR. DUFFY: (Nodding head up and down.)
35 MS. BLUE ARM: Yes.
36 MS. RING: When you were registering voters as
37 part of that campaign the first time, did you experience
38 any difficulty getting voter registration cards to take
39 to people?
40 MS. BLUE ARM: Yes, I did.
41 MS. RING: Can you tell us about that?
42 MS. BLUE ARM: They would give me, like, five,
43 and you had to fill out those five and then turn that in,
44 and then you could get five more. That happened, like,
45 probably three or four times. I finally went up there
46 with Tom, and then we got -- we ordered some books, some
47 packets from the state department.
48 MS. RING: Which county audit office was that?
49 MS. BLUE ARM: Dewey County and Ziebach.
50 MS. RING: And Ziebach. So two separate county
51 offices were both doing that?
52 MS. BLUE ARM: Yes.

1 MS. RING: Thank you. Mr. Duffy, you've talked
2 a little bit about voter intimidation, and you've dealt,
3 I'm sure, with Native American clients in various legal
4 aspects. Do you think that the issue of whether or not
5 they might be committing a felony and the threat that if
6 they fill in a form wrong it's a felony has an
7 intimidating effect on them? And that's the last
8 question.
9 MR. DUFFY: Other than to speculate, I can't --
10 everyone's afraid of committing a felony. But the truth
11 of the matter is the warm-up began back in 2002 when the
12 press -- and the press is much to be faulted for this,
13 all the way from the Rapid City Journal to the National
14 Review. When the press began to pick up and beat the
15 drum of voter fraud in Indian Country, it was not only an
16 insult, it was a threat that you might get in trouble if
17 we catch you. It was designed to intimidate.
18 MR. NELSON: I've had the experience of being
19 cross-examined by Mr. Duffy on more times than I can
20 count, so I cannot pass on this opportunity to ask a
21 question or two. You mentioned several times that
22 without the Voting Rights Act that we would retrogress
23 our election laws in this state back to 1957, etc. Were
24 you speaking of the Act as a whole or can you narrow that
25 to Section 5? If Section 5 wasn't in place, would you
26 still make that statement?
27 MR. DUFFY: I don't understand why anybody
28 would want to remove anything from the Act vis-a-vis
29 South Dakota. I cannot for the life of me --
30 particularly, Chris, I know that you ended up as the
31 defendant in that case, but all one has to do is take a
32 look at that memo that Bill Janklow wrote when he was
33 Attorney General. It would have made George Wallace
34 blush. And no, wait a second now. So why on earth would
35 anybody get rid of Section 5?
36 It just seems to me that there's a real
37 artificial sense of tinkering going into this that
38 somebody ought to go in and pull out one section or
39 another. Why bother? If anything, I'd like to dream up
40 some new sections for the Voting Rights Act, but the
41 truth of it is, I can't imagine anybody pulling any out.
42 We've certainly chronicled enough transgressions of all
43 sections of the Voting Rights Act here in South Dakota to
44 suggest that it ought to be left intact.
45 MR. NELSON: Just one final question. I mean,
46 we've got 30 years where we were not following the
47 pre-clearance process, 30 years where the legislature was
48 making election law changes, board of elections was
49 making changes. Now that we've gone through that
50 process, we've found that none of those changes
51 retrogressed voting rights, so why would you think all of
52 a sudden if Section 5 went away, we would all of a sudden

1 start that process of going backwards?
2 MR. DUFFY: To be really honest and completely
3 blunt with you, Bone Shirt, one, Bone Shirt, two, and
4 Bone Shirt, three. The fact that over and over again in
5 every single case that the ACLU and I have worked with at
6 a cost of almost nothing, we've provided a legal
7 memorandum and a demographer's map that says, "This is
8 the way you have to do it." And the Bone Shirt case in
9 particular, the resistance in Bone Shirt, I'm going to
10 say it was futile, but I'm going to say that by the time
11 we got to the end of it, it ended up going to the South
12 Dakota Supreme Court, and now some of the motions that I
13 have seen recently in Bone Shirt, if anything, suggest
14 that nothing should be changed in South Dakota. It is
15 the conduct of the Attorney General's Office in defense
16 of Bone Shirt, period. That's my opinion.
17 MR. NELSON: Thank you.
18 COMMISSIONER MEEKS: Thank you. Thank you very
19 much.
20 MR. KATUS: Could I make a final comment?
21 COMMISSIONER MEEKS: One final comment.
22 MR. KATUS: The demographics really are going
23 to change things and we still need the law, but the
24 demographics in Montana and South Dakota ought to be
25 looked at very closely. The states are very similar in
26 population. We actually have slightly more Native
27 Americans in a slightly larger percentage in South
28 Dakota. We have exactly four Native American
29 legislators, Montana has eight.
30 Part of the reason for that is that Jeanine
31 Pease, who was invited here, but is not here, sits on my
32 Rural Ethnic Institute Board, became the commissioner
33 under a constitutional revision, much the same thing that
34 Schwarzenegger is trying to bring into California, a
35 public commission that redistricts, and she did an
36 excellent job of crunching the data and making sure that
37 Native Americans and other groups were treated fairly.
38 It's not at all surprising that two sister
39 states so similar, one has exactly twice the
40 representation, and the demographics are virtually the
41 same, but the way legislature has redistricted in Montana
42 and the way it's done with the legislature here is what
43 packs districts to keep people from having their fair
44 share of the pie.
45 COMMISSIONER MEEKS: Are there any closing
46 comments from any of the commissioners?
47 COMMISSIONER ROGERS: I would make just a note
48 of apology, if I can. I hated to miss a portion of the
49 first -- the first two of you who were testifying in
50 particular in this proceeding. I wanted to apologize
51 formally. I've had to step out a number of different
52 occasions. It turns out that in Colorado, we're dealing

1 with a number of folks that are coming in from New
2 Orleans, and I'm helping to coordinate part of an effort
3 there which has necessitated that I had to leave a little
4 bit.
5 So I just wanted you to publicly know that I
6 wanted to hear from you and I'm sorry I didn't get a
7 chance to hear from the two of you directly. But
8 otherwise, I'm certainly appreciative of the opportunity
9 to be here in South Dakota, and it's been fascinating,
10 frankly, Elsie, to be here to learn some perspectives and
11 to hear your comments about issues related to the Voting
12 Rights Act. I dearly appreciate it.
13 MR. NELSON: I would just like to say thank
14 you. I've certainly enjoyed and learned from each of the
15 participants today, and I know a number have departed,
16 but thank you. And thank you again, Jon, for including
17 me.
18 MS. RING: I also thank the Commission again
19 for coming here. There's a population here that has
20 desperately needed the Voting Rights Act for 30 years.
21 They've had it functionally for something like five now,
22 and even though all those laws have pre-cleared, the fact
23 that there is pre-clearance is a prevention of certain
24 other laws being enacted.
25 The fact is that the state did try and
26 retrogress when it tried to reverse the single-member
27 house district on Cheyenne River Standing Rock, and it
28 took a lawsuit to get it back. The fact is that this
29 state needs help from the federal government to be the
30 kind of state a democracy requires where every citizen
31 has an equal opportunity to vote.
32 COMMISSIONER MEEKS: Well, I was very pleased
33 to be asked to preside over this. I've participated in a
34 number of the other hearings, but of course, this one was
35 near and dear to my heart anyway. But what Craig Dillon
36 said, I think, is really true is that, you know, we have
37 just -- yes, we've been voting for many years, but in
38 some ways, I think politically we really just
39 participated over the last few years.
40 And so I think -- I mean, we have -- the only
41 way we have is up from this point, and I think we'll see
42 more Indians in the state legislature, which was a point
43 that Craig made also that, you know, it's through the
44 legislature that we're going to see the most impact
45 rather than through the court systems, although that's
46 certainly an important tool, important weapon.
47 So I thank you all for the work you've done for
48 all these years and for testifying. And thank you, Jon,
49 for all your work and the rest of the staff.
50 MS. BLUE ARM: And we need more women in
51 legislation.
52 (The hearing was adjourned at 4:34 p.m.)

1 COURT REPORTER'S CERTIFICATE
2 STATE OF SOUTH DAKOTA)
)SS
3 COUNTY OF PENNINGTON)
4 I, Carol A. Matt, Registered Merit Reporter,
5 DO HEREBY CERTIFY that I acted as such reporter
6 at the hearing of the within-entitled action, and that
7 the foregoing transcript, pages 1 to 187, inclusive, is a
8 true and complete transcript of my stenograph notes taken
9 at said hearing.
10 That I am not of kin or in anywise associated
11 with any of the parties to said cause of action, or their
12 counsel, and that I am not interested in the event
13 thereof.
14 Dated at Rapid City, South Dakota, this 4th day
15 of October, 2005.
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Carol A. Matt
23 Registered Merit Reporter
24
25

1 NATIONAL COMMISSION ON THE VOTING RIGHTS ACT
2 LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
3 *** WESTERN REGIONAL HEARING ***
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12 CALIFORNIA AFRICAN AMERICAN MUSEUM
13 600 STATE DRIVE
14 LOS ANGELES, CALIFORNIA
15 TUESDAY, SEPTEMBER 27, 2005
16 10:30 A.M.
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23 REPORTED BY:
24 SUSAN NELSON
25 C.S.R. No. 3202
26
27
28 National Commission on the Voting Rights
29 Act, Western Regional Hearing, commencing at
30 10:30 A.M., on Tuesday, September 27, 2005, at the
31 California African American Museum, 600 State Drive,
32 Los Angeles, California.
33
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35
36 APPEARANCES OF NATIONAL COMMISSIONERS:
37
38 BILL LANN LEE, CHAIRMAN
39 JOHN H. BUCHANAN
40 CHANDLER DAVIDSON
41 JOSEPH B. "JOE" ROGERS
42 JONATHAN GREENBAUM
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1 LOS ANGELES, CALIFORNIA;
2 TUESDAY, SEPTEMBER 27, 2005;
3 10:30 A.M.
4
5 MS. ARNWINE: Good morning, ladies and gentlemen. I am Barbara
6 Arnwine, Executive Director of the Lawyers' Committee for Civil Rights Under
7 Law. We begin this, the eighth of ten hearings of the National Commission
8 on the Voting Rights Act, days after James Sensenbrenner, Chair of the House
9 Judiciary Committee of the United States Congress announced that he plans to
10 begin hearings next month on the reauthorization of the Voting Rights Act.
11 Interestingly, in addition to the hearing that will go from October
12 until November, there will be hearings after January, so a total of ten
13 hearings at the beginning, ten hearings later, for a total of twenty
14 hearings by the Congress. It has not been surprising that they have said
15 continually that they are very interested in the record of these hearings.
16 We expect that the report that will be written by the National
17 Commission to greatly inform the record of discrimination of voting that
18 Congress will consider as it debates its conscience, as it looks at the
19 reauthorization of the Voting Rights Act.
20 The National Commission's report will assess the impact of the Voting
21 Rights Act as handled combatting discrimination of voting and allowing
22 minority voters to vote for their candidate of choice. It will offer a
23 comprehensive picture of the state of discrimination in voting today by
24 reviewing the enforcement record of the Department of Justice, cases
25 litigated by voting rights attorneys, and, of course, the testimony from our
26 regional hearings.
27 Together this data will paint a complete picture of the role that the
28 Voting Rights Act has played in combatting discrimination of voting during
29 the past 40 years and how minority voters still depend on its protections to
30 ensure that everyone has equal access to the political process.
31 The Commission's report will be released on January 2006. The
32 National Commission has had hearings in Montgomery, Alabama; Phoenix,
33 Arizona; New York; Minneapolis, Minnesota; Americus, Georgia; Orlando,
34 Florida; and Rapid City, South Dakota.
35 The evidence so far has been both hopeful and disheartening. During
36 each hearing, we hear from voting rights litigators who have been
37 instrumental in the development of the Voting Rights Act, ensuring that its
38 protections reach those at risk of discrimination.
39 We have heard from experts who have studied the impact of the act on
40 affected communities and we have heard from community activists and citizens
41 who have given powerful anecdotal evidence that proves that the Voting
42 Rights Act, particularly Section 5, one of the central provisions of the
43 Voting Rights Act, which must be reauthorized, has been responsible for
44 providing a voice to all formerly voiceless communities. Unfortunately they
45 don't.
46 We also heard from advocates and citizens the continuing disparity of
47 the voting experience between minority voters and other voters. Clearly
48 the work of the Voting Rights Act, while having a powerful effect on
49 minority voters, is not done.
50 We have heard from African-American and Latino voters in the
51 South who still struggle against discrimination, from American
52 Indians in the Southwest and Midwest who tell of a dreadful lack of
53 resources including language assistance and culturally insensitive
54 poll rooms. And we have heard testimony about the impact of the
55 Department of Justice observers and subsequent enforcement have had
56 in forcing jurisdictions in the Northeast to make our democracy

accessible to Asian-Americans and Latinos resulting in members of those communities winning election to local government.

I am grateful for the assistance that the National Commission has received from the Commission's many co-sponsoring organizations. It is through the coordinated effort by members of the civil rights community that we have helped the National Commission accomplish its tremendous task.

Today we will hear from policy makers, experts, attorneys, and advocates who will examine the challenges that minority voters here in the Western region of our nation face. I look forward to hearing today's testimony and adding it to the already impressive record of this august body.

When we put together this impressive group of commissioners, we did so knowing that theirs is not an easy task. While we were asking them for nothing short of assessing the continuing importance of arguably the most important piece of civil rights legislation that ever passed Congress, they have responded with distinction.

I am proud to see this process unfolding and to have the opportunity to work with such a distinguished group.

It is my pleasure to introduce to you the Commission's Chair, Bill Lann Lee. Bill Lann Lee is a partner at the law firm of Lieff, Cabraser, Heimann & Bernstein in San Francisco. He is the former Assistant Attorney General for civil rights in the United States Department of Justice. He has extensive experience in litigation in civil and human rights causes and has received numerous honors and awards for his work in these areas. Ladies and gentlemen, join me in welcoming Bill Lann Lee.

CHAIRMAN LEE: Thank you, Barbara. Happy to be back in Los Angeles where some of you know I was one of the heads of the U. S. Regional Office of the NAACP Defense Fund.

Good morning. I welcome you on behalf of the National Commission on the Voting Rights Act. As you heard from Barbara, this is the eighth of ten public hearings that the Commission has been conducting. This hearing is the Western regional hearing and covers Alaska, California, Hawaii, Oregon, and Washington.

In past hearings we've heard some compelling testimony about voting discrimination and the impact of the Voting Rights Act on African-American, Latino voters in the South, and Latino and American Indian voters in the Southwest, and minority voters in the Northeast and American Indian and African-American, Asian, and Latino voters in the Midwest.

Today we are having our Western region hearing, one of the most diverse areas in the nation, and I personally look forward to today's testimony.

But first, I wanted to give a bit of background on the Voting Rights Act and the provisions that will expire in 2007.

First, as to the background, the Voting Rights Act was signed into law in 1965 by President Lyndon Johnson in response to voting discrimination encountered by African-Americans in the South.

When Congress reauthorized the Voting Rights Act in 1975, it made specific findings that the use of English-only elections and other devices that effectively barred minority-language citizens

1 from participating in the electoral process. In response, Congress
2 expanded the act to account for discrimination against language-
3 minority citizens by enacting Section 203.
4 Before discussing the Voting Rights Act in greater detail, I
5 want to explain what is scheduled to expire in 2007 and what is not.
6 The right of African-Americans and other minorities to vote is
7 guaranteed by the 15th Amendment and is permanent. Permanent
8 provisions of the act ban literacy tests, poll taxes, outlaw
9 intimidation, authorized federal monitors, observers, and create
10 various mechanisms to protect the voting rights of racial and
11 language minorities.
12 However, there are some provisions in the Voting Rights Act that
13 will sunset in 2007 unless they are reauthorized by Congress. Our
14 primary focus today is on those provisions. First, Section 5
15 of the act requires certain states, counties, and townships with a
16 history of discrimination against minority voters to obtain approval
17 or pre-clearance from the United States Department of Justice in the
18 United States District Court in Washington, D. C. , before making
19 any change. These changes include redistricting, changes to methods
20 of election, polling place changes, things of that kind.
21 Jurisdictions covered by Section 5 must prove that the changes do not
22 have the purpose or effect of denying an individual the right to
23 vote on account of race, color, or membership, or a language barrier.
24 Of the states being examined today, the entire state of Alaska
25 and four counties in California are covered by Section 5.
26 Second, Section 203 of the act requires that language assistance
27 be provided in communities with a significant number of voting age
28 citizens who have limited English language proficiency. Four
29 language groups are covered: American Indians, Asian-Americans,
30 Alaskan natives and those of Spanish heritage. Covered jurisdictions
31 must provide language assistance at all stages of the electoral
32 process.
33 As of 2002, a total of 466 local jurisdictions across 31 states
34 are covered by these provisions. In this region 14 census areas with
35 boroughs in Alaska, the state and 24 counties in California, two
36 counties in Hawaii, one county in Oregon, and four counties in
37 Washington state are subject to Section 203.
38 Third, the act authorizes the Attorney General to appoint a
39 federal examiner to jurisdictions covered by Section 5's pre-
40 clearance provisions on good cause to send a federal observer to any
41 jurisdiction where a federal examiner has been assigned. Since 1966,
42 25,000 federal examiners have been deployed in approximately 1,000
43 elections.
44 The Lawyers' Committee for Civil Rights Under Law, acting on
45 behalf of the civil rights communities, created the nonpartisan
46 National Commission of the Voting Rights Act to examine
47 discrimination in voting since 1982.
48 The National Commission is comprised of eight advocates,
49 academics, and legislators and civil rights leaders who represent the
50 diversity that is such an important part of our nation.
51 The Honorary Chair of the Commission is the Honorable Charles
52 Mathias, former Republican Senator from the state of Maryland.

1 The other six National Commissioners are the Honorable John
2 Buchanan, former congressman from Alabama; Chandler Davidson, scholar
3 and co-editor of one of the most seminal works on the Voting Rights
4 Act; Dolores Huerta, co-founder of United Farm Workers of America;
5 Elsie Meeks, first Native American member of the U. S. Commission on
6 Civil Rights; Charles Ogletree, law professor and civil rights
7 advocate; and the Honorable Joe Rogers, former Republican Lieutenant
8 Governor of Colorado.
9 Commissioners Buchanan, Davidson, and Rogers are present today.
10 The Commission has two primary tasks: First, to conduct
11 regional hearings, such as this one, to gather testimony relating to
12 voter rights. As Barbara Arnwine mentioned, the work of this
13 Commission in that respect is keenly being watched by the Congress.
14 And, secondly, this Commission is going to write a comprehensive
15 report detailing the existence of discrimination of voting since
16 1982, the last time there was a comprehensive reauthorization of the
17 Voting Rights Act. And Barbara gave you some details about that
18 report, which may very well be the only piece of evidence Congress
19 has of existence or not of discrimination in voting in our area.
20 The report will be used to educate the public advocates and
21 policy makers about the record of discrimination in the room.
22
23 Now today is here. We're going to have four panels of
24 speakers today. The first three panels will be comprised of policy makers,
25 leading experts, voting rights practitioners, activists.
26 Each panelist will provide a five- to ten-minute presentation. After
27 all the members of the panel have spoken, the Commission will address
28 questions to the panelists.
29 We encourage members of the public who are here to share your voting
30 rights experiences in our fourth and final panel of the day. If you're
31 interested, please speak with a staff member on the left over there. If you
32 would like to share your testimony but cannot stay, please see one of the
33 staff members in the back who will take your testimony and make sure that
34 it's included in the record.
35 I'd now like to introduce each of the Commissioners who each in turn
36 will make a short opening statement.
37 Commissioner John Buchanan. He's an ordained Baptist minister and has
38 served churches in Alabama, Tennessee, Virginia, and Washington D. C. He
39 also represented Birmingham, Alabama, in the Congress for 16 years and was
40 involved personally in the 1965 enactment of the Voting Rights Act and the
41 1970 and 1975 reauthorizations. He's a historic figure. From the outset of
42 his career, he's worked for and been a strong proponent of full voting
43 representation in Congress for the District of Columbia. After leaving
44 Congress he chaired similar duties of the organization People of the American
45 Way for ten years.
46 COMMISSIONER BUCHANAN: Thank you, Mr. Chairman. I'd like to welcome our
47 distinguished panelists.
48 As is no secret in this country, I was born into a part of the country
49 that's systematically discriminated against voting rights of a large block of
50 our citizens through generation after generation. The civil rights act --
51 Voting Rights Act of 1965 transformed the political structure and life of
52 Alabama and has been a force for good and for better government through all
53 the years since.
54 Our job is to simply, with the help of people like you, our
55 distinguished panelists, determine whether those provisions that are set to

1 expire in 2007 should be continued and to look at how much do we need a
2 legislation that was critically needed in 1965.
3 I think you'll help us answer that question. We welcome you.
4 CHAIRMAN LEE: It's now my honor to introduce Commissioner Chandler
5 Davidson. He is the Radoslav Tsanoff Professor of Public Policy Emeritus, has
6 served as chair of the Department of Sociology in Rice University. Dr.
7 Davidson was the co-editor of the "Quiet Revolution in the South. " The
8 definitive work had an impact on the Voting Rights Act in the South. Dr.
9 Davidson testified before Congress during the 1982 reauthorization of the
10 Voting Rights Act.
11 Dr. Davidson.
12 COMMISSIONER DAVIDSON: Thank you. It's a pleasure to be here in
13 Los Angeles today. I look forward to your testimony. I have, as Mr.
14 Lee said, spent a good part of my career doing research on voting,
15 voting problems, Voting Rights Act. I became a commissioner with the
16 understanding that my mind was not made up as to whether the
17 nonpermanent features of the act were still needed. I wanted to listen
18 to testimony around the country and to get a sense of what people in
19 different areas felt was still needed by way of protections of their
20 voting rights. And I've learned a lot over the last few months in
21 hearings such as these, and I'm sure that I will learn more as I
22 listen to you today. So I look forward to your testimony.
23 CHAIRMAN LEE: Commissioner Joe Rogers served as chairman of the
24 Lieutenant Governor -- completed his term as Lieutenant Governor of
25 Colorado in 2003 where he held the distinction of serving as America's
26 youngest lieutenant governor and only the fourth African-American in
27 U. S. history ever to hold the position. He served as the founding
28 chairman of the Republican Lieutenant Governors' Association, has
29 served on the executive committee of the National Conference of
30 Lieutenant Governors. Joe created the acclaimed Dream Alive Program in
31 dedication to the memory and legacy of the Dr. Martin Luther King, Jr.
32 , and the leaders of the civil rights movement. Commissioner
33 Rogers.
34 COMMISSIONER ROGERS: Thank you very much Mr. Chairman. First of
35 all, it's just good to be here with you all here in California. I've
36 enjoyed it. It's good to be here. It's good to be in a little
37 different from our part of the country periodically during the time.
38 I'm excited, though, in particular to be able to hear your testimony
39 and your thoughts as to in particular to, as the chairman has pointed
40 out, it is often noted one of the seminal pieces of the legislation to
41 have impacted the entire country and frankly our livelihood.
42 Issues relating to our voting, our ability to exercise our right
43 to vote, as you well know, as has been pointed out by the three pieces
44 of key legislation that really transform the lives for people all
45 throughout our country -- the Civil Rights Act of 1964, Voting Rights
46 Act of 1965, and the subsequent act in 1968 -- all have to bring about
47 fundamental changes in terms of America and our lives as a whole. And
48 so we're excited just to be here today. I'm excited to hear your
49 thoughts and your testimony in particular as it relates to whether
50 this act ought to, in fact, be reauthorized and under what
51 circumstances it ought to be reauthorized. The key about all of
52 this, as you all well know, is that basically the Supreme Court has

1 set a certain standard. There's some people who wonder, well, why just
2 perpetuate reauthorization of the Voting Rights Act. Isn't it so
3 fundamental.
4 Well, the Supreme Court basically says because it is dealing with
5 issues relating to race, the standard is subject to Supreme Court
6 scrutiny, which is the highest standard the court can vote on, and, as
7 a result of that, because it's particularly measured to the standard
8 toward race, we have to have a substantial justification for that
9 legislation being reauthorized once again if it were measured by the
10 court's standards.
11 And so in this case we're excited to hear your testimony. We're
12 looking forward, frankly, to understanding about the positive aspects
13 of this act and how it is worded and your sense about some of the
14 challenges that may, in fact, remain.
15 So, again, we're delighted to be with you. It's good to be here
16 in California. We look forward to hearing from you.
17 CHAIRMAN LEE: Last, the fourth gentlemen sitting there is
18 Jonathan Greenbaum, the staff director.
19 Just before starting, I wanted to thank particularly the law firm
20 of Kirkpatrick, Stockton for preparing the state report for this
21 hearing. Actually, it's a regional report. The Commission is very
22 grateful also to be in this beautiful setting and in this wonderful
23 museum and we're now ready to hear from the first panel. I will be
24 begin by introducing the panelists. Conny McCormack is the
25 Registrar Recorder and County Clerk of Los Angeles County. This is no
26 small thing. Ms. McCormack is responsible for conducting elections for
27 the largest electoral jurisdiction in the United States, composed of
28 over 4 million registered voters and 5,000 voting precincts. She
29 conducts federal, state, and county elections, and by contract
30 supports or conducts local elections for 88 cities, 100 school
31 districts and 149 districts. Ms. McCormack has the extensive
32 background in election administration and the use of voting systems
33 and election reform initiatives. Prior to coming to L. A. County, she
34 served as the registrar of voters in San Diego County, and before
35 that, as the elections administrator for Dallas County, Texas.
36 Apparently, Ms. McCormack, you only work for large jurisdictions.
37 Joaquin Avila is a professor at the Seattle University School of
38 Law. His current incarnation as a law professor -- actually, we --
39 most of us in this field know Joaquin as a -- because of his efficacy
40 for minority rights. He's been a fearless lawyer in voting rights
41 cases, employment discrimination cases, educational and interrelation
42 cases. It's hard to talk about such an illustrious career, but I'd
43 like to point out he had a lot to do with the security passage of
44 California State Voting Rights Act in 2003 and that act may actually
45 aspire -- be looked to as being a source of some changes in reforms to
46 the Voting Rights Act.
47 In 1982 Professor Avila vote -- he didn't vote -- he testified in
48 Congress about the extension of the Voting Rights Act. He was also
49 president and general counsel of MALDEF and was responsible for the
50 formulation and permutation of the National Latino Civil Rights that
51 generally resulted in major legislative and legal victories. This guy
52 has litigated a lot of very important cases. He's also received the

1 McCarter Fellowship in recognition of his work. The third member of
2 our panel is J. Morgan Kousser, Professor of History and Social
3 Science at the California Institute of Technology. Professor Kousser
4 currently teaches history and social science at Caltech. His extensive
5 body, of course, centers on minority voting rights, the history of
6 education, and the legal and political aspects of relations in the
7 19th and 20th centuries. Professor Kousser's testimony as an expert
8 was accepted in 21 federal and state voting rights cases and he's been
9 a consultant in eight others. Among the cases he's testified was the
10 1981 case of Garza versus County of Los Angeles.
11 I don't think you did that in 1981.
12 MR. KOUSSER: 1991.
13 CHAIRMAN LEE: You did that in 1991. 1991. And he was also an
14 expert for the University Department of Justice in United States
15 versus Memphis. Both of those are leading cases. He was also an expert
16 in trial issues. Professor Kousser is the author of numerous
17 publications including "The Shaping of Southern Politics," "Colorblind
18 Justice," and his works have won numerous awards.
19 Welcome, Professor Kousser.
20 Why don't we start with you, Ms. McCormack.
21 MS. MCCORMACK: Thank you very much. Good morning.
22 CHAIRMAN LEE: Do we need to take a break for moving the camera?
23 Okay.
24 MS. MCCORMACK: Thank you very much, Mr. Lee, and all members of
25 the National Commission on the Voting Rights Act.
26 It's a privilege and an honor for me to appear before you today
27 to share a little bit about Los Angeles County's program regarding
28 Section 203 compliance, the minority language compliance of the Voting
29 Rights Act. I just would like to clarify Los Angeles County is not
30 covered by Section 5. We are covered by Section 203.
31 And also, just as a personal note, thank you for the
32 introduction, but 24 years I've been an election official, as Mr. Lee
33 mentioned, in larger jurisdictions, but he didn't mention that I also
34 lived in Alabama in the 1950s where I was going to school as a young
35 person back then and personally witnessed the situation in Alabama in
36 the 1950s, '58, '59 when I was in school, and that left a lasting
37 impression on me regarding the discrimination in the school systems.
38
39
40 Just to repeat, Los Angeles County is the largest election
41 jurisdiction in the United States. We do have almost 4 million active
42 registered voters, another million-and-a-half inactive registered voters that
43 still appear on the list making our elections about 5-and-a-half million
44 registered voters. And we have the only jurisdiction in the United States
45 that prints our ballot in six languages in addition to English by the
46 minority Voting Rights Act. And these would include Chinese, Japanese,
47 Korean, Spanish, Tagalog, and Vietnamese.
48 We also assist in other languages because Los Angeles County certainly
49 has over a hundred languages spoken in it, and we have some major
50 concentrations of Armenian, Russian, and Cambodian citizens, and so --
51 Americans who are previously from those countries, and so that we do offer
52 assistance in these languages as well. It's not as extensive because we're
53 not required to do it, but we think it's important to mention we believe in

1 this program and the importance of serving voters. One of the reasons for
2 that is California is known for our lengthy ballots. We don't just have
3 candidates and contests on the ballot. We often have long, lengthy
4 initiatives and ballot propositions. The languages of -- the language of
5 these initiatives and propositions for a native English speaker are very
6 complex. They're hard to understand what you're voting for, and we think it's
7 especially difficult if you are limited-English proficiency, or LEP, for a
8 voter who is trying to understand these complex issues in a language that is
9 not their first language.
10 So we think it's absolutely essential that people have the opportunity
11 to both receive written translated materials and also oral assistance in the
12 polling places, and both of those are key components in the election process.
13 I'd also like to mention that we believe our program has been,
14 partially at least, responsible for the large voter turnout we had in Los
15 Angeles in the November 2004 election.
16 Los Angeles County typically runs 3 to 4 percent lower in voter turnout
17 than the rest of the state due to our urban nature and just the mobility of
18 our citizens. And we are very proud of the last numbers in our election.
19 We exceeded the statewide average -- the statewide average was a 76
20 percent turnout -- by 3 percentage points. We had a 79 percent voter turnout
21 in Los Angeles County. And that was over 3 million voters going to the polls
22 the first time ever in our county. And we think the fact that we had a major
23 advertising campaign in all the languages really made a huge difference.
24 And we advertised -- for the first time, we were able to do paid
25 advertising about our services, including our multilingual services, with the
26 help of the Help America Vote Act funding. We've always had to rely on the
27 impact on Public Service
28 Announcements, which, of course, are very important on radio and
29 television and cable, but by no means is the program on which we spent
30 about $8 million-and-a-half for a multimedia advertising campaign.
31 We think that was crucial, and we went to the unusual expense of
32 these multimedia campaigns, and we have samples of all kinds of things
33 and materials for you so you'll be able to see what we actually
34 produced and the success rate of it.
35 There are actually three key facets of our program on the
36 multimedia program. We have the translated written materials. We have
37 oral assistance. And very equally important is our collaboration with
38 the key community-based organizations, known as the CBOs. And, just
39 briefly, our translated materials are everything that we produced.
40 I've brought them in packets, all the languages, from voter
41 registration forms to sample ballots to voter guides to posters.
42 Polling place posters in each polling place are printed in all the
43 languages. It's just a plethora of material. Provisional ballots,
44 voter survivor's guide. It lets you know about the election process.
45 All of those and more are available in the six languages and some of
46 them are available in the additional languages, as I mentioned before.
47 In terms of the oral assistance, we feel like this is a huge
48 component of our program. And I don't think anything matters -- when
49 we walk into the polling place, if they feel comfortable, they feel
50 like their polling place where people are -- are like their
51 neighborhood. If they speak a foreign language, and a lot of people in
52 that neighborhood speak that language, they want to walk in, and they
53 should be able to walk in the polling place and find somebody to
54 assist them in that language.

We are very committed to this. We think it's absolutely essential in the very diverse community we have in Los Angeles. So we have gone beyond what the legal requirement of the Voting Rights Act Section 203 requires that we use as census data, and we do use census data. We take the census data and overlay it in our precincts and we determine which areas and concentrations of those language needs. However, we go way beyond that.

We actually have a four-part program we've designed within the last few years that encompasses -- it ends up targeting about three times as many precincts as we would be targeting of those languages that only the census had.

For example, we have something called requests on file. If individuals would like to get written materials, all they have to do is call our office and we put them, in a permanent way, in the database, so that for every election, from then on out, they will get these sample ballots mailed out to them before going to the polling booths. Everyone gets them in English, but there's an additional cost to that and that adds to the cost of the election. When we used this, there was at least twenty requests on file from additional precincts -- we targeting the precincts -- increasing the recruitment for poll workers.

For example, last year's election we were actually, census alone, targeting 170 of our 4,835 precincts, 170 of them were targeted for Chinese language. However, by adding the requests on file from the callers requesting materials in other languages, we found another 254 precincts for a total of 424 precincts. So it was much more expanded than the census had led us to believe.

Another issue is the census is -- as we all know, people know neighborhoods change over a ten-year period. Early after the census, it's probably pretty accurate, but we've had some communities move from being Spanish in one decade to Chinese or Japanese or Korean in another area, and we want to capture that information so it's accurate. We don't want to be relying on the old census data, so we also have the requests from the voters on file. Another component of the four-part component we're targeting is the community representatives. We also meet with MALDEF, NALEO, APALC, and with each community's resource center, a huge number of organizations. We have 104 organizations where the members are on the Community Voter Outreach Committee. We meet with them quarterly. And every time they come back from the polls, we have a formal meeting where we ask for input, what areas of the neighborhoods that you know of need to have assistance, and through that, we add additional targeted precincts.

For example -- I'm using the Chinese example -- in the packet is all of them from last November. We added an additional 27 precincts based on the 424 that were targeted for Chinese because of the community saying I know there are a lot of Chinese in that area. Even though they hadn't requested it, even though the census doesn't say so, we know this area needs Chinese assistance. So we add that onto our list.

We also have something called a multilingual tally card at every precinct and every election, and the poll voters mark down every time they offer oral assistance to anyone in the polling place. If any time

1 in the past, at least five people have requested oral assistance, we
2 add that as a targeted component. Because of that, we added 61
3 additional precincts last November on top of the other precincts, and
4 that was just for Chinese.
5 For Spanish, out of our 4,835 precincts last November, we had a
6 total of 3,041 precincts that were targeted for Spanish. So it's
7 understandable that a lot more are in the Spanish language. And so
8 therefore we have other languages as well.
9 Our final issue is that CBOs is I think key. We have really found
10 that since we started the program -- we have a whole packet in here of
11 what the organizations we work with, that collaborating with a partner
12 is the way to make these programs successful. Just working in a vacuum
13 does not work in this area, so we work on that.
14 Also our training for poll workers and -- we are training in
15 about 400 separate classes in advance of every major election, and
16 certain ones of those we have translators, and they are targeted in
17 advance so that the poll workers know where they are. They get a list
18 in advance. It's on our Web site, so they can see there are only going
19 to be 15 classes in my area and three of them are going to be
20 translated into other languages. So they can pick and choose if that
21 makes it easier for them.
22 Our precinct coordinators receive extensive training, responsible
23 for between 10 to 15 precincts, receive an 8-hour extensive training
24 program of which about 3 hours of this is cultural sensitivity on
25 working with a multi-unit community. This is making a huge difference
26 in making sure that when we go out and check the polling places on
27 election day we don't have a problem with people not being sensitive
28 to the needs of the community. How do we get the word out? We
29 mentioned our sample ballot. It goes out three to four weeks before
30 the election. We also have the advertising campaign.
31 How do we measure our success? How do we know if we're doing a
32 good job or not? I think this is key. What's the point of doing a
33 program if you don't know it's successful or not. So we've
34 actually, in the packet, provided some of the targeted precincts.
35 Well, how many did we actually put with multilingual speakers who
36 speak those languages out there, and it's a chart that describes all
37 of that in here. And it shows that over 90 percent of our goal was
38 achieved from the November election.
39 In other words, we targeted 500 precincts for Chinese even though
40 we only needed to legally talk about 170, but our target was 500. We
41 met 90 percent of that goal. And all of those percentages are in the
42 packet. All of them are at least 75 percent.
43 Japanese seems to be our most difficult. We really have a
44 problem with finding Japanese poll workers, but we're still looking,
45 we're still working on it.
46 We also have people on our staff, because of the quota, we can
47 now have employees for the whole department who have been identified
48 to speak all the languages. And so they, in advance of the election
49 day, are available to help people in language assistance.
50 We've also received very positive feedback from the U.S.
51 Department of Justice regarding our program. Indeed we've been told by
52 other jurisdictions, when the DOJ comes to visit them, you should look

at the Los Angeles program. So we're very proud of that. In conclusion, I really think that we have a very comprehensive, multifaceted program that has shown to be successful, both through our voter turnout, through our advertising campaign, and in the make-up of our poll workers at the polling locations where we've met 90 percent of our goals to have a multi-faceted program work.

Thank you for this opportunity.

CHAIRMAN LEE: Thank you. The Commission looks forward to accepting that large packet of materials.

MS. MCCORMACK: All of this, it's all yours. A lot more than what I mentioned.

CHAIRMAN LEE: Thank you very much. Thank you very much, particularly for that testimony about the proactive targeting. I also noticed you we had a written statement, appears to be more extensive, and we'd be interested in having that as well.

MR. AVILA: Good morning. It is indeed a privilege and honor to be here before this Commission testifying on such an important issue such as reauthorization of special provisions of the Federal Voting Rights Act. I'm also here speaking on behalf of the Mexican American Legal Educational Fund. I have provided your staff with a copy of my written testimony and have asked that copies be made for the Commissioners, for you. What I'd like to do is to give you a snapshot, and I'd like to begin by saying that California is a land of extremes. There are extremes in weather. There are sunny warm days, like today, disrupted by thunderstorms and tornadoes. There are extremes in geography with mountain ranges and the snow-capped peaks and deserts with temperatures in the hundreds.

And there are also extremes in politics. The governor's office is held by a Republican and the legislature's controlled by Democrats. And so it is with voting. A legislature is represented by minorities in unprecedented numbers, and yet, racially polarized voting continues to prevent minority representation at local governmental levels. In painting this snapshot for you, I'd like to just give you some very basic figures.

According to the year 2000 Census, California had approximately 32.4 percent total Latino population in the state. And when we look at the level of Latino/Latina political representation at the county level, at the city council level, the school board, special election district level, we found there is a significant disparity between the level of minority representation in the jurisdictions and the level of minority representation on these elected boards.

If you just look at just the counties, there's close to 60 counties in California, over a dozen of them have attained significant, substantial Latino/Latina populations and yet we find that there is in some instances, at least as of 2004, a paucity, a complete absence in some instances, of Latino/Latina board of supervisors in these counties.

When we look at the city councils, we find similar levels of underrepresentation. There are close to 454 cities in California, about 1,100 school districts, about -- close to a thousand water districts, about 500 special election districts. And when you look at representation for those areas, we find that, for example, with the city councils, there's close to 10 percent of all the city council members are Latino/Latina extraction. When you look at school boards, you find similar levels of underrepresentation. So what is the cause of this, what is the

1 snapshot, what's the basis for this snapshot? The basis for this
2 snapshot is racially polarized voting and at-large elections.
3 In California there are close to 3,000 political entities that
4 elect the governing boards, and out of that 3,000 number of political
5 entities, close to 90 percent end up elections on an at-large basis.
6 And many of those political subdivisions have substantial and
7 significant Latino/Latina minority populations.
8 In a special study that I cite in my written testimony that's
9 going to be published in conjunction with other researchers, we looked
10 at various school districts in the Central Valley of California, and
11 we found that there were about 100-and-some-odd school districts that
12 had over 10 percent Latino/Latina population, close to 80 percent in
13 population, and yet, there was no Latino/Latina representation on the
14 school boards.
15 So how do we address this problem?
16 Well, when I started working at MALDEF back in 1974, one of my
17 first cases was an at-large election challenge against the City of San
18 Fernando here in Los Angeles. And at that time, back in 1974, it was a
19 year after the landmark White versus Regester decision came out, of
20 which Commissioner Davidson was clearly involved with in many
21 instances, in many respects, and it was that constitutional standard
22 that the Supreme Court for the first time held that at-large election
23 systems can't operate and dilute minority voting strength that we
24 utilize here in California and in the Ninth Circuit back in the 1970s
25 to dismantle at-large election systems.
26 But unfortunately, as a result of that City of San Fernando case,
27 the Federal District Court there adopted a very restrictive
28 evidentiary standard. We almost had to prove a discriminatory intent.
29 This is back in 1974.
30 As a result of that, we lost the case in the trial court level,
31 we lost it in the Court of Appeals, the circuit -- the petition was
32 denied in the Supreme Court. As a result of that decision, there were
33 no more at-large election challenges in California or the Ninth
34 Circuit until 1982 when -- well, actually, 1985 when -- after the 1982
35 Amendment to the Federal Voting Rights Act.
36 As you recall, there was a decision by the U.S. Supreme Court
37 involving the City of Mobile which establishes discriminatory intent
38 for purposes of challenging at-large election systems.
39 As a result of that decision, Congress made two adopted section -
40 - amendments to Section 2 which permitted us to go into court based on
41 these other discriminatory intent standards.
42 The first case that was filed under Section 2 involved the City
43 of Watsonville in California, involving a case which I was privileged
44 to be lead counsel on. In that case, we lost it at the trial court
45 level, but we were successful at the Court of Appeals, and it's a
46 classic case, a classic case where you had a substantial Latino/Latina
47 population, close to 50 percent. There had been a history of Latinos
48 running for office, close to nine times over a period of time, and
49 yet, there were business people, there were teachers, there were
50 community activists and they all lost. They all lost because of
51 racially polarized voting. We were successful ultimately in that case.

1 As a result of that case, we started filing additional cases
2 challenging at-large election systems. Those cases are listed in my
3 written testimony. And then, as a result, two cases, one involving the
4 City of San Marino and El Centro School District, federal courts
5 started to establish very restrictive evidentiary standards again.
6 As a result of those standards, since 1994, there have been no
7 Section 2 cases that have been filed by private parties in California.
8 And we are looking at the substantial disparity between the
9 representation of the Latino/Latina communities and the levels of
10 political representation that just simply is appalling.
11 As a result of the difficulties that we were having with the
12 Federal Voting Rights Act, we initiated an effort to adopt a state in
13 the California Voting Rights Act. And I'm happy to report that the
14 Lawyers' Community for Civil Rights from the San Francisco Bay area
15 instituted two cases, one against the city -- one against the school
16 district in Kings County, another against the City of Modesto, the
17 Hanford Joint Union High School District. The case settled. As a
18 result of that, we now have a district, possibly two, where Latinos
19 can have an effective opportunity to secure representation on the
20 board of supervis- -- on the school board.
21 The City of Modesto, in that particular case, the Superior Court
22 has concluded that the State Voting Rights Act was unconstitutional,
23 so we are pressing forward with an appeal along with the law firm of
24 Heller, Erhman to assist us in that effort. So that's the at-large
25 part, that's the Section 2 part.
26 The other snapshot deals with Section 5. In California we have
27 four counties that are subject to Section 5: Yuba, Kings, Merced,
28 Monterey. And since 1982 there's been four letters of objections that
29 have been issued by the Department of Justice.
30 Now, one would ordinarily think that four letters in 1982 is such
31 a small number, that there's really no need for a continued Section 5
32 clearance. But, on the contrary, those letters have substantial
33 impact, not only in changing the political demography in changing the
34 politics of those counties, but it also served as a deterrent. It
35 prevented jurisdictions in many of those counties from adopting
36 discriminatory voting changes that ordinarily they would have adopted
37 if they had not -- if there was no Section 5. And in that testimony we
38 provide examples of that.
39 To give you an illustration, Kings County, the City of Hanford,
40 there was a letter of rejection dealing with annexations. As a result
41 of that letter of objection, there were district -- a district system
42 was implemented in place.
43 Several years later there had been discussions among the
44 political power structure in the establishment that, if we could get
45 out of Section 5, we could go back to the at-large election system. So
46 in Kings County, at some point, was conducting a very informal inquiry
47 about seeking exemption under bailout or seek an exemption out from
48 Section 5 pre-clearance. So this is a very real scenario. It's not a
49 hypothetical situation.
50 Another example which clearly demonstrates that if there was any
51 doubt about the effectiveness of Section 5 dealt with a letter of

1 objection that was issued against Chualar Elementary School District
2 in Monterey County.
3 There in 1995, what happened is, the Latino population became a
4 majority in this elementary school district. They decided to implement
5 district elections. They had one multi-member district that consisted
6 of three members that were majority Latino. And, as a result of
7 disputes with the Anglo population in this area, there was a petition
8 to change the system from an at-large -- to change it from district
9 elections, which when the majority Latino board took, over they
10 changed it from the district election, they wanted to go back to an
11 at-large election system. And there was a petition that was filed, and
12 I believe an election was held, which it passed. And if it had not
13 been for Section 5, we would be having at-large elections in this
14 school district.
15 So there's still a definite need for Section 5 in California.
16 Another problem that -- and I'll close with this. Another problem
17 is the lack of compliance by jurisdictions. In California we have
18 documented many instances where covered jurisdictions like Monterey
19 County have not submitted -- the City of Hanford have not submitted
20 voting changes for decades. Decades. Not one year, but decades. We
21 simply cannot permit this to go on. So there has to be an aggressive
22 enforcement of Section 5. And in closing, in summary, there
23 continues to be a need for Section 5 pre-clearance. At a minimum,
24 efforts should be undertaken to ensure that jurisdictions have fully
25 complied with Section 5. More importantly, these special provisions
26 should be extended for another 25 years. In California Section 5 will
27 be very effective in preventing the implementation of discriminatory
28 voting changes.
29 Since the founding of this nation to the culmination of the
30 second reconstruction of the passage of the 1965 Voting Rights Act,
31 minorities were effectively excluded from the political process and
32 body politics. For close to two centuries there was a struggle to
33 expand the franchise and provide that most fundamental of all rights.
34
35
36 The problems of voting discrimination continue to this day,
37 especially as evidenced in the 2000 and 2004 presidential elections.
38 Unfortunately, the well-documented history of voting discrimination in this
39 country has clearly demonstrated that there's still much work to be done.
40 Without the protection provided by the special provisions of the Voting
41 Rights Act, we will simply retrogress in our efforts to expand the right to
42 vote. As a society, we cannot continue to have in our midst political
43 outcasts who have no vested interests in the well-being of our community.
44 Access to the ballot provides a powerful tool for the development of
45 politically vested stakeholders who will not only protect the community but
46 will serve as role models for the next generation of political leaders.
47 This, Commission, is why we still need the Voting Rights Act.
48 CHAIRMAN LEE: Thank you, Professor Avila. That was well phrased. It
49 was very targeted testimony.
50 Professor Davidson has admonished me, Professor Kousser, that I tried
51 to be lenient several times. I apologize.
52 Please welcome, if you'll welcome -- since your colleague went on past
53 the time, I guess we will extend the same courtesy to you.

1 MR. KOUSSER: Thanks very much. I appreciate being here. In many of
2 the California cases, I've sort of followed Joaquin Avila around working for
3 a lot of the research, et cetera. And I'm doing the same thing today, so it
4 feels familiar.
5 I want to make three recommendations and then I want to talk about
6 cases from two counties.
7 The three recommendations are -- I think of four recommendations. The
8 recommendations are for changes in Section 5 coverage which for us is key.
9 They are related to cases that have taken place or they're related to
10 changes that I think are necessary to satisfy the City of Burney questions.
11 The first that I would hope that the report will make and the
12 Commission would recommend, is that there should be a unified purpose
13 standard for Section 2 and Section 5. And the purpose standard should be
14 that, which was essentially enunciated in Garza versus Los Angeles County
15 Board of Supervisors.
16 Let me quote from Judge Kenyon's opinion in the District Court case. He
17 said that he thought it sufficient to find that the board, the L.A. County
18 Board of Supervisors, has redrawn the supervisorial boundaries over the
19 period 1959 to '71 at least in part to avoid enhancing Hispanic voting
20 strength in District 3.
21 The supervisors appeared to have acted primarily on the political
22 instinct of self-preservation. The quote finds, however, that the supervisors
23 also intended what they knew to be the likely results of their actions and
24 the prerequisite for self-preservation, continuing from the quotation, was
25 at a core and the dilution was in voting strength.
26 You know, affirming this unanimously, the Ninth Circuit wrote
27 that the discrimination need not be the sole goal in order for it to
28 be unlawful. And in a concurring opinion, Judge Kozinski, a regular
29 appointee often mentioned as a conservative appointee for the Supreme
30 Court, talked about whether there could be, quote, intentional
31 discrimination without an invidious motive. I'll give an example,
32 and I'm quoting here, assume you're an Anglo homeowner who lives in an
33 all-white neighborhood. Suppose also that you harbor no ill feelings
34 towards minorities. Suppose further, however, that some of your
35 neighbors persuade you that having an integrated neighborhood with
36 local property values, that you stand to lose a lot of money in your
37 home. On the basis of that belief, you join a pact not to sell your
38 home to minorities. Have you engaged in intentional racial and
39 minority discrimination? Of course you have. The personal feelings
40 toward minorities don't matter. What matters are that you
41 intentionally took actions calculated to keep them out of the
42 neighborhood. So from having testimony on intent in the Garza case,
43 and I was the chief expert witness for the ACLU, MALDEF, for the
44 Justice Department on intent in the Garza case, which is to say also
45 the only expert witness on intent in the Garza case on either side,
46 but I think "chief" sounds better, so I usually say that.
47 From that experience, in writing a very long report, which was
48 put into Judge Kenyon's opinion largely, I became convinced that it
49 was very important -- it is extremely important in Western
50 jurisdictions, not in Southern -- any of the non-Southern
51 jurisdictions, that in mixed-motives cases where there is intentional
52 or ethnic discrimination, intentional discrimination on racial
53 grounds, the standard ought to be that that is sufficient. That you do
54 not have to prove that people discriminated and said they

1 discriminated purely because of race. We don't have to have it. It
2 shouldn't be up to Congress to state that we do not have to have a
3 standard which would only fit things like Busbee versus Smith in
4 Georgia in 1981 in which the head of the Georgia State House Committee
5 said, with regard to whether he would draw a district which would have
6 elected eventually John Lewis from Fulton County, "I am not going to
7 draw any nigger districts." That sort of smoking gun evidence ought
8 not to have to be collected in order to satisfy an intent standard.
9 The second thing is that I think and -- again, this is
10 particularly for non-Southern jurisdictions -- the coverage formula
11 for Section 5 needs to be changed. There are areas in the South that -
12 -
13 COMMISSIONER ROGERS: Say that again.
14 MR. KOUSSER: The coverage formula that relates to Section 5 needs
15 to be changed. It needs to be changed for City of Burney reasons and
16 it needs to be changed for efficiency reasons. There are places
17 where -- in the South where there has not been very significant
18 discrimination against minorities for a substantially long period of
19 time. There are places outside the South which are not now covered
20 where we have learned through extensive litigation and where we've
21 learned through Commission reports and some other things that there
22 has been a tradition of discrimination. There has been extensive
23 discrimination.
24 In Los Angeles County, for 116 years we did not elect a Latino
25 member to the board of county supervisors. From 1874 through 1991,
26 when, as a result of Garza, we finally put into effect the district
27 where it was possible for Latino voters to elect candidates of their
28 choice, between those two periods, despite the fact that L.A. County
29 was in 1980, 36, 37 percent Latino, we did not have a member on the
30 board of county supervisors.
31 There needs to be a standard which is based partly on the
32 proportion ethnic in a county's population, because my experience and
33 research shows that anywhere there is a substantial proportion in the
34 population, and it doesn't have to be terribly substantial, there is
35 likely to be discrimination in the voters. And so that standard would
36 cut out a lot of the southern counties in the mountains and hills. It
37 would add some counties, particularly with growing Hispanic and Asian-
38 American populations, and that's particularly important in the Western
39 United States, but it's also important in the South.
40 The third thing -- and this, again, is particularly important for
41 Hispanic populations. Some of the states in which the Hispanic
42 population is growing fastest now are North Carolina and Georgia and
43 Arkansas. And in those places they've never elected Hispanics to
44 almost anything.
45 So a retrogression scheme -- a continuation of the retrogression
46 standard would allow the continuation of that towards elections,
47 towards other discriminatory electoral structures which allow for
48 continually to shut out those new emerging ethnic populations in those
49 areas. And those demographic shifts make it particularly important
50 that Congress would weaken or get rid of fear perhaps through a
51 restored purpose standard of to try to overturn the Mosier cases in
52 Louisiana.

1 The fourth thing -- and I just say this because every once in a
2 while I disagree with Joaquin, and this is one of those instances.
3 I don't think that the Section 5 ought to be extended for 25
4 years. I think that on two grounds: One, it endangers the status of
5 the act under City of Burney. And, two, I finished a paper, which is
6 about 80 pages long, on Section 5 for a Russell Sage volume, which
7 will be upcoming.
8 One of the things that I learned from that is that it was very
9 fortunate that after Roman versus Balding, decided April 22, 1980 -- I
10 testified in the Bermuda case which was on intent -- immediately after
11 Roman versus Balding, we had to revisit the Voting Rights Act. And
12 that made it possible -- because we had to revisit the Voting Rights
13 Act in Section 5 to make it possible to change Section 2 -- to amend
14 Section 2 to outflank Roman versus Balding. There had been other
15 cases which have occurred from 1982 to the present. It would have been
16 a good thing had Congress had a -- forced some action which would have
17 invited voting rights forces to try to make some changes in the
18 interpretations of the law that the Supreme Court voice powers, which
19 often seem to me to be incorrect.
20 So there are advantages both from a legal standpoint and making
21 the law something that would pass the Supreme Court and also from a
22 tactical standpoint in constraining the Supreme Court by forcing
23 Congress to act in a more timely fashion that argue for a shorter
24 period of time for renewal.
25 Just quickly to say something about cases from L.A. County and
26 from Monterey County.
27 The Garza case in L.A. County was a huge case. It cost about $12-
28 and-a-half million, I think, all together to litigate. MALDEF was
29 involved. ACLU Justice, the outside attorneys for the County of Los
30 Angeles. There was -- there were very extensive -- it was a very
31 extensive trial. It lasted for two-and-a-half or three months. A
32 great deal of statistical testimony. Some of it -- a very small part
33 of it intent testimony, but the intent testimony eventually became
34 determinative.
35 There was continuing discrimination, continuing drawing of
36 district boundaries in an effort to ensure that Latinos could not
37 elect a candidate of choice. This in a relatively enlightened
38 community where Latinos otherwise were able to be elected to office,
39 but what you had here is Anglo supervisors who again and again and
40 again changed the boundaries so that they would keep Latinos from
41 getting up to the threshold where they would be sufficient to
42 challenge.
43 I hope that your report makes clear that there are instances like
44 this, even in the enlightened state of California, where you have a
45 history of discrimination and very important and powerful
46 discrimination.
47 It's also true in Monterey. In Monterey I was involved in a
48 couple of cases with Joaquin and the -- one of them didn't go to
49 trial. The other, the judge didn't publish the facts, so I have two
50 very long reports that I wrote about discrimination in Monterey which
51 I'll leave with Chandler.

1 When Californians think of Monterey County, they think of Big
2 Sur, they think of Pebble Beach Golf Course, they think of Monterey
3 Bay Aquarium. They don't think of the North County areas. They don't
4 think of the terrible strikes that we've had, the long history of the
5 farm worker, anti-farm worker violence in Monterey County. They don't
6 think of the degree of discrimination on the county level in drawing
7 the supervisorial districts. It looks just like L.A. County and it
8 looks just like several southern counties in cities that I've worked
9 in.
10
11
12 Again and again, they drew boundaries to ensure that Latinos had no
13 opportunity to elect candidates of their choice, and this went through the
14 1990s. And they abolished local courts to allow only the countywide Anglo-
15 majority voters to elect, then, virtually all whites to the -- to the
16 judgeships.
17 They did not make clear that from 1968 on, when Joaquin brought Lopez
18 versus Monterey County, that was litigated up to the Supreme Court level
19 several times. It never went to trial. The Justice Department punted, in my
20 view, and pre-cleared the actions finally.
21 But the point here is that there is very extensive discrimination. It's
22 different from Southern discrimination in the seventies and sixties in that
23 you don't have a lot of smoking gun statements, but it's still very effective
24 discrimination. And I hope that your report will make it possible to continue
25 to show that there is purposeful discrimination in lots of places where you
26 might not otherwise expect it.
27 We've got lots of discrimination in California under -- which could be
28 covered by the Voting Rights Act and sometimes has been covered by the Voting
29 Rights Act in the past. I would hope it continues to be and we need to change
30 the Voting Rights Act to ensure that it's so. Thank you.
31 CHAIRMAN LEE: Thank you, Professor Kousser.
32 Professor Davidson, do you want to begin your questioning? Well, you're
33 checking your notes. Professor Kousser, you had Monterey reports and you
34 also referred to a Russell Sage Foundation report.
35 MR. KOUSSER: That I don't have with me, but I'll send it to Chandler.
36 CHAIRMAN LEE: Okay. Thank you.
37 COMMISSIONER DAVIDSON: I have a couple of questions and the first is to
38 Ms. McCormack.
39 I found your testimony very, very interesting. I was struck by the
40 extent with which your office has reached out to language minorities and it
41 does sound as though your program is a model of how that outreach should be -
42 - should be conducted.
43 I noticed at one point that you said that you offered a great deal of
44 assistance to other language-minority groups that were not offered by Section
45 203, but that your outreach was not as extensive because it was not required.
46 And am I correct, in inferring from your statement there, that Section
47 203 really does have an impact in terms of requiring officials, such as
48 yourself, to do what needs to be done to make the ballot accessible to
49 language minorities?
50 MS. MCCORMACK: Absolutely. And I do believe that's the case. The cost
51 component, which I did not include in my testimony -- it's a legal
52 requirement, but the cost component translating the -- we had 818 different
53 ballot combinations on the November election last year. And that's what part
54 of the geographic precinct you live in -- with the Congressional District -

1 - we have 17, as you know -- which state assembly, which local
2 district creates all these different ballot combinations.
3 Translating all the materials of that into the required languages
4 runs about 3 to 5 million per major election in Los Angeles County.
5 That's a significant portion of our budget which is usually between 18
6 and 20 million to conduct a county election.
7 So when that amount of money can get as high as 5 million, which
8 it has, just to reach the -- to meet the minimum legal requirements,
9 and that would be the translated materials, which are definitely
10 legally required, that's not even the oral assistance. The oral
11 assistance is on top of that. To extend translation of written
12 materials in those other languages, we've just simply have not had the
13 budget to do that, and so we've gone to community groups and we've had
14 volunteers who work with us in Russian, Cambodian, and Armenian
15 because we have such large pockets of those, and any other language
16 which will assist us in doing some minimal translations. We've
17 accepted that from them without cost because it would cost millions
18 more to do that.
19 So it really is a financial limitation, but we don't like to
20 think that that would mean that we can't provide the materials, but
21 certainly oral assistance, which I think is the most needed, is not
22 the expense of translation so that we do go out to the community
23 groups and ask them to help us find poll workers who speak those
24 languages so we don't have to rely so much on bringing in -- a voter
25 doesn't have to rely on bringing in a family member or someone else.
26 They can actually go to the polling place and find that there's
27 someone there who can assist them. So that's the main barrier to the
28 extent it even further is the financial component.
29 COMMISSIONER DAVIDSON: Thank you.
30 I have a couple of questions for Mr. Avila. And we have
31 developed a tradition, I think, on the Commission of encouraging our
32 panelists to disagree among themselves where they have disagreements
33 to express. And given Dr. Kousser's belief that the extension of
34 the nonpermanent features should only be for ten years and your belief
35 that it should be a 25-year extension, do you have a response to Dr.
36 Kousser on that?
37 MR. AVILA: Yes. I respectfully disagree, of course, but I -- I'm
38 really just taking the lead with Justice O'Connor in the Weir case
39 where she first felt it was going to take about a generation or 25
40 years to sort of correct the problems.
41 Based on what I've seen in terms of just talking to other voting
42 rights litigators, talking with organizations, there is a very well-
43 documented, very extensive record that's being developed now. And
44 that record demonstrates that we have still a long way to go. And when
45 you compare 35 to 40 years to 200 years, there's just simply no
46 comparison.
47 And not only do you have to deal with just outright racism in
48 some instances, you have to deal with a lot of institutional
49 structures. And when you're talking about close to 3,000 jurisdictions
50 in California, that's not going to be done in seven years or ten
51 years.

1 COMMISSIONER DAVIDSON: Okay. The second question has to do with
2 your statement that, as I understood it, at least one of the
3 jurisdictions that covered -- is covered by Section 5 has not made
4 submissions for pre-clearance in decades.
5 MR. AVILA: Yes.
6 COMMISSIONER DAVIDSON: Could you be a little bit more specific?
7 You may have been specific and I was just taking notes and I didn't
8 hear what you had to say, but would you consider this to be the wild
9 card here, or are there other jurisdictions that you think may not
10 have been making these submissions? This has been a problem that
11 has worried me for some time. And I don't believe that the Justice
12 Department has a standard procedure for systematically determining
13 whether jurisdictions have made pre-clearance submissions, and I've
14 just wondered if you could expand a bit on that with your remarks
15 there.
16 MR. AVILA: Yes, it's just not me saying it. In 1968 you had the
17 U.S. Commission on Civil Rights stating that there was a high degree
18 of noncompliance with the Section 5 pre-clearance requirements. In
19 my written testimony I highlight congressional testimony from 1970
20 where Congress indicated that there was a high degree of non -- a
21 nondegree of Section 5 compliance. The same testimony was repeated,
22 observations were repeated in 1975. There was a GAO report in 1978
23 that talked -- that documented how many jurisdictions were just simply
24 not complying with Section 5.
25 In 1982 you had then Assistant Attorney General for the Civil
26 Rights Commission for two days testified that even though there was a
27 very strong period of enforcement during that time period, his
28 department did not have the resources or the time to go and even
29 secure an adequate compliance. Now, that's the background. When we
30 look at Monterey County, we look at Lopez versus Monterey County. You
31 had voting changes that occurred in 1968 to 1983 that had not been
32 submitted, and it took two U.S. Supreme Court cases until 1999 -- the
33 year 2000 when they were actually submitted. You would think that
34 Monterey County would have learned.
35 In the past recall election against where the present governor
36 was elected, there was a consolidation of voting precincts in Monterey
37 County. They went from 180 or so polling places to about 80 or so
38 polling places. Half -- just close to half of all the polling places
39 were closed.
40 In investigating that case, it was discovered that Monterey
41 County had not submitted their voting precinct consolidations for many
42 years from at least 1995 to the year 2000. So that's just one
43 instance.
44 In Merced County, several years ago, I personally went out and
45 looked at minutes for special election districts and found that there
46 were a series of annexations to these special election districts that
47 had not been submitted.
48 The U.S. Supreme Court, in Perkins versus Matthews, documented
49 how the -- there were many instances where there was noncompliance.
50 So it's not anything that's just happened, you know, or that I'm just
51 saying. It's well documented. The research is out there. And my
52 greatest fear is that the Section 5 provisions will simply expire and

1 you'll have these hundreds if not thousands of voting changes that
2 have not been submitted.
3 COMMISSIONER DAVIDSON: Thank you.
4 And now a question for Dr. Kousser. Your research has been --
5 on voting rights has been widespread and you have focused a good bit
6 on the South as well as on the Southwest. And as I understand you, you
7 are saying that some of the problems that racial or ethnic minorities
8 encounter in Los Angeles, in California today are in many respects as
9 serious as those which blacks have traditionally faced in parts of the
10 old South. Am I correct there?
11 MR. KOUSSER: That's correct. And there are analogies in the sorts
12 of arguments you used. I testified in Dallas County, Alabama -- Selma
13 -- in U.S. versus Dallas County in the early 1980s, and the judge in
14 the case was W. Rivard Hand, who is well-known, shall we say, in civil
15 rights circles. Judge Hand ruled against the Justice Department in
16 that case, and he said that when the at-large system of elections was
17 set up in Dallas County for the board -- I've forgotten whether it's
18 called board of county supervisors, board of directors -- anyway, the
19 county governing body, it was not so much that they wanted to
20 discriminate against blacks and keep blacks out of office, they simply
21 wanted to keep all the offices for themselves.
22 The same sort of argument was made by the attorney for Los
23 Angeles County, a mixed-motive argument in the L.A. County Board of
24 Supervisors case. It was not so much that they wanted to discriminate
25 against Latinos and set up districts that Latinos could not win in as
26 that they wanted to keep all the offices for themselves, then an all-
27 white board of county supervisors.
28 I found that fairly striking. Los Angeles is like Selma. It's a
29 good tag line anyway. Thank you.
30 CHAIRMAN LEE: Mr. Buchanan.
31 COMMISSIONER BUCHANAN: There's an area of American history that the
32 slaveholder, Tom -- and founder of our country, Thomas Jefferson said, "We
33 must bind men with the chains of the law." Basketball coach -- former
34 basketball coach of Georgetown University, John Thompson, Sr., said, "The
35 world's a pretty nice place if you got a hammerlock on it and force it to
36 be."
37 I feel pretty secure about the state of the law pertaining to rights --
38 voting rights of American citizens, Mr. Chairman, if we would just clone this
39 panel and put the people across the country in counties, like Ms. McCormack,
40 and let these two debate with each other in the Congress and in the courts
41 and life would be secure. In reality we must live with how things are.
42 Now, you've said very clearly, you believe these provisions are needed,
43 and I gather the three of you feel that as -- Chairman Sensenbrenner and his
44 committee and their counterparts in the senate are looking at this
45 legislation and coming up with something that will stand in the courts and
46 determine whether what is there is needed, in a revised fashion or as it is,
47 to be extended, I gather you would all say there needs to be extension of the
48 provisions of the Voting Rights Act either in present form or in amended form
49 in 2007; is that correct?
50 MR. AVILA: That's correct.
51 MS. MCCORMACK: Yes.
52 COMMISSIONER BUCHANAN: Thank you,
53 Mr. Chairman.
54 COMMISSIONER: I think the answer "yes."

1 COMMISSIONER BUCHANAN: I heard "yes." Thank you.
2 CHAIRMAN LEE: Commissioner Rogers.
3 COMMISSIONER ROGERS: Absolutely. Thank you kindly. First of all, I
4 appreciate very much your testimony. I'm glad you all were here today.
5 I'm just curious, I wanted to get a sense -- your cost as it relates to
6 this program that you all have put in place, I'm assuming that your costs
7 have to be significantly higher than if you just had an English-only ballots.
8 MS. MCCORMACK: Yes, absolutely. Our expenditure for the translated
9 materials that we're required to supply in a major -- every election, but for
10 a countywide major election costs between 3 to $5 million to both translate
11 it and print and distribute and mail these materials. Clearly with -- I
12 don't -- I can't project what my bosses would say if we weren't required to
13 do it, but we all know election budgets are not something that is the first
14 order of priority for most governments so --
15 CHAIRMAN ROGERS: Sure.
16 MS. MCCORMACK: -- I don't think that we would see this amount of budget
17 if we were not required, and indeed, as much as we'd like to provide more
18 services in other languages, we really have a limited budget to do that
19 without a requirement. So for the costs of a major election like
20 last November, which was somewhere around 20 million for our county to
21 administer, somewhere in the vicinity of $4 million of that was for
22 the translation and provision of materials under Section 203.
23 COMMISSIONER ROGERS: In addition to that, the costs related to
24 the oral component and otherwise paying folks essentially to be there,
25 that's included within the $4 million figure that you --
26 MS. MCCORMACK: Well, actually, that 4 million is pretty much just
27 the translation. We'd have poll workers anyway, so we --
28 COMMISSIONER ROGERS: Sure.
29 MS. MCCORMACK: -- when we recruit, and we had about 30,000 poll
30 workers that we recruited -- and we pay very little to our poll
31 workers. Probably less than almost anywhere in the country --
32 COMMISSIONER ROGERS: Sure.
33 MS. MCCORMACK: -- so it's very much a volunteer -- we recruit
34 based on these criteria I mentioned to have individuals there who
35 speak those languages and can assist in those languages, so we would
36 have that cost regardless. We have to have people there. We simply
37 find people who speak those languages rather than hiring someone who
38 doesn't. So I don't really consider that an additional cost.
39 COMMISSIONER ROGERS: Sure.
40 MS. MCCORMACK: There is an additional cost in terms of finding
41 them, the recruitment aspects. We have several staff people who are
42 out recruiting, trying to find multilingual speakers, so there is a
43 cost there, and that is included in the 4 to $5 million.
44 COMMISSIONER ROGERS: What's your overall budget?
45 MS. MCCORMACK: Our overall budget -- well, for each election,
46 major election, it's somewhere around 20 million but --
47 COMMISSIONER ROGERS: 20 million.
48 MS. MCCORMACK: -- because I'm the registrar, the recorder, the
49 county clerk, a lot of my budget has to do with property records and -
50 -
51 COMMISSIONER ROGERS: Sure.
52 MS. MCCORMACK: -- other things, so it's about hundred million --
53 COMMISSIONER ROGERS: Absolutely.

1 MS. MCCORMACK: -- but, you know, election budget for each
2 election is about 20 million.
3 COMMISSIONER ROGERS: Absolutely. When you think about the
4 provisions in particular with respect to Section 203, the idea behind
5 the provisions was that they would provide some assistance to people
6 as they're essentially transitioning into the United States. In
7 other words, you have new immigrant groups that come into the country,
8 they may be speaking a native language from wherever country they're
9 from, but the idea is ultimately that you transition into essentially
10 English as a language that you primarily use in the United States.
11 That can be one of the assumptions that's behind the law in and of
12 itself.
13 Does Section 203, in your opinion, create a situation where you
14 have sort of a permanent separation of cultures? In other words,
15 because the ballot is always in Chinese, the ballot will always be
16 printed in Spanish, or the ballot will always be printed in Japanese,
17 that you will, in effect, not encourage people to assimilate generally
18 into the United States culture overall or will you maintain
19 separation, in your opinion, with 203?
20 MS. MCCORMACK: I think regarding voting, because of the complex
21 ballots in California, it's very difficult to understand these
22 propositions. We're about to have a statewide election on November
23 8th on very complicated issues, including redistricting, and they're
24 very hard to understand if it's not your native language. So I do
25 think it's really important that we provide that service. I don't
26 really think that's a determinant, though. I think -- I think what
27 you're describing is much more neighborhoods and schools and
28 assimilation is an everyday event --
29 COMMISSIONER ROGERS: Sure.
30 MS. MCCORMACK: -- versus voting, which is an infrequent event. It
31 doesn't occur that -- although it seems in California it occurs all
32 the time. In my life it seems to be, but relatively you don't go to an
33 election booth every day the way you go to a school or to a
34 neighborhood or the other aspects of life that -- as assimilation of
35 culture. So whether or not we will ever get to the point where
36 people won't need this service, which I think what may -- you maybe
37 heading to --
38 COMMISSIONER ROGERS: Sure.
39 MS. MCCORMACK: -- I do think that we find a lot of the poll
40 workers that we recruit are younger, a lot of students that speak
41 these languages, and what we've observed is that the -- most of the
42 need is the older voters who come in, but it's surprising how many of
43 the younger voters are bilingual --
44 COMMISSIONER ROGERS: Sure.
45 MS. MCCORMACK: -- but, again, maybe their native language at home
46 is primarily one of the foreign languages.
47 So it is -- I think there is some transition that you're
48 describing, because, again, we see most of the need, as they come into
49 the polls, are the older voters, but then older people vote more. So
50 it's kind of a skewed analogy as well. But with the poll workers,
51 we're finding -- we find the multilingual workers primarily from

1 students, college students, and high school students who speak those
2 languages at home.
3 COMMISSIONER ROGERS: Absolutely. Thank you kindly, Ms. McCormack.
4 Professor, I wanted to ask you a question particularly. You talked
5 about essentially block voting, you talked about racial block voting,
6 and you also mentioned about at-large elections. Are you generally
7 opposed to all at-large elections?
8 MR. AVILA: No.
9 COMMISSIONER ROGERS: Which at-large elections are you not opposed
10 to?
11 MR. AVILA: The ones that don't have racially polarized voting.
12 COMMISSIONER ROGERS: By that, you mean -- essentially you're
13 talking about white folks that vote for white folks, black folks that
14 vote for black folks, and Hispanics that vote for Hispanics, and
15 Asians that vote for Asians.
16 In voting patterns here in California, is it generally true that
17 Asians will vote for Asians, that white people will generally vote for
18 white people, blacks will vote for blacks, and Hispanics will vote for
19 Hispanics?
20 MR. AVILA: There's -- yes, generally. I can't give you specific
21 instances. I can say that in the Garza versus L.A. County Board of
22 Supervisors there were findings of racially polarized voting back in
23 1990. I can tell you that in Tulare County and Fresno County in
24 cases that at-large election challenges where I commissioned studies
25 to look into racially polarized voting, there were very significant
26 and substantial degrees of racially polarized voting. When we've had -
27 -
28 COMMISSIONER ROGERS: Where do you not find racially polarized
29 voting?
30 MR. AVILA: Where do you not.
31 COMMISSIONER ROGERS: Where do you not find circumstances in which
32 Hispanics vote for Hispanics, blacks vote for blacks, Asians vote for
33 Asians, whites vote for whites?
34 I guess I'm trying -- what I'm trying to do, Professor, is just -
35 - I understand the context of your comments, and we've heard these
36 comments throughout the United States to some extent, but I guess I'm
37 trying to understand the nature of the comment as you make it 'cause
38 you essentially say racially polarized voting is the basis for why it
39 is that we should not have at-large elections, and we ought to
40 maintain essentially the -- you know, relations that are broken down
41 in a non-at-large basis. But I'm just trying to understand where
42 the opposite occurs.
43
44 MR. AVILA: Well, I'm sure it does in some communities. I -- see, I
45 don't conduct investigations where there isn't a problem. And usually my
46 investigations have been as a result of people coming to me, to my office
47 when I was practicing, and saying, you know, we have a problem with this
48 particular system, so we investigate and we conduct a -- conducting racially
49 polarized voting studies is a very expensive proposition.
50 COMMISSIONER ROGERS: Sure.
51 MR. AVILA: So to do it for all jurisdictions would be just
52 prohibitively impossible for someone like myself.

1 COMMISSIONER ROGERS: Sure. Thank you kindly, Professor. Thank you very
2 much.
3 CHAIRMAN LEE: I hate to interrupt. Isn't part of the answer to
4 Commissioner Rogers' question --
5 UNIDENTIFIED PERSON: Speak up.
6 CHAIRMAN LEE: Isn't it part of the answer to Commissioner Rogers'
7 question your testimony that you thought that the impact of racial
8 polarization was mostly at the local levels rather than the statewide levels?
9 MR. AVILA: Yes. Because I have not done studies at the state levels, I
10 can't really speak with any authority on that, but I can speak with authority
11 at the local levels.
12 CHAIRMAN LEE: Well, what is it -- so is the statewide levels races, do
13 they approximate with Commissioner Rogers is talking about, the kinds of
14 elections where racial -- racially polarized voting doesn't have the bite
15 that it --
16 MR. AVILA: No, no, I --
17 CHAIRMAN LEE: Why is that?
18 MR. AVILA: Well, I think -- no. I think there are -- there are racially
19 polarized voting patterns even in state legislative races and congressional
20 races and it may not rise to the level in some instances. I know that
21 Professor Kousser could probably speak more on that because he did some
22 analysis of statewide -- correct me if I'm wrong. He did some analysis of
23 statewide races.
24 But to look for an example of where there is no racially polarized
25 voting means that there is no racially polarized society in that local
26 community. And it's becoming increasingly more difficult to find the absence
27 of racially polarized societies. And so, for that reason, it's going to be
28 very difficult not to find patterns of racially polarized voting.
29 COMMISSIONER ROGERS: Thank you very much. Thank you, Mr. Chairman.
30 MR. KOUSSER: In California -- well, to give you an example of a place
31 where the -- there seems to be relatively little racially polarized voting in
32 at-large elections, the Pasadena Unified School District, where my kids went,
33 has --
34 COMMISSIONER ROGERS: And you give an example of what was it? I'm sorry.
35 I missed what you said.
36 MR. KOUSSER: There is -- there is not racially polarized voting --
37 COMMISSIONER ROGERS: Sure.
38 MR. KOUSSER: -- in voting for the Pasadena Unified School
39 District. It's not so clear to me why that's so.
40 This is -- the community in general is still pretty polarized.
41 It's segregated to a fairly large extent. The schools are
42 predominantly black and Hispanic now. Whites generally do not go to
43 Pasadena Unified School District. But there has been relatively little
44 polarization. I think one of the things that happened, just to talk
45 about the development of it, is that we had a big integration battle
46 in the 1960s and seventies, a case -- Spangler -- went all the way to
47 Supreme Court, decided in '76. And there were -- when I got to
48 Pasadena in the 1960s and seventies, it seems like there was a school
49 board election every year during the 1970s. There was either an
50 election or a recall election. And there were huge battles between the
51 integrationists and the segregationists.
52 One of the things that came out of that was that the people who
53 continued to support the schools and continued to vote in the school
54 board elections didn't discriminate, and so there have been -- the
55 integrationist leader in the seventies was a Chinese-American. One of

1 his allies was African-American. One of his opponents, one of the
2 anti-integration candidates, was African-American. We've now elected
3 Latinos to the school board, et cetera. It's the experience of going
4 through a sort of racial crisis that made that possible in a way.
5 With regard to statewide elections, famously in California, the
6 Bradley-Deukmejian election, particularly the 1982 election, was
7 clearly very racially polarized in that the -- at the end of the
8 election, very close to the end, Bradley was nine points ahead in the
9 pre-election polls, and he won -- on election day, he lost on absentee
10 ballots, but there was clearly racially polarized voting at a
11 statewide there.
12 There have been subsequent elections in which there has not been
13 racially polarized voting. Lieutenant Governor Bustamante has been
14 elected --
15 COMMISSIONER ROGERS: Sure.
16 MR. KOUSSER: -- without racially polarized voting. Generally
17 African-Americans attract more opposition from Anglos than Latinos or
18 Asian-Americans in California, but they still -- the other two groups
19 still very often attract that. Another thing that is important is
20 clearly whether there is -- whether the elections are partisan or not.
21 The more partisan the elections, the less racially polarized voting
22 there is. Whites will vote for an African-American who gets nominated
23 --
24 COMMISSIONER ROGERS: Wait, let me make sure I understand this.
25 You said the more partisan the election, the less racially polarized
26 voting you find here in California.
27 MR. KOUSSER: White Democrats will vote for an African-American or
28 a Latino who's on the Democratic ticket more easily than they would in
29 an election which didn't have any party ballots on it. And since most
30 local elections are nonpartisan, you find more racially polarized
31 voting in nonpartisan elections and more on the local level therefor.
32 COMMISSIONER ROGERS: Okay.
33 CHAIRMAN LEE: Do you have anymore questions?
34 COMMISSIONER ROGERS: I just had one question in particular for
35 Professor -- forgive me.
36 MR. KOUSSER: Kousser.
37 COMMISSIONER ROGERS: -- Kousser, but I wanted to ask you this
38 question because it is unique. As we travel throughout the United
39 States, there is no doubt that, as we've talked about issues at the
40 end of the day, the ultimate issue is one of discrimination. Do you
41 like me or not like me, are you going to hurt me or not hurt me
42 because of the color of my skin, or will you not vote for me or vote
43 for me because of it, or restrict me from voting because of it.
44 Ultimately this stuff all comes down to race wherever we are
45 throughout the United States. But in particular I'm struck by two
46 things: Conny, you mentioned in particular your thoughts as having
47 grown up in the South and having come from Alabama and now been here
48 in Los Angeles, you were mentioning in particular, as Professor
49 Davidson was pointing out, Chandler was pointing out, your background
50 in terms of having written about Southern politics, yet at the same
51 time commenting here in Los Angeles. I was struck by your comment
52 in particular saying that L.A. was not that different perhaps from

1 Selma in particular as it relates -- I'll take it your comments relate
2 to Hispanics. I haven't heard any testimony about African-Americans in
3 particular here in California.
4 But I guess what I'm trying to get a handle on is to try to
5 understand exactly what the nature of that discrimination as you
6 describe it to be here in California is. It seems that you're saying a
7 couple of things.
8 On the one hand, you're saying nobody uses the word "nigger," so
9 -- because we don't use the word "nigger" out here and nobody says it,
10 we don't have the sort of smoking gun of it having been intent.
11 And then at the other -- on the other hand, you sort of say,
12 well, the effect of it is the following, because I want to preserve my
13 position, I'm not anti-Hispanic, I'm not anti-black, I just want to
14 preserve my position which happens to be all white. And yet, at the
15 same time, you described the world in which you have, quote,
16 enlightened communities -- that's the way you used your phrase -- that
17 seemingly describes a community in which you believe that white folks
18 are somehow enlightened as it relates to issues relative to race, but
19 yet you describe a world in which they engage in the same kind of
20 discrimination that you describe takes place in the South. I'm struck
21 by that.
22 How can you have enlightenment on one hand and discrimination on
23 the other, as you describe it, because I'm trying to get a sense about
24 how it is that we articulate your point of view as you've expressed it
25 here regarding what discrimination is here in California vis-a-vis the
26 rest of the country. If it's not Southern discrimination, yet it is
27 discrimination without the obvious factors of intent, how do you all
28 describe it? And forgive me for that long question.
29 MR. KOUSSER: No, no.
30 COMMISSIONER ROGERS: I did not mean to be that long about that.
31 MR. KOUSSER: It's a wonderful question. I wish I'd fed it to you.
32 My dissertation was called "The Shaping of Southern Politics:
33 Disfranchisement and the Establishment of the One-Party South, 1880 to
34 1910." And the thesis of that, more than anything else, is that the
35 disfranchisement devices that were adopted in the South in the classic
36 period of disfranchisement were adopted more out of a concern for
37 power than they were out of a concern -- out of an enmity, an
38 antipathy for people.
39 This was a question of the preservation of a white power
40 structure and of the -- particularly the power structure of the people
41 who were in then and who wanted to ensure that they and their children
42 and their grandchildren would control politics forever. And the way
43 that they did it was to discriminate against people who were poor and
44 who were -- lacked education.
45 Most of them were black, and certainly the object of it more than
46 anything else was to discriminate against black people. But it was a
47 question not of hatred. The policy makers there, then, and here now
48 don't do things out of hatred. It's not that they hate black people.
49 It's not that they hate Latinos. It's not that they even hate -- or
50 in the late 19th Century, Chinese in the Northern California. It's not
51 so much that. It's a question of power. And in that sense, it's the
52 same thing. They're preserving -- they're using the political

1 structures and the rules of politics to preserve power for themselves
2 and people like them. And that's what it's about. That's what it's
3 always been about.
4 And so, in that sense, it's very similar in the Western United
5 States and in the South, it's very similar in this century and in the
6 last century. I've written a good deal about the two reconstructions
7 and the measures that ended the first reconstruction, and many of the
8 same things were used and are used to have the same effects now.
9 When I see the Georgia voter ID bill and the $35 charge for a
10 ten-year or twenty-year identification card in Georgia, it looks to me
11 awfully much like the poll tax in the late 19th Century.
12
13 When I see redistricting changes in Los Angeles County and
14 redistricting changes in Brighton County, North California, they look --
15 Brighton County, North Carolina looks very similar to me. So it's a question
16 of power and that's what ties the two together.
17 COMMISSIONER ROGERS: Thank you.
18 CHAIRMAN LEE: Commissioner Buchanan, would you like to say something?
19 COMMISSIONER BUCHANAN: Well, I just want to add a footnote. There was
20 no question, as Ms. McCormack would agree, that in 1950s and thereafter was a
21 great deal of racial prejudice in states like Alabama. It was there. But
22 there is also great merit, Professor Kousser, as I believe in what you say.
23 When we try to make a breakthrough as young Republicans in a state that
24 has been in the hands of Dixiecrats most of -- Democrats for 100 years, the
25 people were -- who held the power in counties around Alabama -- it was run by
26 county courthouse police and political machines in one party -- they were in
27 mortal fear of the fact that there were counties that were majority black in
28 Alabama, which would, in their view, guarantee they'd be thrown out of office
29 and lose their power. So I think what you say has to have merit, that
30 power has a lot to do. And if you don't take that into account in looking at
31 voting rights questions, you're missing a very important point.
32 The prejudice was clearly there, too, there's no question about it. But
33 the loss of power was clearly a strong motivation in trying to keep things as
34 they were.
35 CHAIRMAN LEE: This is a new trend. We have commissioners testifying
36 now. Ms. McCormack -- That was good. That was good.
37 COMMISSIONER BUCHANAN: There is my case, Mr. Chairman.
38 CHAIRMAN LEE: I was complimenting you.
39 COMMISSIONER BUCHANAN: Thank you.
40 CHAIRMAN LEE: Ms. McCormack, from your vantage point as an election
41 official, what changes would you like to see in the Voting Rights Act? MS.
42 MCCORMACK: I really directed my testimony very narrowly to Section 203 and
43 what most of this testimony has been on -- a lot of it has been on Section 5,
44 and certainly in terms of redistricting, I'd like to make sure everyone in
45 this room knows that our office has nothing to do with the board of
46 supervisors' lines, which is not always the case. There are counties where
47 the registrar is involved in that process. I'm glad to say ours is not one of
48 them. Clearly that's a very political process. I'd rather keep my testimony
49 on -- based on obvious need.
50 Los Angeles County is the most diverse county in the country and the
51 obvious need that arises through not just, you know, activists, you know,
52 that there's always a couple of activists, but a real community need has been
53 expressed that individuals simply cannot -- who have limited-English
54 proficiency try to deal with the ballot -- the complex ballots that we
55 have in this state. Perhaps that would be different if we didn't have

1 -- like if we were in a state without initiatives or propositions,
2 because I think, you know, names on a ballot, people can learn an
3 office and a name. But when you get into the complex ballots, the need
4 for it is dramatic. And so I think that in term -- and I don't see
5 it going away. If anything, it seems to be increasing.
6 Whether that's -- what Mr. Rogers indicated, whether that's a
7 cultural phenomenon, I don't know, I'm not an expert and don't have
8 any background in that. I just know that we have a very recognized
9 need for these services and I also know that county governments or any
10 government rarely funds a need unless there's a requirement. So it
11 really base -- it boils down to, without a requirement, I don't know
12 whether or not we would be able to sustain the level of services that
13 we're providing in this area.
14 CHAIRMAN LEE: Let me -- well, I didn't mean to put you on the
15 spot. I just wanted to ask -- I want to start with this observation.
16 I noticed that when I was at the Justice Department, state and local
17 officials actually sort of liked technical assistance, and the
18 technical assistance they liked most from the Justice Department was
19 funding. And with respect to the testimony you've given about
20 Section 203 and the high cost of the admirable programs you have, that
21 outreach and targeted advertising and things of that kind, I wonder to
22 -- I can't get any closer to this.
23 MS. MCCORMACK: There you go.
24 CHAIRMAN LEE: Should there be a funding component --
25 MS. MCCORMACK: No.
26 CHAIRMAN LEE: -- to Section 203 because --
27 MS. MCCORMACK: We've obviously never had a funding component to
28 Section 203, and prior to HAVA, we never had any ability to do any
29 advertising at all in our office --
30 CHAIRMAN LEE: Right.
31 MS. MCCORMACK: -- or in my 24 years of being a registrar in
32 Dallas, Texas, and San Diego and here. I never had anything, not even
33 an outreach coordinator that would be funded, so we were reliant on
34 developing PSAs and using that avenue, which often we didn't even have
35 the resources to put together PSAs.
36 So this last year was a new revelation to us because, as part of
37 our Help America Vote Act funding, we were eligible in our state to
38 apply for grants through the Secretary of State's office to improve
39 the process of voting and educating the public. And California, of
40 course, is required to provide everyone a sample ballot, which is very
41 unusual in most states. They do not have this service, which is a very
42 wonderful service that's mandated by state law. But to go beyond
43 that and actually be able to run paid advertisements in newspapers, I
44 think it has to had -- had to have some impact on the fact that we had
45 this remarkable voter turnout. I don't know. I don't have a way to
46 prove that.
47 But I do think that it made a difference to the community, that
48 they knew what their options were for the voting systems, 'cause we're
49 all in the process of changing voting systems, which is very difficult
50 for voters when you start introducing that level of change, and the
51 whole country's doing that right now, which is complex, to say the
52 least. And so a lot of our advertising dealt with how to use the

1 voting system, you know, how to -- what are the deadlines, how do I
2 get there, what are my options, can I vote absentee. People don't
3 always know these things. And, of course, all of us have Web sites but
4 not everybody has access to that, so I think it made a huge
5 difference.
6 As to whether or not it should be funded, obviously, I think that
7 all the local jurisdictions would love to see federal dollars behind
8 federal programs. I mean, that's a standard recommendation of
9 certainly our board of supervisors and I bet any board of supervisors,
10 so certainly we would love to see federal funding coming for federal
11 requirements, yes.
12 CHAIRMAN LEE: I thought you'd say that. With respect to --
13 Professor Avila, with respect to the State Voting Rights Act, do you
14 think there are any lessons in that Voting Rights Act for where we are
15 in the federal act which is thinking about some worthwhile amendments?
16 MR. AVILA: Well, there are several. Perhaps the most significant
17 one dealt with the bill of costs, and that is whenever a winning party
18 wins a case, they can automatically file their bill of costs, and that
19 includes defendants, which would be cities or jurisdictions. And in
20 the seventies, when I was litigating these cases, the bill of costs
21 would just be filing fees, copies, and so on, which would probably be
22 just a couple hundred bucks, especially in Texas. It was no higher
23 than that.
24 But in California, as a result of jurisdictions spending over a
25 million dollars in fighting these cases, the copying charges and all
26 of the ancillary charges that are subject to a bill of costs were in
27 the hundreds of thousands.
28 And what happens is that -- and this is documented in my written
29 testimony -- is that when a case is lost, as it was in Santa Maria, as
30 it was in El Centro, the jurisdiction filed a bill of costs against
31 clients that were very scared as a result of statements made by the
32 jurisdiction that they were going to lose their homes. And so, as a
33 result of that, an appeal was dismissed in the El Centro case and an
34 appeal was not pursued in the Santa Maria case. So in the State
35 Voting Rights Act, there is no provision for the recovery of bill of
36 costs by a winning jurisdiction in a case. That's one.
37 The second part of it and -- because, as a result of that -- it's
38 a chilling factor. People are not going to be filing these cases
39 because they don't want their homes to be taken away from them if they
40 lose, and we can't guarantee -- right? -- that we're going to win.
41 The other more substantive area is that under the Federal Section 2
42 Act, you have like close to nine different factors that courts look
43 at. You have the three precondition factors under Thornburg, and then,
44 if you're able to survive that, you get into the totality of
45 circumstances. In the State Voting Rights Act, we don't require
46 that. All we need to demonstrate is that there is racially polarized
47 voting plus dilution in -- dilution of minority voting strengths. The
48 two go together, so.
49 CHAIRMAN LEE: Thank you.
50 Professor Kousser, I have some questions, but I'm told -- I've
51 been told that we have to pretty much end this session because we're

1 running out of tape. But I wonder if -- oh, I wonder -- this is my
2 question.
3 With respect to the standard for coverage, it would be very nice
4 if we could get some more details of what your thoughts are on that as
5 well as the other recommendations that you made. And I wonder if you
6 could supplement your testimony in some way.
7 MR. KOUSSER: I will send you something.
8 I think that there should be coverage wherever there is -- you
9 gather information about what the exact percentages should be, but if
10 a group or a set groups in a county is more than 20 percent or is 20
11 percent, say, then it seems to me that there are -- that Section 5
12 coverage ought to be extended.
13
14
15 If it's less -- and the figure is somewhat arbitrary. You
16 may be able to hone that figure better, make it larger or smaller. Or if
17 there has been a successful case or a Section 5 objection over the last X
18 period of years -- and, again, your evidence will probably be able to fill in
19 that X better than I.
20 The object of this is to say here is where we expect to see voting
21 structures or voting rules adopted which are likely to be discriminatory and
22 in other places it's less likely to occur. And that makes very much more than
23 a rational basis. It may make -- it may be something that will survive strict
24 scrutiny under City of Burney. It's -- but it would enable the Commission to
25 say that we have very good reasons for the -- because of the evidence that we
26 have gathered, to try to modernize the Voting Rights Act and make sure that
27 it covers exactly who it ought to cover.
28 In 1970 and 1975 there were proposals to make Section 5 national,
29 universal coverage. The purpose of that was really to flood the Justice
30 Department with so many voting changes, that it would not be able to make
31 distinctions between them and enforcement would go out the window. That's
32 the wrong thing to do, but there should be more nationalization of the Voting
33 Rights Act than there is today.
34 Those two sorts of provisions with numbers to be filled in and exact
35 provisions to be made on the basis of your more extensive experience than
36 mine seem to me to be the right way to go.
37 CHAIRMAN LEE: I think that the effect of -- I think some of the
38 testimony we've heard from the Northeast in particular places does indicate
39 the unhappily the national persistence of vote -- of polarization but also,
40 you know, supports I guess the argument you're making. I don't know,
41 Chandler. Do you think that's true? That there seem to be -- you know, we're
42 not talking about that fact it's focused on the South anymore.
43 COMMISSIONER DAVIDSON: Yeah, I think that's true.
44 CHAIRMAN LEE: That was eloquent. Okay.
45 So we're done and we're breaking for lunch. And we have lunch --
46 where, Chandler?
47 COMMISSIONER DAVIDSON: Over there.
48 CHAIRMAN LEE: -- over there for everybody, and we'll start up again at
49 1:05.
50 Thank you very much for this panel. And it's been one of the more
51 instructive panels we've had actually.
52 Thank you very much.
53 (At 12:28 P.M., the hearing was adjourned for noon recess.)
54 (At 1:18 P.M., the hearing was reconvened.)

1 CHAIRMAN LEE: Okay. We're now going to resume the hearing in the
2 Western Regional Hearing of the National Commission on Voting Rights Act.
3 Our second panel consists of three guest panelists: Robert Rubin. He's
4 the legal director of the Lawyers' Committee for Civil Rights of San
5 Francisco.
6 Notwithstanding his youthful appearance, Mr. Rubin has been a
7 civil rights lawyer for 25 years, specializes in immigration and voter
8 rights. He's done many cases on the Voting Rights Act, but also under
9 the National Voter Registration Act of Law. And he was counsel to
10 Latino voters in the Monterey County case that was earlier discussed.
11 And more recently, he was counsel to minorities voters challenging the
12 elimination of community-based voting precincts during the 2003
13 California gubernatorial election. And he has testified numerous times
14 before the California Legislature and the United States Congress.
15 Prior to coming to the Lawyers' Committee, he was ACLU staff counsel
16 in Jackson, Mississippi.
17 Debbie Hsu Siah is the fund developer of the Chinese Information
18 and Service Center of Los Angeles. Ms. Siah works for the Service
19 Center, which is a nonprofit social service agency, as a housing and
20 urban development fellow at the University of Washington. Ms. Siah
21 documented voter access issues and conducted voter outreach projects
22 for local nonprofit organizations.
23 I think I moved you to Los Angeles when you're actually from King
24 County in Washington state. Sorry.
25 Since July 2002, Ms. Siah has helped coordinate the King County
26 Section 203 Community Coalition that monitors bilingual voter access
27 in King County.
28 The third member of our panel is Rosalind Gold, the senior
29 director of NALEO. She's a senior director, policy research and
30 advocacy for NALEO. NALEO is the National Association of Latino
31 Elected and Appointed Officials.
32 I guess you're with the educational fund.
33 Ms. Gold has worked there for over a decade on policy analysis
34 and research for the naturalization and Latino power empowerment
35 efforts of NALEO. Her areas of expertise include election reform, a
36 census, and the restructuring of the nation's immigration bureaucracy.
37 Welcome. Why don't we begin with you, Mr. Rubin.
38 MR. RUBIN: Thank you very much. Again, I'm Robert Rubin with
39 the Lawyers' Committee for Civil Rights in San Francisco. Am I doing
40 okay on sound? Morgan Kousser talked about how he followed Joaquin
41 Avila and how difficult that was. Well, I've been following Joaquin
42 Avila and Morgan Kousser around voting rights issues for the better
43 part of ten or fifteen years now, and I'm not sure what I have to add,
44 but I will try to make it as informative and interesting as possible.
45 COMMISSIONER DAVIDSON: Mr. Rubin, could I interrupt and ask you
46 if you could move the microphone just a little bit closer. I know it's
47 close now, but I'm having a hard time hearing everybody on the panel.
48 And speak clearly and -- and keep on going. Sorry to interrupt.
49 MR. RUBIN: No problem.
50 CHAIRMAN LEE: We ourselves are going to try to do that also.
51 MR. RUBIN: I think the acoustics are challenging in this room.
52 What I'd like to try to focus on is, not so much some of the legal

1 standards that I think you heard a lot about in the earlier panel, but
2 some of the things that I've observed and learned just about voting
3 behavior in California, and around the issues that we've litigated.
4 As my written testimony connotes, there's essentially four areas
5 that I'd like to focus on. One of them I think I'll probably skip,
6 given the earlier discussion, which is Lopez versus Monterey County.
7 That was a case that Joaquin Avila and I cocounseled to the Supreme
8 Court, actually twice. Once, it didn't quite feel like a voter rights
9 victory, because Clarence Thomas voted for us. The second time it was
10 eight to one. It felt a lot better when he dissented.
11 But having prevailed on that, that was a fairly clean legal
12 issue, although I should say, just in terms of voting rights behavior,
13 is that we had a very interesting reaction from our District Court
14 panel. Of course, there is a Section 5 case, so it was a three judge
15 panel. And the judges were really quite incredulous that we could be
16 alleging discrimination and retrogression in the Section 5 context.
17 And there really was that attitude of, well, that's -- that's
18 Alabama, that's Mississippi, that's not the enlightened state in which
19 we live here in California. And it's required quite a bit of
20 education.
21 So, as I talk about some of these issues, I'd like to talk, not
22 just about the behavior of voters, but the reactions of behavior of
23 judges, particularly state court judges that we're trying some of
24 these cases in front of now.
25 One of the other issues that we've addressed in our office is the
26 special elections, and what happens when special elections are called.
27 I'm not sure, is there one this week, Rosalind? Or is it -- it almost
28 seems as if we're dealing with it on a weekly basis. We, of course,
29 had the gubernatorial election, and on that I think I would ascribe to
30 Morgan Kousser's views that, well, it wasn't as blatant as literacy
31 tests and poll taxes, we did have an extraordinary reduction and
32 consolidation of voting precincts. We noted at least 17 instances
33 in which voting booths were being moved out of Latino neighborhoods to
34 remote areas. In one instance, it was being moved to the sheriff's
35 posse clubhouse, an Anglo hunting club that was not known for
36 particularly friendly attitudes towards Latinos. And these changes
37 were being adopted, were going forward, without Section 5 pre-
38 clearance. This was in Monterey County as well as in several other of
39 the other four counties in California that are covered jurisdictions.
40 We sued on that, we got a temporary restraining order, and the
41 court was just about ready to hold up the whole gubernatorial election
42 itself, when Monterey County and the other counties finally did exceed
43 to the provisions of Section 5 and submit on their changes for pre-
44 clearance. I should add, as to the efficacy of Section 5, it wasn't
45 just a procedural submit and pre-clear process, but that, what the
46 county ultimately acknowledged, is that several of those changes --
47 those closing of voting booths, the moving of those voting booths out
48 of predominantly Latino neighborhoods into areas that, if they weren't
49 hostile to Latinos, they were miles away, not accessible by public
50 transportation and had a clear chilling effect on their voting rights,
51 that those -- that those changes could be found to be retrogressive
52 and the County, in fact, withdrew those voting precinct consolidations

1 and restored the polling places in those various places in the Latino
2 neighborhoods. So, that was one instance in the gubernatorial
3 election.
4 Another instance I think that's particularly important, is the
5 letter of objection that we received involving the Chualar School
6 District. And, again, my colleague, Joaquin Avila, because we work in
7 tandem on a lot of these issues, has stepped on my lines and I won't
8 bore you with the details of that. But I think it's important to know
9 that the Justice Department in 2002 issued a letter of objection to
10 this school district that has a 75 percent Latino voting age
11 population, 55 percent registration rate. And, despite these figures,
12 DOJ issued a letter of objection because of the strong evidence of
13 discrimination against Latino voters. Quoting a little bit from
14 their findings, the DOJ found evidence that the petition drive -- this
15 was a petition drive to recall the elected official -- the Latino
16 elected officials -- that the petition drive to -- was, quote,
17 motivated, at least in part, by discriminatory animus. The cover
18 letter for the petition drive, quote, attacked the credibility of the
19 districts of the trustees from the district citing the language skills
20 of one trustee and making unfavorable references to the language
21 preferences of another.
22 And so, here, it wasn't the -- the "N" word being spewed about by
23 a Southern Secretary of State or a Registrar of Voters, but it was a
24 ridiculing of one's language preference, of an elected official's
25 language preference, that was relied upon by the Justice Department
26 for its finding, that these proposed changes would be retrogressive.
27 The Justice Department actually determined that the proposed
28 change would have a retrogressive effect on Latino voting strength and
29 noted these two points: One, that despite the 75 percent Latino voting
30 age population, that the Latino voters had experienced some mixed
31 success in voting and, when they were successful, they faced constant
32 and sometimes successful, as in this instance, efforts to recall the
33 candidates that they had elected.
34
35
36 So, even once they'd elected them, they would then resort to recall
37 elections in which there would be lower turnout, and the Anglo voters would
38 recall the Latino elected officials.
39 So the DOJ did confirm that, during that referendum election, the Anglo
40 proponents easily defeated the Latino opposition under, quote, highly
41 charged, racially polarized circumstances.
42 Okay. So I think that you have there the reasons why we need Section 5.
43 And it's a little different than I think it was in the South, and I've got
44 some experience with that, having spent the first couple of years of my
45 practice, when I really was young, in Mississippi. And here, it's more
46 about changing demographics. And, although I have the utmost respect for
47 Morgan Kousser, I would suggest, it's not quite simply about power -- that
48 there is a racial element here involved. We've analyzed these recent
49 elections.
50 We've analyzed elections like Proposition 187, which is a statewide
51 referendum that would have denied education to immigrant children. This was
52 one of the most -- in fact, he did some of the analysis for us, Dr. Kousser
53 did. This was one of the most racially polarized votes that we've ever seen.

1 It was -- it was incredible, the kind of numbers that we got out of that
2 analysis.
3 The California voters were not concerned about immigrants coming across
4 the Canadian border. They were not concerned about the Western Europeans
5 that had overstayed their tourist or student visas, who I might add, comprise
6 50 percent, that's correct, one-half of the undocumented immigrant population
7 in this country is made up of overstays, people who are typically from
8 Western Europe, that come in on tourist visas and student visas. Yet, that
9 was not what propelled the California electorate in 1994 to vote almost 60
10 percent in favor of Proposition 187. It was the fear of the brown immigrant
11 coming across the Mexican border. Dr. Kousser is absolutely correct,
12 however, that there is a power element here and we've seen it in local
13 jurisdictions, in Kings County, in Monterey County, and that these changing
14 demographics, and the potential attendant power shifts that they bring, may
15 create and do create a temptation for incumbents to make those kinds of
16 voting changes that we typically only associate with the South.
17 So we saw it in Chualar, where changes are made quickly to a voting
18 schedule and a recall -- a referendum election is held to, essentially,
19 recall previously elected Latino officials. That would be a change that would
20 be subject to Section 5.
21 Or, as in Hanford, California -- Hanford is in Kings County, the San
22 Joaquin Valley -- we recently filed one of the only two lawsuits that have
23 been filed under the California Voting Rights Act. The suit was against the
24 high school board, one of the largest school boards in the State of
25 California.
26 Hanford, although they quickly settled because it was a dead-bang
27 winner for us and they didn't want to pay our attorney's fees, has
28 fought tooth and nail on how the district lines are going to be drawn.
29 They're incredibly hostile to this and, in that case, Dr. Kousser's
30 absolutely correct. They see power slipping away. In some cases they
31 may be evil, but they are not stupid.
32 They realize the reality of the demographics. And, when Latinos
33 are coming in, in the kind of numbers that they are to our state, when
34 people are becoming naturalized citizens, when the citizen voting age
35 population is getting to the levels that it does, entrenched power is
36 fearful. And so, when we were in Hanford, I was accused of playing
37 games with the law for having filed a suit under the California Voting
38 Rights Act that you heard described earlier. Why? Because we relied on
39 the law. I didn't think that was playing games. I thought that the
40 school district that had long since shut out the Latino community,
41 such that there were no Latino elected official on the school board,
42 despite a 40, 50, almost 60 percent school attendance rate, that there
43 was not a single Latino elected official on that board until very
44 recently, that that was a school board -- that was a local
45 jurisdiction playing games and playing very serious games with the
46 lives and the educational aspirations of these children. And so
47 that is why we need Section 5 so that when influenced districts in
48 places like Hanford, influenced districts being anywhere from a 35 to
49 40 percent -- lower 40 percent district, in which, with minimal
50 crossover votes, Latino and minority candidates can get elected. When
51 those influenced districts threatened to become the majority minority
52 districts, we're going to see these last-minute changes in voting
53 procedures that Section 5 needs to be able to cover.

1 And when special elections are called, we're going to see long-
2 standing polling places moved. We're going to see polling places
3 consolidated. We're going to see people inconvenienced and, indeed --
4 in perhaps more subtle ways, but no less effective ways, shut out of
5 the voting process. That is why Section 5 is still needed here in
6 our enlightened State of California and that's why the Congress ought
7 to be reauthorizing Section 5 and ensuring the important protections
8 remain main in effect. Thank you.
9 CHAIRMAN LEE: Thank you, Mr. Rubin. Ms. Siah.
10 MS. SIAH: I thought he was going to have questions afterwards.
11 CHAIRMAN LEE: We're going to have questions at the end of --
12 MS. SIAH: At the end. Okay.
13 CHAIRMAN LEE: If possible, try to restrict your comments to
14 between five and ten minutes.
15 MS. SIAH: Sure. Well, I want to thank the Commission for
16 inviting me here today. And I represent the Section 203 community
17 coalition in Seattle, Washington or King County, Washington. And we're
18 a coalition of nonprofit organizations that are involved in voter
19 outreach efforts in King County. So all of us are volunteers and we
20 all have different jobs during the day, but we're really excited to be
21 part of this hearing today.
22 We learned about our Section 203 distinction in King County in
23 July of 2002. And the Coalition has worked pretty closely with our
24 elections office to ensure full compliance and has been quite
25 successful. Besides scheduling, sort of, the monthly meetings with our
26 elections office, we've worked together to produce an impressive array
27 of bilingual materials. This is the first time that King County's had
28 to implement any type of bilingual voter assistance, so they were
29 starting from zero, and we've been with them since that process.
30 So we're very happy to report that, because of our advocacy
31 efforts, we've hired a minority language coordinator -- or our
32 elections office has -- and been able to implement a good program.
33 We've also conducted six successful poll monitoring projects at
34 polling sites, with the help of the National Asian Pacific-American
35 Legal Consortium, and also the Asian Pacific-American Legal Center
36 here in Los Angeles.
37 We've also sent bilingual mailings to about a hundred -- to --
38 excuse me -- to 20,000 registered voters with Chinese surnames, to
39 tell them about the bilingual ballot availability. We've designed
40 script for the elections office for their poll worker training so that
41 they are able to educate their poll workers about Section 203 and also
42 some of the questions that voters may have on the polling day. And the
43 video was watched by all 3,000 of the King County's schoolworkers and
44 judges.
45 We've conducted poll worker surveys to find out their impression
46 of interactions between poll workers, since a lot of them have -- most
47 of the poll workers, at least that I've witnessed, are not minorities,
48 and so we wanted to get impressions from some of the minority poll
49 workers in terms of their interactions, and also the training that
50 they received. And we also sent out mass mailings to over 8,000
51 families requesting assistance for bilingual poll workers to recruit
52 them for the important job on election day.

1 So these projects and outreach efforts have made voting -- legal
2 voting -- accessible for the English limited proficient community in
3 King County. And our work with the elections office started with 278
4 voters that requested bilingual assistance. And that number's grown to
5 1,415, so we still are small in the numbers, just emphasizing the need
6 for outreach in our community. I guess it's sort of been a work in
7 process and we've had a couple years to strengthen this program, but
8 we have had instances where we've run into miscommunication at the
9 polling sites as well as other problems surrounding written materials,
10 on-line materials, and oral language assistance.
11 In particular there was no effort from the elections office to
12 recruit bilingual poll workers and it remained inconsistent. Also,
13 once they were recruited, they weren't sent to the targeted sites
14 where help was most needed.
15 In addition, voters were unable to identify bilingual poll
16 workers at polling sites. They didn't know who to go to when help was
17 needed. And we addressed this at several of our poll monitoring
18 projects in King County.
19 In terms of our on-line assessment of materials, many of the
20 different things posted on the Secretary of State Web site were
21 translated incorrectly. We found that the Secretary of State would use
22 software which translated English directly into Chinese using English
23 syntax, so it didn't make any sense, so it was just gobbledygook, I
24 guess you could say, and so when someone tried to read information on-
25 line, they wouldn't weren't able to. And when we talked to the
26 Secretary of State about this issue, they took it off their Web site
27 and they never put anything else back on, because they thought that
28 they weren't required to do any type of translation and the
29 translation they did do was out of courtesy for the community. And
30 this was also evident in the Korean community as well.
31 And the Secretary of State also translates the voter pamphlets
32 every, I think, other year, and then King County will translate it.
33 They share the translation responsibility and the printing
34 responsibility. And when they did translations, we also found a lot of
35 different problems with the translations and had -- which caused a
36 delay in sending out of the Chinese mail ballots, so folks that voted
37 with the bilingual ballots got their ballots later, meaning that less
38 people had a chance to turn them in and, therefore, vote for
39 candidates of their choice.
40
41 We found that in many of the polling sites a lot of poll
42 workers did not know or were unaware of where to put signs, you know, which
43 way was up, which way was down, in terms of Chinese characters, so things
44 were all in the wrong places. They also had Chinese language ballots that
45 were still sort of in the shrink-wrap on the table or underneath the table,
46 and weren't visible for folks to look at.
47 We also found, because the County didn't have a way to track or to send
48 out bilingual voter materials in the beginning, we've had voters that would
49 receive Chinese language ballots for primary election, but when the general
50 election came around, they didn't get the Chinese ballot and they'd call the
51 elections office multiple times to request the materials, and it just never
52 came. So finally they'd have to go into the elections office themselves to
53 pick things up, which made it difficult for many people, and thus,

1 discouraging them to go out and vote even though they were registered. We
2 also found just numerous translation issues that we've struggled with.
3 And the other thing that I wanted to talk about was just reminding us
4 about some of the state initiatives and -- state initiatives that have been
5 passed to try to make voting harder for immigrant communities. In Seattle
6 we have initiative 313, if passed -- this is a current legislation, that
7 voters can vote on in the general election. If passed, the aggressive
8 initiative would require voters provide proof of citizenship, telephone
9 number, occupation, former residence, and evidence -- different evidence
10 pieces in order to vote. So consequently we'd see that immigrants and
11 refugees, many who are already fearful of, you know, providing information to
12 the government, would be discouraged from voting. Also, last year our
13 Senate Bill 5499 on Section 7 required additional identification upon every
14 visit to the polling site, making this process tedious and repetitive for no
15 apparent reason. This would increase the wait time during voting and also
16 encourages voters to leave polling sites without voting. Unfortunately the
17 Senate Bill was approved in May 2005. And those are the two sort of big
18 legislative piece that we've seen affect the community.
19 And each time we conduct poll monitoring, we always run into poll
20 monitors and judges that are exceptionally rude and harass poll workers and
21 they always question why there is a need for bilingual assistance. I mean,
22 I've observed, personally, poll workers intimidate voters by making side
23 comments like, you know, why don't you read English or, if a poll -- if a
24 bilingual person comes up and needs extra assistance or extra time to fill
25 out a ballot, poll workers will not be patient with them. And also we've had
26 some elderly poll workers just mention that this is just not -- that the
27 hostile environment makes it difficult to vote. And I think those -- our poll
28 monitoring just shows us a lot, we're at the polls, and we do see things
29 happen every day.
30 In general, the Coalition, though, is confident that the Section
31 203 of the Voting Rights Act has helped King County. Many of these
32 instances that I've mentioned happened throughout the past two years.
33 However, our agenda's always full of advocacy items when we do talk to
34 the elections office.
35 We wanted to just really emphasize the need for Section 203 in
36 our community and we hope that the Commission continues to advocate
37 for its reapproval in 2007.
38 CHAIRMAN LEE: Thank you, Ms. Siah. Now we'll hear from
39 Rosalind Gold of NALEO.
40 MS. GOLD: Thank you. Chairman Lee, commissioners, fellow
41 panelists and invited guests, I'm Rosalind Gold. I'm the senior
42 director of policy research and advocacy, with the National
43 Association of Latino Elected and Appointed Officials, which is NALEO
44 Educational Fund. And I also want to thank the Lawyers' Committee for
45 Civil Rights Under the Law for inviting me to testify today.
46 The issue that this hearing is addressing is very, very critical
47 for our community and we really welcome the opportunity to share
48 information that we have gained from over two decades of work with the
49 Latino community in California.
50 The NALEO Educational Fund is a nonprofit, nonpartisan
51 organization and our mission is to empower Latinos to participate
52 fully in the American political process on the full spectrum from
53 citizenship to public service. Our constituency includes the more
54 than 6,000 Latino elected and appointed officials nationwide, and

1 about one-fifth of them are Californians. So, you know, California's a
2 very, very critical state for Latino political progress in Latino
3 political participation. In 2001 we launched our Voces del Pueblo
4 program, which is a comprehensive effort to mobilize Latino voters
5 across the country who do not yet fully participate in the electoral
6 process. And through our Voces program, we've conducted several voter
7 forums in California, and we've also done mobilization where we've
8 reached more than 350,000 California Latinos with motivational and
9 informational materials through the media, through the phone, and
10 through the mail.
11 And our Voces program also includes a national bilingual voter
12 information hot line called VE-Y-VOTA or come and vote which has
13 provided assistance to more than 1,300 callers since September 2004,
14 including about 3,500 in California.
15 Most recently, in the May 2005 municipal elections that were held
16 in Los Angeles, we conducted a survey and monitoring of 89 polling
17 sites to evaluate their accessibility to Latino and other language
18 minority voters. And through all of our mobilization and our Voces
19 activities, we've really gained valuable knowledge about the barriers
20 Latinos face in voting and registration. Although the written
21 testimony that I'll be submitting will cover a wider range of issues
22 than my spoken testimony to you today, I just want to focus on what
23 we've learned through our voter engagement programs about the
24 importance of the language provisions of the Voting Rights Act, the
25 importance of the Latino participation, the challenges Latinos have
26 experienced in obtaining that assistance in California, and the impact
27 on their ability to participate.
28 First of all, just some basic information about coverage of the
29 Voting Rights Act, Section 203, and other language assistance, Section
30 4, for Spanish in California. The entire state is covered for
31 Spanish under the Voting Rights Act. And under Section 203, 25 of the
32 state's 58 counties must provide a language assistance in Spanish to
33 voters. That's only 25 out of 58 counties, but those 25 counties are
34 home to 95 percent of the state's Latino population. So, essentially,
35 every -- virtually every Latino in California really lives in a county
36 that's covered under Section 203 for Spanish.
37 With regard to the language ability of California Latinos,
38 according to data from the Census 2000, about 15 percent, which is a
39 little bit over more than 1 out of 7 of California Latino adult U.S.
40 citizens, report that they have limited proficiency in the English
41 language. And that's about 419,000 Latinos in the state.
42 When we look at what we've learned from our voter engagement
43 activities, again, we really believe that the language assistance
44 required under the Voting Rights Act is critical to ensure that
45 Latinos can surmount the barriers to political participation in the
46 state. And when we look at this assistance, we really see that it's
47 important that it be provided at all stages of the voting and
48 registration process.
49 You know, many folks just focus on the informational materials
50 that are provided in the polling booth. But when we look at the
51 process of being able to participate, you need a certain set of skills
52 to sort of navigate the electoral bureaucracy, just to get registered

1 to vote, just to get information about voting, and it's very important
2 that language assistance be provided in all of those stages.
3 For example, some of the callers to our VE-Y-VOTA hot line
4 reported that they had problems obtaining information about voter
5 registration or resolving registration problems. And they couldn't
6 obtain assistance in Spanish when they would call up phone numbers
7 established by election officials. They would call the local election
8 office or the number that would be publicized by election officials
9 and they were told that there was no one available to help them in
10 Spanish. Other callers were just put on hold until they could try
11 to find somebody who would speak Spanish. Other callers, the minute
12 they asked for assistance in Spanish, basically, they just got hung up
13 on. So, like I said, it's really important even at the initial contact
14 that folks have with the electoral process that the requirements of
15 Section 203 are complied with.
16 From our work we also found that these kinds of challenges also
17 confronted Latinos in the voting booth in election day 2004. And,
18 again, what we learned is that Latino voters with limited-English
19 proficiency have real challenges casting ballots because they can't
20 get Spanish language voting informational materials. Also, in some
21 cases, and this is very similar to what Debbie found in Kings County,
22 they were found that there were no bilingual poll workers available to
23 help them. We've also had reports from Spanish-speaking voters that
24 they were treated rudely or they were ignored by poll workers.
25 When we've talked to Latino voters at some of our informational
26 forums -- you know, there's a real sense that, if you need language
27 assistance in Spanish in some polling sites, the poll workers treat
28 you like a problem voter. You're seen as a problem. You need more
29 time. They have to go to extra steps to take care of you. And that
30 poll workers are less amicable and more impatient with Spanish-
31 speaking voters and they do not get the same quality of assistance as
32 English-speaking voters.
33 When we actually surveyed polling cites in the 2005 Los Angeles
34 municipal elections, we also found some problems with the availability
35 of Spanish language informational materials. About 15 percent of
36 the polling sites did not have Spanish language sample ballots
37 available, and a larger percentage also lacked other important
38 informational forms materials.
39 For example, in California the Secretary of State puts out a
40 Voters Bill of Rights, which is supposed to be available at every
41 polling place under the Help America Vote Act. There is just supposed
42 to be basic information about your rights as a voter that is available
43 at the polling place. About one-third of the sites that we surveyed
44 didn't have Spanish language Voter Bill of Rights. About one-half of
45 the sites had -- lacked Spanish language information on provisional
46 voting and 80 percent of the sites had no information on how to
47 contact election officials if you had complaints or concerns.
48 The NALEO Educational Fund strongly supports the reauthorization
49 of all of the Voting Rights Act provisions that are up for renewal,
50 because we believe they're critical to ensure that the state's growing
51 Latino electorate become fall participants in California's democracy.
52 Certainly we have seen progress in terms of Latino participation in

1 California. For example, if we look in November 1992 presidential
2 election, there were about 1.1 million Latino voters. Compared to
3 November 2004, that number almost doubled to reach 2.1 million. We
4 also know, if we look at just the number of Latino elected officials,
5 in 1984 there may be in California about 400 or so. That number is now
6 topping a thousand. But we really have a lot more progress to make and
7 a lot more challenges to face.
8 For example, if we look at the last
9
10
11 presidential election, Latinos were 31 percent of the states' adult U.S.
12 citizen population, but they were only 16 percent of the actual voters who
13 went to the polls. And we know, generally, even though the numbers of Latino
14 voters continue to rise, the participation, the percentage of Latinos who are
15 actually getting to the polls of the citizen population still is staying
16 between 40 to 50 percent of adult Latino citizens who are actually getting
17 out and voting.
18 And the language assistance provisions are also particularly important
19 because of the critical role that Latino naturalized citizens play in the
20 state. According to 2000 Census data, while naturalized Latinos are about 40
21 percent of all adult citizen Latinos, naturalized Latinos are 80 percent of
22 those who are not fully proficient in English. Yet we know from our
23 experiences working that Latino naturalized are a growing segment of the
24 overall Latino electorate and they're very eager to participate in the
25 electoral process.
26 In 1996 Latino naturalized citizens were about 25 percent or about one
27 out of four Latino voters in California were naturalized citizens. In 2004,
28 they were about 31 percent, nearly one out of three of Latino voters.
29 Ensuring that these voters continue to obtain the language assistance
30 required by the Voting Rights Act is really the key to the future growth and
31 vitality of the Latino electorate in California.
32 When Congress first extended the protections of the Voting Rights Act
33 to Latinos and other language minorities in 1975, Congress recognized that
34 lack of access to educational opportunities and limited-English proficiency
35 prevented minorities from exercising their fundamental right to vote.
36 It's 30 years later and we acknowledge that our community have, indeed,
37 made significant progress, but we still confront barriers in making our
38 voices heard on election day. Reauthorization of the provisions of the Voting
39 Rights Act that are up for renewal will not only ensure that our communities
40 can surmount those barriers, but it will strengthen our democracy and ensure
41 that it's responsive to all of the citizens in our state and in our nation.
42 Thank you for the opportunity to testify.
43 CHAIRMAN LEE: Thank you, Ms. Gold. Now, at this point, we're going
44 to have -- Jonah is going to read some testimony that will be received from
45 Hawaii.
46 MR. GOLDMAN: Thank you, Mr. Chairman. My name is Jonah Goldman. I'm
47 with the Voter Rights Project for the Lawyers' Committee. I have two
48 testimonies to read, both coming from Hawaii. The first one comes from Wing
49 Tek Lum, who is the cochair of the Voter Registration Committee for the
50 Chinese Community Action Coalition in Honolulu. The subject of the testimony
51 is actually about mail-in voting. And the reason why it's appropriate for
52 this commission is because -- Wing Tek Lum suggests that it's because of the
53 language barriers that -- that Chinese voters encounter in voting in
54 the -- rather, voting in Honolulu, is the reason why his organization

suggests that most voters should be voting by mail instead of voting in the polling place, at least most Chinese voters.

"Chinese Community Action Coalition operates programs directed towards Chinese immigrants: A citizenship tutorial, voter registration, and a candidates forum. For the past five election years it has conducted drives to help citizens in Chinatown register to vote and/or apply for absentee ballots. In 2004 it served nearly 600 registrants, a 40 percent increase from the previous election year.

"Chinatown's immigrants primarily come from parts of Asia lacking traditions of democratic elections and voting. Nonetheless, after arriving in America they have worked hard to become citizens, especially passing the citizenship exam, and are now proud to exercise their voting franchise. In addition, once they have discovered Voting by Mail, they make sure they reapply for this friendly method in subsequent years.

"Voting by Mail encourages voting especially by immigrants, the elderly, the disabled, and those who may not be able to easily take off work to go to their polling places on election day. By voting at home voters feel freer to consult with family and friends, are able to deliberate on whom to vote for without rushing, and can carefully make sure that the actual casting of the ballots are without mistakes which would validate their votes. Furthermore, the Chinese translation to the absentee ballot instructions, which CCAC initiated in 1996, but which is now being undertaken by the City Clerk, provides an extra measure of assistance to those voters who do not feel confident about their English language ability.

"More and more voters are realizing that Voting by Mail is both convenient and reliable. However, state laws and regulations could be even more application friendly. Three suggestions are as follows:

"Number one, at present, although Deputy Voter Registrars may collect and deliver to the City Clerk on behalf of registrants the application for voter registration, they cannot do the same for the absentee ballot application; only the registrant himself can personally send in or deliver his own absentee ballot application. However, many new registrants wish to apply for both at the same time. Also, those already registered may feel it easier to apply for absentee ballots if a Deputy Voter Registrar assists in the delivery. Since the Deputy Voter Registrars are already under oath to obey all laws with respect to the collection and delivery of voter registration applications, they should be entrusted under the same oath to collect and deliver absentee ballot applications.

"At present, absentee ballot applications must be applied for each election year, primarily because this method of voting was initially established to accommodate travelers. But now more nontraveling voters want to take advantage by Voting by Mail in their homes, not just once but in each election year. Accordingly, Voting by Mail should be a right which after the first request is automatically carried over to subsequent election years. "Number three, at present, absentee ballot applications can be received by the City Clerk no earlier than 60 days prior to the primary election. Yet the City Clerk now sends its yellow postcards notifying voters of their polling places and election districts in the spring; at that time many

1 voters begin thinking about the voting process and have wanted to make
2 sure that they are able to apply for Voting by Mail early. They should
3 be accommodated by allowing the City Clerk to receive absentee ballot
4 applications up to 180 days prior to the primary election."
5 The second testimony, Mr. Chairman, is from Patricia McManaman,
6 who is an attorney and the Chief Executive Officer of Na Loio, which
7 is Immigrant Rights and Public Interest Legal Center, also in
8 Honolulu.
9 "Founded in 1983, Na Loio is a nonprofit legal services
10 association that provides free legal services for indigent immigrants,
11 simple advice and counsel, community education and advocacy in the
12 public interest. Over the past six years Na Loio has gathered
13 anecdotal information regarding voting procedures and on several
14 occasions has submitted complaints to election officials or spoken
15 with the press concerning voting irregularities. Those irregularities
16 include:
17 "In the late 1990s, polling sites in Hawaii Kai failed to post
18 multilingual materials at the poll places. At one polling site, the
19 worker expressed surprise when advised that the law required the
20 posting of multilingual material. After spending several minutes
21 searching her supply boxes, the poll worker found the materials and
22 posted the same. In speaking with her, she noted that multilingual
23 materials were not identified in English anywhere and she was, in
24 fact, reluctant to post them not knowing with they were for. She
25 called her office to verify the posting requirement. I, in turn,
26 phoned in a formal complaint. When the Office of Elections returned my
27 telephone call, I discussed the matter with them for several other
28 calls. I suggested they place an English translation of the limited-
29 English proficient materials in a prominent place to provide notice to
30 English speakers and to create a check-off box on the set-up sheet to
31 note that all the multilingual materials had been posted. They did not
32 appear to welcome my suggestions. "In early 2000, I again visited
33 one of the Hawaii Kai polling stations and noted that the station
34 workers had failed to post a multilingual informational piece on a
35 hotly contested constitutional amendment question, despite an order
36 from the Hawaii Supreme Court directing all polling stations to post
37 the specified materials. When the matter was brought to the attention
38 of the poll captain, the materials were posted. "In 2003, I
39 contacted city and county officials regarding my daughter's absentee
40 ballots. The election was rapidly approaching and she had not
41 received the same. She is attending school in Canada and it normally
42 takes an excess of ten days for mail to reach her. She was eventually
43 able to vote by phone, but only because I was here to facilitate the
44 same and was quite adamant in my request that she be allowed to vote.
45 My daughter is part Japanese. Hawaii law needs to be amended to allow
46 earlier mail out of absentee ballots to ensure that those who live
47 abroad or in remote areas of the United States have the ability to
48 cast a timely ballot. "Thank you for your work on behalf of voting
49 rights. Sincerely, Patricia McManaman." Thank you.
50 CHAIRMAN LEE: Well read, Jonathan.
51 MR. GOLDMAN: Thank you very much, Mr. Chairman.

1 CHAIRMAN LEE: We'll start the questioning with Commissioner
2 Rogers.
3 COMMISSIONER ROGERS: Yes, thank you very much, Mr. Chairman.
4 Hispanics, as a percentage of California's population, are what
5 percentage?
6 MS. GOLD: It's about a third.
7 COMMISSIONER ROGERS: About a one-third of California's
8 population is Hispanic? Of the third of the population of California
9 that is Hispanic, what percentage of the population is undocumented or
10 considered to be illegal?
11 MS. GOLD: You know, there's estimates that really range all over
12 the place for that. So I really can't give you a precise number on
13 that.
14 COMMISSIONER ROGERS: What's the low and the high?
15 MS. GOLD: You know, I would want to get back to the commission on
16 that.
17 COMMISSIONER ROGERS: Do you know that number, by chance? Robert,
18 do you think that --
19 MR. RUBIN: The percentage of Latinos in California --
20 COMMISSIONER ROGERS: -- who are considered to be undocumented or
21 illegal, as a basis of the population.
22
23 MR. RUBIN: The raw number is anywhere between 2 to 3 million.
24 COMMISSIONER ROGERS: I've heard that number. I didn't know -- so, if
25 it's 2 to 3 million Hispanics that are here and -- or Latinos that are here
26 in California that are undocumented or illegal, what is the overall number of
27 Hispanics that are in the State of California?
28 MR. RUBIN: It's about 30 percent of -- what do we have? -- 30 million?
29 MS. GOLD: You see, that would be a very high percentage. That would
30 probably be between -- that would be about 10 percent of the Hispanic
31 population, if that's the case.
32 COMMISSIONER ROGERS: You're saying it's about 10 percent of the overall
33 Hispanic population.
34 MS. GOLD: I'm sorry, excuse me. Hold on a minute.
35 COMMISSIONER ROGERS: I'm sorry, I don't mean -- I am -- I do mean to be
36 specific, but I didn't want to put you on the spot too much. I thought you
37 all might know those numbers.
38 MS. GOLD: Like I said, I would like to get back to you on specific
39 ranges and percentages, if that would be okay.
40 COMMISSIONER ROGERS: Okay. It's helpful to answer one particular
41 question because I know in California politics are often shaped by both
42 immigrant-related issues as well as race issues and the power issues that
43 we've talked about. And, given that California, obviously a border state, and
44 Mexico, in particular, composing such a substantial portion of the Latino
45 immigration population, and the undocumented or illegal immigration
46 population that composes part of the state, how much does the issue, in terms
47 of illegal immigration, undocumented workers or undocumented people here in
48 this state, in particular, impact issues related to voting and voting rights
49 under both provisions related to Section 203 and Section 5?
50 MS. GOLD: Um --
51 MR. RUBIN: Well, I mean --
52 COMMISSIONER ROGERS: I'm asking you all these questions -- you all look
53 a little bit irritated by the question, but I'm asking you the question
54 because I am trying to get a sense from you all to try to understand about
55 the impact of issues related to undocumented and illegal folks who are here

1 in the United States, in particular from Mexico, as that relates to issues
2 related to Section 203 and Section 5 of the Voting Rights Act. I don't see
3 how we can talk about this issue without also talking about the fact that
4 issues related to illegal immigrants in the United States is a significant
5 issue as it relates to the politics of this state and issues related to
6 voting rights in particular.
7 MS. GOLD: I think that the issues regarding undocumented immigration
8 certainly have played an overall role in shaping the discussion in the state
9 on immigrant integration and the impact of things that are done to assist
10 immigrants in integrating into California society. So that, in some
11 cases, people who are very ignorant about the Voting Rights Act and
12 the history of the Voting Rights Act, think that Section 203 -- they
13 have misinformation that Section 203 somehow provides undocumented
14 immigrants with the right to vote or some -- I actually saw an
15 editorial in the "L.A. Times" where someone was claiming that, because
16 of Section 203, U.S. citizens, Latino U.S. citizens didn't have to
17 learn English as part of the naturalization process. So, on one
18 hand, the dialogue and the discussion about illegal immigration sadly
19 and unfortunately feeds into a lot of misconceptions and a lot of
20 misunderstandings about the Voting Rights Act.
21 Another challenge, and Robert really was very articulate about
22 this, if you look at signposts of discrimination against Latinos and
23 Asians in California, and you're looking for ways to gauge how that
24 comes out in public discourse, a lot of the discussion of illegal
25 immigration serves as a pretext for people to really express racially
26 discriminatory or ethnically discriminatory attitudes. So that is
27 another way that the discourse on undocumented immigration plays a
28 role as we go forward with our work on the Voting Rights Act and as we
29 look at the history of discrimination against Latinos and Asians in
30 California. I think it's very, very critical that as we work to
31 talk to the public about the Voting Rights Act that we dispel these
32 myths, that we really address exactly what the Voting Rights Act does.
33 Talk about exactly why Congress thought the Voting Rights Act act was
34 a good idea and extending those predictions to Latinos and Asians with
35 language minorities -- so, yes, this is something we're going to have
36 to face as we move forward. But, you know, it's not -- even though
37 it's very much a hot button issue in states that, you know, have
38 borders with Mexico or states that are high immigrant population
39 states, this is really an issue that we're going to have to have a
40 discourse in, in any place where there are merging language minority
41 community. And, again, I think what we're going to really need to do
42 is to stay focused on why we have Section 203 in the Voting Rights Act
43 and what the purpose is and how it brings down barriers for democracy
44 -- democratic participation.
45 COMMISSIONER ROGERS: And I certainly don't disagree with any of
46 that, but I'm begging the question -- forgive me for being piercing
47 about it, but I am trying to get the distinction. Because, again, it
48 seems to me that the issue of -- in particular of illegal immigration
49 or undocumented folks here in this state in particular as it impacts
50 issues which you've just mentioned, for example, misunderstanding,
51 related to the application of the Voting Rights Act or Section 203.

1 When you talk about issues related to discrimination, as it
2 relates to Latinos in California, can you draw a distinction between
3 individuals who may have a problem with undocumented or illegal
4 immigration versus problems with Latinos period? Or do you simply say
5 that, if you have a problem with folks based upon issues related to
6 undocumented or illegal immigration, that you also have a problem
7 related to the issues related to Latinos as a whole? Or can they be
8 separated?
9 You seemed to suggest, Mr. Rubin, earlier that they could not be
10 separated; that an individual, for example, if you had a problem with
11 illegal immigration or if you had a problem with folks being
12 undocumented, that you would also have a problem with Latinos, period.
13 MR. RUBIN: Well, first of all, I am fascinated by the discussion,
14 not irritated, so, if I was the provocation for your comment about
15 irritated look, it's maybe a wrinkle in my brow that's -- that doesn't
16 reflect my mood.
17 I think these are compelling issues. What I meant to say, if I
18 didn't, is that I believe that that is how the issue is perceived. I
19 would not say that that is how the issue must be seen. I think that
20 there is a legitimate difference between someone who might have a
21 legitimate concern about illegal immigration versus somebody who is
22 flat out racist towards Latinos.
23 At the same time I will tell you that that line gets blurred
24 quite a bit. And, frankly, we have experienced political leadership in
25 this state that likes to blur that line. And when a governor in 1994
26 is running on a campaign in which his primary ad is his video of these
27 grainy -- this grainy video of brown faces flooding across a highway
28 and saying, "They're coming," that plays on fears the same way that
29 Jesse Helm's famous ad shown in North Carolina played on fears of,
30 they're coming and they're coming to take your jobs away, because that
31 was exactly what was going on.
32 We were in a deep recession at the time here in 1994 and there
33 was this sense, amazingly bought by the California electorate, that
34 the reason that we were in the rescission is because the undocumented
35 were taking their jobs. Well, those were jobs in aerospace and the
36 defense industry, which were downsizing. I don't think that's where we
37 found populations -- heavy populations among the undocumented, yet
38 that was the sense that was left. And so, to answer the question
39 again -- I'm a civil rights attorney, I'm not an a sociologist, but I
40 do spend a lot of time actually around immigrant issues as well as
41 voting rights issues, and I will tell you that a lot of the woes of
42 this state, including voting fraud, has been laid at the feet of
43 undocumented and, by association, Latinos.
44 And so that, when people talk about voting fraud, they're saying,
45 well, can't these Latinos use all the documents that they have, that
46 they get all their free welfare benefits, as if -- can't they also be
47 used to vote? And so we have, you know, voting fraud that sort of
48 clouds, I think, voter access issues, again being laid at the feet of
49 Latinos.
50 MS. GOLD: And just as a quick follow-up, I mean, I certainly
51 think that it is possible, in the abstract, to have a discourse on --
52 a public policy discourse -- on the impact of undocumented immigration

1 in places like California, that is completely free from racial or
2 ethnic discriminatory undertones or overtones. But I would sadly say
3 from our experience looking at the type of public outreach and ads
4 that were done in Proposition 187, looking at some other propositions
5 that have been before the state, looking at the discussion of other
6 public policy issues affecting immigration in California, we have
7 found, you know, a very, very narrow group of people who engage in
8 that dialogue in a way that separates it from issues of anti-Latino or
9 anti-Asian sentiment.
10 MR. RUBIN: In our voting rights litigation -- I think I may have
11 mentioned this -- some of the strongest exogenous elections
12 demonstrating racial polarized voting are the 187, the denial of
13 education to immigrant children, and 225, the bilingual education
14 initiative, both of which passed overwhelmingly. So that tells you
15 something about how charged and how racially charged issues around
16 immigrants are.
17 COMMISSIONER ROGERS: No doubt about it. Thank you very much.
18 MR. DAVIDSON: Could I interject a question here?
19 COMMISSIONER ROGERS: Please.
20 MR. DAVIDSON: I grew up, for the most part, in southern New
21 Mexico, in a little community that was about half Hispanic and half
22 Anglo. And back in those days, the word "wetback" was bandied around
23 by the Anglos, and it was a common term of derogation, somewhat along
24 the lines of "nigger," that was sometimes meant to talk about
25 undocumented people and at other times just a common term of
26 derogation that was focused on Hispanics in general. And I wonder,
27 is there still a language of that sort that you encounter today that
28 blurs that distinction between undocumented people and Hispanics, or
29 is that pretty much a relic of the past?
30 MR. RUBIN: I would certainly not condemn it to a relic of the
31 past as much as I'd like to. I think it's alive and well. I think the
32 language -- I mean, we deal with a lot of issues in our office around
33 harassment in schools, racially hostile atmospheres, and so we deal
34 with issues where kids, fellow students, are using those kinds of
35 epithets toward each other in environments in which the schools aren't
36 doing anything about it. It's a separate legal issue, but it does
37 speak to your point as to whether or not those racially charged items
38 are still used. Sadly, I would say that it's not always Anglo
39 against kids of color. It is oftentimes, you know, black against
40 brown, brown against Asian. But, no, it is, unfortunately, not on the
41 dust bins of history.
42
43 MS. GOLD: I can't speak specifically to language or terms
44 that are used, but I know that, in general, Latinos encounter incredible
45 confusion about the fact that there's enormous diversity in the Latino
46 community with respect to immigration status. You've got everything from
47 people who have been here for six to seven to eight generations to folks who
48 are undocumented, to folks who have gone through the citizenship process, to
49 folks who are legal permanent residents, to folks who are otherwise
50 authorized to work, you know, to folks who are here, you know, from Central
51 America, from other Latin American countries and, you know, there's just, in
52 some cases, an assumption that if you are Latino, you are an immigrant and,
53 you know, we've had Latino elected officials who, like I said, have been here

1 for five or six generations and get told that, why don't you go back to
2 Mexico where you came from. It's heard very commonly.
3 CHAIRMAN LEE: Well, I think it's a fascinating subject that I'm not
4 sure we're going to fully address. I would note that there's a school of
5 thought that our immigration laws came into existence as a way to deal with
6 the problem of the Chinese in California. There was a time when the most
7 popular slogan in San Francisco is that the Chinese had to go, and it was
8 California -- California Congressional delegation that was very big on
9 establishing immigration naturalization services as a way to deal with the
10 Chinese problem in California -- Northern California, I would add. Talking
11 about enlightened parts of the state.
12 So I'm not sure that it's something we could solve today, but it is
13 pretty interesting to hear testimony about the fact that you said, 50 percent
14 of the undocumented population was actually Western European?
15 MR. RUBIN: Are -- actually are overstays, and the majority of the
16 overstays. Mexicans typically do not come in with visas.
17 CHAIRMAN LEE: Well, when we talked about the undocumented, we are
18 thinking of a brown population.
19 MR. RUBIN: Yeah.
20 COMMISSIONER LEE: Is that factually correct?
21 MR. RUBIN: No, no, it's not. And I think another thing, another
22 misperception is that people stay undocumented. I mean, probably when we were
23 litigating 187, which blessfully never did go into effect because we did tie
24 it up in the courts in 1994, we dealt a lot with the sociological and
25 demographic experts on that. And they were telling us that upwards of 60 to
26 70 percent of all documented persons lived in what we call mixed families.
27 That is, they had citizen brothers and sisters or permanent residents who
28 were mothers and fathers. And so what that tells us is, maybe undocumented
29 today, but legal tomorrow.
30 But this is a thornier issue and there's some legislation pending in
31 Congress on immigration, but that's obviously for another subject. One
32 other point I would make, unless people do want to continue on the
33 immigration point, is a fairly positive note, which is how civil
34 rights laws have tended to have a salutory effect on immigration laws.
35 And I would note that it was in 1965, at the height of civil rights
36 legislation, that the Immigration Act of 1965 was enacted. The
37 significance of that is that the -- prior to the Immigration Act of
38 1965, you had national origins quotas and those quotas were based on
39 the existing population of the United States, which, of course, was
40 heavily influenced by discriminatory policies of the previous 150
41 years, which favored white Western Europeans. So those national
42 origin quotas basically allowed the Irish and the British and the
43 Italians to come in, and they discriminated greatly against Latinos
44 and Asians. As a result --
45 CHAIRMAN LEE: They discriminated also against Eastern Europeans
46 and Southern Europeans.
47 MR. RUBIN: Yes. Thank you for reminding us of that, particularly
48 since my family comprises some of those Eastern Europeans.
49 And, it was in that same mood of, you know, the 1964 Civil Rights
50 Act, that this immigration law was passed. So I would say that
51 civil rights laws have tended to have that positive impact and have
52 brought along the debate in immigration, which is so charged on a
53 racial basis, as is, of course, the mainstream civil rights issues.

1 CHAIRMAN LEE: Well, implicit in what -- some of what Commissioner
2 Rogers was asking is, should Section 203 deal with this issue of
3 immigration? I don't know if you were asking that. It had occurred to
4 me during your colloquy that, but -- but, you know, it's a rather
5 common phenomenon for people to say, oh, yeah, they're just
6 undocumented and try to dismiss the need for 203.
7 MR. RUBIN: Well, I'm not sure exactly what it's done. I think
8 that there is attention, and I think Commissioner Rogers asked about
9 it in the earlier panel, which is, does it serve as a disincentive to
10 immigrant families learning -- not immigrant families, of course --
11 recently naturalized families, immigrant families to their desire to
12 learn English.
13 I've spent the better part of 25 years working with immigrant
14 families as well as in the area of voting rights. I've never met an
15 immigrant family that didn't want to desperately learn English as fast
16 as they possibly could. They see the advantages that the kids have
17 over the parents because the kids typically are more fluent in English
18 and they desperately want to learn English.
19 And so I think that we need not fear that the extension of 203
20 would serve as a disincentive to anybody's desire or willingness to
21 learn to speak English.
22 MS. GOLD: I would not only want to echo that particular point,
23 but again, go back to Congress's initial intent with creating Section
24 203 and extending the protections of the Voting Rights Act to language
25 minorities. Actually, Congress really heard testimony about the
26 challenges that many different groups face in terms of educational
27 opportunities, not only immigrant but native born.
28 So, for example, one of the largest group of language groups that
29 get coverage under Section 203 are native Americans, who are arguably
30 definitely not immigrants, and what Congress had in mind, really, was
31 looking at what kind of educational opportunities do both the native
32 born have in the United States and the fact that people lack access to
33 educational opportunities, as well as the educational opportunities
34 that are available to immigrants. So that, for example, in some of
35 the states that have Latinos who have been living, you know, born in
36 the United States, have very, very poor educational systems, where
37 students may be born in the U.S., but they still are experiencing
38 challenges in being fully proficient in English, even after going
39 through the U.S. educational system. I think that we want to really
40 keep that idea in mind in Section 203 of the challenges that both the
41 native born and immigrants have in terms of access to educational
42 opportunities.
43 CHAIRMAN LEE: Ms. Siah, I was wondering if in your work in King
44 County have you encountered some of the issues we've been talking
45 about?
46 MS. SIAH: Sure. A lot of people respond very negatively to
47 Section 203. When we sent out mailings to different -- to registered
48 voters, we have a lot of people sending things back that say, you
49 should speak English to vote, very negative sentiments. And I think,
50 as my fellow panelists, I agree with them, that it's very hard to
51 differentiate when someone sees that you look different, that they
52 can't tell whether you're an immigrant or not, and there is really no

1 way -- unless -- I mean unless you talk to them, there really is no
2 way to find out.
3 COMMISSIONER DAVIDSON: I would like to ask any of the panelists
4 who want to respond to this, I remember reading recently in the
5 newspaper that a congressman from, I believe, Georgia -- he called
6 himself a conservative Republican -- said he was going to vote in
7 favor of renewal of Section 5, but he simply could not bring himself
8 to vote for the renewal of Section 203 simply because he believed
9 that, in order to -- in order to vote, one ought to be able to speak
10 and read the English language and that that should be a minimal
11 qualification for casting a ballot. And I would just like to hear any
12 response you might have to that obviously sincerely made argument.
13 MR. RUBIN: Well, I would just take a first crack at it and that
14 my brief answer is, I would invite him to take a look at some of the
15 California ballots that some of us native English speakers have
16 trouble wading through. The ability to speak and understand English is
17 one thing. The ability to read and understand complex legal jargon,
18 oftentimes in the kinds of initiatives that we have on the California
19 ballot, is --
20 COMMISSIONER DAVIDSON: I gather there's a proposition now before
21 the voters that's rather daunting to make sense of.
22 MR. RUBIN: Many.
23 COMMISSIONER DAVIDSON: Pardon?
24 MR. RUBIN: There are six, I think. [Voices in background.]
25 Eight?
26 MS. GOLD: And, in addition, both to the point that Robert made,
27 and Conny McCormack also had addressed this point, talking about the
28 complexity of our ballot, again, we also look at the level of English
29 you need to navigate the election bureaucracy. That's not just a basic
30 level of English that's required to basically get along in day-to-day
31 affairs, but to really try to talk about complex things like, you
32 know, what do I have to do when I have to change my address in the
33 voter registration forms, and a lot of just the bureaucratic
34 navigation skills and abilities that require a higher language -- much
35 higher language proficiency than basic speaking and writing English.
36 MS. SIAH: And in King County we've seen that many of the people
37 requesting bilingual assistance and bilingual ballots are elderly, so
38 many of them naturalized when they were quite a bit older, and
39 learning a second language to the degree that you do need to learn
40 would be very, very difficult for them.
41 And we also remind folks that, you know, language ability is
42 something -- it's something that a person has difficulty overcoming,
43 especially when they're a lot older, just as a person's eyesight gets
44 worse as they get older, yet we still provide assistance for folks who
45 have difficulty reading the ballot. Well, you know, if you go to a
46 polling site, someone will go with you into the polling booth and read
47 the ballot for you word for word for you if you have bad vision.
48 However, we feel that's the same disability that someone has as a
49 person that can't read or write English as well as they'd want to.
50
51 MS. GOLD: And this is actually recognized in our naturalization law,
52 that most of legal, permanent residents have to show basic proficiency in

1 English in order to become a U.S. citizen. But if you're elderly and you have
2 long-standing permanent residency, you're allowed to take the civics part of
3 the citizenship exam in your native language.
4 COMMISSIONER DAVIDSON: Question for both Ms. Gold and Ms. Siah. Do
5 you have copies of your prepared testimony that you'll give to the commission
6 here?
7 MS. GOLD: I will be submitting it. I do not have it, but I will be
8 submitting it.
9 MS. SIAH: I will be submitting it, as well.
10 COMMISSIONER DAVIDSON: Thank you.
11 CHAIRMAN LEE: To your point, Mr. Rubin, about the complexity -- well,
12 your point and the point made by others about the complexity of our election
13 materials, actually, I think it might be useful for you to see what a
14 California voter pamphlet looks like. I think the last one I saw was about a
15 hundred pages long. And I assumed that the upcoming one's going to be way
16 longer. Do you have any spare voting voter pamphlets?
17 MR. RUBIN: I think you lost your opportunity with Ms. McCormack.
18 CHAIRMAN LEE: Maybe we can follow-up with her, because I think it
19 actually would be interesting. The complexity point is actually a pretty good
20 one, when you see what our ballot pamphlets are like.
21 MR. RUBIN: You should get one from the general election, though, not
22 the special election because, I mean, eight initiatives is light action. I
23 mean, we can have upwards of 20, 25 initiatives, plus a full slate of
24 candidate elections.
25 CHAIRMAN LEE: Okay. Any more questions?
26 COMMISSIONER ROGERS: No, Mr. Chairman. Thank you.
27 MR. RUBIN: Can I make one other comment back on -- I'm sorry, do you
28 have a question?
29 I just had one other comment that I wanted to make on -- sort of back
30 on voting rights issues or more traditional ones, which is that I know
31 Joaquin Avila talked a little bit about it, but I think that it should be
32 emphasized that the California Legislature, just a few years ago, recognized
33 the ongoing problem with racially polarized voting in at-large election
34 systems, and noted that upwards of 80 percent of all local jurisdictions
35 conduct their elections pursuant to an at-large system.
36 As a result of the combination of those two factors, that prevalence of
37 at-large systems with racially polarized voting, it enacted this California
38 Voting Rights Act that we've already filed two cases under, as we speak. But
39 I think that that recognition is important and I would hope that, whoever the
40 emissary is from this commission to the Congress and the powers that be
41 that are going to be considering the reauthorization, should take
42 that, because I think that -- because it comes from a somewhat
43 unsuspected place because people don't feel that California is Alabama
44 or Mississippi. I think it may come with, you know, clothed in that
45 much more credibility than California -- the California legislature
46 has recognize this ongoing problem associated with at-large election
47 systems and the evil of racially polarized voting.
48 CHAIRMAN LEE: Well, Mr. Rubin, if you can't provide the voter
49 pamphlet, can you provide the findings underlying the California
50 Voting Rights Act?
51 MR. RUBIN: That I can.
52 CHAIRMAN LEE: I think it might be helpful. Thank you. Thank
53 you panelists, Ms. Gold, Ms. Siah, Mr. Rubin.
54 MR. RUBIN: Thank you very much.
55 CHAIRMAN LEE: Reverend, would like to testify?

1 COMMISSIONER BUCHANAN: I just want to observe that, it appears to
2 me that, many of the problems of this and other societies, is a
3 problem of race. We're all a part of the human race. We have a certain
4 tendency, I think, with respect to my state, that you take the worst
5 characteristics of the -- of the given element of the population and
6 attribute them to the whole ethnic group. That seems to be a really
7 common human practice.
8 I am sure there must be an element of that in this area of
9 discussion, which is one reason I'm thankful the Bill of Rights
10 guarantees our individual rights, regardless of the degree of
11 prejudice it makes against us, ethnically. And I see, when we talked
12 about voting rights, that question -- the tendency -- of human
13 tendency to attribute, if you're Hispanic, that means you're an
14 undocumented alien. If you're Middle Eastern, you're probably a
15 terrorist. That tendency is there, but it should not impact the law in
16 terms of the right of people to vote. It seems to me that's true of
17 the language requirement, as well as Section 5. Thank you. End of
18 testimony. Thank you very much.
19 CHAIRMAN LEE: You can testify whenever you want.
20 MR. RUBIN: I'd only respond that, other than with regard to the
21 right to vote, our founding fathers did find it appropriate that most
22 of our protections do apply to persons, not citizens, and so the
23 discussion that we're having here, with regard to due process, equal
24 protection under the laws, applies to persons without regard to
25 immigration status. And we are thankful for that.
26 CHAIRMAN LEE: Do you have a response, Commissioner Buchanan?
27 COMMISSIONER BUCHANAN: No. Thank you.
28 CHAIRMAN LEE: Thank you, panelists. We're going to be taking a
29 short break for about ten minutes.
30 (Recess taken.)
31 CHAIRMAN LEE: Okay. We're going to get started with the third and
32 last panel of today's hearing. We thought there would be four, but
33 we've collapsed them into three. Carolyn Fowler has graciously
34 consented to be on the third panel. I'll introduce the panelists.
35 Eun Sook Lee is executive director of the National Korean American
36 Service and Education Consortium. The Consortium was founded in 1994
37 to protect a progressive Korean-American voice on critical civil
38 rights issues through education, organizing and advocacy. Previously,
39 Ms. Lee was the executive director of Korean-American Women in Need, a
40 bilingual domestic violence service agency. She's also a board member
41 of a lot of organizations, which I won't read. But welcome.
42 Eugene Lee is a staff attorney at -- in the Voting Rights Project
43 of the Asian Pacific-American Legal Center. Eugene Lee has work deals
44 with API voters, overseeing poll monitoring efforts, engaging in
45 policy advocacy at the state, local, and federal levels. And Mr. Lee
46 works with many local and state coalitions focused on promoting access
47 and participation in elections, and provides training to community-
48 based organizations on the language assistant provisions of the Voting
49 Rights Act.
50 The Asian Pacific-American Legal Center is now the country's
51 largest organization focused on providing multilingual, culturally

1 sensitive legal services, education and civil rights support for one
2 of the nation's fastest growing populations.
3 Kathay Feng is the executive director of California Common Cause.
4 Under her leadership, Common Cause is taking a leading role in
5 election and redistricting reform, government sunshine, and
6 accountability laws, campaign finance reform, media access, and
7 championing the voting rights of traditionally disenfranchised
8 communities. Prior to joining Common Cause, Ms. Feng was the project
9 director of Voting Rights of Hate Crimes in the Asian Pacific-American
10 Legal Center, where she worked on a number of areas, including voting
11 rights redistricting, hate crimes, police accountability, and
12 antidiscrimination. Carolyn Fowler of Los Angeles is the -- is with
13 the California Election Protection Network, an organization of over
14 300 organizations statewide. It's a bipartisan outfit that are
15 working to ensure election integrity and security in the state of
16 California. She's a founding member of that organization. She's also a
17 member of the L.A. County Central Committee and a poll watcher and a
18 member of the County Voter Outreach Committee. She is also a very
19 public, spirited citizen of L.A. County and has been for many years.
20 Welcome, panel. And, I believe we start with Eun Sook Lee.
21 MS. LEE: Good afternoon and thank you. Thank you to the members
22 of the commission and the staff for inviting me to speak today. Let
23 me begin with a brief introduction of my organization, the National
24 Korean-American Service and Education Consortium, NAKASEC. We were
25 established ten years ago as a consortium by local community centers
26 that realized that only by coming together can we build a national
27 movement and progressive Korean-American voice for social justice. Our
28 issued priorities since our formation have been immigrant rights and
29 immigration reform, as well as other major civil rights issues,
30 including voting rights.
31 Hence, since the 1996 presidential elections, NAKASEC and our
32 three affiliates in New York City, Los Angeles, and Chicago, have
33 coordinated a multifaceted civic engagement and voter empowerment
34 project that includes voter registration, voter assistance, voter
35 education, voter mobilization, voter research, and voter rights
36 advocacy. I'm here today to state our support for the reauthorization
37 of the three key provisions of the Voting Rights Act that are
38 scheduled to expire in August 2007.
39 Furthermore, we are seeking to see those provisions strengthen
40 through the expansion of coverage. The Voting Rights Act is widely
41 understood to be among our nation's most effective civil rights
42 legislation. Key provisions authorizing the federal government to
43 monitor polling places and, specifically, Section 203, which requires
44 counties to provide multilingual materials and services to certain
45 language minority groups, have been instrumental in enabling Asian
46 Pacific-American voters to vote free from discrimination. As a
47 result, the Voting Rights Act has contributed to the noticeable
48 increase in the electoral participation of the Korean-American and
49 Asian Pacific-American voting population. Korean-Americans are a
50 minority population that now number more than 1.2 million, according
51 to the 2000 Census. More than 70 percent or 865,000 are foreign born
52 or immigrants. Finally, 72 percent of those who are 25 years or older,

1 speak or read English not well. Moreover, in the major cities that
2 Korean-Americans reside, the level of linguistic isolation that has
3 been documented is considerable, ranging from 35 to 42 percent.
4 Linguistic isolation means that, in a given household, all family
5 members over the age of 14 years have some difficulty with the English
6 language.
7 The short profile that I provide shows that, as a voting
8 population, Korean-Americans are ethnic minority voters, immigrant
9 voters, limited-English proficient voters, and new voters.
10 For this reason, Section 203, coupled with other provisions in
11 the Act ensures that Korean-American voters are not discriminated and
12 that language access is appropriately provided.
13 Currently the Korean language is covered in three counties: Los
14 Angeles, Orange, and Queens County.
15
16 In speaking on the importance of continuing the provisions in the
17 Voting Rights Act that will expire in 2007, we also know that we have yet to
18 achieve full compliance. We base this statement on the decade of poll
19 monitoring that we have conducted in New York and Los Angeles. The results
20 are our poll monitoring efforts indicate that Korean-American voters will be
21 discriminated against because they are minorities, foreign born, and limited-
22 English proficient.
23 For example, during the 19- -- 2004 November elections, a precinct
24 inspector at a polling place in Koreatown was documented to have given
25 certain voters time limits and sent one Asian Pacific-American voter to the
26 back of the line.
27 Broadly, the shortcomings have also included the failure of certain
28 counties to translate all materials, to translate inaccurately, or not in a
29 timely manner. And on election day, polling places have had too few
30 interpreters or missing multilingual materials.
31 It is this reason that Asian Pacific-American organizations have worked
32 with local candidates to advocate for full compliance, as well to donate
33 their services to increase the number of poll workers or to review translated
34 materials.
35 In short, our communities have developed strong working relationships
36 with local counties, because we share the common goal of ensuring full access
37 to minority voters.
38 As we approach the sunset date for key provisions in the Voting Rights
39 Act, with regard to Section 203, we understand that there are several
40 proposals to decrease the threshold for coverage from 10,000 voters to 7,500
41 or 5,000 voters.
42 Currently, Section 203 covers counties that have 5 percent or 10,000
43 voting age citizens who speak the same language, are limited-English
44 proficient and, as a group, have a higher illiteracy rate than the national
45 illiteracy rate.
46 In our opinion, measures that would allow counties to capture as many
47 language minority voters as possible are both meaningful and necessary. For
48 this reason, we reiterate our support for, first, the reauthorization of key
49 provisions in the voting rights act, and second, we seek to strengthen these
50 provisions by expansion of coverage for language minority voters under
51 Section 203. Thank you.
52 CHAIRMAN LEE: Thank you very much, Ms. Eun Sook Lee. This is a nice
53 panel. It's virtually impossible for me to mangle these names, since half of
54 you is named Lee. Eugene Lee.

1 MR. LEE: Good afternoon. Thank you for inviting me to testify at this
2 hearing. My name is Eugene Lee and I'm a staff attorney with the Asian
3 Pacific-American Legal Center or APALC. APALC is affiliated with the National
4 Asian Pacific-American Legal Center, or NAPALC, from Washington, D.C.
5 For over two decades APALC has engaged in community education,
6 advocacy, and poll monitoring, to secure the rights of Asian Pacific-
7 Americans, guaranteed by law. APALC sends poll monitors to polling
8 sites throughout Los Angeles and Orange Counties during major
9 elections, particularly in areas with significant API populations.
10 Most recently, APALC monitored 60 poll sites for the March 2004
11 primary election and over 115 poll sites during the November 2004
12 general election. APALC uses the poll monitoring results to advocate
13 for systemic performance and improvements for API voters.
14 In addition to its voting rights work, APALC conducts large-scale
15 exit polls of voters in major elections. APALC also recently launched
16 a series of demographic vote reports on API communities in California
17 and in three Southern California counties. All four of these reports
18 used this aggregated Census 2000 data to provide information on 20 API
19 ethnic groups. Just a note before I go further, a lot of my
20 testimony here today does include a lot of data and I note that I
21 include further data in the written testimony that I'll submit after
22 I'm finished. I'd first like to talk about the impact of Section
23 203 of the Voting Rights Act. In the 30 years since Section 203 was
24 added to the Voting Rights Act, there have been substantial gains,
25 both in API electoral representation, and also on levels of voting
26 participation and voter registration. Many of these gains have
27 occurred since Section 203 was amended in 1992, to add a numerical
28 threshold for when a jurisdiction is covered by language assistance.
29 Talking about gains and API electoral representation, with the
30 recent election of Ted Lieu to the State Assembly, there are now nine
31 API state legislators in California. This stands in marked contrast
32 with 1990, when that number was zero. One factor in the success has
33 been Section 203, allowing limited-English proficient voters, or
34 voters who speak English less than very well, to fully exercise their
35 right to vote.
36 Eight of these nine legislators represent legislative districts
37 located in counties that are covered under Section 203 for at least
38 one Asian language. These seven counties represent all of the counties
39 in California that are covered under Section 203 for an Asian
40 language. Put differently, every county in California that is covered
41 under Section 203 for an Asian language has at least one API
42 legislator from a district in such county. These counties each have
43 significant Asian-American populations that are limited-English
44 proficient, ranging from San Francisco County, with the 34 percent
45 Asian-American population that is 50 percent limited-English
46 proficient, to San Diego County, with a 11 percent Asian-American
47 population that is 32 percent limited-English proficient.
48 In California there have also been increases in both number of
49 API registered voters and in API turnout. Again, language assistance
50 under 203 has been a factor in this success. According to census
51 data, the number of API registered voters has increased by 61 percent,
52 from the November '98 election to the November 2004 election. In this

1 same period, the number of API registered voters who vote has
2 increased by 98 percent. Both of these increases have outpaced the
3 increase in the overall API voting age population and also the overall
4 API citizen voting age population.
5 I'd like to talk about the need for language assistance and
6 Section 203 as an appropriate remedy for discrimination. Because of
7 the high rates of limited-English proficiency among API voters and
8 other language minority voters, the language assistance under 203 is
9 an appropriate remedy for racial discrimination against such voters.
10 As Congress found in 1975, racial discrimination against such
11 language minority voters has resulted in high illiteracy rates. This
12 aggregated Census 2000 data indicates that the language minority in
13 population in California does, indeed, have a high limited-English
14 proficiency rate.
15 In California, the Asian-American population is nearly 40 percent
16 limited-English proficient. A number of these groups are majority or
17 near majority limited-English proficient or -- or LEP. I'll use that
18 term now, LEP, as a shorthand for limited-English proficient,
19 including Vietnamese at 62 percent, Korean at 52 percent, and Chinese
20 at 48 percent. The Latino-American population is 43 percent LEP.
21 During major elections, APALC conducts exit polls, as I mentioned
22 before. These poll results show that the LEP rate of API voters
23 mirrors the LEP rate of the general API population. For example, in
24 2000 -- in November 2004, 40 percent of API voters surveyed in the
25 exit poll indicated that they are LEP.
26 These exit poll results illustrate that language minority voters
27 have a need for language assistance. These results also show that
28 Section 203 is an appropriate remedy. Exit poll results show that many
29 API and Latino voters in Los Angeles and Orange Counties would benefit
30 from language assistance during the voting process. For example, in
31 November 2000, 54 percent of API voters and 46 percent of the Latino
32 voters indicated that they would be more likely to vote if they
33 received language assistance.
34 Another measure of the appropriateness of Section 203 as a remedy
35 is the number of voters who have requested language assistance.
36 According to data tracked by the Los Angeles County Registrar of
37 Voters, the total number of voters in L.A. County who have requested
38 language assistance has increased by 38 percent from December '99 to
39 August 2005. This increase reflects increased outreach by L.A.
40 County. It also illustrates the reliance of language of minority
41 voters on language assistance.
42 These data indicate that, because of voter outreach and education
43 by both the county in Los Angeles and community advocates, many LEP
44 API and Latino voters are using the Section 203 remedy. These data
45 also indicate that, as a number of requests for language assistance
46 increases, language minority voters have a continuing need for Section
47 203 assistance. In addition to Section 203, API voters and other
48 language minority voters have benefited from the federal examiner and
49 observer provisions contained in Section 6 through 9 of the Voting
50 Rights Act.
51 Earlier this year, the Justice Department filed suit against
52 three cities in Los Angeles County for alleged violations of Section

1 203. The Justice Department complaint against City of Rosemead,
2 alleged that during its March 2004 primary election, the City failed
3 to provide bilingual assistance to Latino, Chinese, and Vietnamese-
4 American voters. The Justice Department's complaints against the
5 Cities of Paramount and Azusa contain similar allegations with regard
6 to bilingual assistance for Latino voters.
7
8
9 The Justice Department entered into consent agreements with each
10 of these three cities that authorize federal observers to observe future
11 elections held by the cities. These federal observers will help to ensure
12 that LEP language minority voters in Rosemead, Paramount, and Azusa, and
13 Rosemead, receive adequate language assistance under Section 203. Despite
14 these gains and the protections of the Voting Rights Act, discrimination
15 against language minority voters still occurs in the voting process. Evidence
16 of this discrimination can be seen both in demographic research and anecdotes
17 from poll monitoring efforts. I'd first like to talk about demographic
18 efforts and again, I noted before that a lot of this testimony of is data
19 heavy and I have -- again, it's in the written testimony that I'll submit
20 later.
21 CHAIRMAN LEE: Commissioner Davidson likes data.
22 MR. LEE: That's great.
23 In 1975 Congress passed Section 203 after concluding that English-only
24 elections and voting practices effectively denied a right to vote to a large
25 segment of the nation's language minority population. Congress found that
26 this result is directly attributable to the unequal educational opportunities
27 afforded to language minorities, resulting in high illiteracy and low voting
28 participation.
29 Current demographic data indicate that these discriminatory conditions,
30 including unequal educational opportunities, still exists. Using high school
31 completion as a measure, this aggregated Census 2000 data show that a number
32 of Asian-American groups in California have low rates of education
33 attainment, compared with the California population as a whole.
34 These data also show that Asian-Americans, as a whole, have lower rates
35 of educational attainment than white Americans. For example, 36 percent of
36 Vietnamese-Americans have less than a high school degree, compared with 23
37 percent of the overall California population. 19 percent of Asian-Americans,
38 as a whole, have less than a high school degree, compared with 10 percent of
39 white Californians.
40 These low rates of high school completion are a contributing factor to
41 continuing high LEP rates among API children, defined as children age 17
42 years and younger. According to this aggregated census data, over 20 percent
43 of Asian-American children in California are LEP. In the majority of
44 counties covered by Section 203 for an Asian language, these rates are
45 higher. For example, 30 percent of Asian-American children in San Francisco
46 County are LEP and 24 percent of Asian-American children in Los Angeles
47 County are LEP.
48 In sum, current demographic data indicates that discriminatory
49 conditions cited by Congress in 1975 such as unequal educational
50 opportunities still exist, and that the results of these conditions, such as
51 high limited-English proficiency, still also exist.
52 I'd like to talk now about anecdotal evidence of discrimination.
53 Despite improvements in poll training, racial discrimination against
54 API voters still occurs in the polling place. Over the years, APALC
55 poll monitors have observed a number of instances of racial

1 discrimination. A few -- one example in California is -- occurred in
2 the March 2000 primary election at a polling site in Santa Ana, Orange
3 County.
4 The poll inspector was reluctant to help LEP voters and,
5 inappropriately, asked some young API voters for identification. The
6 APALC poll monitor at the site heard the poll inspector comment,
7 "Everyone wants to come to America and take what is ours, our land."
8 In the November 2004 general election, API advocacy groups in other
9 parts of California conducted poll monitoring in their regions. These
10 organizations include the Asian Law Alliance, the Asian Law Caucus,
11 Center for Asian American Advocacy, Council of Philippine American
12 Organizations and the Orange County Asian and Pacific Islander
13 Community Alliance. Poll monitors deployed by these organizations
14 observed similar instances of discrimination.
15 For example, at a polling site in San Diego County, one poll
16 worker talked to minority voters as if they were children. At a
17 polling site in San Mateo County, a poll worker questioned the
18 competency of a voter to vote because of the voter's limited-English
19 proficiency.
20 APALC poll monitors have also seen recurring problems at poll
21 sites, including problems in Section 203 implementation. These same
22 problems have been observed in other parts of California by poll
23 monitors deployed by other API advocacy groups.
24 With regards, specifically, to Section 203 implementations, these
25 problems include, as Ms. Lee alluded to before, poll sites lacking
26 sufficient number of bilingual poll workers and interpreters,
27 multilingual materials not being supplied, or, if supplied, poorly
28 displayed. Also, poll sites lacking multilingual signage or -- or
29 instruction cards directing voters where to vote, explaining what
30 their rights are, and how to vote.
31 These recurring problems in Section 203 implementation, reflects
32 the failure of county registrars to educate the poll workers about
33 language assistance.
34 Many of these problems are a result of poll worker training, or
35 poll workers not attending training sessions at all. However, even the
36 most comprehensive poll worker training program will not completely
37 eliminate discriminatory attitudes obtained by some poll workers.
38 These recurring problems are the result of some poll workers having a
39 cavalier attitude about language assistance. Or, even an attitude that
40 language assistance should not be provided at all to voters. This
41 ambivalence about providing language assistance, reflects a view of
42 society that excludes nonmainstream voters from the political process.
43 APALC poll monitors have observed poll workers expressing these
44 attitudes, either verbally or in their obvious refusal to provide
45 language assistance. I'll give you a few examples. For example, in
46 the March 2000 primary election at a polling cite in Monterey Park,
47 the inspector said that these bilingual materials are a waste of time
48 and money. She pulled them out at the request of the APALC poll
49 monitor, but then put them back in the envelope. Again, in March
50 2000, in the primary election at a polling site in Westminster, Orange
51 County, when the APALC poll monitor noted that no translated materials
52 were displayed, the poll workers looked around and discovered that the

1 poll site did have translated materials and displayed them. However,
2 when the poll monitor returned to the poll site in the afternoon, she
3 found that the poll workers had put the translated materials back into
4 their storage envelope instead of keeping them displayed.
5 In March 2004, in the primary election, in Artesia, Los Angeles
6 County, after the APALC poll monitor discussed the translated sample
7 ballots with the poll inspector, the inspector said, "One day, I wish
8 we can have all English," motioning to the sample ballots with his
9 hand.
10 Poll workers also express these attitudes in their dealings with
11 poll monitors. For example, at polling sites in Santa Clara County,
12 during the November 2004 election, poll monitors experienced rude,
13 difficult, and uncooperative poll workers, refused the monitors' entry
14 into the polling site, or did not allow the monitors to inspect the
15 translated materials. In addition to these individual instances of
16 discrimination in polling sites, there have also been instances of
17 schemes of voter discrimination.
18 Section 6253.6 of the California Government Code is a reminder of
19 such instances. Enacted in 1982, this section requires government
20 officials to maintain confidentiality of information in voter files
21 that identifies voters who have requested bilingual voting materials.
22 This section was enacted to protect language minority voters from
23 being targeted with allegations of voter fraud. As detailed in the
24 legislative history of Section 6253.6, the section's enactment arose
25 out of an investigation conducted by U.S. Attorney's Office in nine
26 Northern California counties. The U.S. Attorney's Office randomly
27 investigated voters who had requested Spanish and Chinese language
28 materials and arranged for the immigration and naturalization service
29 to cross-check the voters' records with citizenship records.
30 This investigation followed on the footsteps of INS raids on
31 factories and businesses, in most part of a larger scheme to scapegoat
32 language minority and immigrant communities for economic woes.
33 The investigation also occurred during voter registration drives
34 among minority language communities in Northern California. Amidst
35 concerns that this investigation would intimidate language minority
36 voters, the ACLU and MALDEF filed suit understand the Voting Rights
37 Act. There was also a large amount of public outcry against the
38 investigation, including censures by a number of city counselors.
39 The U.S. Attorney's Office abated its investigation and Section
40 6253.6 was passed overwhelmingly by the Legislature, by a 54 to 7
41 Assembly vote and a 38 to 0 Senate vote. To briefly conclude this
42 testimony, the Voting Rights Act has had a marked impact on the
43 ability of API and other large minority voters in California to
44 participate in the electoral process. Section 203 has been of
45 particular benefit to API voters who are limited-English proficient.
46 Unfortunately, voting discrimination continues to exist, and API and
47 other language minority voters have a continuing need to receive the
48 protections of the Voting Rights Act, including the special provisions
49 that are scheduled to expire in 2007. Thank you for this
50 opportunity to provide testimony.
51 CHAIRMAN LEE: Thank you, Mr. Lee. Kathay Feng.
52

1
2 MS. FENG: Good afternoon. Is it on?
3 Good afternoon. My name is Kathay Feng and I am the executive director
4 of California Common Cause, a state organization with over 35,000 members in
5 California alone, dedicated to being a government watchdog group throughout
6 the nation.
7 In addition to working on government ethics, media reform, and campaign
8 finance, California Common Cause has had a long and proud history of
9 championing voting rights and electoral reform, to make sure that our ballots
10 and our voting process are as open as possible. Prior to joining Common
11 Cause, I was the lead attorney and headed up the voting rights work for the
12 Asian Pacific American Legal Center for over seven years.
13 In the days when the Voting Rights Act had just been extended to cover
14 discrimination and barriers faced by the Asian Pacific American community, I
15 led efforts to push Los Angeles County and Orange County to comply with the
16 bilingual language requirements of Section 203 of the voting Rights Act.
17 In the two counties that had the largest and most diverse Asian Pacific
18 American communities, the experience that we gained in implementing bilingual
19 ballots and providing voter assistance in over -- in five Asian languages was
20 invaluable.
21 When the 2000 Census revealed that seven counties in California and 16
22 counties nationwide were covered for Asian language provisions, we used that
23 experience to take it to other counties around the nation, to make sure that
24 those counties complied with Section 203. And, more importantly, we gave the
25 tools to communities to be able to monitor and be very active in their
26 advocacy for full bilingual coverage. Those counties included Seattle --
27 Seattle's King County, Chicago's Cook County, Houston's Harris County, and,
28 of course, five counties in California.
29 I wanted to talk a little bit about punch card voting. November 7th,
30 2000, was a real eye opener for a lot of Americans who I think, up until
31 then, really wanted to believe in the integrity of our voting process. And,
32 as a result of a very, very close presidential election and, more
33 specifically, irregularities that were revealed in the state of Florida in
34 their voting practices, America woke up to the very real reality that our
35 democracy was both fragile and chipped at the edges. In Florida, we
36 learned of examples after examples of punch cards machines malfunctioning,
37 African-American and minority voters being turned away from the booths, and
38 irregular practices from one county to another surfacing, such that you
39 couldn't find a single standard on various election and voting practices
40 within even one state. The nation learned an entirely new vocabulary.
41 All of a sudden, we understood that the things that were inside our
42 punch card voting ballot were called chads, and that those chads could become
43 pregnant sometimes and that there were such things as butterfly ballots. And
44 all of this new vocabulary was part of an awakening process that, in
45 fact, we had to be very vigilant about our electoral process, if we
46 were to fix it.
47 Here in California, unfortunately, we suffered from many of those
48 same problems. Millions of voters used those exact same faulty punch
49 card voting machines. Over 53.4 percent of voters in California used
50 them in the presidential elections of 2000. And, yet, those punch card
51 machines accounted for 74.8 percent of all ballots that didn't even
52 register a single vote for a presidential candidate. The combined
53 overvote and undervote for punch card voting machines was more than
54 double the error rate of other types of voting machines. And so in
55 counties like Los Angeles County, Sacramento, San Diego, San

1 Bernardino, Santa Clara, Solano, Shasta, Mendocino that used punch
2 card voting machines, we found error rates of between two and three
3 times as high, compared to counties that didn't use those types of
4 machines.
5 In L.A. alone, 72,000 ballots suffered from under- or overvoting,
6 and in many cases resulted in those ballots being thrown away.
7 Essentially, those people tried to vote and were disenfranchised
8 because of faulty voting machines. California Common Cause
9 investigated and found that the error rate of punch card voting
10 machines had a disproportionate effect on African-American, Asian-
11 American, and Latino communities. In a state where no one group is the
12 majority, these communities comprise a sizeable portion of the state's
13 population and certainly part of its electorate. And these voting
14 communities tended to live in counties that were using these more
15 error prone punch card machines. I can personally attest to being a
16 poll monitor in over a dozen elections, where I observed example after
17 example of Asian-American voters trying to use these punch card voting
18 machines, taking a ballot, not knowing what to do with it, not knowing
19 how to insert it. If they were lucky enough to be able to insert it
20 correctly and line it up, they still had the challenge of taking this
21 and poking it through the whole.
22 The challenge was that if they didn't line it up correctly, or if
23 there was some kind of slight malfunction because it hadn't been
24 cleaned recently, the entire ballot would be misaligned and their
25 entire ballot would be mismarked. One vote down meant that it was --
26 they had either voted for the wrong candidate or overvoted or
27 undervoted, and the ballot could be thrown away. As you can see
28 from this machine, it is in English only. And all punch card voting
29 machines were designed in such a way that the maximum of languages
30 that they could accommodate was two languages.
31 In California, we have such a diverse population, that many of
32 our counties require the provision of three, four, and five, or six
33 languages, on the ballot. In L.A. County, those six languages include
34 English, Spanish, Chinese, Japanese, Korean, Tagalog, and Vietnamese.
35 You can't even accommodate that on this kind of machine.
36 And so it was the case that these kinds of punch card voting
37 machines had a disproportionate impact on disenfranchising minority
38 and language minority communities. Until 1999, it was a total
39 crapshoot for a voter to be able to walk into a poll site that was in
40 a county that was required to provide bilingual poll workers and
41 assistance, as to whether or not they would actually get that
42 assistance. In L.A. County, for instance, there was no system of
43 targeting. They had no system of recruiting bilingual poll workers,
44 and so if you walked in, you were lucky if you had those bilingual
45 materials, you were lucky if you had a bilingual poll worker, but more
46 likely than not, you walked into a poll site where neither of those
47 were available, and you were left to try to decipher how to use this
48 machine.
49 Using both the Voting Rights Act and the 14th Amendment of the
50 Constitution, California Common Cause challenged the certification and
51 the use of punch card voting.

1 CHAIRMAN LEE: You know, Ms. Feng, I wonder if we could take a
2 short break. I was trying to find a natural point to ask you to stop,
3 because we need to do something to the tape.
4 MS. FENG: Change tape?
5 CHAIRMAN LEE: Yes, and so, if we can take a short break right
6 now, before you -- how many minutes? You want her to continue? Yeah.
7 If you could stop, because I think you're getting to the culmination
8 of your testimony.
9 (Off the record.)
10 MS. FENG: I was just getting to the good stuff.
11 CHAIRMAN LEE: Ms. Feng, you can now get to the good stuff. I
12 realize you were building up to a grand climax of some kind, so here
13 we go.
14 MS. FENG: Well, we used the Voting Rights Act and also the 14th
15 Amendment to bring a lawsuit against the State of California in order
16 to decertify these punch card voting machines, and we won. And so, in
17 a seminal case, California became one of the first states to decertify
18 punch card voting machines and to require all of its counties to
19 switch to new and more accurate voting machines by the 2004 elections.
20 As it turns out, the rest of the country ended up implementing
21 similar types of provisions with the passage of the Help America Vote
22 Act, but it's important to note that we use the Voting Rights Act in
23 order to make that statement to the -- the California Secretary of
24 State, that it was important for them to look at the discriminatory
25 impact of certain voting machines and to decertify them on that basis.
26 In 2002, and I mentioned the Help America Vote Act and I think
27 that's a good segueway, we created a coalition of organizations that
28 includes many of the organizations that have testified here today.
29 That organization's called the California Voting Empowerment Circle
30 and it includes, for instance, ACLU, Asian Pacific American Legal
31 Center, MALDEF, NALEO, and, of course, Common Cause and League of
32 Women Voters. Some 40 organizations come together in that year in
33 order to address the new requirements that were coming down from the
34 Feds as a result of the passage of the Help America Vote Act and,
35 specifically, the Help America Vote Act would have given millions of
36 dollars to states in order to implement certain reforms that were in
37 response to the 2000 elections and the problems that were uncovered
38 then.
39 In order to receive that money, states had to develop a cohesive
40 state plan to address problems like discrepancies between provisional
41 voting requirements between different counties to require there to be
42 a statewide voter database. And some of the things opened up the door
43 and other things closed the ballot booth to voters. And what we came
44 together as a coalition to do was to really look at all of the
45 potential changes and advocate very vigorously for regulations and new
46 laws to be implemented in the State of California that would maximize
47 the ability of traditionally disenfranchised voters to be able to vote
48 as well as to minimize the potential negative impact of certain
49 provisions of the Help America Vote Act. Specifically, let me give
50 a couple of examples. One of them was that we worked with the
51 Secretary of State and a lot of us actually were active in the
52 advisory committee that wrote the language of these regulations and

1 the laws that were eventually passed to create a state plan that would
2 soften the blow of new voter ID provisions. And we created policies
3 that had a very broad definition of what voter IDs could be accepted
4 that had a very broad definition of what the certification and the
5 verification standards would be for that ID, and also created very
6 extensive county poll worker training standards. Because what we knew,
7 from experience, was that when it all came down to it, you could have
8 the perfect policies in place at the state level, and even great
9 policies at the county level, but the person who was interacting at
10 front line with the voter could be the person who would decide, on
11 their own, that they were going to have a discriminatory choice about
12 who to ask for ID from.
13 And, in fact, before we had implemented some of those, I had been
14 a poll monitor and seen firsthand many examples of poll workers who
15 discriminatorily chose to tell Asian-American voters, or other voters
16 who they considered to be less legitimate than white voters, to go to
17 the back of the line or to present proof of citizenship, or to show
18 something besides the driver's license because they didn't think that
19 the driver's license was valid and could possibly be faked.
20 And so it was very important for us to make sure that there were
21 new state provisions from all the way from the top to the bottom that
22 were implemented to ensure that these new voter ID provisions would
23 not have a discriminatory impact on Asian-American voters, Latino
24 voters, African-American voters, senior citizens, youth, people who
25 tended not to have -- or tended to be more likely to be
26 disenfranchised.
27 Another example of some of the changes that we use that we implemented
28 invoking the Voting Rights Act, were also implementing standards for the
29 statewide database and creating new uniform purging standards. We saw in
30 Florida that there were some very shaky examples of using faulty databases in
31 order to clean lists that had a disparate impact of cleaning more African-
32 Americans or minority voters from those lists. And what we were particularly
33 concerned about was, with the requirement of the Help America Vote Act, to
34 implement a new statewide database and to verify voters' names more strictly
35 that we might have a situation where, voters whose names were, for instance,
36 Chun Swai Hsieh Binh, been might be inputted in the wrong way. It might be
37 misspelled where the first name might be juxtaposed with their last name or
38 their surname might be juxtaposed with their family name, and, as a result,
39 there might be a disparate impact on people who had, quote unquote, foreign
40 sounding names. Similarly we were also concerned about the potential that
41 purging practices could be implemented where people who were irregular voters
42 might not be notified before their names were purged off the list, and we
43 knew that minority voters tended to be less regular voters than white voters.
44 And so we secured standards that were, I think, some of the model standards
45 in the country to require that precautions be taken before names were purged
46 from lists; that there were several checks before a name could be considered
47 to be irregular, and that, before a name was removed from a list, that the
48 voter had to be contacted and given a number of opportunities to indicate
49 that they wanted to stay on the list and that maybe there was some way to
50 correct the voter files by presenting additional information.
51 A third example of some changes that we implemented with the Help
52 America Vote Act by invoking the Voting Rights Act was in advocating for the
53 allocation of millions of federal HAVA dollars for voting technology
54 improvements. And, as I said before, in California we really do have a unique

1 situation where the interplay between the language requirements of Section
2 203 and the constantly changing demographics requires that many of our
3 counties have to look at voting technology that maybe other counties in other
4 parts of the state don't need to.
5 Questions about how you can put five, six languages onto a single
6 ballot, so that from the very first screen, a voter can see the ballot
7 entirely in their language, or the instructions entirely in their language,
8 or where voters with disabilities can vote with the assistance of sip-and-
9 puff technology or audio, or where people who are semi-literate, or people
10 who need visual assistance can enlarge the text or listen to the ballot read
11 to them. All of those were questions that were very much at the crux of which
12 machines were going to be certified in California and whether we were going
13 to move from the old and outdated punch card voting machines to newer
14 technologies like electronic voting or optical scan voting that were
15 hybrid.
16 Since then, we have actually created landmark regulations in
17 California that are,both respectful of security concerns but also,
18 more importantly, that protect traditionally disenfranchised
19 communities, because the Voting Rights Act proved to be a very
20 effective tool in making sure that any of those legal changes took
21 into consideration these particularly vulnerable communities.
22 And so I just wanted to end by saying that with the potential
23 expiration of the Voting Rights Act in 2007, it's absolutely important
24 that we remain vigilant and do everything that we can to improve
25 voting participation by minority and language minority communities. It
26 is unquestionable that the Voting Rights Act has made meaningful
27 access to the ballot a reality for thousands of African-Americans,
28 Asian-American, Latino and Native American Californians. Thank you.
29 CHAIRMAN LEE: Thank you, Ms. Feng. And in clean up, Carol
30 Fowler.
31 MS. FOWLER: Wow. Kind of a tough act to follow. Carolyn
32 Fowler, as Bill had shared with you, California Election Protection at
33 Work. A lot of what Kathay and Eugene have talked about, our
34 organization has been hand in hand with them in state testimony, et
35 cetera, and working in partner with them. I think, first, I want to
36 thank the Commission, definitely, for this opportunity to testify.
37 Particularly, I was fortunate enough to run into Barbara last week in
38 D.C., so I knew about this. The California election protection
39 network certainly supports the reauthorization and the strengthening,
40 we hope, of the Voting Rights Act, particularly Section 5, Section
41 203, and the Department of Justice participating and observing and
42 monitoring in elections.
43 One of the main places that I did meet Eugene and Kathay was with
44 Conny McCormack's CVOC organization which she spoke to this morning,
45 the County Voter Outreach Community section. While there have been
46 positive gains in the multilingual area, much is to be done still
47 throughout our state. Conny is to be commended for the progress
48 that's been made, but I think I would be remiss if I didn't discuss
49 some of the areas that our organization has a concern that are not
50 being met.
51 When you're talking to some of these registrars around the
52 country, I think some of the key things when you talk to them about
53 what sounds like a model program, which is a model program, but I

1 think you need to understand, I'd be asking what percent of the poll
2 workers that they have in place are bilingual, because you can't get a
3 true picture unless you know the numbers.
4 Also, when they do the outreach, from a media standpoint -- which
5 they do have a media component and they have spent money in preparing
6 the brochures and so forth -- you need to understand the outreach
7 needs to be more, what percentage is in the minority publications,
8 their radio programs -- this is a very radio-focused community,
9 especially in the State of California -- what percentage of those
10 dollars are being spent in those communities to reach out. I mean, the
11 "Los Angeles Times" everybody just does not read. It's not -- it is in
12 English. However, there's still many other networks and mediums that
13 the minority communities, whether it's African-American or Asian or
14 Latino, that's where they get their information.
15 When we talk about training -- this is my pet peeve -- I think
16 I'm going to say this is systemic from the training of the election
17 administrators from the beginning. Not so much at the county level,
18 but certainly, I think you need to understand how many municipal
19 elections take place, and I'll just speak to the State of California.
20 The registrars and city clerks in those areas -- there are many
21 of them -- in some cases, don't even have a high school diploma. So
22 you have to understand, how can they be training the appropriate
23 training of poll workers and everything else. And they're managing
24 records. Some of them hire people to come in and do the training
25 for them, so they don't know. And more importantly, which is
26 significant to me, there is no certification. And by that, I mean --
27 I'm a notary. I'm background checked, I'm fingerprinted, the works. I
28 pass a test to certify in this state to be a notary. Those
29 requirements don't even exist for these registrars. I know it's a
30 frightening thought, but it's a fact.
31 And I've shared some of this with the Secretary of State's office
32 and they say they're looking into it. But this creates systemic
33 problems in terms of, if there's no certification for them when they
34 go to train these people or their lack of training, how does that
35 translate into the treatment from the individual coming to the polling
36 place. And there is a linkage, I do believe, from being a poll
37 observer, a poll inspector. In the most recent Los Angeles city
38 election, I was a team leader, so I was responsible for several
39 election sites.
40 So I do want to comment on the fact that, people are kind of --
41 if they have a language problem, are kind of pushed to the side or
42 acted like, you don't know what you're doing. And I think I'm going to
43 speak to translate that into intimidation, intimidation as a senior,
44 intimidation as a person of another language, to even think about
45 coming to the polling place in terms of not feeling comfortable about
46 knowing what to do, as Kathay pointed out, with that voting system.
47 When we changed voting systems, there was no significant outreach
48 to train the public ahead of time that we were changing systems, how
49 you use that system. Yes, they may have put a publication with the
50 sample ballot, but that does not give me an ease of walking to a
51 polling place and perhaps feeling uncomfortable or being embarrassed
52 about how to use that system. Very significant that people don't

think about and some -- a lot of times when we talk about our disability community, we just think of those that maybe have hearing impaired or visually impaired or because they're in a wheelchair. But there are a lot of voters, particularly in the African-American community, that maybe have arthritis or they have trouble walking or they need a walker. And so, to stand in long lines, when they've consolidated the polling places, which happens frequently when it's not a, quote, unquote, major election -- in fact, we are trying to meet and understand what that consolidation is going to look like for our special election because -- because of that, many of us are advocating that we do consider, as the gentleman in Hawaii said, an absentee ballot. But yet and still, and with all due respect to Mr. Rogers's comment earlier, in English some of these measures are hard to understand what to do, let alone in a multilanguage situation.

In fact, the English language, you still wonder, well if I vote "yes" what does that mean, if I vote "no" what does that mean, let alone if it was in Spanish or Chinese, I'm sure they don't have a clue. And then again, the uncomfortability of seeming like you're an ignorant voter. Who wants to come to a poll -- or, at best, you get the sample ballot, you go to the polling place, and you feel the rush to vote because there's a line five miles behind you of people waiting to cast their ballot.

So, in speaking to that, I also want to transition to the fact that I think the level of change impending for voters around the country, while it's in L.A. today the amount of diversity, as someone spoke to earlier, whether you see it in North Carolina, Georgia, Texas, Arkansas, I think it's going to increase, and that being the case, these measures are going to be instrumental in keeping, as you heard my registrar say, if it wasn't required, the County, the Board of Supervisors, probably would not authorize the budget to do that.

And I'm glad to hear you ask, Bill Lee, about additional funding, because I think additional funding is needed to do the level of training for not only the poll worker but for the public on these issues, the public on how to use the systems and being comfortable with using these systems. We treat the training as a -- whenever there's an election -- although, however, in California it is getting more frequently. However, voting and training and recruitment of the appropriate people should be all year long.

When I went to the session for the March election, they had several of us there. They talked about -- they had a book this thick about all the changes that took place. Yet, they did not bring every inspector in for the training. They were only training the team leaders over the various precincts.

Now, I had to question that, and I even asked the city clerk there, why would you do that with that amount of change. And they don't know about it. That means there's a high probability whether, you're a minority or not, you're going to be disenfranchised when you get to that polling place because they're not aware of that change.

My observations also were that many of them had no clue about the provisional ballot and when to use it. So people could come to that polling place -- say they were to vote, and there might be four precincts in one section. First you got to figure out which one is yours. Then when you go to that one, if you're not on that list, some people were turned away. Not even given an opportunity to vote. And a lot of people, particularly if they are

of another ethnicity, they just do what they're told. They don't want to make a fuss, they don't want to cause any attention or create a problem, so they just move along and don't vote at all. I observed that. So these voting rights cannot go away by any stretch of the imagination. We've got a long way to go.

I want to share with you, when we talk about some specifics for Section 5, one community that I know, specifically Inglewood, has a high percentage of Latino in their school district. They have been unable to elect a Latino school board member in all this time. And it's not that no one has run. I guess it's a combination of power, it's a combination of retaining, but it also clearly becomes discrimination whether the preponderance of students attending that school district are Latino and they cannot get one representative to sit with them on their behalf on that school board. So I watched these practices continue on a daily basis.

I would also suggest that when you want to understand what's going on here we have a fair political practices commission. I suggest you seek to see some of their complaints. A lot of them are discriminatory and I think we have maybe four or five people to handle the volume of complaints for the State of California, which is ludicrous. They cannot get back to you. The first response you get is, we have your -- if you're lucky, in two weeks, you get a letter saying, we did receive your complaint. And in many instances, people that have complained -- and they've testified to this at the Secretary of State -- they never get a response. Well, that's because you've got a few people trying to manage volumes of information and complaints.

So I would suggest that you check that source to get another understanding or picture of what may be happening in the State of California along discriminatory voting practices. I also wanted to discuss the fact that accessibility can become a big problem as well. When I was observing the polling places, many of them not only did not have the Voting Rights Act in multiple languages, but there was nowhere to park. I mean, while we have what they call -- you can just drive up if you're a disabled voter. I forget what they call that motor -- motor something, motor voter, I think, and you can get your ballot -- curb-side voting, thank you -- I didn't want to say drive-by voting. Curb-side voting.

But I wanted -- two of my polling places, the traffic -- there was clearly -- there was nowhere to park and you really had to walk at least five or six blocks even to pay to park. And so the accessibility becomes an issue for many voters. And I myself, who was supposed to check the poll, almost said, well, forget this. But I did, of course, I went ahead and parked and walked back. But just think what it is to a voter that's just coming to vote.

At that same municipality that I spoke to earlier, I was able to observe polls not open on time. And in some cases I did feel the candidate was a Latino candidate, and it was interesting that the two polls that didn't open in time were in his precinct. And not only did they not open on time, they moved -- one never opened, they put signs up. The other, they moved the poll to a separate precinct where his voters would never go that far to vote for him. And, needless to say, he did lose the election.

There are just -- and this has been written to the fair political practices and I'm just telling you that if we did not have these

1 voting rights in place, I shutter to think what else might go on in
2 terms of voting.
3 The Department of Justice should have in place -- I spoke to you
4 at lunch about how what it seems like a small number of observances
5 they made considering the problems we've been having for the last
6 couple of years in elections. I think they should have in place a
7 standard audit and observer process that randomly spot-checks various
8 election activities. And it should be at a far greater number than I
9 see today here.
10 We need that level of protection and maybe as a balance or a
11 check point maybe the Department of Justice should be checking with
12 these fair political practices agencies and reviewing some of these
13 cases and seeing if there's any trend on certain areas or certain
14 things that have happened. That might be a place for them to start to
15 check. I know we're trying to keep our government down, but at the
16 same time, if voters cannot view that their votes are counted as cast,
17 we will have a huge, huge deluge of problems moving forward. We really
18 will.
19 In conclusion I'd just like to say, these Voting Rights Act
20 provisions and their reauthorization strengthening are tantamount to
21 restoring voter confidence and participation, not only in California,
22 but the entire country and particularly especially for the minority
23 communities. Thank you again for this opportunity and I look
24 forward for your questions.
25 CHAIRMAN LEE: Thank you, Ms. Fowler. Well, Commissioner
26 Rogers, do you want to start or --
27 COMMISSIONER ROGERS: Thank you.
28 First of all, thank you all for your testimony, compelling
29 testimony, and I appreciate that. I did have a couple of questions
30 that I wanted to try to get a sense about, in particular, as it
31 relates to the Asian population as it exists here.
32 I found the document that you produced, by the way, Mr. Lee,
33 remarkable in terms of just the data about educational attainment and
34 poverty and all of those issues as they were in play in terms of the
35 Asian-American communities as a whole. I did want to ask you all, you
36 in particular gave some numbers that you talked about this. You said
37 there was a 61 percent increase in terms of registration of Asians
38 essentially between 1998 and presently. Is that right? Is that a
39 correct figure? Or did I get the number wrong? Was it 1994 or 1998 you
40 were talking about?
41 MR. LEE: November 1998 to November 2004
42 COMMISSIONER ROGERS: So, from November 1998 to 2004, a 61 percent
43 increase in registration among Asians or, excuse me, of API, as you
44 described. And then you said there was a 98 percent increase in terms
45 of voting in those -- in that six-year time frame, essentially.
46 MR. LEE: That's according to the census data.
47 COMMISSIONER ROGERS: What you seem to be doing is, you're
48 attributing that to -- as I heard your comments, to the productiveness
49 essentially of Section 203 in allowing for that to happen. Is that
50 accurate?
51 MR. LEE: My testimony was that Section 203 was a factor in that,
52 and I think a large factor.

1 COMMISSIONER ROGERS: Now, I'm curious about that, because you
2 say it's a large factor. Section 203 has been around for a number of
3 decades and, yet, you haven't had this dramatic increase that you're
4 talking about essentially that occurs in a six-year time frame. And
5 203's has been along since how long? Bill, what's the exact date of
6 203?
7 MS. FENG: As you know, and I hope I get the dates right, but the
8 Voting Rights Act was passed in the 1960s and then it was amended to
9 add Section 203 in the 1970s. But what happened was that the
10 thresholds that were created, specifically, that I think you had to
11 have a certain percentage of the population that was illiterate in a
12 particular language, and that it constituted a certain percentage of
13 the overall county's population.
14 Those thresholds were so high that it excluded Asian-American
15 communities across the nation. We couldn't meet those thresholds. And
16 so in the 1980s we pushed for amendments to the Voting Rights Act and
17 specifically Section 203's threshold requirements, so that besides
18 proving that we were a certain percentage of the population of that
19 county, we could also show that if a minority -- a language minority
20 community constituted 10,000 people or more within that county, they
21 could trigger it.
22 And so that was changed and the first time that you saw those new
23 census data being applied to the -- or the -- well, the 1990 census
24 data being applied to the new formula that was passed in the 1980s was
25 in the 1990s. And as we got through the 1990s, we had a couple of
26 counties that were covered and counties were very clearly -- I would
27 say not until 1996, 1997 did counties start to really think about how
28 to make the law that they had to implement truly effective.
29 And the examples that I gave of people showing up to poll sites
30 where you could go to a poll site in Chinatown, for instance, and
31 anybody on the street and certainly anybody who had worked with these
32 communities could tell you that these particular communities had a
33 need for Chinese language or, specifically, particular dialects like
34 Toi San or Cantonese. The county had no idea. They would send a
35 Spanish speaker, a Tagalic speaker, if they were lucky. Somebody who
36 was bilingual. If they weren't, just any old poll worker to work in
37 those poll sites. And so you end up with a system where they knew they
38 had to provide bilingual assistance. They had no way of targeting
39 where that bilingual assistance should be put to, and, more
40 importantly, they didn't consistently translate all of their materials
41 into the required languages and put them out in targeted poll sites.
42 So it really wasn't until the late nineties that, for instance,
43 L.A. County and other counties like L.A. started developing more
44 refined ways of knowing where to put that material, of recruiting
45 bilingual poll workers, of doing outreach into minority language
46 minority communities, so that you started to see that change, that
47 title change that Eugene talked about in the 2000, 2001, and so on,
48 elections.
49
50 COMMISSIONER ROGERS: Well, to me that's remarkable, in
51 particular -- and I wanted to try to understand the linkages you were
52 attributing it related to 203, in particular, and that language, in and of

1 itself, is confirming in what we've heard in various places around the
2 country that essentially it's opened up the door of opportunity for more
3 people to participate in the electoral process.
4 But looking at those numbers in and of themselves without that context,
5 you'd have to say, well, wait a minute, that's got to be due to something
6 else. Something else has to be attributable as to why you've got that -- such
7 a dramatic increase in that period of time.
8 COMMISSIONER GREENBAUM: Joe, I can give you some more technical
9 information on that.
10 Kathay's right in that the original formula used had to do with having
11 5 percent minority language citizens who are limited in English proficient in
12 a particular group. And, for the most part, if you look at where most of the
13 Asian population is congregated and where the -- it tends to be in larger
14 urban areas and that -- while there might be a significant number of Asian-
15 American citizens in those areas, they wouldn't make that 5 percent
16 threshold.
17 So, as Kathay was saying, in the beginning in the eighties, there was a
18 move to add a number in there, a threshold number. And in the 1992
19 reauthorization, the threshold was added of 10,000 voting Asian citizens, or
20 5 percent. And a number of counties we covered for the first time in the
21 Asian language, and it took -- whenever the census does it, does the updating
22 every decade, it requires a special tabulation. And that special tabulation,
23 I don't believe, was done until 1993.
24 So while the -- even after Congress changed the statute in 1992, the
25 coverage didn't actually become effective until 1993 because you didn't have
26 any numbers to actually base it on. So that's a little bit of the history,
27 just in terms of the technical --
28 CHAIRMAN LEE: Well, this demonstrates the importance of the coverage
29 formula; doesn't it? I mean, because what -- this demonstrates the importance
30 of the coverage formula, 'cause what Commissioner Rogers' point is, is really
31 that the formula sort of makes real these rights, and that only happened for
32 Asians in these communities less than ten years ago. And I assume -- is it
33 the case that the same thing happened in these -- let's say, these
34 communities outside of New York City in the northeast?
35 COMMISSIONER GREENBAUM: Which communities are you referencing?
36 CHAIRMAN LEE: Massachusetts, Connecticut, those small cities where
37 there's been this recent activity.
38 COMMISSIONER GREENBAUM: Most of them, some of them began being covered
39 in the nineties and some of them began being covered in the eighties and some
40 of them became covered for the first time in 2002. But, you're right, in
41 that there was a dramatic increase between 1984 when the post-1980
42 coverage formula came out and 1992 in terms of the number of
43 jurisdictions even under the 5 percent threshold that a lot of the
44 jurisdictions in the northeast that became covered for the Spanish
45 language, that happened in the nineties.
46 CHAIRMAN LEE: Okay.
47 COMMISSIONER ROGERS: Thank you.
48 Mr. Lee, one quick question. I was looking through your data. I'm
49 trying to get a sense about this. As I look, in particular, on page 7
50 of the document that you had given us, it is essentially a document
51 about educational attainment and, in many respects, that document is
52 remarkable. It testifies to the fact that there have been remarkable
53 levels of achievement essentially by Asians in the United States.
54 Asian and Pacific Islanders, in particular, you note, for example,
55 people with associate degrees and bachelor degrees and master's

1 degree. If you're Chinese it's roughly 53 percent of the population.
2 If you're Japanese, it's 54 percent of the population. If you're
3 Korean, it's 52 percent of the population. If you are Asian, Indian,
4 63 percent. Pakistani, 59 percent.
5 I found those numbers to be remarkable, because they're
6 extraordinarily high, first of all. But, at the same time, you
7 pointed out problems in particular communities.
8 So, I mean, you referenced the Hmong population, there might be
9 12 percent, according to the data, who have advanced degrees or
10 college backgrounds or otherwise. Laotian communities, 12 percent.
11 Cambodians are 15 percent. Tongans are 11 percent, Vietnamese, 30
12 percent. Fijians, 16 percent. So you point out those as examples or
13 groups of sub-peoples, as examples of problems as it relates to the
14 language minorities.
15 What I didn't see was what percentage of the population they
16 represent as a percentage of the API population that you're referring
17 to. In other words, the people that you identify as having problematic
18 LEP problems, as you talk about them, what percentage of the overall
19 Asian population do they constitute? Is it less than 10 percent? Is it
20 less than 5 percent? Is it 20 percent? What's the number of the
21 problematic groups that you're speaking of, given the fact that you
22 have such extraordinary achievement among other Asian groups? MR.
23 LEE: Mr. Rogers, I don't know that number off the top of my head. I
24 would point out that in my testimony I talked about the measure --
25 using a measure of high school completion, which I think is the most
26 relevant thing to look at, as opposed to educational achievement
27 beyond high school. And the reason I say that is, for most people, I
28 think, for all people, the learning process until the age 18 is the
29 key process where one either learns or does not learn a language,
30 including English.
31 So when I pointed out rates of educational attainment, I used
32 high school completion as a measure, because I thought that was the
33 most relevant measure for looking at the Congressional findings back
34 in 1975 of unequal educational opportunities leading to high
35 illiteracy and high limited-English proficiency rates.
36 So Mr. Rogers, when you pointed out educational achievement
37 beyond high school level, it is true, certainly many API groups have
38 achieved educational successes beyond high school. For example,
39 bachelor's degrees or master's degrees or professional degrees. But
40 with regards to high school attainment, Asian-Americans in California,
41 as a whole, have rates that are lower than white Californians and
42 there are a number of groups that are below the overall California
43 population.
44 COMMISSIONER ROGERS: Okay.
45 CHAIRMAN LEE: Well, one answer to your question is the high
46 school -- the number -- the comparative number for less than high
47 school in the white population is 10 percent?
48 MR. LEE: That is correct.
49 CHAIRMAN LEE: So the Asian not having less than high school
50 education is -- I mean, that's true for every Asian group except
51 Japanese which is 7 percent. So since I know as a matter of fact that,
52 I mean, most of the Asian population is not Japanese-American, I mean,

1 it's going to be overwhelmingly more, you know -- this is a population
2 that has less high school attainment than the white population. I
3 think the Hmong population would be rather small, so I'm not sure it's
4 going to be the 30s range probably will be the -- the teens or 20s.
5 MS. LEE: We were just going to add that often, cases, when they
6 do try to enumerate -- in cases where they are documenting levels of
7 educational attainment, often cases for Asian Pacific Americans and,
8 specifically, even for Korean-Americans, if they were to have post-
9 secondary degrees, oftentimes they would be in the home country and
10 not necessarily in the U.S. Therefore, I'm not quite clear about the
11 page that you're specifically looking at, but we have asked for and
12 called for that. When we looked at language ability or English
13 ability, we don't look at it just based on educational attainment
14 because oftentimes they may have graduated from their home country
15 with a degree, but when they immigrate here, they're still limited-
16 English proficient.
17 And when I look at the Korean-American population, less than 10
18 percent are under the age of 18. For example, I'm just speaking
19 broadly, because I'm also not very good with numbers, but I know the
20 general numbers. In other words, very few are U.S. born and of age to
21 vote. And, of those under 18, 5 percent are LEP. But any of those over
22 25, that LEP population rate goes up higher by about more than 70
23 percent. So I think that when we look at education attainment, we have
24 to break it down in terms of whether they graduated from U.S. high
25 school and also whether they graduated from U.S. college and
26 university and so on.
27 COMMISSIONER ROGERS: Absolutely.
28 CHAIRMAN LEE: Is there LEP information in this book?
29 MR. LEE: There is LEP information in the book that, both for
30 California as a whole, and looking at -- it breaks it down by county
31 and breaks it down by region in California.
32 CHAIRMAN LEE: Okay.
33 COMMISSIONER ROGERS: Thank you. Thank you very much. I appreciate
34 your responses. Carolyn, I had a question for you and I -- I'm
35 sorry. I didn't mean to hit the microphone.
36 I had two questions, actually, for you. I guess I'm struck to
37 some extent -- I appreciate your testimony. Essentially, you indicate
38 there are problems that take place in the polling place. I'm an
39 observer. I see these problem as they take place. I'm curious as to
40 whether or not you describe the problem -- and I wasn't quite as clear
41 about this. You describe it essentially as people can be, one, made to
42 feel uncomfortable, as you said, embarrassed or uncomfortable or made
43 to feel this way. You feel the rush to vote, as you described it,
44 because of the line behind you. You see all those folks and everything
45 else in between. You don't want to be a problem and you don't want to
46 create a fuss, because you do want to vote and you don't want all
47 those folks waiting on you, whatever. And you describe it as --
48 essentially, as a problem that takes place in that way.
49 You also mentioned there were voter training issues, recruitment
50 issues, and those kind of things, and what kind of people were in the
51 polls. You reference that there was discrimination, particularly, as
52 you see it, vis-a-vis Latinos, but I am curious as to how you describe

1 it. I don't get the absolute sense that this is, one -- a pervasive
2 problem, one, from your testimony. I don't know that to be true. And
3 it may well not be true. This may be isolated cases in which you were
4 seeing this occur as opposed to what you'd view as to be a pattern or
5 a practice or simply the way it is here in California. I don't know
6 that I know that for sure. And I'm trying to understand the balance
7 between, as you describe it, a sort of -- I think, the problems -- a
8 lot of this experience in voting, you don't want to wait, you don't
9 want to hold up the line. Naturally, as a matter, you don't want to be
10 a problem in not understanding something. And you don't want to ask a
11 question about it because you got all those folks waiting behind you.
12 How much of that is race and how much of that is just plain the
13 process of voting?
14
15 MS. FOWLER: Okay. I think I understand your question or your concern in
16 terms of it. When I speak to the fact of -- I want to go back to the
17 training. And I started with, in some instances, which we take our eye off
18 the ball from the city clerk level, which they run a lot of elections that,
19 like our county registrar may not have anything to do with, period. And there
20 are a lot of those here in California. I'm not sure what part of the country
21 you're from, but there's --
22 COMMISSIONER ROGERS: Colorado. Denver.
23 MS. FOWLER: Yeah. There's tons of those in the State of California as
24 you might observe. And when I say it's systemic in terms of, there is no
25 standardized training throughout our state that is required for a poll
26 worker, an election administrator, for that matter. And my sense to you, in
27 terms of the voter, on the receiving end is, because there is no training in
28 many instances or it's a short training which does not consist of a customer
29 service component, maybe that's the best way to articulate that. And in some
30 instances, these poll workers have worked at that same poll for years, year
31 in, year out, never been retrained, if you will, to the changes that are
32 happening from the system perspective and so their patience is short.
33 Why they have the expectation that the voter should come in and know,
34 when they don't, I don't understand. So when I say these things about that
35 and how people are treated, my observation is, it is more -- in some
36 instances, it is not necessarily race, to your point. It is systemic in the
37 lack of training and how to treat people, period. It also lends to, though,
38 race when you don't know what to do and there's a language issue, and I'm not
39 understanding what you're saying. Here, take this, do that, whatever, and
40 making the voter feel very uncomfortable with even coming there to vote.
41 And you're right about, you know, the lines. I get irritated in
42 standing in a long line, but I'm talking about from an election
43 administration standpoint, I believe that with proper training, proper
44 planning, not just only at election time, the recruitment and training of
45 qualified people is an on-going basis which I had here. Voter registration
46 should be year-round. Recruitment should be year-round. Training should be
47 year-round, so that there's maybe a posted, for lack of a better term, we're
48 going to do these six trainings this year for recruitment. It's almost like
49 they post it on their Web site, but what it's really done to recruit people
50 to vote. And we have shortages now. And I'm not sure I'm still answering
51 you, but I'll go back to my instance of the example where there is no Latino
52 member in Inglewood and they have ran and ran and ran, and the observation of
53 the polls closing. I'll go a step further. I just was trying to keep my
54 comments -- and I didn't want to repeat all the things they said either.

The candidate -- the Latino candidate's name was on the ballot. The sample ballot went out. There was an English portion of the ballot showing the candidate with the candidates true numbers -- we use numbers here to identify the candidates -- so let's say she was number two. In the bilingual portion of the sample ballot, the Latino candidate was number four. When asked, the city clerk was asked -- so if you voted number four, you were going to be voting for another candidate. And if you're, you know, Spanish and that's what you're reading, you're going to say, okay, that meant that's person number four. So when asked, the city clerk asked to re-send another sample ballot with the correction or to send out the correction, refused to do so, understanding that that was a significant difference to that population in that community.

Now, it's difficult for me to believe that that is just, oops, and this is a person that's been city clerk for a little while. So I'm saying that, in my opinion, is racial discrimination. And you can't call it anything else. So when you ask for specifics, I could probably give you a lot of them, but in the interest of time, I'm just citing examples that I have observed and these have been documented and written. That's why I'm saying the fair political practices might give you another vision of what's going on, you know.

COMMISSIONER ROGERS: And I absolutely appreciate that. The most important reason why I asked you that question is that we're creating a record. Everything we're saying is all being recorded and this record, in and of itself, I think it's important that it be factually specific, so that we are not just making general statements, but have a factual basis for the statements that you all have been all kind enough to make. Last question. This will be it. I'm sorry, my fellow commissioners, but I have to ask you this question. We haven't heard anything today, all day long, about African-American participation in terms of --

COMMISSIONER DAVIDSON: Amen. That was my question.

COMMISSIONER ROGERS: Chairman, you want to jump in?

COMMISSIONER DAVIDSON: No, ask the question. Have the problems of African-Americans in California been solved?

CHAIRMAN LEE: Well, there was a brief mention of Tom Bradley this morning.

MS. FOWLER: I think what happens in terms of African-Americans I'll speak more to -- and I still can't even solely make this African-Americans. In this state, once you've had a felony and served your time, which really includes a high percentage of African-American and Latino population, more so men than women at this point, they are -- at one point we're not even told that, if you're not on parole, you're not on probation, you do have the right to vote. They were never even told that, that they had that right restored. In my opinion, that's discrimination. They -- in fact, they were led to believe they still could not vote when they were released and not on probation and not -- not on parole. So I think that impacts the African-American community severely.

We've made a lot of strides, as Kathay has talked about, in many of us lobbying at the state level, and now you must inform these people. Several of us are in different groups and organizations that

1 particularly reach out to that community and try to ensure that they
2 are registered to vote if they are eligible and that they can either
3 do absentee, if they are fortunate enough to be working, et cetera,
4 but to understand their responsibility and how that looks in them
5 being coming back as a citizen, meaning to do well and good in their,
6 you know, community. So that's one key thing I would say as far as the
7 African-American.
8 The other piece, which I find, I'll say for African-Americans
9 gets back to this intimidation piece in terms of being comfortable
10 going to the poll and feeling comfortable knowing what to do once the
11 system has changed. Particularly the seniors.
12 Like I said, everybody is not necessarily classified disabled,
13 but many of them, particularly, like I said, we have complex issues.
14 And that tends to make people very uncomfortable in going to the polls
15 and knowing what to do. But now the seniors as a rule, as you probably
16 do know, particularly an African-American, do want to vote and a lot
17 of the senior housing centers now are starting to hold sessions about
18 -- and they're asking the county registrar, or whatever, to come out
19 and talk about what is the voting going to be like, bring a sample,
20 bring something to them.
21 So that was a big problem for the African-American community,
22 particularly as systems change. We had the early voting and they were
23 very uncomfortable, the seniors particularly in African-American
24 community, with that electronic -- if they weren't computer savvy, et
25 cetera, and what does that mean, how do I do that. Just a little more
26 sensitive to not wanting to be embarrassed. Just like I said earlier,
27 I find that, particularly in our community, those two key things.
28 As far as -- I have not heard of anyone in an African-American
29 community saying they were turned away and were not able to vote.
30 Perhaps if their addresses change, I haven't heard anybody saying,
31 "Where's your ID?" So I'm not aware of that as being a problem. But I
32 have the prison piece and the -- if things have changed and they're
33 not notified.
34 I would say another complaint, though, is what they feel is
35 proper notification of the polling place changes. For example -- and
36 it will happen like a special election like this, where they know
37 there's going to be a low turnout, they'll do a significant
38 consolidation of polling places. And, now, places that they are
39 familiar with, maybe it's further to go to. So in some ways that can
40 compromise their ability to go and vote. Many of them maybe not having
41 the ability to drive or have to rely on someone to take them there,
42 and which is why you'll find a lot of organizations offering to give
43 rides in our community, in South Central particularly, so that they
44 can get people to the polls.
45 So I do know that becomes a problem, and issues like this, when
46 they do that consolidation, because typically that puts our community
47 further away, you know, to go and vote and I don't -- and it's not
48 that it's necessarily intentional, but that's exactly a reality of
49 what happens. Therefore, given the appearance of disenfranchising.
50

1 COMMISSIONER ROGERS: I understand black folks, as a
2 percentage of California's population, are actually declining as a percentage
3 of the population.
4 Is that true?
5 MS. FOWLER: I haven't seen the latest census so I don't know.
6 MS. FENG: I think that the numbers are that in the 2000 Census, white
7 Americans were approximately 45 percent of the state's population. Latinos
8 were about 35 percent. Asian-Americans were 13. And African-Americans were
9 about 8 percent. And what it is, is that certain groups like Latino and
10 Asian-Americans are growing at a much faster rate than the general
11 population, and African-American population, while it's not shrinking, it's
12 not growing as fast.
13 MS. FOWLER: That's it. It's not growing.
14 MS. FENG: And so, as a percentage, it is true that it's declining in
15 percentage, if you're looking at the overall state numbers. And I just wanted
16 to say, to echo Carolyn's observations, that a number of organizations did
17 election protection hotlines during the 2004 elections and received thousands
18 of calls coming in from voters who had problems that they faced because of
19 the very issues that Carolyn raised, like poll sites that were consolidated
20 or had been moved from where the poll site had originally been located and
21 people just entirely lost and not knowing where to go.
22 Another example that seemed to have more instances of this happening in
23 low-income and particularly in African-American communities, was poll sites
24 running out of the ballots. This thing. So when you got their -- if you
25 showed up because you were working late and you couldn't get to the poll site
26 until 7:30 and they had run out of the packet of ballots, you might have
27 either been stuck or asked to wait for several hours while they -- while
28 somebody ran to get some new ballots. And that seemed to happen in a number
29 of communities, particularly in African-American communities in Los Angeles.
30 And I think the third example that I have that I understand happened
31 significantly in the African-American community was not being fully informed
32 about provisional voting. There's a lot of people who move from one place to
33 another, who, because you get married, you change your name, for whatever
34 reason, their name did not appear in the roster when they went to check in at
35 the poll site that they usually voted at. And what they found was that, for
36 whatever reason, if the poll workers were not informed of provisional voting
37 procedures, that, instead of being given the opportunity to vote on
38 provisional ballots, they would be turned away or sent to another poll site.
39 And, I regret that my colleague, Erika Teasley, who is with the
40 NAACPLDF, who normally would be the person who give all of this testimony
41 could not be here, but she has a good reason. She recently gave birth to a
42 healthy baby boy, Isiah, so she couldn't join us. But I'm sure what she would
43 say is that a lot of the kinds of problems, while somewhat different,
44 that impact on African-American communities, still exist. And as
45 recently as 2004, they received hundreds of thousands of calls
46 attesting to those kinds of problems. So it wasn't just singular
47 isolated incident, but a pattern.
48 COMMISSIONER ROGERS: Thank you. Mr. Chairman, thank you.
49 CHAIRMAN LEE: Commissioner Buchanan.
50 COMMISSIONER BUCHANAN: Mr. Chairman, I just wanted to observe
51 that Commissioner Roger's penetrating questions constitute a real
52 service to the Commission in helping us accomplish our purpose.
53 CHAIRMAN LEE: Amen.
54 COMMISSIONER BUCHANAN: And, an essential function, I think, and
55 questions like this will be raised in the Congress and courts, and

1 they need to be raised and answered, and your responses have, I think,
2 contributed invaluably to the Commission. So I want to thank both
3 sides of that conversation.
4 I've long believed that our country is not just a melting pot,
5 but a rich mosaic of the world's peoples and cultures and faith. And I
6 feel it's a great strength of this country, and it seems to me that
7 this has been well-demonstrated in this hearing room this day, the
8 very -- the strength of -- the diversity of our country and the
9 quality of both the questions and the answering by my colleague and
10 answers by you. So I just want to express my appreciation. You
11 have enriched our record and I thank you for it.
12 CHAIRMAN LEE: Commissioner Davidson, do you have any questions?
13 COMMISSIONER DAVIDSON: I would just like to ask Ms. Feng if
14 there's any way that I can get a copy of the revised purging
15 requirements. That's an interest of mine, and if I can get my hands on
16 that, I would be grateful.
17 MS. FENG: I'll be happy to e-mail you a copy.
18 COMMISSIONER DAVIDSON: Thank you.
19 CHAIRMAN LEE: Incidentally, you mentioned that this issue of the
20 threshold that was later mentioned by others, the 10,000 numbering.
21 You said that there were -- thought there were proposals or some
22 people had some proposals, rather, that that trigger number should be
23 7.500 or 5,000. Do you have a -- do you want to expand your
24 comments on that? Do you have a particular recommendation?
25 MS. LEE: Well, again, there are different proposals. One is to
26 reduce the threshold to 7,500 and the other is to 5,000. And in each
27 case, it obviously captures more Asian Pacific Americans and increase
28 -- including not only Korean-Americans in certain counties, but also
29 emerging populations of Asian Pacific Americans, like Cambodian and so
30 on. So, we do think it's a good thing.
31 The reason why I said there are differing proposals is that
32 different groups are still not coming into common in terms of what
33 would be the better number, but we definitely do think that decreasing
34 the threshold, just because, again, it includes a larger percentage of
35 LEP voters, would be beneficial. And what I could do is send you
36 information about what more counties and what languages would be
37 captured if we were to go -- to be down from 7,500 and, again, to
38 5,000. And I'm getting that data, actually, from other groups, not
39 only our APALC, but the Asian American Legal Defense and Education
40 Fund, which is also calling for, specifically, 5,000, but then a lot
41 of the D.C. groups who are working on this are calling for #######
42 And I don't think it's -- it's not a conflicting request. It's more
43 about what could be possible. And I think we feel that whatever that
44 could, again, capture, more is better, but there is just difference in
45 terms of how much we can do. So can I submit that afterwards?
46 CHAIRMAN LEE: Oh, yes, we'd like that very much. As a matter of
47 fact, I was going to ask you if you would submit it, do you know what
48 the implications would be for the Hispanic community?
49 MS. LEE: I do not know about that, but we can send you
50 information about that as well.
51 CHAIRMAN LEE: Oh, good. It occurred to me, in listening to this
52 testimony today, that maybe that threshold issue is very important

1 because, if it's true that so many of the at-large elections are at
2 the local level and at the city levels and the reach of the Voting
3 Rights Act is, in a sense, been greater at the statewide levels. And I
4 guess Congressional elections, it would make some sense, from that
5 point of view, not just for the Asian-American community, but for
6 other communities.
7 I wonder also if putting together some testimony I'd heard
8 earlier, particularly in the Northeast, how about the rate of change?
9 I've heard testimony that when communities seem to have a big infusion
10 of, whether it be Asian-Americans or African-Americans or Latinos, so
11 that the rate of change is very fast, voting rights issues seem to
12 arise. Could any of you address that? I guess Inglewood might
13 actually be an example.
14 MS. FOWLER: I think Inglewood would probably be a very good
15 example because when you look at the electorate there, they do, but
16 this was just this -- the term before last, have one Latino on the
17 city council. But, like I said, no one on the school board. I'm trying
18 to think even if there are commissioners.
19 CHAIRMAN LEE: Well, of course, these lower -- these lower offices
20 are feeders for the higher offices, also.
21 MS. FOWLER: Exactly. And I submit to you, and this is just my
22 observation, that just so happened that that candidate was nominated
23 and supported by what I consider the power structure, so, okay, we'll
24 have you and that's it. So I don't see that candidate going any
25 higher, if you want to know the truth.
26 In fact, I think they spoke to me not too long ago and said that
27 they were talking about taking a job somewhere else even outside of
28 the state. So that is my point.
29 Those are feeder positions for the next level if you're in
30 public service and you plan to move up. And so, if they don't even get
31 an opportunity to enter, how does that ever change? And how do you
32 stay in a community where you feel you have zero representation? And
33 it's not to say that the people in place are not looking out for the
34 community at whole but, particularly from a minority standpoint, you
35 look to seeing someone that you think maybe looks at your issues a
36 little differently.
37 I guess my example is, women in the Senate and the State
38 Assembly, and to date, there's only one African-American woman, and
39 that's recently, in the State Assembly. And I just feel that men look
40 at issues differently than women look at issues. And so we worked
41 very hard to get that candidate elected, I might add. And it was a
42 struggle. And so when you do look at those positions and how do you
43 move up, you do get a sense of -- and I think you're right. When the
44 demographics have changed dramatically, that seems to be when that
45 occurs, if I use Inglewood as an example. I personally live in
46 Hawthorne. Now, the demographics have changed recently there and
47 electorally.
48 COMMISSIONER ROGERS: Where's Hawthorne?
49 MS. FOWLER: Yeah, by the airport, right by the airport. Just
50 south of the airport. And there is the city clerk is a Latino. But
51 he's the only one, but now he's running for city council. Now, I don't
52 know whether he'll make it or not. There are no African-Americans. In

1 fact, there's one woman. There is one woman. So, but the Latino
2 population is growing very rapidly in Hawthorne.
3 So it will be interesting to see. That's just starting to happen.
4 So it will be interesting to see if that turns out like -- like
5 Inglewood. But these positions are power, but there are term limits
6 in some cases. In some cases they're not. And that's -- you know,
7 that plays into it, you know, as well.
8 CHAIRMAN LEE: Kathay, did you want to come in and just -- some of
9 this is informed by Morgan Kousser's testimony, his recommendation
10 that maybe we should -- he wasn't talking about 203. I think he was
11 talking about Section 5 -- have a 20 percent sort of trigger as -- for
12 Section 5 coverage.
13 MS. FENG: Okay. I guess what I wanted to maybe point to was an
14 example in Orange County where the largest expatriate community of
15 Vietnamese outside of Vietnam lives. And they live in what's commonly
16 known as Little Saigon. And it covers three different cities:
17 Westminster, Fountain Valley, and Garden Grove. It's a community that,
18 when we first did exit polling they were about 91 percent Republican.
19 More Republican than the surrounding Orange County area, largely
20 because, like many Cubans, they had a history of coming from a
21 communist country and aligning themselves with the party that they
22 felt was anti-communist.
23
24
25 I only say that because I think what's important is that in the
26 eighties and early nineties was probably one of the fastest growing times of
27 this area, Little Saigon. So much so that they became much more visibly
28 present. There are streets that you could drive through, where all of a
29 sudden it went from Ralph's and Albertson's to Saigon and Pho 99 stores,
30 lining up and down where there were visible signs that were in Vietnamese,
31 and people in the neighborhood who were walking were clearly all not the
32 homogenous white population that had lived in that area before.
33 There is -- there were a couple of examples of Vietnamese-Americans who
34 ran for elected office and who faced incredible discrimination. Some of the
35 campaign signs that they had up would have swastikas drawn on them. And this
36 was in the late nineties, so it's not like it was, you know, fifty years ago
37 or a hundred years ago. And where people would get threats. Where people
38 would show up to poll sites and they would be told, you know, if you're an
39 American, you should be voting in English. If you can't speak English, you
40 shouldn't be voting.
41 And it's really -- we saw this big change happening around the late
42 nineties and the 2000s when we started being much more present. And what we
43 had been doing in terms of poll monitoring was being present in between 50
44 and a hundred, sometimes even over that, poll sites in Los Angeles and Orange
45 County. And changing literally poll site by poll site, poll worker by poll
46 worker, where there were changes, documenting them and giving them to the
47 counties so that they would remove those problematic poll workers or relocate
48 a poll site so that it would be in a more friendly venue.
49 And that's all just to say that I think that you see that kind of very
50 harsh reality manifest itself where communities are changing demographically,
51 where you have an influx of a new population that is very different from who
52 used to live there. Sometimes it's white on minorities. Sometimes, as in
53 Inglewood, it could be African-American on Latino. So the race lines are not
54 necessarily, you know, between majority/minority. It's just that there used

1 to be a homogenous group and it's becoming increasingly heterogenous. And
2 that results in, oftentimes, discrimination at the polling place or
3 discrimination against candidates of that -- of a particular race -- of the
4 new influx group. And it means that the Voting Rights Act becomes all the
5 more important because if you don't have something like that, you have no way
6 of challenging discrimination at the poll site, discrimination by poll
7 workers, or practices that may inadvertently have a disparate impact on a
8 community.
9 CHAIRMAN LEE: Well, also, it doesn't sound partisan, I mean in Orange
10 County, and it doesn't sound partisan in Hawthorne and in Inglewood either.
11 MS. FENG: No.
12 CHAIRMAN LEE: I'm just saying, in the two-party sense.
13 MS. FOWLER: Yeah, no, it's not partisan in either case. And I was
14 going to speak to, too, in Orange County, if you'll remember, the same
15 thing happened when there started to be a large influx of Latino
16 population. And, as you'll recall --
17 MS. FENG: I might have been a little partisan.
18 MS. FOWLER: Yeah. -- Congresswoman Sanchez now, Loretta
19 Sanchez, ran into some severe discrimination in terms of people --
20 even the literature was unbelievably discriminatory against an
21 incumbent candidate. I don't know, you might want to say that was
22 partisan, I don't know, but it was clearly discriminatory.
23 But, by the same token, that large flux of population, once you
24 got past that, and there were reports reported to the registrar,
25 reported to here, changing poll workers, changing polling places, et
26 cetera, in more friendly areas, that probably did allow her to get
27 that Congressional seat. And then, because of that volume, then her
28 sister in that Congressional district, because the two sisters are
29 still serving.
30 MS. FENG: And as I recall, the first time that Loretta Sanchez
31 ran for Congressional office, there were people who staked out poll
32 sites and hung banners up that said "citizens only," with the specific
33 intent to send a message to -- I don't know -- whoever they considered
34 to be more likely to be fraudulent voters. But trying to send an anti-
35 immigrant message that, you don't belong here. And, certainly, that
36 had an intimidating effect on many Latino and Asian-American voters
37 who were trying to vote.
38 Eventually, within the day, those banners were pulled down, and
39 it was because we had close cooperation with voter registrars, and
40 said hey, you know, that would be a violation of the Voting Rights Act
41 as well as any number of California and local laws. But that kind of
42 voter intimidation certainly has reared its ugly head in a lot of
43 instances in California.
44 MS. FOWLER: That was along the time of Prop 187, as well, so, it
45 was almost like, if you were Latino and you were here, you were
46 illegal, period, especially in Orange County. That was the perception.
47 CHAIRMAN LEE: Any more questions? Commissioners? Oh, come on.
48 Come on.
49 COMMISSIONER ROGERS: I'm fascinated. I have to ask another
50 question. I'm fascinated, you all, I really am, because, first of
51 all, we're in California and there's that old saying that, as
52 California goes, so goes the country. Now, that's good or bad.

1 In our part of the world, we have a whole lot of you all
2 Californians who make Colorado home, who leave and come work in
3 Colorado. But I'm fascinated because this is a state where you noted
4 this fascinating thing that just happened that doesn't -- that has not
5 happened in any other state. You now have no majority population.
6 You're the first state in the country to be in this new status of not
7 having a majority population. And I'm fascinated as to what that will
8 mean in terms of the dynamics of you all getting along with each
9 other. Have lessons been -- this is more philosophical in nature,
10 and forgive me for asking it, but you're all here, so I've got to ask
11 it.
12 We've had this cross-section of people who have been here.
13 Latinos have been here. Asians have been here. Various representations
14 of various factions of the Asian community. You, as an African-
15 American, are here. We've had white folks that are here. And you're
16 all here in the state in which you now no longer have a majority,
17 absolute majority. And the question is, in terms of the relationships
18 as they'll exist, or do exist, among you all together as a whole here
19 in California.
20 I've heard, in my part of the world, that there are classic
21 tensions that exist between black folks and Hispanics here, that folks
22 just can't stand each other at times. That there are real core issues
23 about, you know, the native Latino population here and new immigrant
24 populations, that a substantial portion of Hispanics who lived in
25 California voted in favor of Proposition 187 and said, no, we don't
26 want more folks streaming across the border illegally here into our
27 country, quote, unquote. And so you've got all of those things that
28 are sort of interplay, but now that you have no absolute majority as a
29 population, just very generally, and I want to limit your answers just
30 to a few seconds, if I could.
31 MS. FENG: Let me just say, I wear another hat, which is I sit on
32 the L.A. County Human Relations Commission, and there is no doubt that
33 racial tension is still alive and well. In Los Angeles, for instance,
34 I think it was 26 of our high schools recently suffered from some
35 crazy rash of racially based violence, where shootings or attacks
36 between one group and another escalated and --
37 COMMISSIONER ROGERS: Between various minority groups.
38 MS. FENG: -- between various minority groups -- escalated and
39 then jumped from one school to another because, unfortunately, text
40 messaging between groups. But, let me end with, I think, a note of
41 hope, which is -- I know that we're not talking about Section 2 of the
42 Voting Rights Act, but in the most recent restricting process, the
43 African-American, Latino and Asian-American community worked very
44 closely.
45 And one of the abiding principles that we all sat down and agreed
46 on was that we wanted to make sure that our communities had
47 representation, and, to the extent possible, that our communities
48 weren't divided and that we could advance more districts that could be
49 created, that would have or preserve minority communities, but in no
50 circumstances would we do it at the expense of another community.
51 And that took a lot of negotiation behind the scenes for us to
52 work out, but for the first time, we actually went to the Senate

1 hearings of the Election and Reapportionment Committee and presented a
2 unity map. And that map -- for instance, in Oakland, we met with
3 Latino and Asian-American communities. And they decided that instead
4 of trying to maximize their community and build a district that would
5 take what is Assembly District 16 south to extend Oakland's district
6 into a city called San Leandro that has a higher population of Asian
7 and Latinos. Instead what they were going to do was reach north, keep
8 the district whole within Oakland and reunify a community of African-
9 Americans that had been split right down the middle by the 1990 lines.
10
11
12 That was of no, quote, unquote, racial political advantage to African-
13 American or Asian-Americans but, in their minds, their community was about
14 being Oaklanders, sharing issues of transportation, of environment, of, you
15 know, issues about city development, that they felt that they had a greater
16 alliance with the African-American community that had been split than Asian-
17 American or Latino communities to the south.
18 And, I would say, that in example after example in California, when
19 asked where do your communities lie, people who are given the ability to draw
20 the redistricting lines and think about race, but also beyond race,
21 oftentimes chose to be very respectful of other communities of color and many
22 times would build alliances so that they could create districts that would
23 both enhance their community's ability to have a candidate of their choice
24 elected, but also another community's ability.
25 And can I give you a dozen examples. We can also probably e-mail that
26 to you, because I think in California it certainly is a potential model for
27 other states where, when you give the ability to draw redistricting plans to
28 community groups or to people who live in those communities and not just
29 incumbents, you can have a very different result.
30 MS. FOWLER: I don't want to dismiss, though, while she painted that
31 very good picture of collaboration on that, the racial tension, as she did
32 say, still exists very well, but it is typically at the younger population. I
33 don't know what this text message -- I thought it was a good thing, but now
34 I'm concerned. It's the -- the education with our youth, I think, that we
35 have a lot of work to do in terms of, one, their self-esteem and their
36 importance on this earth and their purpose, along with, not only the
37 education of that, I think we've missed a lot in terms of who we are as a
38 people individually, culturally, and what we all need to be doing.
39 And this whole idea of, I'm in your set, not in your set, this street
40 belongs to this gang, this street belongs to that gang, a lot of that comes
41 from, in my opinion, the -- a clue on the economic and the poverty level that
42 has set in where we have reduced -- no programs, no fundamental leadership
43 roles, and things for youth to do once they leave, should they go, to the
44 school that they're supposed to be educated in on a daily basis.
45 We do have a lot of racial tension. Why that is, I think we're losing
46 some things at home with more families working, where both parents working,
47 or some people working two jobs to try to meet. Much to the chagrin of us, a
48 high percentage in our schools in the minority population are foster
49 children, and that is a frightening and shocking thought for us moving
50 forward in terms of educating our children and having people that are going
51 to be able to move this country in the direction that it needs to be in.
52 And until one of the schools recently lost their accreditation --
53 it's back now -- did that fact come out about the high number of
54 foster children that were in that school and not getting the
55 leadership and guidance that they needed. And it's not just -- you

1 can't blame it on the teachers and the school board. They -- there has
2 to be parental or some type of family or some sustaining thing for
3 them -- for them to move forward. And so, when they get to school,
4 they've got these built-up tensions, frustrations, et cetera. And,
5 then, combine that with those that are not going to school, hanging
6 around at the schools, no matter how much security the schools are
7 trying to set up to protect the children that are there, there are
8 always those on the outside that aren't doing the right thing that are
9 there to make trouble. So we do have a long way to go in terms of
10 race relations, but we, hopefully -- we have a new mayor. He's trying
11 to set some standards. The school board is trying to take a different
12 tact. But that's almost like a different group when you start talking
13 about redistricting, you know, and so forth. It's California. It's --
14 we've got some of everything. Welcome.
15 CHAIRMAN LEE: Eun Sook or Eugene, do you want to take a crack at
16 that?
17 MS. LEE: I'd say something really short, which is I felt that
18 it's pretty -- I see signs and I see potential, and in the short
19 amount of time that we have, it would be hard to answer fully, but I
20 do feel that in also the work that we're doing, not only allow around
21 civic engagement and voter empowerment but around, say for example,
22 immigration reform and immigrant rights issues, I have seen the coming
23 together of communities, Asian Pacific American, Latinos and so on.
24 So I think and -- at the same time, we're also trying to reach
25 out to the African-American community and trying to see the common
26 links. So I think that in a few years we would probably -- I feel I
27 would be able to give a more informed answer about how California will
28 look, given that it's no longer a majority state.
29 MR. LEE: I don't have much to add. I think Carolyn said it well.
30 When there are a lot of problems, especially young people, with
31 insensitive attitudes -- APALC has a leadership development promise
32 that does a lot of work in high schools in the San Gabriel Valley. And
33 we see a lot of tensions there, from time to time, between Asian and
34 Latino students. And I think a lot of work needs to be done. There's
35 also a lot of potential for good things to come about it. As Kathay
36 mentioned, in 2001, a number of groups worked very well together in
37 making sure that they didn't really step on each other's toes. And I
38 think that's an example in the voting context where groups working
39 together can overcome racial tensions.
40 CHAIRMAN LEE: Okay. With that, we bring this panel to a
41 conclusion. I'd like to thank the panelists. This has been an
42 exceedingly thoughtful panel, actually, and I think that the -- I
43 think you've touched some really deep issues -- goaded by Commissioner
44 Rogers, of course. But, you know, we thank you very much for your
45 answers and I think all of us believe they were very thoughtful
46 answers. So thank you. [Applause] We should applaud. We have on
47 the schedule closing statements. Does anyone feel the need to have a
48 closing statement?
49 COMMISSIONER BUCHANAN: Amen.
50 CHAIRMAN LEE: "Amen" it shall be. Okay. Thank you very much.
51 (Whereupon, at 5:05 P.M., the hearing was adjourned.)

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7 LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
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9 National Commission ON the Voting Rights Act
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11 MID-ATLANTIC REGIONAL HEARING
12
13 October 14, 2005
14 10:00 a.m.
15 Arnold & Porter, LLP
16 555 12th Street, N.W.
17 Washington, D.C.
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1 P R O C E E D I N G S
2 MR. JOSEPH: Welcome. I'm Jimmy Joseph
3 from Arnold & Porter and I wanted to welcome all of
4 you here today for your participation in this very
5 important ongoing effort by the Lawyers' Committee
6 For Civil Rights. I'm very proud to be a member of
7 the Lawyers' Committee board of directors and to have
8 participated in several of their voting rights
9 projects over the last year. And this is a wonderful
10 service that the Lawyers' Committee is doing and I
11 know that the commissioners appreciate the input from
12 everyone who is testifying around the country and we
13 look forward to a successful outcome of this hearing.
14 Barbara?
15 MS. ARNWINE: Thank you. Good morning,
16 everyone. I am Barbara Arnwine, executive director
17 for the Lawyers' Committee for Civil Rights Under
18 Law. I welcome you to this, the ninth of 10 hearings
19 of the National Commission on the Voting Rights Act.
20 I first want to thank James Joseph and the law firm
21 of Arnold & Porter for hosting today's meeting,
22 commission hearing, in this wonderful space. It's
23 quite great to be here.
24 We begin this hearing a week before the
25 House Judiciary Committee begins hearings on the
26 reauthorization of the Voting Rights Act. We expect
27 the report that will be written by the National
28 Commission to greatly inform the record of
29 discrimination in voting that Congress will consider
30 as it debates the reauthorization of the Voting
31 Rights Act.
32 The National Commission's report will
33 assess the impact that the Voting Rights Act has had
34 on combating discrimination in voting and allowing
35 minority voters to vote for their candidate of
36 choice. It will offer a comprehensive picture of the
37 state of discrimination in voting today by reviewing
38 the enforcement record of the Department of Justice,
39 cases litigated by voting rights attorneys, and of
40 course the testimony from our regional hearings.
41 Together this data will paint a complete
42 picture of the role that the Voting Rights Act has
43 played in combating discrimination in voting over the
44 past 40 years and how minority voters still depend on
45 its protections to ensure that everyone has equal
46 access to the political process.
47 The commission's report will be released
48 in January 2006. Don't quake too much, Chandler.
49 The National Commission has had hearings in
50 Montgomery, Alabama; Phoenix, Arizona; New York, New
51 York; Minneapolis, Minnesota; Americas, Georgia;
52 Orlando, Florida; Rapid City, South Dakota and Los
53 Angeles, California.
54 The evidence so far has been both helpful
55 and disheartening. During each hearing, we heard
56 from voting rights litigators who have been
57 instrumental in the development of the Voting Rights

1 Act, ensuring that its protections reach those at
2 risk of discrimination.
3 We have heard from experts who have
4 studied the impact of the Act on affected communities
5 and we have heard from community activists and
6 citizens who have given powerful anecdotal evidence
7 that proves that the Voting Rights Act, particularly
8 Section 5, one of the central provisions in the
9 Voting Rights Act, which must be reauthorized, has
10 been responsible for providing a voice to formerly
11 voiceless communities.
12 Unfortunately, however, we also heard from
13 advocates and citizens chronicling the continuing
14 disparity in the voting rights experience between
15 minority voters and other voters. Clearly the work
16 of the Voting Rights Act, while having a powerful
17 effect on minority voters, is not done.
18 We have heard from African-American and
19 Latino voters in the South who still struggle against
20 discrimination, from American-Indians in the
21 Southwest and Midwest that tell of the dreadful lack
22 of resources, from Asian-Americans and others in the
23 Northeast and all of them pointing to the need for
24 language assistance and culturally sensitive polls.
25 And we have heard testimony about the
26 impact the Department of Justice observers in
27 subsequent enforcements have had enforcing
28 jurisdictions in the Northeast to make our democracy
29 accessible to Asian-Americans and Latinos, resulting
30 in members of those communities winning elections to
31 local government mostly for the first time in
32 history.
33 I am grateful for the assistance that the
34 National Commission has received from the
35 Commission's many cosponsoring civil rights and civic
36 organizations. It is this coordinated effort by
37 members of the civil rights community that has helped
38 the National Commission to accomplish its immense
39 task.
40 Today we will hear from policy makers,
41 experts, attorneys and advocates who examine the
42 challenges that minority voters have faced in
43 Virginia and Maryland as well as an analysis of how
44 well the aspiring provisions of the Voting Rights Act
45 has served minority voters nationwide, including a
46 look at the enforcement record in the Department of
47 Justice.
48 I look forward to hearing today's
49 testimony and adding it to the already impressive
50 record of this august body. When we put together
51 this impressive group of commissioners, we did so
52 knowing that theirs was not an easy task. In fact,
53 as you heard about the other eight hearings, we have
54 literally had these commissioners traveling all over
55 the country, sometimes having hearings within days of
56 each other and going from one extreme to another.
57 Nevertheless, they have done an impressive job.

1 What we were asking of them and what we
2 have asked of them has been nothing short of
3 assessing the continuing importance of arguably the
4 most important piece of civil rights legislation that
5 has ever passed Congress. They have responded with
6 distinction. I am proud to see this process
7 unfolding and to have the opportunity to work with
8 such a distinguished group.
9 It is my pleasure to introduce you to the
10 Honorable Joe Rogers, who is the commissioner who is
11 going to preside over today's hearing. The Honorable
12 Joe Rogers completed his term as the lieutenant
13 governor of Colorado in 2003 where he held the
14 distinction of serving as America's youngest
15 lieutenant governor and only the fourth
16 African-American in U.S. history ever to hold that
17 position.
18 He served as founding chairman of the
19 Republican Lieutenant Governor's Association and
20 served on the executive committee of the National
21 Conference of Lieutenant Governors. He created the
22 acclaimed Dream Alive program in dedication to the
23 memory and legacy of Dr. Martin Luther King, Jr. and
24 the leaders of the civil rights movement. Today it
25 is my pleasure to turn this program over to
26 Commissioner Joe Rogers.
27 MR. ROGERS: Thank you, Barbara. Good
28 morning, everybody. Is everybody all right? We are
29 glad to be with you here in Washington, a bit of a
30 ways away from Colorado. But you all saw a snowstorm
31 that hit our state just the other day.
32 What you didn't see was about eight hours
33 later, all the snow went away. We're fortunate we
34 live in that part of the country where things just
35 sort of come and go in terms of the weather, but very
36 much delighted to be with you all here today.
37 Barbara, thank you for the gracious introduction, and
38 we're delighted to be with you here and the National
39 Commission on the Voting Rights Act.
40 This morning I would like to provide you
41 with some introduction as to the substance of why
42 we're here and frankly what we seek to do here this
43 morning. On behalf of the National Commission on the
44 Voting Rights Act, I want to welcome you today to the
45 ninth of 10 public hearings that the Commission is
46 conducting. This hearing is the Mid-Atlantic
47 Regional Hearing where we will be looking at the
48 effect of the Voting Rights Act on Maryland and
49 Virginia, hear from voting rights advocates and from
50 experts who have studied various aspects of the Act.
51 In past hearings, we heard some compelling
52 testimony about voting discrimination and the impact
53 of the Voting Rights Act on African-American and
54 Latino voters in the South, Latino and
55 American-Indian voters in the Southwest,
56 African-American, Asian and Latino voters in the
57 Northeast and American-Indian and African, Asian and

1 Latino voters in the Midwest. Today here in
2 Washington, D.C., we will be able to hear from the
3 former Department of Justice attorneys who will talk
4 about the enforcement of various provisions of the
5 Act.
6 Before we start, I wanted to give you a
7 bit of background on the Voting Rights Act and the
8 provisions that will expire in 2007. The Voting
9 Rights Act was signed into law in 1965 by President
10 Lyndon Johnson in response to voting discrimination
11 encountered by African-Americans in the South. When
12 Congress reauthorized the Voting Rights Act in 1975,
13 it made specific findings that the use of
14 English-only elections and other devices effectively
15 barred minority language citizens from participating
16 in the electoral process.
17 In response, Congress expanded the Act to
18 account for discrimination against language minority
19 citizens, by enacting the Minority Language
20 Assistance Provisions found in Section 203. Before
21 discussing Section 5 and Section 203 in great detail,
22 I want to expand on what is scheduled to expire in
23 2007 and what is not.
24 The right of African-Americans and other
25 minorities to vote is guaranteed by the 15th
26 Amendment and is permanent. Permanent provisions of
27 the Act ban literacy tests and poll taxes, outlaw
28 intimidation, authorizes federal monitors and
29 observers and creates various mechanisms to protect
30 the voting rights of racial and language minorities.
31 However, there are some temporary
32 provisions of the Voting Rights Act that will sunset
33 in 2007, unless they are reauthorized by Congress.
34 Our primary focus today is on these temporary
35 provisions, the expiring provisions. In 2007, three
36 major protections of the Voting Rights Act will
37 expire unless Congress acts to reauthorize these
38 sections.
39 First is Section 5 of the Act requires
40 certain states, counties and townships with a history
41 of discrimination against minority voters to obtain
42 approval or preclearance from the United States
43 Department of Justice or the United States District
44 Court in Washington, D.C. before they make any voting
45 change. These changes include redistrictings,
46 changes to the methods of election, polling place
47 changes. Jurisdictions covered by Section 5 must
48 prove that the changes do not have the purpose or
49 effect of denying or abridging the right to vote on
50 the account of race, color or membership in a
51 language or minority.
52 Virginia is covered by Section 5.
53 However, nonpolitical jurisdictions have successfully
54 bailed out of their obligations under Section 5 here
55 in Virginia. This is a provision of the Act that
56 specifically allows for this option to exist where
57 essentially a locality has successfully complied with

1 the terms of the Act.
2 Second, Section 203 of the Act requires
3 that language assistance be provided to communities
4 with a significant number of voting age citizens who
5 have limited English proficiency. Four language
6 groups are covered by Section 203. American-Indians,
7 Asian-Americans, Alaskan natives and those of Spanish
8 heritage. Covered jurisdictions must provide
9 language assistance at all stages of the electoral
10 process. As of 2002, a total of 466 jurisdictions
11 across 31 states are covered by these provisions. In
12 this region, Montgomery County, Maryland is subject
13 to Section 203 for Spanish language citizens.
14 Third, Section 6B, 7, 8 and 9 and 13A of
15 the Act authorize the attorney general to appoint a
16 federal examiner to jurisdictions covered by Section
17 5's preclearance provisions on good cause or to send
18 a federal observer to any jurisdiction where an
19 examiner has been assigned. Since 1966, 25,000
20 federal observers have been deployed in approximately
21 1,000 elections throughout the United States.
22 The Commission's purpose of its
23 membership. The Lawyers' Committee for Civil Rights
24 Under Law, under the direction of Barbara Arnwine,
25 acting on behalf of the Civil Rights Committee,
26 created the nonpartisan National Commission of the
27 Voting Rights Act to examine discrimination in voting
28 since 1982. The National Commission is comprised of
29 eight advocates, academics, legislators and civil
30 rights leaders who represent the diversity that is
31 such an important part of our great nation.
32 The honorary chair of the Commission is
33 the Honorable Charles Mathias, former Republican
34 United States Senator from Maryland. The other six
35 national commissioners are Commissioner Chair Bill
36 Lann Lee, who could not be with us here today; the
37 Honorable John Buchanan, former congressman from
38 Alabama; Professor Chandler Davidson, who is to my
39 right, distinguished scholar and coeditor of one of
40 the seminal works on the Voting Rights Act; Delores
41 Huerta, cofounder of the United Farm Workers of
42 America; Elsie Meeks, the first Native-American
43 member of the United States Commission on Civil
44 Rights; and, as you all know, Professor Charles
45 Ogletree, the distinguished Harvard professor and
46 civil rights advocate.
47 Joining me today are Commissioners
48 Davidson and Ogletree. We are also fortunate to have
49 two regional guest commissioners, one of which is
50 here with us today, Karen Narasaki. Karen, we're
51 delighted to have you here today and thanks so much
52 for being with us.
53 I want to give you a little bit of Karen's
54 background, by the way. We'll come right back to
55 you, Karen, I promise.
56 The Commission has two primary tasks.
57 First, to conduct regional hearings such as this one

1 across the country to gather testimony relating to
2 voting rights. And, second, to write a comprehensive
3 report detailing the existence of discrimination in
4 voting since 1982, the last time there was a
5 comprehensive reauthorization of the Voting Rights
6 Act. The report will be used to educate the public,
7 advocates and policy makers about the record of
8 racial discrimination in voting.
9 I also wanted to share with you some
10 information about our hearing purpose and how today's
11 hearing will work. There will be three panels today.
12 The first two panels are comprised of policy makers,
13 leading experts, voting rights practitioners and
14 advocates. Each panelist will provide a 5 to
15 10-minute presentation. After all the members of the
16 panel have spoken, the Commission will ask questions
17 of the panelists.
18 We encourage members of the public who are
19 here today to share their voting rights experiences
20 in our third and final panel of today. If you are
21 interested in participating in this panel, please
22 speak with one of our staff members who is here
23 today. If you would like to share your testimony but
24 cannot stay, please see one of the staff members who
25 will take your statement so that it can be included
26 in the record.
27 Just so you all know, we have members who
28 are here as a part of our staff. Would you all the
29 just stand or raise your hand so that everybody can
30 see you and knows who to come to? Absolutely. And
31 Barbara, I guess we should give everybody a round of
32 applause. We appreciate you being here.
33 (Applause.)
34 MR. ROGERS: Congressman Watt, I know that
35 your schedule requires that you leave today so we
36 wanted to, if we could, just break a little bit in
37 terms of our overall pattern in terms of the time for
38 testimony and our panel discussions today.
39 Congressman, if you would come forward, we would
40 appreciate that. We understand that you have to run
41 in terms of your schedule and we would appreciate the
42 opportunity to hear from you directly.
43 I would like to provide you with some
44 background information as it relates to Congressman
45 Watt. First of all, it's good to see you. In 1992,
46 Congressman Melvin Watt was elected to the
47 United States House of Representatives from
48 North Carolina's 12th congressional District and
49 became one of only two African-American members
50 elected to Congress from North Carolina in the 20th
51 Century.
52 The 12th district is North Carolina's most
53 urban congressional district. Currently Congressman
54 Watt is a member of the House Financial Services
55 Committee where he serves on the Financial
56 Institution Subcommittee, the Domestic and
57 International Monetary Policy Subcommittee and the

1 Capital Markets, Insurance and Government Sponsored
2 Enterprises Subcommittee.
3 Congressman Watt is on the House Judiciary
4 Committee also where he serves as ranking member on
5 the Subcommittee on Commercial and Administrative
6 Law. In December of 2004, Congressman Watt was
7 elected as chairman of the Congressional Black
8 Caucus.
9 We're so delighted to have you with us
10 today, Congressman Watt, and thank you for being with
11 us. We would appreciate hearing your thoughts and
12 answering any questions that we might have.
13 CONGRESSMAN WATT: Thank you so much and
14 thank you all for inviting me to be here today. I'm
15 usually sitting on the opposite side of this hearing
16 process and I'm trying to enforce some time
17 constraints so I'll try to be cognizant of time
18 constraints sitting on this side also because I know
19 you all have a substantial amount of work and
20 testimony to hear today.
21 Let me start by applauding the work of the
22 National Commission on the Voting Rights Act for the
23 important role that you all are playing in this
24 process as we move to an effort to try to reauthorize
25 the expiring provisions of the Act. Most people kind
26 of take for granted that, well, you can just vote and
27 extend the provisions of the Voting Rights Act that
28 are expiring.
29 But those of us who know the legal and
30 legislative process know how important it is to build
31 a record that substantiates the necessity of what we
32 are doing in the expansion and extension of the
33 expiring provisions lest the Supreme Court look at
34 what is being done or has been done and say there was
35 no legal, constitutional, historical justification
36 for this kind of affirmative action in the voting
37 rights area.
38 So the role that the Commission is playing
39 in helping to build the record and substantiate the
40 continuing discrimination and exclusion of
41 African-American voters from the -- and other
42 minority voters from the electoral process is an
43 extremely important one.
44 In the 40 years since its passage, the
45 Voting Rights Act has come to be regarded as one of
46 the most effective civil rights laws in our nation's
47 history. The Voting Rights Act has safeguarded the
48 right of millions of minorities to have their votes
49 counted and consequently to have their voices heard.
50 Today's hearing focuses on Virginia and Maryland and
51 I know that there are panelists here with specific
52 data on voting practices in those states, but I'm
53 here to applaud the Voting Rights Act for its impact
54 nationally on protecting and preserving the rights of
55 minorities to vote free from discrimination.
56 Prior to the passage of the Voting Rights
57 Act, there were fewer than 300 African-Americans in

1 public office in all of the Southern states. This
2 figure rose to 2,400 by 1980 and stands at more than
3 9,000 today. Similar increases have been seen in
4 other racial groups. For example, the Act has
5 facilitated access to the political process for many
6 of the 4,853 Latinos who now hold public office. The
7 Act has similarly benefited Native Americans, Asians
8 and other minority groups that have historically
9 encountered many barriers to full political
10 participation.
11 But the success of the Act is not cause
12 for its demise as some have argued. When something
13 works, you run with it, not away from it, especially
14 when the purpose has not yet been fully fulfilled.
15 And we have the opportunity, this Congress, to extend
16 and strengthen the Voting Rights Act to ensure that
17 the democratic process continues to evolve and be
18 protected in its fullest aspects.
19 The trends in increased voter
20 registration, not only minorities serving in
21 political office, may also be attributed to a
22 substantial degree to the existence of the Voting
23 Rights Act. These gains are a testament to the
24 effectiveness of the Act as well as its continued
25 necessity. Although there are only certain
26 provisions of the Voting Rights Act that are
27 scheduled to expire, I believe that the structure of
28 the Act in its totality is what has made it the
29 success that it is.
30 Section 2 of the Act applies nationwide
31 and prohibits all forms of voting discrimination on
32 the basis of race, color or membership in a language
33 minority. Because of Section 2, violations of voting
34 rights may be challenged whenever and wherever they
35 occur.
36 Section 5 forces jurisdictions with a
37 historical record of discrimination to preclear any
38 voting changes to ensure that those changes will not
39 disenfranchise minority voters. But those
40 jurisdictions covered by Section 5 may also bail out
41 from coverage by demonstrating that they now
42 facilitate equal opportunity at the ballot box. The
43 bail-out process undercuts any argument that the
44 Voting Rights Act is an intrusion on states' rights.
45 I support states' rights but we also know
46 that states also violate the Constitution and some of
47 them have a long and persistent history of doing so.
48 Other expiring provisions of the Voting Rights Act
49 help ensure that voters are free from discrimination
50 on election day. The federal examiner or observer
51 provisions are key when effectively utilized by the
52 Department of Justice. These provisions ensure a
53 federal presence in areas that are suspected of
54 inappropriate discriminatory or other activity.
55 Section 203 is also vitally important.
56 The significant increase in the Latino and Asian
57 population since 1975 when the language minority

1 provisions of the Voting Rights Act were first
2 adopted makes these aspects of the law even more
3 significant today. Native-American language groups
4 and Alaska natives also benefit from the language
5 assistance provided in Section 203.
6 Based on testimony and other evidence
7 showing how gerrymandering, annexation, adoption of
8 at-large elections and other political maneuvers that
9 have been used to discriminate against and
10 disenfranchise minority voters, Congress voted three
11 times to extend Section 5 in 1970 for five years,
12 1975 for seven years and 1982 for 25 years. I know
13 that through these hearings of the National
14 Commission on the Voting Rights Act, that some of
15 that similar evidence will be entered into the
16 record, evidence that discrimination, exclusion and
17 failure to make every vote count still persists, that
18 the job of the Voting Rights Act is not yet done.
19 Much progress has been made in minority
20 voting rights and office holding in recent times, but
21 it has been made in large measure because of the
22 existence of Section 5 and the other provisions of
23 the Voting Rights Act. Racial bloc voting and
24 polarization continue to exist. In fact, those who
25 think the purposes behind the Voting Rights Act and
26 the Act itself have outlived their usefulness need
27 only look to my own state and the story behind my
28 eventual run and election to Congress.
29 We're not talking about problems that
30 occurred 40 years ago. Many of you may recall the
31 races for the U.S. Senate that Harvey Gantt launched
32 against Jessie Helms in 1990 and 1996. In those two
33 contests, racially divisive ads helped seal Harvey
34 Gantt's defeat. And prior to my election in 1992, no
35 African-American had been elected to Congress from
36 North Carolina in the 1900s, since 1898, despite the
37 fact that the African-American population in
38 North Carolina was approximately 20 percent.
39 So I don't believe the Voting Rights Act
40 requires proportional representation, nor do I
41 believe that every racial and language minority who
42 runs must or should win. But without the protections
43 of the Voting Rights Act, more elections may be
44 tainted by blatantly divisive tactics. Without the
45 protections of the Voting Rights Act, the people who
46 deserve and require representation most will be
47 misinformed, intimidated or simply deterred from
48 exercising their right to vote.
49 You were generous in your introduction to
50 indicate that I am now serving as chair of the
51 Congressional Black Caucus, an honor that I am proud
52 to have, and I can tell you that the majority of our
53 members, the majority of our members would not be
54 members of the Congressional Black Caucus, would not
55 be serving in the Congress of the United States but
56 for the provisions of the Voting Rights Act. And
57 most of them are there because of the aggressive

1 enforcement that has occurred since 1990 when the
2 Voting Rights Act started to be aggressively enforced
3 more vigorously.
4 And discriminatory acts still continue,
5 exclusion still continues and until we root every
6 aspect, every nuance of discrimination out of the
7 process, our democracy cannot be the true democracy
8 that we expect it to be.
9 I was in South Africa before the election
10 occurred there, the free election, and I remember
11 leaving and thinking that, at that time, perhaps the
12 United States was still the model of democracy
13 throughout the world. Since then, I've come to
14 question that with the large participation in South
15 Africa, the lack of impediments to voting there,
16 pictures on ballots to help people who can't read.
17 There are a number of things that we could do. Doing
18 away with voter registration. I never have quite
19 understood why, in a democratic, free society like
20 America, you need to register voters, especially with
21 advanced technology that allows us to check and
22 cross-check whether people are double voting or not.
23 I think our democracy needs the Voting
24 Rights Act to assure the level of participation that
25 we have today. And to do away with the Voting Rights
26 Act, in fact, not to strengthen the Voting Rights
27 Act, to make it live up to its real promise, I think
28 would be a blow to our democracy and would
29 substantially erode our ability to say to the world
30 that we have the most effective democracy in
31 existence in today's world.
32 So I applaud your efforts to build this
33 record. I assure you that we will be working, as
34 members of Congress, to take the record that you are
35 building, and to get it into the congressional record
36 as part of what we're doing. We were fortunate
37 recently to have the chair of the Judiciary Committee
38 in the House just a week and a half ago attend the
39 brain trust, the Congressional Black Caucus brain
40 trust on voting rights that I chair, and to get his
41 pledge that there would be 10 or 12 hearings
42 conducted by the Judiciary Committee in preparation
43 for drafting a bill that reflects current day
44 conditions. And the hearings that you all are
45 conducting will be made a part of that congressional
46 record.
47 I applaud you for it, thank you for it,
48 and thank all of you for the wonderful work that you
49 are doing to help make our democracy viable by
50 justifying and documenting the ongoing need for the
51 expiring provisions of the Voting Rights Act. Thank
52 you so much.
53 MR. ROGERS: Absolutely.
54 (Applause.)
55 MR. ROGERS: Congressman, thank you so
56 much. I did want to ask you, do you have a moment
57 that we could ask you a few questions?

1 CONGRESSMAN WATT: I would be happy to.
2 MR. ROGERS: Wonderful. There may be
3 commissioners who have questions for you. We'll
4 start with Commissioner Davidson.
5 MR. DAVIDSON: Congressman, it's a
6 pleasure to hear you speak today. I've read about
7 you over the years but this is the first time I've
8 actually met you face to face.
9 CONGRESSMAN WATT: Just don't believe
10 everything you read.
11 (Laughter.)
12 MR. DAVIDSON: You made the statement a
13 few minutes ago that the majority of the
14 Congressional Black Caucus wouldn't be serving in
15 Congress today were it not for the Voting Rights Act.
16 My first question is, would you be one of those
17 Congresspeople?
18 CONGRESSMAN WATT: I would definitely be
19 one of those Congresspeople. If you look at the
20 history of the districts in North Carolina, if race
21 and the Voting Rights Act -- if the Voting Rights Act
22 were not in place, there simply never would have been
23 created the opportunity for African-Americans to be
24 elected.
25 And when you've got 20 percent of your
26 population being African-Americans and you take that
27 20 percent and disperse it into other congressional
28 districts and make it an effective minority or an
29 ineffective minority, you simply don't have the right
30 to have the African-American community elect the
31 representatives of their choice. So I would
32 certainly not be here today but for the Voting Rights
33 Act.
34 MR. DAVIDSON: If I understand you, then,
35 the premise of your explanation for your being
36 elected is that there is a high degree of racially
37 polarized voting in North Carolina?
38 CONGRESSMAN WATT: There is a very high
39 degree of racially polarized voting and we like to
40 think that the racially polarized voting is
41 decreasing. It should be decreasing over time.
42 But if you took a blind poll today, as was
43 done 25 years or so ago in preparation for Gingles
44 versus Thornburg, and you ask white voters whether
45 they would vote for a black candidate, there would
46 still be today a substantial minority of white voters
47 who would say that under no circumstances would they
48 consider voting for an African-American candidate.
49 It got so bad in North Carolina really
50 that the dramatic example that I point to all the
51 time, we had -- in North Carolina, our court system
52 is an elected system. We had an African-American
53 lawyer who had practiced law, distinguished record.
54 At that time, you weren't even required to be a judge
55 to be on the appellate courts of -- you weren't
56 required to be a lawyer to be on the appellate courts
57 of North Carolina.

1 And a fireman ran against him. No legal
2 background, no experience, nothing to commend him for
3 the court except that he was white, against a
4 well-qualified, seasoned African-American lawyer who
5 had been practicing law for years in North Carolina.
6 MR. DAVIDSON: What was his name?
7 CONGRESSMAN WATT: I can't remember his
8 name. I can get that for you. But the fireman won
9 the election. And, I mean, there is just no more
10 dramatic example of the impact of racially polarized
11 voting. And when I say racially polarized voting,
12 I'm not talking about people who prefer one race over
13 the other. I'm talking about people who will tell
14 you that under no circumstances will they consider
15 voting for a minority candidate, an African-American
16 candidate.
17 All voters have preferences. You know,
18 most voters would prefer to vote for a white
19 candidate, black voters might prefer to vote for a
20 black candidate. That's not evidence necessarily of
21 racial polarization. But when you get white voters
22 who are in a substantial majority saying that they
23 will, under no circumstances, consider voting for an
24 African-American candidate, those voters need to be
25 factored out of the equation. The playing field
26 needs to be leveled to factor them out because you
27 know they are voting solely on the basis of race.
28 And that's where the Voting Rights Act
29 comes into play. It allows those voters who are
30 themselves taking race into account affirmatively by
31 saying they are not, under any circumstances, going
32 to vote for a minority candidate. They're taking
33 race into account.
34 All the Voting Rights Act does is say you
35 can take race into account on the opposite side to
36 balance that equation. That's what the Voting Rights
37 Act has done over the years. And as long as there
38 are still people out there who are saying, I won't
39 vote for a minority candidate under any
40 circumstances, the Voting Rights Act will always be
41 needed.
42 Now, I hope, at some point in the life of
43 my children or, if I have grandchildren, at some
44 point in their lives, that those attitudes will
45 change. But they have not yet changed sufficiently
46 to allow us to do away with the Voting Rights Act
47 yet. Long answer. I'm sorry. I get on my soapbox.
48 MR. DAVIDSON: Thank you.
49 MR. ROGERS: Thank you, Congressman.
50 Professor Ogletree?
51 MR. OGLETREE: Good morning, Congressman
52 Watt, and congratulations --
53 CONGRESSMAN WATT: Good morning. My hero,
54 Professor Ogletree.
55 MR. OGLETREE: Thank you for your
56 excellent leadership on the Congressional Black
57 Caucus and all that you've done. And we've really

1 appreciated being here in Washington and that you
2 could join us knowing your busy schedule.
3 I just wanted to touch upon a point that
4 you made in your written presentation this morning
5 that should be underscored. The significance of this
6 Act reauthorization could not be clearer when we look
7 at the state of North Carolina. Perhaps the most
8 dispiriting piece of legislation on the voting
9 rights, the case of Shaw versus Reno, comes out of
10 North Carolina despite the able and legendary work of
11 both of our mentors, Judge A. Leon Higginbotham, who
12 fought very hard to try to ensure that sort of
13 representation. And it's underscored by other
14 factors. It's not simply the right to vote but all
15 the benefits of voting.
16 For example, because of the power of
17 members of the Senate, a President of this country is
18 unable to express his will to diversify the Fourth
19 Circuit Court of Appeals in the 1990s because a
20 Senator from the state of North Carolina prevented
21 that from happening. A well-qualified, capable
22 individual who should have been appointed a decade
23 ago, that never happened because of the implications
24 of voting.
25 And finally, it ties in today's issues
26 with Hurricane Katrina. As we think about the impact
27 on Louisiana, Mississippi, Alabama and Florida, it is
28 ironic that, by my count, we have one
29 African-American in the state of Louisiana in the
30 House, that's Congressman Bill Jefferson, one in the
31 whole state of Mississippi, that's Congressman Bennie
32 Thompson, and yet we have substantial representation
33 of African-Americans in all of those states.
34 The question, with that background, is, is
35 it your sense that if we strengthen the Voting Rights
36 Act, that we may be able to address the
37 underrepresentation of African-Americans,
38 particularly in those regions of the South where we
39 have substantial voters but very little actual
40 representation in Congress?
41 CONGRESSMAN WATT: You actually pointed to
42 one of the concrete examples where the Voting Rights
43 Act should have had, did have and then had the
44 Supreme Court undercut some of its provisions by
45 court rulings and then you go back in the opposite
46 direction.
47 You pointed to Louisiana. You had Bill
48 Jefferson, you had Cleo Fields. Cleo Fields and I
49 came in to Congress in 1992. We both were elected.
50 Both of us were elected because of the benefits of
51 the Voting Rights Act. A court case was filed. A
52 provision of the Voting Rights Act was undercut by a
53 Supreme Court interpretation of the provision. Cleo
54 Fields' congressional district was redrawn to
55 substantially reduce the African-American population
56 in his congressional district.
57 The next election, Cleo Fields, seeing --

1 running polls, understanding that he simply was not
2 going to be re-elected in that congressional district
3 as it had been reconfigured, decided he had a better
4 shot at running statewide in Louisiana for the
5 United States Senate. Ran for the U.S. Senate, lost.
6 White person elected to the newly drawn district.
7 So you end up with a state -- Louisiana
8 probably has 25, 30, 35 percent African-American
9 population. Instead of having two African-American
10 representatives, they have only one and that one is
11 from New Orleans which, because of Katrina and the
12 mass exodus of African-Americans from the city, if
13 those people don't come back, there may not be any
14 African-American representative in Louisiana in the
15 House.
16 So race, a dramatic factor. And part of
17 that is simply because folks will -- white people
18 will not -- all of them will not consider voting for
19 an African-American candidate. Some of them will.
20 Attitudes are changing. This is a transitional
21 remedy. That's why we come back periodically and
22 renew the provisions of the Act rather than making it
23 permanent. So we're doing it the right way. We're
24 doing it in the legal context but the way we do it
25 and whether we do it or not has a dramatic impact.
26 And if we don't strengthen -- restrengthen
27 the provisions that have been undercut by the Supreme
28 Court, then you're going to see more erosion of
29 minority representation in this country, I believe.
30 MR. OGLETREE: Thank you.
31 MR. ROGERS: Commissioner Narasaki?
32 MS. NARASAKI: Thank you. I have two
33 questions, Congressman Watt. The first is,
34 North Carolina was the third fastest growing
35 Asian-American population, grew by over 127 percent.
36 I'm wondering whether any Asian-Americans have been
37 elected to office in North Carolina. And the second
38 question is, in your testimony, you talked about the
39 need to strengthen the Act and I'm wondering what
40 things you think need to be done in order to do that.
41 CONGRESSMAN WATT: I can't tell you that I
42 know an Asian-American who has been elected in
43 North Carolina. That doesn't necessarily mean that
44 none has, but I can try to research that and put it
45 into the record.
46 MS. NARASAKI: I'm not aware of any
47 either.
48 CONGRESSMAN WATT: But I'm not aware of
49 any Asian-Americans who serve in elected office in
50 North Carolina. And the number is growing. The
51 number is not growing as fast as the Latino/Hispanic
52 population in North Carolina and there are a few
53 Latino or Hispanic representatives yet being elected
54 in North Carolina, although I think it's a coming
55 thing.
56 Most people don't realize, in my
57 congressional district alone, I had the first -- the

1 highest percentage increase of Latino voters of any
2 congressional district in the country. I went from
3 under 1 percent to over almost 9 percent, like 900
4 percent increase in a 10-year span. So minorities,
5 Latino, Asian-Americans are growing in
6 North Carolina.
7 The second question was --
8 MS. NARASAKI: You had said there was a
9 need to strengthen the Act and I'm wondering what you
10 would --
11 CONGRESSMAN WATT: You want to know
12 what -- well, there are two important cases that have
13 been decided over the last 10-15 years by the Supreme
14 Court, actually over the last 10 years, I guess, by
15 the Supreme Court that have substantially undercut
16 the provisions of Section 5 and we think that
17 those -- Section 5 needs to be restored so that the
18 intent that was there by Congress when those
19 provisions were passed would be implemented.
20 So that's probably the most important set
21 of changes that we are proposing to try to just get
22 us back to what we understood and what the courts
23 were saying at that time was the meaning of Section
24 5. If we could just get back to that. We're not
25 trying to strengthen it beyond that but certainly get
26 back to that original intent.
27 Now, there are other things that are being
28 discussed but that's the primary thing. There is
29 some discussion of maybe expanding the coverage but I
30 won't wade off into that more controversial
31 territory. I personally would like to see us expand
32 the coverage to include jurisdictions where there has
33 been a finding of racial discrimination in the last
34 25 years since the last extension of the Act was, to
35 add them to the covered jurisdictions that would be
36 required to get preclearance.
37 I don't think you can have a clearer
38 indication of the effect of racial discrimination
39 than in the jurisdictions that have been found by a
40 court to have violated the Voting Rights Act in the
41 last 25 years. It just seems to me like a no-brainer
42 but it's also very controversial. And I'm speaking
43 for myself now. I'm not talking for any
44 organization, I'm not talking for the CBC, I'm not
45 talking for anybody. I'm just talking about from my
46 own personal perspective, that seems like it would be
47 a no-brainer for me.
48 MS. NARASAKI: Thank you.
49 MR. ROGERS: Thank you kindly. Thank you
50 for joining us. We're glad to have you with us.
51 MR. RABEN: I don't have a question but if
52 I could comment.
53 MR. ROGERS: Sure.
54 MR. RABEN: Thank you.
55 CONGRESSMAN WATT: I know they say things
56 about me.
57 MR. RABEN: You may be sorry you said

1 that. I was going to, on behalf of La Raza, thank
2 you for your leadership on this. I heard you say
3 we're going to have 12 hearings, or I heard that you
4 said we're going to have 12 hearings in the House and
5 La Raza will be there supporting you and working with
6 you. No good deed goes unpunished and we're going to
7 have a busy year. That's all. Thank you for
8 allowing me to say that.
9 MR. ROGERS: Absolutely. Thank you very
10 much.
11 CONGRESSMAN WATT: I thought Robert was
12 going to say something about me and I was trying to
13 stop that from happening. He wasn't going to put
14 anything bad on the record.
15 MR. RABEN: I hear you well.
16 CONGRESSMAN WATT: He and Charles Ogletree
17 know me well enough that they could put some bad
18 things on the record.
19 MR. ROGERS: Professor Davidson, do you
20 have a question?
21 MR. DAVIDSON: If you've got the time,
22 Congressman, I would like to ask just a couple more
23 questions and it goes back to this issue of racially
24 polarized voting. And I guess my first question is,
25 wouldn't some people say, in response to your claim
26 that there are a lot of white people who wouldn't
27 vote for blacks in your state, 40 counties of which
28 are covered by the Voting Rights Act, that this is
29 just a matter of partisanship. You're a Democrat. A
30 lot of whites are Republican and that we're not
31 talking about racial animus here but we're simply
32 talking about a partisan animus. How would you
33 respond to that?
34 CONGRESSMAN WATT: Well, I've heard that
35 argument. Every time I make the statement, in fact,
36 I usually hear that argument on the other side and I
37 try to remind people that the Voting Rights Act has
38 nothing to do with partisan politics. I've seen a
39 number of instances where African-American Republican
40 candidates have not gotten the support from
41 Republicans that would allow them to win. I've seen
42 a number of African-American Democrat candidates who
43 have not gotten the level of support they need from
44 white electorates to win. So it cuts --
45 MR. DAVIDSON: Are there nonpartisan
46 elections in your state at the city level, for
47 example, or at the county level?
48 CONGRESSMAN WATT: There are a number of
49 jurisdictions in North Carolina that have nonpartisan
50 elections. We still have partisan elections, in
51 Charlotte where I live, for city council and county
52 commission. We have nonpartisan elections for the
53 school board.
54 MR. DAVIDSON: How have African-Americans
55 faired in those kind of elections?
56 CONGRESSMAN WATT: African-Americans don't
57 fair well in those except in minority voting rights

1 districts. Don't have to necessarily be majority
2 black districts but race has to be taken into account
3 enough to factor out the people on the opposite side
4 who will not, under any circumstances, take race out
5 of their equation.
6 I was sitting here running through the
7 political equation of whether I should give you a
8 specific example of this partisan thing. Professor
9 Ogletree will know that after Judge Gregory went to
10 the Fourth Circuit in a recess appointment and became
11 the first African-American on the Fourth Circuit
12 Court of Appeals, there was a woman after that who
13 was appointed named Alyson Duncan.
14 MR. OGLETREE: Right.
15 CONGRESSMAN WATT: Alyson Duncan is a
16 Republican. She served on the North Carolina Court
17 of Appeals and our court of appeals runs state-wide.
18 MR. DAVIDSON: This is an elective post?
19 CONGRESSMAN WATT: Elective office. She
20 was appointed to the court. When she ran the next
21 time, she was defeated.
22 MR. DAVIDSON: By a white?
23 CONGRESSMAN WATT: By a white person, yes.
24 White male, right? This is a woman who now is the
25 Republican's appointment to the Fourth Circuit Court
26 of Appeals, Federal Circuit Court. So you could not
27 argue about her imminent qualifications. We didn't
28 even argue about her qualifications. We thought she
29 was imminently qualified. There was not a whimper of
30 opposition to Alyson Duncan when she was nominated to
31 the Fourth Circuit Court of Appeals, Democrat or
32 Republican.
33 So there is nobody in judicial legal
34 circles who could argue about it. But because she
35 was black, she wasn't qualified enough for the
36 voters, Republican or Democrat. So this is not a
37 partisan issue. This is a race issue that we're
38 talking about here.
39 MR. DAVIDSON: My last question, and I'm
40 sorry to kind of hog the questions here, but do you
41 have very many African-American elected officials at
42 the statewide level in North Carolina?
43 CONGRESSMAN WATT: Well, we had a state
44 treasurer -- I'm sorry, state auditor who was just
45 elected and just defeated. He had been in office for
46 a number of terms and we think that race was the
47 decisive factor. It was a very close race. So now
48 we have I think the only state-wide elected official,
49 African-American elected official in North Carolina,
50 is one of the judges on the court of appeals. So you
51 could argue that things have gotten worse, not
52 better, in terms of racial attitude.
53 And perhaps some of that is attributable
54 to partisan politics. I'm not suggesting that
55 partisan politics doesn't play some role but, most
56 importantly, normally the decisive factor is race.
57 It's not whether you're Republican or Democrat. The

1 decisive factor is race. And race, even in the world
2 of the United States Supreme Court, in the world that
3 all of us aspire to, race should not be a factor.
4 But when the real world is taking it into
5 account in the way they cast their votes, the only
6 way you can counteract that is to make it a factor in
7 the legal framework because it has to be offset.
8 Otherwise, our society, our electoral process becomes
9 a slave to racism, to racially polarized voting. And
10 we have to move beyond that point. So I just want to
11 emphasize that this is transitional. We're not
12 talking about a permanent remedy here. The
13 transition, the duration will be there only as long
14 as these racial attitudes persist that make it
15 impossible for African-Americans and other minorities
16 to be playing in the political arena on a level
17 playing field.
18 MR. DAVIDSON: Thank you.
19 MR. OGLETREE: I would just want to make a
20 comment to respond to Congressman Watt's comment
21 about racism being the most significant factor. It's
22 ironic in the state where I now live where we've had
23 the largest number, I think in the history of the
24 country, the largest number of unsuccessful
25 candidates for the President of the United States --
26 we did have John Kennedy in 1960 but we've had many
27 failures since then -- that we see a state that was
28 able to elect Edward Brooke, the first
29 African-American as a Republican, a moderate, in the
30 history of the Senate.
31 And yet our delegation today in 2005 is
32 all white, all male and all Democratic. So race does
33 matter. In one of the most quickly diversified
34 states in the country, it still matters. It's not in
35 the South. We're the bluest of the blue states,
36 having -- along with Wisconsin, the only two states
37 that elected George McGovern. That tells you how
38 blue we are.
39 But you touched an important principle,
40 that people should be elected across the country
41 without regard to race and I hope that through the
42 educational provisions of the Voting Rights Act and
43 other things we can do to elect people based on
44 qualifications and not just on race, because we have
45 outstanding candidates who are not being elected
46 because of their race and not because of lack of
47 qualifications. And hopefully the hearings on
48 October 18th will allow us to get underneath some of
49 these factors that are preventing us from having a
50 much more diverse Congress.
51 MR. ROGERS: Thank you kindly, Professor.
52 Congressman, I'm so tempted to ask you questions but
53 we're tough on time at this point in terms of other
54 members. What I did want to do is -- I can't help
55 myself. I've got to ask you one question. I do want
56 to get a sense about the pulse that you have on
57 Congress right now. These expiring provisions,

1 Section 5, Section 203, what's your pulse or sense
2 about reauthorization at the present time?
3 CONGRESSMAN WATT: I don't know that I can
4 give you a pulse of the Congress as a whole. I think
5 we're trying to build a bipartisan, bi-racial,
6 bi-ethnic coalition to do what needs to be done and
7 where everybody is now is kind of on a superficial
8 level because everybody is saying, yes, let's
9 reauthorize. But what's behind that is not clear.
10 Is it just a straight reauthorization, is it to try
11 to get us back to where we were before the Supreme
12 Court started chipping away at the foundations of --
13 or actually taking an axe to the foundations. Chip
14 wouldn't be accurate or descriptive enough. Taking
15 an axe to some of the provisions of the Voting Rights
16 Act.
17 And I think that's when you start to test
18 the willingness of people to be committed to it.
19 When you start talking about a possibility of
20 bringing some more current day jurisdictions who have
21 violated -- the Supreme Court and the courts have
22 found that they've violated the Voting Rights Act,
23 will that support be there, if you get to talking
24 about that.
25 Example: Massachusetts. And some of the
26 jurisdictions in Massachusetts have been determined
27 to be in violation of the Voting Rights Act. Will
28 the folks in Massachusetts be willing to subject
29 themselves to the same kind of preclearance
30 requirements that some of the Southern states have?
31 It's hard to gauge because the discussions are taking
32 place on this kind of global superficial level and
33 until you get down into the guts of what is needed to
34 make the Voting Rights Act a continuing effective
35 mechanism to level the playing field, it's just hard
36 to assess where people are because you don't know how
37 deep and wide the level of support is. It's wide
38 now. We're wondering how deep it is.
39 MR. ROGERS: Congressman, we're so
40 appreciative of you taking the time to be with us
41 here this morning. I know your schedule. Your staff
42 will indicate it's time for you to probably head on
43 but we very much appreciate you spending the time
44 with us today.
45 CONGRESSMAN WATT: He doesn't get to ask
46 any questions today.
47 MR. GREENBAUM: No, I'm just the staff
48 director.
49 MR. ROGERS: Thank you, Congressman Watt.
50 We appreciate you --
51 (Applause.)
52 MR. ROGERS: I wanted to give you all a
53 quick update in terms of what we're doing on time.
54 As you can all see by your watches, we are tough on
55 time at this point but we are going to move things
56 along quickly. I'm going to ask the remaining
57 members of the panel if they would please come up to

1 the area that we have set for you here and look for
2 your name tag, if you would. I would like to now --
3 thank you for kindly coming up.
4 I would like to now introduce each of the
5 commissioners who are at the hearing today. Each
6 will make just a brief -- actually what we're going
7 to do is we're going to waive the opening statement
8 right now. We'll come back to it in a moment, if
9 that's all right. But I would like to make sure that
10 you all have an understanding at least of the
11 commissioners who are here.
12 Commissioner Chandler Davidson is the
13 Radoslav Tsanoff Professor of Public Policy Emeritus
14 and served as chair of the department of sociology at
15 Rice University. Dr. Davidson was the coeditor of
16 the Quiet Revolution in the South, a definitive work
17 on the impact of the Voting Rights Act in the South.
18 Dr. Davidson testified before Congress during the
19 1982 reauthorization of the Voting Rights Act and
20 we're so glad to have you here.
21 Commissioner Charles Ogletree, the Harvard
22 law school Jesse Climenko professor of law and
23 founding and executive director of the Charles
24 Hamilton Houston Institute for Race and Justice.
25 He's a prominent legal theorist who has an
26 international reputation of examining the complex
27 issues of law and working to secure the rights
28 guaranteed by the Constitution for everyone equally
29 under the law.
30 Commissioner Karen Narasaki is the
31 president and executive director of the
32 Asian-American Justice Center, formerly the National
33 Asian Pacific American Legal Consortium. The AAJC is
34 a nonprofit, nonpartisan civil rights organization
35 whose mission it is to advance the human and civil
36 rights of Asian Pacific Americans through advocacy,
37 public policy, public education and litigation.
38 Ms. Narasaki is a nationally recognized
39 leader in the Asian-American community where she
40 serves as the chairperson of the National Council of
41 Asian Pacific Americans and the chairperson of the
42 Asian Pacific American Media Coalition.
43 Commissioner Robert Raben is with us right
44 there on the end. Glad you're here. He is
45 representing the National Council of La Raza. He is
46 the principal of the Raben Group, a legislative
47 consulting and lobbying practice that specializes in
48 intellectual property issues and civil rights issues.
49 Mr. Raben, a former attorney, senior Hill staffer and
50 assistant attorney general, creates bipartisan
51 legislation and communications for clients using law
52 and public policy to meet the needs of voters.
53 Before starting, I also wanted to make
54 sure -- and forgive me for not doing this
55 initially -- to thank the law firm of Arnold &
56 Porter. We're so --
57 (Interruption.)

1 MR. ROGERS: I'm not sure what's going on
2 in our room. You guys want to buzz in for a moment?
3 Before starting, I want to make sure that
4 we thank the law firm of Arnold & Porter. We're so
5 glad to be here. This is obviously a wonderful and
6 impressive location and honored to be here in terms
7 of having our hearing here today.
8 I would like to now introduce, if I can,
9 each of the panelists who will be with us here. The
10 sound that you're hearing, by the way, is we're
11 trying to get one of our panelists with us by phone
12 so please excuse that technical difficulty that we're
13 having for the moment.
14 I would like to introduce Sam Hirsch. Sam
15 is right in the center. Sam, thank you for being
16 with us. He is a partner in Jenner & Block.
17 Mr. Hirsch is currently a partner at Jenner & Block's
18 Washington, D.C. office. He's a member of the firm's
19 litigation and dispute resolution and appellate and
20 Supreme Court practices. And his litigation focuses
21 primarily on election law, redistricting and voting
22 rights. Mr. Hirsch graduated from Rice University,
23 Chandler Davidson's school, in 1984 and received a
24 J.D., his law degree, from Harvard Law School in
25 1993.
26 We're also pleased to have Jeff Wice with
27 us, Jeffrey Wice, who is here. Jeffrey Wice is an
28 adjunct professor of law at the Touro Law School in
29 New York where he teaches election law and is also a
30 practicing attorney specializing in redistricting,
31 census and voting rights law. During the 1980s, he
32 created the first redistricting program for the
33 Democratic National Committee and served as
34 redistricting counsel to the DNC through the 2000
35 redistricting process. Mr. Wice is a graduate of the
36 George Washington University Antioch School of Law.
37 Gerald, it's good to have you here with
38 us. Gerry Hebert is here with us also. Gerald
39 Hebert is executive director and director of
40 litigation of the Campaign Legal Center. For the
41 past 10 years, Mr. Hebert has served as -- has had an
42 active federal court litigation practice specializing
43 in redistricting and voting rights cases and has
44 worked on cases in more than two dozen states around
45 the United States. Mr. Hebert is also an adjunct
46 professor of law at Georgetown University Law Center
47 in Washington, D.C. here in Washington where, since
48 1995, he has taught courses on voting rights,
49 election law and campaign finance regulation.
50 You all, we're delighted to have all of
51 you with us here this morning but because of our time
52 consideration, I wanted to try to do this, if we
53 could. I wanted to try, if we could, to narrow down
54 our testimony this morning and to try to narrow down
55 our questions if we can for you to just get
56 precisely, if we can, to the substance of what you
57 have to offer. We're thankful for the time you have

1 with us here today. And if we can, we'll start with
2 Mr. Hirsch.
3 MR. HIRSCH: Thank you very much. Thank
4 you for having me. It's a particular honor to be
5 here. Although I'm sure he doesn't remember it,
6 Professor Ogletree was actually my 1L advisor.
7 Although he was phenomenally busy, he always had
8 time. I remember having dinner at your house one
9 time and you made law school a wonderful experience
10 for me.
11 MR. OGLETREE: Thank you. And I do
12 remember. You graduated the year I got tenure, you
13 remember?
14 MR. HIRSCH: 10 years earlier, Professor
15 Davidson was my informal advisor at Rice undergrad.
16 So I may be the only person coming before this panel
17 who has been advised by two of you academically.
18 Professor Davidson really changed my life by getting
19 me involved in voting rights during the '82
20 reauthorization. I was a sophomore and a former
21 member of the CDC on the Hill and from there I was
22 interested in this and it has never left. So thank
23 you very much, Chandler.
24 I have worked in the last 10 years in
25 redistricting litigation in about 20 states.
26 Sometimes the cases involve a protection clause of a
27 state law but many of them involve Section 2 or
28 Section 5 of the Voting Rights Act. And in my
29 experience, there are politically significant
30 statistical levels of racial polarization in voting
31 between Anglos and Latinos, as between whites and
32 blacks, in almost every locale which I have
33 experienced.
34 That fact is, of course, for many reasons,
35 one of which is if there was no differentiation
36 between white or Anglo voting and minority voting,
37 then the way the district lines were drawn would not
38 have such a great potential impact in diluting
39 minority voting strength.
40 So I'm here to talk primarily about the
41 degrees of racial polarization that we have seen
42 empirically, particularly in Section 2 litigation
43 that I've been involved with. And I've chosen to
44 focus on a couple of states because I think they're
45 particularly interesting.
46 I brought with me here -- and the staff
47 can distribute these to the folks in the back.
48 Unfortunately I have only four copies for six of you.
49 I apologize. But I brought three expert reports
50 you'll see are quite voluminous. I think they're
51 terrific reports in and of themselves. They're also
52 good examples of how useful Section 2 expert reports
53 can be in the work that this Commission has ahead of
54 it.
55 As you'll see in a moment, one of these
56 reports is from Maryland here in the Mid-Atlantic
57 region subject to today's hearing. Two of the

1 reports deal with Texas. Obviously, you know Texas
2 is a covered jurisdiction under Section 5 and
3 Maryland is not. I think Maryland, though, is
4 relevant not only because it's here in this region
5 where we're testifying today, but also because the
6 coverage scope of the Act is potentially subject to
7 change in the course of reauthorization and,
8 therefore, I think it's useful we get evidence from
9 noncovered jurisdictions as well as covered ones.
10 Thank you, Professor.
11 These are, as you'll see, enormous reports
12 with tons of tables, tons of data. I'm going to take
13 one or two very quick examples and see how they
14 operate. The thing you should know about these three
15 reports is that they were not substantially
16 contradicted at all by opposing experts or through
17 cross-examination at trial. They withstood the trial
18 and pretrial processes very, very well. The
19 attorneys who hired them and who hired opposing
20 experts very much disagree about the legal
21 conclusions to be drawn from the data but the data
22 and the analysis was largely uncontroverted.
23 Let's begin with Maryland. Here my
24 clients were primarily African-American and Latino
25 voters of Prince George's County, which, of those of
26 you who are from here, largely wraps around the
27 District of Columbia. Our expert was Dick Engstrom,
28 a very well respected political scientist from the
29 University of New Orleans who unfortunately, due to
30 the events down there, is settling now in Georgia.
31 Prince George's County is a very
32 Democratic jurisdiction. I think it gave 82 percent
33 of its votes to Senator Kerry during the Presidential
34 election. So the focus here is not so much on voting
35 behavior in general elections but in Democratic
36 primaries because winning a Democratic primary is
37 tantamount to winning office.
38 The most probative elections in this state
39 dealt with state legislative districts or state
40 legislative Democratic primaries from the two most
41 recent cycles from the time of litigation or in 1994
42 or 1998. There were five such primaries and in four
43 of those five, the preferences of white voters and
44 the preferences of black voters diverge in 80 percent
45 of the instances.
46 I'll show you one example so you can see
47 how the tables can be read. These are at the bottom
48 of page 14. It's complicated here because it's a
49 three-seat district so everyone gets three votes and
50 three candidates ultimately get elected. If you look
51 at the next to right-hand column, you're looking at
52 the nonblack voting behavior and what you see there
53 is the three white incumbents, Hubbard, Conroy,
54 Pitkin, who are preferred by white voters.
55 African-American voters, on the other hand, gave
56 their highest percentage of the vote to Holmes, who
57 was an African-American candidate but who lost

1 because the district was heavily white. Whites
2 participated in the Democratic primary and, as this
3 data shows, they voted quite heavily against the
4 African-American candidate preferred by
5 African-American voters.
6 We thought this was kind of prevalent
7 throughout the litigation, for example, at the county
8 level as well.
9 In Texas --
10 MR. ROGERS: Mr. Hirsch, I'm sorry, I want
11 to look at that sheet again. I'm trying to
12 understand exactly what the percentages are.
13 MR. HIRSCH: It's difficult to read. The
14 candidates are listed on the left column. The next
15 column over shows African-American voting behavior
16 and the next column over shows nonAfrican-American
17 voting behavior, which in that area is also
18 overwhelmingly Anglo white.
19 MR. ROGERS: So that when we're looking at
20 the numbers, it says Holmes, Hubbard, Conroy, Pitkin,
21 Armen and Noland. The number right next to that is
22 26.4?
23 MR. HIRSCH: Yes.
24 MR. ROGERS: What does that indicate?
25 MR. HIRSCH: That means that candidate
26 Holmes, who is in boldface here, meaning that he's an
27 African-American candidate, got 26.4 percent of the
28 black vote. He got -- it's listed here as negative
29 2.2 percent of I'll call it the white vote, just for
30 shorthand. Of course that's not literally true but
31 it means he got virtually none and when they run the
32 regression analysis, literally the line came below
33 zero percent. He got virtually no white vote.
34 Hubbard is not in bold face but he's a
35 white candidate. He has an asterisk next to his name
36 which means he's an incumbent. So he's a white
37 incumbent and he also got a high percentage of the
38 black vote, 25 percent, but he got 21 percent of the
39 white vote, which was enough to put him back into
40 office. The same thing was true of Conroy, a white
41 incumbent, got the least amount of the black vote,
42 17.8 percent of the black vote, got 29.8 percent of
43 the white vote. He was put back in office. I'm
44 saying he. I may be forgetting the gender of some of
45 these candidates. It's been a few years.
46 Pitkin, another white incumbent with the
47 asterisk, would not have won if this was a heavily
48 black district because Pitkin finished fourth on the
49 black vote with only 13.5 percent of black support
50 but prevailed nonetheless with 29.6 percent of the
51 white support. Pitkin was basically tied for the
52 first choice among whites, the fourth choice among
53 blacks, just as Holmes, the first choice among
54 blacks, was a very distant, basically last place
55 finisher among white voters.
56 So here you see what is truly polarization
57 because if you have an all black electorate you have

1 different office holders than when you have an all
2 white electorate, that meets the definition of
3 polarization. I'm not going here to racial animus
4 necessarily or the source of this behavior. I'm just
5 looking at the behavior itself as we do in Section 2
6 litigation.
7 Now, I want to switch gears to Texas.
8 Texas being, at least in certain areas, a much more
9 competitive area in the general elections, we have to
10 look at both general election behavior and primary
11 behavior. I brought two reports just to show you a
12 couple of different approaches. One is the 2000
13 report from Dr. Jonathan Katz, who is a political
14 scientist from Cal Tech. This was a report that had
15 a lot of good data, particularly on the general
16 elections.
17 Dr. Katz studied 113 different general
18 elections in the U.S. House alone in the 1990s.
19 These were in districts with large black or Latino
20 populations. And he found a virtually universal
21 pattern of racially polarized voting with the Latino
22 and black voters overwhelmingly preferring Democratic
23 voters and Anglo voters -- and by Anglo, I mean
24 nonHispanic/white voters -- heavily preferring
25 Republican candidates for Congress in Texas.
26 Just to give you one concrete example,
27 switching from the House to the Senate, the only
28 federal statewide campaign in the '90s in Texas that
29 involved a Hispanic candidate and an Anglo candidate
30 was the U.S. Senate race in 1996 where Phil Gramm
31 defeated Victor Morales 55/44. But if you break it
32 down by race across the entire state of Texas,
33 Morales won 83 percent of the Latino vote, 77 percent
34 of the black vote but lost because he got only 34
35 percent of the Anglo vote.
36 These patterns are -- the numbers vary
37 from contest to contest but that sort of pattern with
38 very high percentages of the black/Latino vote going
39 Democratic and a third or a quarter or it just varies
40 from place to place, but certainly well under half of
41 the Anglo vote going Democratic is a standard feature
42 you see in Texas general elections in partisan
43 contests.
44 Now, in areas where there is enough
45 Democratic presence that winning the Democratic
46 primary matters, which includes a lot of these more
47 heavily minority areas of Texas, it's important to
48 look at polarization in Democratic primaries. There
49 I'm going to direct your attention to the last item
50 in the pile I handed you, which is the thick report,
51 which is a 2003 report from Professor Lichtman who is
52 a well regarded quantitative historian from here in
53 Washington, D.C. at American University. There are
54 literally dozens and dozens of interesting tables,
55 these tables of data all involving recent elections.
56 I'll give you an example. Table 3 on page
57 9 goes on for a couple of pages but it shows 27

1 Democratic primaries that had at least one Anglo
2 candidate and at least one Latino candidate and 7
3 Democratic primaries or runoffs that had at least one
4 Anglo candidate and at least one African-American
5 candidate. And what you see is high degrees of
6 polarization. I'm just going to give you some
7 summary figures on average.
8 In the Anglo versus Latino contests,
9 Latinos were supporting Latino candidates on average
10 with about 61 percent of their votes while Anglos
11 were supporting those same Latino candidates with
12 only 18 percent support. So a gap between 61 and 18.
13 On the black versus white campaigns, highlighted in
14 that same table, black voters on average were giving
15 about 72 percent of their support to black candidates
16 while white voters were giving 21 percent. So again
17 you see an enormous gulf between the voting behavior.
18 (Interruption.)
19 MR. ROGERS: Excuse me just a moment. Our
20 chairman is gracious to be here. Senator Mathias,
21 we're thankful to have you present with us today.
22 Thank you for coming.
23 SENATOR MATHIAS: Well, I am thankful that
24 all of you are here.
25 MR. ROGERS: Absolutely. I'll do a formal
26 introduction in just a moment if I can and presently
27 we're hearing testimony from Sam Hirsch. Thank you
28 kindly. Please excuse us. Thank you.
29 MR. HIRSCH: So generally you see very
30 high levels of polarization in Democratic primaries
31 and Democratic runoffs in Texas for legislative
32 seats. There are times, for example, in statewide
33 contests where you see regional factors overriding to
34 some degree racial factors. One example being the --
35 you can piece this together from the reports, table 6
36 and table 18, but just to summarize, you have a
37 three-way contest with a Latino candidate and an
38 African-American candidate, both from roughly the
39 Dallas area, and an Anglo candidate from the Houston
40 area.
41 And the Anglo candidate, for example,
42 carried the black vote in the Houston area. The
43 minority candidates carried about two-thirds of the
44 Anglo vote in the Dallas area so there was some
45 regional home field advantage sort of phenomenon
46 going on there that, in a Democratic primary, not a
47 general, Democratic primary, could somewhat override
48 that general statewide pattern of voter polarization.
49 But that tended to be, again, limited to these home
50 field effects where you have candidates from opposite
51 ends of the state or competing like in farm areas.
52 Generally we had high levels of polarization.
53 These are just two examples. And
54 obviously they don't speak directly to the 48 states
55 but these studies were comprehensive. They withstood
56 the test of cross-examination. They withstood attack
57 from some very good attorneys on all sides. And they

1 are a rich source of very up to date and very
2 carefully executed social scientific analysis and
3 data gathering.
4 So one thing I would like to do today is
5 to encourage the Commission to look at this body of
6 literally hundreds of expert reports that exists --
7 these are all public documents -- in the litigation
8 files of courts around the country where there has
9 been Section 2 Voting Rights Act litigation. It is a
10 wonderful source of data, way beyond what you could
11 get despite plucking through political science
12 journals. It's fresh, it's often well done and when
13 it's not well done, you can tell by looking at the
14 transcripts of the trial that the expert is eaten
15 alive.
16 The other thing I would like to say, to
17 encourage the Commission to think about based on
18 this, is about background to the basic argument you
19 may hear, which is maybe we don't need Section 5
20 because we have Section 2. These were expert reports
21 delivered in Section 2 cases that, despite lawyering
22 that I thought was pretty good, I lost. We lost in
23 Maryland where the Court found that voting was not
24 racially polarized even though we showed that in fact
25 it was in 4 out of 5 of the most probative contests.
26 We lost in Texas, even though there they
27 agreed it was racially polarized. The court did not
28 substantially, significantly disagree with that
29 conclusion but for other reasons, they found reason
30 not to award relief to our clients, including
31 African-American clients, in Fort Worth who were
32 egregiously disturbed by the 2003 mid-decade
33 gerrymandering in Texas as well as Latino plaintiffs
34 throughout the state who were very well represented
35 at trial.
36 So the point here is, one, take advantage
37 of this great source of expert analysis that is
38 available to you through Section 2 litigation; two,
39 take with a big grain of salt the argument that
40 Section 2 solves all our problems. Section 2 is a
41 wonderful law. It does a lot of good for this
42 country and there has been a lot of terrifically
43 important victories, as you heard from Congressman
44 Watt this morning, that have really changed American
45 politics based on Section 2 as well as Section 5.
46 But Section 2 alone, just like the 14th Amendment
47 alone, is not enough because this is a difficult
48 problem for which we need many, many tools. Thank
49 you.
50 MR. ROGERS: Thank you, Mr. Hirsch.
51 Mr. Wice?
52 MR. WICE: Thank you very much for the
53 opportunity for being here today. My two colleagues,
54 Sam Hirsch and Gerry Hebert, in the late 1990s --
55 MR. ROGERS: Mr. Wice, please excuse me.
56 Forgive me for a moment. Mr. Aguilar is on the phone
57 and I understand there is a time limitation on him.

1 Do you mind if I interrupt very briefly?
2 MR. WICE: Not at all.
3 MR. ROGERS: Please forgive me for that.
4 Mr. Aguilar, are you with us?
5 MR. AGUILAR: Yes, I am.
6 MR. ROGERS: I wanted to make sure we got
7 you in for the moment if we can. We thank you kindly
8 for the ability to appear with us by telephone and I
9 wanted to give a brief introduction of Mr. Aguilar.
10 Juan Aguilar works as a citizen volunteer
11 for the Sunnyside Voter Restoration Project. He
12 works on developing and implementing a strategy to
13 get Hispanic voters in Sunnyside, Washington, Yakima
14 County, get involved in the electoral process. He is
15 part of a team of volunteers who seek out technical
16 and financial assistance to assist the Hispanic
17 population. Mr. Aguilar has worked with the
18 Department of Justice to ensure that monolithic
19 Spanish language speakers get the assistance they
20 need when voting.
21 Thank you kindly for joining us and I'll
22 need you, if I can, Mr. Aguilar, to speak directly,
23 if you would, into the centerpiece of your phone.
24 Thank you kindly.
25 MR. AGUILAR: Thank you, Joe. Thank you,
26 ladies and gentlemen. I honestly don't know who is
27 in the room this morning but I'm very honored to be
28 invited to speak on behalf of the people in our
29 general area. The gentleman that introduced me
30 mentioned, we knew that in Yakima County, and that is
31 in Washington State, our recent demographics
32 indicates that we have an exclusion of Hispanic
33 populations, the people that are coming into our
34 areas and have been in our area for some time. The
35 demographics have changed significantly to the point
36 in which we have larger populations of Hispanic
37 people than any other race in our general area, not
38 just our city but also in Yakima County.
39 MR. ROGERS: Mr. Aguilar, let me have you,
40 if I can -- I'm sorry to interrupt you. I'm going to
41 ask you to speak a little louder in terms of the
42 phone that you're speaking into so that the court
43 reporter can hear you a little better.
44 MR. AGUILAR: Thank you. Hopefully this
45 is a little better. Can you hear me better now?
46 MR. ROGERS: Yes.
47 MR. AGUILAR: Wonderful. Thank you. The
48 reason that I'm here today is I wanted to share with
49 the Commission that we currently -- I should say in
50 the last three years we have been engaged with the
51 Yakima County auditor's office which runs the
52 elections in our county.
53 They had no bilingual coordinators, they
54 had no bilingual programs established, they had no
55 information in Spanish, brochures, literature, et
56 cetera. The announcements on the multimedia outlet
57 did not exist for the Hispanic population base and so

1 we were seeking out how do we change those things and
2 how do we enhance that communication to the
3 population that I'm speaking of.
4 And so we were actively engaged in
5 speaking with those folks. We ran across several
6 voters with some reluctance on their part to
7 participate and so we sought out Department of
8 Justice assistance. They were very active in
9 contacting the Yakima County auditor's office and
10 promoting that activity. And ultimately we have now
11 a bilingual coordinator, one bilingual official on
12 staff to assist in translation and trying to get all
13 those pieces out.
14 They're at the beginning stages of getting
15 those things implemented but they're actually doing a
16 pretty fair job of getting the 100 percent bare
17 minimum pieces out. I'm not saying that they're
18 dragging their feet. They just haven't really
19 contributed the amount of efforts and resources that
20 would dictate reaching out to the larger population.
21 We're hopeful that will change. We're hopeful that
22 we will do a lot better job of getting people, one,
23 registered and, two, out to vote. But that's been
24 our largest focus area is to get the message out, get
25 people registered and get people out to vote.
26 Now, we've done the first piece in getting
27 the message out. We've also done the second piece
28 which doubled our voter registrations in our state
29 and I believe also in the Yakima Valley, which is the
30 primary population base. So I think we're headed in
31 the right direction. We're on the verge of seeing
32 some good things happening and getting some
33 candidates that represent the population in positions
34 of power and that's ultimately what our goal is, is
35 to have fair representation.
36 We've run across many obstacles. We've
37 changed the registration location from traditional
38 places that the current population base will not
39 visit or it can't. We've changed those to the
40 Hispanic restaurants and the locations that they
41 frequent. We ran across some opposition there with
42 the auditor's office and the local businesses and
43 were able to overcome those.
44 There are a number of things. I'm sure
45 you've heard many of these kinds of stories and I
46 just want to let you know that we're in full support
47 of the Commission's activity. Discrimination still
48 exists. Discrimination will continue for a great
49 deal longer. We all understand that and we're really
50 glad that you're doing this effort for all the
51 American people, not just a certain group of
52 individuals. There are a number of different
53 minority groups and this work is very important and
54 we support you.

1 MR. ROGERS: Mr. Aguilar, thank you so
2 much for appearing with us and being with us right
3 now. I wanted to ask my remaining commissioners if
4 they have any questions at all for you. Panel? I'll
5 begin with -- Commissioner Narasaki has a question
6 for you.
7 MS. NARASAKI: Mr. Aguilar, I'm actually
8 originally from Seattle, Washington so I'm very
9 familiar with Yakima and I know it's a fairly rural
10 community. But what I'm not sure about, is Yakima
11 covered by Section 203 for Spanish?
12 MR. AGUILAR: I believe that we are.
13 MS. NARASAKI: So were you able to get the
14 Department of Justice to come in and require better
15 enforcement?
16 MR. AGUILAR: The Department of Justice
17 has been playing a pretty good role in regards to
18 oversight of the elections but really not playing a
19 hands-on role in regards to the years prior to the
20 election. And that's kind of what we're looking for
21 is we're looking for organizations that can come in
22 and give us a hand effectively with other things that
23 we don't know. It paves the way, makes it a little
24 easier for people to come in and not be frightened of
25 the whole process.
26 MS. NARASAKI: Thank you.
27 MR. AGUILAR: By the way, thank you for
28 letting me know that you're from Seattle. We're very
29 happy to know that.
30 MR. GREENBAUM: Let me just add a point of
31 clarification. Yakima County became covered under
32 Section 203 for the Spanish language in 2002.
33 MR. AGUILAR: Thank you very much.
34 MR. ROGERS: Commissioner Ogletree?
35 MR. OGLETREE: No questions.
36 MR. ROGERS: Wonderful. Mr. Aguilar,
37 thank you for being with us. We appreciate you
38 taking the time for being with us by phone.
39 MR. AGUILAR: Thank you very much for
40 inviting me. I'll be happy to see you in person one
41 day, hopefully.
42 MR. ROGERS: Thank you. We'll look
43 forward to it. Thank you kindly. We'll move
44 forward. Mr. Wice? Thank you.
45 MR. WICE: I'll pick up where I left off.
46 Thank you again for the opportunity. My two
47 colleagues here, Sam and Gerry Hebert, coauthored a
48 booklet before the 2000 redistricting cycle called
49 the Realist's Guide to Redistricting, giving you some
50 hands-on advice before the line drawing took place in
51 the post-2000 census.
52 I'll try to take a realist's view of the
53 Voting Rights Act because we're still in a state of
54 flux now with renewal before Congress and a lot of
55 action in the states which will also play out in the
56 political dynamic of the states in the post-2010
57 world, especially with some of these states having

1 term limits which are impacting the face of
2 legislative bodies at the state and local level as
3 well as the changes going on in redistricting itself,
4 whether it leads to the creation of commissions where
5 we're seeing major efforts now in four or five states
6 to change the way line drawing is done which will
7 also impact the Voting Rights Act, and how to deal
8 with those aspects as well as the redistrictings.
9 I'll touch upon Georgia in a few minutes and how that
10 impacts the Voting Rights Act as well.
11 In an effort to be brief, I'll summarize
12 experiences that I've had working as the counsel to
13 the Democratic National Committee with three
14 redistricting cycles as well as my work in private
15 practice focusing in a national context on New York,
16 Louisiana and Georgia. But the cases I'll cite
17 really reflect on all states' applicability.
18 I started this work in New York for the
19 legislature in the late 1970s. And in the 1980s
20 redistricting, three counties in New York are covered
21 by the Voting Rights Act. Brooklyn, New York and
22 Bronx Counties. The Justice Department, in its
23 Section 5 review of state legislative districts --
24 this is going back again to 1982 -- was looking at a
25 65 percent number for the required population of
26 minority districts to be effective under Section 5
27 review to avoid retrogression.
28 We tried to argue -- "we" being the
29 legislative leadership -- that often, going back in
30 the early '80s, you had so low a number of minority
31 elected officials that to create an effective
32 opportunity for the minority communities to elect
33 candidates, you had to go into the 80 and 90 percent
34 range. And it took a lot of local effort to help
35 convince the Justice Department to preclear those
36 plans after the '80 census because of local factors
37 in that a 65 percent rule which had come out of a
38 Chicago court case around the same time was too low a
39 number and actually would have perpetuated the
40 nonpreferred candidates to win.
41 Using the same set of lines post-2000 in
42 New York looking at the state senate in particular,
43 things have changed a lot. And I'll just preface by
44 saying that State Senator David Patterson, the
45 Democratic leader of the New York Senate who I also
46 do work for, testified before this commission in New
47 York in June and talked in more detail about the
48 state legislative situation.
49 But in a nutshell, the lines redrawn in
50 the 80s/90s percent range which perpetuated a larger
51 number of minority-free candidates to be elected but
52 also ended up in creating white gerrymanders in
53 surrounding areas by actually packing as many
54 minority voters and residents into as few districts
55 as possible where the state senate used the Voting
56 Rights Act as a sword to make the argument that
57 historically in the '70s, '80s and '90s, you had to

1 have higher numbers of residents and voters in
2 districts to maintain them.
3 But now you also have a situation where
4 you have many more African-American and Latino
5 elected officials. The numbers in essence don't need
6 to be as high. And there may be political goals
7 elsewhere in the jurisdiction to create opportunities
8 for nonminority candidates whose districts are not as
9 overpopulated as the minority districts are.
10 So essentially you had a situation in New
11 York City of overpopulating minority districts
12 compared to nonminority, but also creating as high a
13 number of packed populations as possible and against
14 that that the methodologies from the 1980s to the
15 2000s have really changed significantly.
16 I also worked on the New York City council
17 redistricting in 2003 and that was a bipartisan
18 commission to redraw 51 city council districts. As
19 the counsel to that commission, one of the things
20 that we did was to require the use of racially
21 polarized analysis data, similar to what Sam had
22 talked about, before the plan was agreed to, before
23 the lines were actually drawn.
24 We went in and looked to see, in the three
25 covered counties, what is an effective district, what
26 is the bright line minimal number of minority
27 residents or voters needed to maintain the status quo
28 of the Section 5 situation. I found generally across
29 the country, working at the legislative level, that
30 legislative line drawers tend to -- finger to the
31 wind -- hope that the figure that they reach will
32 meet the nonretrogression test of Section 5.
33 The Justice Department, on the other hand,
34 does the analysis on the front end to know what they
35 determined to be an effective district and the
36 legislators often don't do that and end up fighting
37 over it in court, similar to the Maryland and Texas
38 data that you've been provided.
39 So in the New York City Council, where now
40 25 of 51 members are Latino or Hispanic, I found that
41 many of the members themselves wanted to perpetuate
42 their own districts, albeit that they are term
43 limited, and that many of them are not running for
44 re-election two years later this year in this next
45 month's election.
46 But I found that Section 5 is a very
47 powerful tool because New York City is still
48 polarized and New York City fell under the Voting
49 Rights Act because of a low voter turnout in 1968
50 Presidential elections coupled with New York state's
51 literacy test that was used through the 1960s, which
52 was later eliminated. But people now ask, with many
53 of the leaders of the legislature, city-wide elected
54 officials, city council members, city-wide elected
55 officials being Latino or African-American, why does
56 New York state still need Section 5 coverage? But we
57 found that by doing the racially polarized voting

1 analysis prior to council managed redistricting, it
2 was a very good tool and demonstrates the continuing
3 need for Section 5.
4 Let me jump over to two other states. In
5 Georgia, the Supreme Court's major case of Georgia v.
6 Ashcroft from a year or two ago told us that
7 influence can also be used in the determination of
8 Section 5 retrogression, that while you may have X
9 numbers of districts going into the plan, the final
10 plan may better reflect the fact that minority
11 elected officials are in a controlling seat of power
12 in that legislative body. But after the subsequent
13 nonrelated case of Larias v. Cox on population
14 standards, the Democrats lost both the Georgia House
15 and Senate.
16 I served earlier this year as outside
17 counsel to the Georgia Democrats in the House and
18 Senate. You had an African-American minority Senate
19 leader. He had no power. You had a situation in the
20 Georgia v. Ashcroft, the Supreme Court saying that
21 Section 5 retrogression benchmark standard can factor
22 in the use of influential leadership.
23 But now the Democrats have lost
24 everything. They've lost both chambers and I can't
25 see how going into the 2010 process that you can use
26 the same relevant benchmark because of the lack of
27 power that the Supreme Court supposed was there even
28 though the straight number changes were different.
29 So I really question -- give you time to think about
30 how to best apply the Georgia v. Ashcroft case to a
31 retrogression benchmark standard in Section 5.
32 I also want to touch base on Louisiana.
33 In the 2000 redistricting, I served as counsel to the
34 Legislative Black Caucus. The state of Louisiana
35 went to federal district court in Washington to seek
36 preclearance rather than go through the Justice
37 Department process which they thought would be biased
38 against them, in a similar way as had Georgia also
39 went to the federal district court for preclearance
40 approval.
41 And the Georgia legislature tried to make
42 the argument that not only was the benchmark field
43 unlawful that was being applied to 2001 because the
44 Justice Department, in their view, required, quote,
45 unquote, additional African-American districts to be
46 created back in 1991 but they ended up trying to make
47 the case that because a white Democrat represented a
48 black district in New Orleans, that really wasn't an
49 effective district and shouldn't be held part of the
50 benchmark. They lost on that and the district was
51 maintained.
52 But now Louisiana also provided Katrina.
53 No one ever figured, in the history of the Voting
54 Rights Act, that this kind of awful disaster could
55 come upon us where thousands and thousands of people
56 might not be there the next time. Now, as a covered
57 jurisdiction in this entirety of Louisiana, I don't

1 want to throw numbers out because it's way too early
2 to even guesstimate. But when you have a seven
3 district congressional delegation which is already
4 looking at losing one seat going down to a loss of
5 possibly two seats and whereas the African-American
6 majority seat now held in Louisiana is in New
7 Orleans, it might shift over to Baton Rouge. The
8 numbers might not be there. We don't know that yet.
9 But should that occur and, under the
10 current Justice Department procedure in reviewing
11 claims, you would have the same number in, the same
12 number out and you can replace the district if
13 population changes elsewhere in the same
14 jurisdiction. You simply draw someplace else. But
15 we're looking at a situation in Louisiana where we
16 don't know yet where that might be.
17 Similarly, for the state house and senate,
18 these are smaller population numbers. The three or
19 four African-American House districts, state House
20 districts in New Orleans, might not be there.
21 Similarly, one or two state Senate districts might
22 not be there. And whether you can simply move them
23 to Baton Rouge or to a different part of the state,
24 there is really food for thought as to how to address
25 this.
26 And the question also, do you want to
27 replace a district in New Orleans with Shreveport,
28 hundreds of miles away, and then the question
29 becomes, if you do that, would you then run afoul of
30 a Shaw v. Reno type situation on a race-based
31 district. It's going to vary jurisdiction to
32 jurisdiction but it is going to be an issue there as
33 well as possibly other states where you have these
34 kind of shifts.
35 But there is time from the 2007 renewal
36 perspective to the 2010 census to consult with
37 officials from Louisiana. If you haven't had the
38 hearing there yet, you might want to revisit that.
39 New Orleans is planning a city-wide election in
40 February of next year and the jury is still out as to
41 whether they can effectively still hold that
42 election. They're planning it but that's going
43 beyond anyone's power to determine if they can have
44 it or not.
45 So in closing, I would suggest that
46 Section 5 be renewed but in light of the proper
47 benchmarks to be used. Also I would give some
48 thought to a proposal of opt-in type review where not
49 every single change from the location of polling
50 places, to access ramps, to other matters need to be
51 precleared. But certainly I think major
52 redistrictings, other kinds of major impacts on
53 voters still needs to go through a preclearance
54 process.
55 Professor Gergen has suggested recently in
56 the Republic of a plan where you have jurisdictions
57 posting or announcing the fact that an election was

1 to be changed and providing an opportunity for the
2 public to participate in that process. And should
3 something go awry at either end, then petition DOJ
4 for proper remedy or to go to the courts. I think
5 that's also food for thought and I want to look into
6 it more myself as to how that would work in practice.
7 And so I want to thank you very much for the
8 opportunity and in brevity, I'll end here. Thank
9 you.
10 MR. ROGERS: Thank you kindly, Mr. Wice.
11 And I know we'll have questions for you in just a
12 moment. Mr. Hebert, before we get to you, I wondered
13 if I could do a quick introduction of our honorary
14 chairman. We're honored to have Senator Mathias be
15 with us here today. We are so glad that you could be
16 with us here this afternoon or morning. I want to
17 make a quick introduction, if I may.
18 The Honorable Charles Mathias serves as
19 the chair of the National Commission of the Voting
20 Rights Act and serves as honorary chair. He's a
21 former United States Representative and United States
22 Senator from Maryland. He was born in Frederick,
23 Maryland on July 24th, 1922 and graduated from
24 Haverford College in Pennsylvania. He served as
25 assistant attorney general for Maryland from 1953 to
26 1954, city attorney of Frederick from 1954 to 1959
27 and is a member of the Maryland House of Delegates
28 from 1959 to 1960.
29 Senator Mathias was elected as a
30 Republican to the 87th Congress and served four terms
31 between 1961 and 1968. In 1968, he was elected to
32 the United States Senate and subsequently re-elected
33 in 1974 and 1980. Senator Mathias served in Congress
34 when the Voting Rights Act was originally enacted in
35 1965 and, during the 1970, 1975 and 1982
36 reauthorizations, again, he was present in Congress.
37 We're so delighted to have you with us
38 today, Senator Mathias, and delighted to have you
39 with us and we appreciate perhaps any remarks you
40 would like to share with us.
41 MR. MATHIAS: Thank you very much,
42 Mr. Chairman. You're very generous. I principally
43 wanted to express my appreciation to everyone who is
44 involved in this effort and extension of the Voting
45 Rights Act in the current phase. It's so important.
46 It was clear when the original Voting
47 Rights Act was adopted that this was going to be a
48 major influence in the development of American
49 society, and it has been. And it's no less so today
50 than it was in 1965. And so it's very important that
51 this effort be made and I am grateful that you have
52 the foresight and the interest and the conviction to
53 go forward with this effort and I hope that we can
54 successfully push it through to a conclusion before
55 too long. Thank you very much, Mr. Chairman.
56 MR. ROGERS: Absolutely. Senator, thank
57 you kindly for being with us today.

1 (Applause.)
2 MR. ROGERS: And Senator, we understand
3 that your schedule may be limited today so we're just
4 delighted that you could spend this time with us here
5 this morning and certainly give us the history and
6 substance that you bring to this entire process.
7 Again, we could not be more honored to have you with
8 us here today.
9 Gerald Hebert, we're delighted to have you
10 with us also and appreciate your thoughts.
11 MR. HEBERT: Thank you very much,
12 Mr. Chairman, and thank you to the National
13 Commission on Voting Rights Act for inviting me to be
14 with you today and talk about the crown jewel of
15 civil rights, the Voting Rights Act of 1965 as
16 amended. I'm going to talk primarily today about the
17 bail-out provisions of the Voting Rights Act and I'm
18 also going to relate, as you'll see in a moment,
19 justifiably, I think, why Virginia plays an important
20 part in the bail-out provisions and how they've
21 operated up to this point.
22 As originally enacted in 1965, the Voting
23 Rights Act permitted covered jurisdictions to exempt
24 themselves from coverage by initiating bail-out
25 litigation against the United States in the federal
26 court in Washington. An importable subdivision in a
27 jurisdiction designated for coverage was the only
28 entity that was allowed to initiate bail-out
29 litigation. Now, that's significant because what
30 that meant was that if a state was covered under the
31 Voting Rights Act in 1965, an individual county or a
32 city would not be eligible to seek a bail-out
33 exemption if the state within which it was located
34 had been designated for coverage.
35 Bail-out lawsuits were to be heard and
36 determined by a court of three judges. And as
37 originally formulated in the Act, a state or a
38 county, if it was within a state that was not
39 entirely covered and could pursue a bail-out on its
40 own as some did, they had to demonstrate that in the
41 last five years preceding the filing of the bail-out
42 lawsuit, the jurisdiction had not used any test or
43 device as a prerequisite to registration of voting
44 for the purpose or with the effect of denying or
45 abridging the right to vote on account of race or
46 color.
47 Now, what that really had the effect of
48 doing is really preventing all the jurisdictions
49 essentially that fit covered in the states where the
50 state in itself was covered in its entirety from
51 bailing out. For example, in Virginia, Virginia had
52 used a test or device and had used it with the intent
53 and with the effect of discriminating on account of
54 race and so therefore the state was not eligible to
55 bail out. However, there were a number of counties
56 that were covered under the original '65 Act and they
57 did in fact bail out from coverage in that '65 to '70

1 period. Baltimore County, Idaho; Wake County,
2 North Carolina and a couple of others state of
3 Alaska, Navaho County, Arizona and several others.
4 Now, what happened was that in 1970,
5 Congress amended the Act, as you know, and also had
6 the effect of amending the bail-out provisions by
7 extending for an additional five years to 10 years
8 the time period that covered jurisdictions had to
9 demonstrate in a bail-out lawsuit that they hadn't
10 used a prohibited test or device.
11 In 1972, Alaska and New York successfully
12 maintained bail-out actions on behalf of the
13 jurisdictions that had been newly covered. And
14 subsequently New York was recaptured in 1973 when the
15 attorney general of the United States moved to get it
16 re-covered because it had been shown to use a
17 prohibitive test or device in a discriminatory manner
18 and there was an actual court finding to that effect
19 in a case called Torres versus Sachs in 1974.
20 In 1974 also, my home state, the state of
21 Virginia, was unsuccessful in its attempt to seek a
22 bail-out from coverage in a case called Virginia
23 versus United States. The reason for that was
24 because the D.C. Court found that Virginia had
25 maintained inferior schools with black citizens and
26 that had a discriminatory effect on blacks because it
27 prevented them or lowered their ability at least from
28 passing the literacy test that had been imposed in
29 Virginia in a discriminatory way. And so the D.C.
30 Court denied Virginia a bail-out on that basis.
31 In '75, as you know, the bail-out
32 amendments were extended for an additional seven
33 years, for 17 years, the time period that covered
34 jurisdictions had to show that they had not used a
35 prohibited test or device. And consequently,
36 jurisdictions that had been originally covered in '65
37 or had been additionally covered in '70 or
38 additionally covered as a result of the amendments in
39 '75 had to show that over a 17-year period, they had
40 not used a discriminatory testing device.
41 As you also know, the '75 amendments
42 effectuated a change in the minority language
43 provisions and under those, additional jurisdictions
44 became covered. I'm going through this I know
45 quickly because I want to really get to the 1982
46 amendments because they effectuated really the
47 greatest change in the bail-out law and is the
48 bail-out law that we have today.
49 Under the '82 amendments to the bail-out
50 provisions, they were the most significant and what
51 they really did was they did two principal things.
52 First, they allowed counties and cities within
53 covered jurisdictions to seek a bail-out for the
54 first time if they were within a state that was
55 entirely covered. And they also recognized -- and
56 this is probably the most important thing Congress
57 did in 1982 insofar as the bail-out provisions were

1 concerned. They really rewarded good conduct. There
2 was an incentive for jurisdictions to end the
3 discriminatory practices of the past and rather than
4 simply requiring them to wait for some expiration
5 date with a fixed period and instead focused on the
6 actual record.
7 Now, here is how that actually happened.
8 Jurisdictions had to show, in order to get a bail-out
9 as a result of the '82 amendments, that, first of
10 all, that no test or device was being used within the
11 last 10 years to determine voter eligibility.
12 Because the Voting Rights Act had suspended those,
13 that was largely a fairly easy thing for most
14 jurisdictions to prove. They also had to show that
15 no federal examiners had been assigned to the
16 jurisdictions. For many, many jurisdictions, over 90
17 percent of them, that was easy to prove because
18 federal examiners had not been sent to the locale as
19 a result of the certification by the attorney
20 general.
21 They also had to show -- and this was
22 probably one of the more nitty-gritty provisions --
23 that they had made a timely submission to either the
24 Justice Department or the D.C. Court of any change
25 that they had made that affected voting. And I want
26 to pause for a minute here and say that that was a
27 particularly interesting provision because in a
28 county, for example -- and I will in a moment just
29 list a couple of examples of counties that I've
30 represented where this issue has come up.
31 And one county, for example, was Kings
32 County, California where you have political
33 subdivisions within the county that can make all
34 kinds of changes that affect voting, changes that the
35 county may not even know about or have any ability to
36 control. A town or a school district or a city
37 within a county can go ahead and schedule an
38 election, can run an election and can effectuate
39 voting changes and yet, for the county to get a
40 bail-out -- and the county is the only entity in
41 California, for example, that could get a bail-out --
42 they would be required to not only show that they
43 have made a timely submission of the voting changes
44 but that all the cities and towns and other political
45 subdivisions within the county have made a timely
46 submission of voting changes.
47 So that's something that I think needs to
48 at least be studied to see whether or not there could
49 be a change in the bail-out law there that would
50 allow perhaps -- and I say perhaps, underscoring --
51 local jurisdictions within that covered county to in
52 fact seek a bail-out on their own.
53 The other provision you have to show
54 within the last 10 years is that you've had no
55 objections by the Justice Department or denials by
56 the D.C. Court for preclearance. In order to get a
57 bail-out, you have to show all of what I just

1 mentioned as a result of the 1982 amendments. You
2 have to show all of that within the last 10 years.
3 So that's why I mentioned earlier that the amendments
4 focused on a record of good behavior rather than just
5 some arbitrary time period.
6 Then you also must show, in addition, to
7 get a bail-out, that if there had been any diluted
8 voting procedures, that they've been eliminated. And
9 you have to show that at the time you're seeking the
10 bail-out. You also have to show at that time that
11 there -- if there had been any harassment or
12 intimidation of voters.
13 And unfortunately there are some places in
14 this country where voters are still being harassed
15 and intimidated. You have to show that you've taken
16 constructive efforts to eliminate it. And you must
17 also show that you've expanded the opportunities for
18 convenient registration and the opportunities to vote
19 and you must also show that you've appointed minority
20 citizens to participate in all aspects of the voting
21 process from registration to voting conducted in the
22 election.
23 Now, what I've done is, since 1982, I've
24 represented 10 jurisdictions that have now sought, in
25 the D.C. Court, a bail-out. One is pending and the
26 other ones have all been granted with the consent of
27 the United States. They all happen to be in
28 Virginia, which is where I'm licensed to practice
29 law.
30 The interesting thing there -- and I know
31 that we're running out of time so I'm going to cut
32 right to the chase. The interesting thing about the
33 Virginia bail-outs is that in a number of the
34 jurisdictions in Virginia, you had unprecleared
35 voting changes within the county that existed at the
36 time the jurisdiction sought a bail-out.
37 And what the Justice Department did was
38 they looked at the bail-out provisions and they said,
39 you know, we're going to approach these with a heavy
40 dose of common sense. We're going to say, well,
41 let's look at these unprecleared changes and have you
42 submit them now and see if any of them are
43 objectionable. And if they are, then you won't be
44 eligible to bail out. But if there are minor,
45 de minimis changes that merely were overlooked and
46 there was no intent to invade Section 5, we'll go
47 ahead and review those now nun pro tunc and then
48 perhaps you'll be eligible if you meet the other
49 criteria.
50 So since the 1982 amendments, you've had
51 jurisdictions that have bailed out, nine so far, the
52 10th is pending, all in Virginia. I'm often asked
53 two questions -- and I see my time is up so let me
54 just summarize the conclusion here that I have seen
55 in handling these bail-out cases.
56 First of all, the jurisdictions that want
57 to seek a bail-out are not trying to invade coverage

1 under the Voting Rights Act. They are in fact
2 jurisdictions that are proud of the fact that they do
3 have equal opportunity in the voting process and they
4 want to demonstrate it to the satisfaction of the
5 Justice Department and their own citizens.
6 They also want to be able to implement
7 voting changes without having to wait for
8 preclearance to occur. Oftentimes the changes they
9 want to implement expand the opportunity to register
10 to vote. I had, in Frederick County, Virginia, for
11 example, I had a registrar tell me that a black
12 pastor came to him and asked on a Friday if he could
13 go out on Sunday, if the registrar could go out on
14 Sunday and register people after church service. And
15 he said, well, that would be a special voter
16 registration drive that I can't do without
17 preclearance and that takes more time than just
18 Friday to Monday.
19 And so he wanted -- that's why Frederick
20 County cited to me as examples of why they wanted to
21 get a bail-out, so they could do those kinds of
22 things. They had never experienced problems there
23 with minority voting. The minority population in all
24 of the jurisdictions in Virginia where I've
25 represented has been less than 10 percent minority.
26 So there really isn't a cutting edge issue about
27 balance of political power between minority citizens
28 and whites as you see in so many other jurisdictions.
29 And then the final question I'm often
30 asked is, well, why haven't more people bailed out?
31 Well, first of all, I think the provisions show that
32 they are well tailored to meet what I would call the
33 City of Boerne test. There is a congruence in
34 proportionality between the medial provisions of the
35 bail-out law and what they are actually intended to
36 cure and eliminate and foster.
37 And so I think that a lot of jurisdictions
38 believe that they are going to have to come clean and
39 they don't really know what that process is all about
40 and what the burden might be. They also don't know
41 what its costs would be and many of them don't know
42 that the bail-out provisions exist because, in some
43 of the rural places, they simply haven't been advised
44 in it and they think it's too costly.
45 I will tell you I don't think it's too
46 costly, I don't think it's too onerous and I do think
47 that it's well suited for extension largely as is,
48 subject to reviewing some of those things like
49 political subdivisions within a covered county or the
50 issue I cited earlier. That's really the gist of my
51 testimony. Thank you again for the opportunity to
52 testify. I look forward to your questions.
53 (Applause.)
54 MR. ROGERS: I'm going to start with
55 Professor Ogletree. Do you have any questions?
56 MR. OGLETREE: I actually want to commend
57 all the members of the panel and hope that in

1 addition to what they have said today, that they will
2 add their testimony to the official record of what
3 we've done, the longer presentation. And I don't
4 know how to ask one question that gets at all three
5 of you, but I'll do it and then there are related
6 questions on the specifics of your presentation.
7 The first is the question about -- one of
8 the reports talk about Congressman Bonilla, the
9 Republican in Texas who was elected despite large
10 Hispanic opposition. The question is whether that's
11 a bad thing under the Voting Rights Act, that people
12 express their will for a candidate. Is that a bad
13 thing based on the report that you submitted, number
14 one? Let me get all the questions out.
15 And then for Jeff Wice, the question I
16 have is, with Hurricane Katrina and with
17 congressional elections happening a year from today
18 basically, is there anything that can be done
19 strategically to make sure that Louisiana doesn't
20 have an all white congressional delegation as early
21 as next year when it has had a very diverse
22 delegation in the past?
23 And the final question, Mr. Hebert, you
24 cited Virginia versus United States which is an
25 important case that talks about Brown and it talks
26 about the irony that after Brown, Virginia is one of
27 those states that closed down their entire public
28 school system so blacks weren't even able to even
29 attend the public school system, whether that logic
30 is relevant to many other states that did similar
31 things, where the reaction to Brown was massive well
32 into the '60s.
33 And the question is whether or not that
34 has any relevancy now. Have those states been able
35 to avoid being responsive, to being accountable for
36 the post-Brown denied basic rights through education
37 that have some impact. We'll start with Mr. Hirsch.
38 MR. HIRSCH: Professor, let me address the
39 point about Congressman Bonilla and it could be that
40 Mr. Hebert will want to follow up because I think
41 he's quite knowledgeable on this too. Congressman
42 Bonilla was elected as a Republican Latino candidate
43 in '92 running against -- I believe it was '92,
44 running against a scandal-plagued Democratic Latino
45 candidate. It was a close election.
46 Congressman Bonilla had been a TV anchor
47 in the media market. He was very well-known. In
48 that election, the Democratic Latino incumbent got a
49 majority of Latino vote but lost because the
50 Republican Latino candidate, Bonilla, got an
51 overwhelming majority of the Anglo vote.
52 What happened over time to that district
53 was two things. One, the percentage of registered
54 voters with Spanish surnames, which is a good
55 surrogate for the percentage of the voters who are
56 Latino, went up quite steadily. At the same time,
57 the degree of Latino support for Congressman Bonilla,

1 which was never more than half, was always less, as I
2 recall, dropped quite steadily and, for example, in
3 '96, he had 30 percent Hispanic support. I
4 apologize. I switch back and forth between Hispanic
5 and Latino. I don't mean any distinction there.
6 '96 was 30 percent, '98, 26 percent and in
7 2000, 20 percent. By 2002, he was getting only 8
8 percent of the Hispanic vote in his own district. He
9 was winning very narrowly because he was getting
10 about 88 percent of the non-Hispanic vote.
11 His district, by the end of the decade,
12 the beginning of the next decade, was a Hispanic
13 opportunity district. It was majority Hispanic by
14 any definition and it was soon, in my view, going to
15 elect a Hispanic-preferred candidate who likely would
16 have been a Hispanic Democratic challenger who would
17 have beaten Bonilla. Nothing is wrong about that.
18 What's wrong is what happened in 2003.
19 His district could have been redrawn so that his
20 house was in a heavily Anglo, heavily Republican,
21 heavily suburban district full of the kinds of voters
22 who had always supported him. But they didn't do
23 that. Instead, the Republicans who engineered the
24 2003 gerrymander wanted to maintain him but they also
25 wanted to maintain him in a technically majority
26 Hispanic district.
27 So effectively what they did is they
28 trapped almost 400,000 Hispanics, including some who
29 are noncitizens and some who have a history of low
30 voting percentages, in a district that was actually a
31 Republican district that could re-elect him. So they
32 added 100,000 people who are overwhelmingly Anglo
33 from the San Antonio suburbs to the district. They
34 cut 100,000 heavily Democratic, overwhelmingly
35 Hispanic constituents out of his district.
36 So they took an effective Hispanic
37 opportunity district and ruined it. It is no longer
38 an effective Hispanic opportunity district. It is
39 virtually impossible for a Hispanic-preferred
40 candidate to win that district now. He can win it
41 because he was never a Hispanic preferred candidate.
42 He was always the Hispanic-opposed candidate. So
43 it's good for him, it's good for the Republicans who
44 now have -- he is the only Mexican-American
45 Republican in the United States Congress.
46 They can parade him around as their poster
47 child for what a wonderful party they are but
48 meanwhile, rather than giving him the district he
49 wanted and giving Hispanic voters in South and
50 Central Texas and West Texas what they wanted, they
51 wanted to preserve this mirage that he was actually a
52 Republican winning in a majority Hispanic district.
53 So they have violated the voting rights of
54 between three and 400,000 Hispanics who are trapped
55 in this district and can't quite get rid of them even
56 though 92 percent of them are voting against him.
57 MR. ROGERS: What's the percentage of

1 Hispanic population in this district?
2 MR. HIRSCH: It is majority Hispanic in
3 total population. It is not majority Hispanic in
4 terms of the citizen voting age population. It is
5 not majority Spanish surname in terms of the
6 registered voters. And it consistently, in statewide
7 elections, votes Republican. And this is a part of
8 Texas, like most of Texas, where Hispanic voters are
9 very consistently Democratic. So it is a district
10 designed to be technically majority Hispanic but
11 effectively Anglo Republican controlled.
12 MR. ROGERS: Do you know what his vote
13 margins were in his last election?
14 MR. HIRSCH: Right before the change in
15 2002, I believe he was between 51 and 52 percent. He
16 was about to topple over. And what the gerrymander
17 did was to bump him up. And I think there are
18 problems with that from a partisan standpoint.
19 But from a voting rights standpoint, what
20 makes it so offensive is they didn't give him a
21 heavily Anglo suburban Republican district full of
22 his supporters. They gave him a district that was
23 controlled by those voters but still contained
24 hundreds of thousands of Hispanic voters who have
25 consistently said we don't want this guy representing
26 us in Congress. I think it's a terrible story. It
27 should have been struck down by the three-judge
28 court, which split two to one. And those issues are
29 now on appeal in the Supreme Court. Conference is
30 scheduled for two weeks from today and we expect to
31 see some kind of decision from the U.S. Supreme Court
32 this term.
33 MR. HEBERT: Sam covered everything. I
34 have nothing to add. It's a classic case of
35 fragmenting Hispanic population. Laredo split
36 basically down the middle and it's an issue that a
37 number of groups attacked and it's really up to the
38 Supreme Court as the last stopping point to rectify
39 one of the most egregious voting rights violations
40 affecting millions of minority voters in the state.
41 MR. HIRSCH: I apologize. Can I say, what
42 the state then did was they created a new majority
43 Hispanic district elsewhere that stretches from the
44 Mexico border on the river 300 miles north to the
45 Hispanic neighborhoods of Austin and Central Texas.
46 This district is more than 300 miles long and in
47 places less than 10 miles wide. They did that
48 because they thought if they didn't do that, they for
49 sure would lose under the Voting Rights Act.
50 Now, if that doesn't violate the Shaw
51 versus Reno doctrine, I don't know what does. And
52 that is yet another question pending before the U.S.
53 Supreme Court right now.
54 MR. HEBERT: And that district did not
55 elect a Latino, by the way, when it was up. It
56 elected an Anglo Democrat, Lloyd Doggett.
57 MR. WICE: On your question on Louisiana,

1 what I can tell you is what I'm hearing or have been
2 told, that Mayor Nagin is making every effort
3 conceivable to reach residents/registered voters
4 throughout the country. I think he said there are
5 four New Orleans voters in Boise and he would like to
6 find them so they can vote next year in the February
7 elections, that he's working with his own city
8 administrative elections board with the State Board
9 of Elections, with the existing voter reach-out as
10 best he can.
11 And of course if he needs to have any laws
12 changed, whether he has to go to Baton Rouge for
13 approval or then to DOJ is another question of the
14 short time frame, but they're thinking about it. I
15 think as we've all learned under the circumstances,
16 that every plan that has been announced can't
17 actually be implemented. But having said that, and
18 should there be an election next year for Congress,
19 which I think itself could be delayed, is a case that
20 talks about delaying congressional elections.
21 We have learned in other parts of the
22 South that incumbency has its assets. Mel Watt, who
23 was here earlier, Sam Bishop. Members who are
24 elected and build up some incumbency and have several
25 years in office often overcome the antagonism to
26 first get elected and whether or not they still have
27 a majority or effective minority district, they are
28 able to win re-election in a differently configured
29 and populated piece of geography.
30 So the answer is we don't know yet, but I
31 think the government from Louisiana will do all it
32 can at the state and local level. And I've talked to
33 people in Baton Rouge about this and they can best
34 hope that what they've announced will work out but we
35 won't know until next year.
36 MR. OGLETREE: Thank you.
37 MR. HEBERT: Professor Ogletree, you are
38 correct, of course, that there are a number of states
39 where the same type of a finding that was present in
40 the state of Virginia versus the United States could
41 have been and has been in fact demonstrated in other
42 court cases.
43 The interesting thing about that insofar
44 as it relates to the bail-out provisions is that we
45 all remember what we really thought were the best
46 test of vote dilution which were the Zimmer factors.
47 And one of those factors which I always thought was
48 one of the more appropriate ones was whether or not
49 the jurisdiction had a history of discrimination that
50 affected or that was aimed at the right to vote.
51 And it seems to me that if we consider
52 ever altering the mathematical formula that exists
53 under Section 4 of the Voting Rights Act, that
54 perhaps we ought to look at some of those factors,
55 including whether the jurisdictions had a history of
56 discrimination, whether there is racially polarized
57 voting, whether the minority population continues to

1 suffer the effects of socioeconomic disparities and
2 so on that impact their ability to participate and so
3 on and so on.
4 Because I think if you do that, you kind
5 of meet the City of Boerne test which is that there
6 has to be, as I said earlier, a congruence of
7 proportionality between the injury that's to be
8 prevented and the remedy that is being offered.
9 MR. OGLETREE: It would be great if, in
10 the short time that we have, if you could submit some
11 information, it would be helpful to Professor
12 Davidson in preparing our report because I think
13 that's something Congress would love to hear on
14 Section 4 that could be relevant to the other issues
15 that we consider as well.
16 MR. ROGERS: Absolutely. We would
17 appreciate that very much, sir. We'll move on to
18 questions from Professor Davidson as well as
19 Commissioner Narasaki. We will break for lunch in
20 just a few minutes and so we wanted to make sure that
21 everybody knew that lunch will be available. We're a
22 little bit over -- obviously more than a little bit
23 over in terms of the time but because of several
24 issues we had to deal with, we'll make sure that
25 that's squared out this afternoon. So we'll move
26 forward. Commissioner Davidson?
27 MR. DAVIDSON: I wanted to express my
28 frustration, first of all, at having the vast
29 repository of knowledge that's represented by these
30 three gentlemen this morning and not having time to
31 really ask about 20 questions of each one of them,
32 but I'm simply going to ask one question of all three
33 of you and it ought to be easy to answer because it's
34 really a data gathering question.
35 Mr. Hirsch has suggested that we take a
36 look at the data that are provided in Section 2 cases
37 that have been tried around the country to get a
38 fuller grasp of the extent of vote discrimination in
39 the country and, as you may know, Professor Katz at
40 the University of Michigan and her law students are
41 in the final stages of compiling a database of all
42 reported Section 2 cases in the country since 1982.
43 However, as you also know, there are a lot
44 of these cases that are not reported. And I'm
45 wondering if you can give me suggestions as to how
46 one might systematically or even unsystematically
47 gain access to those unreported cases that we all
48 know are out there but are difficult to track down.
49 MR. HEBERT: Well, let me start. I think
50 I'm responsible for some of those so let me give you
51 an example. In Alabama in the late 1990s, I was
52 retained by the Alabama Democratic Conference to
53 determine whether or not -- which is a black
54 Democratic organization that's statewide. It has
55 chapters in every single county in the state of
56 Alabama.
57 And they said, you know, we're curious as

1 to whether or not the preclearance provisions are
2 really being followed in each and every jurisdiction.
3 Would you be willing to do somewhat of a survey in
4 some of our less active areas as to whether or not
5 preclearance is being obtained and sought by
6 jurisdictions.
7 And so I went in and represented -- I
8 think we filed 10 Section 5 enforcement lawsuits and
9 all 10 places we went to, we found a series of voting
10 changes that had not been submitted for preclearance.
11 And we filed a lawsuit against each and every one and
12 they all settled and submitted their voting changes.
13 Now, as it turned out, none of those
14 changes ultimately was objected to, although there
15 were a couple that raised some serious issues. But
16 what it illustrated to us is that there was a lack of
17 compliance even with the fairly routine voting
18 changes that everyone knew should have been submitted
19 but hadn't been.
20 Now, I say that, Dr. Davidson, because
21 what you could do, I think, would be to contact --
22 the Voting Rights Bar is not that big but it runs
23 deep and you could actually, I think through going to
24 the various groups as well as the Voting Rights Bar
25 members, actually get us to produce our complaints
26 and our consent decrees that were actually filed.
27 And all those 10 or 12 cases that I just
28 mentioned in Alabama are all reported as far as I
29 know so that's certainly one method to gather
30 information on not only Section 5 enforcement cases,
31 which I also think is pretty relevant to the
32 extension, but the vote dilution cases.
33 MR. HIRSCH: Three ideas. One, I agree we
34 need to reach out not only to national civil rights
35 groups but to local and state civil rights
36 organizations around the country because they are
37 either involved or at least have knowledge of the
38 bulk of this.
39 Two is, I believe when you file a
40 complaint in federal court, that the standardized
41 federal civil cover sheet has a checkoff which says
42 not -- I believe not civil rights but voting rights.
43 I think there is actually a separate check box for
44 it. If that is right, then that gets reflected in
45 the docket sheets submitted to the federal district
46 courts and you can run computer searches on those,
47 although they're not free and I don't know if
48 Professor Katz's group has access to databases but
49 she might actually and not even realize that.
50 MR. GREENBAUM: They're all in the
51 published opinions.
52 MR. HIRSCH: The question is how to reach
53 the unpublished ones. And I think that any good law
54 firm librarian can find cases according to which
55 category they checked on the civil cover sheet, which
56 is a standardized form. It doesn't cover state
57 courts.

1 The third thing I would say, and this goes
2 back to my initial testimony, is you could look up --
3 I'll use two examples. You could look up and find a
4 published decision in Maryland that will tell you
5 there is not racially polarized voting in Prince
6 George's County, but the report I just handed you
7 tells you the opposite and the report of the winning
8 expert tells you the opposite.
9 So don't stop at the judicial opinions.
10 Look at the reports and look at the actual
11 transcripts of expert testimony because the judges
12 get one of these cases in a lifetime and they often
13 get them wrong. Obviously they try to get them
14 right. Whereas the experts are repeat players, to
15 some extent the attorneys are repeat players and if
16 you look beneath the opinions, you can get different
17 answers.
18 You can look at the Texas case and they'll
19 tell you, well, yeah, there is actually polarized
20 voting but there is no Voting Rights Act violation
21 and I just described to Professor Ogletree why I
22 believe that was wrong in the case of Texas
23 congressional district 23. So I think that you need
24 to dig one level deeper.
25 MR. WICE: I'll add to that. I'll
26 volunteer the trial analyses done in the unreported
27 case of Louisiana House of Representatives versus
28 Ashcroft which is where the House of Representatives,
29 in 2001, sought preclearance. We were in court two
30 years. The state lost but the Legislative Black
31 Caucus who I represented as intervenor as well as the
32 NAACP Legal Defense Education Fund, retained experts
33 to produce reports which were quite accurate and
34 ended up in helping settle the case that we could
35 offer.
36 I also suggest that there are many --
37 well, there aren't that many but should be reports
38 done by experts during the Section 5 preclearance
39 process that I often always will use as an expert for
40 submitting a plan rather than waiting until the tail
41 end to have to catch up and fix things later. So
42 some of those reports might be useful and I would be
43 glad to help put those together.
44 MR. DAVIDSON: Thank you.
45 MR. ROGERS: Commissioner Narasaki?
46 MS. NARASAKI: Thank you. I have two
47 questions, one which I suspect will have a short
48 answer. The first question is, what studies are you
49 aware of that exist regarding looking at
50 Asian-Americans and racially polarized voting? A lot
51 of you have talked about Latinos and
52 African-Americans but I haven't heard anyone mention
53 Asian-Americans and I know, Mr. Wice, you were
54 talking about New York City, which has 8 to 9 percent
55 Asians and finally has an Asian on the city council
56 and the state legislator. So I'm interested to know
57 because we've had a hard time finding that kind of

1 data.
2 The second is, I was a little alarmed, I
3 have to say, by Mr. Wice's suggestion that there be
4 some more limited opt-in review, that maybe things
5 that seem less important, like moving polling places,
6 might not require preclearance. And it's highlighted
7 by my recent experience with Hurricane Katrina and
8 the fact that we've had a hard time getting FEMA and
9 Red Cross to open stations where there are North
10 Vietnamese communities, for example.
11 So this notion that it's not a big deal
12 where these things are placed I think is of concern
13 to us. So I'm wondering if the panel now has any
14 reaction to this suggestion and if Mr. Wice wants to
15 elucidate a little more on that.
16 MR. WICE: Let me answer -- let me address
17 both of yours. First the second question. I do
18 agree with you about being -- I would be alarmed too
19 at a minor change not being precleared in a situation
20 with a specific language minority problem. If I was
21 too broad, I'll clarify.
22 If a jurisdiction, as we discussed on
23 bail-out, has a very good record, then maybe not
24 every change need be precleared but certainly I have
25 had experiences working in New York City with the
26 Asian-American community and I've seen ongoing to
27 this day violations of rights being disregarded at
28 the polling place, people being told -- you know,
29 Koreans speaking to Americans being told, that's in
30 Chinese, you can read that in totally different
31 languages. So I've seen that in Queens County as
32 recently as a year or two ago.
33 So I was discussing opt-in in the
34 instances of where maybe not every change need be
35 addressed but changes would be broadcast or posted to
36 the civil rights community and others to know that a
37 change would take place. If a jurisdiction in a
38 problematic area made a change and didn't publicize
39 it in advance, I think that would be a problem. I
40 share your ongoing concerns and wouldn't want to
41 reflect anything differently.
42 Again, this is a subject that needs more
43 attention and analysis as to how it might work. So
44 it's just an idea that one professor has put forward
45 but is a good idea to at least look at. But
46 certainly I think in the instance of the language
47 minority community being disenfranchised, it would
48 not apply or at least be an instance where the kind
49 of dialogue would need to take place.
50 In terms of analyses, I work very closely
51 with the American-Asian Legal Defense Fund in New
52 York. And Glenn Magpantay has done the best analyses
53 recently on the Asian-American vote. And I think to
54 wit the New York City council, in Queens County,
55 which was not covered, we felt it important to create
56 the opportunity for John Liu to be elected to the
57 city council. Even though it wasn't a Section 5

1 county, it was the politically right thing to do.
2 And in New York county where you have a
3 large Asian population, the numbers are there. I
4 think at some point soon, whether it be for the state
5 assembly or city council, in lower Manhattan you will
6 see more of an opportunity to create it. And maybe
7 the 2010 census will reflect that.
8 MR. HIRSCH: As to the data question on
9 Asian voting behavior, it's tricky for two reasons, I
10 think. One is you need to focus on areas where the
11 Asian population is large and large relative to the
12 size of districts. So, for example, even in
13 California where there is a large Asian population,
14 because the congressional districts are 6 or 700,000
15 people, the state legislature is even larger, the
16 issue of Asian opportunity in congressional and state
17 senate districts is quite limited because you would
18 have to have an enormous concentration of Asian
19 voters to control a district. So therefore you don't
20 get as much litigation at the congressional or state
21 legislative level.
22 A long-winded way of saying I think you
23 have to look -- if you're looking for litigated cases
24 that lend themselves to expert reports, you would
25 have to look mainly at county and local elections
26 that were the subject of Voting Rights Act challenges
27 under Section 2 and that's going to be a limited
28 universe.
29 The other problem is that the
30 methodologies used in these three reports and other
31 reports -- they're very different, by the way. For
32 example, Katz uses a different method than the one
33 that Engstrom and Lichtman uses. But they all rely
34 on having some precincts that are overwhelmingly
35 white and some precincts that are overwhelmingly
36 Latino or black as the case may be in Maryland or
37 Texas.
38 And you would need to have a body of
39 precincts that are heavily Asian in order to run
40 these kinds of calculations because you not only
41 polarize voting to find these sorts of patterns, you
42 need residential segregation. It's actually a
43 combination of those two things that allows for
44 minority voter issues. It's also a combination of
45 those two things that allows for these political
46 science methodologies to operate correctly.
47 If you have a community that has a large
48 Asian percentage and it's fairly dispersed, you won't
49 be able to calculate Asian voting. That's a
50 long-winded way of saying you may need to go away
51 from these traditional Voting Rights Act
52 methodologies and more towards public opinion polling
53 and exit polling, which means you should reach out to
54 pollsters who actually have a lot of data on Asian
55 voting behavior but it's mostly confidential and you
56 have to get their clients, political candidates and
57 political parties, to listen to you. That's tricky.

1 MR. WICE: And one thing. Also in Queens
2 County, Jimmy Meng, an Asian-American candidate, did
3 win a state assembly district by ousting an Anglo
4 incumbent last year. And I don't believe that was a
5 majority Asian-American district but the opportunity
6 was there. So now in New York you have two
7 Asian-American elected officials.
8 MR. HEBERT: I would just add to what Sam
9 said. There are some local jurisdictions where there
10 is a sizable enough Asian-American community where --
11 and Houston, Texas is a good example. I represent
12 the City of Pasadena, Texas, right on the edge of
13 Houston. There is a sizable Asian-American community
14 there to the point where if you were doing extreme
15 case analysis or homogeneous placing, you could
16 actually at least see their voting behavior vis-a-vis
17 other groups.
18 And oftentimes as part of a Section 5
19 submission -- I know I represented the City of New
20 York's charter review commission. We were
21 considering some nonpartisan election changes and we
22 did some analysis there and you might find them in
23 those files. But I'm not really aware of -- because
24 of the problems that Sam identified -- any real
25 systematic review.
26 On the issue of the opt-in provision, I
27 wasn't really tracking a lot of what Jeff was saying
28 about his definition of an opt-in provision. I have
29 read Professor Gergen's that he referenced. The one
30 thing I'm not enamored with as far as opt-in
31 provisions are concerned is I think it has a tendency
32 to take Section 5 and flip it on its head because it
33 puts the burden on the minority, sort of seems to opt
34 the jurisdiction in, when right now the burden is on
35 the perpetrator of discrimination in the past, which
36 is where I think it should be.
37 MR. WICE: I just read a piece recently so
38 that's why I'm saying it's one idea that I think
39 should be discussed. I'm not endorsing it but I
40 think it's an idea that's worth looking at.
41 MS. NARASAKI: The concern I have is I
42 work -- as you know, the Asian-American community is
43 largely an immigrant one and a third or more of the
44 voters now, the new voters, are actually recently
45 naturalized citizens and their ability to pay
46 attention to a notice that something is going to be
47 happening and then be able to react to that is I
48 think unrealistic. So I'm very concerned about
49 putting -- as Gerry said, shifting the burden onto
50 the community.
51 MR. WICE: Right. In the Northeast, I
52 think it's Glenn Magpantay and Margaret Fung.
53 MS. NARASAKI: Yes, but unfortunately, the
54 most fastest growing Asian-American populations are
55 in places like Atlanta, Houston and Nevada where we
56 don't have that kind of infrastructure.
57 MR. ROGERS: Thank you very much. I was

1 tempted to ask you questions but we're not going to
2 do that, but I want to at least pose a thought. My
3 hope is that you all will be able to join us for
4 lunch as it's going to take place. Everybody is
5 certainly invited to lunch. Lunch will be provided
6 right next door. But there are two thoughts I wanted
7 to have you think about in advance of us going to
8 lunch that I wanted to ask you about.
9 First of all, I wanted to go back, to some
10 extent, to your analysis related to Texas, Bonilla's
11 district. I have some thoughts there in particular
12 about -- or at least your testimony as it relates to
13 performance patterns or vote patterns by ethnic
14 groups, white folks or Hispanics in terms of that
15 district, thoughts about racial polarized voting as
16 you characterize it and otherwise.
17 And I also want to make sure also that I
18 talk to all three of you all to some extent about
19 this notion of retrogression or what happens in a
20 world to the extent that the provisions of this Act,
21 Section 5, for example, to the extent that it is not
22 reauthorized, what would happen in that world.
23 And in particular, it might be very
24 interesting to speak with you, Mr. Hebert, about your
25 experience with jurisdictions where you've sought
26 bail-out and been successful on bail-out and ideas or
27 notions perhaps of what might happen over the long
28 run. So we'll deal with that over lunch. Everybody,
29 let's take a break. Thank you kindly. We'll come
30 back at just after 1:30.
31 (Whereupon, at 1:05 p.m., the hearing in
32 the above-entitled matter was recessed, to reconvene
33 at 1:30 p.m., this same day.)
34
35 AFTERNOON SESSION
36 (1:45 p.m.)
37 MR. ROGERS: I would like to welcome
38 everybody back to our second panel here at the
39 National Commission on the Voting Rights Act in our
40 ninth regional hearing. We're delighted to have
41 members of our second panel to be here with us this
42 morning. Thank you all this afternoon. I keep
43 saying morning. It actually is morning in my time of
44 the world. Colorado is two hours behind you here, as
45 you know. But in any event, we'll make sure we
46 begin.
47 We're delighted to have with us Rick
48 Valelly who is here with us now. Rick, you've had to
49 correct people your whole life. I know you have.
50 MR. VALELLY: I'm used to this now.
51 MR. ROGERS: I'll try to get it right.
52 We're delighted to have with us Mark Posner. We're
53 also pleased to have Robert Kengle, Kent Willis and
54 Margaret Jurgensen with us today. Brief
55 introductions if I may.
56 The one thing that we did not have an
57 opportunity to do during the course of the last

1 hearing because of time constraints was we didn't
2 have open remarks by commissioners who were all
3 present with us here today.
4 And at the very least, what I wanted to do
5 was to give each one of our commissioners a quick
6 minute or so to perhaps introduce themselves in their
7 own words or any comments or thoughts they might have
8 which were supposed to be open remarks to this
9 hearing but we'll do this now in the midway portion
10 of this proceeding. And I will start with you,
11 Professor Ogletree. Do you have any brief remarks or
12 rolling remarks that you want to share with us this
13 morning?
14 MR. OGLETREE: Well, thank you,
15 Commissioner Rogers. I want to thank you for the
16 very effective monitoring and managing of this
17 hearing. You did a great job of giving everyone a
18 chance to be heard and yet making sure we get many
19 voices in within our allotted time. I'm delighted to
20 be here with the Commission. This work is, in my
21 view, the most important work that one can imagine in
22 terms of voting rights.
23 The 1965 Voting Rights Act was the most
24 significant piece of legislation in the 20th Century
25 and, in my view, achieving reauthorization is the
26 most important challenge of the 21st Century. As
27 much as we can applaud what happened 40 years ago as
28 a major step forward in equalizing justice for all of
29 our citizens, we now see various issues, national,
30 local and regional that undermine the right of every
31 citizen to vote.
32 The work that we're doing here allows us
33 to collect a large amount of information that we
34 think can help the Congress think constructively and
35 thoroughly about it and there will be a substantial
36 legislative record. There will be a sense of some
37 data being presented. And as you look at Supreme
38 Court precedents, it's clear that the Supreme Court
39 looks favorably upon efforts like this to make sure
40 things have been discussed, debated and resolved.
41 So I look forward to hearing the
42 testimony. I look forward to helping us ensure that
43 every voter in this country, without regard to race
44 or class or religion or region, will be able to have
45 the benefits of having their votes count, having
46 their votes counted and having their voices heard.
47 And I appreciate all that you are going to do to help
48 us to make sure that that happens. Thank you.
49 MR. ROGERS: Thank you. Commissioner
50 Narasaki?
51 MS. NARASAKI: Good afternoon. I would
52 like to thank the Commission and the Lawyers'
53 Committee for inviting me today to serve as a guest
54 commissioner. I'm honored to be on the Lawyers'
55 Committee board and I think this work that these
56 hearings are doing is very critical to document the
57 landscape of voting rights and the current malady of

1 discrimination facing so many of our communities.
2 As you heard, I'm president and executive
3 director of the Asian-American Justice Center which
4 is based in D.C. We have three affiliates in
5 Chicago, Los Angeles and San Francisco as well as
6 over 100 community based organizations for our local
7 partners in 24 states, many of whom have been very
8 engaged in the issue of protecting the voting rights
9 of the Asian-American community and have witnessed
10 firsthand the importance of the Voting Rights Act
11 provisions and how they affect our ability to vote as
12 a community.
13 And while California and New York and
14 Hawaii account for over half of the Asian-American
15 population, the fastest growing regions are places
16 like Nevada, Florida and North Carolina. In this
17 region, the D.C./Maryland/Virginia region, metro
18 region, has the fifth largest metropolitan
19 concentration of Asian-Americans, yet only two of the
20 141 of Maryland state delegates are Asian and there
21 are no Asian-Americans in the Virginia state house,
22 although we do share Bobby Scott with the
23 African-American community.
24 Section 5 of the Voting Rights Act has
25 been particularly important to the Asian-American
26 community because New York is covered and the
27 expansion of the Asian-American community in Texas
28 and places in the South has meant that it's
29 increasingly relevant and I just want to give one
30 example.
31 In Bayou LaBatre, Alabama, which is a
32 fishing village, about one third of the 3,000
33 residents are Vietnamese fishermen and their
34 families, many of them who went there right after the
35 Vietnam war. During the 2000 elections, an
36 Asian-American candidate ran for city council and
37 during the primary, supporters of the white incumbent
38 city council challenged the eligibility of every
39 single Asian-American voter, clearly without any
40 individualized basis.
41 The Department of Justice investigated and
42 resulted in sending monitors down for the general
43 election and I'm happy to say Alabama had its first
44 Asian-American elected official after that election.
45 And the importance of that in the wake of Hurricane
46 Katrina and what it's done to Bayou LaBatre has shown
47 the need to hear voices in the rebuilding and
48 recovery.
49 I just want to point out one other case,
50 which is Harris County, Texas, which is where Houston
51 is. We worked with the Justice Department and the
52 local Asian-American Center for Justice because that
53 county was newly covered for Section 203, which is
54 another key provision to the Asian-American
55 community. After we finally got better enforcement
56 and compliance of that law, the turnout among
57 Vietnamese-American eligible voters doubled and, as a

1 result, in November 2004, the first
2 Vietnamese-American won state legislative seat in
3 Texas beating an incumbent by 16 votes. So we very
4 much applaud this Commission and look forward to
5 hearing the rest of the panel. Thank you.
6 MR. ROGERS: Thank you kindly,
7 Commissioner Narasaki. Commissioner Davidson?
8 MR. DAVIDSON: I have attended all but one
9 of the nine hearings, including this one, which has
10 been held so far since March and have listened to
11 people from around the country talk about problems
12 that they have encountered with voting rights,
13 listened to experts, listened to lawyers and some of
14 the most eloquent and moving testimony that I've
15 heard has come from the public, just ordinary folks
16 who have come in to express their views on the need
17 for continued monitoring of their voting rights.
18 I've learned a lot already today. I look forward to
19 hearing the testimony of the remaining panelists.
20 I'm honored to be a member of this Commission and I
21 welcome you.
22 MR. ROGERS: Thank you, Commissioner
23 Davidson. I would like to now introduce members of
24 the panel who are present with us here today. I
25 forgot, you all know Jon. Jon Greenbaum serves as
26 executive director of the Voting Rights Project at
27 the Lawyers' Committee for Civil Rights Under Law.
28 Everybody knows Jon. Everybody knows you here. You
29 all know Johnny. He's whispering in my ear.
30 Rick Valelly, a recognized expert of the
31 Voting Rights Act, is currently a professor of
32 political science at Swarthmore College in
33 Swarthmore, Pennsylvania. Professor Valelly is
34 author of The Two Reconstructions: The Struggle for
35 Black Enfranchisement and Radicalism in the States
36 (The American Political Economy and the Minnesota
37 Farmer-Labor Party). The Two Reconstructions won the
38 2005 Ralph J. Bunche prize of the American Political
39 Science Association which honors excellence in
40 scholarship on racial, ethnic and cultural hurdles.
41 We're delighted to have you with us today, Rick.
42 Mark Posner. Mark is currently the
43 adjunct professor of the Washington College of Law at
44 American University and University of Maryland Law
45 School where he teaches election law and legal
46 writing. He has also worked as an independent
47 consultant for the U.S. Commission on Civil Rights.
48 Mr. Posner has worked -- is a graduate of the
49 University of California at Santa Cruz and the Bolt
50 School of Law at the University of California,
51 Berkeley. We're again very delighted to have you
52 here.
53 MS. POSNER: Thank you very much.
54 MR. ROGERS: Robert Kengle served with the
55 Voting Section of the Department of Justice after
56 joining the civil rights division in 1984 as an
57 honorable graduate of the Antioch School of Law. A

1 trial attorney, he litigated minority vote dilution
2 claims under Section 2 of the Voting Rights Act,
3 enforcement and preclearance actions under Section 5
4 of the Voting Rights Act and constitutional claims of
5 unconstitutional racial gerrymandering. We're very
6 delighted to have you here with us today and thank
7 you for being with us.
8 Kent Williams. Kent serves in particular
9 as the executive director of the Civil Liberties
10 Union of Virginia. And again, we're very delighted
11 to have you here with us today.
12 Margaret Jurgensen. Margaret has served
13 as the elections director of the Montgomery County
14 Board of Elections since August 2001. Ms. Jurgensen
15 has a master's degree in public administration from
16 the University of Nebraska at Omaha. That's my part
17 of the world. I'm born in Nebraska, of all places.
18 And a bachelor's degree. I'm into that, as an aside.
19 In our state, if I told folks I was from
20 Omaha, I would have never been elected as lieutenant
21 governor. But in any event, I'm delighted that
22 you're here with us. You have a bachelor's degree in
23 journalism from the University of Nebraska at
24 Lincoln. So thank you kindly for being here with us
25 today.
26 Margaret, we are going with your testimony
27 first. I understand that there are time
28 considerations that are important. Thank you for
29 being with us.
30 MS. JURGENSEN: Good afternoon. For the
31 record, my name is Margaret Jurgensen. I'm the
32 election director for Montgomery County, Maryland
33 Board of Elections. We conducted an election in
34 November of 2004 in which 518,000 registered voters
35 participated. This included a dramatic increase in
36 the number of registered voters and the introduction
37 of touch screen voting systems, the Department of
38 Justice voting rights under the Section 203 for the
39 bilingual voting as well as the Help America Vote
40 mandates or provisional voting.
41 The multicultural voter empowerment
42 community engaged over 100 community representatives
43 and volunteers as election information guides and we
44 designed the election judge training module to
45 incorporate the legal and technical voting system
46 requirements and this program was unique as well as
47 successful. Our election judge training was
48 redesigned and delivered by experienced election
49 judge trainers. This program included hands-on
50 experience, take-home videos, a quick reference guide
51 and open the door refresher.
52 Election judges, experienced and first
53 timers gained from this multifaceted information
54 delivery system. In the process of recruiting
55 approximately the needed 3,200 election judges
56 necessary to conduct the election on November of
57 2004, our goal was to make certain that we had at

1 least one individual that spoke Spanish in every
2 precinct.
3 We achieved that goal in all instances and
4 it was the decision of our multicultural voter
5 empowerment committee to also reach out to other
6 members of our community that spoke other languages.
7 And we ultimately represented 17 different languages
8 in our county that were placed at the polling place.
9 Additionally, our election judges were
10 informed that if, for some reason, they were to have
11 a difficulty working with an individual with a second
12 language that was -- English was the second language,
13 they were informed to call the Board of Elections and
14 we would have language banks standing by to be able
15 to assist them.
16 The challenge for -- the biggest challenge
17 for the Board of Elections, besides the language
18 requirements, we were having to implement technology
19 on a level that we had never seen before. And this
20 forced the Board of Elections to examine the entire
21 system and, in that process, we brought in our
22 members of our committee to help us devise the best
23 means to inform the voters of the voting system and
24 the voting procedures.
25 This challenge required us to look at
26 every aspect of our functions, beginning with the
27 process of the actual voter registration form to the
28 way we notified voters in what language, what the
29 expectations of a potential voter are when they come
30 into the polling place, the sample ballot that we
31 have traditionally sent to the voters. In our
32 discussions with our committee members, they brought
33 to us a lot of disinformation or information that
34 quite honestly I put in the same category as urban
35 myths.
36 One of the things that probably, as an
37 election director who has served for 16 years, I was
38 informed by members of my committee that, well, of
39 course you don't count absentee ballots if the
40 election is a clear-cut winner on election day and we
41 said, no, that's not the case. It's very important
42 for you to understand that you have the right to vote
43 absentee, you have to meet certain legal
44 qualifications and after -- according to the laws of
45 Maryland, whether John Smith wins 99 percent of the
46 way, we will count every ballot.
47 And also it was really critical for our
48 committee as well as our board to educate individuals
49 on the new procedure of provisional voting and that
50 every person, even if their name didn't appear, they
51 weren't a resident of Montgomery County, was afforded
52 the opportunity to vote a provisional ballot in the
53 State of Maryland.
54 The cost of implementing this program and
55 obviously, on the local level where -- that is where
56 the service is delivered and we, by many standards,
57 we have a small budget. It's approximately $2

1 million. And what we did was convinced -- and this
2 was a county effort. So we went to our county and
3 said -- we went to the county council and stated, in
4 order for our office to succeed in implementing the
5 requirements of Section 203 of the Voting Rights Act,
6 we need to be able to have one individual help us
7 look at this. So we hired one individual and then we
8 provided the committee a budget as to what they could
9 spend to help them spread the word. So these monies
10 included salary, overtime, voting units and cell
11 phone costs and things like that.
12 And then, again, you have to keep in mind
13 that besides meeting the requirements of the Voting
14 Rights Act, we were also looking at this huge shift
15 in the technology. We went from the old data mode
16 punch cards to this touch screen voting system. So
17 we looked at the entire process and said, we need to
18 examine the way everything is delivered.
19 And so this meant that election judge
20 training, which had been a simple one and a half,
21 two-hour program, now needed to be ramped up to four
22 to five hours' worth of training, making certain that
23 besides the technology requirements, the importance
24 of integrating the requirements of sensitivity, the
25 importance to lay out a polling place so that the
26 signage -- I mean, these things -- in terms of my
27 colleagues who are sitting here on the panel, they're
28 way up here. These gentlemen probably are very, very
29 well-meaning.
30 But I'm kind of on the street level. I
31 have to make sure that the men and women that are
32 serving in the polling place treat every individual
33 walking through that schoolhouse door or going
34 through that recreation center the same equal
35 opportunity that every other voter should have across
36 the country. And that means making sure that there
37 is equal access, that the signage is very clear, that
38 they feel comfortable asking the questions and we
39 have those languages available.
40 Montgomery County was identified by the
41 National Association of County Officials for their
42 multicultural voter empowerment committee in 2005 and
43 every dime we spent was well worth it and I think
44 it's an effort that we need to continue reaching out
45 toward. Thank you.
46 MR. ROGERS: Thank you, Ms. Jurgensen. Do
47 the commissioners have any questions for Ms.
48 Jurgensen? Because she needs to leave.
49 MS. NARASAKI: I really want to commend
50 Montgomery County for going beyond the requirements
51 of Section 203 which only mandates, I believe,
52 Spanish for Maryland, and for doing the other
53 languages. I'm wondering how much it cost to do that
54 and whether the touch screen technology has helped in
55 that regard.
56 MS. JURGENSEN: I think that the touch
57 screen technology definitely helps on the election

1 day level in improving everyone's opportunity to
2 vote. We currently have two languages on that
3 particular ballot station. I know that it can go up
4 to seven, I believe is what our manufacturer can do.
5 And I think that anything that enhances the
6 opportunity to execute your vote in privacy, whatever
7 language you want.
8 And one of the things I would ask in your
9 making your recommendations is I have been approached
10 on several different instances by the media and
11 elected officials and they say, well, can't you tell
12 us how many people are actually voting on those
13 languages? And I don't think that that's a good
14 idea. I think that that would have a chilling effect
15 because let's say you're one of 200 and you're the
16 only person that selects one language. I don't want
17 any opportunity for anyone to be able to go back and
18 check whether that individual vote could be
19 identified by a person.
20 MS NARASAKI: And the cost?
21 MS. JURGENSEN: Well, the cost of the
22 entire technology, I can get that for you.
23 MS. NARASAKI: Thank you.
24 MR. ROGERS: Commissioner Davidson?
25 MR. DAVIDSON: You mentioned, I believe,
26 that the multicultural empowerment committee reached
27 out to 17 different language groups?
28 MS. JURGENSEN: Yes.
29 MR. DAVIDSON: Did those language groups
30 have their own -- I mean, ballots in their own
31 languages?
32 MS. JURGENSEN: No. The only languages
33 that are on the ballots currently are English and
34 Spanish and then we also have written instructions in
35 Vietnamese, Korean and Mandarin Chinese.
36 MR. DAVIDSON: So what was the nature of
37 the help that was given to the other languages?
38 MS. JURGENSEN: We had election judges
39 that were bilingual in, say, English and Russian or
40 Chinese and English, Vietnamese and English, and then
41 if you did have an individual, let's say, show up at
42 a polling place that their primary language was
43 Vietnamese, then they could call into the Board of
44 Elections on a special phone line and we would have
45 an individual affiliated with the language bank there
46 to talk to the voter and talk to the chief judge.
47 MR. DAVIDSON: Thank you.
48 MR. ROGERS: Margaret, I have a question
49 for you. I'm curious about this. Let me assume, for
50 example, that 203 does not exist. If you assume that
51 Section 203 is gone, that it's not reauthorized, what
52 happens under those circumstances with voters as you
53 described at the base level where folks are going and
54 do vote? What happens?
55 MS. JURGENSEN: Well, one advantage for
56 myself would be that -- I mean, I've already invested
57 the money into all the translation services so I

1 would continue to do it. But I will tell you that
2 when I was the election commissioner in Omaha,
3 Nebraska, and that was back in the '80s, early '90s,
4 and one of the very first things that I tried to do
5 and was very simple was to create a sample ballot in
6 both English and Spanish.
7 I was really met with a lot of resistance.
8 That was considered not a good investment of the
9 public money and all of the things that come with
10 that. And so I think it would be harder on the local
11 level to convince the public policy makers, your
12 county commissioners, your town councils that that is
13 an important investment of public dollars.
14 MR. ROGERS: Some minority, for example,
15 by asking you to take a look at the numbers, that if
16 you have a circumstance in which only one out of,
17 let's say, 500 voters needs the language assistance
18 that you're talking about, or maybe that's why
19 they're asking you for those numbers in the first
20 place, that you really don't need to have essentially
21 taxpayer dollars being spent in that regard to aid
22 one out of 500 people. Your response to that would
23 be what?
24 MS. JURGENSEN: Well, it's my
25 understanding that according to the Census Bureau
26 that the reason Montgomery County moved into that
27 particular category is that we had individuals that
28 were not -- the literacy in English was so low that
29 it was better to have the ballot available in
30 Spanish. So again, while it is important to vote, to
31 be able to understand what you're voting for is just
32 as important.
33 MS. NARASAKI: To be covered, you have to
34 have 10,000.
35 MR. ROGERS: Exactly. Well, thank you
36 very much. We appreciate you being with us today and
37 I understand that you may need to leave. Thank you
38 kindly.
39 We'll move forward, if we can. Rick
40 Valelly. I'll get it right. You just have to
41 forgive me on it, please.
42 MR. VALELLY: Absolutely. For the record,
43 I'm Rick Valelly, professor of political science at
44 Swarthmore College and I have a last name that is
45 hard to pronounce.
46 I'm here because I'm one of three
47 coauthors on an article which has not yet appeared
48 but we hope it will appear in either a law review or
49 in some kind of journal that lawyers read and we also
50 have some expectation of publication with a volume
51 that's coming out of the Russell Sage Foundation.
52 Some years ago, I was at a panel of the
53 American Political Science Association and one of the
54 panelists leaned into the microphone when it was his
55 turn to speak and said in a very low voice, "I'm here
56 because I have some very important discoveries to
57 share with you."

1 This was obviously a facetious way of
2 introducing what I think is worthwhile about this
3 article. The article involved reading and
4 systematically quoting over a thousand objection
5 letters that the Department of Justice issues to
6 covered jurisdictions under Section 5 of the Voting
7 Rights Act. And as you know, Section 5 of the Voting
8 Rights Act is one of the sections which is a
9 temporary section and is up for reauthorization.
10 And the purpose of the investigation that
11 the three of us did in looking at these objection
12 letters was to get a sense of the structure and
13 evolution of Section 5 enforcement, looking at the
14 information contained in the objection letters. And
15 the objection letters are public so our findings can
16 be replicated by anyone who cares to look at the
17 letters. And these letters spanned a period of three
18 and a half decades from the 1970s to 2004. And to
19 repeat, it's a sample of over a thousand letters.
20 And when we finished the work, we were
21 struck by -- because we did the work both before and
22 after the Supreme Court's decision in Bossier 2, the
23 second Bossier Parish case. As you know, the
24 section -- meaning of the purpose prong of Section 5
25 changed as a result of the 5/4 decision of the
26 Supreme Court in that particular case.
27 The opinion of the Court written by
28 Justice Scalia holds that the purpose prong of
29 Section 5 does not in fact have any constitutional
30 meaning so that if there is any evidence of
31 discriminatory purpose in the record, the Department
32 must nonetheless preclear the proposed change.
33 If there is no intent to retrogress, so,
34 that is to say, the record might show that local
35 elections officials have an intent to limit or
36 contain the influence of minority voters on public
37 policy and on the election of officials or on access
38 of ballots and to the polling place. But if the
39 change is not retrogressive, that is to say, does not
40 make their position worse off than it was before,
41 that is to say, there is no change in the status quo
42 and a roll-back, if you will, the Department of
43 Justice is required, despite the evidence of
44 discriminatory purpose, to preclear that proposed
45 change.
46 And that is, according to the opinion of
47 the Court, to adjust the meaning of the effect prong
48 and the purpose prong so that they're both about
49 retrogression. And our findings from our data had a
50 very clear implication when we took a look at
51 Bossier. And what we found was that up until the
52 holding in Bossier, there was a great deal of
53 objection activity from the Department of Justice
54 under Section 5 preclearance that objected on the
55 basis of evidence of discriminatory purpose.
56 And after Bossier 2, the number of
57 objections which are issued under the new doctrine

1 that you can only object to retrogressive intent
2 dropped to some 25 objections relative to -- and if
3 you compare that four-year period to a four-year
4 period from the 1990s, there were 250 objection
5 letters on the basis of intent under the prior
6 standard. So this is a huge shift. It's sort of
7 like dropping off a cliff.
8 Now, actually, things change all the time
9 and perhaps there are other explanations other than
10 the other factual explanation which seems to be
11 coming at us from the data, namely, that because
12 there was a new standard, there was a narrowing,
13 therefore, of Section 5 clearance. It could be that
14 there were other reasons for why there wasn't
15 evidence of discriminatory intent to retrogress. But
16 because the Department is barred from considering
17 anything except retrogressive intent and
18 retrogressive effect, essentially the number of
19 objection letters really shrank from a modest-sized
20 stream to a trickle.
21 And we think that that has very important
22 implications for the reauthorization of the Voting
23 Rights Act. We think that Section 5 not only needs
24 to be reauthorized, and I'm just going to give a
25 sense of the deterrent effect of Section 5 in just a
26 second in the sense of qualitative evidence, but we
27 also think that Section 5 not only needs to be
28 reauthorized but, when it's reauthorized, it needs to
29 address this problem that Bossier 2 creates.
30 Bossier 2 narrows what can be done with
31 Section 5 to a point that -- one wouldn't go as far
32 as to say it eviscerates Section 5, but it actually
33 weakens Section 5 and so the language of Section 5
34 has to also be amended in order to cope with and
35 correct the finding in Bossier 2.
36 Just to give a sense of what Section 5
37 does, and this is familiar to all of you but it's
38 often incredibly helpful to realize. I particularly
39 have objection letter evidence that comes from the
40 1990s. So this is recent evidence. There is a
41 ballot access case that comes from Georgia in 1995.
42 A Georgia county tried to switch from a polling place
43 in an urban black neighborhood with sidewalks,
44 crosswalks, street lights and a speed limit of 35
45 miles per hour to land outside the city limits in a
46 predominantly white neighborhood on a blind curve on
47 a highway with a speed limit of 55 miles per hour and
48 the Department saw this as retrogressive.
49 The black community had no opportunity for
50 input, moreover, and the county provided no nonracial
51 explanation for the change, leading the attorney
52 general to object on purpose grounds as well.
53 My point here is -- I'm disconnecting my
54 first point with my larger point here which is
55 important to Section 5. Here is an example from 1995
56 of an apparently minor but subsequently enormously
57 important change in ballot access. Section 5 allows

1 the United States to object to a change of this sort
2 and is, therefore, a deterrent.
3 So not only has Section 5 been weakened
4 but it also -- that needs to be addressed. But here
5 is a clear example of the kind of thing Section 5 can
6 prevent and deter. Take Section 5 away and these
7 kinds of things -- I mean, obviously I can't predict
8 that this will happen but this is evidence from 1995.
9 To give another example, there is an
10 annexation case from Lamesa, Texas in the late 1990s.
11 The city of Lamesa, Texas where Hispanics and blacks
12 together form 51 percent of the population, Lamesa
13 de-annexed an area only a year after initially
14 bringing it into the city. So again, this is
15 evidence of a discriminatory purpose.
16 White residents of a particular election
17 district with new areas where a low and moderate
18 income housing development was to be placed mounted a
19 major effort to block the arrival of, quote,
20 undesirables, quote, HUD people and, quote, Section 8
21 people who would allegedly bring, quote, criminal
22 activity to the neighborhood. The city bowed to this
23 pressure and de-annexed the development one year
24 later. The Department objected on purpose grounds.
25 So just two examples from two different
26 places just to underscore the absolutely fundamental
27 point that Section 5 is an extraordinary deterrent
28 and these are examples of behavior from -- official
29 behavior from the 1990s.
30 The second point, which I led with, is
31 that Bossier 2 weakens Section 5 and it essentially
32 says the Department can only object to a tiny sliver
33 of official behavior that has a discriminatory
34 purpose, that is to say, behavior that is
35 retrogressive. And not only does Section 5 need to
36 be reauthorized, it needs to be strengthened. Thank
37 you.
38 MR. ROGERS: Thank you, kindly. We
39 appreciate it. We'll come back with some questions
40 in a moment. Mr. Posner?
41 MS. POSNER: Thank you, Mr. Chairman. Let
42 me just add, in terms of my background, that after I
43 left California and graduated from various University
44 of California institutions, I then joined the Voting
45 Section of the civil rights division, like
46 Mr. Kengle, and I was a member of the Voting Section
47 from the day after President Reagan was elected in
48 1980, or actually the day before, until 1995.
49 And for many of those years, particularly
50 from the mid-'80s until I left in 1995, I was the
51 supervisor handling Section 5 submissions, for
52 example, from '92 to '95, I had the title of Special
53 Section 5 Counsel. So I was involved in the
54 interposing probably of scores of Section 5
55 objections and really God knows how many
56 preclearances that went through my desk.
57 Also, before I left California, I'll also

1 mention that I share something with one of your
2 panelists having clerked for the Honorable Harry
3 Pregerson, who was then a district court judge in Los
4 Angeles.
5 So turning now to my testimony, which I'm
6 very honored to provide to this Commission, sort of
7 taking off from where Professor Valelly was
8 discussing, two themes I believe stand out above all
9 others as this Commission and members of Congress
10 examine how Section 5 of the Voting Rights Act has
11 been enforced since its most recent authorization in
12 1982.
13 First, as Professor Valelly described,
14 prior to the Supreme Court's January 2000 decision in
15 the Bossier Parish case, discriminatory purpose
16 increasingly has become the principal basis on which
17 the Justice Department was basing its Section 5
18 objections. And this in turn was mostly a function
19 of the Department's redistricting objections.
20 According to the analysis that Professor
21 Valelly prepared with his coauthors, about three
22 quarters of all Section 5 objections in the 1990s
23 were based by the Department in whole or in part on
24 the finding of discriminatory purpose where the
25 voting change was not retrogressive. Furthermore,
26 among those purpose objections, about three quarters
27 were to districting claims. So these redistricting
28 purpose objections played a central and substantial
29 role in the Justice Department's enforcement of the
30 preclearance requirement in the 1990s.
31 Second, a majority of the Supreme Court in
32 recent years has been highly distrustful of the
33 manner in which the Justice Department applied the
34 Section 5 purpose test to redistrictings and it's
35 been hostile to the purpose test itself. In 1995 in
36 the Miller versus Johnson decision, the Supreme Court
37 blasted the Department's conduct, concluding that the
38 Department was using the purpose test as a cover for
39 the implementation of a near unconstitutional policy
40 of maximization.
41 Then in the Bossier Parish 2 decision, the
42 Court essentially read the purpose test entirely out
43 of the statute by keeping the purpose inquiry within
44 the narrow confines of the retrogression analysis.
45 Thus, the discriminatory purpose under Section 5 is
46 no longer coextensive with discriminatory purpose
47 under the 14th and 15th Amendments.
48 Putting these two things together or, more
49 accurately, subtracting the second from the first,
50 the Justice Department and the District Court for the
51 District of Columbia had been left uncomfortably
52 close to zero. The authority of the Department and
53 the District Court under Section 5 to bar the
54 implementation of discriminatory changes is now
55 highly circumscribed.
56 The bottom line question posed by this
57 history is whether Congress should legislatively

1 reverse the Bossier Parish 2 decision as part of an
2 extension of Section 5. This question in turn
3 presents two critical subsidiary questions. Did the
4 Justice Department in fact overstep and misuse its
5 authority in the 1990s when it interposed numerous
6 purpose objections to redistricting plans? And was
7 the Supreme Court correct in the Bossier Parish 2
8 decision that Congress meant for the Section 5
9 purpose test to be limited to the issue of
10 retrogressive purpose?
11 In my testimony today, I will focus on the
12 former question. However, I know that I also
13 strongly am of the view that the Bossier Parish 2
14 majority misstated what Congress intended the purpose
15 test to mean. The plain meaning of the word purpose
16 encompasses any and all discriminatory purposes, not
17 merely a purpose-caused retrogression.
18 Moreover, it is implausible, if not
19 unbelievable, that Congress in 1965 meant to adopt
20 such a small definition of purpose when, as the
21 Supreme Court noted in 1966, Congress had adopted
22 Section 5 to respond to exceptional circumstances by
23 acting in a decisive manner to an uncommon exercise
24 of congressional power.
25 The question of whether, in the recent
26 past, the Justice Department followed a
27 constitutionally suspect or prohibited path is
28 directly relevant to the legislative reversal issue
29 because when we now look to the future, it presents
30 the question whether the Department may be trusted to
31 properly apply the purpose test if the pre-Bossier 2
32 law is reinstated. In other words, if the Department
33 badly handled this authority in the past, one could
34 ask whether it is appropriate to again give the
35 Department that authority in the future.
36 In examining the Justice Department's
37 application of the Section 5 purpose test in the
38 1990s, it is important at the outset to place the
39 1990s objections in context in terms of how and when
40 did the Department develop its purpose analysis. As
41 a threshold matter, by the 1990s, the courts clearly
42 had held that the Department had the authority to
43 pose objections to nonretrogressive voting changes
44 based upon discriminatory purpose.
45 The Supreme Court had so held in the City
46 of Richmond case, the District Court for the District
47 of Columbia underscored this in the Section 5
48 decision in Busbee and the Supreme Court again so
49 held in the City of Pleasant Grove. The Department
50 began to interpose a significant number of purpose
51 objections to nonretrogressive changes in the 1980s
52 under the leadership of then assistant attorney
53 general William Bradford Reynolds.
54 These objections first took full flower in
55 the Department's reviews of post-1980 redistrictings
56 by Mississippi counties. During Mr. Reynolds'
57 tenure, the Department imposed about 25 objections to

1 such plans based upon purpose. Thereafter,
2 Mr. Reynolds expanded the application of the purpose
3 test to review covered jurisdiction changes from an
4 at-large method of election to a mid system of
5 districts and at-large seats.
6 In the 1980s, many covered jurisdictions
7 were abandoning their at-large systems in response to
8 the amendment to Section 2 in 1982 creating the
9 results test. In the context of racially polarized
10 voting, the new mix of election systems clearly
11 weren't ameliorative, but the concern was that some
12 jurisdictions nevertheless were intentionally seeking
13 to minimize the minority voting stream by adopting
14 such things as a majority vote requirement or
15 antisingle shot provisions for the remaining at-large
16 seats.
17 The modes of analysis forged under
18 Mr. Reynolds then were applied by the Justice
19 Department to the post-1990 redistricting. Indeed,
20 about a fifth of the total number of 1990 purpose
21 objections to redistricting plans were against plans
22 enacted by Mississippi counties. Overall, the
23 Department interposed objections to 1990 census plans
24 at almost exactly the same rate it interposed
25 objections to the post-1980 census plans.
26 I previously have published a
27 comprehensive and detailed analysis of the
28 Department's post-1990 redistricting plans in a book
29 edited by Professor Bernard Groffman. I concluded
30 that in interposing these objections, the Department
31 followed the well-established framework for
32 conducting purpose analyses set out by the Supreme
33 Court in the Arlington Heights decision and also
34 followed the factors set forth in the Department's
35 procedures for the administration of Section 5. I
36 guess I have a little bit more if I could continue.
37 We're past the time limit.
38 MR. ROGERS: That is fine, although we
39 would have to have -- could we have a copy of your
40 actual testimony?
41 MS. POSNER: Yes, I gave that to
42 Mr. Greenbaum.
43 MR. ROGERS: Wonderful. We'll move
44 forward.
45 MS. POSNER: I then go on to describe the
46 factors that the Department used in applying the
47 Arlington Heights framework to the purpose analysis
48 following judicial precedent, looking at the impact
49 of the plan as court decisions have indicated the
50 Department should in studying discriminatory purpose,
51 and then studying the rationales used or put forward
52 by the jurisdictions to see if the justifications
53 they have -- they were submitting for adopting a plan
54 that diluted the minority voting stream, whether
55 those justifications in fact were mutual
56 justifications or really they were just a cover for
57 an intent to discriminate in adopting these

1 redistricting plans.
2 In sum, what I conclude and what I lay out
3 in some more detail in my written testimony is that
4 the Department's approach in interposing the 1990s
5 purpose objections was, as I said, a continuation of
6 the modes of analysis begun in the 1980s and
7 involved, on the one hand, a tough and assertive use
8 of the Section 5 preclearance authority and, on the
9 other, abuse of the authority that was well grounded
10 in judicial precedent. In other words, the claim
11 made by the Supreme Court I believe is incorrect and
12 the claim also made by conservative commentators, and
13 that the Department in fact did not abuse its
14 authority when it enforced the pre-Bossier 2 purpose
15 standard.
16 What this means, then, is this. The
17 Justice Department's conduct in enforcing the purpose
18 standard fully supports the purpose of returning that
19 authority, the purpose authority, to the Department
20 as well as to the District Court for the District of
21 Columbia through a reversal of the Bossier Parish 2
22 decision.
23 And finally, in order to provide further
24 assurance that the Department and the district court
25 will employ the purpose standard in an appropriate
26 manner in the future, Congress should consider
27 including statutory language and/or legislative
28 history that will guide the Department and the
29 district court much like Congress did when it enacted
30 the Section 2 results test in 1982. Thank you again
31 for providing me the opportunity to testify before
32 this Commission.
33 MR. ROGERS: Thank you again, Mr. Posner.
34 We'll come back with a question. I know we have
35 plenty for each one of you that are here.
36 Mr. Kengle, are you ready?
37 MR. KENGLE: Yes. Good afternoon,
38 Mr. Chairman and members of the Commission. I thank
39 you for the opportunity to appear before you today.
40 I've been asked to discuss the Supreme Court's
41 decision in the Georgia versus Ashcroft case from
42 2003. Usually I work from an outline. Today I'm
43 going to try to stick to the script in order to make
44 time. There is a fair amount of ground to cover and
45 if you need to cut me off, go ahead but I do want to
46 try to address these issues because I think they're
47 fairly important.
48 Until April of this year, I have had the
49 privilege to serve as a deputy chief of the Voting
50 Section of the Civil Rights Division at the
51 United States Department of Justice. In that role, I
52 supervised the voting sections trial team for the
53 Ashcroft case in the District Court for the District
54 of Columbia. I also played a limited direct role in
55 the litigation of the case by handling the
56 cross-examination of the State of Georgia's expert
57 witness at trial. My remarks today are based upon

1 the public record and my own personal views and they
2 do not disclose the internal deliberations within the
3 Department of Justice on the Ashcroft case or any
4 other matter.
5 The Ashcroft case involves Section 5 of
6 the Voting Rights Act which, as you know, Congress
7 first enacted in 1965 and extended in 1975 and 1982.
8 Section 5 was one of the provisions of the Voting
9 Rights Act that was set to expire in 2007 and much
10 already has been written about the Ashcroft decision
11 and its implications, raising more issues than I can
12 hope to cover today. So what I'm going to try to do
13 today is to provide an outline of the Ashcroft
14 decision and to provide some additional context
15 comment on the case, time permitting.
16 Under Section 5 of the Voting Rights Act,
17 certain covered jurisdictions are required to obtain
18 preclearance before they enforce any changes
19 affecting voting. Examples of these changes would
20 include polling place changes, voter registration
21 hours, voter registration procedures as well as more
22 complicated complex changes such as legislative
23 redistricting plans. That's what was at issue in the
24 Ashcroft case.
25 A jurisdiction may obtain Section 5
26 preclearance by making an administrative submission
27 to the United States attorney general, after which
28 the attorney general has 60 days in which to
29 interpose an objection. If the attorney general does
30 not interpose an objection within 60 days, the
31 changes are deemed precleared.
32 A covered jurisdiction also has the
33 option, which is used in only a very small number of
34 cases, to seek judicial preclearance by filing a
35 lawsuit in the United States District Court for the
36 District of Columbia. The United States and the
37 United States attorney general are named as
38 defendants in all of those lawsuits which are known
39 as Section 5 declaratory judgment actions and those
40 lawsuits are decided by panels of three judges.
41 Appeals from declaratory judgment actions
42 go directly to the Supreme Court. They bypass the
43 Court of Appeals for the District of Columbia
44 Circuit. Prior to the Ashcroft case, Section 5
45 declaratory judgment actions involving redistricting
46 plans almost always were filed only after the
47 attorney general had interposed an objection to an
48 administrative submission, meaning that the
49 Department of Justice had already received, analyzed
50 and reached a determination about the plan before the
51 cases that were filed.
52 In either an administrative preclearance
53 decision or a declaratory judgment lawsuit, the
54 jurisdiction is required to prove that its proposed
55 voting changes do not have the purpose and will not
56 have the effect of denying or abridging the right to
57 vote on account of race or membership in a language

1 minority. The Department of Justice follows, in its
2 administrative determinations, the holdings of the
3 District of Columbia Court and, of course, the
4 Supreme Court.
5 The Georgia versus Ashcroft case
6 determined the question of how to apply the portion
7 of Section 5 which prohibits voting changes having
8 the effect of denying or abridging the right to vote
9 on account of race. Ever since 1976, the District of
10 Columbia Court and the Department of Justice have
11 been guided by the leading decision of the Supreme
12 Court on this point which was a case named Beer
13 versus United States.
14 The Beer case involved the redistricting
15 of New Orleans City Council districts. In the Beer
16 case, the Supreme Court interpreted the term effect,
17 under Section 5, to mean a voting change which leaves
18 minority voters in a worse position than they
19 presently occupied. That prohibited type of change,
20 that is, a change to a worse position, became known
21 as retrogression.
22 When the Supreme Court looked at the facts
23 of the Beer case, it found that the city's proposed
24 redistricting plan would create more districts with
25 black voter registration majorities than the plan in
26 effect at the time and, therefore, that there was no
27 retrogression because black voters would have a
28 better chance to elect black-preferred candidates
29 under the new plan as compared to the old plan, which
30 is known as the benchmark plan. The existing plan is
31 known as the benchmark plan under Section 5.
32 Somewhat surprisingly, between the time of
33 the Beer decision in 1976 and 2001, there were very
34 few judicial cases directly involving retrogression
35 in redistricting plans. That changed in October 2001
36 when the State of Georgia filed a declaratory
37 judgment action in the D.C. Court seeking Section 5
38 preclearance for its 2001 congressional, state senate
39 and state house redistricting plans.
40 A declaratory judgment action involving
41 three statewide redistricting plans for which there
42 had been no administrative submission was
43 unprecedented. I raised this point to illustrate to
44 the court the current Section 5 scheme under which a
45 jurisdiction may perversely gain an advantage by
46 waiting to seek judicial preclearance until the last
47 possible minute without first having made an
48 administrative submission. This seriously limits the
49 ability of the Justice Department to develop a
50 comprehensive record in a highly complex and
51 significant type of case which, after the Ashcroft
52 decision, has become significantly more complex.
53 In Ashcroft, the state demanded final
54 judgment from the D.C. Court before the end of 2001,
55 which the D.C. Court rejected. But the court did set
56 a firm trial date for the first week in February
57 2002. The Voting Section assigned a trial team of

1 four attorneys to the case full time and they
2 immediately began an intensive investigation and
3 analysis of the three statewide plans at issue.
4 Recalling, we had no information about
5 these plans at the time the lawsuit was filed and the
6 section was handling hundreds of other redistricting
7 submissions which were pending at the time. If we
8 could have put more than four attorneys on it, I
9 would have requested that we do so but there were
10 other pressing issues that had to be addressed as
11 well. The voting sections trial team did an
12 incredible job of meeting this most demanding
13 schedule.
14 Now, the United States ultimately
15 challenged the state senate plan as retrogressive.
16 Our theory was simple, that the state had made
17 retrogressive changes to three specific state senate
18 districts, in Albany, Macon and Savannah, that were
19 not offset elsewhere in the plan. In each of those
20 three districts, black voter registration had been
21 reduced from above 50 percent to below 50 percent
22 and, in each of those districts, our evidence shows
23 that voting was racially polarized.
24 Furthermore, although each of those three
25 districts was underpopulated and needed to add
26 population in order to achieve one person/one vote
27 compliance, majority black precincts had been taken
28 out of each of those districts unnecessarily.
29 Now, the United States did not object to
30 the court granting preclearance for the state
31 congressional and state house plans. However, the
32 United States was not the only defendant in the
33 Ashcroft case. The D.C. Court permitted a group of
34 Georgia citizens to intervene in the case and to
35 defend against the state's claims, not only for the
36 senate plan but also for the congressional and state
37 house plan to which the United States had no
38 opposition.
39 I believe this right of a private citizen
40 to challenge voting changes to which the
41 United States did not object is significant because
42 it provides a potential ground for Congress to grant
43 a private right of action to individual citizens to
44 enforce the substantive provisions of Section 5 which
45 currently is foreclosed by the Supreme Court's
46 decision in the case of Morris versus Gressette.
47 As I noted previously, the DOJ challenged
48 three senate districts. One point that is often
49 missed or misunderstood is that there have been
50 significant reductions in the black VAP voting age
51 population in every majority black district in the
52 benchmark senate plan, yet those other districts did
53 not prompt a challenge from DOJ.
54 In thinking about what the Ashcroft
55 decision did and did not change, it's important to
56 bear in mind that DOJ did not take the position that
57 Georgia was locked into maintaining the current black

1 percentage in each of the majority black districts in
2 the benchmark plan. However, the Ashcroft case
3 brought out just how limited the precedent was for
4 applying Section 5 retrogression standards to
5 redistricting plans. The jurisdictions really did
6 not have much in the way of precedence to give them
7 guidance on what to do.
8 Ultimately in 2002, the D.C. Court ruled
9 against the state, agreeing with the Department of
10 Justice that three challenged districts were
11 retrogressive and that the state had not shown any
12 offsetting increases in the black voting stream. For
13 those reasons, the state failed to meet its burden of
14 proof.
15 The D.C. Court did rule in favor of the
16 state and granted preclearance to the congressional
17 and state house plans which the intervenors had
18 challenged. The state appealed the senate plan
19 judgment to the Supreme Court and in 2003, the
20 Supreme Court vacated the district court's judgment
21 and remanded the case.
22 In its decision, the Supreme Court touched
23 upon numerous points. The main point, however, was
24 its conclusion that in deciding whether effective
25 black voting strength was being reduced in Georgia,
26 the D.C. court should have looked at factors beyond
27 the number of districts in which black voters had the
28 ability to elect candidates of their choice. These
29 factors included the creation of additional districts
30 in which black voters could influence the outcome by,
31 for example, helping to elect a white Democrat
32 candidate, even if they could not elect the
33 candidates of their choice, the candidates they would
34 most prefer.
35 The Supreme Court also held that the
36 district court should consider whether helping
37 Democrats retain control of the senate would help
38 advance black voters' interests by maintaining the
39 seniority of current black representatives, some of
40 whom were committee chairs.
41 I will stress the Supreme Court merely
42 vacated the district court's judgment and remanded
43 the case for further consideration. It did not
44 reverse the case, nor did the Supreme Court reverse
45 any of the district court findings of fact. Thus,
46 the district court's specific findings that the three
47 senate districts challenged by DOJ were retrogressive
48 remained the law of the case. I see that I've got
49 the time flag.
50 MR. ROGERS: Go ahead and finish.
51 MR. KENGLE: The fact that the case was
52 remanded is important to a full understanding of
53 Ashcroft because the Supreme Court never found that
54 Georgia had met its burden of proof. Certainly there
55 is language in the Ashcroft decision which suggests
56 that the Supreme Court majority expected the state to
57 be able to meet its burden of proof based on the

1 record that it had at the time. On the other hand,
2 the Department of Justice's brief on remand contains
3 several supporting demonstrative exhibits which I'm
4 appending to my testimony. And I've passed copies of
5 those out previously.
6 With 20/20 hindsight, I wish that we had
7 introduced those exhibits during the initial trial
8 because they illustrate how, when you compare the
9 benchmark plan in that case with the proposed plan
10 that was challenged, it immediately becomes
11 questionable whether any additional new influenced
12 districts were in fact created by the senate's
13 proposed plan, by the state's proposed plan.
14 I think the Supreme Court thought that
15 there were new districts that had been created but
16 when you look at the actual numbers side by side, I
17 think it's hard to come to that conclusion. Now,
18 whether this would have affected the Supreme Court's
19 view of the facts, I can't be sure. I do suspect
20 that it might have tempered some of the Court's
21 observations that it made.
22 Ultimately, the case was dismissed on
23 remand back down to the district court because of the
24 Larios case that was going on in Georgia. It
25 effectively rooted out the state's case. Before the
26 case was dismissed, though, the D.C. Court had
27 decided to reopen the record, allow additional
28 discovery and allow an additional evidentiary
29 hearing. So the Court, in looking at the evidence
30 and the arguments that we made, agreed that there was
31 more to it than simply entering a judgment in favor
32 of the state. There was more of a case there than
33 what might have initially met the eye.
34 On the Ashcroft case, my personal view is
35 that the Supreme Court prematurely and unnecessarily,
36 if not incorrectly, introduced factors into the
37 retrogression analysis that make the Section 5
38 process more complicated and burdensome for
39 everybody, not just for the Department of Justice but
40 for the jurisdictions that have to comply with it as
41 well. Furthermore, I think decisions will become
42 less predictable and more open to subjective
43 judgements, individual preconceptions and even
44 political biases as a result of the Ashcroft
45 decision.
46 In any event, there are important
47 unresolved issues resulting from Ashcroft. The most
48 vexing -- there are any number that we could talk
49 about but the most vexing, I think, is exactly how
50 one should quantify the creation of new influence
51 districts to offset the loss of districts where
52 minority voters are no longer going to be able to
53 elect candidates of their choice.
54 Now, I could suggest a numerical rule.
55 For example, I could say the rule should be that you
56 have to create three new influenced districts in
57 order to offset the loss of one district of minority

1 voters to previously elect their candidates of
2 choice. The problem is I don't know how to make a
3 principal distinction between that rule and a rule
4 that was based on a two-to-one ratio or a four-to-one
5 ratio. It's very hard to know that.
6 And that's left completely unclear by the
7 Supreme Court's decision. And the fact that there is
8 not a clear standard on that now is to me the best
9 reason for Congress either to act in some way to
10 clarify this or to repudiate the holding in the
11 Ashcroft decision.
12 Let me conclude with this. My initial
13 reaction to Ashcroft was somewhat akin to Charlie
14 Brown flopping down as his friend Lucy once again
15 pulled the football out from under his feet. Over
16 time, however, I've come to believe that Ashcroft may
17 turn out to have more limited effect than was often
18 thought. This may sound somewhat surprising so let
19 me quickly try to explain.
20 The essence of Ashcroft is that
21 majority-minority legislative districts are not
22 necessarily the only means by which minority voters
23 can effectively exercise the electoral franchise,
24 especially where partisan elections may encourage
25 cross-racial electoral lines as implicating control
26 of legislative bodies. This could include, depending
27 on how broadly one defines an effort to control a
28 legislative body, as most legislative and
29 congressional redistricting plans.
30 Now, for many people, I think this is what
31 they think of when they think of Section 5. The
32 impact on power politics, high profile statewide
33 redistrictings. And that's understandable. Those
34 things are very important. But it's my firm
35 conviction, based on two decades of experience with
36 the entire range of Section 5 issues, that in terms
37 of the day-to-day effect upon the average citizen in
38 a covered jurisdiction, Section 5 is equally
39 important, if not more important, to local government
40 and local elections as it is to high profile
41 statewide redistrictings.
42 Even if the statewide plans were excluded
43 from Section 5 coverage, which I'm not suggesting at
44 all but even hypothetically, if they were not under
45 Section 5 coverage, Section 5 would nevertheless
46 continue to play a vital role in preventing
47 retrogressive changes at the local level. Many local
48 governments are nonpartisan. Even localities with
49 partisan elections may not reflect cross-racial
50 alliances that occur at the statewide level, which
51 the D.C. Court actually found in the Ashcroft case
52 based on the voting history in Georgia. Thus,
53 Ashcroft's emphasis on partisan alliances may only
54 prove to have a passing impact in local elections,
55 local cases.
56 I think there are several other reasons
57 that Ashcroft may be more limited than people think.

1 But for time purposes, I'll let my written testimony
2 cover those things. Once again, I thank the
3 Commission for the opportunity to testify and for the
4 work that the Commission is doing in going across the
5 county to support public service.
6 MR. ROGERS: Thank you, Mr. Kengle. We
7 appreciate that. We're asking you all, by the way,
8 just so you know this, you all have spent a lot of
9 time to prepare your remarks as they relate to this
10 hearing today and I understand that and we're talking
11 about complex issues that the court obviously has
12 taken some time to deal with and years' worth of
13 substance that goes into the substance of your
14 testimony.
15 We're sorry about the short time frame
16 that we're working with but we're very appreciative
17 of having your written remarks or any summaries or
18 outlines that might be available to make that all
19 part of the record. But I know that we'll all have
20 tons of questions for you so I don't want you to feel
21 the need to necessarily get every word in now because
22 we have tons of questions to ask you.
23 All right. Mr. Willis? Thank you.
24 Administratively, I do want to check on one thing. I
25 know we've gone over time. Are you okay on time for
26 questions? Okay, wonderful. As a practical matter
27 what we'll do, and I'll let the fellow commissioners
28 know this, we will not likely have public testimony.
29 And so what we would like to do is to take
30 the additional time that would have been allotted
31 related to public testimony and spend the time in
32 terms of questions and answers for this panel and
33 then we will likely have closing remarks and move
34 forward with the end of this proceeding.
35 So you are likely to be our final panel
36 today unless there are members of the public that I'm
37 unaware of who may well be here to share remarks or
38 thoughts. Mr. Willis, please.
39 MR. WILLIS: Thank you. I would like to
40 begin by letting you know that I am absolutely not an
41 expert on the Voting Rights Act. I'm much different
42 than the folks up here and I'm quite impressed with
43 what they've had to say. I'm someone that's worked
44 at the ground level with the Voting Rights Act for
45 the last 18 years in Virginia as the executive
46 director of the ACLU of Virginia. I've been involved
47 directly with organizing citizens and preparing
48 information for more than a dozen Section 2 lawsuits
49 that were filed in Virginia. Most of those lawsuits
50 challenge local electoral print-ins. Generally we're
51 talking about at-large claims that through Section 2
52 were moved to redistricting plans.
53 I've also worked extensively with Section
54 5 comments. Our office produced, in the early '90s
55 and again in early 2001, manuals for localities to
56 follow. When they were -- for minority use in
57 localities to follow when they were following the

1 redistricting plans taking place under the bicennial
2 redistricting in their localities. And I worked very
3 closely with those groups, helped them write comment
4 letters under Section 5 and helped them draw up
5 alternative voting plans in those districts.
6 I also, in 1991 and again in 2001, was the
7 lead person for the ACLU lobbying the Virginia
8 General Assembly on the redistricting of state senate
9 and delegate seats as well as congressional seats.
10 I'm proud to say, by the way, that it was the ACLU in
11 Virginia that stood before the Virginia General
12 Assembly in 1991 when the privileges and elections
13 committees for both the House and the Senate said
14 that it was impossible to draw a majority-minority
15 congressional district. We held the plan up and
16 said, here it is. We were working on a $3,000
17 computer. They were working on $500,000 worth of
18 computer equipment and personnel and we managed to do
19 it when they didn't.
20 I bring that up because I think part of my
21 theme today is not about some of the details of
22 Section 5 or Section 2 or other factors of the Voting
23 Rights Act, but how people feel about it at the
24 ground level and the forces that exist. And these
25 are forces against full implementation of the Voting
26 Rights Act or full implementation of the quality in
27 voting by minorities and what that might be like
28 without the Voting Rights Act, particularly Section
29 5.
30 I've witnessed, during my time in
31 Virginia, a dramatic shift in the political
32 landscape. In the mid-1980s in Virginia, there was
33 75 minority-elected officials. That's local and
34 state level both. Of course there was no -- there
35 were no minorities in the congressional delegation at
36 that time.
37 By 1991, after a series of voting rights
38 cases filed under Section 2 and after dramatic
39 changes with redistricting under -- in 1991 when
40 localities through the Section 5 process submitted
41 plans that really redrew very, very significantly the
42 local political landscape, Virginia moved from 75 to
43 150 African-American elected officials by the
44 mid-'90s.
45 By the late '90s, that had moved to about
46 300. And there is a distortion in the figure but one
47 of the things we were working on all of this time is
48 that Virginia was the last state in the nation to
49 allow school boards to be elected. Our lawsuit
50 actually challenging that was based on the 1902
51 Virginia Constitutional Convention, at least partly
52 based on information at the convention in which the
53 record showed that Virginia purposely excluded --
54 purposely prevented elected school boards to make
55 sure that blacks were not elected to the school
56 board. Through the appointing process, there was
57 much greater control. And that's on the record, for

1 the record.
2 So this is the long history of race
3 discrimination you have in Virginia. What I have
4 handed to you is a document we call a compilation of
5 laws, legislative reports and initial decisions
6 demonstrating the presence of government-sanctioned
7 racial discrimination in Virginia. This is a report
8 we actually compiled originally a few years ago to
9 send to the governor of Virginia during the 2001
10 redistricting process to remind him of the long
11 history of racial discrimination in Virginia,
12 particularly official government sanctioned race
13 discrimination.
14 One of the things this report does,
15 though, that is particularly relevant to what you are
16 looking at is it does list all of the Section 2 cases
17 in Virginia where racially polarized voting was
18 found. Among the expert testimony that was accepted
19 by the courts related to racially polarized voting, I
20 think probably most dramatic is the testimony that
21 came out in Moon v. Meadows. That was the case
22 challenging the constitutionality of the third
23 congressional district, Virginia's one
24 majority-minority congressional district.
25 In that case, the court accepted the
26 testimony that within that congressional district, in
27 35 elections between 1986 and 1991, that in
28 head-to-head local elections between black and white
29 candidates, there was significant racially polarized
30 voting. 78 percent of blacks voted for blacks and 87
31 percent of whites voted for whites. And that's just
32 part of the sort of broad landscape of racially
33 polarized voting that's been documented in Virginia
34 with these cases.
35 One of the cases I wanted to mention too
36 about racially polarized voting was a case against
37 Henrico County, Virginia. Henrico County, Virginia
38 was about 20 percent African-American, had never had
39 a black elected official, had never had a black
40 appointed official, yet it had a district that was 43
41 percent African-American, largely by luck of the
42 draw. We challenged that plan in a redistricting
43 lawsuit and in it found that there was significant
44 racially polarized voting in Henrico County and that
45 a district in which an African-American had a fair
46 opportunity to be elected could be created.
47 What I like about that case is in the
48 first election ever under the new plan, the
49 African-American candidate, Dr. Frank Thorton, lost
50 by six votes. Now, while this was a defeat for
51 Dr. Thorton, it actually was a victory for the Voting
52 Rights Act. This said that you could indeed draw a
53 plan in which an African-American candidate had a
54 fair chance to be elected.
55 Dr. Thorton was elected during the next
56 election. That was in 1996. And eight years later,
57 his peers on the city council of Henrico elected him

1 to be chairman of the board of supervisors there. A
2 nice success story of the Voting Rights Act.
3 The two other issues I would like to bring
4 up and I'll just bring them up anecdotally primarily
5 because I'm not an expert but I think these are
6 issues that are important. In Fredericksburg where I
7 live, in 2002, the city had to redistrict because of
8 changes in the population that came about as a result
9 of the census. Fredericksburg has long had one
10 African-American majority district in its system and
11 from that district, an African-American has been
12 elected.
13 But the discussion -- and I attended these
14 meetings because, one, I tend to do it and, two, I
15 live in Fredericksburg. The discussion was entirely
16 about how do we eliminate this district. And the
17 instructions to the city attorney was, look at the
18 recent Supreme Court case, you know, look at the
19 cases that are taking place in the mid-'90s and early
20 2000, and tell us if there is a way we can eliminate
21 the African-American majority district. And that was
22 the thrust.
23 All of the original plans produced by the
24 planning department and by the planning commission
25 were plans that eliminated the African-American
26 majority district. Only when the city attorney said,
27 listen, you can't do it, under Section 5, under any
28 interpretation of it, even the most recent ones by
29 the Virginia Supreme Court, you have to draw this
30 district or it's retrogressive. Then the city
31 council drew the district.
32 But what I'm indicating to you is, despite
33 the successes of the Voting Rights Act, there are
34 still strong forces looking to take us backwards.
35 And Section 5 is one of the great powers of the Act
36 that prevents us from moving backwards.
37 The last thing I wanted to mention is
38 something that I only know about because I've only
39 seen it happen one time in Virginia and I don't know
40 how it works elsewhere and how often and this was in
41 2004 Presidential elections. The Chesterfield County
42 registrar announced that he was going to fight
43 terrorism by putting armed police guards at every
44 polling place. This drew outrage from the minority
45 community. Even the state Board of Elections told
46 him not to do it and the state Board of Elections in
47 Virginia is not one to get involved in this sort of
48 thing.
49 The registrar, despite our objections --
50 and I'll be just a few more minutes with this.
51 Despite our objections, decided to go ahead and have
52 the police, the armed guards at the polls. But what
53 the Department of Justice decided to do was to send
54 people to monitor the situation.
55 Once that was announced that the
56 Department of Justice would have monitors on the
57 scene, that's what changed significantly the way

1 people reacted to this. The grave concern, of
2 course, was that Chesterfield County, a very white
3 county with a long history of race discrimination,
4 was reinstituting a process and that is putting armed
5 guards at polls that had been used earlier to prevent
6 African-Americans from voting.
7 The concern was African-Americans,
8 particularly older African-Americans who were aware
9 of this long history, might not show up to vote.
10 Once it was announced that the federal government, in
11 this case the friendly federal government, would be
12 at the polls to monitor the situation, it seemed to
13 at least calm people's nerves and we think that maybe
14 the armed guards didn't have the effect that possibly
15 the registrar intended them to have.
16 So it's a single anecdote but it is
17 something about the effect of monitoring and how it
18 can be ameliorative. Anyway, I thank you very much
19 for listening to my testimony.
20 MR. ROGERS: Thank you kindly. I
21 appreciate it and thank you very much. We'll now go
22 to questions from members of the Commission. I will
23 start to my right, actually, with Commissioner
24 Narasaki. I wanted to note, by the way, that
25 Commissioner Raben had to leave. You saw him a bit
26 here earlier at the end. He had a family emergency
27 which required that he leave the Commission hearing
28 but we certainly wanted to acknowledge and appreciate
29 him for having been here for the time that he was
30 able to be with us here today.
31 Commissioner Narasaki?
32 MS. NARASAKI: Yes. I want to ask about a
33 topic that wasn't necessarily covered by your
34 testimony and generally that is there is a debate
35 about the jurisdictions that are actually covered by
36 Section 5 and I'm wondering if any of the panelists
37 have a thought about whether it should remain the
38 same jurisdictions. A congressman earlier this
39 morning talked about perhaps there should be an
40 adjustment where you would add jurisdictions who have
41 been found by a court to have violated voting rights
42 in the last 10-15 something years. So I'm wondering
43 if any of the panelists have thought about that
44 question.
45 MR. WILLIS: Obviously I'm probably the
46 last person to answer because I know Virginia only.
47 Virginia, as you may know, is entirely covered and
48 the only thing that's happened in Virginia, and I
49 think you heard testimony from Gerry Hebert earlier
50 so he probably talked about the fact that there are
51 options that are not particularly difficult to get
52 out of the Section 5 coverage of the Voting Rights
53 Act.
54 But I would say in Virginia, based on my
55 experience, this is a place that, unless it can
56 formally -- unless a jurisdiction can formally find
57 its way out through this process, it ought to remain

1 covered.
2 MR. POSNER: I guess I would just add
3 there are sort of two aspects to the question. One
4 is, of course, policy and the other is the
5 constitutional question and I'm not sure I'm prepared
6 to offer expert advice on either. But I guess my
7 concern on the constitutional side is of course there
8 has been quite a lot written by various law
9 professors and others about the pending
10 constitutional questions that might be posed by an
11 extension.
12 But if you separate the basis for coverage
13 from the history that preceded the '65 adoption of
14 the Act, I guess I am worried about the extent to
15 which or whether the courts would see it as
16 constitutional because the benchmark might be the
17 kind of history that justified coverage back in 1965.
18 If you then try to base coverage on
19 something more recent, of course there is the
20 argument, well, pre-'65 history is now receding in
21 time and this is recent history. But that recent
22 history is inevitably not going to be of the same
23 level of discrimination that was involved. And then
24 to the extent that falls short might be seen as an
25 inadequate basis to have this special kind of
26 coverage.
27 I would also note that there is another
28 option for coverage under Section 3 of the Act which
29 has been used to some extent where, as relief in a
30 voting rights lawsuit, one of the things that the
31 court can do is order Section 5 type coverage. And
32 that's been used not a whole lot but I think there
33 have been something like maybe 15 jurisdictions. So
34 that's not a whole lot.
35 But there have been 15 jurisdictions that
36 have been covered for specified periods of time. And
37 I suppose another option as opposed to changing the
38 Section 5 coverage formula, we need to look at
39 somehow augmenting that Section 3 provision and
40 making that more powerful and making it more direct.
41 MR. KENGLE: To add to what Mark said, to
42 answer your question, I have a lot of thoughts about
43 it. I'm not sure that they really congeal into what
44 I think is the right answer. I identify generally
45 the dichotomy of issues and basically breaks down to
46 underinclusion and overinclusion.
47 Underinclusion would mean, are there
48 jurisdictions that ought to be covered under Section
49 5 currently that are not and overinclusion would be
50 are there jurisdictions currently covered under
51 Section 5 which should not be. Are they in there as
52 a historical artifact, is there any reason to
53 continue to require them to obtain preclearance based
54 upon the events that have occurred since the time
55 they came under Section 5 coverage.
56 MS. NARASAKI: I'm most concerned about
57 the second category because there is the opt-out

1 provisions. So if you truly don't belong there, if
2 you can work your way out conceptually but the
3 question is more of the issue whether we're being
4 underinclusive at this point.
5 MR. KENGLE: Just to pull out two
6 anecdotal examples of noncovered jurisdictions that
7 raise questions to my mind about retrogression, I
8 would point to two things.
9 One, the Department of Justice recently
10 has filed a Section 2 vote dilution lawsuit against
11 Osceola County, Florida and the case is not resolved
12 yet but it was filed. As far as I know, there
13 appears to be no settlement in the case. But the
14 United States complaint makes the allegation that
15 Osceola County had gone from a single-member district
16 system electing its county commission to an at-large
17 system.
18 Now, if the county had been covered under
19 Section 5, the odds are really pretty good that there
20 would have been a Section 5 objection there had it
21 been covered. But it was not covered and so now
22 Section 2 is being used in order to challenge that
23 at-large system as violating the Section 2 results
24 test. But also there is the claim that it had a
25 discriminatory purpose which, in this context, would
26 be a retrogressive purpose. So that's an example of
27 the kind of change that even under the Bossier 2
28 standard, it would, I think, be highly subject to
29 Section 5 objection.
30 The other instance that I would point to,
31 a type of change -- a change that did not actually go
32 through but would have created real potential for
33 retrogression occurred in November 2004 in the City
34 of Philadelphia. You may recall, having read about
35 this, about a week before the election, roughly, I
36 don't know exactly how many days at this point, about
37 a week before the election, the city Board of
38 Elections received a request from one of the state
39 political parties -- I'll pick on the Republicans but
40 it was from the state Republican party.
41 They requested that 80-some precincts have
42 their polling places reassigned for the November
43 election. And the Board of Elections told them no.
44 They were threatened with a lawsuit but they said no.
45 Now, if that had been a Section 5 covered
46 jurisdiction and it had been proposed to move all of
47 those polling places a week before the election and,
48 as it turned out, almost all of those precincts were
49 over 90 percent minority in their racial composition,
50 that again would have seriously implicated a Section
51 5 objection. I think it would have been very hard to
52 justify that under the circumstances by the
53 jurisdiction.
54 Now, as I said, the city did not implement
55 that change but the request was made. And so I think
56 that's an illustration of the type of voting change
57 that may be happening in noncovered jurisdictions and

1 if there is a way to pick those up, to identify those
2 jurisdictions where it has been a problem, where it's
3 likely to be a problem, then those are the
4 jurisdictions I think obviously that would address
5 the underinclusion. There are also jurisdictions
6 where the minority population has grown recently, you
7 know, since the time of the last determinations and
8 so clearly finding some way to take that into account
9 I think would make sense.
10 MS. NARASAKI: Thank you.
11 MR. OGLETREE: I have a question for
12 actually all of the panelists, but I want to ask
13 Professor Valelly first. I listened very carefully
14 and I did not hear the title of the article that you
15 coauthored. Can you tell me what that's going to be,
16 for our purposes?
17 MR. VALELLY: Thanks for asking that.
18 Variously it's either The Law of Preclearance as the
19 main title or The End of Preclearance As We Knew It.
20 And the subtitle is the same, Enforcing Section 5 of
21 the Voting Rights Act. The other two authors are
22 Peyton McCrary of the U.S. Department of Justice and
23 Christopher Seaman, who is currently in private
24 practice.
25 MR. OGLETREE: Can you spell those two
26 last names for the court reporter? Because she's
27 going to ask me later.
28 MR. VALELLY: Sure. McCrary is --
29 P-e-y-t-o-n and then capital M, small C, capital
30 C-r-a-r-y and Christopher Seaman and that's as in a
31 seaman that sails on a ship, S-e-a-m-a-n.
32 MR. OGLETREE: The related question was
33 are the 1,000 letters that I assume you discussed
34 thoroughly in the report, are those available
35 anywhere as a public document?
36 MR. VALELLY: Not to my knowledge, no.
37 MR. OGLETREE: You just selected them?
38 MR. VALELLY: As it happens, Peyton is
39 here. Are they available?
40 MR. DAVIDSON: And our Commission has
41 them.
42 MR. OGLETREE: Great.
43 MR. VALELLY: I had to think.
44 MR. OGLETREE: The question that I have
45 for all of you, without having to give your own
46 personal views but we've identified thus far some
47 particular aspects of the 1965 Voting Rights Act that
48 are the subject of much debate, Section 5, Section
49 203.
50 From your sort of collective experience,
51 practice and otherwise, without giving away any trade
52 secrets, what's your sense today, if you have any, of
53 the greatest hurdles one might imagine in Congress
54 reauthorizing the aspects of the Voting Rights Act
55 that seem to be debated so vigorously today? Do you
56 have any thoughts on that, any of you?
57 MR. KENGLE: Of obstacles?

1 MR. OGLETREE: Yes.
2 MR. KENGLE: Well, I think one of the
3 things that I've found in attempting to enforce
4 Section 5 consistently and fairly over the years is
5 that it's been necessary for the Department of
6 Justice Voting Section to, by experience, come up
7 with a set of administrative rules which are
8 reflected in the C.F.R., the federal guidelines, as
9 reflecting our practice. Mr. Posner really is quite
10 the expert on the C.F.R. guidelines. They reflect
11 the experience.
12 But the statutory language is very -- if
13 you looked at the statute, you would know that there
14 is little statutory guidance and so trying to address
15 some of the technical points that arise in Section 5
16 administrative practice is difficult in bringing
17 people up to speed that don't live and breathe it
18 every day because there are so many informal things
19 that are done by practice and necessity that are
20 reflected in the guidelines, to some extent.
21 But you would be surprised how many other
22 issues have to be dealt with sort of informally and
23 trying to get across how an entire system works. And
24 everything that is looked at during the
25 administrative process, there tends to be a lot of
26 misunderstanding about what the Department actually
27 does in the course of making those reviews and
28 factors that are looked at.
29 I can't give you the memos that are done
30 internally but I find that part of the difficulty in
31 trying to make changes to understand why -- to
32 explain why a particular change might need to be made
33 or not made, it will implicate a lot of things that
34 just aren't really reflected in the public record
35 very well.
36 MS. POSNER: I think one issue certainly
37 that goes to the testimony that I gave and Professor
38 Valelly's is sort of the second level problem in the
39 sense of Congress in fact saying, okay, we'll extend
40 Section 5, but an extension that simply is an
41 extension of Section 5 as it currently exists. As we
42 both expressed, I think there is quite a bit of
43 concern that that kind of extension would be of value
44 but it would be of limited value because of that
45 Bossier Parish 2 decision in 2000.
46 In fact, just to give you some numbers,
47 between the '75 and '82 -- Section 5 was extended
48 until '82. At that time, there was an average of 39
49 objections each year. From '82 when it was extended
50 most recently in I think the end of June, the 1st of
51 July of '82 through 1995, again, 43, an average of 43
52 a year. So 39, 43. Since 1996, the average has sort
53 of fallen off the cliff. It's down to 17 a year.
54 So that doesn't address the deterrence
55 issue which has been discussed previously but
56 certainly there are very, very few objections being
57 interposed and maybe that's a good thing. It shows

1 that maybe people are living up to their obligations.
2 In fact, this year I think there has been one
3 objection in nine and a half months, which is just
4 extremely remarkable.
5 But it isn't just because jurisdictions
6 are somehow doing a better job of documenting their
7 changes. It's that the rules of the game have
8 changed and the rules changed most significantly in
9 January of 2000 when the Supreme Court adopted that
10 restrictive view or approach.
11 So for Congress to say, well, we're going
12 to extend Section 5, that on its face sounds like a
13 very, very positive statement. But underneath, there
14 is this other issue which I think people know is of
15 tremendous importance and would have a huge impact on
16 the course of enforcement in a renewed Section 5.
17 MR. VALELLY: I would like to follow up on
18 that. I think that a key problem at this level of
19 argument which is that there is a point of view which
20 is that the Voting Rights Act has worked and it was
21 meant as temporary, indeed, emergency legislation,
22 the emergency is over and there is no need to renew
23 it. And survey evidence shows that the attitudes
24 of -- racial attitudes of whites have changed and so
25 people bring political science into the equation and
26 they bring in the most scientific aspect of political
27 science which is survey evidence.
28 For me, when I see what happened in 2000
29 and 2004 in uncovered jurisdictions, in terms of
30 selective disenfranchisement and problems with
31 voting, it gets me to thinking about the deterrent
32 effect of Section 5. It's interesting that the
33 evidence of selective disenfranchisement of -- and
34 I'm not talking about anything of the kind of
35 conflict and intimidation that used to exist in the
36 United States at least in the '70s, but nonetheless
37 there was trouble for minorities in key electoral
38 college states in 2000-2004. Those happened to be in
39 covered jurisdictions and interestingly, in none of
40 the covered jurisdictions did you see anything
41 similar.
42 So it seems to me that my fear is if you
43 take away the deterrent effect of Section 5, even a
44 fairly toothless Section 5 -- and I completely agree
45 with Mark Posner that that's of some value but that's
46 not of enough value. If you take away Section 5, the
47 selective disenfranchisement spreads from the
48 uncovered jurisdictions to the previously covered
49 jurisdictions. I can't prove that but that's what I
50 worry about.
51 MR. OGLETREE: Which takes me to the
52 second and final question that I want to ask along
53 those lines. I didn't hear in your testimony and
54 your responses the sense that things have changed and
55 I worry about the transparency of that view. You
56 don't have the Bull Connors, you don't have the
57 hoses, you don't have the dogs and so visually it

1 seems as if we've overcome the barrier of
2 discrimination in voting that we witnessed in the
3 early '60s that led to the Voting Rights Act in some
4 respect.
5 And yet what I see is all sorts of
6 psychological factors, psychological coercion that
7 prevents voter turnout and it's been viewed as apathy
8 rather than objective fear about there is a police
9 officer there, you have to show your ID, the voting
10 places have been moved. All those things to me are
11 very troublesome and I worry that if the experts
12 think that things are better, how can we convince a
13 skeptical Congress and certainly a skeptical court
14 that there is a problem if we've solved that problem.
15 That's my major question.
16 And the underlying example that I give
17 that is related to it, the difference between state
18 interest and federal interest. The federal interest
19 is that every vote should be counted. The state
20 interest is that everybody in this state should speak
21 English and if they can't speak English, they
22 shouldn't have a right to participate in democracy,
23 is another example of how far we can go or how far
24 we're willing to go to make the polling place
25 accessible to the very different diverse community we
26 have in 2005 than we had in 1965.
27 It's a world that was black and white then
28 and that's all that seemed to count and it's so
29 multiracial and multilingual now. Whether that
30 problem is being understated, even with Section 203
31 being understated, that creates another problem.
32 Complacency is my concern, or apathy, whatever you
33 want to call it, about the urgency of the concerns.
34 Any thoughts on either of those questions?
35 MR. VALELLY: I think that -- one way I
36 think about it is that we don't say that we have a
37 sort of zone of indifference about voting. In other
38 words, the Court has always been clear, whenever it
39 has to speak to the -- the chief justice is very
40 clear about this even in his memorandum in 1982 which
41 is that the right to vote is the central right and
42 other rights come out of the right to vote. So we
43 don't say, well, it's good enough.
44 So just because the urgency has subsided
45 doesn't mean that we've said that things are okay.
46 On the contrary, we're so far from being -- when you
47 think about it, we've only been a fully functioning
48 democracy for 20 or 30 years and, ironically, we're
49 the first country in the world to have created mass
50 electoral politics in the 1820s and 1830s with the
51 Jacksonian party system, which was extraordinarily
52 exclusionary.
53 At the same time, it was the first wave of
54 black disenfranchisement. And yet we're among the
55 last of the major democracies, if not the last, to be
56 at the business of fully including every single
57 American citizen that is entitled to vote. So either

1 we take the Constitution seriously or we don't.
2 And it's not a matter of, well, 85 percent
3 fulfillment or 90 percent fulfillment. Things are
4 better since -- before, we had 50 percent fulfillment
5 and now we're up to 85 so we don't need to have any
6 kind of regime of enforcement. That argument strikes
7 me as substantially implausible if not ludicrous.
8 MS. POSNER: I guess part of my concern is
9 the premise to the question. I have heard it
10 described as, quote, unquote, the Bull Connor
11 problem, that Bull Connor is dead so there is no
12 problem. I think that problem has been gone for
13 quite some time in most jurisdictions and I think
14 that sort of, in a sense, feeds into the argument
15 that Abigail Thurston was most known for in terms of
16 arguing the limited nature of the purpose of Section
17 5 in its adoption in '65.
18 There certainly has been quite a bit of
19 change and I think we should celebrate that. I don't
20 know if it was Dr. Davidson's choice or his
21 publisher's choice, the name of the book he published
22 or edited in the 1990s, but it was called Quiet
23 Revolution in the South.
24 So certainly that indicates the nature of
25 changes that occurred. But the issue is never simply
26 Bull Connor preventing people from registering to
27 vote. The question has always been, from the
28 beginning, the ability to have an effective voice in
29 the political system so that in the 1990s and today,
30 redistricting is the question.
31 It isn't whether you can simply have --
32 whether minorities can achieve one majority-minority
33 district. That doesn't mean that that problem has
34 completely gone away. I mean, that unfortunately was
35 the issue in Bossier Parish which makes the Supreme
36 Court's contrary opinion so striking in terms of it
37 being wrong.
38 I think Justice Souter indicated that in
39 his dissent. But the issue is not simply whether
40 you're at the table and you can eat the first course
41 and the fifth course. But the question is whether
42 you're fully entitled to participate. And if you
43 have a situation where a fair plan might have two
44 majority-minority districts and the jurisdiction
45 adopts one and they do that for discriminatory
46 reasons because they wanted to minimize the influence
47 of minorities, maybe that's not the Bull Connor issue
48 but it's still very much an issue. So I think there
49 are many issues left. And to frame it as Bull Connor
50 is to frame it in a way that makes it, yes, difficult
51 to justify a renewal of Section 5.
52 MR. WILLIS: Can I add something to that?
53 MR. ROGERS: Sure. Go ahead.
54 MR. WILLIS: I think something that's
55 important here is to realize that part of what's
56 happened is the strength of the Voting Rights Act has
57 changed the way people act and what they do. One

1 thing to do, I think, and maybe you're doing this to
2 some extent, is to look to collect evidence of
3 policies and laws outside the voting arena that show
4 that race discrimination is still a strong force in
5 this nation. And maybe if it's not as strong as it
6 was or as blatant as it was in voting, it's only
7 because the Act exists.
8 But look around and look at the state of
9 anti-immigration laws that have appeared in the last
10 few years. In Virginia, I know, and unfortunately I
11 can't speak beyond my own state, there have been a
12 spate of laws, English-only laws, related to things
13 like welfare, whether the welfare department would be
14 required to give out documents in other languages.
15 And these sorts of things clearly show a deep stream
16 of prejudice and discrimination that still exists.
17 And even within the voting arena, I have a
18 report that you may have seen recently that was just
19 reported in a Virginia newspaper that the registrar
20 in Norfolk, Virginia has rejected 50 percent of the
21 voter applications that have been submitted to him in
22 the last six months. 50 percent rejection of voter
23 application. This is in a city that is majority
24 African-American. Something is going on there. We
25 haven't gotten to the bottom of it because we just
26 heard about it. That's not the same thing as
27 standing in front of the polling booth but it's a
28 great way to prevent people from getting to the
29 polls, particularly minorities.
30 MR. ROGERS: I think to some extent, this
31 begs the question, though, in terms of this whole
32 notion of purpose and effect. As we've been all
33 throughout the country, we've tried to get a sense or
34 a handle about what this really means at this time.
35 We live in a day and age in which, frankly, unless
36 you're burning a cross or unless you use a word or
37 unless you are sort of caught in the act, so to
38 speak, of engaging in a formal prejudice or an "ism"
39 in one way or another, that folks don't believe it
40 anymore. Either there has been too much of a crying
41 of wolf or there is just a general attitudinal change
42 in terms of the country.
43 And I say that after having traveled all
44 over the United States trying to get a handle around
45 this issue of sort of purpose or intent or otherwise.
46 And I am curious and I wanted to follow up on
47 Commissioner Ogletree's question about that in that
48 regard. Given your analysis in particular in having
49 to work these cases and trying to establish issues
50 related -- I understand effect, discriminatory effect
51 but talking about purpose in and of itself, whether
52 there is deliberate intent to hurt or to
53 disenfranchise minorities, what is your analysis
54 showing and is there empirical data to show your
55 analysis one way or another?
56 MR. KENGLE: If I could just start off,
57 generally some of the major cases that I've worked on

1 dealt with intent in one form or another and, as the
2 previous testimony indicated, many of the Section 5
3 objections that have been interposed over time were
4 based upon purpose.
5 Generally speaking, I would say that the
6 conclusion of purpose or contention of purpose that
7 would be made in a lawsuit or a Section 5 objection
8 would generally not be based upon direct statements
9 by an individual. It generally more is a
10 circumstantial case and the way that it generally
11 works is that you see an official action that has
12 been taken that seems to have a direct and a
13 disparate impact on the minority population, whether
14 it's splitting their neighborhood with a
15 redistricting boundary or adopting some procedure
16 that appears to bear more heavily on minority voters
17 and citizens as opposed to white citizens. You see
18 that impact.
19 And then you look at the proffered
20 justifications for it and the question is, are any of
21 those proffered justifications really going to stick.
22 And so what you go through is this sort of process of
23 elimination. In other words, here we see this
24 impact. Is there any plausible justification for it
25 that could be advanced. And if, at the end of that
26 process, you say no, and you have some other indicia
27 that the jurisdiction knew about the impact that it
28 was going to have and it didn't, because that's the
29 ultimate conclusion that needs to be done to satisfy
30 the purpose test that's adopted now, you have to show
31 that the jurisdiction was aware of what was going to
32 happen and took the challenged action because it was
33 going to have that effect.
34 It's a difficult thing to do. It is a
35 very fact-intensive process to gather that
36 information. It requires a very nuanced
37 consideration of all the possible inferences that
38 might be drawn from somebody's statement or actions.
39 It takes a lot of effort. It can be done. It has
40 been done.
41 I think that those who would like to take
42 a narrow reading of civil rights laws would like to
43 focus exclusively on those actions where a plaintiff
44 in a lawsuit or DOJ or whomever can go ahead and make
45 that showing and satisfy the constitutional standard
46 for intentional discrimination. And clearly that
47 ought to be part of the equation.
48 But the courts have recognized,
49 commentators have recognized repeatedly, Congress has
50 recognized in adopting 1982 amendments to Section 2
51 of the Voting Rights Act, proving potential
52 discrimination is an extremely difficult thing to do.
53 And if the goal is to prevent racial discriminatory
54 practices in election systems, limiting the inquiry
55 simply to purpose is not necessarily the best way to
56 achieve that end because intentions can be disguised.
57 With a little bit of forethought and a little bit of

1 planning, one can put lipstick on the pig, as the
2 expression goes, and yet still achieve the same end.
3 And so in applying the results test,
4 courts have been careful to look at all of the
5 circumstances and not jump to premature conclusions.
6 But the results tests that have been included in
7 Section 2 of the Voting Rights Act and the effect
8 test in Section 5 have proven to be workable and
9 they're not limited just to that intentional
10 discrimination.
11 MR. ROGERS: Absolutely. Thank you very
12 much. I didn't mean to interrupt but I'll come back
13 to a few final questions of my own. Commissioner
14 Davidson?
15 MR. DAVIDSON: Just as a point of
16 information for Mr. Posner, I would never let a
17 publisher tell me what the title of my book should
18 be. Quiet Revolution in the South was actually
19 plagiarized from a Laughlin-McDonald's Law Review
20 article by the same title.
21 MS. POSNER: So we have a different
22 problem.
23 MR. DAVIDSON: And I must share with you
24 this anecdote. Not long after the book was
25 published, I met, at a conference, a legendary
26 federal court judge, William Wayne Justice from Texas
27 who presided over a number of very important voting
28 rights cases in the '70s and I gave him a copy of
29 that book. He lives in a small town in East Texas,
30 heavily black part of the state, old slave-owning
31 part of the state.
32 And he suffered tremendously personally in
33 terms of being isolated from his neighbors and church
34 members and so forth when he handed down some of his
35 decisions. And I gave him a copy of that book and he
36 looked at the title of it and he said, "Well, it may
37 have been a quiet revolution for you but it sure
38 wasn't for me." And I'm sure a lot of other people
39 could testify as he did.
40 I would like to address this question
41 primarily to the former Justice Department lawyers
42 but anybody else is free to jump in if they want to.
43 We've focused this afternoon, it seems to me, to some
44 considerable degree on the declining number of
45 objections that have been interposed by the Voting
46 Section and that is taken I think generally as one
47 index of the -- all kind of qualifications around the
48 statement, but it has generally been taken as one
49 index of the extent of discriminatory behavior that
50 is still extant.
51 There are a couple of other measures that
52 I would like to at least have your input on. One of
53 them is what is known as a withdrawal. And a
54 withdrawal, as you know, is a phenomenon whereby a
55 given jurisdiction makes a submission to the Justice
56 Department for preclearance and the Justice
57 Department responds to the jurisdiction by asking a

1 number of questions and, in some cases where there
2 are questions about whether discriminatory behavior
3 is being engaged in here and once the question is
4 answered, as I understand it, often the Justice
5 Department will then go ahead and say, okay, we
6 understand the situation now and we give you
7 preclearance.
8 But in other cases, it becomes pretty
9 obvious, in the back and forth between the Justice
10 Department and the jurisdictions, that an objection
11 is probably going to be interposed and, in some
12 cases, the jurisdiction, when it sees that red flag,
13 will withdraw its submission. And I guess another
14 phenomenon that I would like your opinion about has
15 to do with observers being sent out. And there has
16 been a good deal of testimony today about observers
17 being sent out all over the country.
18 And with regard to both of these, perhaps
19 more the withdrawals than the observers, but to some
20 extent both of them, can one make the case that these
21 also, as well as objections, are indicia of either
22 actual or potential discrimination that one might
23 want to consider as part of the evidence as to the
24 extent to which jurisdictions are still involved in
25 discriminatory, potentially discriminatory behavior?
26 MS. POSNER: I'll start out. To take your
27 last one first, I certainly agree that observers are
28 an important addition of concerns that just -- there
29 are standards set forth in the statute for
30 designating counties as being eligible for observers
31 and the Department goes through a detailed process
32 when it looks -- when elections are upcoming to try
33 to identify problems.
34 And of course observers are not sent out
35 willy-nilly but are sent out after the Department
36 identifies potential problems on election day and
37 they're a way to try to prevent those problems from
38 occurring, to try to have people on the ground should
39 problems occur, that those people then can discuss
40 issues with, bring issues to the attention of
41 election officials for them hopefully to resolve and
42 potentially wait to gather data for filing lawsuits
43 in the future.
44 In fact, there has been a close connection
45 between observer activity, for example, in Navajo
46 areas and other areas of Arizona and New Mexico where
47 Indian populations live and subsequent lawsuits and
48 enforcement actions and work under 203 with regard to
49 requiring that that information be provided in other
50 Indian languages as required by 203.
51 So I think that's very definitely an
52 example. It's not something where it's an absolute
53 clear standard like in a Section 2 case so it can be
54 a little bit -- there is not a bright line that says,
55 well, the Justice Department sent observers here and
56 that means X, Y and Z. But if you take it as a
57 whole, I think it is a clear indication of the

1 presence of problems.
2 I don't recall that many withdrawals of
3 submissions after additional information being
4 requested. Now, that is the subject -- one can get
5 numbers on that by making a request to the Justice
6 Department, at least the data that exists in the
7 Justice Department computers after 1990. It would be
8 a simple matter of just simply finding out --
9 MR. DAVIDSON: I have them.
10 MS. POSNER: Okay -- how many requests
11 have there been for additional information where
12 there subsequently was a withdrawal. The other thing
13 that -- I'm not sure if it's directly on point with
14 what you're saying but there are quite a few
15 redistricting cases -- well, instances where the
16 Justice Department filed objections to redistricting
17 plans where those jurisdictions filed lawsuits in the
18 district court and they never were litigated.
19 And I know Bob worked on at least one if
20 not more where the jurisdiction then ultimately sort
21 of withdrew its lawsuit, so to speak, and ultimately
22 changed to make a different plan in response to
23 various pressures and didn't try to prove its case.
24 And the kind of objections, there are various
25 reasons. It's not something that's a simple answer.
26 Certainly Bossier Parish is an issue. But I think
27 there are also other issues that indeed the change in
28 district elections has maintained a difference in.
29 MR. DAVIDSON: Let me just put the
30 question like this. Leaving aside the number of
31 withdrawals, would you put a withdrawal in the same
32 category as an objection in the sense that a
33 jurisdiction, when confronted by a letter from the
34 Justice Department, decides that that's probably not
35 the way to go so far as the change that had been
36 submitted?
37 MS. POSNER: I agree. I think it heads in
38 that direction, yes. It's not quite the same as an
39 objection but withdrawing it after the questions,
40 specific questions have been raised about why lines
41 are drawn in a certain way or why the changes are
42 adopted or the impacts of the change, I think this is
43 evidence that the jurisdiction decided that those
44 concerns were things they wouldn't be able to meet
45 and they would -- it's the same as any kind of
46 settlement to the lawsuit. People argue about what
47 settlements mean. You know, we just settled because
48 it's too much trouble to defend and that's certainly
49 what jurisdictions are saying, but I don't think
50 that's the whole story.
51 MR. DAVIDSON: Thank you. Mr. Kengle?
52 MR. KENGLE: Well, to take the withdrawals
53 first. That reminds me of the semi-statistic that
54 they used to keep on Patrick Ewing when he played at
55 Georgetown where they tracked the "almost" shots. I
56 think that Mark is right that under the recordkeeping
57 system, you should be able to get fairly easily a

1 precise listing of those submissions that were
2 withdrawn following the request for additional
3 information. I don't know the numbers.
4 My sense is that the number is small
5 enough that you should be able to go through it on a
6 case-by-case basis to try to get a better sense of
7 what happened because it may have been withdrawn for
8 reasons that were not directly related to the
9 information.
10 In other words, they may have found out
11 that they violated state law when drawing a
12 redistricting plan. There is not necessarily a nexus
13 between that and the request for additional
14 information, although I would think that in many, if
15 not most cases, it is related. But I think the
16 numbers are such that you could get enough background
17 to be able to ascertain that more directly and not
18 infer it simply from the mere fact that it's
19 withdrawn.
20 MR. GREENBAUM: The answer is we're
21 talking about a couple hundred since 1982.
22 MR. KENGLE: Oh, it is?
23 MR. GREENBAUM: Yes.
24 MR. KENGLE: I know Chandler Davidson is a
25 very hard worker so that's not a big number for him.
26 To respond on the observers, certainly the fact that
27 observers have gone out to a jurisdiction is
28 something that, again, is very relevant to the
29 question of whether there was the potential for
30 continued discrimination in that jurisdiction. The
31 absence of observers in a particular jurisdiction
32 over time I wouldn't necessarily take as the same
33 quality as there is not a problem. It just may mean
34 the situation is stable.
35 But let's say that Section 5 coverage were
36 withdrawn, this situation could change radically. If
37 the jurisdiction knows that federal observers are no
38 longer able to be sent, the situation could change
39 dramatically. I think the experience in the Voting
40 Section has been that many times -- that, for
41 example, in a primary election, we get reports of all
42 kinds of things going wrong and it could be
43 documented so that you know that things went wrong.
44 The observers show up for the runoff election or the
45 general election and things are smooth as glass. So
46 the presence of the observers can have -- the threat
47 of observers can also have that kind of effect.
48 One thing that I would know that I think
49 you want to take into account is that presently, in
50 the past several years, there has been an increasing
51 willingness on the part of the Civil Rights Division
52 to send out attorneys for what's called attorney
53 coverage in elections. Now, that always was an
54 option but there has been an increasing, I think, use
55 of that practice.
56 Now, attorney coverage does not involve
57 federal observers. The federal observers of course

1 are recruited and supervised by the Office of
2 Personnel Management. There is a very formalized
3 procedure under which they are dispatched and the
4 jurisdictions to which they were sent have to be
5 certified either by court or by the attorney general
6 before the observers are eligible to be sent out.
7 MR. DAVIDSON: Can I interrupt you right
8 at this point just for purposes of clarification?
9 When observers are sent to a locale, are Justice
10 Department lawyers also sent?
11 MR. KENGLE: Yes. They work hand in hand
12 with the supervisors from the Office of Personnel
13 Management. Generally the observers are
14 investigators who are low key and there are captains
15 and cocaptains who supervise them and they are senior
16 investigators. They work hand in hand with the DOJ
17 attorneys. But in terms of direct supervision, the
18 reporting chain goes up through OPM and then their
19 supervisors work with DOJ.
20 But there has been an increasing use of
21 attorney coverage and so there will be DOJ personnel
22 present in jurisdictions on election day that will
23 not be reflected in the numbers of federal observers
24 that are sent out.
25 MR. DAVIDSON: Is there a way that one
26 could obtain information on the number of civil
27 rights attorneys who are sent out without observers?
28 I mean, I have data on observers but I don't have any
29 data on just --
30 MR. KENGLE: As I recall the practices,
31 prior to the election, there will be a press release
32 issued by the public affairs officer who handles the
33 Civil Rights Division and the press release will
34 identify those jurisdictions in which attorneys will
35 be present. It doesn't identify them by name and I
36 don't think it identifies the number that will be
37 present in the particular jurisdiction, but it will
38 at least identify those states and I think counties
39 in which they'll be present.
40 MR. GREENBAUM: The answer is that since
41 2001, you can get that information in terms of where
42 attorneys were sent for attorney coverage. Prior to
43 2001, that information is not available.
44 MS. NARASAKI: Can I ask a related
45 question on the observer issue? Because that's
46 obviously one of the sections that also might sunset.
47 So is it your sense that that section is fine as it
48 is? Do you feel like -- are there cases where you
49 wish that you had more ability to send out -- is it
50 too narrowly drawn, in other words, in terms of your
51 ability to send out observers?
52 MR. KENGLE: Well, presently the ability
53 to send out observers was conditioned either upon the
54 jurisdiction being subject to the special provisions
55 in Section 4 of the Act which would lead to Section 5
56 coverage or a certification by Federal District
57 Court.

1 And the Department has been able to use
2 the certification by federal court as a way to get
3 out for -- let's say Section 203, in those cases
4 where we have a consent decree in the Section 203
5 enforcement case, we've been able to have those
6 jurisdictions certified by the federal court for
7 federal observer coverage for a number of years and
8 it really has been invaluable.
9 I've spent a lot of time working on a case
10 involving Passaic County, New Jersey and we've sent
11 observers there repeatedly. They would not have been
12 eligible to go there but for the consent decree and
13 the lawsuit, and their presence really was invaluable
14 in turning that situation around and in bringing the
15 county up to Section 203 compliance.
16 MS. NARASAKI: I know, but I think part of
17 the challenge, I know for Asian languages in the
18 early days, it was hard to get litigation -- it was
19 hard to get to the consent decree and -- for the
20 Asian languages are often not in the Section 5
21 covered jurisdictions and so then we're kind of stuck
22 with knowing there is a problem and trying to get
23 Justice to come out but under what authorization did
24 they come out.
25 MR. KENGLE: This could be -- it's trying
26 to address situations like those is one of the
27 reasons why attorney coverage has become more
28 popular. But that is more limited because the
29 federal observers have a statutory right to be
30 present in the precincts and to observe the voting
31 process at all stages, whereas the attorney coverage
32 is outside their jurisdiction and if they want to
33 throw you out, they can throw it out. They don't
34 want to let you in in the first place and you pretty
35 much have to respect that. And so there is a sort of
36 qualitative difference in what could be achieved with
37 those two types of coverage.
38 In terms of making federal observers
39 available in additional jurisdictions, I haven't
40 really thought about whether or how to do that
41 outside of -- if Section 4 is revisited and
42 additional determinations are made, then I think the
43 current system would certainly want to keep that and
44 jurisdictions that want to be covered would also be
45 eligible for federal observers.
46 MS. POSNER: If I could just add a brief
47 comment to your question. I do think there is a
48 strong case to be made for extending the ability to
49 assign observers. Right now, as Bob said, the
50 ability to send observers is a subset of the Section
51 5 jurisdictions. It's not every Section 5
52 jurisdiction. It's those Section 5 jurisdictions
53 which are separately certified by the attorney
54 general.
55 But certainly 203 is pretty much tied to
56 the question of how elections are run and very much
57 that has, of course, to do with a lot of things that

1 go on before you actually vote, but has a lot to do
2 with what goes on in the polling place. So it would
3 seem like it would make a lot of sense to add and say
4 that observers also can be assigned to 203
5 jurisdictions perhaps again pursuant to that
6 certification process that the attorney general uses
7 so it wouldn't be automatically all 203 jurisdictions
8 but that would be a further qualification.
9 Furthermore, the Justice Department
10 recently has been sending observers to other places
11 throughout the country if the jurisdiction agreed.
12 And just as a matter simply of constitutional law, I
13 would think that observer coverage could be
14 assigned -- that ability even beyond 203 could be
15 extended throughout the country, at least when you're
16 dealing with federal elections, just like the
17 National Voter Registration Act applies to federal
18 elections, a specific constitutional authority that
19 gives Congress the right to extend it.
20 So I think it is unreasonably limited
21 based upon the fact that the way it was drafted, it
22 was drafted with what people were thinking about in
23 '65-'70. Certainly we've gone beyond that,
24 especially with 203.
25 MS. NARASAKI: Thank you.
26 MS. POSNER: The examiner part hasn't been
27 used much at all. The last time we actually sent
28 people out to register to vote was in the '80s.
29 MR. ROGERS: I'm going to really press you
30 for quick answers if we can, only because of time.
31 And it turns out we do have a public testimony
32 portion. So let's try, if we can, to be as precise
33 as we can with questions.
34 MR. VALELLY: With your permission, I was
35 wondering if I could address the question that
36 Commissioner Davidson asked about other indicia
37 because there was -- I didn't want the premise -- and
38 I couldn't tell if there was a premise -- that there
39 has been a decline or tapering off in objection
40 letters or in other kinds of evidence that would show
41 evidence of discrimination. I just wanted to -- so I
42 don't know if this is the right time.
43 MR. ROGERS: Sure.
44 MR. VALELLY: Okay. In this piece that
45 I'm a coauthor with Peyton McCrary and Christopher
46 Seaman, table 2 is legal basis for objection
47 decisions and the number of letters that were sent
48 out in the 1970s that were based on intent was 2
49 percent. I mean, the percentage. In the 1980s, that
50 rose to 25 percent and by the 1990s, that rose to 43
51 percent.
52 This is picking up with Ken's earlier
53 point about how smoking gun evidence is one thing but
54 intent evidence is something that can affect -- that
55 is shown. And what our survey of the objection
56 letters showed was that the Department was able
57 increasingly to interpose objections on the basis of

1 intent evidence. So that's one important factor.
2 MR. ROGERS: That is all preclosure 2.
3 MR. VALELLY: That's all preclosure 2,
4 exactly.
5 MR. ROGERS: In a post-closure 2 world,
6 that is a significant, as you pointed out, decline.
7 MR. VALELLY: In a four-year period, and
8 so these aren't entirely comparable but -- and this
9 is what Bossier did. Two letters. And we're not
10 even talking about percentages. So in other words,
11 it's implausible to think that official behavior
12 drastically changed from 1999 to 2001. In other
13 words, in the 1990s, the Department was predominantly
14 showing in its objections that it was concerned about
15 intent. In other words, over half of the letters, it
16 was intent.
17 And then suddenly in the four-year period
18 after Bossier, it can only issue two letters
19 regarding retrogressive intent. It's just impossible
20 to believe that we're talking about a transformation
21 of attitudes or intentions. We're talking simply
22 about an artifact of the requirement imposed by the
23 Court. So I just wanted to stress that what you
24 actually see is more like a peak and then a crash in
25 the data that we sent.
26 MR. ROGERS: That's very helpful.
27 MR. DAVIDSON: I want to ask one more
28 question here to Mr. Willis and it has to do with
29 the -- refresh my memory here. Was it the voter -- a
30 voting official who asked for armed guards in what
31 places in -- what was the town?
32 MR. WILLIS: This was Chesterfield County,
33 Virginia and it was the voter registrar who announced
34 that he was going to hire police officers, that he
35 was going to ask the county to send police officers
36 or he would hire them outside the normal duty hours.
37 MR. DAVIDSON: And what was his purpose in
38 doing that?
39 MR. WILLIS: Ostensibly, his purpose was
40 to fight terrorism and this was to deter a terrorist
41 attack on Chesterfield County, Virginia. And given
42 -- who knows exactly what was motivating him to do
43 this and I guess you get to some of the issues of
44 purpose here but he did announce it.
45 He was roundly criticized for it from the
46 state Board of Elections to -- even all the other
47 registrars in the state of Virginia announced that
48 they would not be doing anything like that. This is
49 an instance of actually isolating someone but he
50 stuck to his guns on it.
51 MR. VALELLY: So to speak.
52 MR. WILLIS: Yes, so to speak. Stuck to
53 his many guns on it.
54 MR. DAVIDSON: So there were armed guards
55 at the election sites?
56 MR. WILLIS: Yes.
57 MR. DAVIDSON: But there were also

1 observers who were there?
2 MR. WILLIS: That's right. There were
3 observers from the Justice Department.
4 MR. DAVIDSON: Was there any suggestion
5 that this was racially motivated or was it against
6 Arab-Americans or anything of that sort?
7 MR. WILLIS: Like many of these issues,
8 there are so many nuances to it and people are
9 careful with their language. He simply announced it
10 as a measure to fight terrorism. It certainly caused
11 the African-American community to respond but also
12 the Arab-American community.
13 And in fact, we worked with the Muslim
14 coalition in the area who decided to send out its own
15 monitors to the polls as well and I talked to some of
16 those people afterwards and there weren't any
17 incidences. This was largely a symbolic act on the
18 part of the registrar.
19 And whether it intentionally targeted race
20 or not, it was at the very at least a grossly
21 insensitive move that indicated no knowledge of the
22 past history of discrimination that had taken place,
23 not just in this country but Chesterfield is a nearly
24 all white, suburban county with a very long history
25 of its own problems of race discrimination.
26 MR. ROGERS: Thank you kindly,
27 Commissioner Davidson. Before we did close, I did
28 have a couple of questions. And I wanted to go back
29 -- Georgia v. Ashcroft I'm fascinated by. And I've
30 read over the opinion and I wanted to get, in
31 particular a sense -- there was testimony earlier
32 from the other panel of what happened in the
33 post-Georgia v. Ashcroft world and I guess I'm trying
34 to understand the facts about this.
35 The whole design of that plan was that it
36 was initiated essentially by African-American
37 legislators in Georgia who essentially devised a plan
38 that would help to assure their own continued success
39 perhaps as well as continued Democratic success in
40 Georgia, that they wanted to essentially begin to
41 unpack overly packed districts there and essentially
42 spread its voters out so that they would increase the
43 odds or the likelihood of long-term Democratic
44 dominance with respect to the state legislature in
45 Georgia. That's my own summary. I know it's not
46 half as good as the one you all might provide.
47 But I understand generally that that may
48 perhaps have been the goal and that it was initiated,
49 at least the plan that was objected to was in fact a
50 plan that was sanctioned by I believe over 90 percent
51 of the African-American legislators in Georgia. I
52 may be incorrect about that. I understand also that
53 John Lewis testified in favor of the plan as
54 articulated by Georgia, which I understand again was
55 opposed by the Department of Justice.
56 In a post-Georgia v. Ashcroft world, you
57 have a circumstance in which there has been a

1 reversal of that to some extent. Democrats have lost
2 both houses of the legislature despite the plan in
3 effect -- the plan being in effect as articulated by
4 the proponents in that case, is that correct? Please
5 forgive me. My recitation of the facts may not be
6 half as good --
7 MR. KENGLE: Clearly in the South there
8 has been a very large partisan realignment and all
9 the social science literature election results
10 indicate that. And so I think a lot of transition
11 has occurred in terms of control of legislatures in
12 most jurisdictions. That is the way that was
13 occurring. And then the impact of voting rights laws
14 interacts with that to some extent and I think it's
15 hard to distinguish those.
16 In terms of what was happening in Georgia,
17 the plan that ultimately was adopted and litigated in
18 the Georgia case actually was drawn in a relatively
19 closed setting among a relatively small handful of
20 individuals, some of whom were African-American.
21 But the plan itself was unveiled on the
22 day of the vote to the remainder of the members,
23 including members of the black caucus, and there was
24 testimony that went into the record from -- I think
25 it was Vincent Fort who made the speech from the well
26 saying that I've only just seen this plan, I don't
27 know -- I don't really know what it is or not. I
28 have concerns about it but I'm going to let the
29 Justice Department make up their minds about what it
30 means and whether it's retrogressive.
31 So in that particular case, I would
32 distinguish that plan from those in which the black
33 caucus or the black community generally had been more
34 broadly involved in the inception of the plan and had
35 full understanding of what was occurring with the
36 district boundary changes. Those particular facts I
37 think were probably not the best ones for the general
38 desire on the part of anyone in the Democratic Party.
39 MR. ROGERS: There was clearly a split in
40 the minority community in a post world after that
41 vote, but I understand the vote as at least recited
42 in the Ashcroft opinion by the Supreme Court
43 indicated that there was only one objector in the
44 legislature who objected -- African-American who
45 objected to that plan.
46 MR. KENGLE: Yes. She was the
47 representative from -- in the Senate, she was the
48 Senator from the Savannah district that was at issue.
49 But to put it bluntly, my belief is there was a fair
50 amount of nose holding in that vote, in other words,
51 that we're going to vote for it. They did in fact
52 vote for it. That is clear. But in terms of making
53 an informed decision, I had serious questions about
54 whether it was an informed decision as it affected
55 their districts and other African-American controlled
56 districts.
57 MR. ROGERS: Absolutely. All right. One

1 other question about language in and of itself.
2 Again, we've heard this term polarized voting
3 throughout the United States in terms of people and
4 commenting about it. It's framed interestingly to
5 me.
6 Essentially, the term racially polarized
7 voting essentially refers to pattern of whites as it
8 relates to voting and not necessarily to minorities
9 as it relates to voting. Is that generally accurate?
10 In other words, the description of the fact that 80
11 percent of African-Americans may be voting for the
12 Democratic candidate, for example, in an election and
13 that 80 percent of whites vote for a Republican
14 candidate in an election, the label of being racially
15 polarized, I guess in its generic sense, applies to
16 both groups. But the thought is that the animus may
17 reflect attitudes or thoughts as it relates to whites
18 in voting for minority candidates as opposed to
19 minorities voting for white candidates. Is that
20 generally true?
21 MS. POSNER: I think racially polarized
22 voting really refers to both sides of the equation
23 but there are several terms used there which I think
24 reflect a lot of dispute about what polarized voting
25 means. I think what Justice Brennan tried to
26 describe in the Gingles case was something that
27 reflects a correlation between votes and race and it
28 doesn't try to get at the reason why, in terms of
29 whether there is animus or whether there is some
30 political party or explanation for it. It is simply
31 a descriptive term of what is occurring.
32 You try to identify who is the
33 minority-preferred candidate, which involves some
34 dispute. But once you do that, you look at, okay --
35 you can do various analyses, you can do statistical
36 analyses which can show you, with a great deal of
37 certainty, that indeed minority voters voted one way,
38 party voters voted another way. Of course you want
39 to look at the extent because that can make a
40 difference. Whites voting 90 percent for the white
41 candidate would be very different than whites voting
42 60 percent for the white candidate. But it's simply
43 a description of votes being divided between the
44 racial groups.
45 Since then, there have been various
46 efforts to try to undermine the ability of minorities
47 to show that kind of polarized voting by trying to
48 look at, well, what is the best explanation, so that
49 if you have a situation where minorities are voting
50 for the Democratic candidate and whites are voting
51 for the Republican candidate, the argument has been
52 made and the Fifth Circuit has so held and it said,
53 well, maybe that's not polarized voting. That's
54 simply partisan voting and that's, quote, unquote,
55 the better explanation. So I'm not sure -- that may
56 go way beyond what you were asking me.
57 MR. ROGERS: No, to some extent that does

1 go to the point because it's an interesting analysis.
2 I mean, if you know that you have demographic
3 patterns that indicate that groups of people vote by
4 and large -- now, this isn't necessarily true among
5 white voters. But among minority voters, there are
6 pretty clear patterns of voting in large numbers
7 exceeding 50 percent for a particular party or
8 orientation.
9 And so the idea of -- this begs questions
10 about what's involved in terms of -- as you point
11 out, that the court may note, issues relating to
12 partisanship, issues related to race and how you draw
13 lines and boundaries and otherwise. But there is no
14 doubt that this is part of this sort of general
15 policy debate about sort of what goes on as it
16 relates to the Voting Rights Act, should there in
17 fact be reauthorization of the provisions of it that
18 we're dealing with and otherwise. Is it race or is
19 it party at the end of the day.
20 MS. POSNER: I guess I would explain to
21 you that that's not an appropriate question, that
22 that's not what's at issue. What's at issue is
23 whether you could simply describe it in terms of
24 polarization. In fact, everybody knows there is a
25 close correlation throughout the country,
26 particularly in the South, between race and party.
27 To try to untangle the two I think is to try to do
28 something that's very difficult to do and is simply
29 not something that leads to any helpful result.
30 MS. NARASAKI: Could I clarify that?
31 MR. ROGERS: Sure.
32 MS. NARASAKI: That's actually -- I don't
33 understand how parties get separated from race if the
34 reason why racial groups are voting among party lines
35 is because they perceive one party to represent their
36 interests more than the other party. To me, that
37 would be in fact evidence that people are voting what
38 their perceived interests are and your the ability to
39 get what you think -- your inability to really elect
40 the candidate of your preference. Am I missing
41 something?
42 MS. POSNER: No. We had a situation of
43 course in the South where, in 1965 and continuing up
44 until the 1990s, certainly at the local level, where
45 the Democratic Party was the party that controlled
46 all elections. If you hypothesize two situations,
47 you have the Democratic Party and you have the white
48 faction and the African-American faction. If
49 African-Americans voted for the African-American
50 faction of the party and the whites voted for the
51 white party, that's polarized voting. That's not a
52 partisan explanation.
53 But if suddenly you take that same
54 situation and you simply rename those into two
55 different parties, suddenly people say, no, that's a
56 partisan issue. I think it's the same wine in a
57 different bottle.

1 MR. VALELLY: Would it be appropriate for
2 me to raise a couple of points?
3 MR. ROGERS: Sure.
4 MR. VALELLY: I think there is a history
5 here which is the 15th Amendment was written
6 initially with an explicit right to office and it was
7 from that right to office was -- this was in response
8 to the expulsion of black legislators from the
9 Georgia legislature. And that right to office was
10 taken out in order to aid the ratification process.
11 And I think that that's cast a shadow over these
12 issues.
13 In other words, I think that racially
14 polarized voting also refers to, and I picked this up
15 in some of the prefatory comments you made, which is
16 that a lot of white voters just really have a hard
17 time voting for an African-American or minority
18 candidate. They just can't do it. And they don't
19 think of themselves as racist. In response to the
20 survey, no, of course, I'm not racist. But they
21 often will say, ahead of election, they don't know
22 who they're going to vote for. And it turns out if
23 you take the -- Thomas Pedigree, who is a
24 sociologist, pointed out that if you take the "don't
25 know" percentage and you add it to the percentage
26 that is going to vote for the white candidate, you
27 get a perfect prediction of who it is that is
28 actually going to win the election when it's a
29 minority candidate running against a white candidate.
30 A colleague of mine at Swarthmore, Keith
31 Reeves, did a terrific simulation for his Ph.D.
32 dissertation which got tendered into a book. It's
33 called Voting Hopes, Voting Fears and what it did was
34 it showed a sample of people -- he created a
35 simulation in which it was revealed to them that
36 after they had expressed a preference for a liberal
37 Democrat, that liberal Democrat they had expressed a
38 preference for before the poll, the person was an
39 African-American.
40 When they were told that the person was an
41 African-American, the significant percentage changed
42 their voting predictions to "don't know." They
43 weren't sure how they were going to vote. And so the
44 clinical simulation -- it's not a real world test but
45 it does get at this issue of taking out policy
46 preferences and party preferences and being able to
47 control for policy preferences and party preferences
48 and see the role of racial effect and switching
49 people's decision to "I know who I'm going to vote
50 for" to "I don't know who I'm going to vote for."
51 MR. ROGERS: Absolutely. I won't belabor
52 the point anymore, but I think it's sort the crux of
53 what this stuff is all about at the end of the day.
54 This provision of the Voting Rights Act is designed
55 to remedy the issues related to problems related to
56 race. We live in a time at which we no longer
57 describe the terms in the same way as they were in

1 the past.
2 The behavior in and of itself may well
3 still be the same, i.e., as you described it, I'm not
4 going to vote for you, period, and it doesn't have
5 anything to do with your qualifications. It's just
6 because of what you look like, period. And yet it's
7 not formally described that way.
8 And so now we live in a world in which we
9 try to call something what it is, what it appears to
10 be or at least is articulated as something else. And
11 from a public policy standpoint, when you get folks
12 who are sitting on the Hill, it's interesting to
13 again hear opponents or proponents for or against
14 this, those who may be against reauthorization
15 basically say, listen, it's been a great Act, it's
16 accomplished its purpose, we're a different society
17 now, the world has changed, people are no longer
18 caught up in emotions of the past and let's start
19 from a level, quote, playing field.
20 Folks on the other end say, wait a minute,
21 it's not right. The world hasn't fully changed.
22 These are circumstances that are different today,
23 that are still evident today, maybe couched
24 differently but are still the same. I won't belabor
25 the point. Thank you kindly. Any other questions
26 from the members of this panel?
27 You all, I wanted to thank you personally.
28 You all bring obviously a level of sophistication and
29 substance that is remarkable. Given the fact that
30 you all are involved in the substance of actually
31 litigating these cases, you've taken the provisions
32 articulated to the Congress and then you are
33 responsible for their implementation and enforcement.
34 And in that sense, it's remarkable getting a chance
35 to talk with you. I just wish we had a few more
36 hours to be with you, frankly.
37 It's very helpful having -- and I don't
38 know that we've had as much because we've had very
39 practical testimony in our fact-finding role which is
40 what we have to do as a Commission. But it's
41 certainly extraordinarily helpful to have the
42 analysis point of view that you all bring as a result
43 of sort of the legal minds that have been involved in
44 challenging or dealing with factual cases involving
45 the substance of what we're asking may be considered.
46 So thank you.
47 (Applause.)
48 MR. ROGERS: We'll now move to the public
49 portion of our testimony today and we have one
50 individual in particular who has been gracious enough
51 to wait and to be present with us here today. We are
52 honored to have Mr. Luther Lowe who has joined us.
53 Luther, you are a student, of all things, at the
54 College of William & Mary. I'm not sure what year
55 you're in. You're a sophomore?
56 MR. LOWE: I'm a senior.
57 MR. ROGERS: You're a senior. You're a

1 senior this year at the College of William & Mary and
2 we are pleased that you've taken some time to come
3 and join us here and we look forward to frankly any
4 statement that you might have to offer.
5 MR. LOWE: Well, thank you. And I'll try
6 to keep my statements brief knowing that we're
7 running into a late part of the day. But good
8 afternoon, Commissioners. Thank you for being here
9 today and the important work that you all are doing.
10 I'm Luther Lowe. I'm a senior at the College of
11 William & Mary.
12 Now, my comments today reflect, I would
13 say, another aspect of disenfranchisement but our
14 efforts are alike and intersect in many ways. And
15 I'll get back to that. My reason for attending is to
16 discuss a serious problem I see in Virginia and
17 around the country, the problem of college student
18 voter disenfranchisement.
19 Nearly two years ago, I attempted to
20 register in the town where I live, Williamsburg,
21 Virginia. As a senior of the College of William &
22 Mary, I believed it was necessary that I register to
23 vote where the local democracy had the greatest
24 impact on me. After submitting my application to
25 register to vote, I was sent a two-page questionnaire
26 that I would later find out was sent to all students
27 who attempted to register. Among the questions
28 included are you a student, do you live on campus,
29 are you active in local civic activities such as
30 church, and many others.
31 I filled out the questionnaire honestly
32 and to the best of my ability. A few days later, I
33 received a letter notifying me that my right to
34 register had been denied. The reason? I lived in a
35 dormitory and the city considered this a temporary
36 address. Though I, like so many other college
37 students, live with my parents for less than six
38 weeks out of the year, I was told I needed to
39 register where my parents lived in Arkansas.
40 With the help of Kent Willis and the ACLU
41 I challenged the decision of the local registrar.
42 Ultimately, I was able to win my individual right
43 solely on the basis that I also happen to be a member
44 of the Virginia National Guard. But it did not set
45 the precedent needed to protect the right of
46 franchise for my peers. For example, students have
47 been denied in the last month in Williamsburg alone
48 attempting to register to participate in a
49 gubernatorial election.
50 My case is not unique. In Virginia and
51 nationally, students are either denied the right to
52 vote because of confusing laws, antistudent
53 administrative practices or statutes or acts of
54 blatant disenfranchisement. And really it shifts the
55 focus to the question of the 26th Amendment and, when
56 it was ratified in 1971, the ratifiers really failed
57 to consider where do 18 to 20 year-olds live in small

1 to mid-size college towns such as Williamsburg and
2 how could this affect the makeup of the world of
3 democracy. As I said before, my comments today
4 reflect another aspect of disenfranchisement but our
5 efforts are like and intersect in many ways.
6 For example, a similar situation to mine
7 occurred less than two years ago at Paraview A&M in
8 Texas, a historically black university. Indeed, the
9 problem of student voter suppression often affects a
10 different kind of minority, young people. As
11 students, we are held to a higher standard as voters.
12 Often those who are against allowing
13 students to register in their college communities say
14 that students are transients and have no vested
15 interest in the long-term outlook of the community.
16 But if you look at the U.S. Census data for 2000,
17 you'll find that 47 percent of the U.S. moves every
18 five years. To penalize some group with a defined
19 transient behavior seems antidemocratic.
20 Some further argue that this is not true
21 disenfranchisement. After all, students mostly
22 retain their right to vote where their parents live.
23 I raise an objection to this as well. It makes no
24 sense for me to be voting in a community where the
25 local democracy affects me three months out of the
26 year or less. Indeed millions of students opt to
27 take on internships or jobs here in the summer months
28 away from where their parents live. It doesn't make
29 sense for me to be voting in a place where I only
30 visit during Christmas vacation.
31 As opening this forum, Commissioner Rogers
32 spoke of two primary objectives of this Commission.
33 First, to conduct regional hearings with regards to
34 voting rights problems and, secondly, to create a
35 comprehensive report. The purpose of the Voting
36 Rights Act is to identify threats to a healthy
37 democracy. I believe it is relevant to this panel to
38 bring this troubling issue to light. Thank you for
39 your consideration and thank you again for the
40 important work that you all do.
41 MR. ROGERS: Mr. Lowe, thank you so much.
42 We appreciate your testimony and sharing your
43 thoughts about your experience. Do any commissioners
44 have any questions at all for Mr. Lowe?
45 MR. OGLETREE: I have a comment. I
46 appreciate what you have to say and your deep
47 interest in voting and in fairness and I think you
48 probably represent a generation of young voters who
49 face the same dilemma.
50 The irony of being disenfranchised for you
51 is that our funny voting process now actually
52 enfranchises political figures through our prison
53 system. What I mean by that, there are thousands of
54 residents of the District of Columbia who are
55 incarcerated. There is no prison at all here in the
56 District of Columbia where they can be housed. So
57 when they're sent to Oklahoma or Colorado or

1 California, those local members of Congress get
2 credit for voters. They're considered voters where
3 they live, where they're imprisoned, and not at their
4 home, which is an irony the other way, because it
5 helps people to have a captive audience in some sense
6 where people don't have any rights.
7 But I think your testimony raises
8 important issues. Both of my children went through
9 the same thing. One was in New York and one was in
10 Florida and they're voting. They kept coming to
11 Massachusetts and they always had to be absentee
12 voters, which made no sense to them. They would have
13 to go through a whole lot of rigamarole but they
14 really lived 90 percent of the time outside the place
15 of their birth and their permanent residence. And I
16 think what you have raised gives us much room to
17 think about that, how to make that part of the
18 broader agenda. I appreciate your comments.
19 MS. NARASAKI: I have a short question.
20 My organization helped participate in the 1-800-VOTE
21 hotline in the last election and a lot of the calls
22 we got over the enforcement or the compliance with
23 the Help America Vote Act identification
24 requirements, a lot of calls we were getting were
25 complaints from students who felt like they were
26 being asked to give not just one but two or sometimes
27 three forms of identification.
28 And Georgia just passed a law trying to
29 implement how they're going to accept identifications
30 from the state schools but not from the historically
31 black colleges. I'm wondering if, as a student, do
32 you experience or do your friends experience any
33 issues around identification requirements?
34 MR. LOWE: I don't know specific examples
35 but I do know of anecdotal reports in the City of
36 Williamsburg where students were turned away from the
37 polls. I'm not sure if those were as a result of ID
38 now today. I had a conversation with our registrar
39 who -- it's funny, we do actually get along even
40 though we were on opposite sides in a lawsuit.
41 He instructed me that if students were to
42 be registered at -- now he's allowing off-campus
43 students to register and on-campus students to not
44 register. But if on-campus students register, that
45 they need -- or if off-campus students register, they
46 need to change their driver's license if they're an
47 out of state and they need to change their driver's
48 license to Williamsburg and it was a warning because
49 I guess in January, he said that in Virginia, they're
50 going to cross-reference it with DMV records so that
51 essentially if you're a student from Michigan, an out
52 of state student from Michigan who is on the voter
53 rolls and you present a Michigan driver's license,
54 then that wouldn't be valid ID, was essentially his
55 point.
56 So I think that there have been problems
57 with that and there will probably continue to be

1 problems with that. And I also heard reports around
2 the country of students facing similar issues.
3 MS. NARASAKI: Thank you.
4 MR. ROGERS: Do we have a copy of your
5 written testimony or can we receive a copy?
6 MR. LOWE: I'll submit that. And also
7 there is a study by Michael Laughlin from Salisbury
8 University on this and if there is no objection, I'll
9 submit those for the record as well.
10 MR. ROGERS: We would be delighted to
11 receive that. Thank you very much, Mr. Lowe. We've
12 reached our closing portion in terms of our ninth
13 commission hearing. Are there any closing remarks by
14 any of the commissioners that you would like to
15 share? Well, then, we are so delighted to close this
16 ninth hearing of the National Commission on Voting
17 Rights Act and I thank you kindly for attending. We
18 are now closed.
19 (Whereupon, at 5:30 p.m., the hearing was
20 concluded.)
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1 LAWYERS' COMMITTEE FOR CIVIL RIGHTS
2 ON THE VOTING RIGHTS
3
4 NATIONAL COMMISSION ON THE VOTING RIGHTS ACT
5
6 EXAMINING THE DEGREE OF RACIAL DISCRIMINATION
7 IN VOTING AND THE IMPACT OF THE
8 VOTING RIGHTS ACT SINCE 1982
9
10 MISSISSIPPI HEARING
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12 TRANSCRIPT OF PROCEEDINGS
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14
15 Taken at the Marriott in Jackson, Mississippi, on
16 Saturday, October 29, 2005, beginning at
17 approximately 9:30 a.m.
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27 PRESENT:
28 Chandler Davidson, Chairman
29 Marjorie Lindblom, Co-Chair
30 Barbara Arnwine, Executive Director
31 John Buchanan, Commissioner
32 Joe Rogers, Commissioner
33 Fred Banks, MS Supreme Court Justice
34 Armand Derfner, Commissioner
35 PANELISTS:
36 Robert B. McDuff
37 Carroll Rhodes
38 Brenda Wright
39 Deborah McDonald
40 Ellis Turnage
41 Lawrence Gill
42 John Walker
43 Carlton Reeves
44
45 REPORTED BY: ROBIN G. BURWELL, CSR
46

1 MS. LINDBLOM: Good morning. My name is Marjorie Lindblom. I'm one of the
2 co-chairs for the Lawyer's Committee for Civil Rights Under Law. I'd like to welcome you this
3 morning to this the 10th hearing of the National Commission on the Voting Rights Act. These
4 hearings have been held all around the country, and this is the final public session of this group.
5 We appreciate your coming, and I'd like to introduce the first speaker of the day, our executive
6 director, Barbara Arnwine.
7 MS. ARNWINE: Good morning, everyone.
8 ALL: Good morning.
9 MS. ARNWINE: Good morning. Welcome, welcome, welcome. I am Barbara
10 Arnwine, Executive Director of the Lawyers' Committee For Civil Rights Under Law. Welcome
11 to the final hearing of the National Commission on the Voting Rights Act. For the staff, please
12 clap, because that's a great accomplishment.
13 (APPLAUSE.)
14 MS. ARNWINE: We have had ten of these hearings all over the country. We've been
15 in Montgomery, Alabama. We've been Rapid City, South Dakota, New York City, Minneapolis,
16 Washington, D.C., Los Angeles, California, Phoenix, Arizona. We have been all over the
17 country. We had many hearings in Georgia, in America's Georgia, and we had a hearing in
18 Orlando, Florida. So we have literally traveled the country. And the people who have done that
19 work, who have brought us here this day, not only has been our talented staff who worked on this
20 program, and may I see -- I don't even think she's in the room. She's probably running around,
21 Marcia Johnson-Blanco, who has done so much work. But, also, I really want to thank the
22 Commission, the National Commission on the Voting Rights Act who has just been outstanding
23 in doing all of this incredible hearing work.
24 It is fitting that we should have this final commission hearing in the place where it all
25 began for the Lawyers' Committee. We begin the final hearing of the National Commission at
26 the House of Representatives, is in the middle of oversight hearings on the impact of the Voting
27 Rights Act. We have been assured by the members of the House Judiciary Committee that the
28 National Commission's report will be entered into the congressional record. In fact,
29 Comissioner Joe Rogers testified at the first hearings about the Commission's activities and the
30 trends that we have absorbed over the course of the hearing.
31 Indeed, Jon Greenbaum will tell you that Congressman Mel Watts, who is also the chair
32 of the Congressional Black Caucus, always says, well, we're going to do nine hearings, and the
33 Lawyers' Committee has already done their ten, so if you add it together we've got 19. So in --
34 also, I would like to tell you that when Joe Rogers testified and electrified the congressional
35 hearing room that both Republicans and Democrats talked about how important these
36 commission hearings were.
37 So I just want to again to salute the Commission for its great work. The National
38 Commission's report will assess the impact that the Voting Rights Act has had on discrimination
39 in voting and allowing minority voters to vote for their candidate of choice. It will offer a
40 complimentary picture of the state of discrimination in voting today by reviewing the employee
41 records of the Department of Justice, cases litigated by voting rights attorneys, and, of course,
42 the testimony from our regional hearings.
43 Together this data will paint a complete picture of the role that the Voting Rights Act
44 has placed in combatting discrimination in voting for the past four years and how minority voters
45 still depend on its protection to ensure that everyone has equal assess to the political process.
46 The Commission report will be released in January 2006. The evidence so far has been both

1 hopeful and disheartening from these hearings. During each hearing, we hear from voting rights
2 litigators who have been instrumental in the development of the Voting Rights Act ensuring that
3 its protections reach those at risk of discrimination.
4 We have heard from experts who have studied the impact of the Act on effected
5 communities, and we have heard from community activists and citizens who have given
6 powerful antidotal evidence that proved that the National Voting Rights Act, particularly Section
7 5 under the Central Provisions in the Voting Rights Act, must be reauthorized has been
8 responsible for providing a voice to formally voice the community.
9 Unfortunately, though, we have also heard from advocates and citizens chronicling
10 continuing disparity in the voting experience between minority voters and other voters. Clearly
11 the work of the Voting Rights Act, while having a powerful effect on minority voters, is not
12 done.
13 We have heard from African-American and Latino voters who still struggle with
14 discrimination. From American-Indians who tell of lack of language assistance, discrimination in
15 culturally insensitive poll workers. And we have heard about the impact in the Department of
16 Justice observers that have made our democracy accessible to Asian Americans and Latinos. We
17 have heard from elective officials grateful for the mandate of the language of citizens provision.
18 We have heard from former Department of Justice attorneys who testified about the
19 impact the preclearance provision have had on jurisdictions. I am grateful for the assistance that
20 the National Commission has received from the Commission's many cosponsors. It is through
21 the coordinated effort by the members of civil rights communities that have helped the national
22 commission to accomplish this audacious task.
23 I look forward to hearing today's testimony and adding it to the already impressive record
24 of this august body. When we put together this impressive group of commissioners, we did so
25 knowing that theirs was not an easy task. What we were asking of them for was nothing short of
26 assessing the continuing importance of arguably the most important piece of civil rights
27 legislation that ever passed Congress. They have responded with distinction.
28 I am proud to see this process unfolding and to have the opportunity to work with such a
29 distinguished group. It is my pleasure before I introduce the Commissioner, I just wanted to
30 recognize in the room our other co-chair, Robert Herrington, who is with Robinson, Bradshaw in
31 Charlotte, North Carolina.
32 I'm also happy to see in the audience and who will be testifying today our board member
33 and distinguished civil rights attorney in Mississippi, Carroll Rhodes, and it's just great to see
34 you, Carroll, and to have you with us here today.
35 So now I want to introduce to you to our presiding Commissioner, Chandler Davidson.
36 Professor Davidson is the Radoslav Tsanoff Professor of Public Policy Emeritus and served as
37 chair in the Department of Sociology at Rice University. Dr. Davidson was the coeditor of the
38 "Quiet Revolution in the South," a definitive work on the impact of the Voting Rights Act in the
39 South. Professor Davidson.
40 CHAIRMAN DAVIDSON: Thank you. Good morning. On behalf of the National
41 Commission on the Voting Rights Act, I welcome you today to the last of the ten public hearings
42 that the Commission will be conducting. The Voting Rights Act was signed into law in 1965 by
43 President Lyndon Johnson in response to voting discrimination encountered by African-
44 Americans in the South.
45 When Congress reauthorized the Voting Rights Act of 1975, it made specific findings
46 that the use of English only elections and other devices effectively barred minority language

1 citizens from participating effectively in the electoral process. In response, Congress expanded
2 the Act to account for discrimination against language minority citizens by enacting the minority
3 language assistance provisions found in Section 203.
4 Before discussing Section 5 and Section 203 in greater detail, I want to explain which
5 protection are scheduled to expire in 2007 and which are not. The right of African-Americans
6 and other minorities is guaranteed by the Fifteenth Amendment, and this right is permanent.
7 Permanent provisions of the Voting Rights Act ban literary tests and poll taxes, intimidation,
8 authorized federal monitors and observers, creates various mechanisms to protect the voting
9 rights of racial and language minorities.
10 However, several temporary provisions of the Voting Rights Act will sunset or expire in
11 2007 unless they are reauthorized by Congress. Three major protections of the Voting Rights Act
12 will expire. First, Section 5 which requires certain states, counties, and townships with a history
13 of discrimination against minority voters to obtain approval or preclearance from the United
14 States Department of Justice or the United States District Court in Washington, D.C. before
15 making any voting changes.
16 These changes include redistricting, changes to methods of election, and polling place
17 changes. Jurisdictions covered by Section 5 must prove that the changes do not have the purpose
18 or effect of denying or abridging the right to vote on account of race, color, and membership in a
19 language minority. The entire State of Mississippi, of course, is covered by Section 5.
20 Second, Section 203 of the Act requires that language assistance be provided in
21 communities with a significant number of voting age citizens who have limited English
22 proficiency. Four language groups that are covered by Section 203, American Indians, Asian
23 Americans, Alaskan natives, and Latinos. Covered jurisdictions must provide language
24 assistance at all stages of the electoral process. As of 2004, a total of 466 local jurisdictions
25 across 3states were covered by these provisions. Two Mississippi counties are covered by
26 Section 203 for Choctaw Indians.
27 Third, section 6(b), 7, 8, 9, and 13(a) of the Act authorize the Attorney General to appoint
28 a federal examiner to jurisdictions covered by Section 5's preclearance provisions on good cause
29 or to send a federal observer to any jurisdiction where a federal examiner has been assigned.
30 Since 1966, 25,000 federal observers have been deployed in approximately a thousand elections.
31 The Lawyers' Committee For Civil Rights Under Law acting on behalf of the civil rights
32 community created the nonpartisan National Commission on the Voting Rights Act to examine
33 discrimination in voting since 1982, the last time Section 5 was reauthorized. The National
34 Commission is comprised of eight advocates, academics, legislators, civil rights leaders who
35 represent the diversity that is such an important part of our nation.
36 The honorary of the Commission is the Honorable Charles Mathias, former
37 Representative and Senator from Maryland. The chair is Bill Land Lee, former Assistant
38 Attorney General for Civil Rights, who unfortunately cannot be here today.
39 The other national Commissioner is the Honorable John Buchanan, former Congressman
40 from Alabama. On my far right, Dolores Huerta, co-founder of the United Farm Workers of
41 America. Elsie Meeks, first Native American member of the US Commission on Civil Rights.
42 Charles Ogletree, Harvard law professor and civil rights advocate. And the Honorable Joe
43 Rogers, to my immediate right, former Republican Lieutenant Governor of Colorado.
44 In addition to myself, Commissioners Buchanan and Rogers are present here today. We
45 are also fortunate to have Mississippi Supreme Court Justice Fred Banks, and leading voting

rights attorney, Armand Derfner as Guest Commissioner here today. A hearty welcome to both of the gentlemen on my left.

The Commission has two primary tasks: First, to conduct regional hearings, such as this one, across the country to gather testimony relating to voting rights; and, second, to write a comprehensive report detailing the existence of discrimination in voting since 1982. The report, which will be released in January of 2006, will be used to educate the public, advocates, and policymakers about the record of racial discrimination in voting.

I would now like to ask the members of the first panel if they would come up and be seated, please, and I'll give a brief description of how we will work this. There will be only two panels today, and the panelists of the first panel, who are now being seated, will be described in a minute. And we will then have a second panel in which we encourage members of the public who are here today to share their voting rights experiences.

If you like to participate in the second panel, please speak with a staff member in the back. This is our primary staff member that you would speak to. If you would like to share your testimony but cannot stay, please see a staff member who will take your statement so that it can be included in the record.

I would now like to introduce the commissioners who are present here today. Commissioner, John Buchanan, who is a Baptist minister who has served churches in Alabama, Tennessee, Virginia, and Washington, D.C. Commissioner Buchanan also represented Birmingham, Alabama in Congress for 16 years.

While in Congress, he was instrumental in the passage of Title 9, and also was a strong component of the full voting representation in Congress for the District of Columbia. After leaving Congress, he chaired the civil liberties organization, People for the American Way. John, would you like to make a statement at this time?

MR. BUCHANAN: Thank you, Mr. Chandler. It's a pleasure to be here in Jackson, Mississippi and to be a part of this celebration this weekend, this week of those who made the effort and made the sacrifices so that the promises on paper of the Bill of Rights, the Constitution, and the Declaration of Independence might become realties of the world for black Americans and all Americans.

I salute those who are here from all over the country. We have continued in that similarly important task and those who came before. It's also a pleasure to be in Jackson. Both my parents were born in Mississippi, in Blue Mountain, Mississippi, and if you folks in Jackson have never heard of Blue Mountain, you're culturally deprived. But it's a suburb of Cotton Plant in northeast Mississippi.

It was there I held my first job, and I earned $2.50 a week as a boy in Uncle Sam's General Store, and I got $2.50 plus room and board at Aunt Nattie's house. So that explains my credentials for being here. It was here in Mississippi that I had my first encounter with the South as it was in attending a trial for a young man on trial for his life for the death of another young man. And the whole thing was treated as a great joke by the prosecutor and the court appointed defense attorney.

It was a great amusement to the judge and the jury that the man was on trial for his life. I was stunned as a teenager at that performance. I do not celebrate the Mississippi or the Alabama that it was. We have reason to celebrate the Mississippithat has it become because of efforts of people like you, the Mississippi that's trying to make itself a place of hope and opportunity for all of its people.

1 And I share with you the dream of the Mississippi that yet can be. It is a pleasure to be
2 with you this morning and to listen with interest and attention to your testimony, because you're
3 helping make a record that needs to be made so the law can be as it ought to be in the 21st
4 century as it's trying to become in the 20th. Thank you, Mr. Chairman.
5 CHAIRMAN DAVIDSON: I've enjoyed being a member of this Commission for several
6 reasons, but I think after hearing Commissioner Buchanan's testimony, you can infer one of the
7 reasons for my enjoying being on this Commission so much.
8 Commissioner Joe Rogers completed his term as Lieutenant Governor of Colorado in
9 2003 where he held the distinction of serving as America's youngest Lieutenant Governor, and
10 only the fourth African-American in US history ever to hold the position. He served as founding
11 chairman of the Republican Lieutenant Governors' Association and served on the executive
12 committee of the National Conference of Lieutenant Governors.
13 Mr. Rogers created the acclaimed Dream a Life program, dedicated to the memory and
14 legacy of Martin Luther King, Jr. and the leaders of the civil rights movement. I must say I have
15 really enjoyed getting to know Mr. Rogers over the course of the last several months as well. Mr.
16 Rogers, would you like to make a statement?
17 MR. ROGERS: Thank you. Mr. Chairman, thank you kindly. First of all, it's just good to
18 be with you all here in Mississippi, and I hope I said that as well coming from Colorado. How
19 many of you all are here from Mississippi, by the way? I know there are people who were not --
20 most people are. I know we went to dinner last night there were a number of folks who had come
21 from various parts of the country that have obviously been committed to the issues of Justice and
22 hope for people all around this State for a number of years.
23 It was a pleasure to be with you all last night and to hear, Barbara, the number of
24 accomplishments, and, frankly, the sense of family that seems to exist among many of you all
25 that you all have together in terms of this meeting this weekend that you call Justice weekend. So
26 I'm delighted to be with you all here today. The substance and obviously our purpose in terms of
27 being here is credible.
28 And I wanted to explain in particular to the members of the panel that are here, your
29 testimony is really incredible, and I know that you all have been (inaudible) here today. All of
30 what you're saying on the panel will all be recorded. Everything will be recorded, all that
31 information will be provided to the members of the United States Congress who are considering
32 the issue of reauthorization, and reauthorization is something that we don't necessarily at all take
33 lightly.
34 The Supreme Court has set a standard. Basically what they've said is if you can't find a
35 factual basis for the continuing existence of provisions like the Voting Rights Act, if you don't
36 have a tactual basis for its continual existence, then there may not be a constitutional basis and
37 need for going forward with reauthorization of the key provisions. The bottom line is that the
38 facts are what are critical in terms of our whole analysis taking place.
39 And so, in that sense, we're delighted to be here today. We're pleased to have the
40 opportunity to hear from you all as individual panelists, and our hope is that we will also hear
41 from members of the public more generally in our open session. So it's just good to be here from
42 the mile high city of Denver, so to speak, the highest elevation peak in America. So good to be
43 here. Thank you.
44 CHAIRMAN DAVIDSON: Now let me introduce our guest commissioner Fred Banks, a
45 partner in the general litigation group in the Jackson office of Phelps Dunbar. Commissioner
46 Banks is a former presiding Justice of the Mississippi Supreme Court, and before his service on

1 the Mississippi Supreme Court, Commissioner Banks served as a circuit judge in Hinds and
2 Yazoo Counties for six years. From 1976 to 1985, he served in the Mississippi House of
3 Representatives. Judge Banks.
4 HONORABLE BANKS: Thank you, Mr. Chairman. I'm honored to be invited to be a
5 guest Commissioner here with these distinguished Commissioners, and I welcome them to the
6 State of Mississippi and thank them for their service in this important work. As you can tell from
7 what the Chairman just said, I was a beneficiary.
8 I was elected a total of eight times during 1975 and 1976, and I'd like to think that my
9 service was beneficial. Minority voters were given a chance to select persons of their choice
10 through the operations of the Voting Rights Act. I testified in the last reauthorization process
11 before Congress and (inaudible) my role in this authorization process.
12 I also served as chair of the relief (sic) committee of the national NAACP, and as you all
13 know, the Washington Bureau of the NAACP will be (inaudible) securing reauthorization by this
14 Commission (inaudible). I thank the panelists for coming to give us those facts to get the job
15 done. Thank you.
16 CHAIRMAN DAVIDSON: Commissioner Armand Derfner is preeminent voting rights
17 attorney. He's worked to ensure the promise of the Voting Rights Act from its exception to
18 working as a federal examiner to working as an attorney on voting rights cases and testifying
19 before Congress to ensure its reauthorization. Commissioner Derfner.
20 MR. DERFNER: Thank you all. It's good to be home. The time that I spent here, like
21 many of you, both homegrown and from far away, changed my life. And I was privileged to
22 begin then some opportunities to participate in dealing with the right to vote and helping, I think,
23 to expand the right to vote.
24 These hearings involving the reauthorization of the Act which have taken place several
25 times, you know, the temporary provision keeps expiring and keeps getting renewed, because it
26 becomes clear each time that we still need them. And so, events like this hearing and the series of
27 hearings that the Commission has conducted are vital in carrying out a national dialog that tells
28 us exactly where we are and exactly how far we need to go.
29 So we hope to hear today from distinguished panelists who are both lawyers and lay
30 people and those involved in the struggle who will tell you exactly where we are and where we
31 have to go. Thank you.
32 CHAIRMAN DAVIDSON: Thank you. I'm going to introduce our panelists now. I've
33 been told that Representative Chuck Espy is here, and if he is, we'd certainly like to recognize
34 him. He's in the back. We're really privileged to have you here.
35 Robert B. McDuff is a civil rights and criminal defense attorney practicing in Jackson,
36 Mississippi. He has represented black voters in several cases in the South, seeking to increase the
37 number of black majority election districts through public officials, including members of
38 Congress, state legislators, and state court judges.
39 Prior to opening his practice in Jackson in 1992, Mr. McDuff was an attorney with the
40 Lawyers Committee For Civil Rights Under Law in Washington, D.C., a member of the faculty
41 at the University of Mississippi Law School where he directed a federal court public defender
42 program, an attorney with the civil rights law firm of Bradford and Sugarman in Memphis,
43 Tennessee, and a law clerk to the Honorable William Wayne Justice, a United States district
44 judge in the eastern district of Texas and something of a legend in my home state of Texas.
45 Mr. McDuff is a recipient of the pro bono service award with the National Human Rights
46 Law Group. He currently serves as advice chair of the board of directors of the Mississippi

Center For Justice and is a member of the board of directors of the Lawyers' Committee for Civil Rights Under Law.

Carroll Rhodes, solo practitioner in Hazlehurst, Mississippi, has been instrumental in the effort to enforce the Voting Rights Act in Mississippi and in establishing black majority judicial districts. He has served as lead counsel in numerous precedents setting voting rights cases, including the Magnolia Bar Association, Incorporated versus Lee case, and first of its kind in which Section of the Voting Rights Act was used, challenging the method of election for state Supreme Courts Judges.

Before establishing his own practice, Mr. Rhodes served as a judge in the municipal court in Hazlehurst and also worked as a staff attorney for the Central Mississippi Legal Services.

Brenda Wright is the managing attorney for the National Voting Rights Institute in Boston, Massachusetts, where she directs the nationwide litigation program. She served as the lead counsel for NVRI in its landmark cases in Vermont and New Mexico defending the constitutionality of campaign spending limits.

Before joining the Institute in 1997, Ms. Wright served as director of the voting rights project at the Lawyers Committee For Civil Rights where she successfully argued her Supreme Court case involving in the 1993 motor voter law Young versus Fordice, which challenged Mississippi's efforts to establish a racially discriminatory view on registration requirement for voting in federal and state elections.

Ms. Wright has testified before Congress and the state legislatures and authored numerous publications on voting rights and campaign finance reform issues.

Deborah McDonald is a municipal court judge in Fayette, Mississippi and has a law practice in Natchez. She has served as the executive director, managing attorney and staff attorney of Southwest Mississippi Legal Services. She has been involved in several redistricting cases, including Watkins versus Fordice and Smith versus Arnold. She is also an active member of the Magnolia Bar Association.

Ellis Turnage is a voting rights attorney. I have his curriculum vitae before me, and I'll just try to wing it a little bit. Mr. Turnage here has been legal counsel of Bolivar County, Mississippi Board of Election Commission since 1989. Duties include in court legal representation, training election officials and workshops, administrative supervision of elections and resolution of election contests and challenges.

Private consultant in election contests, racial black voting demographics and reapportionment cases and issues under the United States Constitution and Voting Rights Act of 1965. He also was a Cleveland, Mississippi Board of Aldermen elected in 1988 and served through 1993. He was not here last night, I understand, at the celebration, because he was involved in a law case.

So he's a working attorney, and we're pleased to have him here. We're pleased to have all of you here. And let me simply spell out to you our procedure, which I've found in the past hearings sometimes changes from moment to moment, but at least at the beginning it will be the following.

I will ask each of the panelists to give their testimony, and after all of the panelists have completed giving their testimony, the Commissioners will then ask them questions individually. So we're honored at this point to begin with Mr. Rob McDuff.

MR. MCDUFF: Thank you, Commissioner Davidson. Thank you all that are from out state for coming to Mississippi for holding these important hearings. I am a native of Mississippi. I was raised in Hattiesburg. I've been back and been living in Jackson the last 15 years.

1 So as so many people in this room know, it's a remarkable struggle in the 1950s and
2 1960s by black citizens throughout the State to obtain the right to vote, to break down the
3 manifestation of segregation and white supremacy. But even with the right to cast a ballet, very
4 few black citizens were elected to public office in Mississippi in the 1960s.
5 The first member of the Mississippi Legislature who was black was elected in 1967, and
6 no additional black members of the Legislature were elected until eight years later in 1975, and
7 as a result of enforcement of Section 5 by the Justice Department and litigation in the federal
8 courts subject to the 14th Amendment.
9 There was no black member of Congress in Mississippi for the first 85 years of the 20th
10 century. The only reason that change was because of the enforcement of Section 5 of the Voting
11 Rights Act by the Justice Department and litigation under the amended Section 2, as it was
12 amended in 1982, of the Voting Rights Act, leading finally to the creation of the majority black
13 congressional district and the election of the first black Congressman from Mississippi in 1986.
14 That same year, 1986, of the 100 Chancery, Circuit, and County Court judges in Mississippi,
15 those are the trial courts of record in Mississippi, out of a hundred only one, Fred Banks, was
16 African-American. As a result of the litigation filed under Section and Section 5 and
17 enforcement of Section 5 by the Justice Department, that was changed. Judicial districts were
18 redrawn, and a significant number of African-American judges were resulted.
19 So that -- the same story is true for city councils, county supervisors, county election
20 commission. The integration of those bodies in any significant numbers resulted only after
21 enforcement of Section 5 and litigation under Section in the 14th Amendment.
22 There has been a lot to change in Mississippi, but without Section 5 of the Voting Rights
23 Act, much of that change would not have come about. Much of it would not have occurred, and
24 we would still be living -- most of the citizens of this State would still be living under
25 governmental bodies that are all white.
26 People often talk about the fact that Mississippi has the highest number of black elected
27 officials of any state in the country. The last time the Joint Center for Political Studies did report
28 the number of 892. And, now, see, it's a remarkable change from 1965 when the Voting Rights
29 Act was passed.
30 But two things need to be kept in mind. Number one, Mississippi does have the highest
31 African-American population percentage of any of the 50 states. So it should have the highest
32 number of black elected officials. But even that number was only 18.7 percent of the total
33 number of elected officials in Mississippi in a state where over 33 percent of the voting age
34 population is black.
35 So 33 percent of the voting age population is black, but less than 19 percent of the elected
36 officials are black here in the beginning of the 21st century. We do -- one other thing I want to
37 add. Nearly all of those officials were elected. Nearly all of those black officials were elected
38 from majority black jurisdictions. Only a handful have been elected from a majority white voting
39 district.
40 I think when we start talking about the need for renewal of Section 5, some people are
41 going to say, well, we don't need it anymore. Discrimination is behind us. That's all ancient
42 history.
43 I remember once when I was -- prior to the time I attended law school, I was in
44 Washington, D.C. and went to the United States Supreme Court to hear the argument in a case
45 called Conner versus Finch, which was one of the manifestations of the law running Mississippi
46 legislative redistricting litigation, which so many of you were a part of.

1 And Frank Parker was arguing the case on behalf of black voters in Mississippi, and the
2 attorney for the State of Mississippi kept saying, you know, that's all ancient history. That's all
3 ancient history. And that was before we had an African-American member of Congress. That
4 was before we had any black judges in the State of Mississippi. That was before there was
5 integration of the law of a number of accounting boards of supervisors and city councils. And
6 so, it wasn't all history in 1977, and it's not all history now. There are no statewide black elected
7 officials in Mississippi. In 2003, there was an election for state treasurer. One of the candidates,
8 African-American, had been the director of the State Department of Economic Development. He
9 had a number of qualifications for the job that made him clearly the best choice, and he was
10 defeated by a 29-year-old white man who had no relevant experience in the area in an election
11 that was characterized by severe racially polarized voting.
12 Until elections in Mississippi are not characterized by extreme levels of polarization that
13 exist here, Section 5 must remain in place. They say that those who fail to understand history are
14 doomed to repeat it, and I do fear that if Section 5 is not renewed, we are going to see a repeat of
15 a lot of bad history in Mississippi, as well as in other states throughout the country. So I urge
16 you to recommend to the Congress that for the sake of people in Mississippi and throughout the
17 country, that Section 5 of the Voting Right Acts be renewed. Thank you.
18 CHAIRMAN DAVIDSON: Thank you, Mr. McDuff. Mr. McDuff has set a good
19 example of staying within the allotted time limit. We can applaud him for that, and we now
20 move forward to Mr. Rhodes.
21 MR. RHODES: Thank you, Chairman Davidson and the Commissioner. I, too, welcome
22 you to Mississippi, and thank you for taking the opportunity and the time to vote through this
23 important subject. I, myself, like Rob McDuff, Deborah, McDonald, Ellis Turnage --
24 CHAIRMAN DAVIDSON: Mr. Rhodes, can I ask you please to bring your mic just a
25 little bit closer? Thank you.
26 MR. RHODES: I, myself, like Rob McDuff, Deborah, McDonald, Ellis Turnage, am a
27 native Mississippian, and I have been involved in voting rights litigation ever since I have been a
28 lawyer. I want to talk about the Voting Rights Act, though, in a little bit different context than
29 what Rob did. When the Voting Rights Act was initially enacted, the Section 5 provision was
30 initially enacted in 1965, the thought was that if black people were given the right to vote in
31 Mississippi, that all would be well.
32 And so, from 1965 until 1975, the emphasis of civil rights people in this State and the
33 Justice Department was on gaining access to the battle, making sure that black people could
34 register and vote. Before the Voting Rights Act was enacted, there were only like 6.7 percent of
35 African-Americans registered to vote. After Section 5 was enacted, that number went up
36 dramatically to over 58 percent, and by 1975, had increased to over 75 percent.
37 And when the first sunset of Section 5 came up in 1975, we knew that there was more to
38 be done because just gaining the access of the ballet was not enough, because black voters went
39 to the polls between 1967 into 1970 and voting but they could not elect candidates of their
40 choice.
41 And the reason they could not was because white elected officials in Mississippi who
42 controlled all branches of the government from the state level down to the counties and the
43 municipal level came up with new and ingenuous methods to keep blacks from being elected to
44 office.
45 So the emphasis for Section 5 enforcement from 1975 to 198sort of changed a little bit
46 from just getting blacks elected to -- from just giving blacks the ballet to making sure that they

could be elected to office, striking down a lot of those new barriers that came up. And one of the things that elected officials did, they changed from district elections to at large. They did -- they changed some positions from elected positions to appointed positions.

And because Section 5 was there, it required these officials to seek free clearance and prevent occasional Justice Department objections. And in 1982, everybody thought that all was well. We were getting blacks elected to office. We had blacks be elected to every position except for Congress and statewide positions in the State. And people thought that the Voting Rights Act was affective, and Section 5 was no longer needed.

But then, the reauthorization came in 1982. And after the reauthorization in 1982, there was a vigorous effort of enforcement by civil rights groups in the State and by the Justice Department to make sure that all of these voting changes that Mississippi was enacting was pretty clear. And that's when we had a dramatic increase in the number of black elected officials. As Rob said, the Joint Center for Political Studies most recent report states that there are 89black elected officials in Mississippi. The total number of elected positions in Mississippi is 4,761. Of that 892, most of them, as Rob said, are from majority African-American areas, but they also are from areas where there's less population.

The larger areas where they are greater population, the more difficult it has been to elect black officials. After the 198reauthorization of Section 5, there was a dramatic increase in the number of black elected officials, due primarily to litigation. And some of that litigation was geared just at Section 5.

There had been more than 300 acts of the Mississippi Legislature that had been enacted before 198that had never been submitted for preclearance. Those were acts that dealt with changes in voting, but had never been submitted for appropriate clearance. And there was a case that was brought, Murphy versus Pitman, that required Mississippi to submit all of these different laws to the Justice Department.

And some of those laws that were submitted dealt with the election of judges. And the Justice Department objected to many of those laws, because what Mississippi had done had been to change from single member election districts with chancery and circuit court judges who are judges at the trial level in Mississippi to multi-member districts. And by changing to multi-member districts with at large method of elections, it made it more difficult for blacks to be elected.

Because the Justice Department objected to those voting changes, we were able to have litigation under Section of the Act that resulted in, as Rob said, an increased number of blacks being elected to trial judgeship. The same thing is true for the state legislature. Litigation as a result of being -- more blacks being elected to the Mississippi Legislature because of Section 5 provisions requiring preclearance.

There are 12House members. In 1982, there were 20 blacks. Because of litigation and efforts of preclearance, today there are 35 black members of the House. In the Senate, there are 52 members in the Senate, and in 1982, there were only two African-Americans Senators. Today, there are ten, and that's a result of litigation and Section 5 emphasis.

Out of a total of 174 state legislatures, the number went up from 2in 198to 45 today. On the Supreme Court in 1982, there weren't any African-Americans, and today's there's one. At the Court of Appeals level -- there wasn't a Court of Appeals in Mississippi in 1928, but it was created in the 1980s, and there are two African-Americans there.

The Circuit Court judges, there are 49. Out of that 49, in 1982, one was African-American, and that was Reuben Anderson. He was the first African-American appointed as a

1 Circuit Court judge. Today there are eight. That's an increase of seven. Chancery Court judges,
2 there were 45. In 1982, zero. Today, there are seven.
3 And there are 26 County Court judges. In 1982, one was African-American, and that was
4 Reuben Anderson. He was appointed to the Hinds County court first in 198-- '77, excuse me,
5 1977. And he served from '77 until '8on the Hinds County Court, and in '82, he was appointed as
6 a Circuit Court judge. So he was that one person to serve in both positions --
7 CHAIRMAN DAVIDSON: Then he was elected after he had been appointed?
8 MR. RHODES: He was elected after he was appointed. And, today, there are four
9 African-American County Court judges. And I say that because these efforts of preclearance and
10 litigation have lead to the increase in people holding office, and people might think that, okay,
11 now, things are all well. But they're not.
12 This past year, the Mississippi Legislature enacted judicial redistricting for circuit,
13 chancery court justices. Litigation that Rob and Ellis and I were involved with, Martin versus
14 Allain and Martin versus Mabus litigation, led to the election of African-American trial judges,
15 and it struck down, the litigation struck down the multi-member numbered post election feature.
16 The litigation was brought between 1985 and 1989.
17 In 1994, there was a threat of bringing more litigation so that we can have more blacks
18 elected, but legislative leadership at the timedecided to avert litigation and sit down with us, and
19 we were able to draw up districts where we increased the number of black circuit and chancery
20 judges. And we eliminated the numbered post. That feature had been struck down by federal
21 court in Kirkland versus lane, Martin versus Lane litigation.
22 And so, for the first time, African-Americans throughout the State could vote for judges,
23 either in single member districts or if there were multi-member districts, they could use single
24 shot voting instead of having to vote for the numbered post election feature. This past year, the
25 Mississippi Legislature went back and enacted legislature and reinstituted the numbered post
26 election feature in 19 districts.
27 We need Section 5 to be reauthorized so that there could be an impartial and independent
28 review of election features such as this that election officials in Mississippi might want to revive
29 that once were dead. Just because they think that we have got as many African-Americans
30 elected as possible does not mean that we will not try to revive some of the election features that
31 have been struck down in the past. And I urge you to urge Congress to reauthorize Section 5.
32 Thank you.
33 MR. RHODES: Thank you, Mr. Rhodes. Ms. Wright.
34 MS. WRIGHT: Thank you. And I greatly appreciate the opportunity to be here with you
35 this morning. It's an honor to testify before a distinguished panel such as the one that is
36 assembled here today. I can't claim to be a native of Mississippi, and that's certainly a
37 disadvantage in this group.
38 I have had some occasion to study the history of Mississippi, however, and given that
39 history, it's clear that the Voting Rights Act of 1965 is inextricably tied to the history of the State
40 of Mississippi. This State's record with respect to voting rights was a primary impetus for
41 Congress' enactment of the Voting Rights Act of 1965, which you can see if you go back and
42 reread the Supreme Court's decision in South Carolina versus Catenback (sic) at any time. And
43 Mississippi's continued resistance to the requirements of the Act has been part of the important
44 considerations for Congress and several reauthorizations of the Act since 1965. Since these
45 hearings are primarily focused on the post-1982 record, I thought I would focus my testimony

here today on a battle that started in the 1980s here in Mississippi and continued into the late 1990s over the requirement of dual registration in Mississippi.

Dual registration refers to the practice of requiring citizens to register more than once in order to vote in different categories of elections. And although that battle concerns just one racially discriminatory barrier, I think it's illustrative of several things that are important for the reauthorization of the Voting Rights Act.

One of those is that the dual registration battle illustrates how registration requirements that are facially neutral have been used time and again in states like Mississippi to disapportionately disenfranchise minority citizens. It also illustrates the critical importance of Section 5 in preventing backsliding.

And third, this battle over dual registration shows how Mississippi, even in its more recent history, has continued to defy even the basic requirement of submitting voting changes for preclearance, requiring federal court intervention even to get that review mandated by Congress.

The original form of dual registration in Mississippi was a requirement that in order to vote in local elections, voters had to register twice: Once with the county registrar to be eligible for federal, state, and county elections, and then, separately, with the municipal registrar in order to be eligible to vote in local elections.

And this requirement was part of a package of voter registration barriers adopted by Mississippi in 189to implement provisions of the 1890 Constitutional Convention, who's overall purpose was to disenfranchise black citizens to the greatest extent possible. By 1984, Mississippi still had this requirement, and it was the only state in the Union still to require dual registration.

So in 1984, a group of plaintiffs represented by the Lawyers' Committee and the NAACP legal defense fund and Greenville attorney Johnny Walls challenged this requirement under Section 2 and under the Constitution. And in a decision issued in 1987, the district court found that this requirement did have both a racially discriminatory purpose when it was enacted and a continuing racially discriminatory effect.

The findings of court concluded that as of 1987 there was still a 25 percentage point disparity between the registration rates of white voting age citizens and black voting age citizens in Mississippi. And with respect to the dual registration requirement, the court found that more black citizens than white had been denied the right to vote in municipal elections because their names could not be found on the municipal voter registration rolls.

This was in part due to many factors, including the fact that because of past discrimination, blacks had lower income and educational levels than whites in Mississippi, making it more difficult for them to overcome administrative barriers, such as dual registration requirements.

Many communities, particularly small communities in the Delta, were located far from the nearest registrar's office. Blacks were far less likely than whites to have access to an automobile, and many other findings that documented the discriminatory effect of this dual registration requirement. So as a result of the litigation, the requirement was eliminated, and Mississippi went to a unitary system where registering once would make you eligible for all elections.

Unfortunately, that situation did not last, because in 1994, Mississippi began preparations to implement the requirements of the newly enacted National Voter Registration Act of 1993, the motor voter law, which required states to offer registration at driver's license offices, public officials offices, and so forth.

1 And although the requirements of the NVRA applied directly only to federal elections, virtually
2 every state decided to implement those provisions fully for all elections, because they recognized
3 that a system of dual registration is not only confusing to voters, but is incredibly expensive,
4 cumbersome, and inefficient to run.
5 Well, in Mississippi, things turned out a little bit differently. The State actually started
6 out with the intention of creating a unitary system and began conducting registration under a
7 unitary system believing that the Legislature in Mississippi would pass implementation
8 legislation. Several thousand voters were registered in the first part of 1985 under a unitary
9 NVRA system believing that this legislation would pass.
10 And the Justice Department precleared the administrative manual that provided for these
11 procedures. Unfortunately, the Legislature never did pass the implementing legislation. State
12 Senator Kay Cobb, the chair of the Mississippi Senate Elections Committee, unexpectedly tabled
13 the bill.
14 She later explained her position on this in part by focusing upon the registration
15 opportunities offered to welfare recipients under the NVRA saying that people who, quote, "care
16 enough to go get their welfare and their food stamps but not walk across the street to the circuit
17 clerk should not be accommodated."
18 Then Governor Kirk Fordice later sounded the same theme in opposing NVRA
19 implementation saying the legislation should be called welfare voter rather than motor voter
20 because of the assistance it provided to public assistance recipients.
21 And, of course, when white politicians in Mississippi started invoking the image of lazy
22 welfare recipients, everyone understands that this is an appeal to racial prejudice. And, in fact,
23 editorial writers around the State condemned this as racist, rather.
24 So the result of this legislative impasse was that Mississippi implemented the NVRA
25 procedures only for federal elections, because that was required by federal law, but not for state
26 elections. And this, of course, changed the entire nature of their process, because no one had ever
27 contemplated that this system would be implemented only for federal elections, and their
28 administrative procedures did not contemplate that.
29 The State certainly never sought Section 5 preclearance for a dual system of that nature.
30 But the State, nevertheless, went forward with a set of instructions at that point to the circuit
31 clerks and to the county election commissions announcing that Mississippians who have
32 registered to vote under NVRA will also need to register under Mississippi election law to be
33 eligible to vote in all elections.
34 They directed the registrars to set up separate poll lists segregating the names of NVRA
35 only registrants from those who would be eligible for all elections. In other words, Mississippi
36 once again was going to have a dual registration system, and the electorate was divided into two
37 groups: One of which could vote in all elections, and the other of which could only vote in
38 federal elections, even though these voters have exactly the same qualifications for voting. All
39 of them were required to be 18, to be citizens of the State for a certain period, and so forth. In
40 other words, this was a system that simply had no logical or rational purpose, other than to
41 disenfranchise people.
42 What should have happened next was for Mississippi to submit this system of dual
43 registration to the Department of Justice for preclearance review to determine if it might have a
44 racially discriminatory purpose or impact. The State refused to do so, and have refused to do so
45 even after the Department of Justice formerly wrote to them and said this system has to be
46 submitted for preclearance.

1 So accordingly, the only way to force the State to comply with Section 5 was once again
2 to go to federal court, this time with a Section 5 enforcement action. And I think the fact that we
3 had to do this 30 years after the Voting Rights Act was first enacted speaks volumes about the
4 State's history of resistance to the requirements of the law.
5 We had to litigate the Section 5 enforcement action all the way to the Supreme Court,
6 which unanimously held that Mississippi had violated Section 5 by refusing to submit its federal
7 election only plan for preclearance review.
8 And when after almost two years of litigation Mississippi was forced to submit it for
9 preclearance, the Justice Department objected and found that the confusing system had, in fact, a
10 disproportionate impact on black citizens and had been enacted for what appeared to be a racially
11 discriminatory purpose.
12 So the department Section 5 objection meant that Mississippi had been conducting voter
13 registration for over two years under a patently unlawful system, but even then, the State did not
14 cure the problem. Governor Fordice vetoed legislation in 1998 that would have created a unified
15 system in order to cure the Section 5 violations.
16 And, therefore, in the summer of 1998, we had to return to the federal court once again to
17 urge and to get a remedy. And, finally, the three judge district court noting the failure of the State
18 of Mississippi to enact remedial legislation after full and fair opportunity to do so entered an
19 order enjoining the State from denying the right to vote in any state, county or municipal election
20 to any voter who is registered and qualified to vote in federal elections under the NVRA. And as
21 a result of the order, thousands of voters in Mississippi were restored to the voting rolls for full
22 eligibility in all Mississippi elections. So as I mentioned at the outset, this battle over dual
23 registration is just one small chapter in the struggle for voting rights in Mississippi. But I think
24 it's a good illustration of the State's entrenched resistant to full voting rights, a persistence in
25 State officials in finding new excuses to create barriers to the right to vote, the critical role of
26 Section 5 in protecting the right to vote, and the continued need for reauthorization to protect the
27 hard won gains that have been made. Thank you.
28 CHAIRMAN DAVIDSON: Thank you, Ms. Wright. Ms. Deborah McDonald.
29 MS. McDONALD: Thank you very much. I am a practicing attorney in Natchez, and I'm
30 still practicing in election contests, as well as Carroll and I have done some
31 reapportionment. And what I want to speak to is to bring up to today, this year, a case that I was
32 involved in, and we're still looking at it down in Woodville, which there are several reported
33 decisions of cases Carroll and I have done in that area. That's in southwest Mississippi. There
34 was a mayoral election in Woodville this year of a black candidate, which that particular county
35 and the city is probably 75 percent black, he lost the election by 13 votes. We looked at it as an
36 impossible election contest. What had occurred is that for some reason, and I still haven't been
37 able to understand, there's an election commission in the city that is five whites.
38 And at the polls, there were people who were -- and it was that same dual registration
39 problem. They had been voting in the county for just ever, and they go to the city to vote, and
40 they'd say, well, you're not on the voter rolls. So for whatever reason, the people were told, well,
41 you got to prove that you can vote. You need a voter registration card or you need a utility bill to
42 show us that you live in the city.
43 Some of these people who we have -- we do have a transcript of that. Some of them
44 would come, present themselves. You can't vote. It's 6:30 in the evening. They just got off work.
45 Go home and get a utility bill. They would go home to try to get the utility bill, and, of course,
46 by the time they got back, the polls were closed.

1 Those people were verified voters of the City of Woodville, but they were denied the
2 right to vote. It was our understanding that there was as many 75 people. So in other words,
3 there's never been a black mayor in the City of Woodville, and there was no black mayor then,
4 but I think the election was stolen.
5 These are the types of impediments that I have encountered in my practice in southwest
6 Mississippi. There has been illegal purging. There was a case of Hunter versus whoever the
7 governor was then. I can't remember. But there was a case that would have been in the early '90s
8 where the sheriff of Wilkinson County was -- the black gentleman who was running for office
9 won the election by about 16 votes.
10 There was an election contest. He ended up having to run -- having to run again. And,
11 basically, what occurred was a situation where black voters were purged. All of this since 1982.
12 There were purged due to the fact that they had misdemeanor convictions. Now, if you're aware
13 that there is a case and that the 1890 Constitution, as Brenda stated, dealt with the issue of being
14 purged because of these types of crimes.
15 Now, that particular case, I think it was like 1898, talked about white people being
16 convicted of robust crimes, and we'll put the category of rapes and murders. That's not a
17 disenfranchising offense at that time. But petit theft and petit crimes were crimes that were
18 disenfranchise. So as a result, these people were purged, and that is one of the things that is still
19 going on. People are stilling purged from the voter rolls.
20 And now, young black men who get incarcerated at higher rates, they're being told when
21 they're incarcerated that you can no longer vote, no matter what the conviction is. And that is a
22 really bad problem, I think, with judiciary action, informing or misinforming young black men
23 and women that they cannot vote. And we have a real bad problem in our area, and I think in the
24 entire State with that.
25 So -- and I would like to mention another case that I was involved in, just giving you
26 antidotal information. It was in Amite -- well, it was actually in that same county, Wilkinson
27 County, a young lady ran for the city council or the board of aldermen, and she lost by three or
28 four votes.
29 And what we ended up finding up is that the powers that be had intimidated white people
30 by calling and saying, you better get over here and vote, even though they lived outside the city
31 limits. It was a city election. You better get over here and vote. And the chief of police was doing
32 that, and we found it out.
33 So we subpoenaed the lady who we knew had been intimidated into voting in the city
34 election, even though she lived in the county. She moved out a year or so ago. We subpoenaed
35 her to trial. Once we subpoenaed her to trial, they basically backed off and agreed to a new
36 election. But these are the kind of things that have been going on, are still going on. The racial
37 appeals are still there. There's no question about it. Rob mentioned the treasurer's race in
38 Mississippi. Gary Anderson was the gentleman's name, black gentleman. He was doing just fine
39 until there were television commercialsshowing his picture. Once that occurred, then all bets
40 were off, and he ended up losing the election, and I think that was very crucial.
41 So I guess what I would state that there's no question in my mind that the Voting Rights
42 Act, in particular Section 5 enforcement, is very necessary. We are in a regressive state in
43 Mississippi. We need stronger enforcement. Carroll's statement about the judicial elections. Here
44 we have now again at large elections in the judiciary.
45 And I would submit to you that blacks will not be able to vote to win any of those at large
46 positions. Now, you say, well, most of those, the black judges are in -- still in the single member

1 districts, but the problem is we're heading down a slippery slope. And I think Section 5 is
2 necessary to stop that slippery slope.
3 Now, with that said, we still have to have strong enforcement of Section 5. That's nothing
4 that we can, I guess, deal with here today, but that is really, really important, because we're not
5 getting the support at the state or the national level that we need. As a matter of fact, at the state
6 level, these disenfranchising felonies, when these young men go to vote, they're told you can't
7 vote because of the -- because you've been convicted.
8 But some of these, the Secretary of State continues to expand the list of what comes
9 under a disenfranchising felony. So to that extent, you know, I'm troubled by it, and I see it. And
10 I have people call me about representing them in various ways. And for those reasons, I think
11 that Section 5 needs to be reauthorized.
12 I think the dual registration is a problem, and people are being turned away due to the fact
13 that they are registered one place but not registered another. The circuit clerks and the municipal
14 clerks aren't doing what they need to be doing to make the connection, because once you're
15 registered in the county, you should be on the city rolls, but they're requiring more. Just like
16 Brenda said.
17 And I guess with that the only thing I would say is it's a travesty to the extent that I
18 remember as a child sitting in these mass meetings, because I grew up in Fayette, Mississippi,
19 that's where Charles Evers was elected in 1969, the first black mayor since reconstruction of a
20 biracial town. But, anyway, I was -- my parents, I used to sit with my parents in these mass
21 meetings, and we used to talk about things, impediments to voting.
22 And what I see now is the same thing. I see it all over again. I think we're in a second
23 reconstruction. And for that reason, I think we need to be very forceful about the reauthorization
24 of Section 5 and these other sections of voting rights. And I thank you for giving me the
25 opportunity to speak, and I would just like to say to Brenda that you're an honorary
26 Mississippian.
27 MS. WRIGHT: Thank you very much.
28 CHAIRMAN DAVIDSON: Mr. Turnage, Mr. Ellis Turnage.
29 MR. TURNAGE: Thank you. Welcome to Mississippi. Glad to have you here. Chairman,
30 I wish you had been there for the recent Blues festival. The Chairman and I attended the
31 Mississippi Blues Festival a number of years, so I just thought about you in that sense.
32 CHAIRMAN DAVIDSON: I still got my T-shirt, by the way.
33 MR. TURNAGE: I thank you for the opportunity to come and discuss the Voting Rights
34 Act of 1965. I am a native of Mississippi. I was born in 1956 in Rankin County, just east of here.
35 I attended an all black elementary school out at Goshen Springs, Mississippi in Rankin County.
36 From 1970 to '74, I attended an integrated school, high school, Pisgah High School in Rankin
37 County.
38 I left high school and served in the United States Army in the Military Police Corps from
39 1974 to '76. I returned to Mississippi, obtained a BS degree from Jackson State in 1980, and
40 went on to Ole Miss Law School, and I graduated with a Juris Doctorate in 1982. Was admitted
41 to the Bar on December the 20th, 1982.
42 While at the University of Mississippi, I attended a national Frederick Douglas moot
43 court competition in 198involving the case of Rogers versus Lars, which was pending before the
44 US Supreme Court at that time, involving the proper legal standard in adjudicating cases arising
45 out of the 14th and 15th Amendment. They ultimately held that it had to be intentional,
46 purposeful racial discrimination.

1 In the same year, Congress submitted the Voting Rights Act to apply the result tests on.
2 All of this happened -- that was my date with the destiny of the Voting Rights Act. That's where
3 it all started. Since then, I have litigated six Section 5 cases and over a hundred Section cases
4 here in Mississippi involving mostly municipalities, county jurisdictions, and other cases. The
5 State court judge case that we had, I remember the day I talked to Fred Banks about filing that
6 case. You were in private practice that day. I talked to Frank Parker, and both told me, Mr. Fred -
7 - Fred told us that it didn't apply. At least it hadn't ever been applied, and I said, well, maybe that
8 might be a good reason to apply it now or at least ask it. And that was how that case got started
9 in 1983 or '84, somewhere along in there.
10 But, anyway, I'll move on. I want to talk specifically about the six Section 5 cases I was
11 involved in. And by the way, I have one set for a three judge court hearing on Monday here in
12 Jackson at 9:00 o'clock. So I'll proceed with that.
13 Basically what I have seen is cases where the Attorney General fails to object. And I've
14 been involved in several cases of determining whether or not he timely objected, because if he let
15 the 60 days pass, it's going be precleared by law.
16 And there's a 1977 Supreme Court case, Morris versus Versett, that holds that the
17 Attorney General's failure to interpose Section 5 objection is not judiciary reviewable, even if he
18 said I'm going to let -- I'm not going to object, and I'm going to sit back and do nothing, because
19 your state voted right in the last election. I'm just going to let it go. It's nonrenewable.
20 The fact that that changes is very significant. It puts the burden on the individual voters to now
21 go forward and prove the case, rather than keeping the burden on the State jurisdiction to prove
22 that it does not have effective discrimination under Section 5. It's a big difference. In addition to
23 reauthorizing, in my view, the issue of judicial reviewability needs to be reconsidered and argued
24 before Congress.
25 They need to make clear that the burden will remain with the jurisdiction, the submitting
26 jurisdiction, rather than shifting it to the poor protected voter. You can see that from a case that I
27 was involved in recently, Public versus Grenada. This is a published opinion, but in essence,
28 what happened, the city of Grenada had become majority black. The whites recognized it, and
29 they ran out and did a big annexation.
30 And it got tied up in court. They didn't get it through in time for the next election,
31 because if the election had been held, African-Americans were going to have a majority on the
32 city council, and they knew that. They went to state court and got an order from the Mississippi
33 Supreme Court to stay that election.
34 After we filed the Section 5 case in federal court, the federal court eventually let the
35 election go forward. Yes, it was a Section 5 violation. Ordered the election held, and guess what
36 happened? More blacks got elected. They took control of the city.
37 Well, they then -- the Bill Clinton Justice Department objected to this Section 5
38 annexation that brought in about 1300 more white voters than black voters. So it was 54, 55
39 percent majority black from a special census that was done in 1977. This annexation would have
40 returned the city to being majority white.
41 Now, this year the courts ordered Grenada to make a submission -- no, they didn't order
42 Grenada to make a submission. The Attorney General on his own, the Republican Justice
43 Department, the Bush Justice Department say we're going review -- we're going to rereview this
44 matter. And guess what? They withdraw the objection, and the annexation goes through. The
45 election is set for Tuesday, and you had an African-American mayor that was elected. Grenada
46 did not have a majority vote requirement. Two whites ran, one African-American. Ms. Freelon

1 won the election. Come back now the Justice Department has withdrawn its objection. The
2 federal court -- the white voters got the federal court in Oxford to order a new election, to clear
3 and vacate all the seats, to give the voters in the annexedarea an opportunity to vote. In this case,
4 even though it has been Grenada's past practice to use a plurality win, this election by federal
5 court order imposes a majority vote requirement, by court order, federal court order. Even
6 though the city's own practice had been to use only a plurality. They didn't conduct primary
7 elections. They only hold one election, a general election. And if two whites ran and one
8 African-American ran, you could win with a plurality of the vote. And that's how Ms. Freelon
9 got in.
10 So my point of all of this is that with the Republican Justice Department overruling I
11 guess a Clinton Justice Department decision, the federal court coming in, applying a majority
12 vote where there had been done, there's definitely a need for continuing to enforce the Voting
13 Rights Act. And I would urge you to argue for a change in the judicial reviewabilities. And I'll
14 tell you, that trend of state courts' decrees stopping elections. I ran across that is Kilmichael,
15 Mississippi. Section 5 violation was adjudicated. Kilmichael was another interesting situation.
16 The majority -- the black voters in Kilmichael decided they wanted to change it, and they
17 went down and registered. They got almost everybody in town registered. And the whites
18 realized what was fixing to happen, and they go to the Montgomery County Circuit Court and
19 get a court order stopping the election. A clear Section 5 violation.
20 We go to federal court, prove the Section 5 case, order the election. Guess what happens?
21 Just what they predicted -- the blacks were going to take over. In McComb, Mississippi, this is
22 the interesting case for Monday, a state representative also serves as city council member in
23 McComb, David Meyers.
24 Due to -- on the city council, McComb wanted to have some type of tax that
25 municipalities were authorized to have, a tourism tax, by state statute, but in order to get it,
26 you've got to have a private deal, which requires all the state representatives and state officials
27 from that county to sign on to it.
28 David would not sign on to it, because he knew that all the money was going to be spent
29 over the white part of town, and he pleaded with them to set aside one-third of it for some parks
30 over in the black part of town. They didn't want to do that, so he didn't sign off on it.
31 So what they did was they started and went to state court, filed a lawsuit against him
32 saying that his dual service as state representative and city councilman in McComb violated the
33 Mississippi Constitution of 1890, separation of powers doctrine and the ancient doctrine of
34 common law of incompatibility to hold office.
35 Guess what? State court obliged him. Gave it to him. June 13th of this year, or May 13th
36 of this year, found that his dual service violated the Mississippi Constitution of 1890, and the
37 doctrine of incompatibility, vacated his seat, refused the state order pending appeal, and the
38 Mississippi Supreme Court refused the State order pending appeal.
39 So we filed in federal court saying, hey, this is a Section 5 change. It changes who can
40 serve as a candidate. It's a candidate qualification and requirement case. So that's what we're set
41 for. The precedent here is now you go to state court and get you a friendly judge to sign off on
42 whatever voting procedure you want to implement. That has been the practice here. Luckily
43 we've been able to stop all the ones so far, but it's a trend. Those are my comments at this time
44 about Section 5. And I, again, thank you for giving me the opportunity to come forward and glad
45 that you came down to address this important issue.

1 CHAIRMAN DAVIDSON: Thank you, Mr. Turnage. Before we begin asking the
2 panelists questions, I would simply like to recognize the presence of US Representative Benny
3 Thompson here in the audience. And, Mr. Thompson, would you stand in case there's somebody
4 who might not recognize you?
5 (APPLAUSE.)
6 CHAIRMAN DAVIDSON: Well, we will begin with Judge Banks. Do you have any
7 questions that you would like to ask any of the panelists?
8 HONORABLE BANKS: One question to Mr. Rhodes. What's the status of the change in
9 the judicial election prior to preclearance?
10 MR. RHODES: It was submitted to Justice back in July for Section 5 review. The
11 Magnolia Bar and others submitted comments urging the Justice to object. But on September the
12 15th, Justice precleared, and what I can't understand why they precleared it is because Justice
13 had initially entered a Section 5 objection to the numbered post feature in 1986.
14 And when the State first submitted this voting change during the Kirkland versus Allain
15 and Martin versus Allain litigation in 1986, Justice objected to the numbered post feature. And a
16 three judge federal court entered a permanent injunction permanently barring the State of
17 Mississippi from using the numbered post feature for judicial election. The same Justice
18 Department precleared it on September 15th.
19 CHAIRMAN DAVIDSON: Mr. Derfner?
20 MR. DERFNER: I guess I'm just taken aback. I thought I had a skeptical view of how
21 much peoples hearts and minds have changed over the years. The hearts and minds of those who
22 are in control and determined to remain in control, but I'm just blown away by this testimony.
23 Witness after witness has talked about things in the past year, in the past two years in which
24 changes that have a -- that are identifiably and well known to be discriminatory, they go back
25 and do them again and again and again.
26 I guess the one question I would have, Mr. Turnage referred to a question about
27 reviewability. Do any of the panelists have any other thoughts about ways in which the Act
28 might in fact be strengthened? Do you think that an extension of the Act as it is is satisfactory?
29 Will that do the job, or are there other things that we ought to consider?
30 MS. WRIGHT: I'll jump in on that. I think there are definitely a couple of areas where I
31 would hope to see the Act strengthened, or actually I would probably say restored, to what it's
32 original intent was. One of those areas would be to undo some of the damage that was done by
33 the Supreme Court's Bossier Parish decision in January 2000 where they essentially, you know,
34 without going into a lot of detail, simply read the purpose test out of Section 5. They said that
35 even if you have a voting change that is intentionally racially discriminatory, the Justice
36 Department has to preclear it unless it was infected by a so-called retrogressive intent. So, in
37 other words, if you have -- if you had a jurisdiction that had been successful throughout history
38 in drawing redistricting plans that prevented blacks from ever electing a candidate of choice, and
39 after the new census results come out and they submit a new redistricting plan, they deliberately
40 go out and create a plan to maximize white voting strength and minimize minority voting
41 strength, the Justice Department has to preclear it, because although the intent may have been
42 racially discriminatory, it wasn't actually retrogressive.
43 Since blacks had no power to begin with, it wasn't retrogressive of black voting strength.
44 And that, you know, is a very, very shorthand description of the 2000 Bossier Parish decision. I
45 think that has done a lot of damage to the Justice Department's ability to properly review Section
46 5 and object to racially discriminatory voting changes.

The other area is probably Georgia versus Ashcroft where the court really created a very confusing set of standards that make it much more difficult now to determine when a plan is, in fact, retrogressive. The one thing we all thought we understood pretty well that made it much easier for jurisdictions to reduce black voting strength in legislative districts, and I think that's had a very harmful effect as well.

MR. RHODES: I would like to add in addition to restoring the original intent, I think the Section 5 review process needs to be amended or expanded to include also the ability of both the three judge district court in D.C. and the Attorney General to review voting changes to determine whether or not they result in discrimination and know that the US Supreme Court says that the results of the test should not be used.

And the reason I say that is because it's terribly expensive for litigants to litigate under Section 2, and a lot of voting changes do result in discrimination, and they might very well have the intent to discriminate. But officials in the South have changed from the 1960s.

In the 1960s, they would say the reason they were doing something they did not want blacks to be in office. They would just come out and say it. But somewhere along the line, they've got it into their heads that they can't say that anymore, because they would automatically lose whatever they're trying to do.

So they have developed more sophisticated ways of still getting the results that they want by discriminating without actually coming out with the purposeful language or intentional language. The intent to discriminate is awful hard to prove. Results is easier to prove.

And I think that if Justice could review changes to determine if they result in discrimination, it would lessen litigation and, for the most part, these enforcement efforts are now brought by poor people. Individuals, they can't afford to litigate this stuff in court. So if they go back to restore the intent test, but also add the results test as well. Thank you.

CHAIRMAN DAVIDSON: Mr. Rogers, do you have some questions?

MR. ROGERS: I do. Thank you, Mr. Chairman. As I was listening to all of your testimony (inaudible) testify, because there's a commonality that runs across the board to each of your testimony regarding essentially the way you all see Mississippi in existence today. And I'm struck by that, given to some extent your comment that you made just there, Mr. Rhodes, and I'm trying to testify to this. Essentially you described a world in which you have change in language. Folks can't just say outright I don't want black folks to be elected to office anymore. So the language has changed, but you said the purpose is still the same.

So it's difficult to prove intent necessarily. They intended to do this based upon the fact they just didn't want me in office. But it's easier to prove a fact, so to speak. That's what the result of it is. What I found interesting, though, in listening to all of your testimony, you all essentially described this as being purpose.

The purpose is to limit black folks from opportunities, the purpose is to change the rules of the game continually so that you don't have access to opportunity in terms of black folks being elected to various positions here.

You describe a world in which that is the absolute purpose, not effect. But you describe it as the purpose of what is taking place here. But I kind of think to some extent what you just said just there, Mr. Rhodes. You said essentially if they came out and said what they really meant, if we used the language, so to speak, in this instance we don't want black folks going into office that they would automatically lose.

I'm trying to contrast that statement with Mr. McDuff's statement about racially polarized voting, (inaudible) on statements about the fact that essentially white folks don't cross over to

vote for black folks, period. How do you automatically lose in this State today in Mississippi if the result is still racially polarized voting as you all described in a world in which you do not use that language?

Do you have a world here where white folks essentially say we don't want to use the language anymore, but we still want to essentially practice the same? Practicing the same. Forgive me that long question, but it represents to some extent what I think is to some extent the messages that you all are bringing, which is a common message.

I'm sorry I'm not as articulate on this question. There's kind of message that you all are bringing without necessarily using the language to describe, if you will, what is exactly going on here. Forgive me, Mr. Chairman. I need to ask that question better.

What I really want to ask here I guess at the end of the day is: What is happening in Mississippi? Do you have a (inaudible) effect? Are white folks here essentially saying, listen, this is what we do to conspire to prevent blacks folks from obtaining power? Is there private meetings that take place among white folks here that essentially work in fact to say this is what we will do, and they do that in fact?

Is there just sort of blatant understanding among white folks in Mississippi non-spoken of that essentially says this is what we do as it relates to black folks in Mississippi? Can I ask you that question in that way, if you don't mind? And forgive me for the introduction that I gave you to that, but in the essence of the end of the day, I'm really trying to get the essence of what you all are saying.

MR. RHODES: I'd like to taking a stab at trying to respond, and go back a little bit further in history in Mississippi. After Brown versus Board of Education was decided in 1954, there was a real uproar in Mississippi, because at the time, separate but equal was the law of the land. There was no mixing of the races, as white politicians say.

And almost every politician who ran for governor in 1955 would say that we're not going to allow race mixing. We're going to maintain separate but equal. But there was one candidate running for governor who was a brilliant lawyer, and he had been a circuit judge. He had been a district attorney. He had been an Associate Justice of the Mississippi Supreme Court. His name was J. P. Coleman.

And J. P. Coleman, at the time, said that you do not have to use all this rhetoric that these people are running around using. But he said that there are ways to do things without coming out and actually saying it. I remember one instance in his inaugural address in 1956, he said it would be easier to dip the Atlantic Ocean dry with a teaspoon than it would be to allow mixing of the races in Mississippi.

He said one of the things you do is you enact laws, and before they can have those laws struck down by the federal court or the Supreme Court, you come back and enact new laws. So he was telling white people in Mississippi then you don't need to be hotheads and go out here and use all of this language of intentional discrimination, because you're going to lose those battles, but you can get the same thing accomplished without using that language.

And I think J. P. Coleman was one of Mississippi's most effective leaders as far as maintaining racial discrimination in this State, because after that -- the climate changed after then and into the '60s, white politicians moved away from blatant race discrimination. But white voting ballots had not changed over this period of time.

Primarily in most elections, we have an African-American candidate running against a white. You're going to have probably 90 percent of white voters voting for that white candidate,

or higher. You're not going to have any of the white voters cross over and vote for the black candidate.

Will Kalone was a black Republican in Mississippi who ran for state treasurer I believe in 1983, and he received the Republican nomination, but he did not receive the votes of white people. They voted for the Democratic nominee.

We've talked about the race that was in 2003, Gary Anderson. He was an African-American that received the Democratic nomination, and people said he was far more qualified than Tate Reeves, who was 29-years-old, a Republican. But Gary Anderson did not get the overwhelming majority of the white vote; Tate Reeves did.

I guess I'm saying that white folks don't have to come out and say we're not going to put black folks in office. If you look at the results, if you look at the elective returns in whitemajority precincts, you see that that is what has happened, that they did not vote for. And there has been some discussion within the last few years, and I do not buy into it, that it's not race based voting, but it's party voting. People vote along partisan lines, as opposed to racial lines. But in Mississippi, there's not that much difference between a white Republican and a white Democrat. But when you have a black in the race, that black would get far fewer votes than the white, whether that white person be Democrat or Republican.

MR. TURNAGE: I would like to address that briefly as well. You know, in 1964, when Fannie Lou Hamer challenged the all white Republican delegate to the national convention in Atlantic City, that same year the white folks really left the Democratic party. They wanted to be Republican.

They had always been closet Republicans, or at least -- well, not -- I won't say closet Republicans. They had voted for in 1948 the governor Strom Thurmond and Fielding Wright, who was the Governor of Mississippi, was his vice presidential candidate, they voted for the Dixiecrats. They were Dixiecrats. That's really what they were. They weren't Democrats. They were Dixiecrats.

So after that, the '64 election, in '68, Nixon saw the strategy. I mean, it was simple. They said exactly what they wanted to say. We're against bussing. We're against all of these blacks running around up there in the streets in Chicago. No law and order. We want law and order. They adopted -- we don't want bussing. We think you should have neighborhood schools. We against that. And they all voted for the Republicans. They've been voting for them ever since. Now they don't say we don't want the blacks. They'll fly President Bush down here to DeSoto County and Rankin County in Airforce One and tell them vote Republican, vote Republican. National Democrat party, they for abortion. They want Ted Kennedy. He's a Liberal. A white Democrat running Mississippi, they trying to tie the National Democratic Party around his neck. Haley Barbour was running with Amy Tuck as Lieutenant Governor, they had never ran as a team, you know, before.

But now you had Musgrove, the Democratic governor candidate, incumbent, running with Barbara Blackmon who was running for lieutenant governor. Now all the sudden every time you see Musgrove's face, you see Barbara Blackmon's black face sitting right beside him. And so, now they say, okay, vote Barbour and Tuck. We're Republican. We ask for your vote. Well, now there's a correlation. Mississippi Republican party's almost all white. Very few blacks in the Republican party. So they switched from being Dixiecrats to full out Republicans. Now all they have to say is that vote Republican, because there's a correlation between Republicans and racists. It's all white. That's how they do it. It's easy.

Todd McGinnis (sic) is a Democratic candidate saying that he's for abortion and has no moral values and all of this stuff on the socially conservative issues, you've got 95 percent of the white voters lined up in your pocket. That's the way it works.

MR. MCDUFF: Let me add one thing if I can. I think Ellis' description of the creation of the Mississippi or the rise of the Mississippi Republican party as a refuge for white people who did not want integration in this State, Democrats, who left -- in mass left the Democratic party in 1964 and joined the Republican party, and the continued growth of the Republican party in Mississippi, the policy that it has adopted to depress poor people to prevent serious economic racial integration in this State is just one of the major problems we're dealing with right now in Mississippi.

I think Ellis hit the nail on the head when he talked about that as a real impediment to progress. There has been progress. There is integration of some governmental bodies. There is some integration in the workplace, not nearly as much as there should be, and as a result, some people's attitudes have changed.

Over-racial comments and racial actions characterized as such by the promoters are fewer and further between than they were before. They still occasionally happen. We saw Senator Lott say a couple of years ago that he wished Strom Thurmond had been elected president in 1948.

We see what's happening in Grenada that Ellis described, where as soon as the city becomes majority black, or as it is about to become majority black, the majority of white city councilmen annexes white areas and gets state courts to go along with it.

And although the Clinton Justice Department, we see 13 years later, aided and abeted by the Bush Justice Department and a Reagan appointee to the federal bench, that gets undone. And what was nationally a majority black city has now become a majority white city because of very over-racial actions taken by the white -- former white city council members in Grenada.

So it still happens. But I think another part of the problem is when people get into voting. The majority of the white people in this State, unfortunately, even though they may not admit it to others and some may not even admit it to themselves, will still fall back on those old habits of voting for their own kind. And, unfortunately, we still in this State, and in so many parts of the country, still look at it as our own kind along racial lines.

And political and economic lines correlate with racial lines. And so, that is still a major problem. And we see what happened in 2003 with this treasurer's election which we've talked about so much.

And I can tell you, if the races of the two candidates were reversed -- the 29-year-old white candidate who won, if he were black, and the 47-year-old black candidate were white, the guy who ended up winning the election wouldn't have gotten 15 percent of the vote. He was so unqualified. He shouldn't have even been in the election, but he won because he was white. There's no question about it. No question about it.

So we've still got these problems. The Voting Rights Act has brought a lot of change to Mississippi, but we've got to do everything we can to keep it from slipping back. And Section 5 of the Act is such an important part of the change that has occurred here. We cannot let it slip back.

MS. McDONALD: Let me just add. Also the flag vote, I don't know if you all are familiar with it, but the flag vote came in, what, 2002? Whatever the year. It's been in the last five years. And basically, it was to retain the Mississippi flag which has the Confederate emblem on it. And that vote also was along racial lines. It's no question about it, you know. It reflected the black/white split.

And there may have been -- I would say maybe 5 to 10 percent, and I may be off on that, but I think it was somewhere in that range, of white people who actually did vote against the flag. But for the most part, it was along racial lines. Some of the organizations which supported that flag vote Governor Barbour appeared on a website with them when he was running for office, and people asked him to renounce the group, and he refused to do so.

So that is the kind of thing that we're dealing with. I got appointed to a judicial recommendation commission here a year or so ago. And I was appointed from the wrong Supreme Court district. I immediately notified the Governor who had issued my commission, and nobody did anything. Nine or ten months later, I called to find out how a candidate would go about applying for a judicial position that had come open, and the next day, I got a call removing me from the commission.

So, I mean, nothing has really changed. I mean, things have changed -- like Rob said, things have changed. There are more blacks elected, and that's a good thing, because we need diversity in this State. I mean, I think that the black population in this State is probably more like40 percent. A lot of people don't get counted in the census.

But be that as it may, there is a lot that needs to be done. And the extension of the Voting Rights Act I think is crucial, is absolutely crucial to the work that we're trying to do and to the continued existence of blacks in the political system, because we're being weeded out. We're being weeded out by the convictions.

In the criminal justice system, Rob can speak to this, a lot of times young white men that do things don't even get to the system. It's taken care of before it gets to the system. But the black young men and women go through the system, and as a result, they're disenfranchised, or they're told they're disenfranchised even if they're not.

So to that extent -- you know, I'm not saying -- and your question is, you know, are you telling me that things haven't changed and there's been no progress? No, we're not saying that, but we're saying that if the Voting Rights Act is not extended, you're going to see a serious regression of what has been accomplished in the last 40 years.

MR. ROGERS: I have to tell you that that of all the states we've been to throughout the United States, Mississippi in and of itself is unique to some extent, and this is why I find this panel and your conversation about this to some extent so unique.

Martin Luther King described Mississippi as a place unlike any other state, that there was something so unique about this State and it's intrinsic sort of holding on to, if you will, segregation, noticeable separation of races, implicit superiority in white folks as it relates to black folks. An implicit almost assumption, if you will, even by many blacks in this State to a status of (inaudible). Those things, as I remember, in particular as talked about by Martin Luther King made this State so unique in and of itself.

And yet, to hear your descriptions of Mississippi today, the numbers that you talked about before, one black person elected in 1967 to the State Legislature, the number of black elected officials as you described it, going up to, as you described it, virtually none in the 1960s up to 19 percent or so the State is now -- not consistent, Mr. Rhodes, with what you're talking about, what the numbers ought to be, 4,76elected officials, only 89of which are black.

But even when I consider the dramatic progress (inaudible) minority that's been made here, you've had -- here are you with the state with the largest black population in America. You've had a significant increase in black elected officials. Mr. Espy, as you serve in your capacity, Mr. Thompson, you inherited Mr. Espy's seat previously.

1 So you've had these gains arguably that have been made in this State, and yet, you still
2 talk about a world in which despite that progress, you are holding on to notions of the past. And
3 to me, it's an interesting -- it bodes interestingly perhaps for the rest of the country as we begin to
4 become more of a culture in which you will have minorities continuing to increase in the basic
5 population.
6 And if you want to talk about a world of retrogression or regression, in which essentially
7 even though you've made progress, you have this inclination to still go back, if we don't
8 reauthorize Section 5, then we see a world in which we're going to go back in time. You all said
9 that. Things go backwards, not forwards. I find that remarkable.
10 And this is too long of a comment on my part, and I don't want to do that at all, but I find
11 it remarkable given the substance of Mississippi in the country in our view of issues.
12 MS. McDONALD: Let me just say that almost every issue that comes to the forefront in
13 Mississippi, the issue of race underlies it. I mean, almost every -- if there are ten issues, nine of
14 them are going to be based on race as to what position the political leadership will take. Wouldn't
15 you agree with that, Carroll?
16 MR. RHODES: Yes. And I would also like to add that Mississippi politicians, black
17 politicians in the past have fought every effort to get black majority districts and to get blacks
18 elected. But then, they also go out and tell the nation that we have more black elected officials
19 than anywhere in the nation. But they fought that.
20 And in 1999, there was a black Republican running for agricultural commissioner, Roger
21 Crowder, and he lost, and essentially political proponents (sic) said he lost because he ran against
22 Lester Spell, who was more qualified.
23 2003, Gary Anderson, more qualified black elected official -- I mean, black candidate
24 running for state treasurer, but he lost, and he lost to a white Republican and political proponents
25 say he lost because he was running against a Republican. So when a black run as a Republican,
26 they can't win, and when they run as a Democrat, they can't win for a statewide office. And the
27 reason they can't win for a statewide office is because black's only 33 percent of the population,
28 and you have to have white votes in order to win. You have to -- you need a significant number
29 of white votes to win in a state that's 33 percent. And if you still have white black voting in
30 extremely high numbers, then it is difficult.
31 And what we are saying is that those patterns, those voting patterns haven't changed
32 much since the Voting Rights Act was initially enacted. And if those voting patterns haven't
33 changed, if Section 5 is not reauthorized, you're going to have stuff like the Mississippi
34 Legislature coming back and saying, well, we need to go back and have at large election for
35 judges.
36 That's something that the Legislature, the state Attorney General agreed to strike down in
37 a federal court case in 1989 and in Legislature they enacted in 1994, but then they come back
38 and reintroduce it in 2005, just 1years later.
39 MR. TURNAGE: Carroll, I would point out also, and that this is what you said, Roger
40 Crowder did run. He ran twice. The first time a Democrat, second as a Republican. They beat
41 him out of the Democrats. Then they come back and beat him out of the Republicans. And Will
42 Kalone ran for Attorney General in addition to the treasurer's race, and they beat him down both
43 times.
44 So the message is this, and it's plain to see. With statewide offices, white voters in
45 Mississippi don't want integration. And they haven't given any. I mean, on the Supreme Court,

nine positions, we've never had more than one at a time. That's 1percent. One out of nine is 1percent. And we can't get anymore.

Three highway and public service commissioners, three of them, each one of them, that's six offices, we've never been able to elect any. They don't want any diversity. They don't want any integration. And all you've got to do is go and look at the voting returns in these heavily white precincts, and you've got a whole bunch of them. Some counties in Mississippi have probably less than 500 blacks.

It was told to me yesterday, the judge from Tishomingo County, she said I think we've got 167 blacks in my county. And all you've got to do is go and look at these returns. If it's two white candidates running, white voters will sometimes split, but usually they go 95 percent the same way.

Now, you get down on the local level, you know, like state representative, we have races that we were able to win to put a Democrat in office in Cleveland, because it was two white guys that were running, and they both were local, and they knew everybody. They split their vote, the black voters went in and lined up behind the Democratic candidate, and we was able to win that election.

But for statewide races, and the higher you go up the ballot, there's no integration, and they don't want any. 95 to 98 percent of them voting the same way with 70 percent of the turnout being white, the result is predictable. We already know what the outcome is going to be. So, yeah, it happens. And we made progress, but the federal court drug them all the way. So it wasn't like it was voluntary that white voters gave black voters all of these offices. We had to drag -- the federal court dragged them across the line. So it's still here. It's stillgoing on. I was in a case yesterday in Como, Mississippi that I tried an election contest up there. Como is probably 65 percent African-American, but it's a poor town. A lot of poor people.

The election -- my candidate John Walton, was certified the winner with 253 votes. This is an at large position for alderman. The other candidate, the white candidate, Dr. Ruell, who is a medical doctor, had 244. So it was a nine vote margin. And it was 53 absentee ballots voted in that election.

And in Mississippi law, certain people have to go to the clerk's office and vote. That's the only place you can vote under the present law. But certain people who are 65 years and older and who have physical disabilities can call in and request a ballot, the clerk can mail it to them, and it has to be attested by a person 18 years or older. And if any voter assistance was given, he's got another certificate that has to be filled out.

Well, they left off the certificate for voter assistance. And it turned that all 33 voters that needed assistance were black, they voted for the black candidate. The judge threw the election out, because these 33 ballots that were printed did not have that last form on it, the attestation for the person providing voter assistance, and they threw it out.

So now, you tell me, do we still need it. They purged -- testimony came up in the trial that they had purged at least 50 African-American voters from the list right up before the election. There's no Section 5 preclearance for it at all. This came up during the State court case. So, now, next week I got to go back and work on the Section 5 issue.

It's still going on. All you got to do is go around and watch the election, municipal elections, county elections, state elections, whatever level. 95 to 100 percent of the white voters are going to go the same way, unless it's two white candidates running. You may get some split. But on the statewide level, if it's a Democrat, 95 percent of white folks are going Republican. That's it. Thank you for listening.

1 CHAIRMAN DAVIDSON: Congressman, do you have any questions?
2 MR. BUCHANAN: Mr. Chairman, it's time for me to testify.
3 CHAIRMAN DAVIDSON: We have this moment (inaudible).
4 MR. BUCHANAN: I had a question, but Commissioner Derfner, being highly intelligent
5 and perceptive, he read my mind and answered my question, because I wanted to hear what you
6 all think might need to be strengthened in the Voting Rights Act. Late President Lyndon Johnson
7 I think was the one who said politics is the art of impossible.
8 And I don't know whether it's impossible, but it seems to me we do need as a part of the
9 record of this Commission to have people like you tell us what you think needs to be
10 strengthened, not what needs to be sustained. But he stole my question, so I have to testify.
11 When I was a freshman my first in the conference I helped the steering of the investigation of the
12 Klu Klux Klan, and I really felt (inaudible). There was a newspaper editor, an African-American
13 whom I highly respected, he said, you know, I'm not so worried about those with hoods over
14 their heads. The ones that really worry me are all those with hoods over their hearts.
15 I'm afraid that still exists in your state and mine. And it makes me heartsick,
16 Commissioner Derfner, to hear that testimony. I wish I heard something else that doesn't ring
17 true to me. I think we ought to hold our Bibles a little more closely. It does appear that what you
18 are saying is accurate, and I wish we could clone (inaudible). I know cloning is supposed to be
19 wrong.
20 I wish we could clone you. I wish you were sitting here in the United States Senate or the
21 United States House of Representatives as a committee that would be dealing with this
22 legislation, because I think your testimony has been clear, and I thank you for it. I wish I
23 believed that we had improved as much as I think we should have improved and not look toward
24 each other.
25 It hasn't completely happened yet. I think it's not quite as dark as has been portrayed by
26 this panel, but when it comes to what the law should be, John Thompson, Senior, the former
27 basketball coach at Georgetown University, said the world is a pretty nice place if you've got a
28 hammerlock on it and force it to be. The father of the Declaration of Independence ironically
29 said, Thomas Jefferson said, "You must define men by the chains of law."
30 It would appear to me that it's necessary -- from your testimony one can get a clear
31 impression it is necessary to have the law as it is and possibly strengthened in order to
32 (inaudible) purposes of the Voting Rights Act of 1965 and then through the years, and make sure
33 that -- that pressure is privilege and (inaudible) basically Democrat society of every person
34 having the right to vote and every vote being counted.
35 And it seems to me that if we're going to have that in the 21st century, you make a strong
36 case that we need to sustain the laws (inaudible). And I just want to thank this panel. You
37 represent -- I started out talking about the Mississippi that was and the Mississippi that is and the
38 Mississippi that it yet might be. Seems to me you represent the Mississippi that ought to be,
39 including you honorary Mississippians. Thank you. End of testimony.
40 CHAIRMAN DAVIDSON: I have a few questions here before the panel ends, and
41 they're mostly efforts to just get my notes straight here. One of the reasons I became a university
42 professor is because I much preferred lecturing people than taking notes, and I'm not a very good
43 note taker.
44 And the first question here is for Mr. Rhodes. You mentioned, as I understood you, 300
45 acts of the Legislature before 198that were not submitted for preclearance. Did I get that right?
46 MR. RHODES: Yes, between --

1 CHAIRMAN DAVIDSON: 65.
2 MR. RHODES: 1965 --
3
4 CHAIRMAN DAVIDSON: And '82. Do you have any estimation of how many
5 acts of any governmental body in Mississippi that have not been submitted for preclearance since
6 1982? And let me put it slightly differently. Are you confident that jurisdictions in Mississippi
7 are now abiding by the law that requires them to submit all proposed changes?
8 MR. RHODES: Unfortunately most -- I think most jurisdictions, they would think certain
9 things will need to be submitted, like redistricting plans. But they don't view everything as a
10 change in voting, so they don't submit everything. So there are a lot of voting changes that have
11 not been submitted, and as we catch them, like Ellis said, then we bring litigation to try to force
12 them to be submitted.
13 But they only submit that that have been tested time and time again, and they know that
14 that needs to be submitted along the local level, and even in the Mississippi Legislature. Even
15 after we brought the lawsuit Murphy versus Pitman to force them to submit all those changes.
16 Since then, there have been voting changes that slipped through the crack.
17 CHAIRMAN DAVIDSON: Along the same lines, let me simply pose this question to
18 Ms. Wright, and that's with regard to the motor voter dual registration requirement there. You
19 said, I believe, that when the Legislature went to the dual system, or passed a bill to that effect,
20 that it was not submitted, and so you had to then institute an enforcement action to get them to
21 submit it, and it went all the way to Supreme Court.
22 And I'm just curious as to what their reasons were at the beginning as to why it was not
23 necessary to submit that change for preclearance in a Section 5 state.
24 MS. WRIGHT: Well, to be accurate, they didn't -- the legislature didn't enact a dual
25 system. What they simply did was administratively -- there was no new legislation. They simply
26 administratively started implementing the NVRA for federal elections, and not for any other
27 elections, but using all of the same forms and procedures that have been set up in contemplation
28 of a unified system.
29 For example, the voter registration form that they were using for NVRA registration was
30 entitled something like "Mississippi Voter Registration Form." It was nothing on it that would
31 tell you that if you use that form to register, you were only going to be registered for federal
32 elections and not for all elections.
33 But this was not done by the Legislature. It was done administratively. However, it's
34 absolutely clear, and it has been since Allen versus Board of Election in I think 1969, that even
35 administrative changes, all kinds of changes, no matter who makes them, have to be submitted
36 for preclearance.
37 Another reason they gave for not submitting this program for preclearance was that it
38 wasn't really a change because we're just trying tocomply with a federal law, the motor voter
39 law. But as we pointed out, that argument also had been disposed of in the Allen versus State
40 Board of Elections case, because one of the changes that the court in that case held to be covered
41 by the preclearance requirement was a change that Virginia enacted for the very purpose of
42 complying with the Voting Rights Act itself.
43 And the reason that even those changes that are meant to comply with federal law have to
44 be submitted for preclearance is that there's always a lot of discretion in the way, you know, a
45 particular law might be implemented. There's always room for doing it well, doing it poorly,
46 doing it in a way that fully enfranchises people or in a way that it doesn't.

1 And so, there were a series of arguments that if you ignored all past Supreme precedents,
2 you know, they sounded plausible, but they were really we felt foreclosed by precedents. And,
3 you know, we did get a unanimous decision in the Supreme Court, which is not -- you know,
4 when you get Justice Cooley and Justice Thomas on your side together with all the other justices,
5 you feel like you probably have had a pretty good case going in.
6 CHAIRMAN DAVIDSON: Thank you. I'm struck in listening to the testimony of several
7 of you with regard to Section 5 enforcement that while this Commission has a good
8 comprehensive list of Department of Justice enforcement actions, we don't have anything
9 approximating a good list of enforcement -- Section 5 enforcement actions that have been
10 brought by individual citizens.
11 And I would very much hope that each of you could submit to us after your testimony
12 today any list that you might have or be able to compose without too much difficulty of Section 5
13 enforcement actions here in Mississippi, or for that matter elsewhere, but particularly Mississippi
14 that you have been involved in. That would be very helpful to the Commission.
15 I know Mr. Turnage mentioned several of those actions that he personally had been
16 involved in, and I would really like to get a list of cases if I could.
17 MR. TURNAGE: Tim, I think it was a list attached to my CV that I think that --
18 CHAIRMAN DAVIDSON: Good, thank you. Thank you very much. That may be the
19 easiest way for each of you to get a list to me here.
20 MR. BUCHANAN: Mr. Chairman, while you're looking, may I make one more brief
21 comment?
22 CHAIRMAN DAVIDSON: Certainly.
23 MR. BUCHANAN: I just want you Mississippians to know you may be unique, but you
24 got a lot of kissing cousins in Alabama.
25 CHAIRMAN DAVIDSON: This question is again for Mr. Rhodes. You mentioned I
26 believe it was this past year that the Legislature reinstituted a number of posts in 19 -- was that
27 legislative districts or some kind of districts.
28 MR. RHODES: That was a judicial district.
29 CHAIRMAN DAVIDSON: Judicial districts. And I take it that that change was
30 submitted to the Justice Department for preclearance.
31 MR. RHODES: It was submitted in July of this year, July 2005, and Justice precleared it
32 September the 15th.
33 CHAIRMAN DAVIDSON: They precleared it.
34 MR. RHODES: They precleared it, even though it was retrogressive. And several
35 organizations and individuals submitted comments to the Justice urging an objection because it
36 was retrogressive, and Justice had objected to these same changes that were submitted in 1986.
37 On July the 1st, 1986, they entered an objectional letter to Mississippi's change from single
38 member districts to at large with a numbered post feature.
39 And they objected as it being retrogressive. And then we obtained a federal court
40 injunction with the State of Mississippi agreeing and Justice being a party in 1989 outlawing the
41 numbered post feature. And then, the Mississippi Legislature enacted legislation increasing the
42 number of districts and outlawing the numbered post feature in 1994. But when they came back
43 and submitted it in 2005, Justice precleared it.
44 CHAIRMAN DAVIDSON: Would it be possible for you to send to the Lawyers'
45 Committee, mainly the Commission here, the comments that you mentioned that various

1 organizations made about the appropriateness, or lack thereof, of that failure to object on the part
2 of the Justice Department.
3 MR. RHODES: I'll be more than happy to.
4 CHAIRMAN DAVIDSON: Okay. Thank you.
5 MR. GREENBAUM: Mr. Rhodes, did that apply to all of the judicial districts in the State
6 or just those that did not have a majority of black districts?
7 MR. RHODES: That applied to the ones that did not have a majority of black districts.
8 What had happened, Mississippi had a hodgepodge election mechanism after the Kirkland versus
9 Lane and Martin versus Lane case. In areas where you had sufficiently large black population
10 where you could draw single member districts, you had sub-districts divided for election
11 purposes.
12 But in areas where you did have sufficiently large black populations to draw a single
13 member sub-district, then single shot voting was permitted. The numbered post feature was
14 outlawed, and people were allowed a single shot vote. And blacks were elected as judges in those
15 areas where they could single shot vote between 1989 and 1994.
16 MR. MCDUFF: There were some -- were and are some majority white judicial districts
17 that did have numbered posts, because there had been no objection under Section 5 to the
18 numbered posts in those districts in the late '80s, because there hadn't been seats added to be
19 precleared and that sort of thing. So it isn't every majority black district from which numbered
20 posts were abolished, and there were 19 of them.
21 MR. RHODES: There were 19.
22 CHAIRMAN DAVIDSON: And I have a question for Ms. McDonald who talked at some
23 length about the purging of African-American voters from rolls, and I believe you referred to
24 some of those as illegal purges. Has there been any legal action taken to get the people back on
25 the rolls who have been purged?
26 MS. MCDONALD: Well, Carroll and I, the case I mentioned, we had a case where the
27 sheriff in Wilkinson County was -- they did -- mounted an election contest, and he had to run
28 again.
29 But the problem was there had been 60 or 70 voters purged. He lost -- well, he won by 16
30 votes anyway, but there had been 60 or 70 black voters purged a couple of weeks before the
31 election. And as a result, we filed a lawsuit challenging that action under and stating that Section
32 24of the Mississippi Constitution was -- the whole basis of it was intent, the 1890 Constitution.
33 And there was a case out of Alabama, I believe, that had declared the same statute in
34 Alabama unconstitutional. But it's interesting to note that constitutional provision is still -- you
35 know, it's still a valid constitutional provision that is used by the Secretary of State to determine
36 which are the disenfranchising actions.
37 And basically, I mean, there's -- they're expanded as a municipality or a county rights end
38 to say is this a disenfranchising action under 24or a crime under 241. Then the Secretary of State
39 sends back and says, oh, yes, it is. And when we call, and we say, well, now, that's not
40 specifically stated in Section 241. And then the Secretary of State said, well, that's been the
41 interpretation.
42 So that is, I guess, the Attorney General and the Secretary of State. So we have a problem
43 of, I guess like Brenda said, these -- and Carroll -- there are a lot of Section 5 changes that aren't
44 called Section 5 voting changes by the Legislature. They're administrative changes, and they go
45 on from the election commissioners all the up to the Secretary of State's office.

1 CHAIRMAN DAVIDSON: You obviously consider these to be changes that should be
2 precleared. Are they ever submitted, or do you try to enforce preclearance with regard to this
3 expanding list of disenfranchising measures you're talking about.
4 MS. MCDONALD: I don't think there's been any organized effort to say write Justice and
5 say that there's been a change here, and this needs to be precleared, or you need to interpose an
6 objection. I don't think there is that mechanism in place. But there needs, I believe, to be a
7 comprehensive study of the types of administrative changes.
8 Because I think they're more -- I think they're more hurtful to the voting process really
9 than these overt changes that the Legislature does. You know, the Legislature writes up a bill,
10 and they send it into Justice, and whether it's in force or not, a lot of them aren't, but there are
11 lots of other things that are going on. There are impediments to voting that are just as bad as pre-
12 '65 impediments.
13 MR. TURNAGE: Jim, I had -- on the same note, I had a case -- it wasn't to the voter. It
14 was to the candidate, alderman candidate in Canton, Mississippi. It's a published opinion.
15 McLaughlin versus The City of Canton.
16 What this case is about, my client beat an incumbent alderman in the primary election,
17 and she found out that he had pled guilty. He wrote a bad check to -- well, his wife wrote the bad
18 check to one of her employees. It was cashed at a grocery store in Canton.
19 And the lady that he beat found out about this check, and she went to justice court and
20 got a copy of his record and gave it to the City of Canton Election Commission, and said, hey,
21 he's a convicted felon -- I mean, false pretenses, even though it's a misdemeanor charge in
22 Mississippi.
23 But the underlying fact in the case is that it was a bad check charge, which is a separate
24 statute. False pretenses, what they charged him with falls within Section 241, and it is
25 disenfranchising. But Judge Wingate found that to deprive a misdemeanor of the right to vote is
26 inconsistent with equal protection laws, and he struck it down. But now, that was the only time
27 I've run into that.
28 But I'm sure, I'm confident, and I hear in a lot of towns that like people who have been to
29 the penitentiary -- and this is -- it's only nine under Section 241, if I remember, murder, rape,
30 bigamy, false pretenses, and I can't tell you all of them. Theft, which would be a misdemeanor as
31 well.
32 But, basically, the point I'm getting at is these correctional officers, these parole officers
33 telling these people, hey, you can't vote. You've been convicted of a felony, even though it's not
34 one in Section 24that's enumerated. The word is out there if you've been to prison, you can't vote.
35 And since we disproportionately go to prison, especially in the Delta counties I see it all
36 the time, the people are being told that they can't vote for those reasons.
37 CHAIRMAN DAVIDSON: This, to me at any rate, raises an interesting legal question. If
38 people make these statements to prisoners more or less on their own. I mean, they're prison
39 officials, I gather, of some kind or other, it in some sense or other becomes a practice or a quasi-
40 legal or administrative decision.
41 And in some sense or other, you would read Section 5 to say that that kind of an
42 administrative interpretation ought to be precleared, but how you would go about enforcing that
43 kind of an administrative decision that may be the work of one person or a few people just kind
44 of taking the law into their hands is a mystery to me. As a non-lawyer, I just don't have any idea
45 how you would deal with that.

MR. MCDUFF: Well, we're actually hoping in the near future to deal with a larger problem, because we're doing some historical research right now on the 1890 constitutional provisions and the amendments to it in 1950 and 1968 to try to mount a 14th Amendment equal protection challenge against the entire constitutional provision, which tells people they can't vote if they've been convicted, similar to the one that succeeded in Alabama.

There's a Fifth Circuit precedent that creates a problem, but we're trying to put together the research to work around that, and hopefully we'll be filing a court action in the near future. If we read the whole thing, then, yeah, maybe the word will get out that once people -- that people are not necessarily disenfranchising because they've been convicted of a felony in Mississippi. But that's an obstacle we've got to overcome or work on.

CHAIRMAN DAVIDSON: On behalf of the Commission, I want to thank you from the bottom of my heart for appearing here today and giving such excellent testimony. I assure you it will be made use of as we prepare a report, and I just thank you, and I know that all of the other Commissioners thank you as well, and it's a pleasure listening to you testify. Thank you.

(APPLAUSE.)

CHAIRMAN DAVIDSON: If there are people now who would like to testify, members of the public to the Commission, I urge them to come forward and do so.

(Off the record.)

CHAIRMAN DAVIDSON: Ladies and gentlemen, we're ready to convene our second panel consisting of people who have come forward with testimony to give to our Commission. The three panelists are Lawrence Gill, John Walker, and Carlton Reeves. We will try to keep each person's testimony to ten minutes or less. If you have any prepared or written comments that you would like to also give to the Commission, we would be very happy to receive those. And I would like each of you to begin by telling us a little bit about yourself and then giving us your testimony. So I will begin. You're Mr. Gio; is that right?

MR. WALKER: No, I'm John Walker.

CHAIRMAN DAVIDSON: Wrong end. All right. I'm sorry. You're Gyot? Gyot, I'm sorry.

MR. WALKER: That's all right. You're in a lot of company.

MR. ROGERS: How do you spell that, Mr. Gyot?

MR. GYOT: G-Y-O-T.

CHAIRMAN DAVIDSON: So it's Mr. Reeves?

MR. WALKER: Mr. Walker.

CHAIRMAN DAVIDSON: Mr. John Walker, would you commence, please.

MR. WALKER: I just want to thank the members of the Commission. My name is John Walker. I'm an attorney here in Jackson, Mississippi. I'm what I would call a blue collar, shirt sleeve lawyer in Jackson, Mississippi, and have been since 1971, and have been involved in Mississippi elections since '71.

I came here this morning just to hear this testimony, but after hearing it, I felt compelled to step forward to buttress some of the testimony that was presented here this morning. Since 1973, I also started representing now Congressman Thompson. When he was the Mayor of Bolton, I served as his city attorney until '79, and then helped with his campaign when he became a Hinds County supervisor, and then worked on his campaign when he was elected in 1993 to Congress.

I've been actively involved in Mississippi elections since 1971, and I would just echo what the first panel stated, and this -- I would also say this for the record. The members of the

first panel, these were the cream of the crop. These were probably the -- if not the best, some of the best lawyers in the areas voting rights in this country, and they have had remarkable success and achievements in that area. And I think that their testimony is testimony that is very credible and very worthy of consideration.

But in terms of the Voting Rights Act, I cannot urge the importance of it being reenacted. I would say that the Voting Rights Act is the 5,000 (inaudible), and we've seen all in the news about Hurricane Katrina. Well, I would say that the Voting Rights Act are the levees that keep repression out of Mississippi.

If not for the Voting Rights Act, if that levy is broken, New Orleans would look like a Sunday School picnic compared to what will happen in Mississippi, because the oppression will rain down. And what I'm saying is that the forces are here to come forward with oppression. We only have to look at the -- and as Carroll Rhodes accurately described, the Mississippi power structure now knows not to use the "N" word, and basically, you know -- basically screw folks with a smile.

And so -- but as you can see in their actions that if the Voting Rights Act is not reenacted, it will be a whole cascade of repressive actions and activities. You don't have to look at the recent Supreme Court raised up Justice James Graves where the advertisements of his opponents was that he was one of us. And this was the message. His -- the white opponents campaign, where all of his campaigners were each one of us.

At every election there's voter intimidation in the blacks precincts. You know, I'm where the road meets the road in the elections. I'm on the ground in the precincts during elections. And in the black precincts -- and it starts back in the early '80s when Nora (sic) Stewart, who was Justice Banks former law partner, she ran for county judge here in Jackson. And in the election, her opponents, they came in with all these security guards into the black precincts and was stopping black voters as they were coming into the precinct asking for IDs, where there was no ID requirement. They had video cameras to intimidate voters. And this thing is just -- this is an intimidating thing for people who are not used to confronting the power structure to go exercise their right to vote, and it's a deterrent.

But, fortunately, because of the fact that we had some organization, we were able to bring a counterforce up of community folks who confronted these security guards and ran them off. But, I mean, this should not have to happen. And what I'm saying is because of the Voting Rights Act, people, you know, sometimes -- are sometimes reticent to do, engage in this conduct, because they don't want to end up in some sort of lawsuit.

What Deborah McDonald stated is very true about the administrative changes. I think she and Carroll were mentioning that. That really changed voters procedures and have an impact on voting. And one of them is for instance a situation of what they call affidavit ballots. The law is -- it goes back and forth on these affidavit ballots.

An affidavit ballot is basically where when a person goes to the poll to vote, and for whatever reason, his or her name is not on the poll vote there, they have to vote what's on the affidavit ballot. Well, whether or not that affidavit ballot is counted is determined by the election commission after the poll closes.

And what is supposed to be the determining factor, if that person's name is -- if that person is actually registered, but it was inadvertently left off the role. Well, one of the issues that comes up with these affidavit ballots is whether the poll manager initials that ballot.

And in many instances, poll managers don't know of any requirement to initial the ballot. Therefore, do not initial it, put it in the envelope, the voter doesn't know any better, and the

1 ballot goes down to the election commission, and the election commission -- depending on the
2 mindset of the election commission, it will determine whether or not they're counted depending
3 on whether they're saying it should be initialed.
4 In 1991, we had a situation here in Hinds County when Benny Thompson was still the
5 supervisor, there was a lady, a black lady by the name of Peggy Hopson who ran for supervisor,
6 she lost on the machines. She lost on the machines in Hinds County in a supervisor race.
7 However, then Benny Thompson at that time was a supervisor. He was at the election
8 commission, saw all of the boxes coming in, and saw a large number of affidavit ballots out of
9 her precincts.
10 And so, therefore, we monitored that process and found out that she had enough votes to
11 win if those affidavit ballots were counted. And the long and short of it is a decision was made
12 by the election commission that they would not count those affidavit ballots, because they were
13 not initialed.
14 A court challenge was brought, and eventually there was a ruling by the Supreme Court
15 that they did not have to be initialed. They were counted, and she was -- became the victor by
16 about five or six votes. Now, since that time -- I mean, that's a reported Supreme Court case. But
17 since that time, election commissioners in this State still do not count affidavit ballots unless they
18 are initialed. I mean, they'll make that decision. Unless the candidate is there and has an
19 aggressive force of people with him or her, they will not count it. And even if they have an
20 aggressive force, they will say they aren't going to count it, you can take it to court. And that
21 shouldn't be.
22 But because of the Voting Rights Act, some election commissions when you bring that
23 up, say, we're going to -- we're going to bring a suit, they'll back off and go ahead and do the
24 right thing. So, as I said, it's the levees that keep the repression from raining back and running
25 back into Mississippi.
26 And, I mean, that's something that has, you know, been a major problem in terms of the
27 powers of these election commissioners to make decisions in which -- and many times are
28 changes in the voting laws in terms of the decisions that they make whether or not to count these
29 votes, because, I mean, that's where a lot of discretion and judgment exists.
30 And the law is not clear, and -- I mean, there's a probably a lot of Section 5 violations
31 going on in those areas. And they also depend on interpretations of the law by the Secretary of
32 State. And the interpretation you get from the Secretary of State depends on who's giving the
33 interpretation. You know, one person in that office will give one interpretation, and another one
34 will give a different one.
35 So I would say that it's very important. And just in terms of improvements, that was a
36 question that was asked before, I mean, one thing that's always I guess concerned me and
37 puzzled me is, you know, when you have these federal reserves. And, you know, who basically
38 come and take notes, and you never know what happens after they take the notes.
39 First of all, I think that when you have the federal observers, it's important that the people
40 that they send to be federal observers are people who are supportive of the objectives of the
41 Voting Rights Act, who are interested in seeing it, as opposed to I've seen where people say, you
42 know, a federal observer, they say, I'm here because I was told to be here. And they have no
43 interest in making sure that the purposes of the Voting Right Acts are carried out.
44 But over and above that, they have no power. All they can do is take notes. In terms of
45 any observable abuses that are going on in their presence, they have no power to act or do
46 anything at that time to curtail that particular practice from going on. So I think it would be

1 important that -- you know, that would be a positive change that where the observers would be
2 people who are supportive and would have some power or authority to do something to curtail
3 the practice that's going on.
4
5 Like, for instance, I stated about Nora Stewart, there were federal observers there, and
6 they were just taking notes. And we said, well, do something about this. We can't do anything
7 about this, except take notes. So I urge you that the -- for the record to reflect that the Voting
8 Rights Act needs be reenacted and strengthened to keep the repression from returning. Thank
9 you.
10 CHAIRMAN DAVIDSON: Thank you, Mr. Walker. Mr. Reeves.
11 MR. REEVES: Yeah. I'd like to thank the Commission for being here. My name is
12 Carlton Reeves, and I'm here in a couple of different capacities. I am the secretary of the
13 Magnolia Bar Association, which is a bar association of mostly black attorneys in the State of
14 Mississippi.
15 Although we're primarily black attorneys, we're certainly not exclusive for black
16 attorneys, and any white attorneys who are also members of the Magnolia Bar. The Magnolia
17 Bar Association has stood on the forefront of fighting the battle toward reenactment of the
18 Voting Rights Act of 1982, as well as our efforts through election contests and otherwise. Since
19 that time, we're making sure that the right to vote for African-Americans is protected.
20 So I come in that capacity. In my personal capacity, I'm from Yazoo City, Mississippi, a
21 native of Yazoo City, having lived there through the '60s and '70s and been involved in elections
22 in my hometown in the State of Mississippi since the 1970s as a young kid, and further -- and
23 even today.
24 I have served as the -- I have served as an associate in a private law firm in town, and
25 after having a stent at the State Supreme Court where I was a law clerk and staff attorney. My
26 other jobs included chief of the civil division for the United States attorney's office here in
27 Jackson, Mississippi from 1995 to 2001.
28 Since 2001, I've been in private practice of a small law firm here in Jackson. I just want
29 to emphasize a couple of things. We understand that you cannot look at political races and
30 political things in a vacuum. We cannot look at things in a vacuum. There was much talk earlier
31 about the Gary Anderson race, for example. The Gary Anderson and Tate Reeves race. You
32 talked about the schism between the experiences of the two candidates and all everyone is
33 emphasized the relatively inexperience of Tate Reeves of whom there is no kin. I'm not any kin
34 to him all. And the inexperience of Tate Reeves versus Gary Anderson.
35 We can look at another race at that election cycle. Two guys with about the same amount
36 of experience in different capacities, and that was the Attorney General's race between Jim Hood
37 and Scott Newton. And they're relatively about the same age. Scott Newton being the Republican
38 candidate who lost resoundly to Jim Hood, the Democratic candidate. And Jim got those votes in
39 Rankin County and other counties that Gary Anderson did not get. MR. ROGERS: Was Scott the
40 black candidate?
41 MR. REEVES: No, Scott was a white candidate. So these are two white candidates. So
42 do not be confused about whether or not there would be crossover votes, because I think if you
43 look at the Tate Reeves and the Gary Anderson race, people say, well, it's not about race. It's
44 about experience or whatever it's about.
45 You just look at a race on the Attorney General side where you have a former district
46 attorney, Jim Hood, running in his first statewide race against Scott Newton, the Republican guy

1 who is former a assistant US attorney, former FBI agent, and you put those two candidates and
2 the scores that they got in their elections, and you will see that white people will vote for
3 experience on the state side, because they voted overwhelming for Jim Hood, who was a
4 Democratic candidate, for Attorney General.
5 And, obviously, he had some appeal to people who voted Republican for the governor's
6 race, people who voted Republican for the lieutenant governor's race, and people who voted
7 Republican in the treasurer's race. So it's not solely experience when you look at the Gary
8 Anderson race. Obviously, Gary was far more experienced than Tate Reeves, but for some
9 reason, white people did not vote for Gary Anderson, and those same people voted for Jim Hood.
10 With respect to the race that Mr. Walker talked about with -- the Supreme Court race of
11 Justice James Graves, it's interesting that his challenger, Samac Richardson who is a Circuit
12 Court in Madison, Rankin County areas did say that -- in his brochures and filings said that he
13 was one of us, and it's so interesting that Judge Richardson comes from and is a native of
14 Neshoba County, Mississippi and the City of Philadelphia area.
15 We know what those signals mean, being one of us. Well, we know what that association
16 is. And so, the other thing you look at in these other judicial races on the Supreme Court, all the
17 black justices of the Supreme Court were first appointed. No Justice has been elected first. There
18 comes -- something comes with incumbency, for example, and people might otherwise vote for
19 Supreme Court justices who have been there for a period of time.
20 And, you know, there's -- if an election is started with two new candidates, one black and
21 one white, it may not end in that same result with the black candidate having won. Reuben
22 Anderson was first appointed, Justice Fred Banks was first appointed, and so was Justice James
23 Graves.
24 Each one of them brought incumbency into their first election. And that, I think, sort of
25 begs the question of whether or not whites will vote for black candidates. And also, there is a
26 commitment among, as quiet as it kept, the business community and otherwise.
27 Some people sort of stay out of those races, because I do believe that Mississippi does not
28 want to give the image that it's reverting back to an all white Supreme Court, an all white
29 Supreme Court. So you might not see as much effort to de-elect or de-select the black incumbent
30 in those circumstances.
31 The Court of Appeals in the Mississippi Supreme Court, initially that is a new creature. It
32 is about -- it is less than 15-years-old, and when there was an opportunity to carve out or to
33 create the new Supreme Court, the -- excuse me, the Court of Appeals, the Supreme Court
34 initially went to a magistrate system first, a three judge magistrate system.
35 And I do believe those three judges back in the 1990-9were appointed by the Supreme
36 Court to serve in that gap filling capacity, and those were three white males who served as the
37 magistrates prior to the formation of the Court of Appeals.
38 I also bring to you some practical experience as and some antidotal stuff. I served as co-
39 counsel with Rob McDuff on at least a couple of cases. One of which is the case of Johnny
40 Johnson up in Drew, Mississippi. Drew, for those who don't know, is in the area with Fannie Lou
41 Hamer comes from. But Drew being a city that's probably about 80 percent African-American
42 have never had a majority black city council.
43 Johnnie Johnson ran for alderman at large. Her race, several of her votes were thrown
44 out, and we mounted an election contest, and eventually we challenged some of the votes that the
45 other side received. But more interestingly, we got votes counted that had been rejected by the

local commission. The end result was it ended in a tie after the trial. It ended in a tie, so the judge ordered a new election.

The most striking thing for me having grown up in the '70s and '80s was to bring forth black women who obviously still worked. Some of whom still worked for many people in power in Drew and Sunflower County, to come forth during the trial and testify, I cast my vote, and I intended for my vote to count, because the election commission had actually thrown out some of their votes because you did not have signatures and because you did not have -- well, because you did not have initials.

Those people cast their votes, came to the voting polls, did everything that they were supposed to do, so why should their vote have been rejected because a person in power or a person in control did not do what he or she was supposed to do, i.e., initial the ballot?

They had done everything else. They'd signed their ballot, they gave it to them, they put it in their control. It should have been counted. Eventually, after the new election, Johnny Johnson became the alderman at large, and the City of Drew had its first African-American predominant city councilman.

CHAIRMAN DAVIDSON: Mr. Reeves, at this point I have to tell you that we've got ten minutes before we have to leave, and if you can wrap it up and go on to Mr. Gyot I'd appreciate it.

MR. REEVES: Okay. The final case is the Michael Cathey case up in Senatobia, Mississippi. Michael Cathey was the only black African-American on the city council there, and there was a movement among the other members of the city council to have him removed from the board and claimed that he had moved outside of his district. Obviously, a challenge had to come on that, and we prevailed for Mr. Cathey, and he still serves.

CHAIRMAN DAVIDSON: Thank you very much. I'm sorry to push you here, but we're just running out of time. Mr. Gyot.

MR. GYOT: Thank you, Mr. Chairman. I am Lawrence Gyot. I'm a citizen of the State of Mississippi and a resident of the District of Columbia, citizenship by affirmation. I know of no greater state who has fought. Mississippi is why the Voting Rights Act exists. We attempted to bring the federal government into the voting question in the case of United States versus Woods in 1962.

We then got them committed to the United States versus Mississippi, which incidentally challenged the legitimacy and the constitutionality of all the voting laws in the State of Mississippi. At the same time, the State of Mississippi was attacked by the Mississippi Democratic party under Section of the 14th Amendment challenging the constitutionality of the seating of the Congressional Delegation of the State of Mississippi.

To his credit, Congressman McMullough, a Republican from Ohio, said this when the challenge was considered: We have a choice. We can unseat the Mississippi delegation, or we can strengthen the Voting Rights Act. That's how Section 5 came into existence. Let us understand that the fight to create Section 5, the fight to utilize it, Allen versus The Board of Elections was my idea, and Armand Derfner helped implement it.

We filed the suit here. So let's be very clear. The whole -- and, Mr. Rogers, I'm glad you asked the question that you asked. I want to quote a couple of people to you. Mr. Wilkins, the head of NAACP and the documentary eyes on the price said Mississippi is such a (inaudible) state, committed to savagery, that it should be cut off and allowed to drift into the sea. Lyndon Johnson said, there's America, there's the South, and there's Mississippi. The uniqueness of

Mississippi is its total commitment. See, the reason I'm so proud to be a Mississippian is in Mississippi, throughout its history, everything has been political. Whether you got pavement, whether you were in jail, whatever you wanted was framed -- that could be framed in a political lexicon was deliverable here.

So this State has been challenged on the Fannie Lou Hamer and others joined with the Mississippi Democratic party. We challenged the seating of the regular Democratic party at the National Democratic Convention. Now, various people give various reasons for the passage of the Voting Rights Act. Mary King in her book, "Freedom Song," said it was a congressional challenge that passed the Voting Rights Act.

John Lewis -- we all know who they are -- said that it was a summer project. Julian Bond says it was a combination of the two. But there's -- I'd like to refer you to the galleys of the book now being written called "Authors of the Liberation of the Mississippi Freedom Democrats and the Redefinition of Politics." It's written by --

CHAIRMAN DAVIDSON: Who's the author of this.

MR. GYOT: By Michael Paul Sistrom.

MR. ROGERS: Who was that?

MR. GYOT: The author. I'm sorry, hold on. Yes, "Authors of the Liberation of the Mississippi Freedom Democrats and the Redefinition of Politics" by Mike Paul Sistrom. He says, since 1965, the consensus has been to incorrectly give the Selma march (sic) sole credit in prompting Congress to pass the Voting Rights Act, while taking almost no notice of the contribution of the 1964 Freedom Summit and the Mississippi Freedom Democratic congressional challenge.

Historian David Garros (sic) observed that scholars have suggested, often with decrepitation, that had it not been for Selma, there would have been no initiative on voting rights in 1965. Such an account, Garros concludes, is not implausible, but when the actual evidence weighed, it is clearly incorrect.

Now, let us be clear. In my opinion, Lyndon Johnson could have given this speech. He could have said, I'm supporting the passing of the Voting Right Acts because of the State of Mississippi that has fought for years, that has been the most oppressed. I fought the Klan. The Klan burned torches in 6of 8counties in Mississippi in 1964 when the Selma project was announced. Selma project brought America to Mississippi.

Lyndon Johnson could have given credit to Mississippi, but he had a problem, because in '64, who did we have to fight in Atlantic City? Lyndon Johnson. Read "Judgement Days" by Nick Kotz. He documents the relationship between Martin Luther King and Lyndon Baines Johnson. He talks about the need for Lyndon to stop us in '64. Why? Because he thought he would lose the white vote himself. Preposterous, but that was Lyndon.

Now, my concern is if you -- and I want to point out. You've heard from two -- you've heard Neshoba County and you've heard McComb. I want to make it very clear: I don't contradict. I don't dilute in any way the testimony of all previous witnesses, because I think it's been excellent.

But I want to say to you, there's a coalition in Neshoba County of blacks, whites, and they did a couple of things. They said we're going to reopen the Schwerner, Chaney, and Goodman convictions, and that led to the conviction of Mr. Killen. They said more than that. Said we're going to change the name of the highway to Schwerner, Chaney, and Goodman Highway.

1 They brought it to the State Legislature. Not one member voted against it. I'm saying in
2 McComb, this book is the foundation for education, in Neshoba County and in McComb. This
3 book is created by us. It's called putting the movement back into civil rights teaching, which
4 demonstrates how to teach the civil rights movement from K through 1 with all of the myths
5 removed.
6 So let me say this, it is -- William Winter and I were on a panel in Minnesota, and we
7 were talking Mondell's roll in Atlantic City, and William Winter said it was a civil rights
8 movement in Mississippi that freed me and other white people. Now, all of you know William
9 Winter is the former governor and a member of President Clinton's commission on race. Let me
10 say that there is a possibility of racial reproach tomorrow in Mississippi, but it will only remain a
11 possibility as long as Section 5 exists. I don't want you to leave, Mr. Rogers, with the feeling that
12 there is no racial possibilities of reproach anymore in Mississippi, but they only exist because of
13 the political nightmare created by Voting Rights Act.
14 And if you remove Section 5, the day you remove -- Section 5 is weakened or removed,
15 we will have a return that will make savages shudder, because the fight in Mississippi is about
16 raw political power. But I wanted to say to you, if the collision in Neshoba County can come out
17 openly on the question of race, I think they're leading the country on the question of race. If
18 McComb can say this is going to be the foundation for the educational system, I think what
19 we've hit up on is that education might be the antidote around -- the solvent around which we can
20 all galvanize, because I can say to you confidentially, young white Mississippians are no better
21 educated than young black Mississippians.
22 And unless this country can deal with the question of race, and I think this is an
23 opportunity. I think it is in the national interest to see that Section 5 is passed, that it's intact,
24 because until we solve the question of racial in American, not only do I support the testimony of
25 everyone here, but it could be universal in this application.
26 We're becoming a country that is more racially polarized, and there are very few people
27 who are prepared to speak out on it. So this is about race, it's about fairness, it's about the most
28 successful legislation ever designed by the Congress. And it is in the national interest to
29 preserve, protect and correct it.
30 CHAIRMAN DAVIDSON: What a note to end these hearings on, folks.
31 (APPLAUSE.)
32 CHAIRMAN DAVIDSON: I want to thank each of you for your testimony. It's moving. I
33 have a hard time controlling my own emotions, but thank you.
34 MR. GYOT: Mr. Chairman, I want to do one thing. I want to enter this testimony by
35 Meredith Bell Flats in your record. It's the best I've heard on why Section 5 should be continued.
36 HONORABLE BANKS: Just one question to Mr. Reeves, because he's contrasted the
37 race between Attorney General Hood and his opponents, and Mr. Anderson and his opponents.
38 He said it wasn't about experience. I think the statement was it wasn't about experience, it was
39 about party. And the contrast there does belie that claim in that Attorney General Hood was
40 experienced as a former Assistant Attorney General and a District Attorney, and he was a
41 Democrat, and he won over.
42 And the candidate Anderson was experienced in governmental financial affairs, and he
43 was a Democrat, and he lost pretty clearly to a person that was clearly less qualified than him. So
44 it could not have been his party. Is that what you --
45 MR. REEVES: Thank you, Justice Banks, for that clarification. That is absolutely what I
46 was referring to.

1 CHAIRMAN DAVIDSON: Thank you very much.
2 (Hearing concluded at 12:30 p.m.)
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Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982

Final Report of the Voting Rights Initiative
University of Michigan Law School

Ellen Katz

with Margaret Aisenbrey, Anna Baldwin, Emma Cheuse, and Anna Weisbrodt

November 10, 2005

The University of Michigan Law School
Ann Arbor, Michigan

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Introduction

This year marks the fortieth anniversary of one of the most remarkable and consequential pieces of congressional legislation ever enacted. The Voting Rights Act of 1965 ("the VRA") targeted massive disenfranchisement of African-American citizens in numerous Southern states. It imposed measures drastic in scope and extraordinary in effect. The VRA eliminated the use of literacy tests and other "devices" that Southern jurisdictions had long employed to prevent black residents from registering and voting.[1] The VRA imposed on these jurisdictions onerous obligations to prove to federal officials that proposed changes to their electoral system would not discriminate against minority voters.[2]

Resistance was immediate both in the streets and in the courts, but the VRA withstood the challenge.[3] The result was staggering. The VRA ended the long-entrenched and virtually total exclusion of African Americans from political participation in the South. Black voter registration rose and black participation followed such that, by the early 1970s, courts routinely observed that black voters throughout the South were registering and voting without interference. That increased participation exposed less blatant inequalities and problems-complex issues such as racial vote dilution, the contours of which courts are still tackling today.

These persistent problems have led Congress to extend and expand the VRA each time its non-permanent provisions were due to expire. The ban on literacy tests, as well as the "preclearance" provisions contained in Section 5, initially were enacted to last for only five years. Nonetheless, Congress decided to extend these provisions in 1970, again in 1975, and for twenty-five more years in 1982. During the last renewal, Congress also expanded the terms of the core permanent provision of the Voting Rights Act-Section 2.

Four decades after their original enactment, the non-permanent provisions of the VRA are once again set to expire.[4] Congress must once again determine whether it should renew these provisions, make substantive alterations to them, or simply let them lapse. To make this determination, Congress needs information about the past and present status of minority participation in the political process.

The Voting Rights Initiative ("VRI") at the University of Michigan Law School was created during the winter of 2005 to help address this need and to help inform the nationwide discussion on voting rights now under way. A cooperative research venture involving 100 students working under faculty direction set out to produce a detailed portrait of litigation brought since 1982 under the core permanent provision of the Voting Rights Act. This Report evaluates the results of this survey. The comprehensive data set may be found in an analytically structured as well as searchable form at http://www.votingreport.org. The aim of this report, the accompanying website, and the project as a whole is to contribute to a critical understanding of current opportunities for effective political participation on the part of those minorities the Voting Rights Act seeks to protect.

The Project: Background, Goals, and Methods

STATUTORY BACKGROUND

The Voting Rights Act of 1965 was enacted in response to the continued, massive, and unconstitutional exclusion of African Americans from the franchise. Despite the ratification in 1870 of the Fifteenth Amendment, which prohibits denying or abridging the right to vote on the basis of race, color, or previous condition of servitude, state voting officials continued to devise mechanisms to exclude African-Americans from the franchise.[5] Judicial invalidation of one such practice prompted the creation of another to achieve the same result. Moving from outright violence to explicit race-based exclusions to "grandfather clauses," literacy tests, and redistricting practices, many former Confederate states (and several others) successfully prevented African-Americans from participating in elections for nearly a century.[6]

Prompted by several notorious attacks on civil rights activists and recognition of the scope of African-American disenfranchisement, Congress and the President acted to remedy the ineffectiveness of existing anti-discrimination provisions in 1965. The statute they created would both reaffirm the basic constitutional prohibition against race-based exclusions from the franchise and make those constitutional prohibitions effective.

The central provision of the Voting Rights Act is Section 2, which, as originally enacted, closely tracked the wording of the Fifteenth Amendment.[7] To this Congress added Section 4, which suspended the use of particular exclusionary practices, and Section 5, which demanded that jurisdictions with extremely low levels of voter registration and turnout seek "preclearance" from federal officials before implementing any changes to their voting laws and procedures.[8] The non-permanent provisions of the Voting Rights Act, including Section 5, were extended in 1970, 1975, and 1982, and are due for re-authorization in 2007.

Congress enacted the current version of Section 2 when it amended the statute in the course of reauthorizing the nonpermanent provisions in 1982. The amendment was a response to the Supreme Court's interpretation of the VRA in a case brought by African-American residents in Mobile, Alabama.

By the summer of 1975, black citizens in Mobile were registering and voting without hindrance, a feat that would have seemed impossible a decade earlier. And yet, ten years after passage of the Voting Rights Act, black residents in Mobile noticed that their participation seemed to be making little difference to the substance and structure of local governance. At the time, African Americans comprised approximately one third of the city's population, white and black voters consistently supported different candidates, and no African-American candidate had ever won a seat on the three-person city commission. Housing remained segregated, black city employees were concentrated in the lowest city salary classification, and "a significant difference and sluggishness" characterized the City's provision of city services to black residents when compared to that provided to whites.[9] Since 1911, Mobile had chosen its commissioners in city-wide at-large elections.

In June of 1975, African-American residents in Mobile filed a class action lawsuit challenging the city's at-large electoral system. Two lower federal courts held that this system unconstitutionally diluted black voting strength.[10]

In 1980, the Supreme Court reversed. In *City of Mobile v. Bolden*,[11] the Court held that neither the Constitution nor Section 2 of the Voting Rights Act prohibited electoral practices simply because they produced racially discriminatory results. The Court determined that these provisions proscribed only those rules or practices enacted with racially invidious intent. Mobile's at-large system remained permissible unless the plaintiffs could demonstrate that the city adopted the at-large system for the purpose of diluting black voting strength.[12]

In 1982, Congress responded to *Mobile* by amending Section 2 to create an explicit "results"-based test for discrimination in voting. As a result, Section 2 provides today:

> *No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [on account of statutorily designated language minority status].*[13]

Determining whether a particular electoral rule results in a denial or abridgment of the right to vote is a complex inquiry. The statute indicates that to prevail under Section 2, plaintiffs must demonstrate that, "based on the totality of circumstances...the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial or language minority]." Plaintiffs must show that members of these protected classes "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Relevant to the inquiry is "the extent to which members of a protected class have been elected to office in the State or political subdivision," although the statute is explicit that it creates no right to proportional representation.[14]

The Senate Judiciary Committee issued a report to accompany the 1982 amendment to Section 2, now known as the *Senate Report*.[15] The Supreme Court has since described this report as "the authoritative source" on the meaning of the amended statute.[16] The Report identified several factors, now known as "the Senate Factors," for courts to use when assessing whether a particular practice or procedure results in prohibited discrimination, in violation of Section 2. Derived from the Supreme Court's analysis in *White v. Regester*,[17] and the Fifth Circuit's subsequent decision in *Zimmer v. McKeithen*,[18] these "typical" factors are:

> *1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;*
>
> *2. The extent to which voting in the elections of the state or political subdivision is racially polarized;*
>
> *3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;*
>
> *4. If there is a candidate slating process, whether members of the minority group have been denied access to that process;*

> *5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;*
>
> *6. Whether political campaigns have been characterized by overt or subtle racial appeals;*
>
> *7. The extent to which members of the minority group have been elected to public office in the jurisdiction.*[19]

The *Senate Report* also identified two additional factors that have "probative value" in establishing a plaintiff's claim under the amended statute, often considered Senate Factors 8 and 9, namely whether "there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group"; and whether the justification for the policy behind the practice or procedure is "tenuous."[20]

The 1982 amendment to Section 2 dramatically altered voting rights litigation nationwide. While prior to 1982 plaintiffs had rarely invoked Section 2 in its original form, most plaintiffs alleging racial vote dilution since 1982 have consistently brought their claims under Section 2.[21]

In 1986, the Supreme Court issued its first major decision addressing the 1982 amendments to Section 2. In *Thornburg v. Gingles,* African-American voters in North Carolina challenged a state-wide legislative districting plan, seeking to replace some of the plan's multi-member districts with single-member districts in which black voters would comprise a majority. The Court used the case as a vehicle to articulate a three-part test for bringing a Section 2 claim: the minority group must demonstrate that, first, it is "sufficiently large and geographically compact to constitute a majority in a single-member district;" second, that it is "politically cohesive;" and, third, that "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate."[22] The *Gingles* case itself involved a challenge to multi-member districts, but courts soon extended its framework to cases where plaintiffs challenged single member districts.[23]

Eight years later, the Supreme Court decided *Johnson v. De Grandy,* which made clear that the *Gingles'* preconditions were precisely that, preconditions, and not a substitute to adjudication under the totality of circumstances test. Courts that find the preconditions met must proceed to evaluate whether under the totality of circumstances relief is warranted. *De Grandy* found such relief unwarranted in the case before it-a challenge to statewide districting plan brought by African-American and Latino plaintiffs. The Court concluded that plan achieved "proportionality" because "both minority groups constitute effective voting majorities in a number of state Senate districts substantially proportional to their share in the population."[24]

Two years ago, the Supreme Court handed down *Georgia v. Ashcroft,* in which it evaluated whether Georgia could replace several of its majority-minority districts with districts where minority voters constituted only a plurality. In concluding that nothing in Section 5 of the Act prevented Georgia from doing so, the Court relied significantly on its own precedent construing Section 2.[25] Recent Section 2 decisions now discuss *Georgia v. Ashcroft* when assessing challenges to various districting practices.[26]

RESEARCH OBJECTIVES

A detailed understanding of Section 2 litigation informs several issues Congress must confront as it evaluates the reauthorization of the expiring provisions of the Voting Rights Act. First, the record of judicial implementation of Section 2 will inform the question whether the auxiliary provisions, such as Section 5, are still helpful today. To be sure, Section 5 is distinct from Section 2 in that compliance with Section 2 is neither necessary nor sufficient to obtain preclearance from the federal government. Nonetheless, analyzing the judicial record of Section 2 decisions-including the structured nature of the judicial inquiry under the Senate Factors-helps illuminate the extent to which meaningful minority participation in elections has been a reality in recent times. Put another way, Section 5 was originally enacted because "Congress had found that case-by-case litigation was inadequate to combat wide-spread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits."[27] Even though the Voting Rights Act successfully reduced the incidence of those tactics, the persistence of many such "obstructionist tactics," as this study documents, suggests that Section 5 remains a useful tool today to protect the basic right to political participation.

Second, the record of judicial implementation of the core provisions of the VRA provides helpful evidence in determining whether the constitutional predicate necessary for Congress to exercise its legislative powers in this area exists. Recent Supreme Court decisions have demanded increased scrutiny of the connection between the perception of a constitutional evil and the remedy enacted under Congress's power to enforce the Civil War amendments. In *City of Boerne v. Flores*, the Supreme Court announced a rule that Congress could only invoke its legislative powers under Section 5 of the Fourteenth Amendment where the Congressional legislation was "congruent and proportional" to "remedy or prevent" an underlying constitutional violation.[28] The same is true for the power to enforce the Fifteenth Amendment pursuant to Section 2 of that amendment.[29]

To be sure, Section 2 prohibits more than the Fifteenth Amendment itself prohibits. In particular, Section 2's "results-based" test goes beyond what the Fifteenth Amendment alone commands. As a consequence, the record of Section 2 violations does not necessarily indicate the existence of constitutional violations, and therefore does not necessarily provide the proper predicate for Congress's exercise of its enforcement powers under the Fifteenth Amendment.

And yet, an examination of Section 2 cases can provide the requisite foundation for Congress's exercise of its enforcement powers. As an initial matter, some Section 2 violations are constitutional violations.[30] These may figure directly into the calculus of whether the predicate for Congress's exercise of its enforcement powers exists. Moreover, courts assessing the Senate Factors in the course of adjudicating Section 2 cases have documented evidence that reveals a wide range of unconstitutional conduct by state and local officials in specific regions across the Nation. While these judicial findings are not formal adjudications of unconstitutional conduct, they represent the considered judgments of federal judges nationwide that the evidence they reviewed reveals conduct that runs afoul of the Constitution. These findings accordingly provide a basis on which Congress can rely in determining the scope of unconstitutional conduct and the need for a federal law that goes beyond the simple prohibition of the unconstitutional act itself.

Third, Section 2 decisions tell a powerful story about the health of minority political participation throughout the United States since 1982. And they do so *in Congress's own terms*—in the way Congress asked courts to assess political equality and to determine whether to issue a remedy. Any examination of Congressional policy in this area should therefore begin with how the courts have addressed minority political participation in the course of implementing the VRA.

Fourth, an examination of these decisions illustrates how both claims and remedies have changed over the years. Enacted by Congress in 1965 to address the specific problem of black disenfranchisement in the South, the Voting Rights Act has been amended to protect language minorities and today is invoked by several different minority groups to challenge a host of electoral practices throughout the country. The findings in these cases offer a lens, that Congress itself defined, through which variations in political participation over time and region may be viewed and evaluated. Finally, the re-authorization of the Voting Rights Act's non-permanent provisions provide an opportunity for Congress to give further guidance on how it believes the law as a whole should operate. Documentation of the judicial record in Section 2 cases—in particular, courts' analysis of the various Senate Factors and the judicial choice of remedies—therefore may be useful to inform Congress on how federal judges have understood the instructions contained in the VRA and whether those instructions are in need of revision.

RESEARCH PROJECT AND DESIGN

The Voting Rights Initiative is a faculty-student research collaborative established in January, 2005 at the University of Michigan Law School. Working under the direction of Professor Ellen Katz, a group of more than 100 Michigan law students set out to document the nature and scope of litigation brought under Section 2 of the Voting Rights Act since 1982.

Researchers began by searching the federal court databases on Westlaw and LexisNexis to identify electronically published decisions addressing a Section 2 claim. To develop this list, researchers searched these databases for every federal court decision that cited 42 U.S.C. § 1973 since June 29, 1982, when Section 2 was amended. The resulting list was then narrowed by identifying cases in which plaintiffs had filed an actual *claim* under Section 2, and removing all decisions that merely reference Section 2 without involving a claim brought under that provision.[31]

Researchers then located on these databases all related decisions and organized them by lawsuit with a single "litigation" title for quick reference.[32] Within each lawsuit, researchers determined which opinion provided the "final word"[33] for the purposes of this project, since many lawsuits included multiple appeals and remands. The final word case in each lawsuit is usually the last case in the lawsuit that assessed liability on the merits and determined whether Section 2 was violated. If there was no such case to analyze, researchers coded as the final word the last published case in the lawsuit making some other determination for or against the plaintiff, including whether to issue a preliminary injunction, whether to order a settlement, what remedy to order, and whether to grant fees.[34] In these latter cases, the contours of the underlying Section 2 claim group and the court's analysis of it were often difficult to discern as the reported decision was addressing a distinct question. Still, these cases, especially preliminary

injunction cases, sometimes included reference to some Senate Factors or other substantive Section 2 criteria, and where possible researchers documented these findings. Even where nothing more than the fact of decision could be discerned from these decisions, researchers included the lawsuit in the overall list of lawsuits to attempt to give as broad a picture as possible of Section 2 litigation.

Researchers reviewed each case within a litigation string and followed a standard checklist (see Data Key located at www.votingreport.org) to catalogue the information discussed and determine the outcome in each lawsuit analyzed. Researchers recorded which of the nine Senate Factors, if any, the reviewing court found to exist, and whether the court ultimately found a violation of Section 2. Researchers also tracked how courts have treated the so-called "*Gingles*" threshold test (set forth by the Supreme Court in its 1986 opinion *Thornburg v. Gingles*[35]), the law or practice challenged in each lawsuit, the implicated governing body, the state of origin, the minority groups bringing the claim, the involvement of expert witnesses, and other basic case data such as the judges and lawyers involved with the case.

Each case was read and catalogued by multiple researchers working independently — then by research directors and then checked for consistency by editors. The case reports are available at: http://www.votingrights.org.

Since the completion of the case reports, searches have been designed and the database used to document and analyze the particular findings in this report. All of case reports and searches to access this data are available at www.votingrights.org. This site includes lists of cases, organized by lawsuit and by state, that: identify a violation of Section 2; identify such violations in covered jurisdictions; find each of the Senate Factors; challenge specific types of electoral practices; challenge certain governing bodies; and involve particular minority groups.

The Findings: Documenting Discrimination

OVERALL RESULTS

The Numbers

This study identified 323 lawsuits, encompassing 748 decisions that addressed Section 2 claims since 1982.[36] These lawsuits, of course, represent only a portion of the Section 2 claims filed or decided since 1982. Of the total number of cases filed, some plaintiffs failed to pursue their claims, many settled, and others saw their cases go to judgment, but the courts involved did not issue any published opinion or ancillary ruling published on the electronic databases surveyed (i.e., Westlaw, LexisNexis). The total number of claims filed under Section 2 since the statute was amended is accordingly not known.

The ACLU has recorded that approximately 1 out of 5 of their plaintiffs' Section 2 cases filed in Georgia and in South Carolina ended with a reported decision.[37] In Texas, the Section 2 litigation record of attorney Rolando Rios shows that 8 of 211 or 3.8% of his law firm's filed Section 2 lawsuits ending with a reported decision.[38] Insofar as these ratios of filings to reported decisions are at all representative, this study's compilation of 323 lawsuits suggests more than 1600 Section 2 filings nationwide with filings in covered jurisdictions possibly exceeding 800 filings.

Of these lawsuits, 208 produced at least one published liability decision under Section 2. The remaining 115 include lawsuits in which the only decisions published on Westlaw or LexisNexis addressed preliminary matters (74 decisions) or fees, remedy, or settlement issues (41 decisions).[39] Of the 208 lawsuits that ended with a determination of liability, 97 (46.6%) originated in jurisdictions covered by Section 5 of the Voting Rights Act, and 111 (53.4%) were filed in non-covered jurisdictions.[40]

Of lawsuits identified, 86 documented a violation of Section 2 — either on the merits or in the course of another favorable determination for the plaintiff. Another 28 lawsuits made a favorable determination for the plaintiff (such as issuing a preliminary injunction, granting a settlement, awarding fees, or crafting a remedy) without deciding whether Section 2 was actually violated. Plaintiffs accordingly succeeded in 35.3% of the lawsuits identified in this study.[41]

Plaintiffs won more Section 2 lawsuits in Section 5-covered jurisdictions than they did in non-covered jurisdictions. Of the 114 successful plaintiff outcomes documented, 64 originated in covered jurisdictions and 50 elsewhere,[42] even though less than one-quarter of the U.S. population resides in a jurisdiction covered by Section 5.[43] Plaintiffs in covered jurisdictions also won a higher percentage of the cases decided than did those in non-covered ones. Thirty percent of the 164 lawsuits published in non-covered jurisdictions ended favorably for plaintiffs, while 40.5% of the 158 lawsuits from covered jurisdictions produced a result favorable to the plaintiffs.
Courts identified violations of Section 2 more frequently between 1982 and 1992, than in the years since. Of the 86 total violations identified, courts found 61.6% of them during the first period, 38.4% since then.[44]

In all, 138 of the 323 total lawsuits challenged at-large districts, and of these, 52 held the practice to violate Section 2.[45] In addition, 8 lawsuits challenging at-large election systems otherwise ended with a favorable outcome for the plaintiff (such as a set-

tlement, remedy or fees case if not a published violation finding). A total of 106 lawsuits challenged reapportionment, i.e., multiple district plans. Of those, 42 ended with a favorable outcome for the plaintiffs (of which 30 found a violation of Section 2). Thirty challenged election procedures (e.g. voter registration or residency requirements, polling place action by election officials), and 13 of these ended with a favorable outcome for the plaintiff (including 7 violations found). Eleven lawsuits challenged majority-vote requirements, such as a run-off requirement, anti-single shot provisions, or numbered-place system.[46] Six of these held the practice to violate Section 2; with no other favorable outcomes reported.[47] Thirty-two challenges addressed annexations, felon disfranchisement provisions, and appointment practices and none of these ended with a favorable outcome for the plaintiff. In some lawsuits, plaintiffs challenged multiple electoral practices.

The nature of Section 2 litigation has changed during the past twenty-three years. There were 142 lawsuits that ended during the first decade after the 1982 Amendments, the most common among those lawsuits were challenges to at-large elections (76 or 53.5%). Since 1992, there have been 181 lawsuits with published opinions. Of these lawsuits, 65 (35.9%) challenged at-large elections, and 67 (36.8%) challenged reapportionment plans with multiple, single-member districts.
African-American plaintiffs have brought the vast number of claims (250) under Section 2 since 1982, with an increasing number of cases involving Latino (91), Native American (12) and Asian American (8) plaintiffs. African-American plaintiffs remain most likely to win, and were plaintiffs in 96 (84.9%) of the successful decisions (and 74 of the violations) overall, and 47 (81.6%) of the 59 total successes for plaintiffs since 1990. Of all successful lawsuits, 12 involved multiple minority group plaintiffs[48] — including only African Americans and Latinos. In addition, Latino plaintiffs won 7 lawsuits independently. Native American plaintiffs won an additional 5 published lawsuits. Sixty-six lawsuits identified the remedy granted for a Section 2 violation. Of these, 25 (38%) replaced an at-large system with a single district system;[49] 27 (40.9%) ordered new multi-district lines to be drawn; [50] 15 (22.7%) ordered something else, such as changes to election administration procedures,[51] changes to the actual outcome of an election,[52] or affirmative steps (such as targeted community voter registration and education) to encourage minority political participation.[53]

In several lawsuits, courts addressed the constitutionality of Section 2 and all upheld that statute.[54]

The Trends

The Persistence of Discrimination

Four decades after the enactment of the Voting Rights Act, racial discrimination in voting is far from over. Federal judges adjudicating Section 2 cases over the last twenty-three years have documented an extensive record of conduct by state and local officials that they have deemed racially discriminatory and intentionally so. Judicial findings under the various factors set forth in the Senate Report reveal determined, systematic, and recent efforts to minimize minority voting strength.

Examples abound.[55] Last year's decision in the *Bone Shirt* litigation documents how county officials in South Dakota have purposely blocked Native Americans from registering to vote and from casting ballots. The Charleston County, South Carolina lit-

igation reveals deliberate and systematic efforts by county officials to harass and intimidate African-American residents seeking to vote. The *North Johns* litigation in Alabama describes the town mayor's refusal to provide African-American candidates registration forms required by state law. The *Harris* litigation in Alabama tells of Jefferson County's refusal to hire black poll workers for white precincts — and the blind eye state government turned to the voting discrimination perpetuated at local polls. A Philadelphia lawsuit describes a deliberate and collusive effort by party officials and city election commissioners to trick Latino voters into casting illegitimate absentee ballots that would never be counted. The *Town of Cicero* litigation categorizes an 18-month residency requirement deliberately designed to stymie Hispanic candidacies. A dozen more cases tell of state and local authorities drawing district lines for the express purpose of diminishing the influence of minority voters, or to protect partisan interests knowing that doing so will hinder minority voting strength.

Section 2 lawsuits also catalogue formal and informal slating procedures implemented by party officials and private associations that function to deny minority candidates meaningful access to the ballot — from the local Democratic party in Albany, NY, the Republican party in Hempstead, NY, informal groups in Texas and Louisiana, to the state-funded firefighters on the Eastern Shore of Maryland.[56] Federal judges further have identified a host of campaign tactics nationwide designed to appeal to base racial prejudice, tactics that include manipulating photographs to darken the skin of opposing candidates, allusions or threats of minority group "take over," or imminent racial strife, and cynical attempts to increase turnout among voters perceived to be "anti-black."[57]

Courts have also documented some instances of suspicious or "tenuous" policies guiding jurisdictions' intentions — as when the legislature in Alabama removed the only majority-minority district from its reapportionment plan after the governor threatened a veto.[58] Courts also carefully considered the ways in which local and state governments responded to minority needs — noting, for example, a Colorado school board's refusal to provide requested bilingual and Native American educational programs in order to keep the curriculum "ethnically clean."[59]

The Power of Partisanship

Courts adjudicating Section 2 claims must confront the significance of the tight linkage between race and party in many parts of this county. This issue has taken on greater importance with the emergence of the Republican Party as a vibrant and influential force in the Southern United States, a development that complicates claims of racial vote dilution, as traditionally alleged. Courts must now assess how partisan affiliation affects minority electoral success and the legal significance to accord to that relationship.

Courts adjudicating Section 2 lawsuits confront this issue at numerous junctures, but do so most prominently when assessing racial bloc voting. The *LULAC v. Clements* litigation famously declared that Section 2 is "implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats."[60] The majority of courts today will examine the claim that party, rather than race, causes minority electoral defeats. Many Section 2 plaintiffs falter on this requirement, particularly as numerous Section 2 lawsuits document the increasing willingness of white Democrats to support minority-preferred candidates in the general election.

Concerned that party affiliation masks instances of racial discrimination among voters, some courts are looking more frequently to the primary elections as a gauge of

minority political opportunity. A host of recent Section 2 lawsuits document that significant racial polarization in voting remains prevalent at this juncture of the electoral process, notwithstanding the willingness of voters, minority and nonminority alike, to support the party nominee in the general election. With the proliferation of noncompetitive districts in the United States, the primary now forms the critical locus for political participation today such that the racial composition of the primary electorate is often critical to minority electoral opportunity than is the composition of the district as a whole.

Emphasis on the centrality of party as an organizing principle in American politics may also obscure the ways in which partisan conduct itslef may diminish opportunities for minority political participation. State-mandated white primaries are long gone, but party officials, acting formally or ad hoc, continue to implement slating procedures that stymie minority candidacies. Some lawsuits document what might aptly be labeled backstabbing by party officials who omit minority candidates from party campaign literature or otherwise fail to support their party's minority candidates. Numerous courts now label the knowing sacrifice of minority interests to the quest for partisan gain a form of intentional race discrimination.[61]

THE GINGLES THRESHOLD

The Supreme Court's 1986 decision *Thornburg v. Gingles* distilled three "preconditions" from the totality of the circumstances test that Section 2 requires. Satisfaction of these conditions does not establish a Section 2 violation, but failure to meet them almost always brings a plaintiff's case to an end.

Since the Court decided *Gingles,* 163 lawsuits addressed its preconditions, and 64 lawsuits found them to be satisfied.[62] Most (52) of these suits proceeded to a favorable outcome for the plaintiff. In many of these cases, courts have engaged in only a perfunctory review of the Senate Factors. Since *Johnson v. De Grandy,* moreover, a number have restricted their inquiry to assessing whether the challenged practice achieved "proportionality," and finding a Section 2 violation only if it did not.[63]

In 99 lawsuits, courts held that plaintiffs failed to establish one or more of the *Gingles* factors.[64] A few of these courts nevertheless proceeded to evaluate plaintiffs' claims under the totality of the circumstances, typically finding that plaintiffs lose under this test as well.[65] In a few cases, courts have analyzed claims under the totality of circumstances without engaging in review under *Gingles* at all.[66]

Since *Gingles,* only 7 cases have identified a violation of Section 2 without addressing the *Gingles* factors.[67] Some courts acknowledge that the *Gingles* factors may "foreclose a meritorious claim," but find that they serve a useful gate-keeping function because "in general they will ensure that violations for which an effective remedy exists will be considered while appropriately closing the courthouse to marginal cases."[68]

Plaintiffs crossing the *Gingles* threshold are more likely to prevail in covered jurisdictions than in non-covered ones. Twenty-seven lawsuits originating in covered jurisdictions found the *Gingles* factors, and, of these, 24 (88.8%) also held Section 2 to be violated.[69] In non-covered jurisdictions, 37 lawsuits found all three *Gingles* factors, of which 26 (70.2%) found a violation.[70]

Gingles *I: Sufficiently Large and Geographically Compact*

Sufficiently Large

The first component of the *Gingles* test requires a minority group to demonstrate that it is "sufficiently large and geographically compact to constitute a majority in a single member district." Courts addressing *Gingles* I have generally engaged in two inquiries: (1) assessing when the minority population is "sufficiently large," and (2) determining whether a proposed district encompassing that population is "geographically compact."[71]

Discussion of the "sufficiently large" prong has focused primarily on the size of the population needed to establish a majority in a single member district. Most courts define the relevant majority to be the voting age population, reasoning that absent a majority among voters, the minority group will not be an effective majority.[72] Where, however, the minority group contains a large proportion of non-citizens, some courts have required that plaintiffs demonstrate the feasibility of creating a district in which the group constitutes a majority of the citizen voting age population.[73] Finally, a few courts rely on the overall minority population when assessing *Gingles* I.[74]

Lower rates of voter registration and turnout in some minority communities have led some courts to require that minority voters (or the minority population overall) constitute more than simply a majority, but in fact a supermajority. Some courts have suggested that population percentages as high as 65% are needed to constitute an effective majority.[75] Others, however, expressly reject an assessment of likely turnout among minority voters when assessing the size of an effective majority under *Gingles.*[76]

Several lawsuits involved claims brought by more than one minority group. These plaintiffs argued that, if members of the two (or more) groups were placed together in a single district, they would constitute an effective majority within the meaning of *Gingles* I. The vast majority of courts view this type of claim as cognizable under the statute, so long as the groups can demonstrate political cohesiveness under the second *Gingles* factor,[77] a requirement on which many aggregation claims falter.[78]

Influence Districts: In an increasing number of lawsuits, plaintiffs are raising Section 2 claims on behalf of minority groups too small in number to constitute a majority in a single-member district. Typically, these plaintiffs take issue with district lines that divide the minority group members among several districts, and argue that the challenged districting plans hinder their ability either (1) to elect representatives of choice by forming coalitions with other voters ("coalition districts"), or (2) more amorphously, to influence elections ("influence districts").[79]

Some courts reject the notion of influence entirely.[80] These courts express concern that allowing influence claims will eviscerate the gate-keeping function performed by *Gingles* I and open federal courts to inundation by "marginal" Section 2 claims.[81] As such, no plaintiffs have succeeded on an influence claim absent an indication that they would have the ability to elect candidates of choice. Courts have shown more openness to coalition claims, but still cite two key problems. For some, the cross-over votes that define coalition districts suggest that voting is not polarized, and thus present an obstacle for plaintiffs trying to establish white bloc voting under *Gingles* III.[82] Other courts require assurance that minority-preferred candidates will prevail, something they maintain a coalition district cannot provide. These courts thus conclude that plaintiffs suffer no injury when a jurisdiction fails to include a sufficient number of minority voters to give rise to a coalition district.[83]

In recent years, courts have been increasingly receptive to the viability of coalition districts.[84] In the *Armour* litigation, for example, the appellate court suggested that African-American voters in a 36% black district might be able to elect their preferred candidate, given that Democratic primaries in the region typically determined the winner in the general election, and at least some white voters were willing to support the black-preferred candidate.[85] In this circumstance, the court held, the jurisdiction's decision to split the black community between two districts might violate Section 2.[86]

Employing similar reasoning, the *Page* litigation rejected a Section 2 challenge to New Jersey's decision to replace several majority-minority districts with districts in which African-American voters constituted a mere plurality.[87] The court noted that support from Latino and white voters meant that black-preferred candidates could win elections in districts where the African-American population was less than fifty percent.[88] In this circumstance, the state's decision not to create majority-black districts, even though such districts were feasible, did not violate Section 2.[89]

In the *Martinez v. Bush* litigation,[90] black plaintiffs challenged a redistricting plan that replaced majority-minority districts with districts in which the black voting age population was less than fifty percent. Plaintiffs argued that, as a result of the change, they were no longer assured that their preferred candidate would win in the affected districts. The court held, however, that because blacks were the majority of Democrats, and Democrats were the majority of the district, blacks were likely to elect their candidate of choice even when comprising only 41.8% of the voting age population. The district court deemed *Gingles* I satisfied, arguing that the *Gingles* I "majority" requirement should not be interpreted literally,[91] but rather that it defines any situation where the district is likely to result in the election of minority candidates of choice in most elections.[92]

The courts in *Armour, Page,* and *Martinez* all recognized that in safe Democratic districts, the Democratic primary dictates the outcome of the general election such that the racial composition of the primary electorate is a more probative gauge of minority voting strength than is the racial composition of the general electorate. Minority voters in safe Democratic districts need not constitute a majority of the district's electorate to elect candidates of choice, particularly when they represent a majority of voters eligible to participate in the primary. Such majority-minority primaries yield results much like majority-minority districts, but do so with fewer minority voters overall. The efficacy of the majority-minority primary in this regard suggests a Section 2 claim might lie where jurisdictions opt to create or maintain majority-minority districts, notwithstanding the ability of minority voters to elect preferred candidates from plurality districts where the primary is majority-minority

Black plaintiffs unsuccessfully pursued a related claim in the *Perry* litigation where they challenged a districting plan that reduced the black population in a district where black voters previously had comprised 21.6% of the voting age population.[93] The plaintiffs argued that, prior to the redistricting, they constituted an effective majority for purposes of *Gingles* I notwithstanding their minority status because they controlled the Democratic primary and Anglos and Latinos voted "either in the Republican primary or not at all, but return[ed] home out of party loyalty in the general election."[94] The *Perry* court, however, viewed black influence exerted through the majority-minority primary simply as a facet of party politics rather than a locus for meaningful black political participation that the courts in *Armour, Page,* and *Martinez* viewed as worthy of cognizance under Section 2.[95] For the *Perry* court, the primary was relevant only

insofar as it showed that black and Latino voters did not vote cohesively and hence could not combine their strength for the purposes of claiming entitlement to majority-minority district.[96]

The plaintiffs in *Perry* relied on the Supreme Court's statement in *Georgia v. Ashcroft* that a coalition district may sometimes provide effective representation to minorities[97] to argue that the requirements of *Gingles* I had been "effectively overruled" and that influence districts are entitled to protection under Section 2.[98] The *Perry* court read *Ashcroft* differently, finding in it no obligation for states to preserve coalitions: "[t]o so conclude would have profound consequences, freezing ephemeral political alliances, which are the bull's eyes of partisan redistricting."[99]

In the *Rodriguez* litigation, plaintiffs were similarly unsuccessful in seeking to establish that New York violated Section 2 by "cracking" the minority population among several districts, in a context were a majority-minority district was not possible.[100] Unlike *Perry*, the claim here was not that an existing coalition district had been destroyed, but instead that district lines continued to divide rapidly growing minority communities.[101] The court found no injury, and, like the *Perry* court, held that *Georgia v. Ashcroft*, while recognizing the ability of states to create influence districts, "does not broaden the power of federal courts under section 2 of the VRA to require state legislatures to protect or create such "ability to elect" districts."[102] To hold otherwise would open a "Pandora's box" because "'[i]nfluence' cannot be clearly defined or statistically proved."[103]

Thus, *Perry* and *Rodriguez* read *Ashcroft* to provide authority for jurisdictions to choose between influence and majority-minority districts,[104] but neither court interprets *Ashcroft* to require that jurisdictions protect these districts where they already exist.[105] In dicta, however, the *Perry* court evinces a preference for the creation of influence or coalition districts where possible.[106] Some other courts have displayed a similar preference for influence over minority-majority districts[107] but doubts remain about determining when an influence district should be created and whether it will better serve minority voters.[108]

Geographically Compact

Courts have consistently used a few different criteria for assessing compactness under *Gingles* I, and have often used them in combination. Courts examine the proposed district's shape,[109] the extent to which it comports with the jurisdiction's traditional districting principles,[110] and how it compares to other proposed or existing districts.[111] Some courts view compactness as a "practical or functional" concept to be assessed in terms of whether the district captures a community.[112]

Since 1994, courts have invoked *Shaw v. Reno* and its progeny[113] when discussing compactness under *Gingles* I.[114] The *Shaw* cases require close scrutiny of districting plans in which racial considerations predominate over traditional districting principles in the drawing of district lines. An oddly shaped district is not a prerequisite to a *Shaw* claim, but courts often look to shape to assess whether race was the primary consideration when the district was drawn. Since *Shaw*, some courts have invoked bizarre shape to measure compactness under *Gingles* I,[115] and generally consider districts compact when they appear more compact than those struck down in the *Shaw* cases.[116] Some courts have, moreover, invoked *Shaw* and its progeny to voice concern that plans seeking to increase minority voting strength do not pay adequate heed to traditional districting principles.[117]

Gingles *II and III: Racial Bloc Voting*

Racial polarization in voting, also known as racial bloc voting, constitutes a critical component of a Section 2 claim.[118] The vast majority of Section 2 violations identified in this study found legally significant racial bloc voting.[119]

Racial bloc voting factors into the evaluation of Section 2 claims at two junctures. The second and third of the *Gingles* "preconditions" to a Section 2 claim call for an inquiry into racial polarization in voting. They require courts to determine whether minority voters are politically cohesive, and whether white voters vote sufficiently as a bloc to defeat the minority-preferred candidate.[120] Courts who so find (and also find the first *Gingles* factor[121]) must then evaluate whether the plaintiffs can sustain their claim under "the totality of circumstances."[122] This inquiry includes analysis of the Senate Factors, one of which is the extent of racially polarized voting.[123]

In practice, however, the majority of courts that consider racial bloc voting engage in one inquiry, typically under the *Gingles* factors.[124] Of those that deem *Gingles* satisfied and proceed to the totality of circumstances review, some simply refer back to their previous analysis of racial bloc voting under *Gingles*, if in fact they return to racial bloc voting at all.[125]

Of the lawsuits analyzed, 186 considered the extent of racially polarized voting, 91 found the factor to exist, and 65 of these identified a violation of Section 2 (another 3 granted a preliminary injunction). In covered jurisdictions, 44 lawsuits found racial bloc voting; 47 in non-covered. Of the 27 lawsuits that found racial bloc voting but not a Section 2 violation, three deemed plaintiffs likely to succeed on the merits of the Section 2 claim. The 23 remaining lawsuits found racially polarized voting but ultimately did not end in a favorable outcome for the plaintiffs.[126] Eight deemed *Gingles* I or II unsatisfied,[127] eight identified "rough proportionality" as defined in *Johnson v. DeGrandy*,[128] two remanded the case for further review,[129] six declined to find a violation under a more general totality of the circumstances review.[130]

Several recurring issues pervade judicial analyses of racial bloc voting. The first concerns the identification of the minority-preferred candidate, the second, the role of causation, and the third, the existence of "special circumstances" that might warrant disregarding particular elections. These are discussed below.

Identifying the Minority-Preferred Candidate

Courts assessing racial bloc voting must identify the minority-preferred candidate in order to determine whether "the white bloc usually votes to defeat" this candidate. In making this determination, courts overwhelmingly agree that the race of the candidates must inform the analysis at least to some degree. Courts have thus flatly rejected Justice Brennan's position in *Thornburg v. Gingles* that a candidate's race should be irrelevant when assessing racial bloc voting.[131]

Most courts, for example, more easily identify a minority candidate as minority-preferred than a non-minority candidate, while some implicitly or explicitly assume the minority candidate is the minority-preferred candidate.[132] Others demand some evidence on point, although typically far less than what they require to demonstrate a white candidate is minority-preferred.[133] No court today holds that white candidates cannot be minority-preferred.[134]

Decisions in the Third, Eighth, Tenth, and Eleventh Circuits hold that courts there will engage in a searching inquiry before they will identify a white candidate as minority-preferred. This approach, typically associated with the *Jenkins* litigation that

articulated it, deems election results only a preliminary component of the inquiry.[135] Courts must determine not only who gets minority votes, but also the depth and vigor of minority support for that candidate, the scope of that candidate's interest in the minority community, whether and why a viable minority candidate did not run, and whether minority candidates had run previously.[136] This approach implicitly imports into the racial bloc voting inquiry some of the Senate Factors such as candidate slating typically reviewed only after the *Gingles* threshold is crossed.[137]

Courts in the Second, Sixth, and Ninth Circuits expressly reject this approach, maintaining that this "subjective" inquiry into minority preferences is inappropriate and impractical.[138] These courts posit that the inquiry should be limited almost exclusively to election results to identify the minority-preferred candidate. With a few caveats, these courts define the preferred candidate as the one who receives the most votes from minority voters.[139] While the Fourth Circuit has not explicitly followed this approach, recent decisions suggest it may be using an analogous approach.[140]

In practice, however, many courts have not strictly adhered to one or the other of these tests.[141] For instance, after adopting the *Jenkins* approach,[142] the Eighth Circuit in *Clay v. Board of Education of St. Louis,* noted "it is a near tautological principle that the minority-preferred candidate "should generally be one able to receive [minority] votes."[143] Likewise, the Eleventh Circuit facially relies on the totality of the circumstances to demonstrate that a white candidate is minority-preferred, but its most recent decisions treat the candidate who receives the majority of the minority vote and election results as minority-preferred.[144] In the context of multi-seat elections, moreover, where voters are permitted to cast as many votes as there are seats, both the Fourth and Eleventh circuits have combined the quantitative and subjective approaches to assess the status of candidates that do not place first among black voters, but do receive a substantial percentage of the black vote.[145]

Probative Elections: Courts in most circuits generally place more weight on elections involving a minority candidate than on those involving only white candidates.[146] Some courts discount elections out of concern that the candidate receiving minority votes is not truly minority-preferred.[147] Other do so because of concern that these elections mask polarized voting patterns that should be deemed legally significant.[148] Not infrequently, candidates preferred by minority voters in elections between white candidates prevail. These victories suggest that white voters are not voting sufficiently as a bloc to defeat minority-preferred candidates. And yet, minority candidates in the same jurisdictions are often defeated even though they receive overwhelming support from minority voters.[149] These elections suggest white voters are voting as a bloc within the meaning of the third *Gingles* factor. Discounting elections between white candidates consequently helps courts discern polarization of a sort that might otherwise be obscured.

For similar reasons, courts have increasingly looked to primary elections to determine which candidate is minority-preferred. Because primary elections remove party as a causal explanation for voting patterns, some courts view these elections as allowing better focus on the role of race in voter decisionmaking.[150] Primaries, moreover, are increasingly the only election of consequence as noncompetitive districts have proliferated nationwide.[151]

Many courts, consequently, discount minority support for a particular candidate in the general election where minority voters supported another candidate in the

primary.[152] A few courts have also held that white support for a minority-preferred candidate in the general election does not bar finding the third *Gingles* factor, where white voters supported a different candidate in the Democratic primary.[153] Highlighting this point, the district court in the *Black Political Task Force* litigation observed that "black and white voters in Boston preferred the [black] Democratic candidate at a general election is hardly news....[and] says less about race than partisan politics."[154]

Courts have also relied on primary election results to examine whether two minority groups seeking to aggregate their voting strength in a Section 2 claim share a preferred candidate. Several decisions find that party affiliation masks a lack of cohesiveness between, for example, black and Hispanic voters. In this context, evidence that members of the minority groups supported different candidates in the primary weighs against finding political cohesion, even if voters from both groups supported the same candidate in the general election.[155] As such, voting patterns in primary elections are probative on the issue of cohesion because such elections remove partisanship as a cause explanation for voting behavior.[156]

Although no court has expressly rejected consideration of primary elections, some courts have identified reasons that suggest caution in weighing primary elections too heavily. For example, some courts have expressed concern that the preferences of politically active members of the minority community should not define the candidate preferred by the minority community as a whole.[157] To the extent that primary voters are fewer in number and more extreme in political persuasion than those participating in the general election, the candidate who garners minority group support in the primary may not be the preferred candidate of most minority voters.

Finally, some courts have questioned whether general election results should be discounted simply because minority voters supported a different candidate in the primary. These courts suggest that doing so privileges minority voters to an improper extent, effectively relieving them of the obligation to "pull, haul, and trade" that all voters confront.[158]

Causation

The justices in *Thornburg v. Gingles* disagreed about the role causation should play in the racial bloc voting inquiry. Justice Brennan rejected causation in his plurality opinion, arguing that "it is the *difference* between the choices made by blacks and whites — not the reasons for that difference" that is important.[159] Justice O'Connor, however, thought the inquiry should address "evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters."[160] Justice White was the critical fifth vote on the issue and his separate opinion did not definitely resolve the question.

Lower courts ever since have disputed the role causation should play in the racial bloc voting analysis. Courts in nine judicial circuits now expressly incorporate causation in the racial bloc voting analysis, either under the third *Gingles* factor or as part of the totality of circumstances.[161] Two circuits have not expressly adopted an approach to causation,[162] while the Ninth Circuit appears to reject causation, though not explicitly.[163]

When courts consider causation, they all ask the same underlying question: namely, whether race, as opposed to partisanship or some other factor, best explains why white voters failed to support the minority-preferred candidate. And yet, courts suggest that the juncture at which they ask this question matters. A finding that political party best explains divergent voting patterns under *Gingles* means that the court will

not find legally significant racial bloc voting and necessarily that plaintiffs' claims fail.[164] Consideration of causation within the totality of the circumstances review means that the plaintiffs have already satisfied the *Gingles* preconditions and, as a result, an inference usually comes into play that "racial bias is at work."[165] In the *Mount Holyoke* litigation, the appellate court posited that "cases will be rare in which plaintiffs establish the *Gingles* preconditions yet fail on a Section 2 claim because other facts undermine the original inference."[166]

In practice, however, the juncture at which courts consider causation may matter less than these courts suggest. Regardless of where they consider causation, courts do not typically require that plaintiffs disprove that factors other than race caused divergent voting patterns,[167] but most require that plaintiffs demonstrate that race is the causal linkage when defendants proffer evidence supporting an alternative explanation.[168] Proving the linkage is difficult regardless of the juncture, and numerous lawsuits have held that plaintiffs failed to meet their burden on this point.[169] Plaintiffs rarely succeeded in rebutting defendant's evidence.[170]

Political Cohesion and multi-race claims

Several courts confronted Section 2 claims where the plaintiffs argued that the injured minority included members of two or more minority groups. Often, these claims arose where a single minority group would not satisfy the size and compactness requirements of *Gingles* I.[171] Most courts that faced a multi-minority claim concluded that these coalition claims were permissible and could result in a finding of a Section 2 violation provided that 1) together the minority groups satisfied the requirements of *Gingles* I and 2) they demonstrated political cohesiveness under *Gingles* II.[172]

To determine whether minority groups were politically cohesive, courts examined varied types of evidence, including electoral results, defendants' stipulation, testimony from community leaders, and evidence of social interaction.[173] Some courts concluded that elections that pitted one minority candidate against another minority candidate may indicate an absence of minority political cohesiveness.[174] Evidence that members of the minority groups supported different candidates in the primary weighed against finding political cohesion, even if the groups supported the same candidate in the general election.[175]

Other courts have confronted the claim that one minority group is part of the white bloc.[176] Thus, in some multi-race claims where the plaintiffs can establish *Gingles* I, the categorization of the other minority group remains a hindrance on their ability to satisfy the preconditions. A failure to find the other minority group votes cohesively with the white bloc makes it significantly more difficult to prove that the white bloc usually votes to defeat the minority-preferred candidate.[177]

Special circumstances

Courts have identified a variety of "special circumstances" that influence the racial bloc voting inquiry and have excluded or discounted elections involving such special circumstances as distinct from the "usual predictability" of voting patterns.[178] Some circuits have identified numerous special circumstances, others few or none. Typically, the recognition of special circumstances makes an ultimate finding of racial bloc voting more likely. A few cases, however, have discounted elections where the minority-preferred candidate was defeated due to special circumstances, thus having the opposite effect.[179] Some recent decisions voice resistance to discounting elections because of special circumstances, preferring instead to consider all the evidence presented.[180]

Incumbency: Numerous courts have held that legally significant white bloc voting may exist, notwithstanding white support for a black candidate, if the black candidate is an incumbent.181 Others disagree, finding that "incumbency plays a significant role in the vast majority of American elections," such that it use as a special circumstance "would confuse the ordinary with the special."[182]

The majority-minority district: Several courts have identified the majority-minority district as a "special circumstance" that alters the conventional racial bloc inquiry. In such districts, white voters, are by definition, a minority of the population, and thus, these courts have reasoned that their inability to defeat the minority-preferred candidate is less probative evidence of a decline in racial bloc voting than it would be elsewhere. The Ninth Circuit said that "[t]o do otherwise would permit white bloc voting in a majority-white district to be washed clean by electoral success in neighboring majority-Indian districts."[183]

Post lawsuit elections: Some courts discount the results of elections occurring after the lawsuit at issue had been filed. This approach is premised on the view that the very filing of a Section 2 lawsuit makes white voters more likely to support the minority-preferred candidate and that this support is somehow not genuine. The concern is that post-lawsuit elections might "work a one-time advantage for [minority] candidates in the form of unusually organized political support by white leaders concerned to forestall single-member districting."[184] Other courts will consider such elections, either outright,[185] or with the caveat that plaintiffs are unable to show unusual white support for the minority-preferred candidate.[186]

Unusual Elections: Courts have held that the success of minority-preferred candidates may be discounted when reason exists to view voting behavior as unusual. Courts have excluded elections based on a plurality victory,[187] an atypical primary,[188] an unopposed candidacy,[189] or a candidacy against only a third-party candidate.[190] Courts have also excluded elections based on unusual political circumstances (i.e., a minority candidate who is seen as "anti-busing" while local school desegregation lawsuit was pending,[191] a candidate under federal indictment at the time of the election,[192] a winning black candidate who had been a professional athlete,[193] or a well-financed campaign amidst anti-incumbent sentiment.[194]) Further, courts discount elections not involving serious or well-known candidates,[195] and some have approved discounting minority success when the race of the candidate was not widely known.[196] Courts are often skeptical, however, of special circumstances that simply illustrate good campaigning on the part of the minority candidate. [197]

Low turnout: Several courts have been unwilling to find white bloc voting where minority voters did not turnout to vote in substantial numbers.[198] Some courts phrase this issue as one of causation: namely, those plaintiffs must establish that white bloc voting caused the minority defeat, as opposed to an independent cause such as low turnout.[199] The premise is that if there had been higher minority turnout, the minority-preferred candidate might have been elected. Other courts warn that indicators of vote dilution, such as official discrimination, may contribute to low turnout.[200] A third approach does not consider turnout a special circumstance, but views it as relevant to an evaluation of other factors, such as minority candidate success.[201]

THE SENATE FACTORS

SENATE FACTOR 1: *History of Official Discrimination that Touched the Right to Vote*

The first factor listed in the *Senate Report* asks courts to assess "the extent of any history of official discrimination" in the jurisdiction that "touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process."[202] Courts assessing Factor 1 have documented scores of instances in which state and local officials engaged in intentional race discrimination in recent years. These judicial findings record the nature, frequency, and recentness of this conduct.
One hundred and forty-eight lawsuits considered Factor 1.[203] The lawsuits that did not consider this factor generally never reached the Senate Factors at all, finding instead that Section 2 did not apply to the plaintiffs' claim,[204] or that, if it did, the plaintiffs had failed to satisfy the threshold *Thornburg v. Gingles* test.[205]

Of the lawsuits considering this factor, 137 (or 92.5%) found that there was a history of official discrimination. Of these, only 107 lawsuits actually found that Factor 1 was met.[206] The remaining thirty cases concluded that plaintiffs had failed to establish that the identified history "touched" the present-day ability of members of the minority group to participate in the political process.[207]

Of the 107 lawsuits that found Factor 1, 65 also found a violation of Section 2 or otherwise issued a decision favorable to the plaintiffs.[208] Seven lawsuits found a violation of Section 2 without considering Factor 1 at all.[209] Ten others identified a violation of Section 2 after considering but not finding Factor 1.[210]

Lawsuits finding Factor 1 most often found that three additional Senate Factors were satisfied: 66 found racially polarized voting (either in the *Gingles* threshold test or when considering Factor 2), 70 found ongoing socioeconomic effects (Factor 5), 67 found lack of candidate success (Factor 7).[211]

Many courts assessing Factor 1 discussed instances of discriminatory conduct dating from the nineteenth century and through much of the twentieth. These accounts addressed literacy tests, grandfather clauses, poll taxes, white primaries, racially discriminatory voter registration requirements as well as state laws mandating segregation, the separation of names by race on voter registration lists, and other official discriminatory practices in education, employment, and housing.[212]

Seventy lawsuits considering evidence of Factor 1 identified official discrimination post-dating the enactment of the VRA.[213] A number of these focused on instances of discriminatory conduct during the period between 1965 and the 1982 amendments to the VRA. These cases cited official resistance to school desegregation orders, employment discrimination settlements and judgments against local governments,[214] and violations of the VRA itself.[215] Courts took note of various states' and counties' failure to hire minority poll officials,[216] a county registrar's refusal to register black citizens as voters,[217] the "hostility and uncooperation" displayed by public officials in Texas when Mexican-American candidates ran for office,[218] and the race-based retention of a majority-vote and post system in Georgia.[219] The *City of Starke* litigation noted the City's failure to repeal unenforceable statutes mandating segregation.[220]

Official Discrimination Since 1982

Twenty-four lawsuits identified more than one-hundred instances of intentionally discriminatory conduct in voting since 1982.[221] Eight of these lawsuits originated in cov-

ered jurisdictions; 14 in non-covered. While several findings identified intentional discrimination in the drawing of state reapportionment plans, conduct by local governmental officials accounted for the vast number of instances of official discrimination identified, as described below.

Judicial findings documenting official discrimination occurring since 1982 encompass a wide range of conduct by public officials. Public conduct found by courts to constitute intentional race-based discrimination is listed below, with the findings from jurisdictions covered by Section 5 cited first, followed by findings in non-covered jurisdictions.

Findings of Intentional Discrimination in Section 5 Covered Jurisdictions Since 1982

IN CHARLESTON COUNTY, SOUTH CAROLINA

— The "consistent and more recent pattern of white persons acting to intimidate and harass African-American voters at the polls during the 1980s and 1990s and even as late as the 2000 general election," including "significant evidence of intimidation and harassment" that was "undeniably racial" and that "never occurred at predominantly white polling places, including those that tended to support Democratic candidates."[222]

—The harassment by county officials, including at least one member of the Charleston County Election Commission and at least one county-employed poll manager,[223] as participants in the Ballot Security Group which, in the 1990 election, "sought to prevent African-American voters from seeking assistance in casting their ballots."[224]

—The county's assignment of white poll managers, described by some as "bulldogs," in unspecified recent elections since 1982, to majority African-American precincts, where they "caused confusion, intimidated African-American voters, . . . had the tendency to be condescending to those voters," and engaged in "inappropriate behavior."[225]

—The "routine" assignment by "the Election Commission...[of] one particularly problematic poll manager to predominantly African-American polling places in different parts of the County during the 1980s and early 1990s. At the polls, this poll manager, who is white, routinely approached elderly African-American women seeking to vote." He would often "make a scene:" approaching them, putting his arm around them and speaking loudly, when "[t]hey just wanted to come in and sign up and vote. And it happened repeatedly just to that class of voter."[226]

—The "recurring" official harassment of elderly African-American voters during the 1980s and 1990s, so severe that that the Charleston County Circuit Court "issue[d] a restraining order against the Election Commission requiring its agents to cease interfering with the voting process."[227]

—The persistence of problematic "treatment of African-American voters by some white poll managers, even though the Election Commission has provided training to poll managers on this subject."[228]

—The refusal of county workers at the polls to provide African-American voters with legally required voting assistance, in elections from 1992–2002; including:

> the discriminatory practice employed by white poll managers working at black-majority precincts of hassling African-American voters who asked for

> help voting, including "asking questions such as: 'Why do you need assistance? Why can't you read and write? And didn't you just sign in? And you know how to spell your name, why can't you just vote by yourself? And do you really need voter assistance?'"[229]
>
> the absence of comparable questioning of white voters who were allowed to have their voting assistor of choice without being challenged: "no evidence exists of any instances of harassment, intimidation, or interference directed against white or African-American voters at predominantly white polling places."[230]

— The county's retention of a poll manager who had exhibited a "threatening attitude" toward black voters at the Joseph Floyd Major Precinct in the 1996 election, after his refusal to respond to a county election commissioner's reprimand; and the retention of this poll manager as a county employee at majority-African-American polls in Charleston County in 2004.[231]

— The decision of "the Charleston County Council [to reduce] the salary for the Charleston County Probate Judge in 1991, following the election of the first and only African-American person elected to that position" from $85,000 to $59,000 annually."[232]

—The state legislative delegation's proposal to replace single member districts with an at-large system following African-American success in School Board elections in 2000, without communicating at all with members of the School Board at the time.[233]

IN THURSTON COUNTY, NEBRASKA

—The County's refusal to adjust its 1990 redistricting process to address a documented increase in the Native American population, and instead to maintain its existing districting system, a course of action found to embody discriminatory intent.[234]

IN SOUTH DAKOTA[235]

—The display of discriminatory, "negative reactions" by county voter registrars to Native Americans during voter registration drives in the 1980s, ranging from the "unhelpful to hostile."

—The limitation imposed by county officials on the number of voter registration forms given to people intending to register Native Americans voters despite the absence of a legal limit on the provision of such forms;[236]

—The refusal of county officials to accept Internet voter registration forms from Native American voters.[237]

—The "erroneous rejections of registration cards" by county officials whom, later (after apparent protest) accepted them without explaining why they had first been rejected.[238]

—The 1986 refusal of the Dewey County Auditor to provide Native Americans with sufficient voter registration cards to conduct a voter registration drive on the Cheyenne River Reservation, conduct that prompted a court order instructing the auditor to supply 750 additional cards and extend the registration deadline.[239]

—The 1984 refusal of the Fall River County Auditor "to register Indians who had attempted to register as part of a last-minute voter registration drive on the Pine Ridge Reservation," a refusal that led to a court order the day before the election requiring that voters be allowed to register and cast their ballots.[240]

—The 2002 refusal of Bennett County commissioners to move two polling places to Indian housing areas that would "increase convenience for Indian voters," after Indian residents petitioned the County for the stations.[241]

—Wholly unsubstantiated public claims made by Bennett County officials just before the 2002 election that Indians involved in voter registration were engaged in voter fraud; and investigations that followed these claims in Pine Ridge and Rosebud, that produced no actual charges but "intimidated Indian voters."[242]

—The state's requirement that voters have photo identification and other new voting requirements enacted by the South Dakota legislature following the 2002 election,[243] passed after a legislative debate that included the following:

> Statement by Rep. Van Norman that in passing these provisions, "the legislature was retaliating because the Indian vote was a big factor in new registrants and a close senatorial race."[244]
>
> Statement by Rep. Ted Klaudt defending driver's license requirements by referring to Native American voters: "The way I feel is if you don't have enough drive to get up and drive to the county auditor ... maybe you shouldn't really be voting in the first place."[245]
>
> Statement by Rep. Stanford Adelstein opposing provisions that would have made voting registration easier and, in reference to Native American voters, claiming: "Having made many efforts to register people ... I realize that those people we want to vote will be given adequate opportunity. I, in my heart, feel that this bill ... will encourage those who we don't particularly want to have in the system.... I'm not sure we want that sort of person in the polling place. I think the effort of registration ... is adequate."[246]

—The state legislature's 1996 decision to replace two single-member house districts with a multi-member at-large house district for District 28, an action that rendered District 28 as a whole a majority-white district and that was taken soon after an Indian won the Democratic primary in 1994 in majority-Indian District 28A.[247]

—The discriminatory retention by Buffalo County of "[a] redistricting plan, which had been in use for decades, confined virtually all of the county's Indian population to a single district containing approximately 1500 people," leaving white voters in control of the remaining two districts, "which essentially gave them control over the county government," an arrangement that prompted a lawsuit settled in 2004, in which the county "admitt[ed] that the plan was discriminatory."[248]

—The 1999 refusal by Day County officials to let Native Americans vote in a sanitary district election, an action that prompted a lawsuit which ended in a settlement under which "the county and the district admitted that the district's boundaries unlawfully denied Indian citizens' right to vote."[249]

IN BLECKLEY COUNTY, GEORGIA

—The county's 1984 decision to replace numerous polling places that "provid[ed] ready access to voters in the outlying areas," with a single precinct for the 219 square mile county and to locate this single precinct in an "all-white civic club" (the Jaycee Barn in Cochran); and the county's decision to use the precinct as the sole polling place for county commissioner and county school board elections throughout the 1980s and up to the court's 1992 decision.[250]

IN DALLAS, TEXAS

—The city's attempts to keep a partially at-large election system after minority voters petitioned for its change and city officials recognized the existing system "denied both blacks and Hispanics access to any of the 3 at-large seats."[251]

IN NORTH JOHNS, ALABAMA

—The town mayor's 1988 selective refusal to provide registration forms required by state law to two African-American city council candidates, the first African-Americans to run for town office after the entry of a consent decree that replaced an at-large regime with a districted one, where "[t]he mayor was aware that Jones and Richardson, as black candidates, were seeking to take advantage of the new court-ordered single-member districting plan and that their election would result in the town council being majority black." [252]

—The town's prosecution of the two successful black candidates for failing to file the forms required by state law that the mayor refused to give them, a failing a federal court later found occurred only because of the mayor's intentionally discriminatory actions

—The town's refusal to seat the candidates after they were elected in 1988 until a federal court ordered the town to do so.[253]

IN BIG HORN COUNTY, MONTANA[254]

—The use of a voter registration process, and the appointment of deputy registrars and election judges in 1986 with "an intent to discriminate" against Native Americans.[255]

—The county's failure to include "the names of Indians who had registered to vote . . . . on voting lists in 1982 and 1984" and the county's removal of the names of Indians who had voted in primary elections from voting lists such that they were not allowed to vote in the subsequent general election.[256]

—The county's refusal to provide "[a]n Indian candidate for the state legislature . . . voter registration cards in 1984, forcing her to obtain them at the State Capitol."[257]

—County officials' refusal to provide a Native American man more than a scant number of voter registration cards based on the claim that few cards remained, even though the official shortly thereafter provided a white woman with fifty more cards than the man.[258]

—The subjection of Native Americans to a more technical and more difficult voter registration process than whites, in which county officials "looked for minor errors in

[Native American] registration applications and used them as an excuse to refuse to allow registration."[259]

IN JEFFERSON COUNTY ALABAMA (AND THE STATE OF ALABAMA)[260]

—The express refusal of Jefferson County officials to appoint black workers in white precincts in 1984 on the ground that white voters will not listen to black poll officials, a refusal found to amount to "open and intentional discrimination" that "is lawless and inexcusable." The court stated that "try[ing] to excuse the practice under cover of the purported intolerance of their own constituents is indefensible and repugnant."[261]

—The intentional failure of the Governor and Attorney General of Alabama to remedy past discrimination or ongoing racial harassment at the polls.[262]

—The conduct of white poll officials who "continue to harass and intimidate black voters" including "detailed numerous instances of where white poll officials refused to help illiterate black voters or refused to allow them to vote, where they refused to allow black voters to cast challenged ballots, and where they were simply rude and even intimidating toward black voters."[263]

IN MONTGOMERY, ALABAMA

—City ordinance proposed by mayor in 1981, following a series of annexations, to lower the African-American population in majority-black district 3 to "the lowest level he understood to be legally possible in order to reduce the possibility that district 3's council member could be reelected."264 The ordinance was still in place as of 1983 and was found to be "in substantial measure the product of a scheme purposefully designed and executed to decrease the voting strength of the black electorate in district 3."[265]

IN TERRELL, TEXAS

—City's reliance on at-large elections with staggered terms for five member city council, adjudicated on the merits to constitute intentional racial discrimination.[266]

—The city's settlement of a lawsuit "alleging that poll workers improperly refused to let certain black citizens vote."[267]

—The city's refusal in 1983 to establish a polling place repeatedly sought by black residents[268]

Findings of Intentional Discrimination in Non-Covered Jurisdictions Since 1982

IN BERKS COUNTY, PENNSYLVANIA[269]

—Hostile public statements by officials at the polls to Hispanic and Spanish-speaking voters,[270] statements such as 'This is the U.S.A.-Hispanics should not be allowed to have two last names. They should learn to speak the language and we should make them take only one last name,' and 'Dumb Spanish-speaking people ... I don't know why they're given the right to vote.' "[271]

—The subjection of Hispanic voters: "to unequal treatment at the polls, including being required to show photo identification where white voters have not been required to do so."[272]

—The county's refusal to "appoint[] bilingual persons to serve as clerks or machine inspectors, and to fill vacant elected poll worker positions" showing an "apparent unwillingness to ensure that poll workers included persons reflective of the community ....Berks County did not provide bilingual oral assistance at the polls prior to this Court's preliminary injunction" ordering Defendants to translate all written election-related materials and appoint bilingual interpreters.[273]

—The conduct of poll officials in the City of Reading, who "turned away Hispanic voters because they could not understand their names, or refused to 'deal' with Hispanic surnames."[274]

—The County's imposition of more onerous requirements for applicants seeking to serve as translators at the polls than those applying to be other types of poll officials, a requirement that impeded the court's order requiring the County to hire bilingual poll officials.[275]

—Boasts by county officials and poll workers, flaunting their racial discriminatory motivations and practices to federal officials observing elections in May 2001, November 2001, May 2001 and November 2002, including statements from poll officials in the City of Reading to Justice Department observers "boast[ing] of the outright exclusion of Hispanic voters...during the May 15, 2001 municipal primary election."[276]

IN MONTEZUMA COUNTY, COLORADO

—The refusal of county officials during the 1980s-early 1990s to allow residents to register to vote at Towaoc on the Ute Reservation, even though the county created satellite registration in the non-Indian communities of Mancus and Dolores.[277]

—The county's imposition of significant limitations on the hours it would make available mobile voter registration on the Ute reservation, after the County decided to allow such registration in the 1990s.[278]

IN PHILADELPHIA, PENNSYLVANIA

—The operation by city election commissioners in conjunction with campaign workers of a fraudulent "minority absentee ballot program" to manipulate the outcome of a 1993 city election; efforts that included "specifically target[ing] Latino and African-Americans as groups to saturate with the illegal absentee ballot program;"[279] and "deceiving Latino and African-American voters into believing that the law had changed and that there was a 'new way to vote' from the convenience of one's home."[280]

ON THE EASTERN SHORE OF MARYLAND

—The operation of "a kind of unofficial slating organization for white candidates" by some all-white, but state-funded, volunteer fire departments on the Eastern Shore" until at least the mid-1980s.[281]

—The failure of the State of Maryland to stop funding departments engaging in this practice, until an amendment to the Code of Fair Practices the Governor made upon the recommendation of the Attorney General in 1988.[282]

—The discriminatory location of polling places, that continues "[e]ven today, [of] counties on the lower Shore...in white-dominated volunteer fire companies, a hostile environment that may depress black electoral participation."[283]

IN LITTLE ROCK, ARKANSAS

—Decisions in recent years (1980s) by county officials to move polling places on short notice.[284]

—The county's appointment, "with isolated exceptions," of deputy voting registrars "only as a result of litigation;" other recent, unspecified efforts to "intimidate black candidates."[285]

—The intimidation in 1986 by an unnamed white county sheriff of a black lawyer, Roy Lewellen, running for State Senate, including:

> first, warning him "not to run," and,
>
> second, when that advice was ignored, an unnamed prosecutor's "institution [of] a widely-publicized criminal prosecution against Mr. Lewellen for witness bribery";[286] treatment that "a white lawyer, even one who opposed the political powers that be" would not have received;[287] and conduct amounting to "racial intimidation" that shows "that official discrimination designed to suppress black political activity is not wholly a thing of the past, at least not in the Delta."[288]

IN BOSTON, MASSACHUSETTS

—The enactment of a redistricting plan described by the court as "a textbook case of packing...concentrating large numbers of minority voters within a relatively small number of districts," devised by the House leadership, which "knew what it was doing."[289]

—The manipulation of district lines "to benefit two white incumbents" where the State House did not "paus[e] to investigate the consequences of its actions for minority voting opportunities," thereby using race "as a tool to ensure the protection of incumbents."[290]

IN NEW ROCHELLE, NEW YORK

—The enactment of a city council redistricting plan that diluted minority voting strength by replacing a majority-minority district with a plurality district, a plan reflecting "a course of conduct which can only be characterized as intentional and deliberate."[291]

IN LOS ANGELES COUNTY, CALIFORNIA

—The County's reliance in 1990 on a districting plan that had been found to be discriminatory[292] because it "intentionally fragmented the Hispanic population among the

various districts in order to dilute the effect of the Hispanic vote in future elections and preserve incumbencies of the Anglo members of the Board of Supervisors."[293] A concurring judge observed that this conduct illustrated the County's "single-minded pursuit of incumbency," which led it to"run roughshod over the rights of protected minorities."[294]

IN CHICAGO, ILLINOIS

—The retention and defense in a 1984 lawsuit of a city districting plan that "packed" and "fractured" minority voters to ensure the reelection of an incumbent senator, a plan that exposed how "the requirements of incumbency are so closely intertwined with the need for racial dilution that an intent to maintain a safe, primarily white, district for Senator Joyce is virtually coterminous with a purpose to practice racial discrimination."[295]

IN ILLINOIS

— The state legislature's retention and defense in a 1983 lawsuit of its districting plan for the state legislature, which diluted minority voting strength in order to protect two incumbent white senators in Chicago.

— The state redistricting commission's drawing of district lines with "the immediate purpose...to preserve the incumbencies of two white state Senators."[296] "[T]his process was so intimately intertwined with, and dependent on, racial discrimination and dilution of minority voting strength that purposeful dilution has been clearly demonstrated in the construction of Commission senate districts 14, 17 and 18."[297]

IN WESTERN TENNESSEE

— "[V]oting rights violations by public officials in rural west Tennessee as late as the 1980's....Official discrimination not only prevents blacks from electing representatives of their choice, it also leads to disillusionment, mistrust, and disenfranchisement. These feelings last beyond the current election, and can cause black voters to drop out of the political process and potential black candidates to forgo an election run." [298]

—The city council's amendment of the Bolivar city charter creating a majority-vote requirement for mayoral elections "in response to the success of two black candidates for mayor," which was challenged in a 1983 lawsuit against the city of Bolivar. "The district court approved a class action settlement setting up a new 'system which will ensure the opportunity of black citizens of Bolivar to meaningfully participate in the political process'....[C]ases challenging newly adopted election systems indicate to the court that official discrimination against blacks in voting is not entirely a thing of the past in west Tennessee."[299]

In addition, some courts have credited allegations of current official discrimination in the course of issuing Section 2 plaintiffs a preliminary injunction, action that reflects the view of these courts that plaintiffs were highly likely to prevail on their claims, but that did not reach the question of whether Section 2 had been violated on the merits.[300]

Examples include:

IN CICERO, ILLINOIS

—Town board's adoption in January 2000 of an 18-month residency requirement to register to vote, and placement on the March primary ballot, a requirement that "was adopted, at least in part, with the racially discriminatory purpose of targeting potential Hispanic candidates for disqualification and thereby seeking to prevent Hispanic voters from having the opportunity to vote for and/or elect candidates of their choice, in violation of Section 2 of the Voting Rights Act."[301]

IN CRENSHAW COUNTY, ALABAMA

— The consistent and repeated creation of at-large systems for local governments by the Alabama legislature, "during periods when there was a substantial threat of black participation in the political process."

—Barriers "consistently erected" by the state "[f]rom the late 1800's through the present [1986] to keep black persons from full and equal participation in the social, economic, and political life of the state," where these systems "are still having their intended racist impact."[302]

— The creation of these "systems...in the midst of the state's unrelenting historical agenda, spanning from the late 1800's to the 1980's, to keep its black citizens economically, socially, and politically downtrodden, from the cradle to the grave."[303]

IN HAYWOOD COUNTY, TENNESSEE

— The 1982 decision by the Haywood County Commission to replace 10 district seats for the Road Commission with 9 seats elected at-large after the first black road commissioner was elected, a decision the court "finds from the evidence in the record . . . occurred as a result of the purposeful intention to dilute black voting strength in Haywood County, Tennessee."[304]

Sources

Of the 107 lawsuits finding Factor 1, 32 lawsuits (30%) did so without reference to any evidence,[305] and another 7 (6.5%) did so based upon defendants' stipulation to a history of official discrimination.[306] Courts addressing lawsuits in Section 5-covered jurisdictions were no more likely than those in non-covered jurisdictions simply to assume or take judicial notice of Factor 1, without any evidentiary discussion. Most courts assessing Factor 1 examined various types of evidence. Sixty-five (or 60.7% of those considering Factor 1) cited statutes or other official policies.[307] Thirty-five (or 32.7%) noted actions and statements taken by public officials;[308] 24 (22.4%) cited expert testimony;[309] sixteen (14.9%) mentioned history books, newspapers or scholarly articles,[310] fifteen

(14%) mentioned other witness testimony.[311] Some listed the jurisdiction's status as a covered (or non-covered) jurisdiction under Section 5 of the Voting Rights Act.[312]

Fifty-six lawsuits (52.3% of those finding Factor 1) looked to prior judicial decisions identifying official discrimination in a range of conduct.[313] Some of these decisions found such discrimination in education, housing, employment. Others specifically addressed claims of discrimination in voting, including a jurisdiction's failure to comply with the requirements of Section 5 of the VRA.[314] Numerous cases addressing Factor 1 cited as evidence the Factor 1 findings from a prior Section 2 case in the same state or jurisdiction.[315] This earlier decision typically engaged in lengthy analysis of the historical record, and the subsequent suit in the state cited back to that decision, sometimes without making further findings.[316]

Some lawsuits (23 or 21.5% of all lawsuits finding the factor) included within their Factor 1 analysis examples of private or unofficial discrimination, although no court relied exclusively on such evidence in finding Factor 1.[317] For example, in the Armour Litigation in Ohio, the court included within Factor 1 the media's use of racial labels to describe an African-American candidate in 1985, the failure in the same year of party officials to support a minority candidate[318] and the 1970 bombing (allegedly by private individuals) of the house of the first African-American member of the Youngstown School Board in Youngstown, Ohio.[319]

Discounting History

Forty-one lawsuits addressed but did not find Factor 1.[320] Some courts deemed instances of discrimination too remote in time to count towards Factor 1.[321] Six lawsuits found that plaintiffs presented no evidence of official discrimination, and refused to take judicial notice of this factor without such evidence.[322] Several courts deemed Section 5 coverage alone insufficient to satisfy Factor 1, and instead have demanded evidence of official discrimination in the specific locality in question.[323]

Courts in covered and non-covered jurisdictions alike have deemed evidence of intentional discrimination in a neighboring locality inadequate, even when that discrimination was of recent vintage.[324] Three lawsuits specifically found evidence insufficient because it was not linked to the specific, local jurisdiction. In the Alabama lawsuit *Chapman v. Nicholson,* the court found Factor 1 absent because "[t]here was certainly no evidence that black citizens in Jasper have had as much difficulty in voting as has been experienced by black citizens in some Southern communities."[325] Similarly, in the *Rodriguez* litigation, the court acknowledged as "troubling" the evidence of discrimination from recent litigation in the City of Yonkers, but deemed this evidence insufficient to establish Factor 1 in a challenge to a proposed state senate district, because only a fraction of the challenged district's residents came from Yonkers.[326] Most lived in the Bronx, where, the court noted, "Hispanics — and the various ethnic groups that fall under that label — have very actively participated in local Bronx politics."[327] Finally, in the *Kent County* litigation, the district court found that evidence of a city's official discrimination was not relevant to a Section 2 challenge to a county's actions.[328]

Thirty of the lawsuits addressing but not finding Factor 1 parsed the factor into two components. These cases all identified a history of official discrimination, but deemed insufficient evidence showing that this past history "touched" on the right to vote today.[329] All read Factor 1 as requiring a showing that the official discrimination hindered present-day minority political participation.[330] Under this approach, much evidence of historic discrimination in voting is irrelevant absent linkage to contempo-

rary problems. Thus, in the *Liberty County Commissioners* litigation the defendants conceded an extensive history of official discrimination and the court recounted this history in detail.[331] The court then assessed "the extent to which that discrimination still affects the rights of blacks to have equal access to the political process,"[332] and, on this question, the court concluded that it did not. The primary example of more recent official discrimination was a school employment lawsuit decided in 1986, which "indicate[d] lingering prejudice on the part of whites even in their official capacity ... did not touch the issues involved in a determination of whether the Voting Rights Act is being violated."[333]

For some courts, affirmative steps taken by a jurisdiction to improve voting rights ameliorated evidence of historical discrimination. The *Aldasoro* litigation, for example, recounted thirty years of California legislation designed to "improve minority voting participation and to liberalize the political process."[334] Some deemed the absence of contemporary examples of discrimination reason to discount past evidence. The court in *City of Woodville,* for example, acknowledged a past history of discrimination and the fact that the city "remains a place of almost total racial segregation on a social level," but it nevertheless minimized this finding because "Blacks and Whites are operating a government which is fair and responsive to Blacks in a community atmosphere of cooperation between the races and devoid of intimidation."[335] So too, the court in a 1997 case in Massachusetts noted that "[t]he 1995 election witnessed the complete absence of election-related problems that plagued elections in the 1980's."[336]

For other courts, the very prevalence of discrimination meant it should be discounted. Thus, while courts in southern States assumed or outlined a long local and state history of official discrimination,[337] some maintained that this discrimination was too common and too widepsread to weigh heavily within the Section 2 analysis.[338] The court in *City of Woodville* explained that the city "has a past history of racial discrimination *as does every other Mississippi town or city,*" thus minimizing that history.[339]

Some courts in Northern states minimized a local history of discriminatory practices by contrasting that history what the record of what occurred in the South. In the *Butts* litigation, for example, the appellate court took issue with the district court's identification of numerous official practices targeting black and Hispanic voters and its suggestion that racial discrimination in voting is hardly confined to the South.[340] The appellate court stated that "*[u]nlike many of the jurisdictions typically involved in Voting Rights Act cases,* New York has ensured to black citizens the right to vote on the same terms as whites since 1874 (when the fifteenth amendment was ratified)."[341] In another New York lawsuit against the Town of Babylon, the district court noted that "[no]thing in the history of New York even remotely approaches the systematic exclusion of blacks from the political process that existed in the South."[342]

SENATE FACTOR 2: *Extent of Racially Polarized Voting*

Senate Factor 2 calls for an evaluation of the extent of racially polarized voting. As discussed above, courts analyzed this issue typically do so when evaluating the *Gingles* factors.

SENATE FACTOR 3: *Use of Enhancing Practices: At-large elections, majority vote requirements*

Factor 3 inquires about the "extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group."[343] Section 2 did not categorically outlaw the practices identified in Factor 3, even though numerous decisions have invalidated specific uses of such practices as violations of the statute.

Fifty-three lawsuits found that at least one enhancing practice existed in the jurisdiction.[344]

Of those finding Factor 3, 35 (or 66.0%) also identified a violation of Section 2 (and 1 additional lawsuit ended with a settlement favorable to the plaintiffs). Thirty-two lawsuits found majority-vote requirements,[345] 26 found anti-single shot provisions, such as staggered terms and/or numbered-place requirements,[346] 23 found the use of at-large elections,[347] 11 found unusually large districts,[348] and 6 found other enhancing practices, including the use of an automatic voter removal or "purge" law (based upon voting frequency), a short interval between an initial election and the runoff election, candidate registration fee, candidate residency requirement, or low financial compensation for elected officials.[349]

Thirty-four (64.2%) of the lawsuits finding Factor 3 arose in covered jurisdictions.[350] Of these, 23 also found Section 2 was violated.[351] Of the 19 lawsuits (35.8%) finding this factor in non-covered jurisdictions, 12 also found a violation of Section 2.[352]

Factor 3 differs from the other Senate Factors in that courts addressing it usually engaged in virtually no analysis. Unlike, for example, identifying a racial appeal (Factor 6) or an exclusive slating process (Factor 4), identifying Factor 3 devices is almost always perfectly obvious. The jurisdiction either uses an at-large system or it does not. Most courts have found little to analyze and little to say apart from identifying the practice.

Even so, some courts that found Factor 3 discounted its import, typically by deeming the identified practice as having a minimally discriminatory effect on the ground.[353] These courts suggested that while Factor 3 practices may generally foster discriminatory results, no evidence establishing that effect was presented in the particular case.

The *Senate Report*'s inclusion of the practices identified in Factor 3 in the totality of the circumstances recognizes the history underlying these practices. Legitimate reasons may exist for their continued use, but numerous notorious and historic examples attest to their adoption and use as devices for limiting political participation by racial minorities, and, in particular, participation by African Americans in the South.[354] The *Senate Report* recognizes this by providing that a jurisdiction's decision to use of such practices is evidence, albeit hardly dispositive standing alone, that Section 2 may have been violated.

SENATE FACTOR 4: *Candidate Slating*

Factor 4 asks whether members of the minority group have been denied access to a candidate slating process, assuming such a process exists in the jurisdiction. A denial of such access was an important component of a Section 2 claim prior to the 1982 amendments,[355] but the factor appears to be of diminished importance under the amended provision. Sixty-four lawsuits determining Section 2 was violated did not find Factor 4.[356]

More than 20 lawsuits specifically addressed evidence relating to Factor 4. Ten of these found the existence of a discriminatory slating process. Of these 10 lawsuits, 4 originated in jurisdictions covered by Section 5. All but one also found a violation of Section 2. Five of the 10 involved challenges to at-large districts. Eight also found racially polarized voting existed; all courts in these 10 lawsuits also found that the minority group had difficulty getting elected.[357]

While the term "slating" is not defined by the *Senate Report*, the Fifth Circuit has described it as "a process in which some influential non-governmental organization selects and endorses a group or 'slate' of candidates, rendering the election little more than a stamp of approval for the candidates selected."[358] Courts finding the factor have identified slating in four general circumstances.

Official Slating

Three courts identified instances where official party conduct constituted discriminatory slating. The *Town of Hempstead* litigation documented a slating process under which the Republican Party Chairman for the County selected candidates to run for office subject to approval by the Party's 69-member executive committee.[359] Deeming this process racially exclusive within the meaning of Factor 4, the district court noted that the executive committee invariably approved the Chairman's selections without debate, making the participation of three African Americans on the committee of little consequence. The only African-American candidate ever slated was not initially supported by a town-based organization of African-American Republicans, but instead was "a close friend and tennis partner" of the party chairman.[360] These circumstances led the appellate court to observe that, in this predominantly white, predominantly Republican town, the lack of access to the Republican slating process meant that "blacks simply are unable to have any preferred candidate elected to the Town Board."[361]

Similarly, in the *City of New Rochelle* litigation the district court found that candidate selection by party members placed barriers on non-party affiliated candidates and limited the prospects for candidates preferred by the African-American community to gain access to the ballot.[362] Finally in the Albany County litigation the district court found a lack of access based on anecdotal evidence coupled with the major parties' failure ever to nominate a minority candidate for county-wide office.[363]

Unofficial Party Slating or Backstabbing

Two courts found unofficial conduct by party officials to constitute slating.[364] In the *City of Springfield* litigation, the court called unofficial party endorsements and support in ostensibly nonpartisan elections "a subtle and covert" form of slating, one that contributed to the failure of African-American candidates to be elected.[365] In the *Bone Shirt* litigation the court found that informal activities by the party organizations stymied Native American candidacies. The court highlighted as evidence the conduct of the chairman of the Democratic Central Committee, who campaigned against his own

party's nominees for county commissioner in the 2002 general election after Indian candidates unseated non-Indian incumbents in the primary.[366]

Although not characterized as "slating," conduct documented in two other lawsuits may be similarly understood. In the *Armour* litigation, the court cited the failure of party officials to support minority candidates despite rules requiring such support.[367] The *City of Philadelphia* litigation cited campaign materials distributed by the Democratic Party listing all city council candidates running at-large except for one African-American and one Latino candidate.[368]

Private Slating

Three courts found that conduct by private organizations denied minority candidates access to slating processes.[369] In the *City of Chicago Heights* litigation the court identified such conduct in the activities of an organization called the Concerned Citizens Group, a group that had no African-American members and chose candidates for city council elections. The court noted the absence of evidence showing either that black voters had input into this slating process or that they could gain access to the ballot absent access to that process.[370] In the *City of Gretna* litigation, the district court found that electoral success hinged on the endorsement of a local political faction known as the Miller-White Ticket, and that the Ticket routinely blocked black candidates.[371] In the *Pasadena Independent School District* litigation, the court noted that essential campaign contributions flowed to candidates endorsed by a group called Communities United for Better Schools ("CUBS"). Since a CUBS endorsement typically led to candidate success on election day, and because CUBS had only once endorsed a Hispanic candidate, the court concluded that Factor 4 was satisfied.[372]

In the *City of Dallas* litigation the district court noted that an organization known as the Citizen's Charter Association had denied black and Latino candidates access to slating through 1977.[373] Because the group no longer existed, however, the factor was not found.

Inference of Slating

One court inferred a denial of access to slating processes given the absence of African-American candidates running for office.[374]

Slating Not Found

In an additional 13 cases, plaintiffs introduced what they contended was evidence of slating but courts did not find that minority candidates had been denied access. Courts in 5 cases rejected evidence regarding private slating processes either because the slating organizations were defunct by the time litigation was initiated[375] or because the activities of the group in question did not fit the court's definition of a slating organization.[376] Anecdotal evidence of slating was conclusorily rejected in another two lawsuits.[377]

Three lawsuits viewed electoral success by minority candidates as evidence of access to slating processes. Additionally, in the *Alamosa County* litigation,[378] the court assumed without deciding that the Democratic Central Committee played a functional role in the selection of county commission candidates, but concluded that anecdotal testimony about ethnically biased comments and "boorish behavior" by some members of the committee was insufficient to establish a "policy or practice" that denied non-

white candidates access to slating. Finally, 2 lawsuits attributed the exclusion of minority candidates from slating processes to partisanship rather than race.[379]

SENATE FACTOR 5: *Ongoing Effects of Discrimination (Education, Employment, Health)*

The fifth Senate factor calls for evaluation of "the extent to which members of the minority group bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." Of the 129 lawsuits addressing this factor, 84 found the factor to be met. Forty-five lawsuits finding Factor 5 originated in jurisdictions covered by Section 5 of the VRA. In 50 lawsuits finding Factor 5, Section 2 was violated, and an additional 4 lawsuits ended favorably for the plaintiffs.[380] Courts have evaluated Factor 5 in several different ways.

Depressed Socio-Economic Status Alone
Several courts found Factor 5 based on a finding of historic discrimination and some showing that the minority group experiences comparatively low socio-economic status. In 12 lawsuits, courts used this approach and found the factor met.[381]

Nexus Between Discrimination and Participation
Most courts require some kind of nexus not only between a history of discrimination and lowered socio-economic status, but also between depressed socio-economic status and the ability to participate in the political process. In 31 cases, courts assumed or deduced, sometimes aided by expert testimony, that lower socio-economic status hindered the minority group's ability to participate effectively in the political process and found the factor met.[382] These courts pointed out, for example, that depressed socio-economic status hinders one's ability to raise money and mount a campaign,[383] and to campaign in large districts.384 Moreover, lower socio-economic status often creates geographic and social isolation from other members of the community, connection with whom may be critical to engage in effective political action.[385] One district court specifically noted that depressed socio-economic status makes it difficult for minority candidates to run for particularly low paying public positions.[386]

Proof of Depressed Participation
In the majority of lawsuits, however, courts concluded that Factor 5 requires concrete evidence of depressed participation as measured through voter registration and turnout statistics. Out of the 35 cases quantifying minority political participation according to voter registration and turnout statistics, 24 found Factor 5 based on depressed minority registration and turnout,[387] while eleven courts found the factor unsatisfied when presented with nearly equal voting participation rates.[388] As a measure of political participation, several courts view turnout as more probative than registration rates.[389]

In an additional 2 cases, the courts made conclusory assertions that socio-economic disadvantage did not hinder political participation by the minority group in question.[390] In another 10 cases, the court did not find Factor 5 met because plaintiffs had not presented sufficient evidence to show whether or not the minority group actually suffered from lower political participation.[391]

Holistic Approach to Participation
Other courts considered statistical measures of voting participation but did so in combination with significant testimonial evidence. Five courts, for example, examined under Factor 5 the effect of various forms of de facto racial segregation on the ability of minority groups to participate in the political process.[392] For example, the district court in the *Charleston County* litigation noted severe societal and housing segregation and found that this ongoing racial separation "makes it especially difficult for African-American candidates seeking county-wide office to reach out to and communicate with the predominately white electorate from whom they must obtain substantial support to win an at-large elections [sic]."[393] The district court in the Neal litigation likewise concluded that similar segregation meant "that whites in the County have historically had little personal knowledge of or social contact with blacks...Quite simply, whites do not know blacks and are, as a result, highly unlikely to vote for black candidates."[394]

Causation and Voter Apathy
Five courts refused to find Factor 5 even in the face of specific evidence of both depressed socio-economic status and low levels of political participation.[395] These courts required additional evidence showing that discrimination directly caused depressed participation.

Some defendants have argued that low participation is not the result of discrimination, but is instead caused by voter apathy. Courts have disputed the relevance of voter apathy within this inquiry into causation. Four courts concluded that voter apathy, as opposed to socio-economic status, best explained low levels of political participation by minority voters in the jurisdiction.[396] At least 5 other courts, however, attributed voter apathy to the very sources of discrimination Factor 5 identifies.[397] In the *City of Gretna* litigation, for example, the district court held that voter apathy was not an independent cause of low political participation, but was instead a product of the very discrimination that depressed black socio-economic status. The court noted that "[d]epressed levels of participation in voting and candidacy are inextricably involved in the perception of futility and impotence" engendered by "severe historical disadvantage."[398] The court concluded that "[t]hese historical disadvantages continue through the present day and undoubtedly hinder the ability of the black community to participate effectively in the political process within the *City of Gretna*."[399]

Significance of Past Discrimination
In one case, the district court required plaintiffs to establish that official discrimination caused the current socio-economic disparities.[400] In another, the district court concluded that plaintiffs had not carried their burden of proof because they could not show that socio-economic disparities were the specific result of discrimination within the challenged jurisdiction itself.[401] In three cases, district courts discounted evidence of low socio-economic status amongst Latinos because the evidence did not distinguish recent immigrants from longstanding residents. This approach posits that new immigrants cannot bear the effects of discrimination in housing, employment or health within the meaning of Factor 5 and thus the failure to distinguish them from other members of the minority group leaves courts unable to find the factor satisfied.[402]

Intransigence of Inequality
Some courts discounted evidence of low socio-economic status because they determined that the status was too intransigent to receive significant weight.[403] In the *Magnolia Bar Association* litigation, the district court found sufficient evidence to establish the factor,[404] but concluded that Factor 5 described a condition too common to weigh heavily in plaintiffs' failure. The court observed that because "the socioeconomic standing of blacks vis-a-vis whites has changed little and it is unlikely that standing will improve markedly in the foreseeable future," continuing socio-economic effects of discrimination "will be a factor on which the plaintiffs in voting rights cases will always win in the foreseeable future. The issue thus becomes one of weight to be afforded this factor.[405]

SENATE FACTOR 6: *Racial Appeals in Campaigns*

The sixth factor in the *Senate Report* instructs courts to assess whether political campaigns have been characterized by overt or subtle racial appeals. Of the cases surveyed, 48 lawsuits considered evidence addressing this factor. Thirty-one of these identified such an appeal and found the factor met. Seventeen (or 54.8%) of these 31 lawsuits were in covered jurisdictions, while 14 were in non-covered jurisdictions. Eighteen also held that Section 2 was violated and another issued a preliminary injunction. Of the successful lawsuits finding this factor, 12 (or 63.2%) occurred in covered jurisdictions.[406]

Some courts noted that campaigns generally have been marked by racial appeals,[407] but most decisions finding Factor 6 identified appeals in specific campaign years. These courts have identified racial appeals in 59 specific elections occurring in 1950, 1954, 1960, 1968, 1970, 1971, 1972, 1975, 1976, 1977, 1982, 1983, 1984, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1995, 2000 and 2002.[408] Courts finding Factor 6 identified 42 specific racial appeals or campaigns characterized by racial appeals since 1982.[409] Of these, 27 occurred in covered jurisdictions.[410]

While some courts have stated without elaboration that elections have been marked by racial appeals,[411] others have identified racial appeals in a wide range of conduct. Courts have disagreed, however, as to whether any particular conduct should be considered a racial appeal.

Identification of the candidate's race
In 6 lawsuits, courts identified as racial appeals a variety of statements in which a candidate's race was identified, including comments by white candidates or their campaign workers that their opponent was black,[412] statements by minority candidates in which they identified their minority status,[413] and newspaper articles that mentioned the race of the candidates.[414]

Photographs
Numerous courts have identified the use of photographs in campaign flyers and advertisements as racial appeals. The majority of these cases involved campaign materials distributed by a white candidate or the candidate's supporters that featured the photograph of an African-American opponent.[415]

No court has deemed the decision by a newspaper to publish candidates' photographs a racial appeal.[416] In the *City of Jackson* litigation, for example, the district court

acknowledged that the publication of candidates' photographs might prompt "some white voters [to] vote for a white candidate and some black voters [to] vote for a black candidate," but, the court concluded, "that is merely a fact of political life in Jackson."[417] Two lawsuits characterized as racial appeals the manipulation of photographs to darken the skin of opposing candidates, be they minority or white.[418] The *Charleston County* litigation recounted the use of this tactic in three separate campaigns occurring in 1988, 1990, and 1992. In each instance, white candidates and their campaigns distributed official campaign literature or placed newspaper ads featuring the darkened photos of African-American opponents.[419] The *City of Philadelphia* litigation discussed the use of similar tactics in two different campaigns. In a state senate campaign in the early 1990s, one white candidate published a brochure containing a darkened photograph of his white opponent next to a photograph of Philadelphia's black mayor.[420] The other involved a televised campaign advertisement in the 1985 district attorney campaign that portrayed light-skinned African-American candidates as having much darker skin.[421]

The Specter of Minority Governance

Courts have held Factor 6 satisfied by a variety of allusions or threats of minority control of government. Conduct of this sort includes references by white candidates or their campaigns that minority voters will engage in "bloc voting" and turn out in high numbers,[422] that a minority will be elected if whites don't turn out,[423] and that minority candidates, when elected, will appoint other minorities to positions of power.[424] Similarly characterized are statements by white candidates that the minority community wants to "take over" the local government, and the country.[425]

In the *Armour* litigation, for example, campaign workers for a white 1985 mayoral candidate went door to door telling voters that if the black candidate was elected, "his cabinet would be black." They also drove a sound truck around Youngstown announcing that should the minority candidate be elected "we will have a black police chief, we will have a black fire chief," and adding "we cannot have that."[426] More recently, in the *Bone Shirt* litigation, the district court identified racial appeals occurring during the 2002 primary elections for county commission, in which three Native American candidates confronted accusations that Indians were seeking to "take over the county politically...[and] trying to take back land and put it in trust."[427]

In-group and Out-group

Two courts identified as racial appeals campaign advertisements making reference a candidate's being "one of us"[428] or promising to stand against vandalism and crime that "drive our people and our businesses out" of the community.[429] In the *City of Holyoke* litigation the district court categorized as a racial appeal the "us versus them" sentiment featured in one candidate's 1987 campaign materials where "the 'us' was fairly clearly the longtime white residential community, the 'them' the more recent Hispanic minority."[430] The district court noted, for example, the campaign's focus on "teach[ing] the 'Spanish' English ...as an answer to increasing crime and vandalism" and featured an advertisement with a "large picture of an Hispanic young man, cigarette dangling from his lips and the caption 'The people who really should read this, can't.' "[431]

Race-baiting

In the *Charleston County* litigation, the district court identified as a racial appeal the efforts to increase turnout among voters perceived to be "anti-black."[432] In 1990, the

campaign of a candidate for Lt. Governor of South Carolina paid Benjamin Hunt, Jr., "a nearly illiterate African-American man" to run in a congressional primary.[431] The candidate took no part in the campaign beyond allowing his picture to be taken while standing in front of a Kentucky Fried Chicken restaurant. A consultant hired by the would-be Lt. Governor's campaign mailed out thousands of leaflets featuring this picture with the caption "Hunt for Congress."[434]

The Portent of Racial Strife

Also counting as racial appeals are statements suggesting racial strife or even violence will ensue if minority candidates or candidates associated with minority interests were supported or elected.[435]

Guilt By Association

Efforts to link a candidate with polarizing figures or organizations have been deemed racial appeals. Four courts, for example, have identified as racial appeals statements by white candidates linking a minority candidate with Jesse Jackson[436] or Louis Farrakhan and the Nation of Islam.[437] Another characterized as a racial appeal statements by an African-American candidate that his white opponent was supported by the Ku Klux Klan.[438]

Courts have also found evidence supporting a finding of Factor 6 in efforts to link a white opponent with minority elected officials or issues of minority concern. For example, two district courts classified as racial appeals the campaign literature of white candidates who featured photographs of their opponents, also white, alongside pictures of unaffiliated African-American elected officials.[439] Another district court identified as a racial appeal a private slating organization's reference to a white candidate's association with a black candidate and his support for voter registration in the minority community.[440]

Discussion of Racially Charged Issues

In 5 lawsuits courts identified as racial appeals candidates' statements on certain racially charged issues. These issues included illegal immigration,[441] low income housing,[442] busing and school desegregation,[443] and crime.[444] In the *Town of Hempstead* litigation, the district court found a racial appeal in a campaign brochure distributed by a candidate for town council in 1997. The brochure noted the candidate's awareness of "his community's proximity to the City of New York," his opposition to those who would seek to "Queensify" the town, and his concern about the danger of "urban crime spilling over the county border." The brochure celebrated the candidate's efforts to "sensitize[] local patrolmen to the special concerns of the community," a statement the court identified as a reference to an "unofficial border patrol policy" under which the police were to stop black youth from Queens, "find out their business and ensure that they 'go back where they belong.'"[445]

One district court identified as a racial appeal public debate on a racially charged issue, absent any linkage to any particular candidate or campaign.[446] Another viewed such debate as evidence supporting the inference that other campaigns are characterized by racial appeals.[447]

Not all courts treat the presence of racially charged issues in campaigns or general public debate as racial appeals. Three district courts rejected plaintiffs' contentions that candidates' discussion of busing and school desegregation should be classified as racial appeals.[448] The district court in the *City of Norfolk* litigation stated that the inclu-

sion of such issues in campaigns was of "legitimate public concern and not an appeal to racial prejudices," and noted that both black and white candidates addressed the issue of busing "reluctantly and often only when questioned by the public about their stance."[449] Similarly, the court in the *City of St. Louis* litigation stated that while school desegregation has "an undeniable racial dimension," plaintiffs presented no evidence that the issue was raised "in an effort to appeal to members of a particular race."[450] In the *Red Clay School District* litigation, plaintiffs introduced into evidence a candidate's flyer that warned of increasing percentages of minority students at local high schools and the potential for "major disruption for our children." The flyer stated that "Bill Manning is the only candidate who has said over and over again that he favors stability. To deal with overcrowding, he supports change within our same feeders, keeping our children together." While the court characterized the flyer as "shrill," it declined to characterize it as a racial appeal because it does not identify the race of any candidate nor does it "malign one of the candidates or his supporters because of race."[451]

One district court refused to characterize debate about at-large and single-member districts as a racial appeal.[452] Another district court refused to "consider every discussion of or question about" Indian exemption from certain taxes a racial appeal, notwithstanding the district court's recognition that "white voters harbor a resentment over this issue, making white support for Indian candidates unlikely."[453]

Racial Bias in Press Coverage

Racial bias exhibited by the press has been deemed a racial appeal in 2 cases. In the *Bone Shirt* litigation, the court credited as evidence of racial appeals unsubstantiated and false news stories circulating throughout 2002 linking Native Americans to voter fraud.[454] Likewise, in the *City of Dallas* litigation, a 1989 newspaper column warning that a vote for the African-American candidate running against the incumbent white mayor "could lead to racial violence and white flight" was classified as a racial appeal.[455]

Candidate Intimidation

Some courts have characterized as racial appeals conduct directed at minority candidates as opposed to voters. In the Jeffers litigation, for example, the court termed a racial appeal a black candidate's receipt of anonymous calls where the caller used obscenities and racial slurs as well as a later incident in which the same candidate was run off the road by a group of individuals wearing hoods.[456] Jeffers also deemed a racial appeal government retaliation against an unsuccessful minority candidate. Prior to his political involvement, the candidate had enjoyed a business relationship with the county that was terminated after his campaign.[457]

In the *Garza v. Los Angeles* litigation, the district court cited "substantial evidence" of racial appeals including hostility directed at a Latino candidate for city council who "had doors slammed in his face" while campaigning in a predominantly white neighborhood.[458] It similarly characterized the destruction of the candidate's campaign literature.

Racial Slurs or Stereotypes

Courts have also deemed a racial appeal the public use of racial epithets and slurs by white candidates running against black candidates.[459] One district court found a white official's admission before the court in 2002 that he casually and regularly uses the

word "nigger" to be a racial appeal, even though the plaintiffs made no allegation that racial appeals existed.[460]

So too, courts have identified condescending stereotypes about minority candidates' lack of qualifications as racial appeals. For example, the district court in the *City of Dallas* litigation so classified a 1970 ad where the white incumbent described his opponent simply as *"A black man* (no qualifications of any kind)."[461] In the same case, the district court also noted a boast made by a white female candidate and printed in the League of Women Voters 1972 voter guide that "evidence of [her] proven ability" was the fact that no white men opposed her, and that her only opponents were black men.[462] Although more subtle, the district court in the *Neal* litigation identified a similar type of racial appeal in an editorial run in the local newspaper. The editorial announced the race of two black candidates only to go on to urge voters "not to vote on account of race, but rather on merit." Still, the editorial noted that one of the races involving an African-American candidate was "of great concern to many county residents" because the black candidate could win "solid black support" and defeat the white incumbent. The editorial weighed in for the re-election of the "more experienced" incumbents.[463]

Sources of Evidence

In most cases, plaintiffs seeking to prove Factor 6 introduce earlier campaign literature and advertisements, documentation of media coverage, and witness testimony from minority and non-minority candidates, elected officials, and community members. In two cases, however the court looked beyond these normal sources of evidence in finding the presence of racial appeals. In the *Wamser* litigation, the district court found the defendant's expert testimony attempting to refute plaintiffs' showing of racial appeals not to be credible seemingly on the basis of the Judge's own experiences —"Dr. Wendel's observation that other political campaigns are devoid of racial appeals would be most credible perhaps to persons who were not in St. Louis during the recent campaign for the City school board."[464] In the *City of Philadelphia* litigation, the court credited as Factor 6 evidence complaints of racial appeals received from voters and investigated by a local non-profit commission.

Discounting Racial Appeals

Several lawsuits identifying racial appeals discounted their import. Some characterized the appeals as merely "isolated" incidents.[465] Others called the appeals ineffective because the targeted candidate was elected, at times with significant white support.[466] In the *Alamosa County* litigation, the court identified "a fundamental electoral truth — that to be elected in Alamosa County, a candidate must appeal to both Anglo and Hispanic voters," such that racial appeals by Hispanic candidates certainly did not weigh in favor of a finding of vote dilution.[467]

Eight lawsuits held that racial appeals occurred too long ago to be probative in contemporary claims.[468] Appeals deemed too remote include ones occurring more than thirty years earlier,[469] as well as ones occurring a decade past.[470] Two courts discounted evidence of racial appeals as dated by noting a new political reality characterized by "racial harmony."[471]

In the *Charleston County* litigation, the court identified numerous racial appeals, but concluded without explanation that "[e]vidence of racial appeals has not materially assisted the Court in reaching a conclusion" on Section 2 liability.[472] Likewise, in the *Magnolia Bar Association* litigation, the district court acknowledged the presence

of both overt and subtle racial appeals in campaigns, while concluding that "the appeal for voters by both black and white candidates crosses racial lines, thereby minimizing the importance of this factor under the totality of the circumstances."[473]

SENATE FACTOR 7: *Success of Minority Candidates*

Under Senate Factor 7, courts must evaluate the "extent to which members of the minority group have been elected to public office in the jurisdiction."[474] Of the lawsuits analyzed, 137 specifically addressed this factor, and 85 found a lack of minority candidate success. Of these, 60 (71%) also found a violation of Section 2. Two additional lawsuits ended in outcomes favorable to plaintiffs, albeit not with an adjudicated Section 2 violation. Twenty-five lawsuits found Factor 7 but did not find a violation of the statute. Fifty-two lawsuits addressed but did not find Factor 7, and of these,[475] only one found a Section 2 violation. Forty-nine (57.6%) of the Factor 7 findings were in covered jurisdictions, while 36 (42.4%) were in non-covered jurisdictions.[476]

Courts evaluating Factor 7 looked primarily at election results and counted the number of minority candidates elected. Courts generally examined minority success over the course of several elections, typically occurring over decades.[477] Several cases distinguished election results occurring before the lawsuit was initiated and those afterward, and often discounted evidence of post-filing minority success as strategic efforts to frustrate the lawsuit.[478]

Unsurprisingly, Factor 7 weighed heavily in the plaintiffs' favor in cases where electoral results revealed a total failure or near total failure of minority candidates to be elected. Courts have repeatedly found a lack of minority success in this situation.[479] On the other hand, Factor 7 favored defendants where electoral results showed significant success of minority candidates.[480]

Electoral results do not constitute the entire inquiry under Factor 7. Numerous courts have also considered the record of minority electoral success in conjunction with population statistics. Because Section 2 is explicit that the statute provides no right to proportional representation,[481] some courts have deemed an absence of proportional representation irrelevant to the Factor 7 analysis.[482] Others, however, have viewed proportional minority representation (or its absence) as informing the Factor 7 inquiry. Several courts deemed the absence of such representation to suggest a lack of minority electoral success under Factor 7,483 while others viewed evidence that minority officeholders approached or exceeded the proportion of minorities in the electorate as proof of minority electoral success.[484] Still, some courts concluded that greater-than-proportional electoral success did not compel a finding that Factor 7 was unsatisfied.[485]

The nature and prominence of the offices to which minority candidates had been elected also informed the Factor 7 inquiry. Some courts deemed the absence of minority candidates in top offices evidence of a lack of minority success, notwithstanding minority election to "lesser" positions.[486] Other courts viewed minority success in these "lesser" elections as sufficient evidence of minority electoral success, even where minority candidates did not win top offices.[487] For some courts, the success of minority candidates in exogenous elections was sufficient evidence of minority electoral success, even where minority candidates did not win *any* office in the challenged jurisdiction.[488] Many courts compared minority electoral success in endogenous elections to other elections for city, county or statewide offices. Most, however, emphasized that exoge-

nous elections were less probative of electoral difficulty or success.[489] Some courts accorded almost no weight to exogenous electoral evidence,[490] and several appellate courts reversed district court decisions finding that plaintiffs failed to meet Factor 7 based on exogenous electoral success.[491]

Some courts cited the *appointment* of minority officials to support a finding that Factor 7 had,[492] or had not been met.[493] For instance, in the *Town of Hempstead* litigation, the appellate court acknowledged that black Republicans had been appointed to various offices in the surrounding area and to "a number of positions" in the Town, but emphasized that the "only one black . . . elected to Town office since the establishment of the Town Board . . . [was] a Republican who was appointed to the Board in 1993 and elected the same year."[494] Thus, where minority electoral "success" hinges on the advantages of incumbency secured through appointment, some courts have found that such "success" has little bearing on the ability of minority candidates to win elections generally.

Several lawsuits looked beyond electoral results to assess the number of minority candidates participating in given races. Some courts noted that the failure of minority citizens to "offer themselves" as candidates weighed against finding a lack of minority electoral success.[495] In the *Red Clay School District* litigation, for example, the district court noted the absence of black candidates running for the school board in several elections. Although it acknowledged that "a sustained inability to elect black preferred candidates could create an atmosphere" that might discourage African-American candidacies, the court found evidence supporting the existence of such an "atmosphere" lacking in the case before it. It noted in particular the success of one black candidate and the absence of an onerous slating process.[496] Other courts, however, considered the possibility that a dearth of minority candidates might itself stem from "the very barriers to political participation that Congress has sought to remove" and weighed the small number of minority candidates in favor of plaintiffs.[497]

A few lawsuits included within the Factor 7 inquiry an examination of the qualifications of successful and unsuccessful minority candidates. Evidence suggesting that minority candidates were not serious or viable weighed against plaintiffs in the *Fort Bend Independent School District* litigation,[498] while the defeat of well-qualified minority candidates contributed to findings of a lack of minority electoral success in a small number of cases.[499] The failure of prominent white Democrats to rally behind a minority candidate contributed to finding Factor 7 in at least one case.[500]

In 12 lawsuits, courts distinguished minority candidates from minority-preferred candidates. Seven of these courts seemed willing to gauge minority electoral success based on the success of minority-*preferred* candidates, even when those candidates themselves were *non-minority*.[501] In 5 lawsuits, courts were more skeptical about whether non-minority candidates were minority-*preferred*.[502] In the *City of Cincinnati* litigation, for example, the appellate court stated that "the Act's guarantee of equal opportunity is not met when . . .'candidates favored by blacks can win, but only if the candidates are white.' "[503] The court suggested that the inability of black voters to elect their preferred candidate unless that candidate is white signals that black voters have been denied an "opportunity enjoyed by white voters, namely, the opportunity to elect a candidate of their own race."[504]

Under certain circumstances, courts discounted evidence of minority electoral success or an apparent lack thereof. Some lawsuits, for example, viewed the defeat of minority candidates by relatively small margins as mitigating evidence of limited minority electoral success.[505] At least one lawsuit discounted the election of a minority

candidate where that candidate was "emphatically not the candidate of choice of the county's African-American voters."[506]

Several courts examining Factor 7 tended to discount minority electoral success absent evidence that the minority candidate received the support of white voters. Apparently agreeing with the Supreme Court's characterization of the majority-minority district as the "politics of second best,"[507] these courts seemed to place more weight on minority success in at-large elections than in majority-minority districts.[508] So too, a few courts discounted as evidence of minority electoral success the experience of an African-American official, first appointed to the city board and then re-elected because the official not only enjoyed the benefits of incumbency but also never faced a white opponent.[509] Conversely, another court credited as evidence of minority electoral success the election of candidates who had originally been appointed to office where evidence established that these candidates subsequently developed "sustained biracial coalitions" and retained their positions through more than "sheer power of incumbency."[510]

SENATE FACTOR 8: *Significant Lack of Responsiveness*

In addition to the seven "typical" factors listed above, the *Senate Report* adds two additional factors "that in some cases have had probative value" in establishing a Section 2 violation. The first is whether there "is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group."[511] Of the lawsuits surveyed, 106 lawsuits addressed this factor and 19 (or 17.9%) found responsiveness lacking.[512] Of those finding the factor, 13 (or 68.4%) ended favorably for the plaintiffs.[513] Thus, only 4 lawsuits (21%) that found a significant lack of responsiveness found in favor of the defendant. Thirty-two lawsuits that addressed but failed to find Factor 8 also held Section 2 to be violated.[514] Thirteen cases considered lack of responsiveness but made no finding.[515]

Nine (47.4%) of the lawsuits that found a significant lack of responsiveness were in jurisdictions covered under Section 5; ten (52.6%) were not.[516] Of the 19 lawsuits that found a significant lack of responsiveness, all found a history of discrimination, 14 found Factor 1 was met, 15 found the minority candidate had difficulty getting elected, and 14 found racial bloc voting.[517]

Courts addressing responsiveness took varying approaches to evaluating the factor and what it encompasses. The *Senate Report* did not define the term, and courts have rarely attempted a general definition, opting instead to evaluate the factor based on specific examples presented in any given case.[518] Nevertheless, the cases suggest that courts view responsiveness as having two distinct components: substantive and procedural.

Substantive responsiveness

In the majority of lawsuits addressing Factor 8, courts viewed the responsiveness inquiry as requiring examination of the substantive policies enacted or implemented by the jurisdiction at issue. Courts applying this approach nevertheless disagreed significantly about which substantive policies signal responsiveness and which do not.

Numerous courts have held that evidence of affirmative discrimination directed at the minority group established a lack of responsiveness to that community.[519] Courts have cited adjudicated court decisions addressing school desegregation, employment discrimination and a violation of Section 5 of the Voting Rights Act;[520] resistance to

school desegregation orders;[521] evidence of disparate treatment;[522] and instances of racial hostility.[523] In making this determination, courts generally restricted their inquiry to conduct within the jurisdiction of the governing body, be it a school board[524] or a general local government.[525] Courts generally did not consider discriminatory conduct when outside the jurisdictional authority of the challenged governing body.[526]

In 25 lawsuits, courts held that elected officials are responsive absent evidence they engage in affirmative discrimination against the minority group.[527] In this context, courts have cited the absence of evidence establishing such discrimination, including the nondiscriminatory provision of city services,[528] and in particular road paving policy.[529] Courts have also deemed as responsive efforts by local officials to address or correct discriminatory practices. For instance, courts have deemed "responsive" governing bodies that achieves "unitary" status for previously *de jure* segregated schools,[530] that enters into consent decrees,[531] or that change to randomized selection of jury roles from a system where commissioners choose who will serve on grand and petit juries.[532] For other courts, the failure of localities to make similar efforts to remedy past discrimination is evidence of unresponsiveness.[533] Courts have also held that a jurisdiction's failure to remedy evident inequalities absent a court order or other compulsion suggests unresponsiveness,[534] while a willingness to provide such remedies absent legal compulsion favors finding the jurisdiction responsive to minority needs. Thus, the Red Clay School District's recalcitrance in implementing a school desegregation plan signaled its unresponsiveness, while Monroe County's initiative in being one of the first Mississippi counties to implement randomized jury selection weighed in its favor.[535]

In lawsuits challenging judicial elections, courts also equated nondiscrimination with responsiveness. None of the 8 lawsuits to address unresponsiveness in this context found the factor to be present.[536] Four expressly state that the only type of responsiveness a judge may properly demonstrate is to be fair and impartial,[537] and 3 deemed the absence of evidence suggesting judges were unfair or biased proof that Factor 8 was not met.[538]

Thirty-one lawsuits suggested that nondiscrimination alone was insufficient to establish responsiveness.[539] These courts looked for evidence of affirmative measures serving the minority community before finding responsiveness.[540]

A few lawsuits deemed the failure to adopt an affirmative action policy evidence of unresponsiveness;[541] while others cited such a policy to support finding responsiveness.[542] Several courts viewed the failure to hire or to appoint minority employees evidence of a lack of responsiveness,[543] while in 16 lawsuits, courts viewed jurisdictions as responsive because they employed or appointed minorities or were making a good faith effort to do so.[544] Further, the provision of bilingual education supported a finding of responsiveness.[545]

Numerous courts have focused on funding decisions in assessing responsiveness.[546] As noted above, several courts have held that failure to provide equal funding for projects in minority neighborhoods shows unresponsiveness,[547] while others courts cited the absence of discrimination in funding decisions sufficient to establish responsiveness.[548] Some courts, by contrast, have suggested that equal funding of particular projects, road paving in particular, insufficient to establish responsiveness, where the needs of minority communities had long been neglected.[549] Six courts found a lack of responsiveness where elected officials failed to fund projects in minority neighborhoods,[550] (particularly while funding comparable projects in white neighborhoods[551]), or failed to participate in federal programs which would fund such projects for the minority community.[552] In 14 lawsuits, courts have found responsiveness where officials pro-

vided minority communities disproportionately large amounts of funding[553] and directed funds to minority neighborhoods for improvements.[554]

A few courts viewed the acceptance of federal aid or efforts to secure such aid directed to minority interests as evidence of responsiveness.[555] In other lawsuits, however, courts viewed the same conduct as bearing little weight on the responsiveness inquiry. The Fifth Circuit suggested such evidence was "suspect" in making a responsiveness finding because the funding showed no actual commitment on the part of the jurisdiction to minority interests.[556]

Finally, some courts have discounted conduct that might otherwise count as responsive when the jurisdiction implementing it does so under legal or economic compulsion.[557] Thus, increased efforts toward hiring minorities do not establish responsiveness where the threatened withdrawal of federal funds propelled the action.[558] Similarly, desegregating long-segregated schools does little to show responsiveness where the school board pursues this course only after threats from the state board of education.[559]

Procedural responsiveness

A number of courts viewed responsiveness more as a question of process than of outcome. Here, courts focus on communication between elected officials and their minority constituents and the extent to which elected representatives advocate for measures that serve the particularized needs of the minority community. The effort to secure enactment or implementation of such measures matters as much as, if not more than, achieving the desired outcome.

Officials are unresponsive under this model when they actively oppose or otherwise evince hostility to the desires of minority community.[560] They are also unresponsive when they fail to address policies that the minority community seeks to have addressed, or do not respond to requests from or advocate for needs of the minority community.[561] For instance, in *Jeffers* litigation, the district court considered under Factor 8 the reluctance of white legislators to co-sponsor "bills of interest to black voters-for example, the bill to create a holiday in honor of Dr. Martin Luther King, Jr."[562] The district court noted the difficulties faced by both black constituents and black members of the Arkansas State Legislature when lobbying for such support.[563]

By contrast, evidence that an official supports causes championed by minorities weighs in favor of responsiveness. The focus is less on securing the desired outcome than on the official's engagement with the issue.[564] In the *Cincinnati* litigation, the court considered that the minority community "vocally protested that the at-large election system dilutes their voting strength, and has demanded change," and found "the City Council has debated the issue a number of times and several proposed ordinances have been before the Council. Council-members have made statements supporting change and decrying the lack of minority proportional representation on City Council."[565] This provided evidence of the city's responsiveness.

A lack of responsiveness is also displayed when an elected official simply ignores minority requests or complaints,[566] or refuses or otherwise fails to meet with minority constituents.[567] The district court in the *Jeffers* Litigation, for example, recounts an incident in which at least one white state representative referred black constituents to black members of the state legislature, rather than meeting with them.[568] Similarly, courts have found evidence of unresponsiveness when white elected officials were unable to identify any concerns particular to their constituent minority community.[569]

Meeting with or generally being available to meet with minority constituents, by contrast, favors of responsiveness,[570] as does seeking out minority groups or purposely including them in the decision making process.[571] For instance, in the *Terrazas* litigation the court considered the process the county went through to adopt a redistrict plan and found "far from evidencing official discrimination, [the plan] convincingly evidences full minority access to the redistricting process and a willingness on the part of almost all involved in that process to consider and effectuate minority proposals."[572]

In 13 lawsuits, courts found responsiveness when an elected official was dependent on minority votes either for election or to implement a desired policy.[573] Many of the courts simply asserted that officials dependent on minority voters will be respondent to these constituents. Similarly, courts considering this dependency often consider Factor 8 based on electoral mechanisms such as a plurality feature,[574] or racially polarized voting.[575] These electoral mechanisms affect the chances that a candidate will be "dependent" on them. Implicit in some of these cases and explicitly stated others is the observation that dependency on minority votes prompts responsiveness largely of a procedural sort. These "dependent" officials will meet with their minority constituents, seek out their views, be familiar with their concerns, and advocate on their behalf.

In related reasoning, four lawsuits suggest that responsiveness is shown by candidates who actively solicit minority votes, either via "door-knocking," or seeking endorsements from minority organizations.[576] Further, 6 lawsuits held that evidence that elected officials promoted voter registration, or otherwise encouraged political participation by the minority community established responsiveness.[577] Thus, efforts to facilitate black voter registration through home visits and special assistance available at voting precincts demonstrated that jurisdiction's responsiveness.[578]

Finally, courts in 4 lawsuits found a significant lack of responsiveness where jurisdictions did not facilitate minority political participation by failing, for instance, to establish a polling place in a minority community or appoint as volunteer registrars minority community members offering their services.[579] All of these lawsuits happened within the first five years of the passage of the 1982 amendments to Section 2.

SENATE FACTOR 9: *Tenuous Policy Justification for the Challenged Practice*

The second additional factor the Senate Report lists for consideration, called in this report Factor 9, is "whether the justification for the policy behind the practice is tenuous."[580] Governmental policy underlying a practice is "less important under the results test" than it was under the intent test. It remains relevant, however, both because a bad purpose or policy "is circumstantial evidence that the device has a discriminatory result," and because "the tenuousness of the justification for a state policy may indicate that the policy is unfair."[581]

Of the lawsuits analyzed, 66 lawsuits considered whether the policy underlying the challenged practice or procedure was tenuous. Twenty-two of these lawsuits held the identified justification to be tenuous, twelve coming from Section 5-covered jurisdictions and 10 from non-covered. Of this total, 20 lawsuits also held Section 2 was violated.[582] Of the lawsuits that found this factor, 20 also found Factor 1, 20 found legally significant racial bloc voting, 19 found Factor 5, and 21 found Factor 7. Sixty-six lawsuits found a Section 2 violation or ended with a successful outcome for the plaintiffs

without finding Factor 9. Of these, 55 did not consider tenuousness, and the remainder accepted the justification proffered.[583]

Twelve lawsuits addressed Factor 9 in cases where defendants offered no justification for the challenged policy.[584] In this circumstance, 8 courts deemed the justification (or lack thereof) tenuous.[585] Four did not, either because the plaintiffs presented no evidence on tenuousness, or because the court itself came up with a legitimate justification for the policy.[586]

Defendants offered a number of substantive justifications for plans challenged under Section 2. Most courts accepted these justifications as not tenuous. Those that did not generally deemed the reason proffered to be (1) false, (2) impermissible, or (3) outweighed by other considerations.

In a number of cases, for example, defendants claimed challenged districting plans preserved municipal and other political boundaries. Most courts accepted this justification as nontenuous,[587] although one deemed this goal tenuous where the jurisdiction did not consistently adhere to it.[588] So too, when defendants claimed the challenged policy was based on political will, some courts accepted this justification,[589] but others did not where they found it was not the true underlying reason for the policy.[590]

Several jurisdictions defended their at-large districts on the ground that the practice fostered accountability and responsiveness among elected representatives. Many courts accepted this policy justification as nontenuous,[591] but some did not, including a few that rejected the argument because they had already found the jurisdiction was unresponsive under Factor 8.[592] Courts, however, have consistently upheld as nontenuous the claim that defendant jurisdictions designed at-large systems for electing judges to prevent judges from being too accountable or responsive to particular constituents.[593]

Many jurisdictions defended their districting choices or other electoral practices on the ground that the plans or practices protected incumbents or other political allies. Some courts accepted this justification as nontenuous.[594] A number of courts, however, deemed this justification tenuous when protecting white incumbents necessarily diluted minority voting strength and the jurisdiction knew of this consequence.[595] Indeed, some courts have concluded that these policies amount to intentional racial discrimination.[596]

In several lawsuits, jurisdictions defended challenged practices on grounds of efficiency or ease of administration, and many courts accepted these justifications.[597] The court in the *Operation Push* litigation, however, deemed administrative ease tenuous as a justification for a dual registration system, concluding that "[m]ere inconvenience to the state is no justification for burdening citizens in the exercise of their protected right to register to vote."[598]

In several lawsuits, jurisdictions invoked historical practice to justify challenged electoral practices. Most courts accepted this justification as nontenuous.[599] In *Milwaukee NAACP* litigation, for example, the court noted that Wisconsin's historic practice of electing judges at-large, a practice dating to 1848, set the default basis for what was reasonable in the state.[600] In the *Kirksey v. Allain* litigation, however, the court deemed historic practice a tenuous justification for using a numbered post system because other judicial bodies in the state no longer used it.[601]

Some jurisdictions defended challenged practices on the ground that the Fourteenth Amendment and Voting Rights Act required the adopted policy. Some courts have held such claims to be nontenuous,[602] but, in the *Bone Shirt* litigation, the district court found this justification to be tenuous, holding that Section 2 did not

require South Dakota to create a district that was 90% Native American, and rejecting the State's claim that low turnout among Native American voters rendered such a district necessary in order Native Americans to elect their preferred candidate. *Bone Shirt* held that not only does Section 2 not compel a district with this concentration of minority residents, but that the statute in fact prohibits packing of this sort as a form of racial vote dilution.[603]

Proportionality as a Tenth Factor?

Eleven years ago, *Johnson v. De Grandy* introduced "proportionality" as a consideration in the totality of the circumstances analysis.[604] The Court stated that proportionality, which "links the number of majority-minority voting districts to minority members' share of the relevant population," is not a "safe harbor" insulating a jurisdiction from liability under Section 2, but that its existence weighs against a finding of vote dilution.[605]

Seventeen lawsuits both considered and made a finding on proportionality or the lack thereof, treating it as a distinct factor under the totality of the circumstances test.[606] The eleven lawsuits that found proportionality identified no violation of Section 2.[607] Five lawsuits found a lack of proportionality,[608] and of these 4 identified a Section 2 violation.[609] One lawsuit found neither proportionality nor a violation of section 2.610 Most courts considered proportionality one of many factors, though in the *City of St. Louis* litigation, the appellate court affirmed the grant of summary judgment in favor of defendants solely on the basis of "sustained proportionality."[611]

De Grandy spoke of proportionality as involving districts with a "clear majority" of minority voters.[612] One court has consequently refused to consider the presence of "opportunity" or "coalition" districts when assessing proportionality.[613] Another deemed an absence of "mathematical" proportionality inconsequential where the proposed additional majority-minority district was one with a bare 50.3% Hispanic majority, and consequently not one the court thought would yield "effective" electoral opportunity.[614]

De Grandy found proportionality by comparing the number of majority-Hispanic districts to the proportion of Hispanics of voting age living in the Miami-Dade area, as opposed to making that comparison statewide.[615] The courts in the *Rural West I* and *II, Bone Shirt* and *Austin* lawsuits followed this approach and limited the proportionality inquiry to subregions of the state, rather than applying the concept statewide in challenges to statewide districting plans.[616] The *Rural West I* court acknowledged the difficulty it faced "in using regional statistics. . . because there are several equally valid ways to decide precisely which districts should be included in a regional analysis."[617] In *Rural West II,* a subsequent challenge to a redistricting plan for the Tennessee House of Representatives, the Sixth Circuit explained its regional, rather than statewide, focus, finding that "neither over-proportionality in one area of the State nor substantial proportionality in the State as a whole should ordinarily be used to offset a problem of vote dilution in one discrete area of the State."[618] The district court in *Austin* offered a distinct explanation for its regional focus, pointing out that it limited "the geographic scope of [its] assessment to Wayne and Oakland Counties, because the plaintiffs d[id] not dispute the State's drawing of district lines except in those areas."[619] Still, not all courts addressing statewide districting plans examined proportionality only

by region. The district court in *Perry* examined proportionality statewide[620] while the appellate court in *Old Person* found disproportionality under both regional and statewide analyses and thus found it unnecessary to choose between the two.[621]

Two courts substituted proportional representation for proportionality when confronted with challenges to at-large elections for which no majority-minority districts existed.[622] The district court in the *Liberty County* litigation made the same substitution,[623] but the appellate court reversed, emphasizing that proportionality and proportional representation are distinct concepts, and that "[s]ection 2 explicitly disclaims any 'right to have members of a protected class elected in numbers equal to their proportion in the population.'" [624]

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VOTING RIGHTS INITIATIVE ENDNOTES AS OF 11/17/05

Endnotes are still being fully integrated into the final report – if you have any questions about any endnotes, please email: echeuse@umich.edu. The final edition of the report and notes will be available on-line soon after Thanksgiving.

1. As originally enacted, the Act banned the use of any "test or device," such as a literacy test for five years, in areas of the country where a significant portion of the voting age population either was not registered to vote or failed to vote in the 1964 presidential election. See 42 U.S.C. § 1973b (2000) as amended Pub. L. 94-73, tit. I, § 101, tit. II, §§ 201-203, 206, Aug. 6, 1975, 89 Stat. 400-402 (making ban permanent and nationwide).
2. Section 5 of the Act required that these so-called "covered" jurisdictions obtain federal "preclearance" before they changed any aspect of their electoral rules. 42 U.S.C. § 1973c (2000). Covered jurisdictions may obtain a declaratory judgment to this effect from the United States District Court for the District of Columbia, or, alternatively, submit a preclearance request to the United States Department of Justice. *Id.* § § 1973b, 1973c. The Act required that these jurisdictions demonstrate that the new practice did "not have the purpose and will not have the effect of denying or abridging the right to vote based on race." *Id.* § 1973c.
3. See South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding constitutionality of major portions of VRA of 1965).
4. These provisions are the preclearance requirements of Section 5, the federal election monitoring and observer provisions set forth in Sections 6, 7, 8 and 9 federal election monitoring, and the language minority ballot coverage provisions of Sections 203 and 4(f). *See* 42 U.S.C. § 1973b(a)(8) (setting 2007 as the next required reauthorization date).
5. U.S. CONST. amend. XV.
6. *See generally* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990, at 3 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter QUIET REVOLUTION].
7. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV § 1.
8. 42 U.S.C. § 1973c (2000).
9. Bolden v. City of Mobile, 423 F. Supp. 384, 391 (S.D. Ala. 1976).
10. *Id.*, *aff'd* 571 F.2d 238 (5th Cir. 1978), *rev'd* 446 U.S. 55 (1980).
11. City of Mobile v. Bolden, 446 U.S. 55, 60-61 (1980) ("[I]t is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, . . . [and] that it was intended to have an effect no different from that of the Fifteenth Amendment itself.").
12. *Id.* On remand, the district court struck down the at-large system based on evidence of such intent. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, LAW OF DEMOCRACY 711 (2d ed. 2002) [hereinafter ISSACHAROFF, KARLAN & PILDES]; Peyton McCrary, *The Significance of* Mobile v. Bolden, in MINORITY VOTE DILUTION 47, 48-49 (Chandler Davidson ed. 1989).
13. 42 U.S.C. § 1973(a) (2000).
14. *Id.* § 1973(b).

15. S. REP. NO. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 [hereinafter "*SENATE REPORT*"].
16. Thornburg v. Gingles, 478 U.S. 30, 43 n.7 (1986).
17. 412 U.S. 755 (1973).
18. 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom*, East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam).
19. *SENATE REPORT* at 27-30.
20. *Id.*
21. ISSACHAROFF, KARLAN & PILDES, *supra* note 12, at 747.
22. Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986).
23. *See* Emison v. Growe, 507 U.S. 25, 39-40 (1993).
24. Johnson v. De Grandy, 512 U.S. 997, 1024 (1994).
25. Georgia v. Ashcroft, 539 U.S. 461 (2003).
26. *See, e.g.*, Perry Litig., discussion at 298 F. Supp. 2d 451, 481 (E.D. Tex. 2004); Rodriguez Litig., discussion at 308 F. Supp. 2d 346, 384 (S.D.N.Y. 2004).
27. South Carolina v. Katzenbach, 383 U.S. 301, 327-28 (1966).
28. City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997).
29. *Id.* at 518 (discussing "Congress' parallel power to enforce the provisions of the Fifteenth Amendment" as co-extensive with Section 2 of the Fourteenth Amendment).
30. *See, e.g.*, Black Political Task Force Litig., 300 F. Supp. 2d 291 (D. Mass. 2004) (finding the state legislature had used race as a proxy to protect incumbents, and in so doing had engaged in an intentional violation of Section 2, therefore not reaching the constitutional claim also raised by the plaintiffs); Harris v. Graddick Litig., 695 F. Supp. 517 (M.D. Ala. 1988) (finding intentional and results-based discrimination under Section 2 in the Governor's failure to remedy the lack of African-American poll workers); Harris v. Graddick Litig., discussion at 601 F. Supp. 70 (M.D.Ala. 1984) (enforcing a preliminary injunction against Jefferson County for failing to hire African-American poll workers).
31. The resulting list includes decisions also published in the federal reporters, as well as some only published on the electronic databases. The list also includes a few lawsuits decided after the 1982 amendment to Section 2 but which did not apply the new results test. *See, e.g.*, Brown v. Board of School Comm'rs, 706 F.2d 1103 (11th Cir. 1983) (finding that the at-large system to elect the Mobile, Ala. School District was enacted with unconstitutional intent and consequently not evaluating it under the new results test); Cross v. Baxter, 704 F.2d 143 (5th Cir. 1983) (remanding case for consideration under newly amended results test, outcome unclear).
32. The Master Lawsuit List, located at: www.votingreport.org or www.sitemaker.umich.edu/votingrights/files/masterlist.xls, sorts all lawsuits by state, and then by the shorthand litigation title given each lawsuit. The litigation title includes the jurisdiction challenged wherever possible; if not included as a party name, however, one or sometimes both of the party names is used as the litigation title. Note that this Report regularly cites to a litigation as a whole using these titles. This Report also cites sometimes to the discussion of a factor or issue within a litigation by naming the litigation and then citing to the case that includes that discussion.
33. Most litigation strings have only one final word case. In the rare situations in which merits issues were severed (e.g. by racial group or by practice challenged) and

addressed in separate proceedings, a lawsuit may have more than one "final word" case, each corresponding to the final decision on one such issue. Many lawsuits may also contain decisions subsequent to the final word opinion, that addressed other matters, such as fees, remedies or other related claims. VRI has included these other cases to give a full view of the lawsuit as a whole.

34. These miscellaneous types of cases were coded as falling into four main categories: 1) preliminary (only deciding whether to issue a preliminary injunction, whether to dismiss for failure to state a claim or some other pre-merits question), 2) settlement (only deciding whether to allow a case to settle by consent decree or other agreement), 3) remedy (only deciding, after a violation found, how to fix it), or 4) fees (only deciding whether to grant attorney's or expert fees or both).
35. Thornburg v. Gingles, 478 U.S. 30 (1986).
36. *See* Master Lawsuit List.
37. *See* American Civil Liberties Union Voting Rights Project, Post-1982 Litigation Report, 2005 (forthcoming) (on file with the Voting Rights Initiative).
38. *See* List of Cases Litigated by Rolando L. Rios, Law Office, sometimes in cooperation with the Mexican American Legal Defense and Education Fund or with Texas Rural Legal Aid (on file with the Voting Rights Initiative).
39. *See* Master Lawsuit List.
40. *Id.*
41. *Id.*
42. *See* Master Lawsuit List.
43. The raw numbers are 67,767,900 out of 281,421,906. *See* U.S. Census 2000 Data, www.census.gov (last visited Nov. 1, 2005).
44. Of these 86 lawsuits, 53 found violations between 1982 and 1992, 25 between 1993 and 2002, and 8 from 2003 through the date of this report. *See* Master Lawsuit List.
45. *See* Master Lawsuit List.
46. *See infra*, discussion of part III.C.3 (Use of Enhancing Practices).
47. *See* Master Lawsuit List.
48. *See* Master Lawsuit List.
49. Charleston County Litig. (SC), 365 F.3d 341 (4th Cir. 2004); Blaine County Litig. (MT), 363 F.3d 897 (9th Cir. 2004); Town of Hempstead Litig. (NY), 180 F.3d 476 (2d Cir. 1999); Pittsburgh litigation in PA, 686 F. Supp. 97 (3d Cir. 1998) (approving single member district plan settlement agreed to by defendant and class counsel); Marylanders Litig., 849 F. Supp. 1022 (D. Md. 1994) (ordering the state to submit proposal that creates a single-member district with a majority African-American voting-age citizen population); Autauga County Litig., 859 F. Supp. 1118 (M.D. Ala. 1994) (approving single member district settlement in determining attorney fees); Fort Lauderdale Litig. (FL), 985 F.2d 1471 (11th Cir. 1993); Kershaw County Litig., 838 F. Supp. 237 (D.S.C. 1993) (ordering a combination of at-large and single districts in remedy proceedings following earlier determination of liability); Love Litig., No. CV 679-037, 1992 WL 96307 (S.D. Ga. Apr. 23, 1992) (approving the settlement plan which created single member districts); Clark Litig., 777 F. Supp. 44 (D. La. 1990) (ordering sub-districts in the "guilty districts"); City of Norfolk Litig. (VA), 883 F.2d 1232 (4th Cir. 1989); Bladen County Litig., No. 87-72-CIV-7, 1989 WL 253428 (E.D.N.C. Dec. 11, 1989) (ordering a combination of at-large and single districts and determining whether Plaintiffs are entitled to attorney's fees); Dillard v. Chilton litigation in AL, 699 F. Supp. 870 (M.D. Ala. 1988) (approving settlement

plan to create single member districts and establish cumulative voting); Granville County Litig., 860 F.2d 100 (4th Cir. 1988) (approving the county's single district remedial plan in remedy proceeding following determination of liability); Dillard v. Baldwin Board of Ed Litig., 686 F. Supp. 1459 (M.D. Ala. 1988); Smith-Crittenden County Litig., 687 F. Supp. 1310 (E.D. Ark. 1988) (ordering the parties to submit proposals for single election districts); LULAC-Midland litigation in TX, 829 F.2d 546 (5th Cir. 1987); County of Big Horn Litig., 647 F. Supp. 1002 (D. Mont. 1986); Washington County litigation in FL, 653 F. Supp. 121 (N.D. Fla. 1986) (approving defendants single member district plan in remedial proceeding following determination of liability); City of Stateville litigation, 606 F. Supp. 569 (W.D.N.C. 1985) (ordering a combination of at-large and single districts in a consent decree);

- Marengo County Litig., 623 F. Supp. 33 (S.D. Ala. 1985); City of Greenwood I Litig., 599 F. Supp. 397 (N.D. Miss. 1984) (ordering the city to submit a proposal for the election of council members other than the mayor by single districts or wards); Lubbock Litig. (TX), 727 F.2d 364 (5th Cir. 1984); Mobile School Board Litig. (AL), 706 F.2d 1103 (11th Cir. 1983) (affirming trial court remedy of dividing county into 5 single member districts, 2 of which were majority African American).

50. Bone Shirt Litig. (SD), 336 F. Supp. 2d 976 (D.S.D. 2004); Black Political Task Force Litig. (MA), 300 F. Supp. 2d 291 (D. Mass 2004); City of New Rochelle Litig., 308 F. Supp. 2d 152 (S.D.N.Y 2003); Rural West II Litig. (TN), 209 F.3d 835 (6th Cir. 2000); Bonilla-Barnett Litig., 17 F. Supp. 2d 753 (N.D. Ill. 1998) (ordering legislature to come up with new lines); Wilson Litig. (LA), 135 F.3d 996 (5th Cir. 1998) (ordering new district lines in determining attorney fees); Lafayette County Litig., 20 F. Supp. 2d 996 (N.D. Miss. 1998); Chickasaw County II Litig., No. CIV.A. 1:92CV142-JAD, 1997 U.S. Dist. LEXIS 22087 (N.D. Miss. Oct. 28, 1997) (ordering parties to attempt to reach agreement on a plan with a majority African-American district); Walthall County Litig., 157 F.R.D. 388 (S.D. Miss. 1994) (approving new district lines in settlement plan); Texarkana Litig., 861 F. Supp. 756 (W.D. Ark. 1992); Elections Board Litig., 793 F. Supp. 859 (W.D. Wis. 1992); Wesch Litig., 785 F. Supp. 1491 (S.D. Ala. 1992) (approving new districting plan in settlement proceedings following determination of liability); Jefferson Litig. (LA), 926 F.2d 487 (5th Cir. 1991); Armour Litig., 775 F. Supp. 1044 (N.D. Ohio 1991); Garza Litig. (CA), 918 F.2d 763 (9th Cir. 1990); Monroe County Litig., 740 F. Supp. 417 (N.D. Miss. 1990); Gretna Litig. (LA), 834 F. 2d 496 (5th Cir. 1987); Mehfoud Litig., 702 F. Supp. 588 (E.D. Va. 1988); Neal Litig., 689 F. Supp. 1426 (E.D. Va. 1988); Reyes v. Stefaniak Litig., No. 93 C 308, 1995 WL 38958 (N.D. Ill. Jan. 30, 1995) (finding that the new single district plan with one majority-minority district entitled Plaintiff to attorney fees); Chickasaw County I Litig., 705 F. Supp. 315 (N.D. Miss. 1989); Fifth Ward Litig., CIV.A. No. 86-2963, 1989 WL 3801 (E.D. La. Jan. 18, 1989) (approving single district settlement plan following determination of liability); City of Crystal Springs, 626 F. Supp. 987 (S.D. Miss 1986) (ordering new district lines in determining attorney fees); Rybicki Litig., 574 F. Supp. 1147 (N.D. Ill. 1983); Buskey v. Oliver Litig., 565 F. Supp. 1473 (M.D. Ala. 1983); Major Litig., 574 F. Supp. 325 (D. La. 1983); Grenada County Litig., No. WC84-136-S-O, 1989 WL 251321 (N.D. Miss. Sept. 13, 1980) (approving new district lines in settlement plan).

51. Beaufort County Litig. (NC), 936 F.2d 159 (4th Cir. 2004) (approving consent degree agreed to by parties which created staggered elections with limited voting); Common Cause Litig., No. 01-03470 SVW(RZX), 2002 WL 1766436 (C.D. Cal. Feb. 19, 2002)

(approving consent decree for punch-card systems to be replaced); Town of Cicero Litig., No. Civ.A. 00C 1530, 2000 WL 34342276 (N.D. Ill. Mar. 15, 2000) (ordering a preliminary injunction preventing the town from enforcing certain requirements on absentee voting and candidacy requirements); Dillard v. Chilton Litig., 699 F. Supp. 870 (M.D. Ala. 1988) (approving settlement plan to create single member districts and establish cumulative voting); Madison County Litig., 610 F. Supp. 240 (S.D. Miss. 1985) (ordering the Board of Election Commissioners to convene and make a determination as to which absentee ballots were properly cast); Dean Litig., 555 F. Supp. 502 (D.R.I. 1982) (ordering polling place not to be moved from public housing community center by preliminary injunction).

52. Williams Litig. in TX, 734 F. Supp. 1317 (W.D. Tex. 1990) (ordering special election to remedy effects of the at-large system); Dillard Litig. in AL, 717 F. Supp. 1471 (M.D. Ala. 1989) (ordering that plaintiffs be certified as elected members of the city council); Marks-Philadelphia Board of Elections, No. CIV. A. 93-6157, 1994 WL 146113 (E.D. Pa. Apr. 26, 1994) (enjoining the certification of one of the candidates and ordering the certification of another, ordering changes to the processes used for absentee ballots).
53. Berks County Litig. in PA, 277 F. Supp. 2d 570 (E.D. Pa. 2003) (ordering county to allow federal officials to oversee election processes, provide election material in Spanish, and provide bilingual poll officers or interpreters); White v. Alabama Litig., 867 F. Supp. 1519 (M.D. Ala. 1994) (held that the settlement reached by the State and plaintiffs was reasonable, ordering the following: 1) each appellate court's size would increase by 2 seats, 2) a new "judicial nomination commission" would recommend 3 African-American judge candidates to the Governor & the Governor would choose to appoint 2 to each court, and they would serve a 6-year term, before standing for re-election under state law) (this remedy was later found unconstitutional under *Holder v. Hall*); City of Tampa Litig. in FL, 693 F. Supp. 1051 (M.D. Fla. 1988) (approving settlement by parties which agreed to provide voter instructions, voter education programs, and outreach); Harris v. Graddick Litig., 695 F. Supp. 517 (M.D. Ala. 1988) (ordering state to have African-American poll workers and submit proposals to rectify the current effect of discriminatory laws and procedures); Campaign for a Progressive Bronx Litig. in NY, 631 F. Supp. 975 (S.D.N.Y 1986) (ordering bilingual voter education, outreach, and election officials in fees proceeding following liability determination); Citizen Action Litig., Civ. No. N 84-431, 1984 U.S. Dist. Lexis 24869 (D. Conn. Sept. 27, 1984) (ordering registrar to authorize volunteers to conduct registration drives and provide materials Spanish in preliminary injunction proceeding).
54. Blaine County Litig. (MT), 363 F.3d 897, 904 (9th Cir. 2004) (declining to consider whether Section 2 is constitutional because of the summary affirmance in *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984), and further stating "in the Supreme Court's congruence-and-proportionality opinions, the VRA stands out as the prime example of a congruent and proportionate response to well documented violations of the Fourteenth and Fifteenth Amendments. Most tellingly, when the Supreme Court first announced the congruence-and-proportionality doctrine in City of Boerne v. Flores, 521 U.S. 507 (1997), it twice pointed to the VRA as the model for appropriate prophylactic legislation.); Alamosa County Litig., 306 F. Supp. 2d 1016 (D. Colo. 2004) (declining to reopen the issue, finding both the Tenth Circuit and the Supreme Court had affirmed its constitutionality); Sanchez-Colorado, 97

F.3d 1303, 1314 (10th Cir. 1996) ("Just as the Court has affirmed its unfailing championship of the Fourteenth and Fifteenth Amendments in Shaw II and Bush, it has also declared the constitutionality of § 2 of the VRA, observing, "it would be irresponsible for a State to disregard the § 2 results test." Bush, 116 S. Ct. at 1969. (O'Connor, J. concurring, joined by Stevens, Ginsburg, Breyer, Souter, JJ.)."); Elections Board Litig., 793 F. Supp. 859, 868-69 (W.D. Wis. 1992) ("The Voting Rights Act authorizes and in some instances compels racial gerrymandering in favor of blacks and other minorities. Because the Act implements the Fifteenth Amendment, it is constitutional despite its discriminatory character. United Jewish Organization v. Carey, 430 U.S. 144, 159, 51 L. Ed. 2d 229, 97 S. Ct. 996 (1976)."); Wesley Litig., 605 F. Supp. 802, 808 (M.D. Tenn. 1985) (citing *Marengo County*); Lubbock Litig., 727 F.2d 364, 375 (5th Cir. 1984) (considering the record before Congress in 1982 and stating "Where Congress, on the basis of a factual investigation, perceives that a facially neutral measure carries forward the effects of past discrimination, Congress may even enact blanket prohibitions against such rules. See South Carolina v. Katzenbach, 383 U.S. at 334, 86 S. Ct. at 821 (literacy tests). Here, Congress has taken the more modest step of shifting to states and municipalities the burden of accommodating their political systems when that system seriously prejudices minority groups, even though the result is either unintended or, at least, not demonstrably intended."); Jordan Litig., 604 F. Supp. 807 (N.D. Miss. 1984) (citing *Major v. Treen* and declining to re-open the question); El Paso Independent School District, 591 F. Supp. 802 (W.D. Tex. 1984) (following *Lubbock*); City of Greenwood Litig., 599 F. Supp. 397 (N.D. Miss. 1984) (citing *Lubbock* and *Marengo County*); Marengo County Litig. (AL), 731 F.2d 1546, 1558 (11th Cir. 1984) (considering Congressional enforcement power in *Katzenbach v. Morgan*, *South Carolina v. Katzenbach*, and *Oregon v. Mitchell* and holding, "The 1982 amendment to Section 2 of the Voting Rights Act is clearly within the enforcement power. Congress conducted extensive hearings and debate on all facets of the Voting Rights Act and concluded that the "results" test was necessary to secure the right to vote and to eliminate the effects of past purposeful discrimination. The *Senate Report* explains in detail why the results test was necessary and appropriate." The court further considered congressional findings in the *Senate Report*); Major Litig., 574 F. Supp. 325, 345 (E.D. La. 1983) (citing Katzenbach v. Morgan and Fullilove v. Klutznick for the proposition that "congressional authority [embodied in § 2 of the Fifteenth Amendment] extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination.").

55. See *infra*, part III.C.1 (History of Official Discrimination that Touched on the Right to Vote Senate Factor)
56. See *infra*, part III.C.4 (Candidate Slating Senate Factor).
57. See *infra*, part III.C.6 (Racial Appeals in Campaigns Senate Factor).
58. See *infra*, part III.C.9 (Tenuous Policy Justification for Challenged Practice).
59. See *infra*, part III.C.8 (Significant Lack of Responsiveness Factor).
60. LULAC v. Clements, 999 F.2d 831, 854 (5th Cir. 1993).
61. *See, e.g.*, Garza v. Los Angeles Litig. (CA), 918 F.2d 763 (9th Cir. 1995); City of New Rochelle Litig., discussion at 308 F. Supp. 2d 152, 158 (S.D.N.Y. 2003); Ketchum Litig. (IL), discussion at 740 F.2d 1398, 1408 (7th Cir. 1984).
62. *See* Master Lawsuit List.

63. *See, e.g.*, Little Rock Litig. (AR), 56 F.3d 904, 910 (8th Cir. 1995) (assuming that plaintiffs can meet their burden on the *Gingles* threshold factors, equating proportionality with the presence of proportional representation, and ultimately finding in favor of defendants); Austin Litig., 857 F. Supp. 560, 569-570 (E.D. Mich. 1994) (assuming for purposes of this challenge that the *Gingles* factor can be met, equating proportionality with the presence and continued likelihood of proportional representation, and ultimately finding in favor of defendants); *see also* City of St. Louis Litig. (MO), 54 F.3d 1345 (8th Cir. 1995) (holding that the district court properly granted summary judgment in favor of defendants on the basis of substantial proportionality alone).
64. Alamosa County Litig., 306 F. Supp. 2d 1016 (D. Colo. 2004); Bexar County Litig., 385 F.3d 853 (5th Cir. 2004); City of Cleveland Litig., 297 F. Supp. 2d 901 (N.D. Miss. 2004); City of Minneapolis Litig., No. 02-1139(JRT/FLN), 2004 U.S. Dist. Lexis 19708 (D. Minn. Sept. 30, 2004); Meza Litig., 322 F. Supp. 2d 52 (D. Mass. 2004); Perry Litig., 298 F. Supp. 2d 451 (E.D. Tex. 2004); Rodriguez Litig., 308 F. Supp. 2d 346 (S.D.N.Y. 2004); South Carolina Democratic Party Litig., No. C/A 4-04-CV-2171-25, 2004 U.S. Dist. LEXIS 27299, 2004 WL 3262756 (D.S.C. Sept. 3, 2004); Sensley Litig., 385 F.3d 591 (5th Cir. 2004); Forest County Litig., 336 F. 3d 570 (7th Cir. 2003); Kingman Park Litig., 348 F.3d 1033 (D.C. Cir. 2003); Parker v. Ohio Litig., 263 F. Supp. 2d 1100 (S.D. Ohio 2003); Campuzano Litig., 200 F. Supp. 2d 905 (N.D. Ill. 2002); Cano Litig., 211 F. Supp. 2d 1208 (C.D. Cal. 2002); Hamrick Litig., 296 F.3d 1065 (11th Cir. 2002); Balderas Litig., 2001 U.S. Dist. LEXIS 25006 (E.D. Tex. 2001); Page Litig., 144 F. Supp. 2d 346 (D.N.J. 2001); DeSoto County Litig., 204 F.3d 1335 (11th Cir. 2000); Anthony Litig., 35 F. Supp. 2d 989 (E.D. Mich. 1999); Belle Glade Litig., 178 F.3d 1175 (11th Cir. 1999); France Litig., 71 F. Supp. 2d 317 (S.D.N.Y. 1999); Mallory-Ohio Litig., 173 F.3d 377 (6th Cir. 1999); Pasadena Independent School District Litig., 165 F.3d 368 (5th Cir. 1999); African American Legal Defense Fund Litig., 8 F. Supp. 2d 330 (S.D.N.Y. 1998); Bradley v. Work Litig., 154 F.3d 704 (7th Cir. 1998); Brooks Litig., 158 F.3d 1230 (11th Cir. 1998); Cousin Litig., 145 F.3d 818 (6th Cir. 1998); Davis v. Chiles Litig., 139 F.3d 1414 (11th Cir. 1998); African-American Voting Rights LDF Litig., 994 F. Supp. 1105 (E.D. Mo. 1997); Campos v. Houston Litig., 113 F.3d 544 (5th Cir. 1997); City of Holyoke Litig., 960 F. Supp. 515 (D. Mass. 1997); City of Miami Beach Litig., 113 F.3d 1563 (11th Cir. 1997); City of Rome Litig., 127 F.3d 1355 (11th Cir. 1997); Lulac v. Roscoe I.S.D. Litig., 123 F.3d 843 (5th Cir.1997); Milwaukee NAACP Litig., 116 F. 3d 1194 (7th Cir. 1997); Alamance County Litig., 99 F.3d 600 (4th Cir. 1996); St. Louis Board of Education Litig., 90 F.3d 1357 (8th Cir.1996); Fort Bend Independent School District Litig., 89 F.3d 1205 (5th Cir. 1996); Kent County Litig., 76 F.3d 1381 (6th Cir. 1996); Town of Babylon Litig., 914 F. Supp. 843 (E.D.N.Y. 1996); Aldasoro v. Kennerson Litig., 922 F. Supp. 339 (S.D. Cal. 1995); Al-Hakim Litig., 892 F. Supp. 1464 (M.D. Fla. 1995); Little Rock Litig., 56 F.3d 904 (8th Cir. 1995); Southern Christian Leadership Litig., 56 F.3d 1281 (11th Cir. 1995); Armstrong v. Allain Litig., 893 F. Supp. 1320 (S.D. Miss. 1994); Cincinnati Litig., 40 F.3d 807 (6th Cir. 1994); City of Columbia Litig., 33 F.3d 52 (4th Cir. 1994); Howard Litig., Civ.A. No. 93-900 SSH, 1994 WL 118211 (D.D.C. Mar. 31, 1994); Nipper Litig., 39 F.3d 1494 (11th Cir. 1994); Emison Litig., 507 U.S. 25 (1993); Lulac v. Clements Litig., 999 F.2d 831 (5th Cir. 1993); Magnolia Bar Association Litig., 994 F.2d 1143 (5th Cir. 1993); Quilter Litig., 507 U.S. 146 (1993); Rangel Litig., 8 F.3d

242 (5th Cir. 1993); San Diego County Litig., No. 92-55661, 1993 WL 379838 (9th Cir. Sept. 27, 1993); Fund for Accurate and Informed Representation Litig., 796 F. Supp. 662 (N.D.N.Y. 1992); Harrison Litig., Civ. A. No. 92-0603, 1992 WL 95909 (E.D. Pa. Apr. 21, 1992); Nash Litig., 797 F. Supp. 1488 (W.D. Mo. 1992); National City Litig., 976 F.2d 1293 (9th Cir. 1992); Orange County Litig., 783 F. Supp. 1348 (M.D. Fla. 1992); Stockton Litig., 956 F.2d 884 (9th Cir. 1992); SW Texas Juinor College Dist. Litig., 964 F.2d 1542 (5th Cir. 1992); West Litig., 786 F. Supp. 803 (W.D. Ark. 1992); Turner Litig., 784 F. Supp. 553 (E.D. Ark.. 1991); Hardee County Litig., 906 F.2d 524 (11th Cir. 1990); White Litig., 909 F.2d 99 (4th Cir. 1990); Bond Litig., 875 F.2d 1488 (10th Cir. 1989); Chula Vista Litig., 723 F. Supp. 1384 (S.D. Cal. 1989); City of Austin Litig., 871 F.2d 529 (5th Cir. 1989); City of Woodville Litig., 881 F.2d 1327 (5th Cir. 1989); Brewer Litig., 876 F.2d 448 (5th Cir. 1989); Houston v. Haley Litig., 869 F.2d 807) (5th Cir. 1989); Pomona Litig., 883 F.2d 1418 (9th Cir. 1989); Williams v. State Bd. of Elections Litig., 718 F. Supp. 1324 (N.D. Ill. 1989); Springfield Park District Litig., 851 F.2d 937 (7th Cir. 1988); Carrollton NAACP Litig., 829 F.2d 1547(11th Cir. 1987); Sisseton Independent School District Litig., 804 F.2d 469 (8th Cir. 1986).

65. *See, e.g.*, Town of Babylon Litig., at 914 F. Supp. 843 (E.D.N.Y. 1996); Meza Litig., discussion at 322 F. Supp. 2d 52, 69 (D. Mass. 2004) (declining to find for the defendant based solely on plaintiffs' failure to meet the third Gingles factor and instead "turn[ing] to the totality of the circumstances.").
66. Lucas Litig. (GA), 967 F.2d 549 (11th Cir. 1992); Marks-Philadelphia Litig., No. CIV. A. 93-6157, 1994 WL 146113 (E.D. Pa. Apr. 26, 1994); Maxey Litig., No. 91 Civ. 7328 (TPG), 1996 WL 529024 (S.D.N.Y. Sept. 18, 1996); Montiel v. Davis Litig., 215 F. Supp. 2d 1279 (S.D. Ala. 2002); Muntaqim Litig. (NY), 366 F.3d 102 (2d Cir. 2004); Salt River Project Litig. (AZ), 109 F.3d 586 (9th Cir. 1997); Operation Push Litig. (MS), 932 F.2d 400 (5th Cir. 1991); Osburn Litig. (GA), 369 F.3d 1283 (11th Cir. 2004); Prejean Litig. (LA), 83 Fed.Appx. 5 (5th Cir. 2003); Prewitt v. Moore Litig., 840 F. Supp. 436 (N.D. Miss. 1993); Town of North Johns Litig., 717 F. Supp. 1471 (M.D. Ala. 1989); U.S. v. Jones Litig. (AL), 57 F.3d 1020 (11th Cir. 1995); Varner v. Smitherman Litig., CIV. A. No. 92-0586-BH-M, 1993 WL 663327, 1993 U.S. Dist. LEXIS 17721 (S.D. Ala. Dec. 8, 1993).
67. Berks County Litig., 277 F. Supp. 2d 570 (E.D. Pa. 2003); Arakaki Litig., 314 F.3d 1091 (9th Cir. 2002); Marks-Philadelphia Litig., No. CIV. A. 93-6157, 1994 WL 146113 (E.D. Pa. Apr. 26, 1994); Elections Board Litig., 793 F. Supp. 859 (W.D. Wis. 1992); Harris v. Graddick Litig., 695 F. Supp. 517 (M.D. Ala. 1988); Operation Push Litig., 932 F.2d 400 (5th Cir. 1991); Town of North Johns Litig., 717 F. Supp. 1471 (M.D. Ala. 1989).
68. *See, e.g.*, City of Springfield Litig. (IL), discussion at 851 F.2d 937, 943 (7th Cir. 1988).
69. *See* Master Lawsuit List.
70. *See id.*
71. Other courts have simply asserted in conclusory terms that *Gingles* I is, or is not, satisfied, or have noted that the parties stipulated to its existence. *See e.g.*, Rural West II Litig. (TN), discussion at 209 F.3d 835, 839 (6th Cir. 2000) (noting that the parties stipulated that *Gingles* I and II were met); City of LaGrange Litig., discussion at 969 F. Supp. 749, 774 (N.D. Ga. 1997) ("Plaintiffs have established the first *Gingles* factor—that the African-American community in LaGrange is sufficiently large and geographically compact to constitute a majority in a single member district.");

Blytheville School District Litig., discussion at 759 F. Supp. 525, 526 (E. Ark. 1991) ("The black population in the School District is geographically compact."); Chattanooga Litig., 722 F. Supp. 380, 390 (E.D. Tenn. 1989) ("There is no doubt whatsoever that the black population of Chattanooga is sufficiently compact and numerous as to be an effective majority in various combinations of single member districts.").

72. *See, e.g.*, Black Political Task Force Litig., discussion at 300 F. Supp. 2d 291, 300 (D. Mass. 2004) (using voting age population statistics in the *Gingles* I analysis); Hamrick Litig. (GA), discussion at 296 F.3d 1065, 1067 (11th Cir. 2002) (finding that ""it is clear that blacks could not constitute a majority of the voting age population in Proposed District 3, and, thus, plaintiffs have failed to satisfy prong one of Gingles"); Old Person Litig. (MT), discussion at 230 F.3d 1113, 1121(9th Cir. 2000)(upholding the district court's finding that Gingles I was met where "American Indians would represent 55% of the voting age population" in the proposed district); Marylanders Litig., 849 F. Supp. 1022, 1051 (D. Md. 1994) (finding the first Gingles prong met where "African-Americans comprise well over 50% of both the total population and the voting-age population"); Brewer Litig. (TX), discussion at 876 F.2d 448, 452 (5th Cir. 1989) ("Only voting age persons can vote. It would be a Pyrrhic victory for a court to create a single-member district in which a minority population dominant in absolute, but not in voting age numbers, continued to be defeated at the polls. *Thornburg* implicitly recognized this fact…"); Springfield Litig. (IL), discussion at 851 F.2d 937, 945 (7th Cir. 1988)("The threshold requirement roughly measures minority voters' potential to elect candidates of their choice. Because only minorities of voting age can affect this potential, it is logical to assume that the [Gingles] Court intended the majority requirement to mean a voting age majority."); *cf.* Dickinson Litig. (IN), 933 F.2d 497 (7th Cir. 1991) (finding that the lower court erred in finding the first Gingles factor not met where plaintiffs were 50.27% of the total population and observing that the Gingles court required only a simple majority, but indicating that the court should explore the "facts surrounding the proposed district.").

73. *See, e.g*, Meza Litig., discussion at 322 F. Supp. 2d 52, 59 (D. Mass. 2004); Pasadena Independent School District Litig. (TX), discussion at 165 F.3d 368 (5th Cir. 1999); City of Chicago-Bonilla Litig. (IL), discussion at 141 F.3d 699, 705 (7th Cir. 1998); Nipper Litig. (FL), discussion at 113 F.3d 1563, 1569 (11th Cir. 1994); Pomona Litig., 883 F.2d 1418, 1426 (9th Cir. 1988); *see also* Suffolk County Litig., discussion at 268 F. Supp. 2d 243, 263 (E.D.N.Y. 2003) (holding that plaintiffs' two plans both failed to consider citizenship of Latino population, and that even if they had they could not show Latino VAP in the proposed districts), Cano Litig., discussion at , 211 F. Supp. 2d 1208, 1234 (C.D. Cal. 2002) (noting that the Ninth Circuit considers CVAP the proper measure, but holding that, where CVAP data had not yet been released by the census bureau, "the ability to construct a district that is so substantially Latino both in overall population and in VAP is sufficient to raise a genuine issue of material fact as to the first Gingles pre-condition.").

74. *See, e.g.*, Albany County Litig., discussion at No. 03-CV-502, 2003 WL 21524820, at *5 (N.D.N.Y. Jul. 7, 2003) ("[A] majority group is sufficiently large if it comprises more than 51% of the population of the voting district"); City of New Rochelle Litig., discussion at 308 F. Supp. 2d 152, 159 (S.D.N.Y. 2003)(finding Gingles I "clearly established" where 60.5% black district was replaced by a "mere plurality

district"); *see also* Thurston County Litig. (NE), 129 F.3d 1015, 1025 (8th Cir. 1997) (finding Gingles I not met in part because "[u]nder the proposed plans, if 4 or 5 Native Americans moved from the proposed majority-minority districts created for the School Board and Village Board, respectively, and they were replaced by non-Native Americans, the majority-minority composition would be destroyed."); Aldasoro v. Kennerson Litig., 922 F. Supp. 339, 372 (S.D. Cal. 1995) (finding Gingles I not met because at the time the white bloc voting occurred Hispanics did not constitute a majority).

75. *See, e.g*, Campuzano Litig., discussion at 200 F. Supp. 2d 905, 910 (N.D. Ill. 2002) ("In the absence of more reliable data regarding African-American voting strength, courts employ the general guideline that African-Americans must comprise 65% of a district's total population to control the electoral outcome in that district...When reliable VAP statistics are available, we may instead evaluate minority voting strength by using a 60% VAP rule of thumb."); African-American Voting Rights Legal Defense Fund Litig. (MO), discussion at 54 F.3d 1345, 1348 n.4 (8th Cir. 1995) ("We conclude that either 60% of the voting age population or 65% of the total population is reasonably sufficient to provide black voters with an effective majority."); Elections Board Litig., discussion at 793 F. Supp. 859, 869 (W.D. Wis. 1992) (adopting 60% voting age population as the size required "to give blacks a reasonable assurance of obtaining a majority of votes in a district"); City of Norfolk Litig., discussion at 679 F. Supp. 557, 566 (E.D. Va. 1988) (finding Gingles I met, but holding that the black population was sufficiently large and compact to create only two, rather than three, "safe" districts with 65% black population); United Jewish Org. v. Carey, 430 U.S. 144, 163-64, 51 L. Ed. 2d 229, 97 S. Ct. 996 (1977) (reasoning that at 65% minority population in a district is required to yield a majority of minority voting age population), *cf.* Alamosa County Litig., discussion at 306 F. Supp. 2d 1016, 1028 (D. Colo. 2004) ("Although the current precinct lines cannot be used to create a single-member district with a majority of Hispanic registered voters, the Government has proposed three hypothetical districts in which Hispanic residents would comprise at least 60% of the voting age population."); Kingman Litig., 348 F.3d 1033, 1042 (D.C. Cir. 2003) (assuming without deciding Gingles I was met while noting that a reduction of the black population from 68.7% to 62.3% in D.C's Ward Six "might deprive African Americans of an 'effective' or 'safe' voting majority").

76. *See,e.g.*, Old Person Litig, discussion at 230 F.3d 1113, 1121-23 (9th Cir. 2000) (upholding district court finding that rejected defendants argument that proposed district would "be insufficient to confer effective voting power" because of low turnout); Red Clay School District Litig., 780 F. Supp. 221, 226 n.9 (D. Del. 1991) ("n3 Although the Defendants agree that the Plaintiffs' evidence satisfies the first Gingles factor, they question whether such a district would allow the black citizens to consistently elect one candidate of their choice. This concern, however, does not negate a finding that the Plaintiffs have proven the first Gingles factor.") (citation omitted); Mehfoud Litig., discussion at 702 F. Supp. 588, 592 (E.D. Va. 1988) ("Plaintiffs need not demonstrate that blacks could comprise a majority of those actually turning out to vote, but rather, must show that blacks would comprise a majority of the voting age population.").

77. *See, e.g.*, Albany County Litig., discussion at No. 03-CV-502, 2003 WL 21524820, at *6 (N.D.N.Y. July 7, 2003); City of Baytown Litig. (TX), discussion at 840 F.2d 1240,

1244 (5th Cir. 1988); Hardee County Litig., discussion at 906 F.2d 524, 526 (11th Cir. 1990); *cf.* Brewer Litig. (TX), discussion at, (5th Cir.1989)(finding Gingles I unsatisfied because no district could be created large enough to have clear majority-minority voting age population, even if black, Hispanic, and Asian populations were combined). *But see* Kent County Litig., 76 F.3d 1381 (6th Cir. 1996) (en banc)(not allowing multiple minority groups for purposes of the *Gingles* I analysis).

78. *See e.g.*, Perry Litig., discussion at 298 F. Supp. 2d 451 (E.D. Tex. 2004) (acknowledging that the Fifth Circuit precedent permits plaintiffs to combine minority groups to satisfy Gingles majority requirement provided the groups are politically cohesive, but concluding that plaintiffs failed to demonstrate political cohesiveness); Rodriguez Litig., discussion at 308 F. Supp. 2d 346, 409 (S.D.N.Y. 2004) (allowing coalition claim, but concluding that plaintiffs failed to show that blacks and Hispanics were cohesive); Forest County Litig.(WI), discussion at 336 F.3d 570, 575-76 (7th Cir. 2003) (finding that blacks and Indians had clearly divergent interests); San Diego County Litig., discussion at 794 F. Supp. 990, 998 (S.D. Cal. 1992) (allowing aggregation, but concluding that plaintiffs had failed to show that Hispanics, African Americans, and Asian Americans were politically cohesive); Stockton Litig. (CA), 956 F.2d 884, 886 (9th Cir. 1992) (affirming the district court's finding of lack of Hispanic-black political cohesion); Hardee County Litig. (FL), discussion at 906 F.2d 524, 527 (11th Cir. 1990) (finding that blacks and Hispanics were not sufficiently cohesive to satisfy Gingles II); Pomona Litig. (CA), 883 F.2d 1418 (9th Cir. 1989) (assuming "aggregation theory" is cognizable but finding no cohesion between the minority groups). Plaintiffs do sometimes succeed in proving cohesiveness, however, and are thus allowed to proceed to the first Gingles precondition. *See, e.g,* County of Albany Litig., discussion at No. 03-CV-502, 2003 WL 21524820, at *11 (N.D.N.Y. July 7, 2003), France Litig., 71 F. Supp. 2d 317, 327 (S.D.N.Y. 1999); LULAC-North East Independent School District Litig., discussion at 903 F. Supp. 1071, 1092 (W.D. Tex.1995); Baytown Litig. (TX), discussion at 840 F.2d 1240, 1248 (5th Cir.1988); *cf.* De Grandy Litig., discussion at 815 F. Supp. 1550, 1570-71 (N.D. Fla. 1992) (finding that Cubans and non-Cuban Hispanics were cohesive in spite of party differences, because Hispanic democrats will vote for Hispanic republicans and because both groups have similar views on education, housing, medical aid, and civil rights).

79. *Gingles* itself expressly left open this question. *See* Gingles Litig., discussion at 478 U.S. 30, 46 n.12 (U.S. 1986) (reserving the question of "whether § 2 permits, and if it does, what standards should pertain to, claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to influence elections"). The Supreme Court again reserved the question in the *Quilter* litigation, 507 U.S. 146 U.S. (1993) (assuming but not deciding that influence districts are a cognizable claim under Section 2).

80. *See e.g.*, Fifth Circuit: Perry Litig., discussion at 298 F. Supp. 2d 451, 485 (E.D. Tex. 2004) ("Considering that District 24 as a pure influence district is unprotected by § 2, we are persuaded that alterations to it raised questions primarily of § 5, which have been answered by the Department of Justice."); Alamo Heights Indep. School District Litig. (TX), discussion at 168 F.3d 848, 853-54 (5th Cir. 1999) (rejecting plaintiffs' claim that they can satisfy Gingles I with less than a 50% majority and reaffirming Fifth Circuit precedent requiring plaintiffs to prove that they constitute

more than 50% of the relevant population in their demonstration district"); Concerned Citizens Litig. (TX), discussion at 63 F.3d 413, 416-17 (5th Cir. 1995) ("As blacks do not constitute a majority in any of the four extant JP Precincts in Orange County, CCE cannot satisfy the first *Gingles* precondition."); Brewer Litig. (TX), discussion at 876 F.2d 448, 450 (5th Cir. 1989) (affirming district court's requirement that plaintiffs present evidence that they can constitute more than 50% of voting age population in a proposed district); Kirksey v. Allain Litig., discussion at 658 F. Supp. 1183, 1204 (S.D. Miss. 1987) (declining to "design single- member districts to raise the black voter percentage by concentrating blacks in order to 'influence' the outcome of the elections" in districts where "black majority single-member sub-districts" could not be drawn); Sixth Circuit: Parker Litig., discussion at 263 F. Supp. 2d 1100, 1105 (E.D. Ohio 2003), summarily affirmed by 540 U.S. 1013 (2003), ("Because influence claims are not cognizable in our circuit and the plaintiffs have failed to establish the first *Gingles* precondition…[t]he plaintiffs' claim under *Section 2 of the Voting Rights Act* must fail."); O'Lear v. Miller Litig., discussion at 222 F. Supp. 2d 850 (E.D. Mich. 2002) (following *Cousin* Litig.); Cousin Litig. (TN), discussion at 145 F.3d 818, 828 (6th Cir. 1998) ("As the following analysis will indicate, we would reverse any decision to allow such a claim to proceed since we do not feel that an "influence" claim is permitted under the Voting Rights Act."); Seventh Circuit: LaPaille Litig., discussion at 786 F. Supp. 704, 715 (N.D. Ill. 1992) (citing McNeil v. Springfield Park District and refusing to recognize "influence districts" because of the "lack of an objective limit to such claims."); City of Springfield Litig., discussion at 851 F.2d 937, 947 (7th Cir. 1988) (refusing to "consider claims that multi-member districts merely impair plaintiffs' ability to influence elections. Plaintiffs' ability to win elections must also be impaired."); Williams v. State Bd. of Elections Litig., discussion at 718 F. Supp. 1324, 1333 (N.D. Ill. 1989) (rejecting influence districts because "even if all eligible black voters supported a single candidate in the proposed single-member district, that candidate *would not be assured* of electoral success" (emphasis in original)). *But see* Elections Board Litig., discussion at 793 F. Supp. 859, 869 (W.D. Wis. 1992) (distinguishing Springfield Litig. and considering the creation of a "stronger influence district . . . .a modest plus" in favor of a proposed redistricting plan). Ninth Circuit: San Diego County Litig., discussion at 794 F. Supp. 990, 996 (S.D. Cal. 1992) (following Chula Vista Litig.); Chula Vista Litig., discussion at 723 F. Supp. 1384, 1392 (S.D. Cal. 1989) ("Accordingly, the Court finds that there exists no legally cognizable "influence" claim under § 2 that would require a lesser standard of proof than set forth in *Thornburg*.").

81. Baldwin County Comm'n Litig. (AL), discussion at 376 F. 3d 1260, 1268-69 (11th Cir. 2004) (finding that "an unrestricted breach of this precondition 'would likely open a Pandora's box of marginal Voting Rights Act claims by minority groups of all sizes,'" and seeing no way to award plaintiffs relief "without awarding similar relief to even smaller minority groups in future cases."). *See also* Rodriguez Litig., discussion at 308 F. Supp. 2d 346, 379 (S.D.N.Y. 2004) ("Allowing influence claims would open the door for a legal challenge any time a minority population could be shifted to increase the minority population in a nearby district. It would open the door for cases like this one, where the plaintiffs are arguing that the defendants had an affirmative obligation to create a district that has never existed in order to unite all minority communities in a particular region to maximize the proportion of a

minority in at least one district."); City of Springfield Litig., discussion at 851 F.2d 937, 947 (7th Cir. 1988) ("Courts might be flooded by the most marginal section 2 claims if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections.").

82. *See e.g.*, Metts Litig. (RI), discussion at 363 F.3d 8, 12 (1st Cir. 2004) ("To the extent that African-American voters have to rely on cross-over voting to prove they have the "ability to elect" a candidate of their choosing, their argument that the majority votes as a bloc against their preferred candidate is undercut."); Turner Litig., 784 F. Supp. 553, 570-71 (E.D. Ark. 1991) ("[P]laintiffs argue here, contrary to the position of the plaintiffs in Jeffers, that if the percentage of black voters in District Four is increased from 27 percent (as it is under Act 1220 of 1991) to 38 percent (as it would be under plaintiffs' proposal), it will be easier for black voters to "elect representatives of their choice" by forming coalitions with white voters. n15 Their argument not only ignores the need to prove under Gingles that polarized voting prevents this from happening, but it directly undercuts their Section 2 claim by showing that even absent a majority, they could elect candidates of their choice if they sought alliances and coalitions with other voters in the traditional political manner."); *cf.* Brooks Litig. (GA), discussion at 158 F.3d 1230, 1237 (11th Cir. 1998) (noting, in the context of a challenge to runoffs in democratic primaries, the "fine line" between plaintiffs' argument that minority candidates would be able to garner enough support to win the general election if they could succeed in the primary and plaintiffs' claim of white bloc voting); City of Chicago Litig. (IL), discussion at 141 F.3d 699, 703 (7th Cir. 1998) (stating that the court is not rejecting the notion of the influence ward by requiring majority minority districts to have a 65% minority voting age population, but finding the concept "inapplicable" to the facts of the case "because of the rigid racial bloc voting on all sides").
83. *See e.g.*, Rodriguez Litig., discussion at 308 F. Supp. 2d 346, 379 (E.D. Tex. 2004) ("If a minority population is too small to elect candidates of choice in a reconfigured district even with the assistance of reliable crossover voters, then it is the size of the population and not the voting practice or procedure that is preventing the minority group from electing representatives of their choice. Dilution of the ability to influence representatives is not an injury cognizable under section 2(b) of the VRA."); Hall Litig. (VA), discussion at 385 F.3d 421, 430 (4th Cir. 2004) ("[T]o establish a vote dilution claim under Section 2, minorities must prove that they have been unlawfully denied the political opportunity they would have enjoyed as a voting-age majority in a single-member district: namely, the opportunity to 'dictate electoral outcomes independently' of other voters in the jurisdiction.").
84. *See also* Jefferson Parish I Litig., 691 F. Supp. 961, 1006 (E.D.La. 1988)("[P]laintiffs may have the legal ability to seek and obtain some relief if they prove that they are politically cohesive, that a majority voting bloc usually defeats its preferred candidates, and that they are geographically compact so that a proposed remedy will insure them *equal access* to the political process and provide them the ability to *influence* elections. The court possesses the equity power to fashion the relief to remedy the effects of the prior dilution and to give the minority group the opportunity to participate equally in the electoral process." But "such relief does not mandate a safe district with a super majority of 60%.")
85. Armour Litig., discussion at 775 F. Supp. 1044, 1059-60 (N.D. Ohio 1991) ("In a reconfigured district plaintiffs will constitute nearly one-third of the voting age

population and about half of the usual Democratic vote. Therefore, the Democratic Party and its candidates will be forced to be sensitive to the minority population by virtue of that population's size.").

86. *See also* Metts Litig. (MA), discussion at 363 F.3d 8, 11 (1st Cir. 2004) (articulating the court's unwillingness "to foreclose the possibility that a section 2 claim can ever be made out where the African-American population of a single member district is reduced in redistricting legislation from 26 to 21 percent.").
87. Page Litig., 144 F. Supp. 2d 346 (D.N.J. 2001).
88. *Id.* at 362.
89. *Id.*
90. Martinez Litig., discussion at 234 F. Supp. 2d. 1275, 1316 (S.D. Fla. 2002).
91. *Id.* at 1321 n.56.
92. *Id.* at 1322. This court considered *Gingles I* in order to determine that the plaintiffs were protected by Section 2, before concluding that the districting plan did not violate Section 2.
93. Perry Litig., discussion at 298 F. Supp. 2d 451, 484-85 (E.D. Tex. 2004).
94. *Id* at 484.
95. *Id.* at 481.
96. *Id.*at 484-85.
97. Georgia v. Ashcroft, 539 U.S. 461, 481 (2003).
98. Perry Litig., discussion at 298 F. Supp. 2d 451, 480 (E.D. Tex. 2004) .
99. *Id.* at 481.
100. Rodriguez Litig., discussion at 308 F. Supp. 2d 346, 373 (S.D.N.Y. 2004).
101. *Id.*
102. *Id.* at 384.
103. *Id.* at 379.
104. Perry Litig., discussion at 298 F. Supp. 2d 451, 481 (E.D. Tex. 2004); Rodriguez Litig., discussion at 308 F. Supp. 2d 346, 384 (S.D.N.Y. 2004) (stating that, under Ashcroft, "states have the flexibility to choose between safe majority-minority districts…and "coalitional" districts").
105. Perry Litig., discussion at 298 F. Supp. 2d 451, 481 (E.D. Tex. 2004); Rodriguez Litig., discussion at 308 F. Supp. 2d 346, 384 (S.D.N.Y. 2004) ("While *Ashcroft* allows crossover districts under Section 5, its reasoning does not broaden the power of federal courts under section 2 of the VRA to require state legislatures to protect or create such "ability to elect" districts.").
106. Perry Litig., discussion at 298 F. Supp. 2d 451, 485 (E.D. Tex. 2004).
107. Rural West I Litig., discussion at 877 F. Supp. 1096, 1104 (W.D. Tenn. 1995).
108. West Litig., discussion at 786 F. Supp. 803, 807 (W.D. Ark. 1992) ("If the Act does not always require the maximization of minority voting power, how do we distinguish those cases in which an "influence" district should be created, from those in which it should not? Plaintiffs have suggested no legal standards to differentiate these two kinds of cases…They are not numerous enough to elect a representative without help, and there is no proof that they would have enough help to elect a different representative, nor even that the same representative would behave differently in some relevant way."). Still other courts faced with influence claims have failed to address them, resolving lawsuits on other grounds. *See e.g.*, Meza Litig., discussion at 322 F. Supp. 2d 52, 64 (D. Mass. 2004) (declining to decide whether plaintiffs may satisfy Gingles I without a numerical majority because the case could

be resolved on alternative grounds); City of Minneapolis Litig., No. 02-1139(JRT/FLN), 2004 U.S. Dist. Lexis 19708 (D. Minn. Sept. 30, 2004); Hardee County Litig. (FL), discussion at 906 F.2d 524 (11th Cir. 1990).

109. *See e.g.,* Sensley Litig. (LA), discussion at 385 F.3d 591, 596 (5th Cir. 2004) ("[I]t is clear that shape is a significant factor that courts can and must consider in a *Gingles* compactness inquiry"); Mallory-Ohio Litig. (OH), discussion at 173 F.3d 377, 382-83 (6th Cir. 2000) (upholding district court's decision that plaintiffs "had the burden of showing that those minority voters lived in a geographically compact pattern such that it would be possible to draw a "majority-minority" district with a rational shape" and stating "But the only evidence submitted by the class to demonstrate geographical compactness was a set of maps that purported to show the concentration of African-American populations within each of Ohio's largest counties."); Montezuma-Cortez, Colo. Sch. Dist. Litig., discussion at 7 F. Supp. 2d 1152, 1167 (D. Colo. 1998) (considering an existing plan in a case where defendants sought to get out of a settlement and return to an at-large system: "A simple visual inspection shows that District D is compact, normally shaped, completely rationale [*sic*] in appearance and similar to all other districts contained in the existing plan.); Jefferson Parish I Litig., 691 F. Supp. 961, 1007 (E.D.La. 1988) (criticizing plaintiffs' proposed plan: "[t]he district contains no less than 35 sides…"), Worcester County Litig., discussion at 840 F. Supp. 1081, 1086-87 (D. Md. 1994), rev'd in part on other grounds by 35 F.3d 921 (4th Cir. 1994) ("The plaintiffs' proposed Plan 1 is not unreasonably irregular in shape, considering the population dispersal within the County...The districts may not be symmetrical, but they are compact. They do not rely on districts that run through several "tentacle-like corridors' nor are the district's boundary lines so unreasonably irregular, bizarre or uncouth as to approach obvious gerrymandering.").

110. *See e.g,* City of Minneapolis Litig., No. 02-1139(JRT/FLN), 2004 U.S. Dist. LEXIS 19708, at *10 (Minn. Sept. 30 2004) (considering any plan must conform to a 2:1 length to width ratio to comport with the city charter), Sensley Litig. (LA), discussion at 385 F.3d 591, 597-98 (5th Cir. 2004) (concluding that there was no clear error where the district court held the proposed districts not compact where they ignored traditional districting principles); Shirt Litig., discussion at 336 F. Supp. 2d 976, 989, 992 (D.S.D. 2004) (that the proposed plans adhered to state's traditional redistricting principles, including respect for geographical and political boundaries, and protection of minority voting rights."), Montezuma-Cortez, Colo. Sch. Dist. Litig., 7 F. Supp. 2d 1152, 1167 (D. Colo. 1998) (finding the district was drawn in adherence to traditional districting principles); Town of Hempstead Litig., discussion at 956 F. Supp. 326, 350 (E.D.N.Y. 1997) ("[P]laintiffs have amply demonstrated that a majority-minority district can be fashioned without subordinating traditional districting principles to racial considerations).

111. *See e.g,* Bone Shirt Litig., discussion at 336 F. Supp. 2d 976, 989, 992 (D.S.D. 2004) (stating that there was no Shaw problem where districts, while irregular in shape, were no more irregular than those in the state's plan); Town of Hempstead Litig. (NY), discussion at 180 F.3d 476, 492 (2d Cir. 1999) ("This proposed District 3 was found to be more compact than the average congressional district."); City of Columbia Litig., discussion at 850 F. Supp. 404, 413 (D.S.C. 1993) (finding compactness where "Plaintiffs' single-member district plans are reasonably compact and are no more irregular in shape than the districts actually in use under

the existing 4-2-1 plan.") Nash Litig., 797 F. Supp. 1488, 1497 (W.D. Mo. 1992) ("A visual inspection of the two plans demonstrates Dr. Jones' plan is less compact than the Commission's plan."); Jeffers Litig., discussion at 730 F. Supp. 196 (E.D. Ark. 1989) (noting plaintiffs' proposed districts "look rather strange" but that they "are not materially stranger in shape than at least some of the districts contained in the present apportionment plan.").

112. *See e.g.*, Albritton Litig. (LA), discussion at 385 F.3d 591, 597-98 (5th Cir. 2004) (concluding that there was no clear error in the district court's holding that compactness was lacking where proposed districts separated distinct communities); City of Chicago-Bonilla Litig., discussion at 17 F. Supp. 2d 753, 758 (N.D. Ill. 1998) (considering and rejecting claims that displacement of part of the community "into another aldermanic ward will result in the destruction of the community."); Columbus County Litig., discussion at 782 F. Supp. 1097, 1105 (E.D.N.C. 1991) (finding compactness where the districts were not "so spread out as to prevent the constituents and their representative from communicating with each other" and "none of these districts are so convoluted that its members and representatives would not be able to tell who actually lived in each district."); Jefferson Parish I Litig., 691 F. Supp. 961, 1007 (E.D. La. 1988) ("A proposed district is sufficiently compact if it retains a natural sense of community. To retain that sense of community, a district should not be so convoluted that its representative could not easily tell who actually lives within the district.") Baldwin County Board of Education, 686 F. Supp. 1459 (M.D. Ala. 1988) (applying a functional approach and suggesting that a district would not be sufficiently compact, the court suggested, if it destroyed all "sense of community.").

113. Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 600 (1993).

114. Sensley Litig. (LA), discussion at 385 F.3d 591, 596-98 (5th Cir. 2004); City of New Rochelle Litig., discussion at 308 F. Supp. 2d 152, 159 (S.D.N.Y. 2003); France Litig., discussion at 71 F. Supp. 2d 317, 325-26 (S.D.N.Y. 1999); Town of Hempstead Litig., discussion at 180 F.3d 476, 492 (2d Cir. 1999); Lafayette County Litig., discussion at 20 F. Supp. 2d 996, 999-1000 (N.D. Miss. 1998); Davis v. Chiles Litig., discussion at 139 F.3d 1414 (11th Cir. 1998); City of Rome Litig., discussion at 127 F.3d 1355 (11th Cir. 1997); Chickasaw County II Litig., No. CIV.A. 1:92CV142-JAD, 1997 WL 33426761, at *1 (N.D. Miss. Oct. 28, 1997); Town of Babylon Litig., discussion at 914 F. Supp. 843, 873 (E.D.N.Y. 1996); Calhoun County Litig., discussion at 881 F. Supp. 252, 253-54 (5th Cir. 1996); Marylanders Litig., 849 F. Supp. 1022, 1056 (D. Md. 1994); Hamrick Litig. (GA), 296 F.3d 1065 (11th Cir. 2002).

115. *See e.g.*, City of Minneapolis Litig., discussion at No. 02-1139(JRT/FLN), 2004 U.S. Dist. Lexis 19708, at *50-51 (D. Minn. Sept. 30, 2004) ("[E]xamination of the redistricting maps clearly demonstrates that the ward shapes in this case are neither bizarre nor irregular. The Court is not alone in reaching this conclusion. Plaintiffs' expert testified that "it would be hard to conclude that either [the previous wards or the redistricting plan wards] are bizarre." (Charles Dep. at 220.) Similarly, defendant's expert testified that, based on his review of numerous redistricting plans, he did not find any of the districts to be "bizarre in terms of their shapes."); Thurston County Litig. (NE), discussion at 129 F.3d 1015, 1025 (8th Cir. 1997)

(holding no violation of Section 2 for either the school board or the village board of elections because of their bizarre shape).

116. *See e.g.,* Montezuma-Cortez School District Litig., discussion at 7 F. Supp. 2d 115, 1168 (D. Colo. 1998) ("A simple visual inspection shows that District D is compact, normally shaped, completely rationale [*sic*] in appearance and similar to all other districts contained in the existing plan. It is plainly not the kind of district criticized in *Shaw v. Reno* and *Miller v. Johnson*."); Lafayette County Litig., discussion at 20 F. Supp. 2d 996, 999-1000 (N.D. Miss. 1998) ("[T]he question is not whether the plaintiff residents' proposed district was oddly shaped, but whether the proposal demonstrated that a geographically compact district could be drawn." While both of plaintiffs' plans had some "ragged edges," and one district "even contain[ed] three thin appendages that reach[ed] awkwardly into minority communities located in and around the City of Oxford" the court found *Gingles* I met because "the Fifth Circuit has also reviewed the plans and concluded that at least one of them 'is not nearly as "bizarre" as those rejected in *Shaw v. Reno*.'"); Sanchez-Colorado Litig., discussion at 97 F.3d 1303, 1315 (10th Cir. 1996) ("We would also note by comparison to the districts the Court recently found 'bizarre' in Shaw II and Bush, plaintiffs' proposed district is nonobjectionable."); Town of Babylon Litig., discussion at 914 F. Supp. 843, 873 (E.D.N.Y. 1996) (noting although the districts were oddly shaped, they were not as odd as the ones in Shaw, so the district would not fail on this alone; it failed because the expert failed to adequately take traditional districting principles into account, including a consideration of similarity to existing districts in the county); Little Rock Sch. Dist. Litig. (AR), discussion at 56 F.3d 904, 912 (8th Cir. 1995) ("[A]lthough the plaintiffs' proposed zone boundaries are nowhere nearly so bizarre as the ones held presumptively unconstitutional by the Supreme Court in Shaw, they are markedly less regular and compact than those in LRSD's adopted plan.).

117. *See e.g.*, Sensley Litig. (LA), discussion at 385 F.3d 591, 596-98 (5th Cir. 2004) (citing Vera and Abrams v. Johnson, the court focused on the district's odd shape and plaintiffs' failure to observe traditional districting principles in holding that Gingles I was not met); France Litig., discussion at 71 F. Supp. 2d 317, 325-26 (S.D.N.Y. 1999) (finding that plaintiffs' plan was "primarily driven by considerations of race" and that plaintiffs "failed to meet their burden of showing that their districting plan takes into account traditional districting criteria such as compactness, geography, and the integrity of political subdivisions;" applying strict scrutiny and finding that the district was not narrowly tailored because it failed on the Gingles factors); Town of Babylon Litig., discussion at 914 F. Supp. 843, 873-74 (E.D.N.Y. 1996) (declining "to find that plaintiffs have met their burden of proof of showing that their districting plan, drawn with a near-exclusive focus on race, by chance adequately takes into account districting criteria such as compactness, respect for the Town's geography, contiguity and the integrity of political subdivisions and communities of interests."). *But see* City of New Rochelle Litig., 308 F. Supp. 2d 152, 159 (S.D.N.Y. 2003)(maintaining that a return to a prior districting plan would not be contrary to Shaw and Vera and that it was not "directing such a race conscious gerrymander; instead it is directing the restoration of the *status quo ante,* which was unnecessarily disrupted in violation of Plaintiffs rights under Section 2 of the Voting Rights Act.").

118. Unlike the other Senate Factors, which were largely derived from judicial decisions predating the 1982 amendments, racial bloc voting emerged as a formal element of the Section 2 inquiry for the first time in 1982. *See, e.g.*, Lubbock Litig. (TX), discussion at 727 F.2d 364, 384 (5th Cir. 1984). Supporters of the 1982 amendments to Section 2 invoked racial bloc voting as the critical restraint that would keep the amended statute from devolving into a mandate for proportional representation. "[O]ne factor that emerges as central in the Senate Report is the extent to which voting is 'racially polarized.' This factor is nowhere directly mentioned in the White/Zimmer line of cases; it starts to rise in the Senate debates when proponents are forced to respond to Senator Hatch's argument that the amended Section 2 will guarantee proportional representation along racial lines." ISSACHAROFF, KARLAN, PILDES, *supra* note 12, at 741.

119. The exceptions are cases involving challenges to specific voting procedures that identified Section 2 violations without considering racially polarized voting, *see* Berks County Litig., 277 F. Supp. 2d 570 (E.D. Pa. 2003) (poll official conduct); Marks-Philadelphia Litig., No. CIV. A. 93-6157, 1994 WL 146113 (E.D. Pa. Apr. 26, 1994) (absentee ballots); Operation Push Litig., 932 F.2d 400 (5th Cir. 1991) (voter registration system); Town of North Johns Litig., 717 F. Supp. 1471 (M.D. Ala. 1989) (withholding of candidacy filing forms); Harris v. Graddick Litig., 695 F. Supp. 517 (M.D. Ala. 1988) (policy of appointing only white poll officials); Madison County Litig., 610 F. Supp. 240 (S.D. Miss. 1985) (invalidation of absentee ballots), and two cases that found a violation of Section 2 based on invidious intent without considering racially polarized voting. *See* Arakaki Litig. (HI), 314 F.3d 1091(9th Cir. 2002); Rybicki Litig., 574 F. Supp. 1147 (N.D. Ill. 1983).

120. *See* Gingles Litig. (NC), discussion at 478 U.S. 30, 50-51 (1986).

121. *See id.* at 32; *see also supra* Part III.B.1.

122. *See, e.g.*, City of Holyoke Litig. (MA), discussion at 72 F.3d 973, 983 (1st Cir. 1995); De Grandy Litig. (FL), discussion at 512 U.S. 997, 1011-12 (1994); LULAC v. Clements Litig. (TX), discussion at 999 F.2d 831, 850 (5th Cir. 1993).

123. *See* SENATE REPORT at 28-30.

124. Decisions decided between the 1982 amendments and the Court's decision in *Gingles* obviously do not employ the *Gingles* test. Instead, these courts applied varied standards to evaluate racial bloc voting under Senate factor 2. *See, e.g.*, Terrell Litig., discussion at 565 F. Supp. 338, 348-49 (N.D. Tex. 1983) ("Typically, the degree of racial polarity in voting is determined by examining election races in which blacks opposed whites, taking the percentage of voters who supported a candidate of their own race, and subtracting the percentage of voters who voted for a candidate of another race, to obtain a "racial polarization score.").

125. *See, e.g.*, Charleston County Litig., discussion at 316 F. Supp. 2d 268, 277-78 (D.S.C. 2003) (discussing racially polarized voting in totality review via a brief recap of experts' statistics already analyzed under *Gingles*); Westwego Litig. (LA), 946 F.2d 1109, 1116 (5th Cir. 1991) (referencing *Gingles* analysis in totality of the circumstances review). *But cf.* Chickasaw County II Litig., No. CIV.A. 1:92CV142-JAD, 1997 WL 33426761, at *3 (N.D. Miss. Oct. 28, 1997) (briefly concluding racial bloc voting under *Gingles*, with more discussion in the totality review). Many courts also hold that causation should be decided in the totality of the circumstances, *see infra* discussion on causation. Some courts then import the causation question into a consideration of factor 2, *see, e.g.*, Alamosa County Litig., 306 F. Supp. 2d 1016, 1029-

33 (D. Colo. 2004) (finding *Gingles* met, but no racially polarized voting due to causation), while others simply consider causation as a different part of the totality of the circumstances *see e.g.*, Alamance County Litig. (NC), discussion at 99F.3d 600, 604 (4th Cir. 1996)("[T]he best reading of *Gingles*...is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions but relevant in the totality of the circumstances inquiry.").

126. *See* Master Lawsuit List.

127. *See e.g.*, Baldwin County Commission Litig. (AL), 376 F.3d 1260 (11th Cir. 2004) (defendant conceded that racial bloc voting existed); Sensley Litig. (LA), 385 F.3d 591 (5th Cir. 2004) (parties stipulated that racial bloc voting existed); Baldwin County Commission Litig. (AL), 376 F.3d 1260 (11th Cir. 2004) (defendant conceded that racial bloc voting existed); DeSoto County (FL), 204 F.3d 1335 (11th Cir. 2000) (finding of *Gingles* I reversed thus appellate court never addressed district court's finding of *Gingles* II or III); Pasadena I.S.D. Litig. (TX), 165 F.3d 368, 371 (5th Cir. 1999) ("Although the district court found that plaintiffs failed to meet the first *Gingles* requirement, the court exhaustively considered the evidence presented, addressed the remaining two *Gingles* requirements, and considered the 'totality of circumstances' using the Zimmer factors."); Davis v. Chiles Litig. (FL), 139 F.3d 1414, 1416 (11th Cir. 1998) (finding *Gingles* threshold met, but no remedy therefore modifying *Gingles* I to state it unmet); Hall Litig. (GA), 512 U.S. 874 (1994) (reversed on another factor and did not address bloc voting).

128. See *infra* part III.C.10 (cases that found *Gingles* threshold but no violation due to proportionality).

129. City of Chicago-Bonilla Litig. (IL), 141 F.3d 699 (7th Cir. 1998) (remanding for review of totality of circumstances); Carrollton NAACP Litig. (GA), 829 F.2d 1547 (11th Cir. 1987) (remanding for a finding on the other two *Gingles* factors).

130. Old Person Litig. (MT), 312 F.3d 1036, 1050 (9th Cir. 2002) ("This is one of those not unusual cases where our decision is controlled by the proper standard of review. On one side of the scale lies a history of official discrimination, the presence of racially polarized elections, the presence of socioeconomic factors limiting Indians' political participation, the use of racial appeals in elections, and disproportionality. On the other side of the scale we see the absence of discriminatory voting practices, the viable policy underlying the existing district boundaries, the success of Indians in elections, and officials' responsiveness to Native Americans' needs. We have fully considered the legal issues presented and the detailed factual record with which the district court grappled. We cannot say that the district court's determination that there was no vote dilution, considered in the totality of circumstances, was clearly erroneous."); NAACP v. Fordice Litig. (MS), 252 F.3d 361, 374 (5th Cir. 2001) ("In summary, the district court found that, although Mississippi has an undeniable history of official discrimination from which its African-American citizens still suffer the effects, Wilson failed to demonstrate that this reality hindered the ability of Mississippi's African-American citizens to participate effectively in the state's political process. Moreover, the court determined that the factors of majority vote requirement, the size of the contested electoral districts, candidate slating, responsiveness, and tenuousness did not favor Wilson. The record before us supports the district court's determinations regarding these factors. As such, we cannot conclude that these findings were clearly erroneous."); Liberty County Commissioners Litig. (FL), 221 F.3d 1218 (11th Cir. 2000); Niagara

Falls Litig. (NY), 65 F.3d 1002 (2d Cir. 1995); Democratic Party of Arkansas Litig. (AR), 902 F.2d 15 (8th Cir. 1990); City of Boston Litig. (MA), 784 F.2d 409 (1st Cir. 1986) (finding "moderate racially polarized voting" does not establish a Section 2 violation when coupled with the lack of voting practices that minimize minority votes, the absence of racial motivation, the plan includes two minority districts, the results of the 1983 elections, in which several minorities were elected, and without clear proof an alternative plan would increase minority vote effectiveness without sacrificing other districting considerations).

131. Gingles Litig., 478 U.S. 30, 68 (1986).

132. First Circuit: City of Boston Litig. (MA), discussion at 784 F.2d 409, 413 (1st Cir. 1986) (assuming that black candidates are the preferred candidates of black voters); *cf.* City of Holyoke Litig. (MA), discussion at 72 F.3d 973, 988 (1st Cir. 1995) (considering only elections in which Hispanic candidates ran for office); Second Circuit: Albany County Litig., discussion at No. 03-CV-502, 2003 WL 21524820, at *10-11 (N.D.N.Y. Jul. 7, 2003) (equating minority candidate with minority-preferred candidate by noting the absence of minority candidates for county-wide office and concluding that "no evidence exists as to whether white voters County-wide supported a minority-preferred candidate"); Green Litig., discussion at No. CV-96-3367 (CPS), 1996 WL 524395, at *10 (E.D.N.Y. Sept. 5, 1996) ("[N]o evidence has been presented that plaintiff voters and registered voters have been outvoted by a white majority class. According to the defendants, eight of the nine newly elected board members are African Americans . . . ."); *cf.* Niagara Falls Litig. (NY), discussion at 65 F.3d 1002, 1018-19 (2d. Cir. 1995) (holding that a white candidate may be minority-preferred and adopting a race-blind bright line rule for the Second Circuit); Third Circuit: Red Clay School District Litig. (DE), discussion at 4 F.3d 1103, 1126 (3d Cir. 1993) (adopting presumption that the minority candidate is minority-preferred and noting that "experience does demonstrate that minority candidates will tend to be candidates of choice among the minority community," but nevertheless insisting that plaintiffs must present some evidence establishing this presumption); Harrison Litig., discussion at Civ. A. No. 92-0603, 1992 U.S. Dist. LEXIS 5315, at *7-8 (E.D. Pa. Apr. 21, 1992) (agreeing with defendant expert testimony that African Americans tend to vote for African-American candidates); Fourth Circuit: Columbus County Litig., discussion at 782 F. Supp. 1097, 1100-02 (E.D.N.C. 1991) (considering only black-white elections). *But see* City of Hampton Litig., discussion at 919 F. Supp. 212, 214 (E.D. Va. 1996) ("[T]he focus of the Plaintiffs' presentation was the race of the candidate elected, whereas the focus of the Voting Rights Act is upon the opportunity of a minority to elect the candidate of its choice . . . ."); Fifth Circuit: St. Bernard Parish School Board Litig., discussion at No. CIV.A. 02-2209, 2002 WL 2022589, at *6 (E.D. La., Aug. 26, 2002) ("In assessing whether racial bloc voting occurs, the appropriate focus is on elections in which a minority group member is a candidate"); LULAC v. Clements Litig. (TX), discussion at 999 F.2d 831, 864 (5th Cir. 1993) (citing City of Gretna for proposition that elections without a minority candidate are less probative because they do not provide minority voters with the choice of a minority candidate); Gretna Litig. (LA), discussion at 834 F.2d 496, 503 (5th Cir. 1987) ("We consider Jones to be an aldermanic candidate sponsored by Gretna's minority group because he received a significant portion of the black vote, and because he is black.") (footnote omitted); Sixth Circuit: Anthony Litig., discussion at 35 F. Supp. 2d 989, 992 (E.D. Mich.

1999) (finding all African-American candidates but one were the minority-preferred candidate); Rural West I Litig., discussion at 877 F. Supp. 1096, 1108 (W.D. Tenn. 1995) ("As a practical matter . . . in most racially polarized districts where white voters prefer white candidates (as is effectively required by the third *Gingles* precondition to find a § 2 violation), black voters will choose to vote for black candidates. This is certainly true in Tennessee."); Seventh Circuit: Campuzano Litig., discussion at 200 F. Supp. 2d 905, 914 (N.D. Ill. 2002) ("The parties agree that, with few exceptions, African-Americans overwhelmingly prefer representation by African-American candidates); City of Chicago Litig. (IL), discussion at 141 F.3d 699, 703 (7th Cir. 1998) (dismissing arguments that white candidates in some areas with substantial minority populations are responsive to minority interests and explaining that "[i]t may be highly regrettable that a candidate's race should matter to the electorate; but it does; and the cases interpreting the Voting Rights Act do not allow the courts to ignore that preference."); Eighth Circuit: Blytheville School District Litig. (AR), discussion at 71 F.3d 1382, 1387-88 (8th Cir. 1995) (adopting Jenkins methodology for determining the minority-preferred candidate which includes a presumption in favor of the minority candidate). The Eighth Circuit, however, requires additional evidence to establish the minority-preferred candidate Ninth Circuit: The Ninth Circuit always requires evidence to establish the minority-preferred candidate. Tenth Circuit: Alamosa County Litig., discussion at 306 F. Supp. 2d 1016, 1029-33 (D. Colo. 2004) (permitting presumption that the minority candidate was the minority-preferred candidate to stand without independent evidence because both plaintiff and defendant expert agreed); Eleventh Circuit: Brooks Litig. (GA), discussion at 158 F.3d 1230, 1235, 1240 (11th Cir. 1998) (assuming without discussion that all black candidates are minority-preferred and all white candidates are majority preferred); Southern Christian Leadership Conference Litig. (AL), 56 F.3d 1281 (11th Cir. 1995) (same); Holder v. Hall Litig. (GA), discussion at 955 F.2d 1563, 1571-72 (11th Cir. 1992) (same); Baldwin Board of Education Litig., 686 F. Supp. 1459 (M.D. Ala. 1988) (same); Dillard v. Crenshaw, 640 F. Supp. 1347 (M.D. Ala. 1986) (same).

133. The following circuits allow for a lesser burden to establish a minority candidate is minority-preferred: Third Circuit: Red Clay School District Litig. (DE), discussion at 4 F.3d 1103, 1129 (3rd Cir. 1993) (adopting a presumption that the minority is the minority-preferred candidate but allowing white candidate to be minority-preferred and adopting different tests for both); Fifth Circuit: Pasadena Indep. School District Litig., discussion at 958 F. Supp. 1196 (S.D. Tex. 1997) (discussing several elections in which, despite evidence of consistent Hispanic support for the Hispanic candidate at the polls, the plaintiffs' expert witness could not identify the Hispanic preferred candidate); LULAC v. Roscoe I.S.D. Litig., discussion at Civ. A. No. 1:94-CV-104-C, 1996 WL 453584, *2 (N.D. Tex. May 14, 1996) (struggling to identify the minority-preferred candidate in an election with multiple Hispanic candidates.); City of Dallas Litig., discussion at 734 F. Supp. 1317, 1393, 1395 (N.D. Tex. 1990) (suggesting that voting patterns and witness testimony can help identify the minority-preferred candidate); Gretna Litig., discussion at 636 F. Supp. 1113, 1133 (D. La. 1986)("Unless it can be shown that an election occurred in which a white candidate ran on issues strongly affecting the black community and with an open, positive and strong identification with the black community -- which has not been shown in this matter -- candidacies of black persons are the proper

focus of inquiry concerning the extent to which elections are polarized."); Seventh: Rockford Board of Education Litig., discussion at Civ.A. No. 89 C 20168, 1991 WL 299104, at *4 (N.D. Ill. Sept. 12, 1991) ("The African Americans in the School District have tended to vote as a group and to vote for African American candidates."); Springfield Park District Litig. (IL), 851 F.2d 937 (7th Cir. 1988) (citing trend in minorities voting for the minority candidate found in district court); Tenth Circuit: Sanchez-Colorado Litig. (CO), discussion at 97 F.3d 1303, 1320-21 (10th Cir. 1996) (adopting *Jenkins* methodology); Bond Litig. (CO), discussion at 875 F.2d 1488, 1495 (10th Cir. 1989) (holding the minority-preferred candidate does not have to be a minority and elections with only white candidates should be given "such weight as the circumstances warrant"); Eleventh: De Grandy Litig. discussion at 815 F. Supp. 1550, 1572-73 (N.D. Fla. 1992) (presuming that minority candidates are minority-preferred after reviewing evidence that blacks and Hispanics generally prefer candidates of the own race). *But see*, City of Rome Litig. (GA), discussion at 127 F.3d 1355, 1377, 1379 n.9 (11th Cir. 1997) (finding that all black candidates were strongly supported by the black community and were black preferred, including one black candidate who did not receive a plurality of the black vote, and then finding that white candidates minority where they had almost as much support as black candidates).

Other circuits require the same evidence regardless of the candidate's race: First Circuit: Black Political Task Force Litig., 300 F. Supp. 2d 291 (D. Mass. 2004) (relying on regression analyses of minority voting patterns to identify the minority-preferred candidate); Meza Litig., 322 F. Supp. 2d 52 (D. Mass. 2004) (same); Second Circuit: Rodriguez Litig., discussion at 308 F. Supp. 2d 346, 388, 389 (S.D.N.Y. 2004) (noting that the "minority-preferred candidate is generally the candidate that receives the most votes from the relevant minority group" and citing Niagara Falls for the proposition that the courts must consider elections where the white majority defeats a minority-preferred white candidate); Fourth Circuit: Alamance County Litig. (NC), discussion at 99 F.3d 600, 615 (4th Cir. 1996) (holding any candidate who receives the plurality of the minority votes is the minority-preferred candidate); Sixth Circuit: Quilter Litig., discussion at 794 F. Supp. 695, 701 (N.D. Ohio 1992) (criticizing plaintiffs expert for merely stating that "given the opportunity there is a much higher percentage of black vote for black candidates than white vote for black candidates" and not finding racial bloc voting); Armour Litig., discussion at 775 F. Supp. 1044, 1057 (N.D. Ohio 1991) (finding the minority candidate was the preferred candidate because of testimony that the "the relationship between the candidate's race and the race of the voter was consistently near linear"); Eight Circuit: While the Eighth Circuit expressly follows Jenkins and allows a presumption that the minority candidate is the minority-preferred, this presumption is insufficient to establish the minority-preferred candidate alone. *See* City of Minneapolis Litig., discussion at No. 02-1139(JRT/FLN), 2004 U.S. Dist. Lexis 19708, at *28-32 (D. Minn. Sept. 30, 2004) (demanding evidence that the minority candidate is minority-preferred); Clay County Board of Education Litig., discussion at 90 F.3d 1357, 1362-64 (8th Cir. 1996) (refusing to presume minority candidate was minority-preferred absent independent evidence but acknowledging the candidate's race should be considered); Nash Litig., discussion at 797 F. Supp. 1488, 1503 (W.D. Mo. 1992) ("We have, for purposes of this opinion, arbitrarily deemed any candidate receiving more than 65% of the black vote "minority-preferred." There was some testimony to the effect that

black voters, given a choice, would vote only for black candidates, and that a white candidate receiving a majority of the black vote was probably not a "true" preference. There was also testimony indicating that if a white person received a majority of the black vote, any black candidates probably were not viable candidates. We refuse to impart these individual witnesses' views to black citizens as a whole. Absent some indication that a particular white candidate was truly not preferred despite receiving over 65% of the black vote, or that a particular black candidate was not viable, we will not assume that the voters in a particular political contest would have voted for someone other than the person they voted for, nor will we assume that a white candidate receiving over 65% of the black vote was not preferred by the minority voters."); Ninth Circuit: City of Santa Maria Litig. (CA), discussion at 160 F.3d 543, 549-50 (9th Cir. 1998) (rejecting that only minority candidates could be minority-preferred and adopting a "bright-line" test for determining the minority-preferred candidate); National City Litig., discussion at No. 88-301-R(M), 1991 WL 421115 (S.D. Cal. May 16, 1991) (looking at voting patterns and using regressions to determine the minority-preferred candidate); Watsonville Litig. (CA), 863 F.2d 1407 (9th Cir. 1988) (holding courts should not look beyond voting patterns to determine the minority-preferred candidate, but not differentiating between the race of the candidates).

134. Most circuits now hold that the minority-preferred candidate does not have to be a minority: First Circuit: Black Political Task Force Litig., discussion at 300 F. Supp. 2d 291, 304 (D. Mass. 2004) ("We understand that black voters sometimes may consider a white candidate their representative of choice and vice-versa."); Second Circuit: City of Niagara Falls Litig., discussion at 65 F.3d 1002, 1016 (2d Cir. 1995) (refusing to "adopt an approach precluding the possibility that a white candidate can be the actual and legitimate choice of minority voters."); Third Circuit: Red Clay School District Litig. (DE), discussion in 4 F.3d 1103, 1126 (3d Cir. 1993) (allowing either minority candidates or white candidates to be minority-preferred but adopting different tests for each); Fourth Circuit: Alamance County Litig., discussion at 99 F.3d 600, 608 (4th Cir. 1996) (stating that the minority-preferred candidate may sometimes be a white candidate); Fifth Circuit: LULAC v. Clements Litig. (TX), discussion at 999 F.2d 831, 882-83 (5th Cir. 1993) ("The black-preferred candidate in Harris County, regardless of race, was always the Democratic candidate."); Sixth Circuit: Cincinnati Litig. (OH), discussion at 40 F.3d 807, 813 (6th Cir. 1994) (adopting a colorblind approach to determining the minority-preferred candidate); Seventh Circuit: Williams v. State Bd. of Elections Litig. (IL), 718 F. Supp. 1324, 1325-26 (7th Cir. 1989) (finding that white candidates that earned a majority of the minority vote were minority-preferred candidates in spite of evidence of discrimination in the candidate slating process); *see also* City of Chicago Heights Litig. (IL), discussion at 824 F. Supp. 786, 791 (N.D. Ill. 1993) (finding, in multi-member districts, candidates who receive the majority of the vote are not minority-preferred where "other candidates, preferred by a significantly higher percentage of the minority community. . . . were defeated in the same election"); Eighth Circuit: Blytheville School District Litig. (AR), discussion at 71 F.3d 1382, 1387-88 (8th Cir. 1995) (adopting the *Jenkins* methodology); Ninth Circuit: City of Santa Maria Litig. (CA), 160 F.3d 543, 549-50 (9th Cir. 1998) (rejecting that only minority candidates could be minority-preferred and adopting a "bright-line" test for determining the minority-preferred candidate); Tenth Circuit: Sanchez-Bond Litig., 875 F.2d 1488,

1495 (10th Cir. 1989) (holding the minority-preferred candidate does not have to be a minority); Eleventh Circuit: City of Rome Litig. (GA), 127 F.3d 1355 (11th Cir. 1997) ("[W]here every voter has to vote for three candidates, a white candidate is considered to be a black preferred candidate if (s)he receives nearly as much support from the black community as does a black preferred black candidate in that election.").

135. Red Clay School District Litig. (DE), discussion at 4 F.3d 1103, 1129 (3rd Cir. 1993).

136. *See, e.g.*, Third Circuit: Red Clay School District Litig. (DE), discussion at 4 F.3d 1103, 1129 (3rd Cir. 1993) (Evidence showing non-minority candidate to be minority-preferred includes evidence of minority "sponsorship" of the candidate, the level of attenuon the candidate pays to the minority community, the level of minority turnout for white-white elections compared to elections involving a minority candidate, the disincentives minority candidates confront and difficulties they face in qualifying for office, and the extent minorities candidates have run in the past); Eighth Circuit: Bone Shirt Litig., discussion at 336 F. Supp. 2d 976, 997-1017 (D.S.D. 2004) (considering anecdotal evidence such as the formation of advocacy organizations, political parties targeting the minority group, get out the vote efforts, and politicians testimony as well as statistical evidence in determining cohesion and bloc voting); Blytheville School District Litig. (AR), discussion at 71 F.3d 1382, 1386 (8th Cir. 1995) (stating circuit will follow Third Circuit's approach in Jenkins); Tenth Circuit: Sanchez v. Colorado Litig. (CO), discussion at 97 F.3d 1303, 1321 (10th Cir. 1996) (adopting approach from *Jenkins*); Eleventh: Nipper Litig. (FL), discussion at 39 F.3d 1494, 1540 (11th Cir. 1994) (requiring evidence of "strong preference" before white candidate will be considered minority-preferred and permitting such evidence to include anecdotal evidence, polling and turnout data, and a review of appeals made during the campaign). *But see supra* note 134 (discussion of *City of Rome* litigation).

137. Bond Litig. (CO), discussion at 875 F.2d 1488, 1496 (10th Cir. 1989) (determining that white candidates are minority-preferred based on Hispanic influence over the candidate slating process); City of St. Louis Litig. (MO), discussion at 90 F.3d 1357, 1362 (8th Cir. 1996) (suggesting slating informs inquiry into minority-preferred candidates by stating: "Absent a showing that minority-preferred candidates are, for some reason, excluded from the ballot, it is a near tautological principle that the minority-preferred candidate 'should generally be one able to receive [minority] votes.' "); *see also* Williams v. State Bd. of Elections Litig., discussion at 718 F. Supp. 1324, 1329-30 (N.D. Ill. 1989) (refusing to consider the slating process in *Gingles* inquiry as "turn[ing] the Court's language on its head and would have it refer to circumstances explaining the defeat of the minority's candidate, such as exclusionary slating").

138. *See, e.g.*, City of Santa Maria Litig. (CA), discussion at 160 F.3d 543, 549-50 ("[M]any of the extrinsic factors relied upon by the courts adopting the totality of the circumstances analysis do not necessarily bear a correlation with how all minority voters feel about a candidate, only how activist groups feel. Whether minority voters mobilized to support a white candidate, a factor considered relevant by the Third Circuit, Jenkins, 4 F.3d at 1129, only indicates how those minorities willing to become politically active feel about a candidate; not all minorities may have the time or inclination to take such steps, even though they support that candidate. A bright-

line rule, on the other hand, is based on the premise "that the ballot box provides the best and most objective proxy for determining who constitutes a representative of choice." Niagara Falls, 65 F.3d at 1019."); Niagara Falls Litig. (NY), discussion at 65 F.3d 1002, 1018 (*2d* Cir. 1995) ("We sympathize with these Circuits in their efforts to grapple with the often-conflicting requirements of the Voting Rights Act, but we believe that evaluating whether a person is, 'as a realistic matter,' minority-preferred -- based on subjective indicators such as "anecdotal testimonial evidence' -- is a dubious judicial task, and one that can degenerate into racial stereotyping of a high order. Questions such as whether a candidate, in a campaign, 'addressed predominately minority crowds and interests' suggest the existence of a racial political orthodoxy that courts should not legitimate, much less profess or promote.").

139. *See, e.g.,* Second Circuit: Niagara Falls Litig. (NY), discussion at 65 F.3d 1002, 1018-19 (*2d* Cir. 1995) (defining the minority-preferred candidate as the candidate that receives more than fifty percent of minority votes in the at-large, general election, while providing that courts need not consider such a candidate minority-preferred if either (1) another candidate received more than fifty percent of the minority vote in the primary and failed to reach the general election; or (2) another candidate received significantly higher support); Sixth Circuit: Cincinnati Litig. (OH), discussion at 40 F.3d 807, 810 n.1 (6th Cir. 1994) (The Sixth Circuit has simply adopted this approach stating "courts generally have understood blacks' preferred candidates simply to be those candidates who receive the greatest support from black voters."); Ninth Circuit: City of Santa Maria Litig. (CA), discussion at 160 F.3d 543, 552 (9th Cir. 1998) (adopting a rule that any candidate who received the largest plurality of minority votes was the minority-preferred candidate); Watsonville Litig. (CA), discussion at 863 F.2d 1407, 1416 (9th Cir. 1988) ("The court should have looked only to *actual voting patterns* rather than speculating as to the reasons why many Hispanics were apathetic. In fact, there is nothing in the record to support the district court's apparent conclusion that lack of enthusiasm for Hispanic candidates was responsible for the low rates of voter registration among Hispanics.").

140. Earlier cases in the Fourth Circuit allowed more room for subjective inquiries. *See* Norfolk Litig. (VA), discussion at 816 F.2d 932, 937 (4th Cir. 1987) ("In elections in multimember systems, where successful candidates receive support from more than 50% of minority voters, but an unsuccessful candidate has received more minority votes, a court must "review[]" the situation "individually" to determine whether successful candidates "can be fairly considered as representatives of the minority community. The presumption must be that they cannot, if some other candidate has received significantly more minority votes."); City of Norfolk Litig. (VA), 883 F.2d 1232, 1238 (4th Cir. 1989) (adding that in such a situation, "in addition to the bare statistics, it is appropriate to consider testimony revealing how political observers and the candidates themselves viewed the city's claim that Howell and Staylor were the minority's preferred candidates and representatives of choice.") More recently, however, the Fourth Circuit has moved closer to the Second Circuit's approach. *See* Alamance County Litig. (NC), discussion at 99 F.3d 600, 615 (4th Cir. 1996) ("Where the first choice of black voters was successful, there is simply no reason to presume that the minority community has been unsuccessful in electing representatives of its choice. . . . we now hold that, in multi-seat elections in which voters are permitted to cast as many votes as there are seats, at the very least any

candidate who receives a majority of the minority vote and who finishes behind a successful candidate who was the first choice among the minority voters is automatically to be deemed a black-preferred candidate, just like the successful first choice...Candidates who receive less than 50% of the minority vote, but who would have been elected had the election been held only among black voters, are presumed also to be minority-preferred candidates, although an individualized assessment should be made in order to confirm that such a candidate may appropriately be so considered."); *see also* Charleston County Litig., discussion at 316 F. Supp. 2d 268, 278 (D.S.C. 2003) (following Alamance County), and discussion at 318 F. Supp. 302, 310 (D.S.C. 2002) (focusing on the weight of the statistical data, rather than on defendants' "anecdotal, deposition testimony of candidates who testify to being minority-preferred candidates").

141. While courts in the Fifth and First Circuits do not expressly adhere to the *Jenkins* approach, they consider some similar factors (voting patterns, testimony from the community, and evidence of active minority support for a particular candidate). These courts do not state a presumption in favor of the minority being the preferred candidate, but they weigh elections with minority candidates more heavily. *See* First Circuit: Black Political Task Force Litig., 300 F. Supp. 2d 291 (D. Mass. 2004) (relying on regression analyses of minority voting patterns to identify the minority-preferred candidate); *cf.* City of Holyoke Litig., (MA), discussion at 72 F.3d 973, 988 (1st Cir. 1995) (considering only elections in which Hispanic candidates ran for office); Fifth Circuit: LULAC v. Roscoe I.S.D. Litig. (TX), discussion at 123 F.3d 843, 848 (5th Cir. 1997) (relying on testimony from minority residents); LULAC v. Roscoe Independent School District Litig., discussion at Civ. A. No. 1:94-CV-104-C, 1996 WL 453584, at *2 (N.D. Tex. May 14, 1996) (listing election results and political activism in favor of a particular candidate as potential indicators that the candidate was preferred by the minority community); City of Dallas Litig., discussion at 734 F. Supp. 1317, 1393, 1395 (N.D. Tex. 1990) (suggesting that voting patterns and witness testimony can help identify the minority-preferred candidate); *Cf.* LULAC-North East I.S.D. Litig., discussion at 903 F. Supp. 1071, 1092 (W.D. Tex. 1995) (explaining decision to discount results of Anglo v. Anglo races on the grounds that "such elections fail to provide minority voters with the choice of a minority candidate").

The Seventh Circuit typically does not engage in any such inquiry analysis to identify the minority-preferred candidate. Rather Seventh Circuit courts typically assume that the minority candidate is the minority-preferred candidate. *See, e.g.*, Campuzano Litig., discussion at , 200 F. Supp 2d 905, 914 (N.D. Ill. 2002) (finding that districts with between 50 and 60 percent minority voting age population are likely to perform for minorities in part because "evidence that African-American candidates enjoy greater support than white candidates within a district would suggest that the district provides African-Americans with effective opportunities to elect the candidate of their choice"); City of Chicago Litig. (IL), discussion at 141 F.3d 699, 702 (7th Cir. 1998) (dismissing arguments that white candidates in some areas with substantial minority populations are responsive to minority interests and explaining that "[i]t may be highly regrettable that a candidate's race should matter to the electorate; but it does; and the cases interpreting the Voting Rights Act do not allow the courts to ignore that preference"); Bradley v. Work Litig. (IN), discussion at 154 F.3d 704, 710-11 (7th Cir. 1998) (finding that it is not clear that the third *Gingles* factor has

been met because two black candidates won retention elections, without any discussion of whether those candidates were minority-preferred). Those cases that do consider the question, however, have relied on objective indicators of voting, even where there are other indicators of lack of access. *See, e.g.*, Williams v. State Bd. of Elections Litig. (IL), discussion at 718 F. Supp. 1324, 1325-26 (7th Cir. 1989) (finding that white candidates that earned a majority of the minority vote were minority-preferred candidates in spite of evidence of discrimination in the candidate slating process); *see also*, City of Chicago Heights Litig., discussion at 824 F. Supp. 786, 791 (N.D. Ill. 1993) (finding, in multi-member districts, candidates who receive the majority of the vote are not minority-preferred where "other candidates, preferred by a significantly higher percentage of the minority community,...were defeated in the same election").

No D.C. Circuit case has had the opportunity to consider this issue.

142. Blytheville School District Litig. (AR), 71 F.3d 1382 (8th Cir. 1995).

143. Clay County Board of Education (MO), discussion at 90 F.3d 1357, 1362 (8th Cir. 1996); *see also* City of Minneapolis Litig., discussion at No. 02-1139(JRT/FLN), 2004 U.S. Dist. Lexis 19708, at *28-32 (D. Minn. Sept. 30, 2004) (noting the plaintiffs "did not otherwise explicitly identify candidates of choice or a methodology for making such a determination," and therefore because plaintiffs failed to prove who the minority-preferred candidate was on an election-by-election basis, the court relied on the defendant's statistical analysis which showed significant white cross-over votes.)

144. Hamrick Litig. (GA), 296 F.3d 1065 (11th Cir. 2002) (treating minority-preferred candidate as candidate who receives majority of minority votes); Davis v. Chiles Litig. (FL), discussion at 139 F.3d 1414, 1417-18 (11th Cir. 1998) (considering white on white elections where blacks and whites supported different candidates rather than looking to subjective indications of minority support); City of Rome Litig. (GA), discussion at 127 F.3d 1355, 1377, 1379 n.9 (11th Cir. 1997) (holding that white candidates can be considered minority-preferred based on anecdotal evidence, turnout, polling data, and campaign appeals, but then assuming, in the absence of other information, that any white candidate receiving nearly as much of the vote as a black candidate is minority-preferred).

145. Fourth Circuit: Alamance County Litig. (SC), discussion at 99 F.3d 600, 614 (4th Cir. 1996). (presuming minorities to be minority-preferred candidates, looking only at election returns and requiring an "individualized assessment" of all candidates who "receive less than 50% of the minority vote, but who would have been elected had the election been held only among black voters."); Eleventh Circuit: City of Rome Litig. (GA), discussion at 127 F.3d 1355, 1379 n.9 (11th Cir. 1997) (requiring typically a subjective assessment of the candidate's support in the minority community, and holding the circuit will treat a white candidate as black preferred if that candidate receives "nearly as much support from the black community as does a black preferred black candidate in that election." In the absence of other information, support can be measured by the percentage of minority vote received.).

146. *See* First Circuit: City of Holyoke Litig. (MA), discussion at 72 F.3d 973, 988 n. 8 (1st Cir. 1995) ("[E]lections in which minority candidates run are often especially probative on the issue of racial bloc voting."); Second Circuit: The Second Circuit does not explicitly place more weight on elections with minority candidates. *See* Niagara Falls Litig. (NY), discussion at 65 F.3d 1002, 1018-19 (2d. Cir. 1995)

(holding that a white candidate may be minority-preferred and adopting a race-blind bright line rule for the Second Circuit); Butts v. NYC Litig., discussion at 614 F. Supp. 1527, 1546-47 (S.D.N.Y. 1985), rev'd on other grounds, 779 F.2d 141 (2d Cir. 1985) (considering only black-white elections); Third Circuit: Red Clay School District Litig. (DE), discussion at 4 F.3d 1103, 1128 (3rd Cir. 1993) (noting that elections involving only white candidates are "much less probative of racially polarized voting" such that plaintiffs need not present evidence on these elections "if they do not believe those elections are probative."); Fourth Circuit: In general, the Fourth Circuit does not place more weight on racially contested elections. *See, e.g.*, Alamance County Litig. (NC), discussion at 99 F.3d 600, 608, 610 (4th Cir. 1996) (holding that because the minority-preferred candidate may sometimes be a white candidate, district courts in determining whether such candidates are "usually" defeated "must consider, at a minimum, a representative cross-section of elections, and not merely those in which a minority candidate appeared on the ballot, at least where elections in which minorities were on the ballot do not constitute a substantial majority of the total number of elections;" not deciding if or to what extent white-white elections were entitled to less weight: "[i]t seems to us, however, that if white-white elections are entitled to less weight, then they are so only on the question of whether racial polarization exists, not on the question of whether, because of that polarization, minority-preferred candidates are usually defeated."); Fifth Circuit: Gretna Litig. (LA), discussion at 834 F.2d 496, 503-04 (5th Cir. 1987) ("*Gingles* is properly interpreted to hold that the race of the candidate is in general of less significance than the race of the voter--but only within the context of an election that offers voters the choice of supporting a viable minority candidate…[t]he various *Gingles* concurring and dissenting opinions do not consider evidence of elections in which only whites were candidates. Hence, neither do we."). Although cases immediately following Gretna only considered elections in which a viable minority candidate ran, *see e.g.,* Baytown Litig. (TX), discussion at 840 F.2d 1240, 1245 (5th Cir. 1988), later Fifth Circuit cases have considered white-white elections, though still viewing them as less probative. *See, e.g.* Magnolia Bar Association Litig. (MS), discussion at 994 F.2d. 1143, 1149 (5th Cir. 1993) (stating that white-white elections will be considered if evidence is presented, but that black-white elections are more probative); Sixth Circuit: Cincinnati Litig. (OH), discussion at 40 F.3d 807, 813 (6th Cir. 1994) (holding the race of the candidate can matter); City of Jackson Litig., discussion at 683 F. Supp. 1515, 1531 (W.D. Tenn. 1988) (giving more weight to elections involving black and white candidates); *cf.* Cousin Litig. (TN), discussion at 145 F.3d 818, 825 (6th Cir. 1998) (criticizing plaintiffs' expert analysis because it excluded white on white elections); Seventh Circuit: City of Indianapolis Litig. (IN), 976 F.2d 357 (7th Cir. 1992) (finding no racial bloc voting where black Republicans are elected because it will not "disregard the race of the victors" but acknowledging that the minority community may prefer another candidate); Eighth Circuit: Texarkana Litig., 861 F. Supp. 756 (W.D. Ark. 1992) (finding racially polarized voting without examining elections involving only white candidates because neither side presented this evidence); Jeffers Litig., discussion at 730 F. Supp. 196, 209 (E.D. Ark. 1989) ("Where two white candidates are running, for example, black voters can hold the balance of power. We do not wish to minimize this aspect of political reality, but we do not believe it has sufficient weight to negate the clear proof of polarization…White voters, in short, can elect white candidates against black

opposition, but black voters cannot elect black candidates against white opposition, with insignificant exceptions."); Smith-Crittenden County Litig.,687 F. Supp. 1310 (E.D. Ark. 1988) (considering that minority candidates lose even if white minority-preferred candidates win evidence of racially polarized voting); Ninth Circuit: Old Person Litig. (MT), discussion at 230 F.3d 1113, 1127 (9th Cir. 2000) ("contests between white and Indian candidates . . . are most probative of white bloc voting."); Santa Maria Litig., discussion at 160 F.3d 543, 553 (9th Cir. 1998) ("minority vs. non-minority election is more probative of racially polarized voting than a non-minority vs. non-minority election"); Tenth Circuit: Sanchez-Colorado Litig. (CO), discussion at 97 F.3d 1303, 1307-08 (10th Cir. 1996) (adopting Jenkins methodology); Bond Litig. (CO), discussion at 875 F.2d 1488, 1495 (10th Cir. 1989) (holding the minority-preferred candidate does not have to be a minority and elections with only white candidates should be given "such weight as the circumstances warrant"); Eleventh Circuit: Southern Christian Leadership Conference Litig. (AL), discussion at 56 F.3d 1281, 1293 (11th Cir. 1995) (upholding district court decision to consider elections generally, but give greater weight to white on black elections, as a "searching and meaningful evaluation of all the relevant evidence"); *see also* Hamrick Litig. (GA), discussion at 296 F.3d 1065, 1076, 1078 (11th Cir. 2002) (finding that district courts may, but are not required to, give additional weight to elections involving minority candidates and upholding the decision of a district court assigning equal weight to elections involving minority candidates where all such elections involved two minority candidates running against each other).

147. *See, e.g.*, Black Political Task Force Litig., discussion at 300 F. Supp. 2d 291, 304 (D. Mass. 2004) ("[T]he choice presented to minority voters in an election contested only by two white candidates is somewhat akin to offering ice cream to the public in any flavor, as long as it is pistachio."); City of Chicago Litig. (IL), discussion at 141 F.3d 699, 703 (7th Cir. 1998) (recognizing that white aldermen may be responsive to blacks, but asserting that "blacks would prefer to elect black aldermen"); Metro Dade County Litig., discussion at 805 F. Supp. 967, 984 (S.D. Fla. 1992) (finding that "when elections do not include minority candidates, some Non-Black candidates will receive more of the black vote than other candidates, but this does not automatically make that candidate the minority-preferred candidate" and analogizing this "strained choice" to "Henry Ford's statement that 'any customer can have a car painted any color he wants so long as it is Black.'"); City of Dallas Litig., discussion at 734 F. Supp. 1317, 1388 (N.D. Tex. 1990) ("[W]hen there are only white candidates to chose from, it is virtually unavoidable that certain white candidates would be supported by a large percentage of...black voters" (internal citations omitted)); *cf.* Old Person Litig. (MT), discussion at 230 F.3d 1113, 1126 (9th Cir. 2000) (in a claim brought by Native Americans, excluding evidence of white on white elections where the minority-preferred candidate was the same as the white preferred candidate because those elections did not "touch[] on issues of heightened concern to the [minority] community").

148. *See* LULAC-North East I.S.D. Litig., discussion at 903 F. Supp. 1071, 1092 (W.D. Tex. 1995) (noting that races that include a minority candidate "provide the most direct test of the hypothesis that race is a factor in the election system under scrutiny"); City of Columbia Litig., discussion at 850 F. Supp. 404, 416 (D.S.C. 1993) ("If the whites who finished first among blacks are, however, considered the blacks' candidates of choice, then blacks' candidates of choice have not usually been

defeated. Indeed, their choices in at-large contests have been elected three out of three times for mayor and four of eight times for the at-large seats. Thus, whether blacks' candidates of choice have usually been defeated depends upon whether the white candidates count as 'candidates of choice.'"); Jeffers Litig., 730 F. Supp. 196 (E.D. Ark. 1989) (considering that in all white elections the African-American vote holds the balance of power, but finding polarization because minority candidates regularly lose); Smith-Crittenden County Litig., 687 F. Supp. 1310 (E.D. Ark. 1988) (finding racially polarized voting because while the minority-preferred candidate sometimes wins in all white elections, s/he never wins when the candidate is a minority).

149. *See* Smith-Crittendon County Litig., discussion at 687 F. Supp. 1310, 1316 (E.D. Ark.1988) (no black candidate had ever been elected, in spite of nine recent candidacies supported by an average of 89% of the black vote, but majorities of whites and blacks had voted for the same candidate in 54 out of 65 of the county-wide elections in the preceding 12 years); City of LaGrange Litig., 969 F. Supp. 749 (N.D. Ga. 1997) (only one black has won a contested election when not running as an incumbent, but the candidate receiving the majority of the minority vote was elected in 6 of the last 10 elections.); Southern Christian Leadership Conference Litig. (AL), 56 F.3d 1281 (11th Cir. 1995) (The majority of blacks vote for the winning candidate in over 75% of elections, but black candidates rarely win); City of Starke Litig., discussion at 712 F. Supp. 1523 1530 (M.D. Fla. 1989) (finding racial bloc voting in black on white elections even though the candidate receiving the majority of the black vote won 78% of the time); City of Columbia Litig., discussion at 850 F. Supp. 404, 416 (D.S.C. 1993) (If the whites who finished first among blacks are, however, considered the blacks' candidates of choice, then blacks' candidates of choice have not usually been defeated. Indeed, their choices in at-large contests have been elected three out of three times for mayor and four of eight times for the at-large seats. Thus, whether blacks' candidates of choice have usually been defeated depends upon whether the white candidates count as 'candidates of choice.' "); Nipper Litig., discussion at 795 F. Supp. 1525, 1534, 1548 (M.D. Fla. 1992) (All six black candidates have lost, but blacks vote for the winner 68% of the time.); Jeffers Litig., 730 F. Supp. 196 (E.D. Ark. 1989) (considering that in all white elections the African-American vote holds the balance of power, but finding polarization because minority candidates regularly lose); Smith-Crittenden County Litig., 687 F. Supp. 1310 (E.D. Ark. 1988) (finding racially polarized voting because while the minority-preferred candidate sometimes wins in all white elections, s/he never wins when the candidate is a minority).

150. *See, e.g.,* Perry Litig, discussion at 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004) (highlighting evidence gleaned from primary elections where minority voters "allegiance is free of party affiliation"); Black Political Task Force Litig., discussion at 300 F. Supp. 2d 291, 305-06 (D. Mass. 2004) (noting that general elections in Boston are not helpful to the racially polarized voting analysis because the vast majority of voters vote Democratic); Anthony Litig., 35 F. Supp. 2d 989 (E.D. Mich. 1999); Cousin Litig. (TN), 145 F.3d 818 (6th Cir. 1998); LULAC v. Clements Litig. (TX), discussion at 999 F.2d 831, 884 (5th Cir. 1993) (relying on evidence from the Democratic primary, "where party affiliation plays no part," to refute plaintiff's claim that racially motivated voting accounted for black Democrats' failure to achieve the electoral success of their white counterparts); Chattanooga Litig., 722 F. Supp. 380

(E.D. Tenn. 1989); City of Starke Litig., discussion at 712 F. Supp. 1523, 1534 (M.D. Fla. 1989) (discrediting testimony from defendant's expert because he failed to consider a number of primary elections in a "heavily Democratic community" where "it would be expected that in general elections both white and black voters would register as Democrats and would generally vote for the same Democratic candidate"); County of Big Horn (Windy Boy) Litig., discussion at 647 F. Supp. 1002 (D. Mont. 1986).

151. *See, e.g.,* City of Starke Litig., 712 F. Supp. 1523 (M.D. Fla. 1989); Black Political Task Force Litig., 300 F. Supp. 2d 291, 305-06 (D. Mass. 2004).

152. *See* Niagara Falls Litig. (NY), discussion at 65 F.3d 1002, 1019 (2d Cir. 1995) ("When a candidate receives support from 50% or more of minority voters in the general election, a court need not treat the candidate as minority-preferred when another candidate receiving greater support in the primary failed to reach the general election."); *see also* Nash Litig., 797 F. Supp. 1488 (W.D. Mo. 1992). *But see* Alamance County Litig. (NC), discussion at 99 F.3d 600, 616 (4th Cir. 1996) ("The statute thus requires that minorities have an equal opportunity to participate not only in primary elections but also in general elections. From this, we believe it follows that the results in these two phases of the single election cycle must be separately considered and analyzed, and, in recognition of this statutory requirement, that *Gingles'* third precondition can be satisfied by proof that, in either the primary or the general election, the minority-preferred candidate is usually defeated by white bloc voting. Not to separately consider primary and general elections risks masking regular defeat in one of these phases with repeated successes in the other, and thereby misperceiving a process that is palpably in violation of the Voting Rights Act, as not violative of the Act at all.").

153. *See, e.g.,* Black Political Task Force Litig., discussion at 300 F. Supp. 2d 291, 305-06 (D. Mass. 2004) (discounting evidence of white support for a minority candidate in the general election because the candidate represented the dominant political party in the area); Garza v. Los Angeles Litig. (CA), 918 F.2d 763 (9th Cir. 1990) (excluding Republican Primary results because all Hispanic candidates who had won in the district did so running as Democrats). This approach attempts to address the same concerns that the courts address in limiting consideration of white on white elections in single party districts, *see supra* note 149 (discussing the impact of giving equal weight to white on white elections).

154. Black Political Task Force Litig., 300 F. Supp. 2d 291, 3006 (D. Mass. 2004).

155. *See, e.g.,* Rodriguez Litig., discussion at 308 F. Supp. 2d 346, 389, (S.D.N.Y. 2004) (primaries more probative in determining black/Latino cohesiveness since members of both groups generally vote for Democrats); Perry Litig., discussion at 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004) ("Here, there is no serious dispute but that Blacks and Hispanics do not vote cohesively in primary elections, where their allegiance is free of party affiliation."); Pomona Litig. (CA), discussion at 883 F.2d 1418, 1426 (9th Cir. 1989) (considering the Hispanic and black minorities voted differently in the primaries and finding no political cohesion). *But see* France Litig., discussion at 71 F. Supp. 2d 317, 327 (S.D.N.Y. 1999) (finding political cohesion among black and Latino voters despite testimony from plaintiffs' expert witness that black and Latino voters were "more likely than not to support different candidates in primary elections").

156. *See* Rodriguez Litig., discussion at 308 F. Supp. 2d 379, 421 (S.D.N.Y. 2004); County of Big Horn (Windy Boy) Litig., 647 F. Supp. 1002 (D. Mont. 1986) (refusing to consider defendant's argument that it was party, not race because defendant did not evaluate the primary elections where party wouldn't be an issue); *see also* Perry Litig., discussion at 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004); Page Litig., discussion at 144 F. Supp. 2d 346 (D.N.J. 2001) (considering only Democratic primaries in determining racial bloc voting).

157. City of Santa Maria Litig. (CA), discussion at 160 F.3d 543, 552 (9th Cir. 1998) ("[w]hether minority voters mobilized to support a white candidate, a factor considered relevant by the Third Circuit, Jenkins, 4 F.3d at 1129, only indicates how those minorities willing to become politically active feel about a candidate; not all minorities may have the time or inclination to take such steps, even though they support that candidate. A bright-line rule, on the other hand, is based on the premise 'that the ballot box provides the best and most objective proxy for determining who constitutes a representative of choice.' Niagara Falls, 65 F.3d at 1019."); Nash Litig., discussion at 797 F. Supp. 1488, 1503 n.29 (W.D. Mo. 1992) (considering primary elections but noting "[t]here was some testimony to the effect that black voters, given a choice, would vote only for black candidates, and that a white candidate receiving a majority of the black vote was probably not a 'true' preference. There was also testimony indicating that if a white person received a majority of the black vote, any black candidates probably were not viable candidates. We refuse to impart these individual witnesses' views to black citizens as a whole. Absent some indication that a particular white candidate was truly not preferred despite receiving over 65% of the black vote, or that a particular black candidate was not viable, we will not assume that the voters in a particular political contest would have voted for someone other than the person they voted for, nor will we assume that a white candidate receiving over 65% of the black vote was not preferred by the minority voters.").

158. City of Rome Litig. (GA), 127 F.3d 1355, 1378-79 (11th Cir. 1997) (following *De Grandy* reasoning that the Voting Rights Act does not exempt minority candidates from the requirement to "pull, haul, and trade" because if black preferred candidates must represent the needs of the black community "without regard for the white community, the white community is quite naturally going to vote against the black preferred candidates almost every time."); Alamance County Litig. (NC), discussion at 99 F.3d 600, 615, (4th Cir. 1996) (rejecting the proposition that the success of a minority-preferred candidate in a general election is entitled to less weight when a candidate with significantly more minority support was defeated in the primary, the court stated: "Such a view is grounded in the belief that minority voters essentially take their marbles and go home whenever the candidate whom they prefer most in the primary does not prevail, a belief about minority voters that we do not share. And such a view ignores altogether the possibility that primary election winners will become the minority's preferred candidate during the general election campaign, or that where, as here, the overwhelming majority of blacks vote in the Democratic primary, that a Republican could in fact become the black-preferred candidate in the general election by addressing himself to issues of interest to the minority community in a way that appeals to them as participants in the political process.").

159. 478 U.S. 30, 64 (1986).

160. *Id.* at 100 ("Evidence that a candidate preferred by the minority group . . . was rejected by white voters for reasons other than those which made the candidate

the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates.").

161. *See, e.g.,* First Circuit: City of Holyoke Litig. (MA), discussion at 72 F.3d 973, 983 (1st Cir. 1995) (stating that satisfying the *Gingles* factors gives rise to inference of racial animus; if defendants present evidence that facts other than race caused the polarization, the court must still "determine whether, based on the totality of the circumstances (including the original inference and the factual predicate that undergirds it), the plaintiffs have proven that the minority group was denied meaningful access to the political system on account of race.");.*cf.* City of Holyoke Litig., discussion at 960 F. Supp. 515, 521-25 (D. Mass. 1997) (Upon remand, the district court pursued its causation inquiry under the third prong of *Gingles* rather than under the totality of the circumstances analysis.); Second Circuit: Town of Hempstead Litig. (NY), discussion at 180 F.3d 476, 493 (*2d.* Cir. 1999) (We think the best reading of the several opinions in *Gingles*...is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions...but relevant in the totality of circumstances inquiry"); *see also* Rodriguez Litig., discussion at 308 F. Supp. 2d 346, 393 (S.D.N.Y. 2004) (acknowledging that *Town of Hempstead* controls but warning that, in the context of such a rule, relaxing the first *Gingles* precondition may cause the third precondition to be "effectively eviscerated"); Fourth Circuit: Charleston County Litig. (SC), discussion at 365 F.3d 341, 348-49 (4th Cir. 2004) ("Legally significant" white bloc voting thus refers to the frequency with which, and not the reason why, whites vote cohesively for candidates who are not backed by minority voters," but "the reason for polarized voting is a critical factor in the totality analysis"); Alamance County Litig. (NC), discussion at 99 F.3d 600, 604 (4th Cir. 1996) ("[T]he best reading of the several opinions in *Gingles*...is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions...but relevant in the totality of the circumstances inquiry."); Fifth Circuit: Perry Litig., discussion at 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004) (requiring demonstration of causation in minority political cohesiveness inquiry); Attala County Litig. (MS), discussion at 92 F.3d 283, 290 (5th Cir. 1996)(considering causation as part of *Gingles*, but holding that the district court erred in placing the burden of disproving that factors other than race caused the polarization); LULAC v. Clements Litig. (TX), 999 F.2d 831 (5th Cir. 1993) (requiring consideration of causation under the third *Gingles* precondition); Sixth Circuit: The Sixth Circuit has never squarely addressed causation on the circuit level, but has affirmed a district court case that found a lack of racial bloc voting in part on causation grounds without addressing the causation argument. *See* Mallory-Hamilton County Litig., 38 F. Supp. 2d 525 (S.D. Ohio 1997) ("In this case, numerous factors, other than race, explain losses at the polls by particular minority candidates. . . Two factors in particular, "partisanship" and "incumbency," accurately explain electoral outcomes in numerous judicial elections involving African-American candidates.") *aff'd* at 173 F.3d 377 (6th Cir. 1999); *see also* Cincinnati Litig. (OH), discussion at 40 F.3d 807, 813 n2. (6th Cir. 1994) ("Given [the lack of white bloc voting in this case], we need not consider whether a showing that the minority-preferred candidates" lack of success is "somehow tied to race," League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 850 (5th Cir. 1993) (en banc), cert. denied, 127 L. Ed. 2d 74, 114 S. Ct. 878 (1994), is a prerequisite to a finding of "legally significant white bloc voting." Gingles, 478 U.S. at 56 (emphasis

supplied). See generally Clements, 999 F.2d at 850-63 (concluding that such a showing is necessary)."); Seventh Circuit: Milwaukee NAACP Litig. (WI), discussion at 116 F.3d 1194, 1199 (7th Cir. 1997) (holding that "a district judge…should not assign to plaintiffs the burden of showing *why* the candidates preferred by black voters lost; it is enough to show *that* they lost, if white voters disapproved these candidates en masse" but that it was proper for the district court to consider non-racial explanations for election outcomes though "it would be best for district judges to postpone this kind of inquiry to their consideration of the totality of the circumstances"); City of Indianapolis Litig. (IL), discussion at 976 F.2d 357, 361 (7th Cir. 1992) (stating that the victory of black Republicans in "Marion County illustrates Justice White's observation, 478 U.S. at 83, that losses by the candidates black voters prefer may have more to do with politics than with race."); Eighth Circuit: While the Eighth Circuit has never held that causation should be a part of the analysis and even defined racially polarized voting in terms of correlation, *see, e.g.*, Little Rock Litig. (AR), discussion at 56 F.3d 904, 910 (8th Cir. 1995) (rejecting Section 2 claim based on totality review while noting that "racially polarized voting is without doubt present to a degree," that the presence of "a high *correlation* between the number of voters in a precinct and the number of votes cast for African-American candidates" while citing "some decisive cross-over voting of whites for African-American candidates"), district courts have considered causation. *See, e.g.* Bone Shirt Litig., discussion at 336 F. Supp. 2d 976, 1008 (D.S.D. 2004)("While causation may be relevant to the totality-of-circumstances review, it is not relevant in the inquiry into the three *Gingles* factors"); Democratic Party of Arkansas Litig., discussion at 686 F. Supp. 1365) (considering whether low voter turnout is why the candidates lost); Smith-Crittenden County, 687 F. Supp. 1310 (E.D. Ark. 1988) (calling the materiality of evidence regarding other reasons voters may have voted as they did, specifically incumbency, "questionable"); *cf.* Texarkana Litig., 861 F. Supp. 756 (W.D. Ark. 1992) (refusing to consider defendant's causation argument because no evidence was presented on point); Tenth Circuit: Sanchez-Colorado Litig. (CO), discussion at 97 F.3d 1303, 1307-08 (10th Cir. 1996) ("[A]t the threshold, we are simply looking for proof of the correlation between the race of the voter and the defeat of the minority's preferred candidate. We do not, therefore, reject multivariate regression analysis but prefer to reserve its use, if at all, to the more global picture plaintiffs must establish."); Bond Litig. (CO), discussion at 875 F.2d 1488, 1493 (10th Cir. 1989) ("we agree with appellants that a court may not explain away evidence of racial bloc voting by finding that such voting is caused by underlying differences between the minority and white population. The reasons why minority voters may vote alike is unimportant in determining whether in fact the minority group votes as a bloc. Racially polarized voting, which indicates political cohesion, exists when there is a consistent relationship between the race of the voter and the way in which the voter votes or, in other words, where minority voters and white voters vote differently"); *see also* Alamosa County Litig., discussion at 306 F. Supp. 2d 1016, 1039-40 (D. Colo. 2004) (noting in the totality of the circumstances review of racial polarization that "No witness testified as to how he or she voted or why, not a single witness testified that he or she did not participate in the electoral process due to a perception of futility based upon ethnic discrimination. To the contrary and without exception, Hispanic witnesses demonstrated their extensive knowledge about and active participation in the political process in Alamosa County. In discussing election

outcomes, they assessed the effect of incumbency, candidate qualifications and election strategy."); Eleventh Circuit: Southern Christian Leadership Litig. (AL), discussion at 56 F.3d 1281, 1293-94 (11th Cir. 1995) (finding ample evidence "that factors other than race, such as party politics and availability of qualified candidates, were driving the election results and that racially polarized voting did not leave minorities with 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'"). *But cf.* City of Rome Litig. (GA), 127 F.3d 1355 (11th Cir. 1997) (adopting verbatim district court's finding that (1) plaintiffs need not "prove racism determines the voting choices of the white electorate in order to succeed in a voting right cases" and that (2) it was nevertheless "necessary to evaluate the level of racism in the electorate in the instant case" to gauge the relevance of appointment and incumbency was to minority electoral success).

162. Third Circuit: Red Clay School District Litig. (DE), discussion at 4 F.3d 1103, 1124 n.19 (3rd Cir 1993) (finding no need to reach the "difficult question of what evidentiary weight, if any, should be given the election of minority candidates who are not the minority voters' candidate of choice" while noting division on this issue in LULAC v. Clement); D.C. Circuit: In the two published cases from the District of Columbia, the plaintiffs failed to allege racial bloc voting, and thus the court did not confront this issue. Klingman Park Litig., discussion at 348 F.3d 1033, 1042 (D.C. Cir. 2003); Howard Litig., Civ.A. No. 93-900 SSH, 1994 WL 118211 (D.D.C. Mar. 31, 1994).

163. *See* Blaine County Litig. (MT), discussion at 363 F.3d 897, 912 (9th Cir. 2004) (rejecting the argument that plaintiffs must show racial bias among the white bloc suggesting such a requirement "would be divisive and would place an impossible burden on the plaintiffs"); *see also* City of Santa Maria Litig. (CA), discussion at 160 F.3d 543, 558 (9th Cir. 1998) (rejecting that plaintiffs must prove an intent to moot pending litigation when excluding a minority candidate victory under the "special circumstances" doctrine because of the pending litigation). *But see* Brief in Opposition to Cert., filed by DOJ, in Blaine County, characterizing Ninth Circuit's decision in Blaine as applying well-established rule that Section 2 does not require a showing of racial animus, and arguing that Blaine raises no conflict with either LULAC v. Clements or Nipper.

164. *See* LULAC v. Clements Litig. (TX), 999 F.2d 831, 850 (5th Cir. 1993) (en banc) ("Unless the tendency among minorities and whites to support different candidates, and the accompanying losses by minority groups at the polls, are somehow tied to race…plaintiffs' attempt to establish legally significant white bloc voting, and thus their vote dilution claim under § 2, must fail.").

165. *See, e.g.*, Nipper Litig. (FL),discussion at 39 F.3d 1494, 1525 (11th Cir. 1994); City of Holyoke Litig. (MA), discussion at 72 F.3d 973, 983 (1st Cir. 1995) (noting that *Gingles* preconditions "rise to an inference that racial bias is operating through the medium of the targeted electoral structure to impair minority political opportunities.").

166. City of Holyoke Litig. (MA), discussion at 72 F.3d 973, 983 (1st Cir. 1995). *See also* Nipper Litig. (FL), discussion at 39 F.3d 1494, 1514-15 (11th Cir. 1994) (noting that "the existence of [the *Gingles*] factors, and a feasible remedy, generally will be sufficient to warrant relief").

167. Compare, for example, City of Holyoke Litig. (MA), discussion at 72 F.3d 973, 983 (1st Cir. 1995) (examining causation in the totality of circumstances of review and stating that plaintiffs need not "affirmatively . . . disprove every other possible explanation for racially polarized voting") with Attala County Litig., (MS) discussion at 92 F.3d 283, 290 (5th Cir. 1996) (considering causation as part of *Gingles*, but holding that the district court erred in placing the burden of disproving that factors other than race caused the polarization).

168. *See, e.g.*, Mallory-Ohio Litig., discussion at 38 F. Supp. 2d 525, 539, 575-76 (S.D. Ohio 1997) ("In this case, numerous factors, other than race, explain losses at the polls by particular minority candidates. As previously noted, Drs. Asher and Tuchfarber, and all of the witnesses who testified herein, identified a number of such factors. Two factors in particular, "partisanship" and "incumbency," accurately explain electoral outcomes in numerous judicial elections involving African-American candidates."); City of Holyoke Litig. (MA), discussion at 72 F.3d 973, 983 (1st Cir. 1995) ("[O]nce the defendant proffers enough evidence to raise a legitimate question in regard to whether nonracial factors adequately explain racial voting patterns, the ultimate burden of persuading the factfinder that the voting patters were engendered by race rests with the plaintiffs."). *But see* Smith-Crittenden County Litig., discussion at 687 F. Supp. 1310, 1317 (E.D. Ark. 1988) ("The defendants have offered evidence of other reasons, such as incumbency, for the choices made by voters in the district. The materiality of this evidence is questionable. *See* Thornburg, 106 S. Ct. at 2773 (focus of case under Voting Rights Act is difference in choices made by voters, not reasons for this difference) (opinion of Brennan, J.). In any event, we assume for present purposes that this evidence may have some bearing on whether the particular election results on which we focus stem from the multimember structure of the district. We find this evidence insufficient to compel a different result in this case, given the sharp polarization in races involving black candidates for State Representative.").

169. *See e.g.*, First Circuit: City of Holyoke Litig., 960 F. Supp. 515 (D. Mass. 1997); Second Circuit: Town of Hempstead Litig. (NY), discussion at 180 F.3d 476, 493 (2d Cir. 1999) (holding that causation was appropriately considered in the totality of the circumstances); Town of Babylon Litig., discussion at 814 F. Supp. 843, 881-84 (E.D.N.Y. 1996) (considering causation as part of the third *Gingles* precondition and finding that party not race explained the voting polarization). Plaintiffs in the Second Circuit have not clearly lost on causation since Town of Hempstead litigation. Fourth Circuit: City of Columbia Litig., discussion at 850 F. Supp. 404, 418, 420 (D.S.C. 1993) (not explicitly mentioning causation but concluding that plaintiffs' evidence was "simply not sufficient to overcome the evidence that the blacks who lost owe their losses as much to blacks' failure to vote more cohesively or to turn out at all as to failure to achieve white support"); Fifth Circuit: Perry Litig., discussion at 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004) (concluding that minority groups are not politically cohesive because they "do not vote cohesively in primary elections, where their allegiance is free of party affiliation."); Rodriguez v. Bexar County, 385 F.3d 853 (5th Cir. 2004) (requiring more than mere correlation between minority electoral success and a minimum threshold of minority voter registration); City of Cleveland Litig., discussion at 297 F. Supp. 2d 901, 907 (N.D. Miss. 2004) (plaintiffs relied on the defeat of three minority candidates, the court said they were defeated "not only due to any white

bloc voting that may have taken place, but also because they failed to receive sufficient support in the majority-minority wards;" concluded that the plaintiffs had failed to satisfy the third *Gingles* precondition); NAACP v. Fordice Litig. (MS), discussion at 252 F.3d 361, 370-71 (5th Cir. 2001) (plaintiffs established racial bloc voting and all three *Gingles* factors but lost on minority electoral success, the case came down to whether the election of two African-American Supreme Court justices could be explained by special circumstances); Sixth Circuit: Mallory-Ohio Litig., discussion at 38 F. Supp. 2d 525, 539 (S.D. Ohio 1997) ("The 'clear partisan patterns' reflected in Dr. King's Report suggest that party affiliation is a, if not *the*, predominant factor in Ohio judicial elections."); Seventh Circuit: Bandemer Litig., discussion at 603 F. Supp. 1479, 1489-90 (S.D. Ind. 1984) (finding that minorities in Indiana vote as a bloc for the Democrat candidate and that therefore "the voting efficacy of [minorities] was impinged upon because of their politics and not because of their race."); Tenth Circuit: Alamosa County Litig., discussion at 306 F. Supp. 2d 1016, 1039-40 (D. Colo. 2004) ("The anecdotal evidence does nothing to buttress the statistical conclusions as to polarization. No witness testified as to how he or she voted or why, not a single witness testified that he or she did not participate in the electoral process due to a perception of futility based upon ethnic discrimination."); Eleventh Circuit: Hamrick Litig. (GA), discussion at 296 F.3d 1065, 1078 (11th Cir. 2002); City of Rome Litig. (GA), discussion at 127 F.3d 1355, 1083 (11th Cir. 1997); Southern Christian Leadership Litig. (AL), discussion at 56 F.3d 1281, 1293-94 (11th Cir. 1995); Nipper Litig. (FL), 39 F.3d 1494 (11th Cir. 1994); Liberty County Commissioners Litig. (FL), discussion at 899 F.2d 1012 (11th Cir. 1990).

170. Town of Hempstead Litig. (NY), discussion at 180 F.3d 476, 495-96 (2d. Cir. 1999) (rejecting defendants' argument that minority-preferred candidates were defeated because of party not race; even if minorities were Republicans they would not have been able to elect their candidates of choice because of the unique slating process of the town's Republican party, which effectively excluded minorities).

171. *See e.g.*, Fifth Circuit: City of Austin Litig. (TX), discussion in 871 F.2d 529, 529 (5th Cir. 1989) (noting that, because plaintiffs could not create a district where Mexican-Americans enjoyed a voting age majority, they must demonstrate political cohesiveness with the Black population); Seventh Circuit: Forest County Litig. (WI), discussion at 336 F. 3d 570, 575-76 (7th Cir. 2003) (rejecting an "Indian/black district" that would pair a longstanding Indian community with a transient black community at the local Job Corps center, because the idea that their local interests coincided struck the court as "ludicrous"); Ninth Circuit: Stockton Litig. (CA), 956 F.2d 884 (9th Cir. 1992) (amended later at 1992 U.S. App. LEXIS 7738, but same finding on racial bloc voting); National City Litig., discussion at No. 88-301-R(M), 1991 WL 421115 (S.D. Cal. May 16, 1991) (affirmed at 976 F.2d 1293 (9th Cir. 1992)); Watsonville Litig. (CA), 863 F.2d 1407 (9th Cir. 1988) (noting minority population statistics); Pomona Litig., discussion at 665 F. Supp. 853 (C.D. Cal. 1987) (affirmed at 883 F.2d 1418 (9th Cir. 1988)) (Neither Black nor Hispanic group was sufficiently large on its own to satisfy *Gingles* I. The court concluded the two groups were not politically cohesive and, thus, failed to meet *Gingles* II.); Eleventh Circuit: De Grandy Litig., discussion at 815 F. Supp. 1550, 1572-73 (N.D. Fla. 1992); Metro Dade County Litig. (FL), discussion at 908 F.2d 1540, 1545-46 (11th Cir. 1990) (affirmed in part, reversed in part at 985 F.2d 1471 (11th Cir. 1993).

172. *See e.g.*, Second Circuit: Rodriguez Litig., discussion at 308 F. Supp. 2d 346, 443 (S.D.N.Y. 2004);

173. Fifth Circuit: City of Baytown Litig. (TX), discussion at 840 F.2d 1240, 1244-45 (5th Cir. 1988) (concluding that, where two minorities make up the minority group, "the proper standard is the same as *Gingles*: whether the minority group together votes in a cohesive manner for the minority candidate."); Eleventh Circuit: Hardee County Litig. (FL), discussion at 906 F.2d 524, 527 (11th Cir. 1990) (needed to survive the first *Gingles* factor). But see Kent County Litig. (MI), discussion at 76 F.3d 1381, 1386 (6th Cir. 1996) (en banc) ("Nothing in the clear, unambiguous language of § 2 allows or even recognizes the application of the Voting Rights Act to coalitions as urged by plaintiffs.").

174. *See, e.g.*, Second Circuit: Albany County Litig., discussion at No. 03-CV-502, 2003 WL 21524820, at *9 (N.D.N.Y. July 7, 2003) (considering defendants' stipulation in a 1991 consent decree and joint political and social activities of the Latino and African-American communities); Third Circuit: Page Litig., discussion at 144 F. Supp. 2d 346, 364-66 (D.N.J. 2001); Fifth Circuit: Brewer Litig. (TX), discussion at 876 F.2d 448, 453 (5th Cir. 1989) (citing Campos for the proposition that "the most persuasive evidence of inter-minority political cohesion for Section 2 purposes is to be found in *voting patterns*"); LULAC—Midland Litig., discussion at 648 F. Supp. 596, 606 (W.D. Tex. 1986) ("Testimony presented showed that Blacks and Hispanics worked together and formed coalitions when their goals were compatible. Additionally, the bringing of this lawsuit provides evidence that Blacks and Hispanics have common interests that induce the formation of coalitions."); Ninth Circuit: San Diego County Litig., 794 F. Supp. 990 (S.D. Cal. 1992) (looking at primary results) (affirmed without opinion at 5 F.3d 535 (9th Cir. 1993), unpublished opinion at No. 92-55661, 1993 WL 379838 (9th Cir. Sept. 27, 1993); Stockton Litig. (CA), 956 F.2d 884 (9th Cir. 1992) (considering expert and lay testimony regarding cohesion between the minority groups); Pomona Litig. (CA), 883 F.2d 1418 (9th Cir. 1988) (looking at evidence of exit polls in the 1985 primary); Eleventh Circuit: Hardee County Litig. (FL), discussion at 906 F.2d 524, 527 (11th Cir. 1990) (considering voting patterns that whether blacks and Hispanics "worked together and formed political coalitions").

175. *See* City of Dallas Litig., discussion at 734 F. Supp. 1317, 1392 (N.D. Tex. 1990) (weighing political cohesiveness within a single minority group, the court noted that "[t]he presence of more than one black candidate in a race *may* indicate a lack of cohesion, but it does not always do so"); City of Austin Litig., discussion at CIV. No. A-84-CA-189, 1987 WL 54389, *14 (W.D. Tex. Sept. 15, 1987) (affirmed at 871 F.2d 529 (5th Cir. Tex. 1989)) (citing polarized voting patterns in an election that featured a black and a Hispanic candidate as evidence that the two minority groups were not politically cohesive).

176. *See, e.g.*, Second Circuit: Rodriguez Litig., discussion at 308 F. Supp. 2d 346, 421 (S.D.N.Y. 2004) (where, as here, the two minority groups are generally affiliated/registered with the same party (Democratic) and vote for that party's candidates at high rates, primary elections for that party's candidate are by far the most probative evidence of cohesion); *cf.* France Litig., discussion at 71 F. Supp. 2d 317, 327 (S.D.N.Y 1991) (finding political cohesion among Black and Latino voters despite testimony from plaintiffs' expert witness that Black and Latino voters were more likely than not to support different candidates in the primary); Ninth Circuit:

Pomona Litig., discussion at 665 F. Supp. 853 (C.D. Cal. 1987) (using exit poll data from the 1985 primary to determine Hispanic and Black voters were not cohesive).

177. *See* Cano Litig., discussion at 211 F. Supp. 2d 1208, 1235-42 (C.D. Cal. 2002) ("Most probative evidence is that relating to the non-Latino voters' willingness to support Latino candidates for office & white cross-over voting."); Aldasoro v. Kennerson Litig., discussion at 922 F. Supp. 339, 343-63 (S.D. Cal. 1995); Garza v. Los Angeles Litig. (CA), discussion at 756 F. Supp. 1298 (C.D. Cal. 1990) (affirmed at 918 F.2d 763 (9th Cir. 1990)); Watsonville Litig. (CA), discussion at 863 F.2d 1407, 1417 (9th Cir. 1988) ("Although the court did not separately find that Anglo bloc voting occurs, it is clear that the non-Hispanic majority in Watsonville usually votes sufficiently as a bloc to defeat the minority votes plus any crossover votes."); De Grandy Litig., discussion at 815 F. Supp. 1550 (N.D. Fla. 1992) (approving a "majority" bloc made up of black and white voters against Hispanic candidates, and Hispanic and white voters against black candidates).

178. *See, e.g.,* Cano Litig., discussion at 211 F. Supp. 2d 1208, 1235-42 (C.D. Cal. 2002); Aldasoro v. Kennerson Litig., discussion at 922 F. Supp. 339, 343-63 (S.D. Cal. 1995). It remains possible to prove minorities can vote as part of the white bloc. *See e.g.*, Garza v. Los Angeles Litig. (CA), 918 F.2d 763 (9th Cir. 1990); Watsonville Litig. (CA), 863 F.2d 1407 (9th Cir. 1988).

179. Gingles Litig. (NC), discussion at 478 U.S. 30, 57, n.26 (1986). *Gingles* recognized a list of potential special circumstances, "such as the absence of an opponent, incumbency, or the utilization of bullet voting…this list of special circumstances is illustrative, not exclusive." Under the facts of the case, *Gingles* considered "an election that occurred after the instant lawsuit had been filed -- and [held the district court] could properly consider to what extent 'the pendency of this very litigation [might have] worked a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting.'" *Id.* at 76. *See, e.g.*, Hamrick Litig. (GA), 296 F.3d 1065 (11th Cir. 2002) (using incumbency to dismiss the loss of the minority-preferred candidate); Fort Bend Independent School District (TX), discussion at 89 F.3d 1205, 1217 (5th Cir. 1996) (discounting a minority loss because the candidate lost to an incumbent).

180. *See, e.g.,* Rodriguez Litig., discussion at 308 F. Supp. 2d 346, 422 (S.D.N.Y. 2004) (noting that it would be possible to find anomalies in most elections and refusing to discount three elections because of low turnout, little known candidate, controversy); *cf.* Cincinnati Litig. (OH), discussion at 40 F.3d 807, 814 (6th Cir. 2000) ("incumbency must play an unusually important role in the election at issue; a contrary rule would confuse the ordinary with the special, and thus 'make practically every American election a 'special circumstance.'"'); Alamance County Litig. (NC), discussion at 99 F.3d 600, 617 (4th Cir. 1996) (incumbency is very common in US elections, it alone cannot be a special circumstance, and if it were used to discount the success of a minority candidate, it would also have to be used to discount the defeat of minority candidates by white incumbents).

181. *See, e.g.,* Gingles Litig. (NC), discussion at 478 U.S.30, 76 (1996); First Circuit: Black Political Task Force Litig., discussion at 300 F. Supp. 2d 291, 306 (D. Mass. 2004) ("Incumbency is a special circumstance that must be weighed, sometimes heavily, in assaying the probative value of election results. [citations omitted] Consequently, we decline the defendants' invitation to treat this election as

disproving the plaintiffs' allegation that legally significant white bloc voting exists in Boston."); Second Circuit: Town of Babylon Litig., discussion at 914 F. Supp. 843, 879, 881 (E.D.N.Y. 1996); Rodriguez Litig., discussion at 308 F. Supp. 346, 422 (S.D.N.Y. 2004); Fourth Circuit: City of Norfolk Litig. (VA), discussion at 883 F.2d 1232, 1342 (4th Cir. 1989); Fifth Circuit: Fort Bend School District Litig. (TX), discussion at 89 F.3d 1205, 1217 (5th Cir. 1996) (discounting a minority win because the minority ran against an incumbent and there was "anti-incumbent sentiment"); *cf.* Magnolia Bar Association Litig. (MA), 994 F.2d 1143 (5th Cir. 1993) (rejecting plaintiffs argument that two elections in which black candidates were elected Supreme Court justices were attributable to special circumstances because both were incumbents: "both of the elections were high profile and involved well-known white candidates" and "neither of the two black candidates had been incumbents for very long"); Sixth Circuit: Chattanooga Litig., 722 F. Supp. 380 (E.D. Tenn. 1989); Eighth Circuit: Little Rock Litig. (AR),, discussion at 56 F.3d 904, 911 (8th Cir. 1995); Texarkana Litig., 861 F. Supp. 756 (W.D. Ark. 1992); Jeffers Litig.,730 F. Supp. 196 (E.D. Ark. 1989); Eleventh Circuit: Metro Dade County Litig. (FL), discussion at 985 F.2d 1471, 1483-83 (11th Cir. 1993) ; City of LaGrange Litig., discussion at 969 F. Supp. 749, 775-76 (N.D. Ga. 1997).

182. Cincinnati Litig. (OH), discussion at 40 F.3d 807, 813 (6th Cir. 2000); Second Circuit: Rodriguez Litig., discussion at 308 F. Supp. 346, 422 (S.D.N.Y. 2004) (noting that it would be possible to find anomalies in most elections; refusing to discount three elections because of low turnout, little known candidate, controversy); Fourth Circuit: Alamance County Litig. (NC), discussion at 99 F.3d 600, 617 (4th Cir. 1996) (incumbency is very common in US elections, it alone cannot be a special circumstance and if it were used to discount the success of a minority candidate, it would also have to be used to discount the defeat of minority candidates by white incumbents); Sixth Circuit: Cincinnati Litig. (OH), discussion at 40 F.3d 807, 814 (6th Cir. 2000) (finding no special circumstance where minority candidate who was appointed and subsequently won an election as an incumbent, noting "a contrary holding would punish the city for its commendable efforts to increase black representation on the city council by means of the appointment process."); Seventh Circuit: Milwaukee N.A.A.C.P. Litig. (WI), discussion at 116 F.3d 1194, 1198-99 (7th Cir. 1997) (rejecting incumbency as a special circumstance in judicial elections when minority judges ran unopposed because "these judges' color did not lead the voters to turn them out"); Eleventh Circuit: City of Rome Litig. (GA), discussion at 127 F.3d 1355, 1382, 1384 n.18 (11th Cir. 1997) (incumbency after appointment is relevant only where there is racism in the electorate [presumably overcome by the endorsement by white community leaders] because otherwise the advantages of incumbency can be overcome through "hard work," at least in communities where it is possible to form biracial coalitions); *But see* Hamrick Litig. (GA), 296 F.3d 1065 (11th Cir. 2002) (allowing consideration of incumbency where the court "reflected on the substantial length of [the candidate's] service").

183. Old Person Litig. (MT), discussion at 230 F.3d 1113, 1122 (9th Cir. 2000).

184. Gingles Litig. (NC), discussion at 478 U.S. 30, 76 (1986). *See, e.g.*, City of Santa Maria (CA), discussion at 160 F.3d 543, 549-50 (9th Cir. 1998) (discounting the election because "Days before the election, Maldonado told a local newspaper that his victory would prove 'Santa Maria is not racist.' "); Davis v. Chiles Litig. (FL), discussion at 139 F.3d 1414, 1417 n.2 (11th Cir. 1998); City of LaGrange Litig.,

discussion at 969 F. Supp. 749, 775-76 (N.D. Ga. 1997); City of Indianapolis Litig. (IN), 976 F.2d 357, 361 (7th Cir. 1992); City of Norfolk Litig. (VA), discussion at 816 F.2d 932, 938 (4th Cir. 1987) (discounting an election where the mayor had for the first time supported two black candidates for city council and had made a public statement suggesting their election could moot the pending litigation).

185. *See, e.g.*, Alamosa County Litig., discussion at 306 F. Supp. 2d 1016, 1033 (D. Colo. 2004); NAACP v. Fordice Litig. (MS), discussion at 252 F.3d 361, 370 (5th Cir. 2001).

186. *See, e.g.*, Aldasoro v. Kennerson Litig., discussion at 922 F. Supp. 339, 376 (S.D. Cal. 1995); National City Litig. (CA), discussion at 976 F.2d 1293, 1297-98 (9th Cir. 1992) (refusing to discount these elections because plaintiffs had not brought forth evidence regarding other elections); City of Norfolk Litig. (VA), discussion at 816 F.2d 932, 938 (4th Cir. 1987) ("If voting patterns show unusual white support for the black candidate…the legal significance of his success should be diminished.").

187. Blytheville School District Litig. (AR), discussion at 71 F.3d 1382, 1387-88 (8th Cir. 1995) (excluding elections where the minority-preferred candidate won on a plurality because the challenge was to the imposition of a majority vote requirement); Little Rock Litig. (AR), discussion at 56 F.3d 904, 910 (8th Cir. 1995); Red Clay School District Litig. (DE), discussion at 4 F.3d 1103, 1126 (3rd Cir. 1993) (reversing district court conclusion that special circumstances were not at work in the Roberts election because this election involved largest field of candidates to ever win, and Roberts was the only candidate to ever win on a plurality); *see also* City of Jackson, TN Litig., discussion at 683 F. Supp. 1515, 1522-1531 (W.D. Tenn. 1988) (refusing to consider elections where minority-preferred candidate won a plurality when the candidate lost the run-off); Neal Litig., discussion at 689 F. Supp. 1426, 1431 (E.D. Va. 1988). *But see* National City Litig., discussion at No. 88-301-R(M), 1991 WL 421115 (S.D. Cal. May 16, 1991) (finding no special circumstances where there was a plurality victory because there were usually more than two candidates for city elections).

188. Jordan Litig., discussion at 604 F. Supp. 807, 813 (N.D. Miss. 1984) (concluding that the primary was "atypical" because of "a variety of factors, including uncertainty about election dates, the recent realignment of the district…the lack of an incumbent" and "a court order allowing Republican voters to participate in the democratic primary").

189. Blytheville School District Litig. (AR), discussion at 71 F.3d 1382, 1387-88 (8th Cir. 1995); *cf.* Clark Litig., discussion at 777 F. Supp. 445, 40 (M.D. La. 1990)(observing that a situation in which a black lawyer was appointed as a district judge, then elected without opposition and later reelected without opposition "do[es] not reveal very much about the electorate"). But other courts do consider these elections on the grounds that the candidate would not be unopposed if not supported by the white voters. *See* Milwaukee N.A.A.C.P. Litig. (WI), discussion at 116 F. 3d 1194, 1199 (7th Cir. 1997) ("One good measure of white voters' willingness to support black candidates is the failure of white candidates to present themselves for election even when a majority of the electorate is white. Potential opponents concede the election only when they face certain defeat. That 6 black candidates ran without opposition therefore is highly informative."); Al-Hakim Litig., discussion at 892 F. Supp. 1464, 1475 n.15 (M.D. Fla. 1995)(considering victories by

minority-preferred candidates running unopposed, although recognizing that this is a special circumstance under *Gingles*); Southern Christian Leadership Litig., discussion at 785 F. Supp. 1469, 1475 (M.D. Ala. 1992); Bond Litig. (CO), discussion at 875 F.2d 1488, 1490-91 (10th Cir. 1989) (holding it not clearly erroneous to consider unopposed candidacies).

190. Old Person Litig. (MT), discussion at 312 F.3d 1036, 1048 n.13 (9th Cir. 2002) (discounting election where minority candidate won a bare majority against a third-party candidate).

191. Chattanooga Litig., 722 F. Supp. 380 (E.D. Tenn. 1989).

192. Kirksey v. Allain Litig., 658 F. Supp. 1183 (S.D. Miss. 1987).

193. Chickasaw County II Litig., No. CIV.A. 1:92CV142-JAD, 1997 Dist. LEXIS 22087, 1997 WL 33426761 (N.D. Miss. Oct. 28, 1997).

194. Town of Babylon Litig., discussion at 914 F. Supp. 843, 858 (E.D.N.Y. 1996) ("In 1987, Democrats gained a majority of the Town Board for the first time since at least 1967. Shaffer and Bachety testified to the causes leading to the defeat of the incumbent Republican Town Supervisor and his two incumbent Republican running mates competing for the Town Board seats. A private citizen unhappy with a Board decision affecting his business launched a well-financed campaign to defeat the incumbents. The personal popularity of the Democratic candidate for County Executive, who won a landslide victory in that election, further aided the Democratic Town Board candidates."); Fort Bend School District Litig. (TX), 89 F.3d 1205 (5th Cir. 1996) (affirming the district court's decision to discount evidence of a black candidate's loss because he was an incumbent running during a year marked by anti-incumbent sentiment).

195. Attala County Litig. (MS), 92 F.3d 283 (5th Cir. 1996) (criticizing the district court for looking to an election in which less than 10% of the total voting population voted for the black candidate as evidence of black crossover); Columbus County Litig., discussion at 782 F. Supp. 1097, 1101 (E.D.N.C. 1991) ("The failure of black voters to support the black candidate in the seventeenth election, that of Freeman running for the Board of Education for seat 5 in 1988, can be explained by the fact that Freeman was new to the county and not well known."). *But see* Rodriguez Litig., discussion at 308 F. Supp. 2d 346, 422 (S.D.N.Y. 2004) (noting that anomalies could be found in most elections, the court rejected "the plaintiffs' suggestion that we should exclude three of these elections either because the candidate was little known, or because there was low turnout, or because controversy touched the election").

196. Carrollton NAACP Litig. (GA), 829 F.2d 1547 (11th Cir. 1987). *But see* Alamosa County Litig., 306 F. Supp. 2d 1016 (D. Colo. 2004).

197. *See e.g.*, Anthony Litig., discussion at 35 F. Supp. 2d 989, 1006 (E.D. Mich. 1999) ("obtaining name recognition and professional success prior to a candidacy are not 'special circumstances'; they are ordinary and necessary components of a successful candidacy"); Niagara Falls Litig. (NY), 65 F.3d 1002 (*2d* Cir. 1995) (finding plaintiffs' attempt to characterize a minority candidate's election due to the candidate's outstanding credentials and popularity as special circumstances "absurd").

198. *See, e.g.*, Meza Litig., discussion at 322 F. Supp. 2d 52, 65 (D. Mass. 2004) ("These elections on their face provide evidence of ethnic voting polarization by both Hispanic and non-Hispanic voters in Chelsea. We note that the force of this evidence is diminished to some extent because the election results reveal low turnout

rates for Hispanic voters in these elections."). *But see* Rodriguez Litig., 308 F. Supp. 2d 346 (S.D.N.Y. 2004).

199. *See, e.g.,* City of Holyoke Litig., 960 F. Supp. 515 (D. Mass. 1997); SW Texas Junior College District Litig. (TX), 964 F.2d 1542 (5th Cir. 1992); City of Columbia Litig., discussion at 850 F. Supp. 404, 418, 420 (D.S.C. 1993) (observing that "the ultimate reason voter cohesion is significant is because it directly bears on the issue of causation" and concluding that plaintiffs' evidence was "simply not sufficient to overcome the evidence that the blacks who lost owe their losses as much to blacks' failure to vote more cohesively or to turn out at all as to failure to achieve white support").

200. *See* Blaine County Litig. (MT), 363 F.3d 897 (9th Cir. 2004); Sanchez-Colorado Litig. (CO), 97 F.3d 1303 (10th Cir. 1996) (considering low turnout may be probative of "disincentives" for minority candidates to run); Blytheville School District Litig. (AR), 71 F.3d 1382 (8th Cir. 1995) (suggesting lower turnout may follow from the moving of a polling place in a minority area, a sense of defeat, or the absence of ballot issues that may turnout the minority vote); City of Holyoke Litig. (MA), discussion at 72 F.3d 973, 986 (1st Cir. 1995) (noting that "low voter turnout in the minority community sometimes may result from the interaction of the electoral system with the effects of past discrimination, which together operate to discourage meaningful elector participation"); Watsonville Litig. (CA), 863 F.2d 1407 (9th Cir. 1988).

201. *See e.g.*, Democratic Party of Arkansas Litig. (AR), 902 F.2d 15 (8th Cir. 1990) (low turnout appropriate to minority candidate success). Other courts have found low turnout was inappropriate for determining minority cohesion in the *Gingles* inquiry. *See, e.g.*, Bone Shirt Litig., 336 F. Supp. 2d 976 (D.S.D. 2004) (refusing to find low voter turnout demonstrates a lack of cohesion); Watsonville Litig. (CA), 863 F.2d 1407 (9th Cir. 1988) (holding low turnout not relevant to determining the minority-preferred candidate).

202. SENATE REPORT at 28.

203. See the Master Lawsuit List.

204. *See, e.g.,* Montero Litig. (CO), 861 F.2d 603 (10th Cir. 1988) (finding Section 2 inapplicable to challenge to collection of signatures on a petition to make English Colorado's official language because state action was lacking); Democratic Party of Virginia, 323 F. Supp. 2d 696 (E.D. Va. 2004) (finding that an African-American candidate who failed to become party nominee did not have standing, as a candidate, to challenge party nomination process under Section 2); Guy Litig., No. Civ.A. 00-831-KAJ, 2003 WL 22005853 (D. Del. Aug. 20, 2003) (dismissing for failure to satisfy *Gingles* factors a claim by an African-American candidate, Samuel Guy, who had won at-large city council seat in 1996, then lost in 2000, where another African-American candidate had won an at-large seat in 2000 and won reelection).

205. *See supra* Part III.B.

206. *See* Master Lawsuit List.

207. In California: Pomona Litig., 883 F.2d 1418 (9th Cir. 1989) and Aldasoro v. Kennerson Litig., 922 F. Supp. 339 (S.D. Cal. 1995); in Florida: Liberty County Commissioners Litig., 221 F.3d 1218 (11th Cir. 2000); City of Fort Lauderdale Litig., 804 F.2d 611, 1986 U.S. App. LEXIS 37448 (11th Cir. 1986); Metro Dade County Litig., 985 F.2d 1471 (11th Cir. 1993); Nipper Litig., 39 F.3d 1494 (11th Cir. 1994); in Georgia: Carrollton NAACP Litig., 829 F.2d 1547 (11th Cir. 1987); in Illinois: Jones

v. Edgar Litig., 3 F. Supp. 2d 979 (C.D. Ill. 1998); City of Chicago-Bonilla Litig., 141 F.3d 699 (7th Cir. 1998); City of Chicago Heights Litig., Nos. 87 C 5112, 88 C 9800, 1997 WL 102543 (N.D. Ill. Mar. 5, 1997); Rybicki Litig., 574 F. Supp. 1147 (N.D. Ill. 1983), in Massachusetts: Black Political Task Force Litig., 300 F. Supp. 2d 291 (D. Mass. 2004); City of Holyoke Litig., 960 F. Supp. 515 (D. Mass. 1997); City of Boston Litig., 784 F.2d 409 (1st Cir. 1986); Meza Litig., 322 F. Supp. 2d 52 (D. Mass. 2004); in Mississippi: Chickasaw County I Litig., 705 F. Supp. 315 (N.D. Miss. 1989) (though Chickasaw County II found this factor met in a later 1997 case); Monroe County Litig., 740 F. Supp. 417 (N.D. Miss. 1990); Armstrong v. Allain Litig., 893 F. Supp. 1320 (S.D. Miss. 1994); Calhoun County Litig., 88 F.3d 139 (5th Cir. 1996); Lafayette County Litig., 20 F. Supp. 2d 996 (N.D. Miss. 1998); NAACP v. Fordice Litig., 252 F.3d 361 (5th Cir. 2001); in New York: France Litig., 71 F. Supp. 2d 317 (S.D.N.Y. 1999); Niagara Falls Litig., 65 F.3d 1002 (2d Cir. 1995); in Ohio: Cincinnati Litig., 40 F.3d 807 (6th Cir. 1994); in Texas: McCarty Litig., 749 F.2d 1134 (5th Cir. 1984); Southwest Tex. Jr. College Dist. Litig., 964 F.2d 1542 (5th Cir. 1992); LULAC v. Clements Litig., 999 F.2d 831 (5th Cir. 1993); LULAC - North East I.S.D. Litig., 903 F. Supp. 1071 (W.D. Tex.1995); in Virginia: City of Norfolk Litig., 883 F.2d 1232 (4th Cir. 1989); Jones v. Edgar Litig., 3 F. Supp. 2d 979 (C.D. Ill. 1998).

208. *See* Master Lawsuit List.

209. Jefferson Parish I Litig. (LA), 926 F.2d 487 (5th Cir. 1991) (not considering evidence of Factor 1 for unclear reasons, but finding the policy behind the practice was tenuous, that there had been racially polarized voting in 15 of 20 Parish elections from 1980-88, plaintiffs had shown a lack of candidate success and enhancing practices); Corbett Litig., 202 F. Supp. 2d 972 (E.D. Mo. 2002) (finding the plan in place violated 1-person, 1-vote and the VRA due to the significant census changes that had occurred, the opinion mainly dealt with the remedy); Garza v. Los Angeles Litig. (CA), 918 F.2d 763 (9th Cir. 1990) (finding that the county board of supervisors had intentionally drawn district lines to reduce minority voting power and protect white incumbents in violation of Section 2 and so not reaching any of the Senate Factors); Madison County Litig., 610 F. Supp. 240 (S.D. Miss. 1985) (not considering Senate Factors after finding that the county's arbitrary invalidation of 200 ballots cast by African-American voters sufficed to establish a violation); Marks-Philadelphia Litig., No. CIV. A. 93-6157, 1994 WL 146113 (E.D. Pa. Apr. 26, 1994); Lawrence County Litig., 814 F. Supp. 1346 (S.D. Miss. 1993); Elections Board Litig., 793 F. Supp. 859 (W.D. Wis. 1992).

210. Watsonville Litig. (CA), 863 F.2d 1407 (9th Cir. 1988); Metro Dade County Litig. (FL), 985 F.2d 1471 (11th Cir. 1993); Rybicki Litig., 574 F. Supp. 1147 (N.D. Ill. 1983); City of Chicago Heights Litig., Nos. 87 C 5112, 88 C 9800, 1997 WL 102543 (N.D. Ill. Mar. 5, 1997); Black Political Task Force Litig., 300 F. Supp. 2d 291 (D. Mass. 2004); Chickasaw County I Litig., 705 F. Supp. 315 (N.D. Miss. 1989); Monroe County Litig., 740 F. Supp. 417 (N.D. Miss. 1990); Calhoun County Litig. (MS), 88 F.3d 1393 (5th Cir. 1996); Lafayette County Litig., 20 F. Supp. 2d 996 (N.D. Miss. 1998); LULAC - North East Independent School District Litig., 903 F. Supp. 1071 (W.D. Tex. 1995).

211. *See* Master Lawsuit List.

212. *See, e.g.,* Bone Shirt Litig., discussion at 336 F. Supp. 2d 976, 1013-34 (D.S.D. 2004); Emison Litig., discussion at 782 F. Supp. 427, 439 n.35, 440 n.39 (D. Minn. 1992); City of Dallas Litig., discussion at 734 F. Supp. 1317, 1320-21 (W.D. Tex.

1990); Chattanooga Litig., discussion at 722 F. Supp. 380, 385-89 (E.D. Tenn. 1989); Neal Litig., discussion at 689 F. Supp. 1426, 1428 (E.D. Va. 1988); Dillard v. Crenshaw Litig., 640 F. Supp. 1347, 1356-60 (M.D. Ala. 1986); Gretna Litig., discussion at 636 F. Supp. 1113, 1116-18 (E.D. La. 1986); Edgefield County Litig., discussion at 650 F. Supp. 1176, 1180-87 (D.S.C. 1986); Butts v. NYC Litig., discussion at 614 F. Supp. 1527, 1544-45 (S.D.N.Y. 1985), overturned and Factor 1 finding criticized in 779 F.2d 141 (2d Cir. 1985); DeSoto County Litig., discussion at 995 F. Supp. 1440, 1442-1450; Major v. Treen, 574 F. Supp. 325, 339-40 (E.D. La. 1983).

213. *See, e.g.,* Abilene Litig., 725 F.2d 1017, 1022 (5th Cir. 1984) (Latino city council candidate "encountered hostility and uncooperation from the County Clerk's office in Abilene when she attempted to file as a candidate for Justice of the Peace in 1976 and for County Clerk in 1978"); Hamrick Litig., discussion at No. Civ. 2:91-CV-002-WCO, 1998 WL 476186 (N.D. Ga. June 10, 1998) ("The 1976 Georgia Constitution still required the completion of a literacy test and good character test as prerequisites to registering to vote, even though such barriers were nullified by the Voting Rights Act of 1965"), *overturned on other grounds*, 296 F.3d 1065, 1224 (11th Cir. 2002) (overruling the district court due to lack of racially polarized voting and minimizing finding of Factor 1 below, since the history of official discrimination shown below "does little to distinguish Gainesville or Georgia from any other Southern state or city"); Mehfoud Litig., discussion at 702 F. Supp. 588, 594 (E.D. Va. 1988) ("state constitutional requirement, in effect until 1974, that all persons registering to vote present proof of literacy").

214. *See, e.g.,* City of LaGrange Litig., 969 F. Supp. 749, 757 (N.D. Ga. 1997) ("Vestiges of segregation remained into the 1970s. The black schools during the era of segregation were run down, overcrowded, and only went through the eleventh grade. Throughout this time period, the African-American schools enjoyed significantly less resources than the schools attended by white students."); City of Springfield Litig., discussion at 658 F. Supp. 1015, 1023 (C.D. Ill. 1987) (finding city school district entered into a consent decree in 1974 to end school desegregation); Marengo County Litig., discussion at 731 F.2d 1546 (11th Cir. 1984) ("in 1978, while this case was being tried, the district court characterized the Board of Education as 'obdurately obstinate' in its opposition to desegregation."); Dillard v. Crenshaw, 640 F. Supp. 1347, 1359-60 (M.D. Ala. 1986).

215. *See, e.g.,* City of Greenwood Litig., 599 F. Supp. 397, 400-01 (N.D. Miss. 1984) (Department of Justice objected to two annexations in 1984 as violating the Section 5 preclearance requirement).

216. *See, e.g.,* Edgefield County, 650 F. Supp. 1176, 1182 (D.S.C. 1986) (first black poll officials not hired until 1970).

217. Columbus County Litig., 782 F. Supp. 1097, 1103 (E.D.N.C. 1991) (also noting that the county did not begin appointing African Americans as special registration commissioners until the 1980s).

218. City of Abilene Litig. (TX), 725 F.2d 1017, 1023 (5th Cir. 1984).

219. City of LaGrange Litig., 969 F. Supp. 749, 767 (N.D. Ga. 1997) (also noting school segregation until 1970).

220. City of Starke Litig., 712 F. Supp. 1523, 1537 (M.D. Fla. 1989).

221. See discussion *infra*; *see e.g.,* Charleston County Litig., 365 F.3d 341 (4th Cir. 2004); Rural West II Litig. (TN), 209 F.3d 835 (6th Cir. 2000); Holder v. Hall Litig.

(GA), 512 U.S. 874 (1994); Big Horn County Litig., 647 F. Supp. 1002 (D. Mont. 1986); Marengo County Litig., discussion at 731 F.2d 1546, 1568 (11th Cir. 1984) ("The historical record of discrimination in Marengo County is undisputed, and it has *1568 not ended even now. The county school system remains under judicial supervision...."); Montezuma-Cortez School District Litig., 7 F. Supp. 2d 1152 (D. Colo. 1998); Marylanders Litig., 849 F. Supp. 1022 (D. Md. 1994); City of Starke Litig., 712 F. Supp. 1523 (M.D. Fla. 1989).

222. Charleston County Litig., discussion at 316 F. Supp. 2d 268, 286 n.23 (D.S.C. 2003); *see also id.* discussion at 365 F.3d 341, 353 n.4 (4th Cir. 2004) (affirming district court's fact findings and finding of a violation).

223. In Charleston County, the court noted: "[t]he Election Commission pays poll managers to setup the books, operate the voting machines and count the votes in polling places on election day." In contrast with poll watchers, who are provided by the private political party on election day to observe elections, poll managers are paid county employees, assigned by the county to work at particular precincts, for whose actions the county itself has legal responsibility. *Id.* discussion at 316 F. Supp. 2d at 286 n.23.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. County of Thurston Litig., discussion at 129 F.3d 1015, 1022 (8th Cir. 1997).

235. Bone Shirt Litig., 336 F. Supp. 2d 976 (D.S.D. 2004).

236. *Id.* at 1025.

237. *Id.*

238. *Id.*

239. *Id.* at 1024-25.

240. *Id.* at 1024.

241. *Id.*

242. *Id.* at 1026.

243. *Id.*

244. *Id.*

245. *Id.* (alteration in original).

246. *Id.* (alteration in original).

247. *Id.* at 1028.

248. *Id.* at 1024.

249. *Id.* at 1023-24.

250. Holder v. Hall Litig., discussion at 955 F.2d 1563, 1566 (11th Cir. 1992) (later overturned by the Supreme Court on the question of whether plaintiffs could challenge single commissioner form of government, but the fact-finding was not affected).

251. *Id.* at 1324.

252. Town of North Johns Litig., 717 F. Supp. 1471, 1477 (M.D. Ala. 1989).
253. *Id.*
254. 647 F. Supp. 1002 (D. Mont. 1986).
255. *Id.* at 1007.
256. *Id.*
257. *Id.* at 1008.
258. *Id.*
259. *Id.* ("The court was not persuaded by defendants' explanation that these acts were caused by a shortage of registration cards and an increased concern about voter fraud.").
260. Harris Litig., discussion at 593 F. Supp. 128, 133 (M.D. Ala. 1984).
261. *Id.*
262. Harris Litig., discussion at 695 F. Supp. 517, 527 & n.8 (M.D. Ala. 1988) ("The defendants' argument that they have abandoned their past discriminatory policies and that local rather than state government is responsible for any discrimination occurring today, misses the point. The critical question is whether the State of Alabama has redressed the present-day effects of its own past discrimination, and the answer is that it has not.")
263. *Id.* at 524-25.
264. Buskey v. Oliver Litig., discussion at 565 F. Supp. 1473, 1483 (M.D. Ala. 1983).
265. *Id.* at 1483.
266. Terrell Litig., 565 F. Supp. 338, 349 (N.D. Tex. 1983).
267. *Id.* at 341.
268. *Id.*
269. Berks County Litig., discussion at 277 F. Supp. 2d 570, 580 (E.D. Pa. 2003).
270. *Id.*
271. Berks County Litig., discussion at 250 F. Supp. 2d 525, 529 (E.D. Pa. 2003).
272. 277 F. Supp. 2d at 580.
273. *Id.* at 577.
274. 250 F. Supp. 2d at 529.
275. 277 F. Supp. 2d at 577.
276. *Id.* at 575-76.
277. Montezuma-Cortez School District Litig., discussion at 7 F. Supp. 2d 1152, 1162 (D. Colo. 1998).
278. *Id.*
279. Marks-Philadelphia Litig., No. CIV. A. 93-6157, 1994 WL 146113, at *11 (E.D. Pa. Apr. 26, 1994).
280. *Id.* at *12.
281. Marylanders Litig., 849 F. Supp. 1022, 1061 (D. Md. 1994).
282. *Id.*
283. *Id.*
284. Jeffers Litig., discussion at 730 F. Supp. 196, 210 (E.D. Ark. 1989).
285. *Id.*
286. *Id.* at 210 n.8.
287. *Id.* at 211. The court found that "[t]his kind of intimidation no doubt had a powerful chilling effect." *Id.*
288. *Id.* at 210.

289. Black Political Taskforce Litig., discussion at 300 F. Supp. 2d 291, 314 (D. Mass. 2004).

290. *Id.* at 315.

291. City of New Rochelle Litig., discussion at 308 F. Supp. 2d 152, 158 (S.D.N.Y. 2003).

292. Garza v. County of Los Angeles Litig. (CA), discussion at 918 F.2d 763, 766, 768, 772 (9th Cir. 1990) (The Ninth Circuit affirmed district court's intent-based Section 2 violation finding, also deciding that where intentional discrimination had occurred there was no need to meet the *Thornburg v. Gingles* test in the current challenge).

293. *Id.* at 769.

294. *Id.* at 778-779 (Kozinski, J., concurring on liability question).

295. Ketchum Litig. (IL), discussion at 740 F.2d 1398, 1408 (7th Cir. 1984).

296. Rybicki Litig., discussion at 574 F. Supp. 1147, 1151 (N.D. Ill. 1983).

297. *Id.* (citing pre-amendment district court opinion in 574 F. Supp. 1110, 1112 (N.D. Ill. 1983)).

298. Rural West II Litig., discussion at 29 F. Supp. 2d 448, 459 (W.D. Tenn. 1998).

299. Rural West I Litig., discussion at 835 F. Supp. 453, 460-61 (W.D. Tenn. 1993).

300. See also Hudson County Board Litig., discussion at 714 F. Supp. 714, 715 (D.N.J. 1989) (where a lawsuit settled, in the last published opinion making findings, the court decided that the county defendant's insurer would have liability if the plaintiffs succeeded in proving their intent-based Section 2 claim; in this lawsuit, the court took notice of the alleged coordinated effort in 1985 by the chair of the Hudson County Democratic Party, a campaign consultant, and the city Director of Housing and Economic Development, "to undercut Cucci's [the incumbent's] strength that would impede or prevent voting in the election districts in neighborhoods that were heavily black or Hispanic." As part of this "strategy," 1) letters were sent to residents of public housing projects with significant African-American and Latino populations informing them "that unless their names appeared on leases, they would be not be permitted to vote and would be prosecuted if they attempted to do so"; 2) the placement of five to six thousand voter names on the county's official "challenge registry" without notification, and despite the fact that some of these people had known good addresses and the "color-coding" of the challenge list; 3) instructions were given to all district board members (who were running the poll operations for the county) to prevent any individual whose name was on a challenge list from voting unless the voter produced a current lease (if the voter was a resident in public housing), or a phone, gas or electric bill in the voter's name; and 4) the county's "failure to provide adequate bilingual assistance both at polling places and at the courthouse for those individuals that attempted to obtain court orders permitting them to vote." *Id.* at 716. The plaintiff also alleged that the Democratic Party chair had appointed off-duty Jersey City police officers to serve as poll challengers in heavily minority districts. *Id.*).

301. Town of Cicero Litig., No. Civ.A. 00C 1530, 2000 WL 34342276 (N.D. Ill. Mar. 15, 2000) (granting preliminary injunction to stop the certification of the referendum results on this question, scheduled to take place 6 days after this decision, due to likelihood the United States could prove intent).

302. Dillard v. Crenshaw Litig., 640 F. Supp. 1347, 1356, 1360-61 (M.D. Ala. 1986) (emphasis added) (granting preliminary injunction) (this finding was later cited in many other Alabama cases, including Baldwin County Board of Education Litig., 686 F. Supp. 1459, 1466-67 (M.D. Ala. 1988) (finding that "this court demonstrated in Crenshaw County that from the late 1880's to the present the State of Alabama and its political subdivisions have 'openly and unabashedly' discriminated against their black citizens by employing at different times such devices as the poll tax, racial gerrymandering, and at-large elections, and by enacting such laws as the anti-single-shot voting laws, numbered places laws, and the Sayre law").

303. *Id.* at 1357.

304. Haywood County Litig., discussion at 544 F. Supp. 1122, 1131, 1135 (W.D. Tenn. 1982).

305. City of Minneapolis Litig., No. 02-1139(JRT/FLN), 2004 WL 2212044 (D. Minn. Sept. 30, 2004); Perry Litig., 298 F. Supp. 2d 451 (E.D. Tex. 2004); City of New Rochelle Litig., 308 F. Supp. 2d 152 (S.D.N.Y. 2003); Albany County Litig., No. 03-CV-502, 2003 WL 21524820 (N.D.N.Y. July 7, 2003); Hamrick Litig. (GA), 296 F.3d 1065 (11th Cir. 2002); St. Bernard Parish School Board Litig., No. CIV.A. 02-2209, 2002 WL 2022589 (E.D. La. Aug. 26, 2002); Old Person Litig. (MT), 312 F.3d 1036(9th Cir. 2002); Davis v. Chiles Litig. (FL), 139 F.3d 1414 (11th Cir. 1998); City of Chicago-Barnett Litig., 17 F. Supp. 2d 753 (N.D. Ill. 1998); Red Clay School District Litig., 116 F.3d 685 (D. Del. 1997); African-American Voting Rights LDF Litig., 994 F. Supp. 1105 (E.D. Mo. 1997); Chickasaw County II Litig., No. CIV.A. 1:92CV142-JAD, 1997 WL 33426761 (N.D. Miss. Oct. 28, 1997); Attala County Litig., 92 F.3d 283 (5th Cir. 1996); Fort Bend Indep. School District Litig. (TX) 89 F.3d 1205 (5th Cir. 1996); U.S. v. Jones Litig. (AL), 57 F.3d 1020 (11th Cir. 1995); Blytheville School District Litig. (AR), 71 F.3d 1382 (8th Cir. 1995); Rural West I Litig., 877 F. Supp. 1096 (W.D. Tenn. 1995); De Grandy Litig. (FL), 512 U.S. 997 (1994); Texarkana Litig., 861 F. Supp. 756 (W.D. Ark. 1992); Rockford Board of Education Litig., Civ.A. No. 89 C 20168, 1991 WL 299104 (N.D. Ill. Sept. 12, 1991); Democratic Party of Arkansas Litig., 902 F.2d 15 (8th Cir. 1990); Holbrook Unified School District Litig., 703 F. Supp. 56 (D. Ariz. 1989); Baldwin Board of Education, 686 F. Supp. 1459 (M.D. Ala. 1988); Smith-Crittenden County Litig., 687 F. Supp. 1310 (E.D. Ark. 1988); Baytown Litig. (TX), 840 F.2d 1240 (5th Cir. 1988); Dallas County Commission Litig., 636 F. Supp. 704 (S.D. Ala. 1986); Marengo County Litig., 623 F. Supp. 33 (S.D. Ala. 1985); Opelika Litig. (AL), 748 F. 2d 1473 (11th Cir. 1984); Abilene Litig. (TX), 725 F.2d 1017 (5th Cir. 1984); El Paso Independent School District Litig., 591 F. Supp. 802 (W.D. Tex. 1984); Lubbock Litig. (TX), 727 F.2d 364 (5th Cir. 1984); Dean Litig., 555 F. Supp. 502 (D.R.I. 1982).

306. 5 of these 7 were in Section 5-covered jurisdictions: Edgefield County Litig., 650 F. Supp. 1176 (D.S.C. 1986); Mehfoud Litig., 702 F. Supp. 588 (E.D. Va. 1988); City of Woodville Litig. (MS), 881 F.2d 1327 (5th Cir. 1989); Chisom Litig. (LA), 501 U.S. 380 (1991); Westwego Litig. (LA), 946 F.2d 1109 (5th Cir. 1991). The other 2 were these: Rockford Board of Education Litig., Civ.A. No. 89 C 20168, 1991 WL 299104 (N.D. Ill. Sept. 12, 1991); Texarkana Litig., 861 F. Supp. 756 (W.D. Ark. 1992).

307. *See, e.g.*, Dillard v. Crenshaw Litig., discussion at 640 F. Supp. 1347, 1356-60 (M.D. Ala. 1986).

308. *See, e.g.*, Bone Shirt Litig., 336 F. Supp. 2d 976, 1026 (D.S.D. 2004); Jeffers Litigation, 730 F. Supp. 196, 210 (E.D. Ark. 1989) (criminal prosecution the sheriff instituted against a black lawyer when ran for office).

309. Courts identified dozens of expert witnesses by name in their Factor 1 discussions, some of whom were repeat players on behalf of the plaintiff or defendant. Examples include: Chandler Davidson, Dick Engstrom, Morgan Kousser, Peyton McCrary, Raphael Cassimere, Jr., David Sansing, Allan Lichtman, Jerrell Shofner, Dr. Mormino, Dr. Hofeller, Philip Hauser, William Rogers, Stephan Thernstrom, Abigail Thernstrom, Dr. Mollenkopf, Lilian Williams. Most experts cited by courts in their Factor 1 discussion were trained historians, university professors with degrees in history or sociology.

310. Some books included: MORGAN J. KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, (1974) (cited in Harris v. Graddick Litig., at 695 F. Supp. 517, 525 n.5 (M.D. Ala. 1988)), Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING 7, 25 n.63 (Bernard Grofman & Chandler Davidson eds., 1992) (cited in Marylanders Litig., 849 F. Supp. 1022, 1062 (D. Md. 1994)), ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (1987) (cited in Town of Babylon Litig., at 914 F. Supp. 843, 885 n.36 (E.D.N.Y. 1996)). Some cases also cited newspaper documentation of discrimination. *See, e.g.,* Berks County Litig., at 277 F. Supp. 2d 570, 577 (E.D. Pa. 2003) ("Numerous articles have appeared in local newspapers outlining Hispanic residents' concerns about equal treatment at the polls.").

311. *See, e.g.*, Charleston County Litig., 316 F. Supp. 2d 268, 286 n.23 (D.S.C. 2003) ("Nettles also provided additional uncontradicted testimony about intimidating and harassing conduct by other poll managers aimed at African-American voters seeking voting assistance....Conversely, Nettles testified that, based on his observations, white voters needing voting assistance at predominantly African-American polling sites were permitted their assistor of choice without challenge."); Harris Litig., 695 F. Supp. 517, 525 (M.D. Ala. 1988) ("Witnesses detailed numerous instances of where white poll officials refused to help illiterate black voters or refused to allow them to vote, where they refused to allow black voters to cast challenged ballots, and where they were simply rude and even intimidating toward black voters."); Terrazas Litig., 581 F. Supp. 1329, 1349-50 (N.D. Tex. 1984) ("Several witnesses, both for the MALDEF Intervenors and the State Defendants, testified that discrimination against hispanics has not only occurred in the past, but continues at least in parts of Texas. E.g., IV Trial Transcript 1117 (testimony of Paul Ragsdale). Still other witnesses testified about the feeling among hispanic candidates and voters in Dallas County that political action is futile.").

312. *See, e.g.*, City of Greenwood Litig., discussion at 599 F. Supp. 397, 401 (N.D. Miss. 1984) (mentioning non-compliance with the preclearance requirement of Section 5); Town of Babylon Litig., discussion at 914 F. Supp. 843, 886 n.38 (E.D.N.Y. 1996) (noting that the Town of Babylon was not in a county targeted as a Section 5-covered jurisdiction, and minimizing the Section 5 coverage of the three New York counties (Bronx, New York and Kings) that are covered: defendants' expert "testified that she found no indication that the New York counties were targets of the 1970 amendments. In fact, Dr. Thernstrom hypothesized that the

extension of Section 5 coverage to these New York counties may have simply resulted from lack of voter interest in the 1968 presidential election.").

313. *See, e.g.*, Marengo County Litig., discussion at 731 F.2d 1546, 1568 (11th Cir. 1984) (citing many recent lawsuits).

314. *See, e.g.*, City of Greenwood Litig., 599 F. Supp. 397, 401 (N.D. Miss. 1984) ("[T]he City of Greenwood acted contrary to Section 5 of the Voting Rights Act…by implementing two annexations (in 1967 and 1979) without obtaining preclearance").

315. *See, e.g.*, Mallory-Ohio Litig., at 38 F. Supp. 2d 525, 541-42 (S.D. Ohio 1997) (recounting history of Section 2 lawsuits in the state of Ohio, as evidence of how much weight to give Factor 1).

316. *See, e.g.*, Clark Litig., discussion at 725 F. Supp. 285, 295 (M.D. La. 1988) ("[A]dopt[ing] by reference" the findings made in Major v. Treen, 574 F. Supp. 325 (E.D.La.1983)); Jeffers Litig., discussion at 730 F. Supp. 196, 204 (E.D. Ark. 1989) (taking judicial notice of a 1982 Arkansas decision, and stating "[w]e do not believe that this history of discrimination, which affects the exercise of the right to vote in all elections under state law, must be proved anew in each case under the Voting Rights Act."). *But compare* Chickasaw County II, No. CIV.A. 1:92CV142-JAD, 1997 WL 33426761, at *3 (N.D. Miss. Oct. 28, 1997) (finding Factor 1 and "tak[ing] judicial notice of Mississippi's and Chickasaw County's history of discrimination in the area of voting.… through the use of poll takes, literacy tests, good moral tests, and other policies and laws," without requiring plaintiffs to establish contemporary political effect) *with* Chickasaw County I, 705 F. Supp. 315, 320 (N.D. Miss. 1989) (finding Factor 1 not met because plaintiffs had not shown current "political detriment").

317. *See, e.g.*, De Grandy Litig., discussion at 815 F. Supp. 1550, 1573-74 (N.D. Fla. Jul 17, 1992) (citing both English-only legal initiatives and "suspension of a supermarket clerk for speaking Spanish in front of customers and the refusal of a personnel agency to refer people with foreign accents to job openings at a Miami bank" as relevant to showing a history of official discrimination against Hispanics in Florida).

318. Armour Litig., discussion at 775 F. Supp. 1044, 1055 (N.D. Ohio 1991).

319. *Id.*

320. Alamosa County Litig., discussion at 306 F. Supp. 2d 1016 (D. Colo. 2004); Black Political Task Force Litig., discussion at 300 F. Supp. 2d 291 (D. Mass. 2004); Meza Litig., discussion at 322 F. Supp. 2d 52 (D. Mass. 2004); Rodriguez Litig., discussion at 308 F. Supp. 2d 346 (S.D.N.Y. 2004); Suffolk County Litig., discussion at 268 F. Supp. 2d 243 (E.D.N.Y. 2003); NAACP v. Fordice Litig. (MS), discussion at 252 F.3d 361 (5th Cir. 2001); Liberty County Commissioners Litig. (FL), discussion at 221 F.3d 1218 (11th Cir. 2000); France Litig., discussion at 71 F. Supp. 2d 317 (S.D.N.Y. 1999); Belle Glade Litig., discussion at 178 F.3d 1175 (11th Cir. 1999); City of Chicago-Bonilla Litig. (IL), discussion at 141 F.3d 699 (7th Cir. 1998); Jones v. Edgar Litig., discussion at 3 F. Supp. 2d 979 (C.D. Ill. 1998); Lafayette County Litig., discussion at 20 F. Supp. 2d 996 (N.D. Miss. 1998); City of Chicago Heights Litig., discussion at Nos. 87 C 5112, 88 C 9800, 1997 WL 102543 (N.D. Ill. Mar. 5, 1997); Milwaukee NAACP Litig. (WI), discussion at 116 F. 3d 1194 (7th Cir. 1997); City of Holyoke Litig., discussion at 960 F. Supp. 515 (D. Mass. 1997); Milwaukee NAACP Litig. (WI), discussion at 116 F. 3d 1194 (7th Cir. 1997); Kent County Litig. (MI), discussion at 76 F.3d 1381 (6th Cir. 1996); City of St. Louis Litig. (MO), discussion at 90 F.3d 1357(8th Cir. 1996); Calhoun County Litig. (MS),

discussion at 88 F.3d 1393 (5th Cir. 1996); Green Litig., discussion at 1996 WL 524395 (E.D.N.Y. 1996); Town of Babylon Litig., discussion at 914 F. Supp. 843 (E.D.N.Y. 1996); Aldasoro v. Kennerson Litig., discussion at 922 F. Supp. 339 (S.D. Cal. 1995); Niagara Falls Litig. (NY), discussion at 65 F.3d 1002 (2d Cir. 1995); LULAC - North East I.S.D. Litig., discussion at 903 F. Supp. 1071 (W.D. Tex. 1995); Nipper Litig. (FL), discussion at 39 F.3d 1494 (11th Cir. 1994); Armstrong v. Allain Litig., discussion at 893 F. Supp. 1320 (S.D. Miss. 1994); Cincinnati Litig. (OH), discussion at 40 F.3d 807(6th Cir. 1994); City of Philadelphia Litig. (PA), discussion at 28 F.3d 306 (3d Cir. 1994); Metro Dade County Litig. (FL), discussion at 985 F.2d 1471 (11th Cir. 1993); Lulac v. Clements Litig. (TX), discussion 999 F.2d 831 (5th Cir. 1993); SW Texas Junior College District Litig. (TX), discussion at 964 F.2d 1542 (5th Cir. 1992); Monroe County 740 F. Supp. 417 (N.D. Miss. 1990); Pomona Litig. (CA), discussion at 883 F.2d 1418 (9th Cir. 1989); Chickasaw County I Litig. (MS), discussion at 705 F. Supp. 315 (N.D. Miss. 1989); Watsonville Litig. (CA), discussion at 863 F.2d 1407 (9th Cir. 1988); Carrollton NAACP Litig. (GA), discussion at 829 F.2d 1547 (11th Cir. 1987); City of Fort Lauderdale Litig. (FL), discussion at 804 F.2d 611 (11th Cir. 1986); City of Boston Litig. (MA), discussion at 784 F.2d 409 (1st Cir. 1986); Wesley Litig. (TN), discussion at 791 F.2d 1255 (6th Cir. 1986); Chapman v. Nicholson Litig., discussion at 579 F. Supp. 1504 (N.D. Ala. 1984); McCarty Litig. (TX), discussion at 749 F.2d 1134 (5th Cir. 1984); Rybicki Litig., discussion at 574 F. Supp. 1147 (N.D. Ill. 1983).

321. Cousin Litig. (TN), discussion at 145 F.3d 818, 832 (6th Cir. 1998) (including in Factor 1 only examples occurring within the last thirty years); City of Chicago Litig., discussion at 969 F. Supp. 1359, 1446 (N.D. Ill. 1997) (considering evidence of discrimination dating back twenty-five years "too remote in time" for purposes of Factor 1).

322. Suffolk County Litig., 268 F. Supp. 2d 243 (E.D.N.Y. 2003); Belle Glade Litig., 178 F.3d 1175 (11th Cir. 1999); Salt River District Litig. (AZ), discussion at 109 F.3d 586, 596 (9th Cir. 1997) (finding no evidence presented that African-American landowners experienced discrimination, but suggesting that the case might have gone differently if the plaintiffs had alleged that non-landowners who were disproportionately African American had experienced discrimination based upon the landownership voting requirement); St. Louis Board of Education Litig., 90 F.3d 1357 (8th Cir. 1996); City of Watsonville Litig. (CA), discussion at 863 F.2d 1407, 1419 (9th Cir. 1988) (finding a violation without Factor 1 met; criticizing the district court for refusing to hear evidence outside of Watsonville and stated that it would have taken judicial notice of the "pervasive" discrimination against Hispanics in the State of California, if this were needed to find a violation).

323. Other courts considered evidence of recent official discrimination, but decided that not enough had been presented to show more than mere disparate impact on the basis of race – therefore, Factor 1 was not met. For example, in the *City of Philadelphia* Litigation challenging Pennsylvania's voter purge law, the court found that the removal of African-American and Latino voters from the voter registration rolls at higher rates than white voters combined with the "correlation between older machines being allocated to neighborhoods with significant minority populations" did not, without more, rise to the level of official discrimination. City of Philadelphia Litig., 28 F.3d 306, 312 (3d Cir. 1994).

324. *See, e.g.*, Chapman v. Nicholson Litig., discussion at 579 F. Supp. 1504, 1510 (N.D. Ala. 1984) ("While the court might assume that, at some point in history, black citizens were discouraged by poll taxes and other means from registering, several of the black witnesses testified that they voted up to 30 years ago without difficulty. There was certainly no evidence that black citizens in Jasper have had as much difficulty in voting as has been experienced by black citizens in some Southern communities."); *see also* cases cited *supra* note 314.
325. Chapman v. Nicholson Litig., 579 F. Supp. 1504, 1510 (N.D. Ala. 1984).
326. *See, e.g.*, Rodriguez Litig., 308 F. Supp. 2d 346 (S.D.N.Y. 2004).
327. *Id.* at 434-45.
328. Kent County Litig. (MI), discussion in 790 F. Supp. 738, 745 (W.D. Mich. 1992).
329. *See* cases cited *supra* note 207.
330. *Id.*
331. 957 F. Supp. 1522, 1557-59 (N.D. Fla. 1997) (findings upheld by 221 F.3d 1218 (11th Cir. 2000), also affirming the court's finding of no violation).
332. *Id.* at 1557.
333. *Id.* at 1559 n.86.
334. Aldasoro Litig., discussion at 922 F. Supp. 339, 363-64 (S.D. Cal. 1995) (citing "the numerous laws enacted by the California Legislature in the last 30 years to improve minority voting participation and to liberalize the political process. These laws included: County clerks could not refuse to deputize registrars because of race (1961); prohibition of election day challenges based on literacy (1961); requirement that a copy of the election ballot in Spanish be posted in each polling place where the language minority population was greater than 3% (1971); law allowing the use of languages besides English in polling places (1973); law requiring county clerks to recruit bilingual deputy registrars and precinct board members (1973); registration allowed by mail (1975); and the ability of voters in California to vote by absentee ballot for any reason" along with the state law requirement that "[w]here more than 3% of the voting age residents of a California county lack English skills, the County Clerk is required to recruit interested citizens and organizations to assist in the registration of individuals lacking such English skills") (citations omitted); *see also* Butts Litig. (NY), discussion at 779 F.2d 141, 150 (2d Cir. 1985) ("[T]he City has taken affirmative steps since 1975 to encourage minority voting, including mail registration (N.Y. Election Law § 5-210(1)) and a Registration Task Force appointed by Governor Cuomo").
335. City of Woodville Litig., discussion at 688 F. Supp. 255, 260 (S.D. Miss. 1988).
336. City of Holyoke Litig., discussion at 960 F. Supp. 515, 526 (D. Mass. 1997); *see also* Tensas Parish Litig., discussion at 819 F.2d 609, 612 (5th Cir. 1987) (noting that "[t]he historical tensions between the races in Tensas Parish, albeit ameliorated, have not disappeared" and that it is "fervently hoped that District Six will provide the occasion for the final rejection of regrettable legacies of the past and the nurturing of more worthy legacies for the future."); Latino Political Action Committee Litig., discussion at 609 F. Supp. 739, 745 (D. Mass. 1985) (noting individual instances of intimidation while noting that "[t]here was, in fact, testimony that the theme of racial harmony played a major role in the campaigns of some candidates in the 1983 elections.").

337. For a detailed description of the history of official discrimination in the Southern States, *see*: Alabama: Dillard v. Crenshaw Litig., 640 F. Supp. 1347 (M.D. Ala. 1986); Mobile School Board Litig., discussion at 706 F.2d 1103, 1104-07 (11th Cir. 1983) (not reaching amended Section 2 question, but finding an intent violation); Florida: DeSoto County Board of Commissioners Litig., 204 F.3d 1335 (11th Cir. 2000) (finding law enacted with discriminatory purpose and remanding for Section 2 results test hearing); Georgia: Brooks Litig., discussion at 158 F.3d 1230, 1233-34 (11th Cir. 1988); Ben Hill County Litig., discussion at 743 F. Supp. 864, 865-68 (M.D. Ga. 1990); Louisiana: Gretna Litig. (LA), 834 F.2d 496 (5th Cir. 1987); Major Litig., 574 F. Supp. 325 (E.D. La. 1983); Mississippi: Kirksey v. Allain Litig., discussion at 658 F. Supp. 1183, 1192-93 (S.D. Miss. 1987); Texas: City of Dallas Litig., discussion at 734 F. Supp. 1317, 1320-33, 1401-03 (W.D. Tex. 1990); LULAC-Midland Independent School District Litig., 648 F. Supp. 596 (W.D. Tex. 1986).

338. *See, e.g.*, NAACP v. Fordice Litig., 252 F.3d 361 (5th Cir. 2001); Lafayette County Litig., 20 F. Supp. 2d 996 (N.D. Miss. 1998); Calhoun County Litig. (MS), 88 F.3d 1393 (5th Cir. 1996); Fort Bend Indep. School District Litig. (TX), 89 F.3d 1205 (5th Cir. 1996); LULAC - North East I.S.D. 903 F. Supp. 1071 (W.D. Tex. 1995); Armstrong v. Allain Litig., 893 F. Supp. 1320 (S.D. Miss. 1994); Lulac v. Clements: Litig. (TX), 999 F.2d 831 (5th Cir. 1993); Southwest Tex. Jr. College Dist. 964 F.2d 1542 (5th Cir. 1992); Tensas Parish School Board Litig. (TX), discussion at 819 F.2d 609 (5th Cir. 1987) (referring to "historical tensions," and seeming to blame both Blacks and Whites equally for these tensions); U.S. v. Jones Litig. (AL), 57 F.3d 1020 (11th Cir. 1995) (noting that one "cannot ignore" the history but finding that it does not weigh in favor of a violation); Little Rock, 56 F.3d 904 (8th Cir. 1995) (any history of discrimination is "remote in time" and so had minimal value in the results test).

339. City of Woodville Litigation, discussion at 688 F. Supp. 255, 260 (S.D. Miss. 1988); *see also* Calhoun County Litig., discussion at 88 F.3d 1393, 1399 (5th Cir. 1996) (finding a violation but not relying on history of official discrimination affecting political participation); Johnson v. Hamrick Litig. (GA), discussion at 296 F.3d 1065, 1224 (11th Cir. 2002) ("The State of Georgia and Gainesville have a history of official discrimination against blacks. Of course, that does little to distinguish Gainesville or Georgia from any other Southern state or city.").

340. Butts v. NYC Litig., discussion at 614 F. Supp. 1527, 1544-45 (S.D.N.Y. 1985) (noting that "[c]ontrary to the popularly held belief that racial discrimination only takes place within the Fifth and Eleventh Circuits, plaintiffs exhibits… support the finding that Black and Hispanic voters in New York City have been subject to various procedures ... which have had the effect of abridging their voting rights").

341. Butts v. NYC Litig., discussion at 779 F.2d 141, 150 (2d Cir. 1985) (overturning district court's prior finding of a Section 2 violation); *see also* France v. Pataki Litig., discussion at 71 F. Supp. 2d 317, 330 (S.D.N.Y. 1999) (finding no history of official discrimination, and noting that "[i]n fact, New York City has taken steps to encourage minority voting including mail registration and a Registration Task Force appointed by Governor Cuomo. Furthermore, defendants' expert, Dr. Mollenkopf, acknowledged that the election practices in question were not adopted as a part of a racist historical tradition" (citation omitted)).

342. Town of Babylon Litig., discussion at 914 F. Supp. 843, 886 (E.D.N.Y. 1996); *see also* Latino Political Action Committee Litig., discussion at 784 F.2d 409,

412 (1st Cir. 1986) (finding "that Boston's history of discrimination in the area of voting rights was less egregious than in certain other parts of the country").

343. See SENATE REPORT at 28-30. Single shot voting is a practice by which voters can direct their votes to a single candidate running in a multi-member district, and choose not to cast their remaining votes for other candidates running at the same time. Doing so increases the relative weight of their votes by reducing the number of votes other candidates receive. An anti-single shot provision may prevent voters from doing this, typically by disqualifying any ballot where a voter has not used all available votes. *See* QUIET REVOLUTION, *supra* note 6, at 46 (Chandler Davidson & Bernard Grofman eds., 1994) (explaining the numbered place ballot system, a common type of anti-single shot provision: "[s]ingle shot voting is impossible if each candidate is required to qualify for a separate *place* or *post* (i.e., place no. 1, place no. 2, and so forth). Because every seat on the governing body is filled through a head-to-head contest in which only one vote can be cast, there is no way to increase the mathematical weight of one's ballot by denying votes to other candidates.") *See also* Marengo County Litig., discussion at 731 F.2d 1546, 1570 n.45 (11th Cir. 1984) ("When voters can cast more than one vote in the same race, an anti-single-shot provision can force minority voters to vote for majority candidates.")

344. *Id.* Of the 53 lawsuits finding Factor 3, 25 were decided in the 1980s (20 violations), 22 in the 1990s (12 violations), and 6 since 2000 (3 violations).

345. City of Cleveland Litig., 297 F. Supp. 2d 901 (N.D. Miss. 2004); Charleston County Litig. (SC), 365 F.3d 341 (4th Cir. 2004); Bone Shirt Litig., 336 F. Supp. 2d 976 (D.S.D. 2004); NAACP v. Fordice Litig. (MS), 252 F.3d 361 (5th Cir. 2001); Brooks Litig. (GA), 158 F.3d 1230 (11th Cir. 1998); City of LaGrange Litig. 969 F. Supp. 749 (N.D. Ga. 1997); City of Rome Litig. (GA), 127 F.3d 1355 (11th Cir. 1997); Chickasaw County II Litig., No. CIV.A. 1:92CV142-JAD, 1997 U.S. Dist. LEXIS 22087, 1997 WL 33426761 (N.D. Miss. Oct. 28, 1997); Calhoun County Litig. (MS), 88 F.3d 1393 (5th Cir. 1996); Southern Christian Leadership Litig. (AL), 56 F.3d 1281 (11th Cir. 1995); Blytheville School District Litig. (AR), 71 F.3d 1382 (8th Cir. 1995); Stockton Litig. (CA), 956 F.2d 884 (9th Cir. 1992); Jefferson Parish I Litig. (LA), 926 F.2d 487 (5th Cir. 1991); Columbus County Litig., 782 F. Supp. 1097 (E.D.N.C. 1991); Monroe County Litig., 740 F. Supp. 417 (N.D. Miss. 1990); City of Dallas Litig., 734 F. Supp. 1317 (W.D. Tex. 1990); City of Starke Litig., 712 F. Supp. 1523 (M.D. Fla. 1989); Baldwin Board of Education Litig., 686 F. Supp. 1459 (M.D. Ala. 1988); City of Jackson Litig., 683 F. Supp. 1515 (W.D. Tenn. 1988); Gretna Litig. (LA), 834 F.2d 496 (5th Cir. 1987); Kirksey v. Allain Litig., 658 F. Supp. 1183 (S.D. Miss. 1987); Dallas County Commission Litig., 636 F. Supp. 704 (S.D. Ala. 1986); Gingles Litig. (NC), 478 U.S. 30 (1986); Edgefield County Litig., 650 F. Supp. 1176 (D.S.C. 1986); LULAC – Midland Litig., 648 F. Supp. 596 (W.D. Tex. 1986); Chapman v. Nicholson Litig., 579 F. Supp. 1504 (N.D. Ala. 1984); Escambia County Litig. (FL), 748 F.2d 1037 (11th Cir. 1984); City of Greenwood Litig., 599 F. Supp. 397 (N.D. Miss. 1984); El Paso Independent School District Litig., 591 F. Supp. 802 (W.D. Tex. 1984); Abilene Litig. (TX), 725 F.2d 1017 (5th Cir. 1984); Major Litig., 574 F. Supp. 325 (E.D. La. 1983); Terrell Litig. 565 F. Supp. 338 (N.D. Tex. 1983).

346. Charleston County Litig. (SC), 365 F.3d 341 (4th Cir. 2004); Bone Shirt Litig., 336 F. Supp. 2d 976 (D.S.D. 2004); Red Clay School District Litig., 116 F.3d 685 (D. Del. 1997); City of LaGrange Litig., 969 F. Supp. 749 (N.D. Ga. 1997); City of Rome Litig. (GA), 127 F.3d 1355 (11th Cir. 1997); Town of Babylon Litig., 914 F. Supp.

843 (E.D.N.Y. 1996); Southern Christian Leadership Litig. (AL), 56 F.3d 1281 (11th Cir. 1995); Blytheville School District Litig. (AR), 71 F.3d 1382 (8th Cir. 1995); Niagara Falls Litig. (NY), 65 F.3d 1002 (2d Cir. 1995); Stockton Litig. (CA), 956 F.2d 884 (9th Cir. 1992); Columbus County Litig., 782 F. Supp. 1097 (E.D.N.C. 1991); City of Dallas Litig., 734 F. Supp. 1317 (W.D. Tex. 1990); City of Starke Litig., 712 F. Supp. 1523 (M.D. Fla. 1989); Brewer Litig. (TX), 876 F.2d 448 (5th Cir. 1989); Baldwin Board of Education Litig., 686 F. Supp. 1459 (M.D. Ala. 1988); City of Jackson Litig., 683 F. Supp. 1515 (W.D. Tenn. 1988); City of Springfield Litig., 658 F. Supp. 1015 (C.D. Ill. 1987); County of Big Horn (Windy Boy) Litig., 647 F. Supp. 1002 (D. Mont. 1986); Gingles Litig. (NC), 478 U.S. 30 (1986); Edgefield County Litig., 650 F. Supp. 1176 (D.S.C. 1986); Sisseton Independent School District Litig. (SD), 804 F.2d 469 (8th Cir. 1986); Escambia County Litig. (FL), 748 F.2d 1037 (11th Cir. 1984); City of Greenwood Litig., 599 F. Supp. 397 (N.D. Miss. 1984); Lubbock Litig. (TX), 727 F.2d 364 (5th Cir. 1984); El Paso Independent School District Litig., 591 F. Supp. 802 (W.D. Tex. 1984); Terrell Litig. 565 F. Supp. 338 (N.D. Tex. 1983).

347. Alamosa County Litig., 306 F. Supp. 2d 1016 (D. Colo. 2004); Bone Shirt Litig. (SD). 336 F. Supp. 2d 976 (D.S.D. 2004); City of Chicago Heights Litig., Nos. 87 C 5112, 88 C 9800, 1997 WL 102543 (N.D. Ill. Mar. 5, 1997); Southern Christian Leadership Litig. (AL), 56 F.3d 1281 (11th Cir. 1995); Blytheville School District (AR) Litig., 71 F.3d 1382 (8th Cir. 1995); LULAC - North East I.S.D., 903 F. Supp. 1071 (W.D. Tex. 1995); Worcester County Litig. (MD), 35 F.3d 921 (4th Cir. 1994); Stockton Litig. (CA), 956 F.2d 884 (9th Cir. 1992); SW Texas Junior College Dist. Litig., 964 F.2d 1542 (5th Cir. 1992); Columbus County Litig., 782 F. Supp. 1097 (E.D.N.C. 1991); City of Dallas Litig., 734 F. Supp. 1317 (W.D. Tex. 1990); Jeffers Litig., 730 F. Supp. 196 (E.D. Ark. 1989); City of Starke Litig., 712 F. Supp. 1523 (M.D. Fla. 1989); Brewer Litig. (TX), 876 F.2d 448 (5th Cir. 1989); Harris v. Graddick Litig., 695 F. Supp. 517 (M.D. Ala. 1988); Gretna Litig. (LA), 834 F.2d 496 (5th Cir. 1987); Dallas County Commission Litig., 636 F. Supp. 704 (S.D. Ala. 1986); LULAC – Midland Litig., 648 F. Supp. 596 (W.D. Tex. 1986); Marengo County Litig., 623 F. Supp. 33 (S.D. Ala. 1985); Chapman v. Nicholson Litig., 579 F. Supp. 1504 (N.D. Ala. 1984); Abilene Litig. (TX), 725 F.2d 1017 (5th Cir. 1984); Lubbock, 727 F.2d 364 (5th Cir. 1984); Mobile School Board Litig. (AL), 706 F.2d 1103 (11th Cir. 1983).

348. Blaine County Litig. (MT), 363 F.3d 897 (9th Cir. 2004); Charleston County Litig., 365 F.3d 341 (4th Cir. 2004); Town of Hempstead Litig. (NY), 180 F.3d 476 (2d Cir. 1999); Stockton Litig. (CA), 956 F.2d 884 (9th Cir. 1992); Jefferson Parish I Litig. (LA), 926 F.2d 487 (5th Cir. 1991); City of Jackson (TN), 683 F. Supp. 1515 (W.D. Tenn. 1988); City of Springfield, 658 F. Supp. 1015 (C.D. Ill. 1987); LULAC – Midland Litig., 648 F. Supp. 596 (W.D. Tex. 1986); Chapman v. Nicholson Litig., 579 F. Supp. 1504 (N.D. Ala. 1984); Escambia County Litig. (FL), 748 F.2d 1037 (11th Cir. 1984); City of Greenwood, 599 F. Supp. 397 (N.D. Miss. 1984).

349. City of Philadelphia Litig. (PA), 28 F.3d 306 (3d Cir. 1994) (voters automatically removed from the registration list, and required to re-register if they had not voted in 4 years); City of Dallas Litig., 734 F. Supp. 1317 (W.D. Tex. 1990) (negligible compensation for elected officials); City of Jackson Litig., 683 F. Supp. 1515 (W.D. Tenn. 1988); County of Big Horn (Windy Boy) Litig., 647 F. Supp. 1002 (D. Mont. 1986); Sisseton Independent School District Litig. (SD), 804 F.2d 469 (8th

Cir. 1986) (apportionment based upon voter registration, not population); Escambia County (FL), 748 F.2d 1037 (11th Cir. 1984) (registration fee for candidates); Lubbock Litig. (TX), 727 F.2d 364 (5th Cir. 1984).

350. See Master Lawsuit List.

351. *Id.*

352. *Id.*

353. Alamosa County Litig., 306 F. Supp. 2d 1016 (D. Colo. 2004); City of Cleveland Litig., 297 F. Supp. 2d 901 (N.D. Miss. 2004); NAACP v. Fordice Litig. (MS), 252 F.3d 361(5th Cir. 2001) (finding that majority-vote requirement was not in itself discriminatory); City of Rome Litig. (GA), 127 F.3d 1355 (11th Cir. 1997); Chickasaw County II Litig., No. CIV.A. 1:92CV142-JAD, 1997 U.S. Dist. LEXIS 22087, 1997 WL 33426761(N.D. Miss. Oct. 28, 1997); Town of Babylon Litig., 914 F. Supp. 843 (E.D.N.Y. 1996); Southern Christian Leadership Litig. (AL), 56 F.3d 1281(11th Cir. 1995); Niagara Falls Litig. (NY), 65 F.3d 1002, 1020 (2d Cir. 1995); SW Texas Junior College Dist. Litig., 964 F.2d 1542 (5th Cir. 1992); Jeffers Litig., 730 F. Supp. 196 (E.D. Ark. 1989) Kirksey v. Allain Litig., 658 F. Supp. 1183, 1194 (S.D. Miss. 1987) ("Although it is obvious that abolition of the majority vote requirements and post system without adoption of anti-single-shot voting laws would make it easier in some situations for black candidates to be elected, this Court cannot hold that these provisions as they now exist discriminate against blacks per se."); Terrell Litig., 565 F. Supp. 338 (N.D. Tex. 1983).

354. *See, e.g.*, Dillard v. Crenshaw County Litig., 650 F. Supp. 1347, 1357 (M.D. Ala. 1986) (ordering a preliminary injunction against the at-large election systems in the 5 counties, finding that "the Alabama legislature . . .has consistently enacted at-large systems for local governments during periods when there was a substantial threat of black participation in the political process . . . enactment[s] . . .[that were] not adventitious but rather racially inspired."); Major Litig., 574 F. Supp. 325, 340 (E.D. La. 1983) ("As a further obstacle to minority access, the legislature established a majority-vote requirement for election to party committees in 1959."); Mobile School Board Litig. (AL), 706 F.2d 1103, 1106-07 (11th Cir. 1983) ("The 1876 act which reenacted the 1852 Act of at-large voting procedures was a convenient method of making the election of a black board member unlikely. . .[and when] the Alabama legislature reinstated a law which suited the purpose of discrimination, the law may be said to have been a product of discriminatory intent."). *See generally* QUIET REVOLUTION IN THE SOUTH, *supra* note 6.

355. *See, e.g.*, Hendrix v. McKinney, 460 F. Supp. 626, 631-32 (M.D. Ala. 1978) (describing the slating inquiry as ascertaining "the ability of blacks to get on the ballot" and finding that slating existed where no blacks had run for county-wide office); Turner v. McKeithen Litig. (LA), discussion at 490 F.2d 191, 195 (5th Cir. 1973) (reasoning that slating is a particularly salient factor in situations where "the black vote has been solicited at a stage when the actual candidate selection has already occurred and the possibility for meaningful influence is significantly diminished"); *see also* White v. Regester, 412 U.S. 755, 766 (1973) ("[S]ince Reconstruction days, there have been only two Negroes in the Dallas County delegation to the Texas House of Representatives and that these two were the only two Negroes ever slated by the Dallas Committee for Responsible Government (DCRG), a white-dominated organization that is in effective control of Democratic Party candidate slating in Dallas County. That organization, the District Court found,

did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community.").

356. *See* Master Lawsuit List

357. *See* Master Lawsuit List.

358. Westwego Litig. (LA), discussion at 946 F.2d 1109, 1116 n.5 (5th Cir. 1991).

359. Town of Hempstead Litig. (NY), discussion at 180 F.3d 476, 483-86 (2d Cir. 1999)

360. *Id.* at 486.

361. *Id.* at 496.

362. City of New Rochelle Litig., 308 F. Supp. 2d 152, 161 (S.D.N.Y. 2003).

363. Albany County Litig., No. 03-CV-502, 2003 WL 21524820, at * 44, 46 (N.D.N.Y. July 7, 2003) (concluding that the evidence "demonstrates that minorities have generally been excluded from candidacy for County offices except in majority/minority districts.").

364. City of Springfield Litig., 658 F. Supp. 1015, 1030 (C.D. Ill. 1987).

365. *Id.*

366. Bone Shirt Litig., (SD), 336 F. Supp. 2d 976, 1036 (D.S.D. 2004).

367. *See* Armour Litig., discussion at 775 F. Supp. 1044, 1056 (N.D. Ohio 1991) (noting such rules and observing that "although each precinct had committeemen who were paid to campaign for the endorsed candidates, Starks received zero votes in four precincts, including one precinct where two party officials resided. No sanctions were taken by the party against the officials or the committeemen who refused to support Starks.").

368. City of Philadelphia litig., discussion at 824 F. Supp. 514, 537 & n.22 (E.D. Pa. 1993).

369. *See* City of Chicago Heights Litig., Nos. 87 C 5112, 88 C 9800, 1997 WL 102543 (N.D. Ill. Mar. 5, 1997).

370. *See also* Abilene Litig. (TX), discussion at 725 F.2d 1017, 1022 (5th Cir. 1984) (remanding to district court for additional findings on whether private citizen group known as Citizens for Better Government denied black candidates access to slating; endorsement of this "white-dominated" organization was essential to win and three minority candidates endorsed by organization had not been shown to be "true representatives" of the minority population).

371. Gretna Litig., discussion at 636 F. Supp. at 118 (D. La. 1986) (affirming district court and noting that "[a]n unofficial slating system excludes black candidates from Gretna city elections").

372. Pasadena School District Litig., discussion at 958 F. Supp. 1196 (S.D. Tex. 1997).

373. City of Dallas Litig., 734 F. Supp. 1317 (W.D. Tex. 1990).

374. City of LaGrange Litig., discussion at 969 F. Supp. 749, 777 (N.D. Ga. 1997) (describing the virtual absence of African-American candidates for city council as "striking" and observing that support received by the few black candidates to run suggested "a lack of opportunity, rather than a lack of inclination, to sponsor minority candidates."); *see also* U.S. v. Marengo County Comm'n (AL), 731 F.2d 1546, 1569 (11th Cir. 1984) (stating that broadly understood, "the term 'access to slating'--that is, the ability to run for office--there does not appear to have been any substantial formal or informal impediment to black candidacies."); Hendrix v.

McKinney Litig., discussion at 460 F. Supp. 626, 631 (M.D. Ala. 1978) ("[t]he core of the inquiry as to slating is the ability of blacks to get on the ballot.").

375. City of Dallas Litig., 734 F. Supp. 1317 (W.D. Tex. 1990) (finding the factor not met as the organization that denied access to black and Latino candidates through 1977 no longer exists); County of Big Horn, discussion at, 647 F. Supp. 1002, 1016 (D. Mont. 1986) (assigning no weight to a now-defunct slating organization that was never successful in having endorsed candidates elected).

376. City of Rome Litig., discussion at 127 F.3d 1355 (11th Cir. 1997) (holding that informal "tickets" were not a slating device given their infrequent use and non-official nature); City of Norfolk Litig., discussion at (concluding that the organization alleged to engage in discriminatory slating did not qualify for the factor because it did not run candidates for all open seats); Westwego Litig., discussion at (finding that although there were local organizations which played a central role in political life from which African Americans were excluded but not finding slating because there was no official endorsing of candidates).

377. Little Rock Litig., discussion at 831 F. Supp. 1453, 1460 (E.D. Ark. 1993) (dismissing plaintiffs' claim that the "white power structure" throws support behind particular candidates as both untrue and not pertaining to slating); City of Philadelphia Litig., discussion at 824 F. Supp. 514, 533 (E.D. Pa. 1993).

378. Alamosa County Litig., 306 F. Supp. 2d 1016 (D. Col. 2004).

379. *See, e.g,* McCord v. City of Fort Lauderdale, 617 F. Supp. 1093 (11th Cir. 1999) (no denied access to slating where citizens' committee exclusively endorsed Republican candidates and no African American ever ran as a Republican); LULAC (CA5 87) (slating not found where no evidence was presented suggesting that African Americans could not run as Republicans if they wanted to).

380. *See* Master Lawsuit List

381. *See* Blaine County Litig. (MT), discussion at 363 F.3d 897, 914 (9th Cir. 2004) (finding socioeconomic disparities as a result of a history of discrimination); Albany County Litig., discussion at No. 03-CV-502, 2003 WL 21524820, at *12 (N.D.N.Y July 7, 2003) (finding that minorities continue to bear the effects of discrimination in almost all aspects of life); City of New Rochelle Litig., discussion at 308 F. Supp. 2d 152, 159-60 (S.D.N.Y. 2003) (finding the continuing socioeconomic effects of historical discrimination); Montezuma Cortez School District Litig., discussion at 7 F. Supp. 2d 1152, 1169-1170 (D. Colo. 1998) ("There is no doubt that this depressed status was caused, at least in part, by the history of mistreatment alluded to in this order."); Emison Litig., discussion at 782 F. Supp. 427, 438 (D. Minn. 1992) (finding the factor met based on extensive housing segregation in the city as well as educational performance differences arising from historical discrimination); Westwego Litig. (LA), discussion at 946 F.2d 1109, 1115 (5th Cir. 1991) (noting that Westwego's black citizens continue to bear the effects of a history of discrimination--"[b]y almost any measure, the black families of Westwego are less well off than their white neighbors."); Garza v. Los Angeles Litig., discussion at 756 F. Supp. 1298, 1339-1341 (C.D. Cal. 1990); Houston v. Haley Litig., discussion at 663 F. Supp. 346, 352-54 (N.D. Miss. 1987) (finding past discrimination led to continuing socioeconomic disparities); Wamser Litig., discussion at 679 F. Supp. 1513, 1531 (E.D. Mo. 1987) (finding present socioeconomic disparities as a result of past discrimination); Baytown Litig., discussion at 696 F. Supp. 1128, 1132, 1136 (S.D. Tex. 1987) (finding that minorities lag significantly behind whites in education,

income, occupational status, and employment--"the Court concludes that the minorities in Baytown carry with them the results of past discrimination to a substantial extent."); City of Holyoke Litig., discussion at 880 F. Supp. 911, 917-19 (D. Mass. 1995); Halifax County Litig., discussion at 94 F. Supp. 161, 166-171 (E.D.N.C. 1984).

382. *See* Metts Litig. (RI), discussion at 347 F.3d 346, 2003 WL 22434637, at * 2 (1st Cir. 2003) ("The state's African-American citizens continue to suffer from past official discrimination in housing, education, health care, and employment. By common measure of socio-economic status, educational attainment, and access to political resources, they continue to lag behind the rest of the state."); Berks County Litig., discussion at 277 F. Supp. 2d 570, 575, 581 (E.D. Pa. 2003) ("Hispanics in Reading suffer from significant socioeconomic inequality, which is ordinarily linked to lower literacy rates, unequal educational opportunities, and depressed participation in the political process."); St. Bernard Parish School Board Litig., discussion at No. CIV.A. 02-2209, 2002 U.S. Dist. LEXIS 16540, at *31-32 (E.D. La. Aug. 26, 2002) (finding socioeconomic discrepancies and then quoting language from the Senate Report linking socioeconomic depression to lower political participation); Old Person Litig. (MT), discussion at 230 F.3d 1113, 1129 (9th Cir. 2000) ("American Indians have a lower socioeconomic status than whites in Montana; these social and economic factors hinder the ability of American Indians in Montana to participate fully in the political process."); Davis v. Chiles Litig. (FL), discussion at 139 F.3d 1414, 1419 & n.10 (11th Cir. 1998) ("Florida has had a history of racially discriminatory voting practices and . . . continuing socio-economic disparities are hindering blacks' participation in the political process in these districts."); Rural West II Litig., discussion at 29 F. Supp. 2d 448, 459 (W.D. Tenn. 1998) (linking low socioeconomic status with inability to fundraise and fully participate in politics); Chickasaw County II Litig., discussion at No. CIV.A. 1:92CV142-JAD, 1997 U.S. Dist. LEXIS 22087, at *10-11 (N.D. Miss. Oct. 28, 1997) (linking low socioeconomic status with lack of access to telephones and vehicles, which "translates into lower voter participation and heightens a finding of vote dilution"); City of LaGrange Litig., discussion at 969 F. Supp. 749, 757, 776 (N.D. Ga. 1997) ("These lingering effects of Georgia's history of discrimination continue to translate into diminished political influence and opportunity for LaGrange's African-American citizens."); City of Rome Litig. (GA), 127 F.3d 1355, 1370-1371, 1385-1386 (11th Cir. 1997) (linking low socioeconomic status with depressed political participation as shown by the positive statistical correlations between status and participation); Sanchez-Colorado Litig. (CO), discussion at 97 F.3d 1303, 1322-1324 (10th Cir. 1996) (deciding that the lower court's finding of roughly equivalent political participation was not enough to refute the massive quantity of evidence showing current socioeconomic depression that could not be explained other than by a history of discrimination); LULAC - North East Independent School District Litig., discussion at 903 F. Supp. 1071, 1085-1086 (W.D. Tex. 1995) ("Blacks and Hispanics still bear the effects of past discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process."); Cousin Litig., discussion at 904 F. Supp. 686, 708-710 (E.D. Tenn. 1995) (linking low socioeconomic status with isolation "from the economic and political main stream" and inability to "fund and mount political campaigns"); Marylanders Litig., discussion at 849 F. Supp. 1022, 1060-61 (D. Md. 1994) (finding depressed socioeconomic status and quoting the

Senate Report for the proposition that depressed socioeconomic status tends to depress political participation); Rural West I Litig., discussion at 836 F. Supp. 453, 461-62 (W.D. Tenn. 1993) ("In west Tennessee, black citizens are more likely than white citizens to live in poverty, to be unemployed, and to live in substandard housing. Black citizens are less likely to have completed high school, to own their own homes, to have access to a car, or to have telephones in their homes. As the Senate Report recognizes, educational and economic disadvantages can translate into political disadvantage."); Brunswick County Litig., discussion at 801 F. Supp. 1513, 1518, 1524 (E.D. Va. 1992) ("[B]lacks in Brunswick County bear the lingering effects of this discrimination by experiencing lower education levels, poorer housing and lesser earning power. This Court finds that these conditions dramatically hinder the ability of African Americans to participate fully in the political process in Brunswick County."); Magnolia Bar Association Litig., discussion at 793 F. Supp. 1386, 1409 (S.D. Miss. 1992) ("A person with less education is less likely to vote than one with more education. A person with less money is less likely to own an automobile and therefore less likely to make the effort to go to the polls to vote or to the courthouse to register."); De Grandy Litig., discussion at 794 F. Supp. 1076 (N.D. Fla. 1992) (linking low socioeconomic status to depressed political participation as shown by voting studies that consistently show a positive correlation between socioeconomic factors and voter participation); Hall Litig., discussion at 757 F. Supp. 1560, 1562-1563 (M.D. Ga. 1991) ("The depressed socio-economic status of black residents, including particularly the lack of public or private transportation, telephones and self-employment, hinders the ability of and deters black residents of Bleckley County from running for public office, voting and otherwise participating in the political process."); City of Dallas Litig., discussion at 734 F. Supp. 1317, 1403-1405 (N.D. Tex. 1990) (linking low socioeconomic status with an inability to fund an effective campaign as well as the inability to afford to hold office because of the small amount of financial compensation Counsel Members receive); White Litig., discussion at 1989 U.S. Dist. LEXIS 16117 at *9-11, 22-23 (E.D. Va. 1989) (finding that the lingering effects of past dscrimination hinder the political process); Clark Litig., discussion at 725 F. Supp. 285, 290-91, 299 (M.D. La. 1988) ("The stipulated facts establish the substantial socio-economic disparities which exist in Louisiana today between blacks and whites. These disparities are a vesture of past discrimination and they do hinder the ability of blacks to effectively participate in the political process."); Smith-Crittenden County Litig., discussion at 687 F. Supp. 1310, 1317 (E.D. Ark. 1988) ("T]he history of discrimination has adversely affected opportunities for black citizens in health, education, and employment. The hangover from this history necessarily inhibits full participation in the political process."); Baldwin Board Education Litig., discussion at 686 F. Supp. 1459, 1466-67(M.D. Ala. 1988) ("The evidence . . . reflects that this discrimination has resulted in a lower socio-economic status for Alabama blacks as a group than for whites, and that this lower status has . . . depressed levels of black voter participation and has thereby hindered the ability of blacks to participate effectively in the political process."); Mehfoud Litig., discussion at 702 F. Supp. 588, 594-595 (E.D. Va. 1988) (linking low socioeconomic status to depressed political participation, which credits expert testimony that "participation in the political process is positively correlated with socioeconomic status," and also linking low socioeconomic status with the ability to raise enough funds to effectively run for political office); City of Jackson Litig.,

discussion at 683 F. Supp. 1515, 1533-1534 (W.D. Tenn 1988) ("White collar workers can more easily register and vote than blue-collar workers since they have a greater ability to take time off from work. Since black citizens earn less money than white citizens, it is more difficult for a candidate favored by the black community to raise campaign funds. Due to their depressed socioeconomic status, it is more difficult for the black community to mobilize and get black voters to the polls than it is for the white community to do so with white voters."); Chisom Litig., discussion at CIV. A. No. 86-4057, 1989 WL 106485 at *8-9 (E.D. La. Sept. 19, 1989) (linking low socioeconomic status with the inability to finance effective campaigns.); Kirksey v. Allain Litig., discussion at 658 F. Supp. 1183, 1194-1195 (S.D. Miss. 1987) (linking low socioeconomic status with depressed political participation and crediting expert testimony linking lower socioeconomic status with lower rates of registration and voting); Operation Push Litig., discussion at 674 F. Supp. 1245, 1253-1254, 1264-1265 (N.D. Miss. 1987) (linking low socioeconomic status with the lower availability of automobiles making it harder for poor blacks to register during working hours); Gretna Litig., discussion at 636 F. Supp. 1113, 1116-1120 (E.D. La. 1986) ("[D]epressed levels of income, education and employment are a consequence of severe historical disadvantage. Depressed levels of participation in voting and candidacy are inextricably involved in the perception of futility and impotence such a history engenders. These historical disadvantages continue through the present day and undoubtedly hinder the ability of the black community to participate effectively in the political process within the City of Gretna."); Lubbock Litig. (TX), discussion at 727 F.2d 364, 383 (5th Cir. 1984) (finding that a history of discrimination combined with socioeconomic depressing led to a decreased ability of minorities to participate in the political process); *cf.* Blytheville School District Litig. (AR), discussion at 71 F.3d 1382, 1390 (8th Cir. 1995) (holding that the district court did not give enough weight to the effect that socioeconomic depression caused by past discrimination has on current political participation).

383. *See, e.g.*, Rural West II Litig., discussion at 29 F. Supp. 2d 448, 459 (W.D. Tenn. 1998) ("Money has a prominent role in American politics. Campaigning is expensive and all candidates are aware of the need to raise money. Financed electorate groups can exert influence by sponsoring their own candidate or gaining the ear of another through contributions. The economic and educational isolation of African-Americans described by the *Rural West I* court limits their ability to fund and mount political campaigns. In this sense therefore, blacks are not able to equally participate in the political process."); Cousin Litig., discussion at 904 F. Supp. 686, 708-710 (E.D. Tenn. 1995) (finding less ability to fund a campaign); Mehfoud Litig., discussion at 702 F. Supp. 588, 594-595 (E.D. Va. 1988) (finding less ability to fund a campaign); Chisom Litig., discussion at CIV. A. No. 86-4057, 1989 WL 106485 at *8-9 (E.D. La. Sept. 19, 1989) (finding less ability to fund a campaign).

384. See, e.g., City of Rome Litig. (GA), discussion at 127 F.3d 1355, 1370-1371, 1385-1386 (11th Cir. 1997) ("Rome's at-large electoral systems, moreover, have the effect of increasing the importance of money in the electoral process by enlarging the electoral district."); Cousin Litig., discussion at 904 F. Supp. 686, 708-710 (E.D. Tenn. 1995) (finding less ability to ability to fund and mount political campaigns); Columbus County Litig., discussion at 782 F. Supp. 1097, 1103-1105 (E.D.N.C. 1991) (finding a large district, an at-large challenge, and a large area in which to campaign disadvantages minority candidates who are likely to have less access to

necessary resources for travel and advertising); City of Dallas Litig., discussion at 734 F. Supp. 1317, 1403-1404 (N.D. Tex. 1990) ("[Socioeconomic]disparities provide a distinct advantage to white at-large candidates in terms of financial and other support.").

385. *See, e.g.*, Charleston County Litig., 316 F. Supp. 2d 268, 291 (D.S.C. 2003) ("The on-going racial separation that exists in Charleston County—socially, economically, religiously, in housing and business patterns--makes it especially difficult for African-American candidates seeking county-wide office to reach out to and communicate with the predominately white electorate from whom they must obtain substantial support to win an at-large elections [sic]."); Cousin Litig., discussion at 904 F. Supp. 686, 708-710 (E.D. Tenn. 1995) (noting isolation from economic and political main stream); Neal litig., discussion at 689 F. Supp. 1426, 1430 (E.D. Va. 1988); *cf.* Terrell Litig., 565 F. Supp. 338, 342 (N.D. Tex. 1983) ("It is clear to the Court that a major reason for the white majority's lack of familiarity with many black candidates is the severe de facto segregation of housing in Terrell.").

386. City of Dallas Litig., discussion at 734 F. Supp. 1317, 1403-1405 (N.D. Tex. 1990) ("The ridiculous pay for Council Members– $50.00 for each meeting – further exacerbates the discriminatory effect of these disparities by limiting the pool of African-Americans and Hispanics who can financially afford to serve on the Council where they would, in effect, volunteer their full time service.").

387. *See* Bone Shirt Litig., discussion at 336 F. Supp. 2d 976, 1037-1041 (D.S.D. 2004) (finding Factor 5 met based on evidence of depressed socioeconomic status, differentials in voter turnout statistics as well as by expert testimony that "'[p]eople living on a day-to-day basis wonder if they can heat their home'"--"'[t]hose are not the kinds of people who are the most predisposed to go out and engage in a great deal of political campaigning or activity'"); Red Clay School District Litig., discussion at Civ. A. No. 89-230-LON, 1996 WL 172327, at *19-20 (D. Del. Apr. 10, 1996) (finding both depressed socioeconomic status and lower levels of political participation by African Americans and overturning the lower court's determination that a 2% difference in voter turnout was insignificant); Attala County Litig. (MS), discussion at 92 F.3d 283, 293-295 (5th Cir. 1996) (finding depressed socioeconomic status and depressed political participation); Nipper Litig. (FL), discussion at 39 F.3d 1494, 1507-1508 (11th Cir. 1994) (overturning the lower courts finding that voter registration and turnout were equivalent and finding that while voter registration was roughly equivalent, black voter turnout still lagged); City of Philadelphia Litig., discussion at 824 F. Supp. 514, 533-535 (E.D. Pa. 1993) (finding depressed socioeconomic status and depressed voter registration and turnout rates); Little Rock Litig., discussion at 831 F. Supp. 1453, 1460 (E.D. Ark. 1993) (finding lower socioeconomic status as well as depressed levels of voter registration and turnout. Although in upholding the District Court's finding, the 8th Circuit held that less weight should be given to this factor because differences were not as great as in other areas.); Columbus County Litig., discussion at 782 F. Supp. 1097, 1103-1105 (E.D.N.C. 1991) (finding depressed socioeconomic status and lower levels of voter turnout despite finding roughly equivalent voter registration numbers); Armour Litig., discussion at 775 F. Supp. 1044 (N.D. Oh. 1991) (finding depressed socioeconomic levels as well as lower rates of political participation); Democratic Party of Arkansas Litig. (AK), discussion at 890 F.2d 1423, 1431-1433 (8th Cir. 1989) (finding lower voter turnout and socioeconomic disparities); City of Springfield

Litig., discussion at 658 F. Supp. 1015, 1024-1027 (C.D. Ill. 1987) ("The lingering effects of segregation and racial isolation are seen in the statistics of black turnout at the polls. The voting participation of blacks continues to lag well behind that of whites. Blacks participate at a rate of one-third to one-half of white voters."); County of Big Horn (Windy Boy) Litig., discussion at 647 F. Supp. 1002, 1016-1017 (D. Mt. 1986) (finding that although voter registration between Native Americans and whites was roughly equivalent, Native American voter turnout still lagged.); Gretna Litig., discussion at 636 F. Supp. 1113, 1116-1120 (E.D. La. 1986) (finding continued socioeconomic disparities, and noting that although blacks and whites register to vote in roughly equivalent numbers, black voter turnout still lagged behind that of whites.); Edgefield County Litig., discussion at 650 F. Supp. 1176, 1180-1189 (D.S.C. 1986) (finding socioeconomic disparities and lower voter turnout for blacks than for whites); Dillard v. Crenshaw Litig., discussion at 649 F. Supp. 289, 295 (M.D. Ala. 1986) (finding both current and past depressed socioeconomic and political participation); Jordan Litig., discussion at 604 F. Supp. 807, 812 (N.D. Miss. 1984) (finding depressed socioeconomic status and decreased voter registration rates); Terrazas Litig., discussion at 581 F. Supp. 1329, 1348-1351 (N.D. Tex. 1984) (finding depressed political participation due to low voter registration and turnout number.); Gingles Litig., discussion at 590 F. Supp. 345, 360, 363 (E.D.N.C. 1984) ("[There are] continued relatively depressed levels of black voter registration." "[African Americans'] lower socio-economic status gives rise to special group interests centered upon those factors. At the same time, it operates to hinder the group's ability to participate effectively in the political process and to elect representatives of its choice as a means of seeking government's awareness of and attention to those interests." The court also noted depressed levels of voter registration.); Marengo County Litig. (AL), discussion at 731 F.2d 1546, 1551, 1567-1570 (11th Cir. 1984) ("Past discrimination may cause blacks to register or vote in lower numbers than whites. Past discrimination may also lead to present socioeconomic disadvantages, which in turn can reduce participation and influence in political affairs."); Dallas County Commission Litig. (AL), discussion at 739 F.2d 1529, 1537-1538 (11th Cir. 1984) (overturning the lower court's finding that equivalent voter registration rates showed effective political participation despite persisting socioeconomic disparities because blacks continued to turn out at lower rates than whites); City of Greenwood Litig., discussion at 599 F. Supp. 397, 400-401 (N.D. Miss. 1984) (finding that plaintiffs showed depressed socioeconomic status as well as depressed political participation as demonstrated by lower voter turnout rates); Escambia County Litig. (FL), 748 F.2d 1037, 143-144 (5th Cir. 1984) (finding depressed socioeconomic status and political participation and expressly rejecting the proposition that plaintiffs must prove causation between the two); Buskey v. Oliver Litig., discussion at 565 F. Supp. 1473, 1475-1476 (M.D. Ala. 1983) (finding socioeconomic disparities and low voter registration); Major Litig., discussion at 574 F. Supp. 325, 339-341 (E.D. La. 1983) (finding that a "legacy of historical discrimination" caused lower socioeconomic status of blacks, and finding lower registration and turnout in the black community); Mobile School Board Litig., discussion at 542 F. Supp. 1078, 1093 (S.D. Ala. 1982) (finding socioeconomic disparities and depressed registration and turnout rates).

388. *See* NAACP v. Fordice Litig. (MS), discussion at 252 F.3d 361, 367-368 (5th Cir. 2001) (refusing to find inequality of political access where evidence showed that

registration and turnout rates were nearly equal); Southern Christian Leadership Conference Litig., discussion at 785 F. Supp. 1469, 1473, 1486 (M.D. Ala. 1992) (finding that despite depressed socioeconomic status, blacks are registered to vote in approximately equal numbers to whites and in some areas black voter registration exceeds that of whites); Monroe County Litig., discussion at 740 F. Supp. 417, 423-424 (N.D. Miss. 1990) (finding no evidence of a disproportionate level of black voter participation in Monroe County, and noting that "the black turnout in the 1989 alderman election in Aberdeen was higher in the 93% black ward than the white turnout in more affluent wards"); City of Starke Litig., discussion at 712 F. Supp. 1523, 1529 (M.D. Fla. 1989) (finding that black and white voter registration and turnout numbers were nearly equivalent); Liberty County Commissioners Litig. (FL), discussion at 865 F.2d 1566, 1582 (11th Cir. 1988) (finding socioeconomic disparities, but that on the whole black voter registration was generally high and often even exceeded that of whites); City of Boston Litig., discussion at 609 F. Supp. 739, 744-745 (D. Mass. 1985) (finding that blacks and whites register and vote at "basically similar" rates); City of Fort Lauderdale Litig., discussion at 617 F. Supp. 1093, 1104-05 (D.C. Fla. 1985) (finding that despite depressed socioeconomic status, blacks still turned out to vote in equal or greater numbers than whites and therefore Factor 5 was not met); City of Norfolk Litig., discussion at 605 F. Supp. 377, 391-392 (E.D. Va. 1984) ("Blacks are registering to vote and turning out to vote at rates equal to or greater than the rate for whites, based on a percentage of the voting age population."); Rocha Litig., discussion at No. V-79-26, 1982 U.S. Dist. LEXIS 15164 at *21-22 (S.D. Tex. Aug. 23, 1982) ("[T]he past discrimination does not appear to affect the political participation of minorities." They freely register to vote and do vote in the same ratio as do the Anglos."); *cf.* France Litig., discussion at 71 F. Supp. 2d 317, 332 (S.D.N.Y. 1999) ("Minorities have not been excluded from participating in the political process as is evident by their climbing voter registration rates, turnout at the polls and their success in the electoral process."); Metro Dade County Litig., discussion at 805 F. Supp. 967, 981, 991-992 (S.D. Fla. 1992) ("[D]espite the depressed levels in [education, employment and health], Blacks are making great strides in overcoming these obstacles as evidenced by their high registered voter turnout levels.").

389. *See, e.g.*, Nipper Litig. (FL), discussion at 39 F.3d 1494, 1507-1508 (11th Cir. 1994) (overturning the lower court's finding that voter registration and turnout were equivalent; finding that while voter registration was roughly equivalent, black voter turnout still lagged); Columbus County Litig., discussion at 782 F. Supp. 1097, 1103-1105 (E.D.N.C. 1991) (finding depressed socioeconomic status and lower levels of voter turnout, despite roughly equivalent voter registration numbers); County of Big Horn (Windy Boy) Litig., discussion at 647 F. Supp. 1002, 1016-1017 (D. Mt. 1986) (finding that although voter registration between Native Americans and whites was roughly equivalent, Native American voter turnout still lagged); Gretna Litig., discussion at 636 F. Supp. 1113, 1116-1120 (E.D. La. 1986) (finding continued socioeconomic disparities, and noting that although blacks and whites register to vote in roughly equivalent numbers, black voter turnout still lagged behind that of whites); Dallas County Commission Litig. (AL), discussion at 739 F.2d 1529, 1537-1538 (11th Cir. 1984) (overturning the lower court's finding that equivalent voter registration rates showed effective political participation despite persisting

socioeconomic disparities because blacks continued to turn out at lower rates than whites).

390. *See* Town of Hempstead Litig., discussion at 956 F. Supp. 326, 342 (E.D.N.Y. 1997) (noting that in comparison to other parts of the country, socioeconomic differences in Hempstead, while present, were not as severe as in other parts of the country and that "differences in the socioeconomic status of blacks do not significantly impair their relative ability to participate in the political process"); Fort Bend Independent School District Litig. (TX), discussion at 89 F.3d 1205, 1220 (5th Cir. 1996) (finding that socio-economic disparities "do not prevent meaningful participation in the political process").

391. *See* Rodriguez Litig., discussion at 308 F. Supp. 2d 346, 435 (S.D.N.Y. 2004) (finding that minorities in New York bear "to some extent" the effects of past discrimination, while finding no "substantial or adequate showing" that the "socioeconomic status of minorities significantly impairs their ability to participate in the political process in the relevant geographical areas"); Alamosa County Litig., discussion at 306 F. Supp. 2d 1016, 1035-1038 (D. Colo. 2003) ("[T]he Court concludes that notwithstanding historical ethnicity-based discrimination, there is insufficient evidence to conclude that socioeconomic or educational conditions currently hinder Hispanic residents in Alamosa County from participating in the electoral process."); City of Chicago Heights Litig., discussion at Nos. 87 C 5112, 88 C 9800, 1997 WL 102543, at *10 (N.D. Ill. Mar. 5, 1997) ("This factor requires a showing that, as a result of past discrimination, African-Americans in Chicago Heights suffer from lower socioeconomic conditions than whites and that African-American political participation is depressed."); Mallory-Hamilton County Litig., discussion at 38 F. Supp. 2d 525, 542 (S.D. Oh. 1997) ("Plaintiffs have submitted no evidence which establishes that the effects of past discrimination deny African-Americans equal access to the political process or actually hamper the ability of African-Americans to participate in the political process. The Court hereby makes these same findings with respect to Summit County in general, and with respect to the Court of Common Pleas for Summit County, and the Akron Municipal Court in particular."); Town of Babylon Litig., discussion at 914 F. Supp. 843, 887-889 (E.D.N.Y. 1996) (noting absence of evidence on depressed socio-economic status and insufficient evidence of depressed political participation); Kent County Litig., discussion at 790 F. Supp 738, 744, 749 (S.D. Mich. 1992) (finding that notwithstanding socioeconomic disparities, there was no showing of less opportunity to participate in the electoral process in Kent County); Turner Litig., discussion at 784 F. Supp. 553, 576-577 (E.D. Ark. 1991) (finding that the factor was not met because there was no evidence that black voters had "less opportunity than other members of the electorate to participate in the political process"); McCarthy Litig. (TX), discussion at 749 F.2d 1134, 1135-1137 (5th Cir. 1984) (holding that plaintiffs must present evidence to show that there are actual obstacles or hindrances to minority political participation); *see also* Suffolk County Litig., discussion at 268 F. Supp. 2d 243, 265 (E.D.N.Y. 2003) ("[T]he plaintiffs have not established, in any manner, that Hispanics' lower socioeconomic condition in Suffolk County, if such is the case, has deprived them of their right to participate in legislative elections."); *c.f.* Chickasaw County I Litig., discussion at 705 F. Supp. 315, 320-321 (N.D. Miss. 1989) (finding insufficient evidence showing actual depressed political participation

and citing some testimony suggesting that registration and turnout may be higher among black voters than white.).

392. *See* Charleston County Litig., discussion at 316 F. Supp. 2d 268, 282-292 (D.S.C. 2003); LULAC v. Clements Litig. (TX), discussion at 986 F.2d 728, 782 & n.41, (5th Cir. 1993); Neal Litig., discussion at 689 F. Supp. 1426, 1428-1431 (E.D. Va. 1988); Terrell Litig., 565 F. Supp. 338, 341-342 (N.D. Tex. 1983) (finding that although blacks are registered in equal or greater numbers than whites past discrimination lingers in housing segregation, which makes winning the white crossover vote nearly impossible because of the white majority's lack of familiarity with many black candidates.); *cf.* Terrazas Litig., discussion at 581 F. Supp. 1329, 1348-1351 (N.D. Tex. 1984) (crediting lay testimony concerning "the feeling among Hispanic candidates and voters in Dallas County that political action is futile").

393. Charleston County Litig., discussion at 316 F. Supp. 2d 268, 291 (D. S.C. 2003).

394. Neal Litig., discussion at 689 F. Supp. 1426, 1430 (E.D. Va. 1988); *see also* Terrell Litig., 565 F. Supp. 338, 342 (N.D. Tex. 1983) ("It is clear to the Court that a major reason for the white majority's lack of familiarity with many black candidates is the severe de facto segregation of housing in Terrell.").

395. City of St. Louis Litig., discussion at 896 F. Supp. 929 (E.D. Mo. 1995) (finding depressed socioeconomic status and voter turnout is not sufficient to satisfy this factor when difference in turnout could be attributable to voter apathy); Armstrong v. Allain Litig., discussion at 893 F. Supp. 1320, 1332-1333 (S.D. Miss. 1994) (finding that although significant socioeconomic disparities between whites and blacks exist, that the lack of vote turnout could be attributable to voter apathy and noting that when a black candidate is up for election, "the turnout of black voters increases dramatically"); City of Columbia Litig., discussion at 850 F. Supp 404 (D.S.C. 1993) ("Based on these registration and turnout statistics, the court rejects the notion that lower black turnout in city elections is attributable, to a significant degree, to the inability of blacks to learn of the election, to obtain transportation to the polls, or to mobilize in support of candidates and issues. A far more plausible explanation for low black turnout in city elections is the same as that for low turnout generally: voters are either satisfied that the City is working well, thus little interest is generated by the campaigns, or they are generally uninspired by some of the candidates."); SW Texas Junior College Dist. Litig., discussion at Civ. A. No. DR-88-CA-18, 1991 WL 367969, at *3-7 (W.D. Tex. Feb. 25, 1991) ("[T]his Court is hesitant to intervene when those same Hispanics could readily solve this problem by simply running candidates and turning out to vote."); Carrollton NAACP Litig. (GA), discussion at 829 F.2d 1547, 1561 (11th Cir. 1987) (upholding the District Court's finding that the defendant had sufficiently carried its burden to disprove "any causal connection between economic disparities and reduced political participation by minorities" and finding that there had been significant efforts to ensure that voter registration facilities were equally dispersed and available to all without regard to race).

396. *See* City of St. Louis Litig., discussion at 896 F. Supp. 929 (E.D. Mo. 1995) (finding evidence of depressed socioeconomic status and voter turnout was not sufficient to satisfy Factor 5 when difference in turnout could be attributable to voter apathy); Armstrong v. Allain Litig., discussion at 893 F. Supp. 1320, 1332-1333 (S.D. Miss. 1994) (finding that although significant socioeconomic disparities between

whites and blacks exist that it could be attributable to voter apathy--when a black candidate is up for election, "the turnout of black voters increases dramatically."); City of Columbia Litig., discussion at 850 F. Supp 404 (D.S.C. 1993) (finding lower black voter turnout attributable to voter apathy as opposed to the "inability of blacks to learn of the election, to obtain transportation to the polls, or to mobilize in support of candidates and issues;" and concluding that black voters "are either satisfied that the City is working well, thus little interest is generated by the campaigns, or they are generally uninspired by some of the candidates"); SW Texas Junior College Dist. Litig., discussion at Civ. A. No. DR-88-CA-18, 1991 WL 367969 at *6-*7 (W.D. Tex. Feb. 25, 1991) (blaming low voter turnout on voter apathy and suggesting that "those same Hispanics [who are currently underrepresented] could readily solve this problem by simply running candidates and turning out to vote").

397. *See, e.g.*, Bone Shirt Litig., discussion at 336 F. Supp. 2d 976, 1040 (D.S.D. 2004) ("People living on a day-to-day basis wonder if they can heat their home. Those are not the kinds of people who are the most predisposed to go out and engage in a great deal of political campaigning or activity."); Attala County Litig. (MS), discussion at 92 F.3d 283, 293-295 (5th Cir. 1996) (overturning lower court's attribution of lower black voter participation to voter apathy, which affected both blacks and whites because to "conclude that black voter apathy is the reason for the failure of blacks to elect the candidates of their choice when apathy affects all voters is counterintuitive"--"[t]he fact that blacks *and* whites in Attala County are going to the polls in decreasing proportions does not explain why blacks *alone* are essentially shut out of the political processes of the county." (emphasis in original)); Gretna Litig., discussion at 636 F. Supp. 1113, 1120 (E.D. La. 1986) ("Depressed levels of participation in voting and candidacy are inextricably involved in the perception of futility and impotence" engendered by "severe historical disadvantage."); Terrazas Litig., discussion at 581 F. Supp. 1329, 1348-1351 (N.D. Tex. 1984) (finding Factor 5 based on depressed political participation as shown by low voter registration and turnout number, and "the feeling among Hispanic candidates and voters in Dallas County that political action is futile."); Major Litig., discussion at 574 F. Supp. 325, 339-341 (E.D. La. 1983) (finding both lower socioeconomic status of blacks and lower registration and turnout in the black community, and concluding that "[a] sense of futility engendered by the pervasiveness of prior discrimination, both public and private, is perceived as discouraging blacks from entering into the governmental process").

398. Gretna Litig., discussion at 636 F. Supp. 1113, 1120 (E.D. La. 1986).

399. *Id.*

400. Cincinnati Litig., discussion at No. C-1-92-278, 1993 WL 761489, at *11 (S.D. Ohio July 8, 1993) ("While the effects of discrimination in such areas as education, employment and housing do hinder the ability of some African Americans personally to finance political campaigns, the defendants have neither created these conditions nor do they intentionally maintain them.").

401. Milwaukee NAACP Litig., discussion at 935 F. Supp. 1419, 1427, 1433 (E.D. Wis. 1996) (finding no evidence had traced the continuing socioeconomic disparities to discrimination in the challenged county or state of Wisconsin).

402. *See* Pasadena Independent School District Litig., discussion at 958 F. Supp. 1196, 1225 (S.D. Tex. 1997) ("The socioeconomic data does not distinguish between Hispanics who are recent immigrants and those who have been in this country for

longer periods, particularly those who are citizens. This information is important to this analysis, but was not presented."); Aldasoro v. Kennerson Litig., discussion at 922 F. Supp. 339, 365 (S.D. Cal. 1995) ("Hispanics are characterized by lower socioeconomic status than Anglos, but many Hispanics in El Centro have immigrated recently from Mexico, a third world country, and naturally are characterized by lower socioeconomic status . . . Therefore, it is critical to distinguish between foreign born and native born Hispanics in addressing this Senate Factor. Plaintiffs' evidence failed to make this distinction."); El Paso Independent School District Litig., discussion at 591 F. Supp. 802, 807, 809-810 (W.D. Tex. 1984) (finding discrepancies in socioeconomic status between Hispanics and whites, but holding that the "record fails to show how many of those affected by unemployment are recent immigrants or resident aliens as opposed to citizens" as well as that "[t]he evidence . . . fails to show how many residents of South El Paso were educated (or not educated) in Mexico rather than in the United States").

403. *See, e.g.*, Magnolia Bar Association Litig., discussion at 793 F. Supp. 1386, 1409 (S.D. Miss. 1992) ("[B]lacks in Mississippi continue to bear the effects of discrimination in critical areas of socioeconomic attainment and this continues in some ways to affect their opportunity to participate in the political process and to elect representatives of their choice."). *See also* Calhoun County Litig., discussion at 813 F. Supp. 1189 (N.D. Miss. 1993) (finding that repercussions of discrimination against African-Americans continues to effect political participation).

404. *See* Magnolia Bar Association Litig., discussion at 793 F. Supp. 1386, 1409 (S.D. Miss. 1992) ("[B]lacks in Mississippi continue to bear the effects of discrimination in critical areas of socioeconomic attainment and this continues in some ways to affect their opportunity to participate in the political process and to elect representatives of their choice.").

405. *Id.*

406. *See* Master Lawsuit List.

407. *See, e.g.*, Columbus County Litig., discussion at 782 F. Supp. 1097, 1105 (E.D.N.C. 1991) (noting the long history and continuing practice of using racial appeals in campaigns in Columbus County and North Carolina generally).

408. Racial appeals found in 1950 (Gingles Litig.), 1954 (Gingles Litig.), 1960 (Gingles Litig.), 1968 (Gingles Litig.), 1970 (City of Dallas Litig.), 1971 (Garza v. Los Angeles Litig. and City of Philadelphia Litig.), 1972 (City of Dallas Litig. and Gingles Litig.), 1973 (Charleston County Litig. and Butts v. NYC Litig.), 1975 (Jeffers Litig. and City of Dallas Litig.), 1976 (Jeffers Litig. and City of Dallas Litig.), 1977 (City of Greenwood Litig.), 1979 (Town of Babylon Litig.), 1982 (Southern Christian Leadership Litig. and Jordan Litig.), 1983 (Garza v. Los Angeles Litig., Clark Litig., Neal Litig., Mehfoud Litig., and City of Philadelphia Litig.), 1984 (County of Big Horn Litig., Gingles Litig., Town of Babylon Litig.), 1985 (Armour Litig.), 1986 (Armstrong v. Allain Litig.), 1987 (Clark Litig., Mehfoud Litig., City of Philadelphia Litig., Town of Hempstead Litig., Town of Holyoke Litig., and Wamser Litig.), 1988 (City of Dallas Litig. and Charleston County Litig.), 1989 (Magnolia Bar Association Litig. and City Dallas Litig.), 1990 (Southern Christian Leadership Litig., Metro Dade County Litig., Magnolia Bar Association Litig., and Charleston County Litig.), 1991 (Magnolia Bar Association Litig. and City of Philadelphia Litig.), 1992 (Charleston County Litig. and Alamosa County Litig.) 1995 (City of LaGrange Litig.), 2000

(Charleston County Litig.), 2002 (Bone Shirt Litig. and St. Bernard Parish School Board Litig.).

409. *See* Master Lawsuit List.

410. *See* Southern Christian Leadership Litig., Jordan Litig., County of Big Horn Litig., Gingles Litig., Armstrong v. Allain Litig., Clark Litig., Mehfoud Litig., Magnolia Bar Association Litig., City of LaGrange Litig., Bone Shirt Litig., St. Bernard Parish School Board Litig.

411. *See, e.g.*, Crenshaw County Litig., discussion at 649 F. Supp. 289, 295 (M.D. Ala. 1986) (finding that "white candidates have encouraged voting along racial lines in Calhoun, Lawrence, and Pickens county by appealing to racial prejudice."); Clark Litig., discussion at 777 F. Supp. 471, 1991 U.S. Dist. LEXIS 14322, *80 (M.D. La. 1991) ("She [an African American judicial candidate] also testified about the overt and covert racial appeals in both elections by candidates and the public [in 1983 and 1987 campaigns]."); Magnolia Bar Ass'n., 793 F. Supp. 1386, 1409-10 (S.D. Miss. 1992) ("Supreme court and other judicial campaigns in Mississippi have been characterized by overt and subtle racial appeals. For example, in the 1986 Supreme Court Central District, Place No. 2 election, avowed segregationist Barrett relied on overt racial appeals in his unsuccessful attempt to defeat black former Justice Anderson."); Martin v. Allain, 658 F. Supp. 1183, 1195 (S.D. Miss. 1987) ("Plaintiffs, however, presented proof of racial appeals . . . by Richard Barrett in his 1986 challenge of Mississippi Supreme Court Justice Reuben Anderson.").

412. *See* LULAC v. Clements Litig., discussion at 999 F.2d 831, 879 (5th Cir. 1993)(finding that a judicial candidate had been labeled a "Black Muslim" by his opponent); City of Dallas Litig., discussion at 734 F. Supp. 1317, 1339 (N.D. Tex. 1990)(finding in the 1972 Precinct 7 Constable's race, the incumbent used ads describing his African-American opponent in this manner: "*A black man* (no qualifications of any kind)").

413. *See* Alamosa County Litig., discussion at 306 F. Supp. 2d 1016, 1025-26 (D. Colo. 2004)(identifying as a "subtle ethnic appeal" Marguerite Salazar's 1992 campaign for county commission in which "she ran as a designated Hispanic role model immediately after joining the Hispanic Leadership Institute").

414. *See* Bone Shirt Litig., discussion at 336 F. Supp. 2d 976, 1041 (D.S.D. 2004) (characterizing as a racial appeal the headline in the state's largest newspaper, trumpeting "HUNHOFF PICKS INDIAN WOMAN AS RUNNING MATE"); Armour Litig., discussion at 775 F. Supp. 1044, 1056 (N.D. Ohio 1991) ("[T]hroughout the [1985] primary race, the media focused on Starks' race, consistently describing him as the black candidate for Mayor."); Neal Litig., discussion at 689 F. Supp. 1426, 1431-32 (E.D. Va. 1988) (identifying a racial appeal in an editorial that identified two candidates as black and "urged voters not to vote on account of race, but rather on merit. However, the editorial also said that the race from District 3, involving Jack Green, 'is of great concern to many county residents' because Green could earn 'solid black support' to defeat the veteran incumbent. The editorial clearly favored the re-election of the 'more experienced' incumbents."). *But see* City of Norfolk Litig., discussion at 605 F. Supp. 377, 392 (D.C. Va. 1984) (deciding that news accounts discussing the race of candidates and the issue of black representation in the 1982 campaign were not racial appeals where court found that black candidates has raised the issue and no evidence the issues was used to appeal to racial prejudice of voters).

415. *See* Charleston County Litig., discussion at 316 F. Supp. 2d 268, 294-97 (D.S.C. 2003); Southern Christian Leadership Litig., discussion at 56 F.3d 1281, 1290 (11th Cir. 1995) ("One . . . subtle racial appeal was in the Democratic Party primary in 1982 which involved a newspaper ad run by a white candidate contrasting the pictures of the white candidate and Justice Adams [who is African American]."); LULAC v. Clements Litig., discussion at 999 F.2d 831, 879 (5th Cir. 1993); Mehfoud Litig., discussion at 702 F. Supp. 588, 595 (E.D. Va. 1988) (citing selective use by white candidate of flyer with black opponent's photograph, and failure to use similar photograph in campaign against a white candidate); Magnolia Bar Litig., discussion at 793 F. Supp. 1386, 1410 (S.D. Miss. 1992) (citing the white candidate's campaign flyers with pictures of African-American candidates used in judicial elections in 1989, 1990, 1991). *But see* Charleston County Litig., discussion at 316 F. Supp. 2d 268, 295 (D.S.C. 2003) (classifying as a racial appeal a campaign flyer from a race involving two white candidates that featured the photograph of an African-American elected official unassociated with either of the white candidates).

416. *See, e.g.* Red Clay School District Litig., discussion at 780 F. Supp. 221, 237 (D. Del. 1991) (concluding that the a newspaper article with accompanying photographs of black and white candidates was not a racial appeal because the "candidates [were] not referred to in any disparaging manner"); City of Jackson Litig., discussion at 683 F. Supp. 1515, 1534-35 (W.D. Tenn. 1988) (rejecting the argument that a newspaper's publishing of candidate photographs was a racial appeal).

417. City of Jackson Litig., discussion at 683 F. Supp. 1515, 1534-35 (W.D. Tenn. 1988); *see also* Red Clay School District Litig., discussion at 780 F. Supp. 221, 237 (D. Del. 1991) (finding no racial appeal where newspaper published pictures of the candidates, stating that race may be an issue in the 1985 election, and noting concerns expressed by sole black board member that the black vote might be split).

418. Charleston County Litig., discussion at 316 F. Supp. 2d 268, 294-97 (D.S.C. 2003) (finding that darkened photographs of African-American opponents were run by white candidates in their campaign materials in 1988, 1990, 1992); City of Philadelphia Litig., discussion at 824 F. Supp. 514, 537 (E.D. Pa. 1993) (finding that a white candidate's photograph had been darkened by her opponent and used in the opponent's campaign literature).

419. Charleston County Litig., discussion at 316 F. Supp. 2d 268, 294-97 (D.S.C. 2003).

420. City of Philadelphia Litig., discussion at 824 F. Supp. 514, 537 (E.D. Pa. 1993).

421. *Id.*

422. *See, e.g.*, City of Dallas Litig., 734 F. Supp. 1317, 1348 (N.D. Tex. 1990) (Noting that a white slating group warned of the "Mass Block Voting Tactics" in the black areas of South Dallas in 1970 and noting that "Folsom also distributed a leaflet charging that Weber was attempting to win the election with a 'massive black turnout,' and threatening that 'Garry Weber's South Dallas Machine is going to elect the next mayor' thanks to the efforts of 'professional black campaigners who will turn out unprecedented numbers of blacks voting for Weber.'"); Neal Litig., discussion at 689 F. Supp. 1426, 1431-32 (E.D. Va. 1988) (identifying a racial appeal in an editorial stating that the race from District 3, involving Jack Green, 'is of great

concern to many county residents' because Green could earn 'solid black support' to defeat the veteran incumbent.").

423. *See, e.g.*, Jeffers Litig., discussion at 730 F. Supp. 196, 212 (E.D. Ark. 1989) ("In the Mayor's race in Pine Bluff in 1975, for example, a supporter of a white candidate publicly warned that if white voters didn't turn out, there would be a black mayor.")

424. *See, e.g.*, Armour Litig., discussion at 775 F. Supp. 1044, 1056 (N.D. Ohio 1991) (finding that a black mayoral candidate's opponents emphasized that if the black candidate was elected, he would have a black cabinet, and that the police chief and fire chief would also be black).

425. *See, e.g.*, Bone Shirt Litig., discussion at 336 F. Supp. 2d 976, 1041 (D.S.D. 2004) ("During the 2002 primary election for Bennett County offices, Indians were accused of 'trying to take over the county politically, . . . [and] trying to take land back and put it in trust.'"); City of Philadelphia Litig., discussion at 824 F. Supp. 514, n.19 (E.D. Pa. 1993) ("In the 1983 mayoral election, Mayor Goode testified that his opponent, former Mayor Frank Rizzo, attempted to associate Mayor Goode with Jesse Jackson and Harold Washington, implying that Mayor Goode's candidacy was part of 'a movement by blacks to take over all across the country.'").

426. Armour Litig., discussion at 775 F. Supp. 1044, 1056 (N.D. Ohio 1991).

427. Bone Shirt Litig., discussion at 336 F. Supp. 2d 976, 1041 (D.S.D. 2004).

428. Jordan Litig., discussion at 604 F. Supp. 807, 814 (N.D. Miss. 1984) ("One campaign television commercial sponsored by the white candidate whose slogan was 'He's one of us' opened and closed with a view of Confederate monuments accompanied by this audio message: You know, there's something about Mississippi that outsiders will never, ever understand. The way we feel about our family and God, and the traditions that we have. There is a new Mississippi, a Mississippi of new jobs and new opportunity for all our citizens. [video pan of black factory workers] We welcome the new, but we must never, ever forget what has gone before. [video pan of Confederate monuments] We cannot forget a heritage that has been sacred through our generations.").

429. City of Holyoke Litig., discussion at 880 F. Supp. 911, 922 (D. Mass. 1995).

430. *Id.*

431. *Id.*

432. Charleston County Litig., discussion at 316 F. Supp. 2d 268, 296 (D.S.C. 2003).

433. *Id.*

434. *Id.*

435. *See, e.g.*, City of Dallas Litig., discussion at 734 F. Supp. 1317, 1368 (W.D. Tex. 1990) (counting as a racial appeal a 1989 newspaper column indicating that "a 'protest vote' for lawyer and 'civic gadfly,' Peter Lesser ... could lead to racial violence and white flight;" citing leaflet that accused opponent's campaign of "planting lies and rekindling old fires that could set Black/White relations back 20 years," and told black voters "No one, Black or White, will benefit from the hostilities between the Races [that] Garry Weber's hate-campaign is trying to force.").

436. [1] *See, e.g.*, Metro Dade County Litig., discussion at 805 F. Supp. 967, 981-82 (S.D. Fla. 1992) ("Recent elections demonstrate how successfully candidates and their supporters have engaged in a tactic of 'guilt by association' to defeat Black opponents. This tactic is utilized at the end of the campaign period, immediately

prior to election day. For example, voters have been told that Black candidates share common goals with Jesse Jackson or Nelson Mandela, two political figures strongly supported in the Black community, but opposed in some Cuban and Jewish communities.").

437. *See, e.g.*, City of Philadelphia Litig., discussion at 824 F. Supp. 514, 537 n.19 (E.D. Pa. 1993) ("Mayor Goode testified that in the 1987 mayoral primary election, Ed Rendell, Goode's opponent, attempted to associate Mayor Goode with Louis Farrakhan, a controversial Muslim leader."); City of Dallas Litig., 734 F. Supp. 1317, 1365 (W.D. Tex. 1990) ("On March 4, 1988, a Dallas Morning News article reported that a candidate for Criminal District Court No. 2, who was running against the African-American incumbent, mailed 77,000 fliers criticizing her opponent because he had changed his name to 'Baraka' after converting to Islam and becoming 'a follower of Malcolm X, the slain Islamic leader and black nationalist.'").

438. Wamser Litig., discussion at 679 F. Supp. 1513, 1527 (E.D. Mo. 1987) ("In his 1987 primary campaign, Roberts[, an African American,] made overt racial appeals to black voters. Roberts accused a white opponent -- Osborn -- of being backed by 'the Klan.'").

439. *See* Charleston County Litig., discussion at 316 F. Supp. 2d 268, 295 (D.S.C. 2003) (noting a campaign flyer from a 2000 race involving two white candidates that featured the darkened photograph of an African-American school board member from a separate district whose permission to use the picture had neither been sought nor granted); City of Philadelphia Litig., discussion at 824 F. Supp. 514, 537 n.20 (E.D. Pa. 1993) (noting campaign material distributed in an early 1990s state senate race between two white candidates where one candidate published a darkened picture of his white opponent side-by-side with the picture of Philadelphia's black mayor).

440. City of Dallas Litig., discussion at 734 F. Supp. 1317, 1339 n.34 (W.D. Tex. 1990) ("During the run-off election for two State Representative districts in June of 1970, the 'Democratic Committee for Responsible Government' attacked a white candidate... because he was 'running in South Dallas . . . as a team' with a black candidate -- and because he had raised money for voter registration activities, mostly in predominately Black or Latin-American neighborhoods."); *see also* Gingles Litig., discussion at 590 F. Supp. 345, 364 (E.D.N.C. 1984) (noting crude cartoons and pamphlets of the campaigns marked by outright white supremacy in the 1890's which featured white political opponents in the company of black political leaders and later appeals of same spirit).

441. Garza v. Los Angeles Litig., 756 F. Supp. 1298, 1341 (C.D. Cal. 1990) ("In the 1971 runoff for the 49th Assembly District, Richard Alatorre ran against William Brophy. Mr. Brophy distributed mailers which included Mr. Alatorre's photograph and alluded that Alatorre was sympathetic to undocumented aliens.").

442. City of Holyoke Litig., discussion at 880 F. Supp. 911, 922 (D. Mass. 1995) ("Proulx, for his part, attacked Dunn for not calling for a moratorium on all subsidized housing programs in Holyoke. Proulx explained that he supported such a moratorium with one important exception -- subsidized elderly housing. The vast majority of government subsidized elderly housing in Holyoke was occupied by white non-Hispanic senior citizens."); Butts v. NYC Litig., 614 F. Supp. 1527, 1531 (S.D.N.Y. 1985) ("Badillo's opponents distributed literature misrepresenting or

emphasizing Badillo's position on issues said to have racial connotations, such as scatter site subsidized housing.").

443. Town of Hempstead Litig., discussion at 956 F. Supp. 326, 342-43 (E.D.N.Y. 1997) ("In a late 1970s campaign for a State Senate seat from an Assembly District within the Town, the incumbent Republican appealed to the fears of Town residents that black students from Queens would be bused to schools in the Town. The campaign literature used pictures of black children in school buses to convey the message that voting for the Democratic opponent would result in such busing."); City of Dallas Litig., discussion at 734 F. Supp. 1317, n.64 (W.D. Tex. 1990)("In Place 9 [city council elections in 1976], Jesse Price campaigned against Bill Blackburn on a platform that included opposition to busing for school desegregation -- and opposition to any court order requiring busing -- saying he intended to 'hang Blackburn's stand on busing around his neck.'").

444. Town of Hempstead Litig., discussion at 956 F. Supp. 326, 342-43 (E.D.N.Y. 1997); City of Holyoke Litig., discussion at 880 F. Supp. 911, 922 (D. Mass. 1995) ("Dunn's campaign literature featured the slogan 'It takes guts,' coupled with a teach the 'Spanish' English theme as an answer to increasing crime and vandalism").

445. Town of Hempstead Litig., discussion at 956 F. Supp. 326, 342-43 (E.D.N.Y. 1997).

446. City of LaGrange Litig., discussion at 969 F. Supp. 749, 777 (N.D. Ga. 1997) ("[P]ublic debate about the consolidation of the local schools was marked by racial appeals and arguments.").

447. City of Greenwood Litig., discussion at 599 F. Supp. 397, 403 (N.D. Miss. 1984).

448. City of Norfolk Litig., discussion at 605 F. Supp. 377, 392 (E.D. Va. 1984); City of St. Louis Litig., discussion at 896 F. Supp. 929, 943 (E.D. Mo. 1995), discussion at Red Clay School District Litig., discussion at 780 F. Supp. 221, 237-38 (D. Del. 1991).

449. City of Norfolk Litig., discussion at 605 F. Supp. 377, 392 (E.D. Va. 1984).

450. City of St. Louis Litig., discussion at 896 F. Supp. 929, 943 (E.D. Mo. 1995).

451. Red Clay School District Litig., discussion at 780 F. Supp. 221, 237-38 (D. Del. 1991).

452. City of Austin Litig., discussion at 871 F.2d 529, 534 (5th Cir. 1989) (noting the lower court's dismissal of "appellants' contention that subliminal racial appeals accompanied the voters' rejection in 1985 of an amendment proposing single-member districts.").

453. County of Big Horn Litig., discussion at 647 F. Supp. 1002, 1017-18 (D. Mont. 1986) ("Unlike plaintiffs, this court does not consider every discussion of or question about the taxation issue to be a racial campaign appeal.").

454. Bone Shirt Litig., discussion at 336 F. Supp. 2d 976, 1041 (D.S.D. 2004) ("Media outlets across the state ran numerous articles about alleged voter fraud prior to the general election. None of the allegations were actually proved to be true. Bennett County's local newspaper ran a large, front page headline announcing, 'LOCAL VOTER FRAUD LOOKED AT BY FBI,' despite the fact that no fraudulent activity was alleged to have occurred in Bennett County. Similar voter fraud allegations made the headlines in 1978.")(internal citations omitted).

455. City of Dallas Litig., 734 F. Supp. 1317, 1368 (W.D. Tex. 1990)

456. Jeffers Litig., discussion at 730 F. Supp. 196, 212-13 (E.D. Ark. 1989).
457. *Id.*
458. Garza v. Los Angeles Litig., discussion at 756 F. Supp. 1298, 1341 (C.D. Ca. 1990).
459. Jeffers Litig., discussion at 730 F. Supp. 196, 212 (E.D. Ark. 1989)("[A]t a public rally [a white candidate running against a black candidate] used profanity and a racial epithet -- not in his actual speech, to be sure, but in open conversation").
460. St. Bernard Parish School Board Litig., discussion at No. CIV.A. 02-2209, 2002 U.S. Dist. LEXIS 16540, *33 -34 (E.D. La. Aug. 26, 2002).
461. City of Dallas Litig., discussion at 734 F. Supp. 1317, 1339 (W.D. Tex. 1990).
462. *Id.*
463. Neal Litig., discussion at 689 F. Supp. 1426, 1432-33 (E.D. Va. 1988).
464. Wamser Litig., discussion at 679 F. Supp. 1513, 1527 (E.D. Mo. 1987).
465. LULAC v. Clements Litig., discussion at 999 F.2d 831, 879 (5th Cir. 1993)(en banc)("Nothing in the district court's opinion indicates that these racial appeals were anything more than isolated incidents."); City of Springfield 658 F. Supp. 1015, 1032 (C.D. Ill. 1987)(noting racial slur directing at black candidate at luncheon meeting in 1982 and stating that this "single occurrence cannot support a claim that political campaigns in Springfield are carried out through subtle or overt racial appeals."); Milwaukee NAACP Litig., discussion at 935 F. Supp. 1419, 1433 (E.D. Wis. 1996)("While the plaintiffs insist that this factor supports the inference of vote dilution, they are able to point to only one judicial election which appears to have involved racial appeals: the 1996 general election between Judge Stamper and Robert Crawford. Assuming that the Stamper/Crawford election did, in fact, involve hostile racial conduct, one election in the past 25 years is hardly enough to prove a pattern.").
466. Alamosa County Litig., discussion at 306 F. Supp. 2d 1016, 1025-26 (D. Colo. 2004)(noting ethnic appeals only by minority candidates who subsequently lost their elections); Southern Christian Leadership Litig., discussion at 56 F.3d 1281, 1290 (11th Cir. 1995)(finding that appeals were "ineffective" as targeted black candidates won their races); LULAC v. Clements Litig., discussion at 999 F.2d 831, 879 (5th Cir. 1993)(en banc)("In the only judicial election affected by a racial appeal, Judge Baraka, the black candidate, won both the Republican primary and the general election, winning a majority of the white vote in both elections.").
467. Alamosa County Litig., discussion at 306 F. Supp. 2d 1016, 1025-26 (D. Colo. 2004).
468. Liberty County Litig., discussion at 957 F. Supp. 1522, 1565 (N.D. Fla. 1997); City of Chicago Litig., discussion at 969 F. Supp. 1359, 1449 (N.D. Ill. 1997); Town of Babylon Litig., 914 F. Supp. 843, 889 (E.D.N.Y. 1996); Sanchez-Colorado Litig., discussion at 861 F. Supp.1516, 1529 (D. Colo. 1994); El Paso Independent School District, discussion at 591 F. Supp. 802, 810 (W.D. Tex. 1984); City of Columbia Litig., 850 F. Supp. 404, 424 (D.S.C. 1993); Chattanooga Litig., discussion at 722 F. Supp. 380, 396 (E.D. Tenn. 1989); City of Boston Litig., discussion at 609 F. Supp. 739, 744-45 (D. Mass. 1985).
469. El Paso Independent School District, 591 F. Supp. 802, 810 (W.D. Tex. 1984)("The next factor to be considered is whether political campaigns for the office of trustee have been characterized by overt or subtle racial appeals. Mrs. Maxine Silva, a candidate for trustee in the 1948 school board election, testified that

during her campaign she received telephone calls in which she was accused of being a 'wet-back,' and subjected to other ethnic slurs. The Court accepts the testimony of Mrs. Silva, and finds it to be quite credible. It was her further testimony, however, that times have changed, and that the same atmosphere does not exist today. In fact, Mrs. Silva is again a candidate for trustee in the 1984 school board election.").

470. Town of Babylon Litig., discussion at 914 F. Supp. 843, 889 (E.D.N.Y. 1996)("The African-American candidates that were the targets of these racial appeals lost. While deplorable, these racial appeals occurred ten years ago, and plaintiffs presented no evidence as to more recent racial appeals.").

471. City of Columbia Litig., discussion at 850 F. Supp. 404, 424 (D.S.C. 1993) ("the court finds that the racial harmony exhibited in the more recent campaigns is more indicative of the present-day political climate within the City. Accordingly, these two instances in which racial appeals were made are, by modern standards, rather isolated incidents and are not indicative of current attitudes."); *see also* City of Boston Litig., discussion at 609 F. Supp. 739, 745 (D. Mass. 1985) ("Other than an incident of verbal intimidation directed at a campaign worker in 1983, the record in this case contains no indication that the use of racial tactics has been a part of the City's elections since 1977. There was, in fact, testimony that the theme of racial harmony played a major role in the campaigns of some candidates in the 1983 elections.").

472. Charleston County Litig., discussion at 316 F. Supp. 2d 268, 304 (D.S.C. 2004).

473. Magnolia Bar Association Litig., discussion at 793 F. Supp. 1386, 1410 (S.D. Miss. 1992).

474. SENATE REPORT at 28-30.

475. *Id.*

476. *See* Master Lawsuit List.

477. *See, e.g.*, Sanchez-Colorado Litig. (CO), discussion at 97 F.3d 1303, 1319 (10th Cir. 1996) (noting that no Hispanic candidate had won election to state legislature from the district since 1940); Jefferson Parish I Litig. (LA), 926 F.2d 487 (5th Cir. 1991) (discussing expert's analysis of the 20 elections in which blacks have sought office in Jefferson Parish since 1980).

478. *See, e.g.*, City of Santa Maria Litig. (CA), discussion at 160 F.3d 543, 548 (9th Cir. 1998) (noting that "[i]t was well-known throughout Santa Maria that the district court was awaiting the results of that election. Days before the election, Maldonado told a local newspaper that his victory would prove 'Santa Maria is not racist,' " and concluding that "[p]laintiffs have raised a triable issue of fact in whether the 1994 city council election was representative of typical voting behavior in Santa Maria"); Chickasaw County II Litig., discussion at No. CIV.A. 1:92CV142-JAD, 1997 WL 33426761, at *4 (N.D. Miss. Oct. 28, 1997) (finding the election of black candidate to constable an anomaly where he "won the election by only 8 votes and his prestige was heightened by the fact that he is an ex-pro athlete. Moreover, this election occurred during the pendency of this lawsuit"); Clark Litig., discussion at 725 F. Supp. 285, 299 (M.D. La. 1988) (discussing Judge Pitcher, who "was elected in East Baton Rouge where this litigation is pending and after this litigation commenced. While the term 'aberration,' used by one witness to describe Judge Pitcher's victory, is too strong, it is clear that the election must be considered as one under unusual circumstances"); City of Springfield Litig., discussion at 658 F. Supp. 1015, 1031

(C.D. Ill. 1987) (noting that "[s]ince this suit was filed, Candice Trees, a black woman, was elected Clerk of the Circuit Court of Sangamon County in a county-wide general election in November of 1986," and "find[ing] that the majority citizens in power sought to evade Section 2 'by manipulating the election of a "safe" minority candidate' to an office that has no policymaking power" because the "result is sudden and aberrant and logically can be attributed primarily to the concern generated by this litigation within the power centers of the City of Springfield") (citation omitted).

479. *See, e.g.*, Albany County Litig., discussion at No. 03-CV-502, 2003 WL 21524820, at *11 (N.D.N.Y. July 7, 2003) (noting that "[s]ince the County was incorporated in 1788, no minority has ever been elected to a County-wide office"); Mehfoud Litig., discussion at 702 F. Supp. 588, 590 (E.D. Va. 1988) (noting that "[n]o black has ever been elected to the Henrico Board of Supervisors. Prior to 1979 no black had ever run for the position, and since that date there have been three black candidates . . . All three were defeated. In addition, as of the date of the trial in this case, no black had ever been appointed to the Henrico County School Board"); Seastrunk Litig., discussion at 772 F.2d 143, 153 (5th Cir. 1985) (observing that "no black had ever held office of any sort in the Parish"); City of Jackson Litig., discussion at 683 F. Supp. 1515, 1535 (W.D. Tenn. 1988) (stating that of the Senate Factors, "perhaps the most significant in Jackson is the fact that no black candidate has ever been elected to, or served on, the City Commission" and pointing out that "[a] politically cohesive, geographically compact minority which exceeds 30% of the population of the City has been unable for over seventy years to have a member of the minority serve upon the governing authority of Jackson").

480. *See, e.g.*, African-American Voting Rights LDF Litig., discussion at 994 F. Supp. 1105, 1125 (E.D. Mo. 1997) (finding that "[t]he seventh factor also weighs in defendants' favor because African-Americans have been generally successful in reaching the bench in the jurisdictions in question; and, to whatever extent it is relevant, African-Americans have also been successful in reaching nonjudicial public office in Missouri of late"); Little Rock Litig., discussion at 831 F. Supp. 1453, 1460 (E.D. Ark. 1993) (noting that "[b]lack candidates won ten of the twenty-five races in which one or more blacks participated" for "the position of Little Rock City Board of Directors from 1962 to 1992"); Magnolia Bar Association Litig., discussion at 793 F. Supp. 1386, 1410 (S.D. Miss. 1992) (finding that "blacks have enjoyed considerable electoral success in Mississippi" from facts that "two blacks. . . have been elected to the Mississippi Supreme Court," that "United States Congressman Mike Espy . . . is black [and that] numerous blacks have been elected to judicial offices and non-judicial offices throughout" the state).

481. *See* 42 U.S.C. § 1973(b) (2005) (providing that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population").

482. *See, e.g.*, Old Person Litig. (MT), discussion at 312 F.3d 1036, 1048 (9th Cir. 2002) (finding that the Voting Rights Act does not "require any precise mathematical calculation of percentages of success in election," suggesting that "[s]uch calculations may be misleading or give undue weight to what is only one of many factors" and that "[w]hat is important is that the district court consider the success in elections of the protected class," and concluding that "neither the statute, nor the Senate report pertinent to its interpretation, nor the Supreme Court's teachings in *Gingles* or *De*

Grandy require any particular form for the district court's assessment of election success"); Cincinnati Litig., discussion at No. C-1-92-278, 1993 WL 761489, at *24 (S.D. Ohio July 8, 1993) (noting minority successes fall short of proportional representation and finding "there is no constitutional or statutory right to proportional representation"); Terrazas Litig., discussion at 581 F. Supp. 1329, 1355-56 (N.D. Tex. 1984) (observing that "[o]ne would expect greater hispanic representation for a population group of its size," but concluding that there are "limits . . . to the probative value of this inference. A lack of proportional representation has no independent constitutional or statutory significance.").

483. *See, e.g.*, Bridgeport Litig., discussion at Civ. No. 3:93CV1476(PCD), 1993 WL 742750 at *3, (D. Conn. Oct. 27, 1993) (noting discrepancy between percentages of voting-age populations of blacks and Hispanics, roughly twenty-two percent for each, and election to thirteen and sixteen percent, respectively, of city-wide offices, lowered if ceremonial and uncontested offices are removed); Operation Push Litig., discussion at 674 F. Supp. 1245, 1265 (N.D. Miss. 1987) (observing that "Mississippi has some 521 black elected officials, including one State Supreme Court Justice, one U.S. Congressman, and two State Senators. On the whole, these 521 black officials as of January 1986 represented approximately 9.9 percent of the total number of elected officials--approximately 5,278 in all. The black population of Mississippi is approximately 35 percent of the total population. Most of these black officials were elected from black majority districts"); Jordan Litig., discussion at 604 F. Supp. 807, 812 (N.D. Miss. 1984) (noting that "[b]lacks hold less than ten percent of all elective offices in Mississippi, though they constitute 35% of the state's population and a majority of the population of 22 counties); Major Litig., discussion at 574 F. Supp. 325, 351, 341 (E.D. La. 1983) (describing a fifteen percent success rate for black candidates at the polls as "substantially lower than might be anticipated" given the parish's fifty-five percent black population, and also noting that "[n]otwithstanding a black population of 29.4%, only 7% of Louisiana's elected officials are black") (citations omitted).

484. *See, e.g.*, Suffolk County Litig., discussion at 268 F. Supp. 2d 243, 266 (E.D.N.Y. 2003) (finding that Factor 7 "favors the defendants" where "there is one Hispanic legislator in Suffolk County which is 6% of the legislators" and "the percentage of Hispanic voting age citizens in Suffolk County is 6.67%"); City of Rome Litig. (GA), discussion at 127 F.3d 1355, 1381 (11th Cir. 1997) (noting that "[b]lack preferred candidates . . . filled 45% (22/49) of the positions available in the races in which they ran [which] is a higher percentage of positions filled than the percentage of Rome's population which is black").

485. *See* Southern Christian Leadership Litig., discussion at 785 F. Supp. 1469, 1477 (M.D. Ala. 1992) (stating that "strict proportionality between blacks and whites eligible for election does not preclude a finding that blacks have not been able substantially to influence elections," noting that Justice Brennan's direction in *Gingles* to "look beyond the single question of the degree of success of black candidates is particularly required where the minority candidate pool is so small").

486. *See, e.g.*, City of Bridgeport Litig., Civ. No. 3:93CV1476(PCD), 1993 WL 742750 at *3, (D. Conn. Oct. 27, 1993) (stating that "[u]nderticket offices are often filled on the coattails of the mayoral candidate and election of minorities so such offices do not clearly reflect the ability of minorities to elect their choices").

487. *See, e.g.*, Butts v. NYC Litig. (NY), 779 F.2d 141, 150 (2d Cir. 1985) (disapproving district court's "decision to disvalue the electoral success that minorities have had in New York City simply because these victories did not involve the City's three top offices").

488. *See, e.g.*, Meza Litig., discussion at 322 F. Supp. 2d 52, 72 (D. Mass. 2004) (acknowledging "a number of unsuccessful campaigns by Latino candidates in [the] Chelsea" portion of the 2d Suffolk District in a lawsuit challenging the redistricting of State *House* districts, but finding that "the success of the Barrios 2002 *senate* campaign in the relevant portions of the 2d Suffolk District suggests that attractive Hispanic candidates with well-run campaigns are currently quite competitive within the Enacted Plan's configuration of the 2d Suffolk District") (emphasis added).

489. *See, e.g.*, NAACP v. Fordice Litig. (MS), 252 F.3d 361, 370 (5th Cir. 2001) (noting that "exogenous elections are less probative than elections for the particular office at issue," but also asserting a "critical evidentiary reality that the exogenous character of . . . elections does not render them nonprobative") (citation omitted); Lafayette County Litig., 20 F. Supp. 2d 996 (N.D. Miss. 1998) (finding that "[w]hile blacks have enjoyed somewhat better success running for other county offices such as constable and board of education members, those exogenous elections are not as probative as the supervisory elections at issue here").

490. *See, e.g.*, Smith-Crittenden County Litig., discussion at 687 F. Supp. 1310, 1317 (E.D. Ark. 1988) (finding non-persuasive "evidence of some success by black candidates in school-board elections or other local races, because the electoral structure at issue here has no effect on these candidates"); City of Jackson Litig., discussion at 683 F. Supp. 1515, 1535 (W.D. Tenn. 1988) (declining "to consider the election of a black candidate to the Madison County Commission as being relevant to an inquiry of whether black candidates have been elected to the Jackson City Commission, the only political subdivision which is the subject of this litigation" and noting that county commission "a different governing body, with many more commissioners than the City, elected from a different group of voters, and having different duties and responsibilities.").

491. *See, e.g.,* Sanchez-Colorado Litig. (CO), discussion at 97 F.3d 1303, 1324 (10th Cir. 1996) (finding that "the record does not justify the district court's credit of the extent to which minorities have been elected to public office in HD 60" and stating that "exogenous elections-- those not involving the particular office at issue-- are less probative than elections involving the specific office that is the subject of the litigation") (quotation omitted); City of Carrollton NAACP Litig. (GA), discussion at 829 F.2d 1547, 1560 (11th Cir. 1987) (holding that "[t]he district court's reliance on municipal elections in Carroll County as proof of minority electoral success of a county electoral scheme is obviously misplaced. The political jurisdiction in question here is the county, not the cities of Villa Rica, Whitesburg, or Carrollton. The record plainly demonstrates the clear lack of minority electoral success in Carroll County.").

492. *See, e.g.*, Bone Shirt Litig., discussion at 336 F. Supp. 2d 976, 1042-43 (D.S.D. 2004) (finding that "electing fewer than thirty Indians in nearly 100 years in a majority-Indian county does not demonstrate a long history of Indians being elected to office. Several positions listed, moreover, were appointed, which detracts from their probative value"); Town of Hempstead Litig. (NY), discussion at 180 F.3d 476, 495 (2d Cir. 1999) (noting that "[a]lthough black Republicans have been appointed or elected to other offices in the surrounding area, and blacks have been appointed

to a number of positions in the Town, the fact remains that until the election of Curtis Fisher in 1993, no African-American was ever elected to the legislative body at issue in this case.") (quotation omitted); Texarkana Litig., discussion at 861 F. Supp. 756, 764 (W.D. Ark. 1992) (discounting as evidence of minority electoral success experience of plaintiff Londell Williams, who was appointed to the city board of directors in 1978, has never had a white opponent, and when he was opposed by a black candidate, was an incumbent."); Metro Dade County Litig., discussion at 805 F. Supp. 967, 982 (S.D. Fla. 1992) (commenting that since 1968 "no Black candidate preferred by Black voters has ever been elected to the County Commission without first being appointed to the Commission. Therefore, although Blacks have been elected to the County Commission, this seeming electoral success does not demonstrate that Blacks are able to elect their preferred representatives in the absence of special circumstances").

493. *See* Niagara Falls Litig. (NY), discussion at 65 F.3d 1002, 1021 (2d Cir. 1995) (finding Factor 7 unsatisfied, citing evidence that "blacks have held several elected positions on the Board of Education, they have been appointed to other local boards and commissions, and they have held positions on the Niagara Falls Democratic Committee"); City of Rome Litig. (GA), discussion at 127 F.3d 1355, 1384 n.18 (11th Cir. 1997) (finding subsequent electoral success of minority candidates first appointed to office probative of minority electoral success where evidence indicated that the appointed candidates had been able to develop sustained biracial coalitions" and have not simply maintained "their elected positions because of the sheer power of incumbency").

494. Town of Hempstead Litig. (NY), 180 F.3d 476, 495 (2d Cir. 1999).

495. *See, e.g.*, Red Clay School District Litig., discussion at 780 F. Supp. 221, 226 (D. Del. 1991) (noting that "[s]pecifically, in 1986, 1987 and 1989, no black candidates ran for a seat on the Red Clay Board and, as indicated *supra,* there are virtually no procedural restrictions in the system which would chill or frustrate black candidacy...The Court finds, therefore, that on the whole this Senate Factor does not weigh heavily in favor of the Plaintiffs."); McCarty Litig. (TX), discussion at 749 F.2d 1134, 1135 (5th Cir. 1984) (noting that "[o]nly two black candidates sought election to the Board of Trustees" and that "Black voters register and vote in Lamar County without hindrance, as each plaintiff testified, and there is no hindrance or obstacle to the candidacy of black persons for the Board").

496. *See* Red Clay School District Litig., discussion at 780 F. Supp. 221, 226 & n.2 (D. Del. 1991).

497. *See, e.g.*, Calhoun County Litig. (MS), discussion at 88 F.3d 1393, 1397-98 (5th Cir. 1996) (noting "[t]hat few or no black citizens have sought public office in the challenged electoral system does not preclude a claim of vote dilution . . . To hold otherwise would allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress has sought to remove.") (quoting Westwego Citizens For Better Government v. City of Westwego, 872 F.2d 1201, 1208 n. 9 (5th Cir.1989)); *see also* City of LaGrange Litig., discussion at 969 F. Supp. 749, 776 (N.D. Ga. 1997) (noting testimony from African-American candidates that they "would not even run for at-large City-Council seats because of the perception that such campaigns would not succeed" and finding that this "testimony comports with the strikingly low number of African-American candidates for the LaGrange City Council over the last one hundred years."); LULAC – Midland Litig., discussion

at 648 F. Supp. 596, 604 (W.D. Tex. 1986) (noting that "only three minority candidates have been elected" since formation of the school board, that "[f]ew minority members have dared to try to be elected," and that "*no* minority member has been elected" since the adoption of majority vote requirement); *cf.* Cousin Litig. (TN), discussion at 145 F.3d 818, 833 (6th Cir. 1998) (acknowledging that "no black has ever *run* for a county judgeship, a phenomenon surely attributable at least in part to the perception that it is very difficult for a black candidate to win a countywide election," but ultimately concluding that Factor 7 did not clearly weigh in plaintiffs' favor; finding the fact that "political success is difficult . . . does not mean it is unmanageable" and observing that three of the 27 black lawyers in the county already held "lawyer-qualified" offices).

498. Fort Bend Independent School District Litig. (TX), 89 F.3d 1205, 1215 (5th Cir. 1996) (crediting defendants' expert testimony that "a serious candidate must raise and expend considerable sums of money for his campaign" and that "the failure to do so renders the candidate non-serious and non-viable" and noting that plaintiffs' concession that "several minority candidates who lost were not 'serious' candidates either because they spent little money or were not supported by the minority community").

499. Blaine County Litig. (MT), discussion at 363 F.3d 897, 900, 914 (9th Cir. 2004) (noting that "no American Indian was ever elected to the Blaine County Commission under the at-large voting system" and also noting evidence "demonstrat[ing] that there is a pool of qualified American Indian candidates [who] also testified that they were currently unwilling to run for County Commissioner because white bloc voting made it impossible for an American Indian to succeed in an at-large election"); Gretna Litig., discussion at 636 F. Supp. 1113, 1122 (E.D. La. 1986) (commenting that "despite the strong candidacies of two qualified blacks on three separate occasions, no black has ever won an aldermanic election" and concluding that "[t]his evidence can be interpreted only as strong evidence of dilution").

500. *See* Bridgeport Litig., Civ. No. 3:93CV1476(PCD), 1993 U.S. Dist. Lexis 19741, 1993 WL 742750 (D. Conn. Oct. 27, 1993); 26 F.3d 271 (2d Cir. 1994) (noting that a black candidate won the mayoral primary, that an "influential" group called the Democratic Town Committee failed to endorse him, and that the candidate lost the general election in an overwhelmingly Democratic city).

501. Bone Shirt Litig., 336 F. Supp. 2d 976 (D.S.D. 2004), Charleston County, 365 F.3d 341 (4th Cir. 2004), Valladolid Litig. (CA), 976 F.2d 1293 (9th Cir. 1992); Romero Litig. (CA), 883 F.2d 1418 (9th Cir. 1989), Sanchez Bond Litig. (CO), 875 F.2d 1488 (10th Cir. 1989), Red Clay School District Litig. (DE), 116 F.3d 685 (3d Cir. 1997), County of Big Horn Litig., 647 F. Supp. 1002 (D. Mont. 1986).

502. Town of Hempstead Litig. (NY), 180 F.3d 476 (2d Cir. 1999); Cincinnati Litig., 40 F.3d 807 (6th Cir. 1994); Collins Litig. (VA), 883 F.3d 1232 (4th Cir. 1989); Collins Litig. (VA), 883 F.3d 1232 (4th Cir. 1989); Campos v. Baytown Litig. (TX), 840 F.2d 1540 (5th Cir. 1988); Rocha Litig., No. V-79-26, 1982 U.S. Dist. LEXIS 15164 (S.D. Tex. Aug. 23, 1982).

503. Cincinnati Litig. (OH), discussion at 40 F.3d 807, 812 (6th Cir. 1994) (quoting *Smith v. Clinton*.).

504. *Id.*

505. *See, e.g.*, Niagara Falls Litig. (NY), discussion at 65 F.3d 1002, 1022 (2d Cir. 1995) (describing Kimble, a candidate who "failed by only six votes to win one of the available nominations in the 1987 Democratic Party primary for the City Council. To be sure, Kimble only placed sixth in a contest of nine, and she received the least white-voter support of all the candidates. Nevertheless, she received more white-voter support than any other black candidate had before, and the crossover vote was nearly enough to secure a seat."); Bond Litig. (CO), discussion at 875 F.2d 1488, 1492-93 (10th Cir. 1989) (basing the conclusion that "Hispanics have the ability to elect commissioners under the at-large system currently in use in the county" in part on finding that "in two recent elections in which Hispanics had run for the county commission, the Hispanic candidate had lost by only 53 votes in one race and by 22 votes in the other."); Pomona Litig., discussion at 665 F. Supp. 853, 861 (C.D. Cal. 1987) (noting that although "no black has been elected to the Pomona City Council, in 1983 black candidate Willie White, despite the small size and dispersion of the black community in Pomona, lost by only 71 votes. His near miss, which could not have been achieved without substantial white cross-over support, demonstrates the potential electability of black candidates").

506. Charleston County Litig., discussion at 316 F. Supp. 2d at 278-79 & n 14 (noting that in the 1997 and 2000 elections, the minority candidates at issue received only 7% and 2.8% of the non-white vote).

507. *See* Johnson v. De Grandy 512 U.S. 997, 1020 (1994) (internal citation omitted).

508. *See, e.g.*, City of Cleveland Litig., 297 F. Supp. 2d 901, 908 (N.D. Miss. 2004) (finding no violation of Section 2 where, "while the three minority candidates in the above-denoted races lost, the record demonstrates that African-American candidates in many other City and county wide elections have prevailed. Three of the City's current aldermen, two of the at-large members on the City School Board, the Superintendent of the School Board, the Circuit Clerk, a Circuit Court Judge, a County Court Judge, and a majority of the County Election Commission are African-American, thus demonstrating that minority candidates are fully capable of winning City and county-wide elections, and that the City's minority citizens can fully participate in the political process"); NAACP v. Fordice Litig. (MS), discussion at 252 F.3d 361, 371 (5th Cir. 2001) (noting that minority candidate "Antwinette McCrary ('McCrary') won an at-large council position in the City of Quitman, a town with a 26.88% black voting age population" and concluding that "absent any other countervailing evidence in the record, we cannot say that [the court below] erred by relying on these elections to ultimately conclude that the electoral success of African-Americans in Mississippi militates against a finding of vote dilution"); City of Niagara Falls, discussion at 913 F. Supp. 722, 748-49 (W.D.N.Y 1994) (noting, in lawsuit finding neither Factor 7 met nor a violation of Section 2, that "African Americans have been elected to the Niagara Falls Board of Education in significant numbers . . . Elections to the Board are at-large and are non-partisan"); Stockton Litig. (CA), discussion at 956 F.2d 884, 891 (9th Cir. 1992) (noting that "[t]he statistical data before the district court reflected that while in past elections minorities had been elected, those elected were for the most part not elected by minorities. Of the three black representatives in office at the time Measure C was adopted, two were elected from districts that were overwhelmingly (more than 70 percent) white. Prior to 1971, when an at-large system was in effect, [H]ispanics had

been elected by white majorities, further indicating that the minority representation before Measure C existed because whites voted for minorities"); City of Boston Litig. (MA), discussion at 784 F.2d 409 (1st Cir. 1986) (finding that "the success of minority candidates and the influence of minority voters were not confined to the two districts having Black majorities," noting that "[t]wo Blacks were chosen by the City as a whole to be at-large members of the School Committee").

509. *See, e.g.*, Texarkana Litig., discussion at 861 F. Supp. 756, 764 (W.D. Ark. 1992) (concluding that the successful black candidate's "experiences do not support the notion that minority voters have the ability to elect representatives of their choice in at-large elections in Texarkana" where "[h]e has had the advantages of appointment and incumbency and the lack of a white opponent"); Columbus County Litig., 782 F. Supp. 1097, 1102 (E.D.N.C. 1991) (noting that in "three of the four elections in which the black candidate won, he was an incumbent, and in two of the four elections the black candidate had no white opponent" and that "[o]nly once, in 1980, has a non-incumbent black beaten a white opponent"); Clark Litig., discussion at 725 F. Supp. 285, 299 (M.D. La. 1988) (finding factor met and noting that "[i]n the case of Judge Collins, there were special circumstances because he was first appointed to a vacancy and then elected as an incumbent in 1978 in an election in which he had no opposition"); Terrell Litig., discussion at 565 F. Supp. 338, 347-48 (N.D. Tex. 1983) (finding that "a disproportionately low number of blacks have been elected as Terrell officials," that black official first appointed to the city council "now runs from an essentially all black residency district, and has never had a white opponent," and that "[t]here has never been more than one black representative on the five member city council").

510. *See, e.g.*, City of Rome Litig. (GA), discussion at 127 F.3d 1355, 1384 n.18 (11th Cir. 1997).

511. SENATE REPORT at 19 n.116.

512. *See* Master Lawsuit List.

513. One of these found a likelihood of success on the merits and granted a preliminary injunction, *see* Bridgeport Litig., Civ. No. 3:93CV1476(PCD), 1993 U.S. Dist. Lexis 19741 (D. Conn. Oct. 27, 1993), and another found a violation of the Fourteenth Amendment, and did not reach the merits of the Section 2 claim. *See* Terrell Litig., discussion at 565 F. Supp. 338, 343 (N. D. Tex. 1983). In addition, in one lawsuit, the appellate court reversed as clearly erroneous the district court's finding that plaintiffs failed to show a lack of responsiveness. *See* Marengo County Litig. (AL), 731 F.2d 1546, 1572 (11th Cir. 1984). Four appellate courts remanded cases for more particularized findings on responsiveness. *See* City of Chicago-Bonilla Litig. (IL), 141 F.3d 699, 703 (7th Cir. 1998); Westwego Litig. (LA), 872 F.2d 1201 (5th Cir. 1989); Liberty County Commissioners Litig. (FL), 865 F.2d 1566, 1582 (11th Cir. 1988); City of Norfolk Litig. (VA), 816 F.2d 932, 939 (4th Cir. 1987). Nine appellate courts criticized district court findings of affirmative responsiveness, finding that the lower court either gave the factor too much weight in the totality of the circumstances review or did not properly account for evidence that would weigh in finding unresponsiveness. *See* Calhoun County Litig. (MS), 88 F.3d 1393, 1400 (5th Cir. 1996); City of Chicago-Bonilla Litig. (IL), 141 F.3d 699, 703 (7th Cir. 1998); Blytheville School District Litig. (AR), 71 F.3d 1382, 1390 (8th Cir. 1995); Westwego Litig. (LA), 872 F.2d 1201 (5th Cir. 1989); Carrollton NAACP Litig. (GA), 829 F.2d 1547 (11th Cir. 1987); City of Norfolk Litig. (VA), 816 F.2d 932, 939 (4th Cir. 1987);

Sisseton Independent School District Litig. (SD), 804 F.2d 469, 477 (8th Cir. 1986); Escambia County Litig. (FL), 748 F.2d 1037, 1045 (5th Cir. 1984); Lubbock Litig. (TX), 727 F.2d 364, 381 (5th Cir. 1984).

514. Black Political Task Force Litig., 300 F. Supp. 2d 291, 313 (D. Mass. 2004); Albany County Litig., discussion at No. 03-CV-502, 2003 WL 21524820, at *13 (N.D.N.Y. July 7, 2003) (magistrate opinion); Charleston County Litig., 316 F. Supp. 2d 268, 297 (D.S.C. 2003); St. Bernard Parish School Board Litig., No. CIV.A. 02-2209, 2002 U.S. Dist. LEXIS 16540, at *27 (E.D. La. Aug. 26, 2002); Cousin Litig. (TN), 209 F.3d 835 (6th Cir. 2000); City of Chicago-Bonilla Litig. (IL), 141 F.3d 699, 703 (7th Cir. 1998); City of Lagrange Litig., 969 F. Supp. 749, 770 (N.D. GA 1997); Chickasaw County II Litig., Civ. No. 1:92CV142-JAD, 1997 U.S. Dist. LEXIS 22087 (N.D. Miss. Oct. 28, 1997); Calhoun County Litig. (MS), 88 F.3d 1393, 1400 (5th Cir. 1996); Blytheville School District Litig. (AR), 71 F.3d 1382 (8th Cir. 1995); LULAC - North East I.S.D. Litig., 903 F. Supp. 1071, 1087 (W.D. Texas 1995); Texarkana Litig., 861 F. Supp. 756, 765 (W.D. Ark. 1992); Westwego Litig. (LA), 946 F.2d 1109, 1122 (5th Cir. 1991); County Litig., 740 F. Supp. 417 (N.D. Miss. 1990); Jeffers Litig., 730 F. Supp. 196, 213 (E.D. Ark. 1989); Chattanooga Litig., 722 F. Supp. 380 (E.D. Tenn. 1989); Baytown Litig. (TX), 840 F.2d 1240, 1250-51 (5th Cir. 1988); Watsonville Litig. (CA), 863 F.2d 1407 (9th Cir. 1988); Monroe Smith-Crittenden County Litig., 687 F. Supp. 1310, 1318 (E.D. Ark. 1988); Kirksey v. Allain Litig., 658 F. Supp. 1183 (S.D. Miss. 1987); City of Springfield Litig., 658 F. Supp. 1015, 1032 (C.D. Ill. 1987); Sisseton I.S.D. Litig. (SD), 804 F.2d 469, 477 (8th Cir. 1986); Edgefield County Litig., 650 F. Supp. 1176, 1204 (D.S.C. 1986); County of Big Horn (Windy Boy) Litig., 647 F. Supp. 1002, 1020 (D. Mont. 1986); McCarty Litig. (TX), 749 F.2d 1134, 1137 (5th Cir. 1984); Ketchum Litig. (IL), 740 F.2d 1398, 1405 (7th Cir. 1984); Lubbock (TX), 727 F.2d 364, 381 (5th Cir. 1984); El Paso I.S.D. Litig., 591 F. Supp. 802, 811 (W.D. Tex. 1984); City of Greenwood Litig., 599 F. Supp. 397 (N.D. Miss 1984); Rybicki Litig., 574 F. Supp. 1147, 1151 (E.D. Ill. 1983); Rocha Litig., No. V-79-26, 1982 U.S. Dist. LEXIS 15164, at *18 (S.D. Tex. Aug. 23, 1982).

515. Charleston County Litig., discussion at 316 F. Supp. 2d 268, 297 (D.S.C. 2003) ("Although the Court received evidence on both factors, the United States has not put them at issue....The Court has considered all of the evidence related to the factors of tenuousness and responsiveness and finds that they do not materially contribute to the Court's conclusion.); Suffolk County Litig., discussion at 268 F. Supp. 2d 243, 266 (E.D.N.Y. 2003) ("The plaintiffs' only evidence is that the Committee of Reapportionment for the Suffolk County Legislature and the Legislature did not respond to the PRLDEF's letters and proposed Latino redistricting plan. This alone, does not show a significant lack of responsiveness. As such, this factor is neutral at best."); Montezuma-Cortez School District Litig., discussion at 7 F. Supp. 2d 1152, 1170 (D. Colo. 1998) (discussing evidence including the use of federal funds to implement programs that will be responsive to Indian student needs, though noting these programs have not been wholly successful, and considering the school board's negative response to an Indian community attempt to get bilingual and Native American education programs but not concluding whether the body was responsive); City of Holyoke Litig., discussion at 960 F. Supp. 515 (D. Mass. 1997) ("The significant lack of responsiveness of Holyoke officials to the needs of the Hispanic community, the eighth factor, was evidenced in the 1980's and is significantly diminishing in the 1990's, if not

disappearing."); Rural West I Litig., discussion at 836 F. Supp. 453, 463 (W.D. Tenn. 1993) (characterizing evidence as "equivocal. We do not, therefore, place much weight upon this factor."); Kent County Litig., discussion at 790 F. Supp. 738 (W.D. Mich. 1992) (noting evidence "raises serious concerns" about responsiveness but making no finding); City of Springfield, discussion at 658 F. Supp. 1015, 1032 (C.D. Ill. 1987) (considering testimony of county board member that he has difficulty getting city officials to listen to him regarding minority needs but making no finding because responsiveness is a "peripheral issue"); Chickasaw County I Litig., discussion at 705 F. Supp. 315, 321 (N.D. Miss. 1989) ("The only area in which plaintiffs have demonstrated a lack of responsiveness is in the employment of blacks in non-elected official positions in county and municipal government. The parties could point to only one black person employed in the government in Chickasaw County, outside of an elected or appointed public office; one black person was hired in 1988 in the tax assessor's office…Of those factors which plaintiffs have failed to prove, none weighs strongly against the plaintiffs' case...A general history of responsiveness, if established, would fail to rebut the evidence of a Section 2 violation…A benevolent monarchy would be nonetheless non-democratic."); Carrollton NAACP Litig. (GA), discussion at 829 F.2d 1547 (11th Cir. 1987) (remanding to the district court noting that "the lack of black teachers in the Carroll County school system was a factor bearing on unresponsiveness, and that this had caused the court deep concern, but, the court nonetheless ruled that the plaintiffs did not prove what steps defendants should have undertaken to increase the number of qualified black teachers. We do not understand that the plaintiffs must carry as part of their burden, establishing what measures the county should have taken to correct alleged unresponsiveness by school administrators."); County of Big Horn (Windy Boy) Litig., discussion at 647 F. Supp. 1002, 1020 (D. Mont. 1986) (finding officials were "without a doubt" more responsive to the Indian community than before the institution of the lawsuit, but noting that courts were often skeptical of steps taken during litigation); City of Boston Litig., discussion at 609 F. Supp. 739, 748 (D. Mass. 1985) (noting "the parties offered conflicting evidence concerning the extent to which Boston's government has attempted to alleviate minority problems" but also noting the factor only has "marginal significance"); Escambia County Litig. (FL), discussion at 748 F.2d 1037, 1045 (5th Cir. 1984) (Circuit noted that responsiveness was less important under Section 2 and stated "Although the court found that the commissioners had generally been responsive to the interests of black citizens, it noted two areas in which they had not: appointments of blacks to committees or boards and housing policy."); Haywood County Litig., discussion at 544 F. Supp. 1122 (W.D. Tenn. 1982) (crediting expert testimony which notes racial bloc voting may create a less responsive governing body but does not make a finding).

516. The lawsuits in covered jurisdictions were Marengo County Litig. (AL), 731 F.2d 1546, 1572 (11th Cir. 1984); Bone Shirt Litig., 336 F. Supp. 2d 976, 1043 (D.S.D. 2004); City of Dallas Litig., 734 F. Supp. 1317, 1406 (N.D. Tex 1990); Baldwin Board of Education Litig., 686 F. Supp. 1459, 1467 (M.D. Ala. 1988); Operation Push Litig., 674 F. Supp. 1245, 1265 (N.D. Miss. 1987); Terrell Litig., 565 F. Supp. 338, 343 (N.D. Tex. 1983); Rocha Litig., No. V-79-261982 U.S. Dist. LEXIS 15164, at *18 (S.D. Tex. Aug. 23, 1982); Mobile School Board Litig., 542 F. Supp. 1078 (S.D. Ala. 1982). The other lawsuits that found a significant lack of responsiveness were Town of Hempstead Litig. (NY), 180 F.3d 476, 487 (2d Cir.

1999); Red Clay School District Litig. (DE), 116 F.3d 685, 698 (3rd Cir. 1997); City of Holyoke Litig., 880 F. Supp. 911, 927 (D. Mass. 1995); Bridgeport Litig., Civ. No. 3:93CV1476(PCD), 1993 U.S. Dist. Lexis 19741 (D. Conn. Oct. 27, 1993); City of Philadelphia Litig., 824 F. Supp. 514, 538 (E.D. Penn. 1993); Metro Dade County, 805 F. Supp. 967, 987 (S.D. Fla. 1992); Columbus County Litig., 782 F. Supp. 1097, 1105 (E.D.N.C. 1991); Armour Litig., 775 F. Supp. 1044, 1058 (N.D. Ohio 1991); City of Starke Litig., 712 F. Supp. 1523, 1538 (M.D. Fla. 1989); Mehfoud Litig., 702 F. Supp. 588, 595 (E.D. Va. 1988); City of Jackson Litig., 683 F. Supp. 1515, 1535 (W.D. Tenn. 1988).

517. *See* Master Lawsuit List.

518. Exceptions to this include Holder v. Hall Litig. (GA), discussion at 117 F.3d 1222, 1227 (11th Cir. 1997) ("An official is responsive if he/she ensures that minorities are not excluded from municipal posts, evenhandedly allocates municipal services, and addresses minority complaints.") and Niagara Falls Litig. (NY), discussion at 65 F.3d 1002, 1023 (2d Cir. 1995) ("The "responsiveness" inquiry here involves review of tangible efforts of elected officials and the impact of these efforts on particular members of the community.").

519. Red Clay School District Litig. (DE), discussion at 116 F.3d 685, 698 (3d Cir. 1997); Town of Hempstead Litig. (AL), discussion at 956 F. Supp. 326, 344 (E.D.N.Y. 1997); City of Philadelphia Litig., discussion at 824 F. Supp. 514, 538 (E.D. Penn. 1993); Bridgeport Litig., discussion at Civ. No. 3:93CV1476(PCD), 1993 U.S. Dist. Lexis 19741, (D. Conn. Oct. 27, 1993); City of Jackson, TN Litig., discussion at 683 F. Supp. 1515, 1535 (W.D. Tenn 1988); Baldwin Board of Education Litig., discussion at 686 F. Supp. 1459, 1467 (M.D. Ala. 1988); Marengo County Litig. (AL), discussion at 731 F.2d 1546, 1572 (11th Cir. 1984); Terrell Litig., discussion at 565 F. Supp. 338, 343 (N.D. Tex. 1983); Mobile School Board Litig., discussion at 542 F. Supp. 1078 (S.D. Ala. 1982); *Cf.* City of Holyoke Litig., discussion at 960 F. Supp. 515 (D. Mass. 1997); Kent County Litig., discussion at 790 F. Supp. 738 (W.D. Mich. 1992) (noting that "serious concerns about responsiveness" raised by districting plan that heavily concentrated minority population into a single district and left them with little voice in others but making no express finding on factor 8); Carrollton NAACP Litig. (GA), discussion at 829 F.2d 1547, 1561 (11th Cir. 1987) ("[T]he lack of black teachers in the Carroll County school system was a factor bearing on unresponsiveness."); *But see* Fort Bend Independent School District Litig. (TX), discussion at 89 F.3d 1205 (5th Cir. 1996) (achieving unitary status weighs in favor of responsiveness); LULAC – North East I.S.D. Litig., discussion at 903 F. Supp. 1071, 1087 (W.D. Texas 1995) (flying a confederate flag and naming a school after an alleged racist does not prove lack of responsiveness); Monroe County Litig., discussion at 740 F. Supp. 417 (N.D. Miss. 1990) (switching voluntarily to randomized jury roles evidences responsiveness); Dallas County Commission Litig., discussion at 548 F. Supp. 794 (S.D. Ala. 1982) (considering improvements made after judgment against the town in segregation lawsuit to be evidence of responsiveness); *Cf. infra* note 531 (consent decrees do not establish a significant lack of responsiveness).

520. *See, e.g,* Town of Hempstead Litig. (NY), discussion at 180 F.3d 476, 487 (2d Cir. 1999) (considering employment discrimination judgment entered against the town); Red Clay School District Litig. (DE), discussion at 116 F.3d 685, 698 (3rd Cir. 1997) (noting seven years to comply with desegregation order); Bridgeport Litig.,

Discussion at Civ. No. 3:93CV1476(PCD), 1993 U.S. Dist. Lexis 19741, at * 16-17 (D. Conn. Oct. 27, 1993) (citing judgments in school desegregation and fire department employment lawsuits as showing a "disservice to minority interests."); City of Philadelphia Litig., discussion at 824 F. Supp. 514, 538 (E.D. Penn. 1993) (taking judicial notice of a judgment for plaintiff Latinos in an unlawful arrest lawsuit); Baldwin Board of Education Litig., 686 F. Supp. 1459, 1467 (M.D. Ala. 1988) (finding "[T]he Baldwin County Board of Education has been particularly unresponsive to the black citizens' concern about race relations in the county's schools, in particular concerns arising out of school desegregation and the apparent resulting displacement of black administrators."); Mobile School Board Litig., discussion at 542 F. Supp. 1078, 1095 (S.D. Ala. 1982) (readopting earlier findings that "as recently as 1970, another judge of this court was forced to threaten members of the Board of School Commissioners of Mobile County with $ 1,000 per day contempt fines for their refusal to comply with orders to desegregate the public schools."). *But cf.* Dallas County Board of Education Litig. (AL), discussion at 739 F.2d 1529, 1540 (11th Cir. 1984) (holding evidence of both a desegregation and a faculty hiring lawsuit not sufficient on record before appellate court to render district court's finding of responsiveness clearly erroneous); City of Greenwood Litig., discussion at 599 F. Supp. 397, 403 (N.D. Miss 1984) (considering a violation of Section 5 of the VRA to weigh against finding responsiveness, but did not suffice to establish factor eight).

521. *See, e.g.*, Red Clay School District Litig. (DE), discussion at 116 F.3d 685, 698 (3d Cir. 1997) (noting that despite a school desegregation plan one year after an adverse judgment, the town board took seven years to desegregate its schools, and then desegregated in the same year the state board of education insisted the racial composition to be corrected); Mobile School Board Litig., discussion at 542 F. Supp. 1078 (S.D. Ala. 1982) (considering that the School Board has only acted in response to numerous restraining and injunctive orders throughout more than a decade).

522. *See, e.g.*, City of Philadelphia Litig., discussion at 824 F. Supp. 514, 538 (E.D. Penn. 1993) (considering testimony of a former mayor and a city councilmen that the police and fire department discriminates against minorities); City of Jackson, (TN) Litig., discussion at 683 F. Supp. 1515, 1535 (W.D. Tenn 1988) ("The fact that ninety-one of 103 inadequate streets in 1978 were located in black neighborhoods, the fact that in 1955 and prior thereto the City of Jackson employed no black supervisors, black policemen, or black firemen, and the fact that no black has ever been appointed as head of any department make it painfully obvious that the City Commission has not always been responsive to the needs of black citizens."); Terrell Litig., discussion at 565 F. Supp. 338, 343 (N. D. Tex. 1983) (finding a law that disproportionately affects African-American neighborhoods in street paving decisions establishes a significant lack of responsiveness); *cf.* Sisseton Independent School District Litig. (SD), discussion at 804 F.2d 469, 477 (8th Cir. 1986) (remanding to district court for particularized findings on evidence of disproportionately low employment of minority teachers, failure to appoint minority voting registrars or establish polling places despite minority requests). *But see* Fort Bend Independent School District Litig. (TX), discussion at 89 F.3d 1205, 1209 (5th Cir. 1996) (citing anecdotal testimony of disparate treatment insufficient to show unresponsiveness).

523. *See, e.g.*, Town of Hempstead Litig. (NY), discussion at 180 F.3d 476, 487 (2d Cir. 1999) (noting placement of Ku Klux Klan insignia in town's fire department); *But see* LULAC - North East I.S.D. Litig., discussion at 903 F. Supp. 1071, 1087 (W.D. Texas 1995) (discounting plaintiff's assertions that a school athletic center had been named after a racist and that the Confederate flag was flown at the high school until 1993 because minority community did not bring these complaints to the attention of the board).

524. *See, e.g.*, Montezuma-Cortez School District Litig., discussion at 7 F. Supp. 2d 1152, 1170 (D. Colo. 1998) (discussing evidence only in terms of the School Board and efforts made by it in evaluating whether there was a significant lack of responsiveness); Aldasoro v. Kennerson Litig., discussion at 922 F. Supp. 339, 366 (S.D. Cal. 1995) (considering evidence regarding school policies in evaluating the responsiveness of defendant school district); Sisseton Independent School District Litig. (SD), discussion at 804 F.2d 469, 477 (8th Cir. 1986) (considering only evidence about the school system and school board in responsiveness inquiry); Dallas County Commission Litig. (AL), discussion at 739 F.2d 1529 (5th Cir. 1984) (noting the responsiveness inquiry rests on different evidence for the County Commission and for the School Board); *See also* Liberty County Commissioners Litig., discussion at 957 F. Supp. 1522, 1566 (N.D. Fla. 1997) (considering evidence of school board and county commission separately).

525. *See, e.g.*, Bone Shirt Litig., discussion at 336 F. Supp. 2d 976, 1043 (D.S.D. 2004) (looking at a wide range of issues in considering whether the state legislature was responsive including legislation about gaming, racial profiling, and legislation regarding negotiations between the state and the reservations); Niagara Falls Litig. (NY), discussion at 65 F.3d 1002, 1023 (2d Cir. 1995) (discussing a wide range of evidence in determining responsiveness including hiring practices by the city, a school integration program, seeking grants for increased community policing in the city, and the adoption of a fair housing law in determining whether the city was responsive.); City of Austin Litig. (TX), discussion at 871 F.2d 529, 534 (5th Cir. 1989) (discussing evidence regarding the number of parks in minority areas, mortgage loans to low-income families, shelter operations, job training, and medical services in making a responsiveness determination.); Baytown Litig., discussion at 696 F. Supp. 1128 (S.D. Tex. 1987) (considering evidence in the areas of employment, appointments to boards and commissions, housing rehabilitation, streets and drainage improvements).

526. *See e.g.*, Hamrick Litig., discussion at 155 F. Supp. 2d 1355, 1378 (N.D. Ga. 2001) ("Significantly, the city manager also testified that Gainesville's attorneys had advised the city that it lacked the power to issue a moratorium on new industry which may contribute to the environmental concerns of Ward 3 residents, and that certain of these areas were both geographically and legally beyond the scope of city control."); Jeffers Litig., discussion at 730 F. Supp. 196, 213 (E.D. Ark. 1989) (discounting evidence regarding poor quality roads in minority areas because the state legislature did not have jurisdiction over this issue).

527. Alamosa County Litig., discussion at 306 F. Supp. 2d 1016 (D. Colo. 2004); NAACP v. Fordice Litig. (MS), discussion at 252 F.3d 361 (5th Cir. 2001); Hamrick Litig., discussion at 155 F. Supp. 2d 1355, 1378 (N.D. Ga. 2001); City of LaGrange Litig., discussion at 969 F. Supp. 749, 770 (N.D. Ga. 1997); Holder v. Hall Litig. (GA), discussion at 117 F.3d 1222, 1227 (11th Cir. 1997); Harris v. Houston Litig.,

discussion at 10 F. Supp. 2d 721, 726 (S.D. Tex. 1997); Texarkana Litig., discussion at 861 F. Supp. 756, 765 (W.D. Ark. 1992); Westwego Litig., discussion at 1989 U.S. Dist. LEXIS 7298, at *14 (E.D. La. 1989); City of Woodville Litig. (MS), discussion at 881 F.2d 1327, 1335 (5th Cir. 1989); Chickasaw County I Litig., discussion at 705 F. Supp. 315, 321 (N.D. Miss. 1989); City of Starke Litig., discussion at 712 F. Supp. 1523, 1538 (M.D. Fla. 1989); Jeffers Litig., discussion at 730 F. Supp. 196, 213 (E.D. Ark. 1989); City of Norfolk Litig., discussion at 679 F. Supp. 557, 585 (E.D. Va. 1988); City of Woodville Litig., discussion at 688 F. Supp. 255, 257 (S.D. Miss. 1988); Houston v. Haley Litig. (MS), discussion at 859 F.2d 341, 347 (5th Cir. 1988); Baytown Litig. (TX), discussion at 840 F.2d 1240, 1250-51 (5th Cir. 1988); Pomona Litig., discussion at 665 F. Supp. 853, 862 (C.D. Cal. 1987); City of Fort Lauderdale Litig., discussion at 617 F. Supp. 1093, 1107 (S.D. Fla. 1985); City of Austin Litig., discussion at CIV. No. A-84-CA-189, 1985 WL 19986, at *12 (W.D. Texas Mar. 12, 1985); Chapman v. Nicholson Litig., discussion at 579 F. Supp. 1504, 1512 (N.D. Ala. 1984); Escambia County Litig. (FL), discussion at 748 F.2d 1037, 1045 (5th Cir. 1984); Dallas County Board of Education (AL), 739 F.2d 1529, 1540 (11th Cir. 1984); Opelika Litig. (AL), discussion at 748 F.2d 1473, 1476 (11th Cir. 1984); Terrell Litig., discussion at 565 F. Supp. 338, 343 (N. D. Tex. 1983); City of Greenwood Litig., discussion at 534 F. Supp. 1351 (N.D. Miss. 1982); *see also* Calhoun County Litig., discussion at 813 F. Supp. 1189, 1201 (N.D. Miss. 1993) (criticizing district court on this point but letting finding stand as not clearly erroneous); *infra* note 537 (nondiscrimination in the context of judicial elections); *cf.* Chapman v. Nicholson Litig., discussion at 579 F. Supp. 1504, 1512 (N.D. Ala. 1984) ("Evidence shows that the city had spent an appropriate amount of resources on the African American neighborhoods in Jasper.").

528. *See, e.g.*, Holder v. Hall Litig. (GA), discussion at 117 F.3d 1222, 1227 (11th Cir. 1997) (stating "municipal services are not allocated in a race based fashion"); Houston v. Haley Litig. (MS), discussion at 859 F.2d 341, 347 (5th Cir. 1988) (noting city services are available to everyone regardless of race); City of Woodville Litig., discussion at 688 F. Supp. 255, 257 (S.D. Miss. 1988) (considering services "are provided equally"); Pomona Litig., discussion at 665 F. Supp. 853, 862, 868 (C.D. Cal. 1987) (citing testimony that city "makes every effort to provide services equally to all citizens, regardless of race, color or creed").

529. *See, e.g.*, Chapman v. Nicholson Litig., discussion at 579 F. Supp. 1504, 1512 (N.D. Ala. 1984) ("Evidence shows that the city had spent an appropriate amount of resources on the African American neighborhoods in Jasper"); Chickasaw County II Litig., No. CIV.A. 1:92CV142-JAD, 1997 U.S. Dist. LEXIS 22087 (N.D. Miss. Oct. 28, 1997) (Responsiveness finding based in part on testimony of Supervisor John Moore that at least half of the roads paved in the last five years have been in predominantly black areas); Dallas County Board of Education Litig. (AL), discussion at 739 F.2d 1529, 1540 (11th Cir. 1984) (Found responsiveness in part because the "roads have been maintained on a non-discriminatory basis"); Hamrick Litig., discussion at 155 F. Supp. 2d 1355, 1378 (N.D. GA. 2001) (finding responsiveness based on city manager testimony that numerous programs which the city has adopted which directly benefit the black community, including a road repaving project); see also Calhoun County Litig. (MS), discussion at 88 F.3d 1393, 1400 (5th Cir. 1996) (discussing equality in road paving but noting that current

equality may not be afforded much weight under totality of the circumstances when there is a history of discrimination in road paving).

530. *See, e.g.*, Fort Bend Independent School District Litig. (TX), discussion at 89 F.3d 1205 (5th Cir. 1996) (defendant's evidence of achieving unitary status characterized responsiveness); *cf.* Dallas County Board of Education Litig. (AL), discussion at 739 F.2d 1529, 1540 (11th Cir. 1984) (declining to review district courts finding of responsiveness based on improvements made in a lawsuit involving school desegregation and faculty hiring because record not included on appeal); *see also* cases considering consent decree note, *see infra* note 531.

531. *See, e.g.*, Cincinnati Litig., discussion at No. C-1-92-278, 1993 U.S. Dist LEXIS 21009, at *36 (S.D. Ohio July 8, 1993) (taking notice of four consent decrees Cincinnati has entered into: the Cincinnati Metropolitan Housing Authority had entered into a consent decree that it had provided housing on a discriminatory basis prior to 1984, the Cincinnati Police Division operates under two consent decrees regarding racial discrimination lawsuits, and the Cincinnati Fire Department also operates under a consent decree stemming from a racial discrimination lawsuit. The court does not fault Cincinnati "for resorting to the Courts to settle disputes. This pattern of behavior on the part of the City to settle these lawsuits constitutes significant responsiveness to the issues of concern to the African American community."); Houston v. Haley Litig., discussion at 663 F. Supp. 346, 355 (N.D. Miss. 1987) (finding responsiveness in part on the provision of city services, noting the city was under a consent decree to pave certain roads, provide parks in black areas, and construct a swimming pool but noting the city manager testified the projects "were not entirely the result of the lawsuit"); City of Fort Lauderdale Litig., discussion at 617 F. Supp. 1093, 1107 (S.D. Fla. 1985) (considering the city responsive in part due to recruitment efforts for minority police and fire departments, despite its efforts being in part to a consent decree that mandated the city try to hire 11.25% minorities); City of Norfolk Litig., discussion at 605 F. Supp. 377, 394 (E.D. Va. 1984) (although city's hiring of police and firefighters was controlled by a consent decree, the city's efforts weighed in favor of responsiveness); Dallas County Board of Education Litig., discussion at 548 F. Supp. 794, 821 (S.D. Ala. 1982) (finding a school desegregation case where County entered into a consent decree and then, after the Department of Justice sought to have the decree judicially enforced, the county entered into a new consent decree "affirmatively shows, and the Court therefore finds, that the School Board's operation of the transportation system has been fair, without discrimination, and responsive to the needs of all students, both black and white.").

532. Monroe County Litig., 740 F. Supp. 417 (N.D. Miss. 1990).

533. Operation Push Litig., discussion at 674 F. Supp. 1245, 1265 (N.D. Miss. 1987) (finding unresponsiveness where officials did not conduct precinct registration, or appoint deputy registrars because it demonstrated a failure by the state to act to overcome past discrimination); Citizen Action Litig., discussion at Civ. No. N 84-431, 1984 U.S. Dist. Lexis 24869 (D. Conn. Sept. 27, 1984) (finding unresponsiveness because officials "have failed to utilize any of the available tools to increase registration."); Terrell Litig., discussion at 565 F. Supp. 338 (N. D. Tex. 1983) (finding unresponsiveness based partially on evidence of a history of unequal funding of white and black cemeteries, despite current equality of funding); *see also* Calhoun County Litig. (MS), 88 F.3d 1393, 1400 (5th Cir. 1996) (criticizing district

court finding of current non-discrimination in road pavement shows responsiveness when there is a past history of discrimination nevertheless affirming as not clearly erroneous).

534. *See e.g.*, Red Clay School District Litig., Civ. A. No. 89-230-LON, 1996 U.S. Dist. LEXIS 4747 (D. Del. Apr. 10, 1996) (evidence that the school board took more than seven years to desegregate showed unresponsiveness); Bridgeport Litig., Civ. No. 3:93CV1476(PCD), 1993 U.S. Dist. Lexis 19741 (D. Conn. Oct. 27, 1993) (evidence of lawsuits against the town established lack of responsiveness); Mobile School Board Litig., 542 F. Supp. 1078, 1106 (S.D. Ala. 1982) (readopting earlier findings that school board only reacted to numerous restraining and injunctive orders by the court in a desegregation lawsuit); *Cf.* Baldwin Board of Education Litig., discussion at 686 F. Supp. 1459, 1467 (M.D. Ala. 1988) ("The Baldwin County Board of Education has been particularly unresponsive to the black citizens' concern about race relations in the county's schools, in particular concerns arising out of school desegregation and the apparent resulting displacement of black administrators."); see also *supra* note 531. (discussing evidence of consent decrees). Also, courts generally discount evidence of responsiveness that occurs under either the threat of withdrawal of funds or legal compulsion. *See infra* note 556.

535. Red Clay School District Litig., Civ. A. No. 89-230-LON, 1996 U.S. Dist. LEXIS 4747 (D. Del. Apr. 10, 1996); Monroe County Litig., discussion at 740 F. Supp. 417 (N.D. Miss. 1990).

536. Cousin Litig. (TN), discussion at 145 F.3d 818, 833 (6th Cir. 1998); Mallory-Ohio Litig., 38 F. Supp. 2d 525, 543 (S.D. Ohio 1997); Bradley v. Work, 916 F. Supp 1446, 1467 (S.D. Ind. 1996); Milwaukee NAACP Litig., discussion at 935 F. Supp. 1419, 1433 (E.D. Wis. 1996); Lulac v. Clements Litig., discussion at 999 F.2d 831, 857-58 (5th Cir. 1993); Magnolia Bar Ass'n v. Lee, 793 F. Supp. 1386, 1410 (S.D. Miss. 1992); Kirksey v. Allain Litig., discussion at 658 F. Supp. 1183, 1195 (S.D. Miss. 1987); Chisom Litig., discussion at CIV. A. No. 86-4057, 1989 WL 106485, at *11 (E.D. La. Sept. 19, 1989). Some jurisdictions claimed to have crafted their systems for electing judges expressly to prevent judges from being too responsive, and they cited this goal to defend these systems from challenge under Section 2.

537. Cousin Litig., discussion at 145 F.3d 818, 833 (6th Cir. 1998); Mallory-Ohio Litig., discussion at 38 F. Supp. 2d 525, 543 (S. Ohio 1997); Bradley v. Work Litig., discussion at 916 F. Supp 1446, 1467 (S.D. Ind. 1996); Milwaukee NAACP Litig., discussion at 935 F. Supp. 1419, 1433 (E.D. Wis. 1996); *See also* Nipper Litig. (FL), discussion at 39 F.3d 1494 (11th Cir. 1994) (en banc) (holding that responsiveness is less important in the context of judicial elections but not resolving whether factor 8 was met).

538. Mallory-Ohio Litig., discussion at 38 F. Supp. 2d 525, 543-44 (S. Ohio 1997); Milwaukee NAACP Litig., discussion at 935 F. Supp. 1419, 1433 (E.D. Wis. 1996); Southern Christian Leadership Litig. (AL), discussion at 56 F.3d 1281, 1295 (11th Cir. 1995) (en banc); *see also* Kirksey v. Allain Litig., discussion at 658 F. Supp. 1183, 1195 (S.D. Miss. 1987) (discounting idea that more minority judges would improve the minority community's perception of the judicial system).

539. Bone Shirt Litig., discussion at 336 F. Supp. 2d 976, 1043 (D.S.D. 2004); France Litig., discussion at 71 F. Supp. 2d 317, 333 (S.D.N.Y. 1999); Montezuma-Cortez School District Litig., discussion at 7 F. Supp. 2d 1152, 1170 (D. Colo. 1998);

Rural West II Litig., discussion at 29 F. Supp. 2d 448, 459-60 (W.D. Tenn. 1998); Chickasaw County II Litig., discussion at No. CIV.A. 1:92CV142-JAD, 1997 U.S. Dist. LEXIS 22087 (N.D. Miss. Oct. 28, 1997); Town of Babylon Litig., discussion at 914 F. Supp. 843, 890 (E.D.N.Y. 1996); Sanchez-Colorado Litig. (CO), discussion at 97 F.3d 1303, 1325 (10th Cir. 1996); Calhoun County Litig. (MS), discussion at 88 F.3d 1393, 1400 (5th Cir. 1996); Niagara Falls Litig. (NY), discussion at 65 F.3d 1002, 1023 (2d Cir. 1995); Aldasoro v. Kennerson Litig., discussion at 922 F. Supp. 339, 366 (S.D. Cal. 1995); Rural West I Litig., discussion at 877 F. Supp. 1096 (W.D. Tenn. 1995); City of Columbia Litig., discussion at 850 F. Supp. 404, 425 (D.S.C. 1993); Cincinnati Litig., discussion at No. C-1-92-278, 1993 U.S. Dist LEXIS 21009, at *36 (S.D. Ohio July 8, 1993); Columbus County Litig., discussion at 782 F. Supp. 1097, 1105 (E.D.N.C. 1991); City of Dallas Litig., discussion at 734 F. Supp. 1317, 1406 (N.D. Tex 1990); City of Austin Litig. (NY), discussion at 871 F.2d 529, 534 (5th Cir. 1989); Monroe County Litig., discussion at 740 F. Supp. 417 (N.D. Miss. 1990); City of Starke Litig., discussion at 712 F. Supp. 1523, 1538 (M.D. Fla. 1989); Operation Push Litig., discussion at 674 F. Supp. 1245, 1265 (N.D. Miss. 1987); Baytown Litig., discussion at 696 F. Supp. 1128 (S.D. Tex. 1987); Edgefield County Litig., discussion at 650 F. Supp. 1176, 1204 (D.S.C. 1986); County of Big Horn (Windy Boy) Litig., discussion at 647 F. Supp. 1002, 1020 (D. Mont. 1986); Lubbock Litig. (TX), discussion at 727 F.2d 364, 381 (5th Cir. 1984); McCarty Litig. (FL), discussion at 749 F.2d 1134, 1137 (5th Cir. 1984); Dallas County Board of Education Litig. (AL), 739 F.2d 1529, 1540 (11th Cir. 1984); El Paso Independent School District Litig., discussion at 591 F. Supp. 802, 811 (W.D. Tex. 1984); Citizen Action Litig., discussion at Civ. No. N 84-431, 1984 U.S. Dist. Lexis 24869 (D. Conn. Sept. 27, 1984); Terrell Litig., discussion at 565 F. Supp. 338, 343 (N. D. Tex. 1983); Rocha Litig., discussion at No. V-79-26, 1982 U.S. Dist. LEXIS 15164, at *18 (S.D. Tex. Aug. 23, 1982); *Cf.* City of Norfolk Litig., discussion at 679 F. Supp. 557, 585 (E.D. Va. 1988) (finding on remand that a housing policy that displaced a disproportionate number of African-American families was "aimed at ensuring that public services were adequately provided" and "encouraging a higher quality of life, re-integrating the inner city area and providing more job opportunities;" that the new development racially inclusive, and thus that the policy was responsive.); Chapman v. Nicholson Litig., discussion at 579 F. Supp. 1504, 1512 (N.D. Ala. 1984) ("Evidence shows that the city had spent an appropriate amount of resources on the African American neighborhoods in Jasper. ").

540. Calhoun County Litig. (MS), discussion at 88 F.3d 1393, 1400 (5th Cir. 1996) ("[W]e offer no brightline here. We are content to note that paving roads left unpaved by years of discrimination and appointing a biracial redistricting commission do not reflect the comprehensive and systematic responsiveness to minority needs that is entitled to substantial weight in the totality of the circumstances"); City of Norfolk Litig. (VA), discussion at 816 F.2d 932, 939 (4th Cir. 1987) (remanding district court finding the East Ghent Housing policy was nondiscriminatory asking whether the policy was not responsive). Courts have also credited as responsive efforts to increase minority political participation. *See infra* note 577.

541. *See, e.g.*, Town of Hempstead Litig. (NY), discussion at 180 F.3d 476, 487 (2d Cir. 1999); Bridgeport Litig., discussion at Civ. No. 3:93CV1476(PCD), 1993 U.S. Dist. Lexis 19741 (D. Conn. Oct. 27, 1993).

542. *See, e.g.*, Niagara Falls Litig. (NY), discussion at 65 F.3d 1002, 1023 (2nd Cir. 1995); El Paso Independent School District Litig., discussion at 591 F. Supp. 802, 811 (W.D. Tex. 1984); *Cf.* Lubbock Litig. (TX), discussion at 727 F.2d 364, 381 (5th Cir. 1984) (criticizing the district court's finding of responsiveness and noting the affirmative action policy has "increased the number of minorities in public employment, but not necessarily in the best positions.").

543. Town of Hempstead Litig. (NY), discussion at 180 F.3d 476, 487 (2d Cir. 1999); City of Philadelphia Litig., discussion at 824 F. Supp. 514, 538 (E.D. Penn. 1993); Columbus County Litig., discussion at 782 F. Supp. 1097, 1105 (E.D.N.C. 1991); City of Dallas Litig., discussion at 734 F. Supp. 1317, 1406 (N.D. Tex 1990); City of Starke Litig., discussion at 712 F. Supp. 1523, 1538 (M.D. Fla. 1989); Chickasaw County I Litig., discussion at 705 F. Supp. 315, 321 (N.D. Miss. 1989) (considering only one black person employed in government, outside of an elected or appointed public office); City of Jackson, TN Litig., discussion at 683 F. Supp. 1515, 1535 (W.D. Tenn. 1988); Operation Push Litig., discussion at 674 F. Supp. 1245, 1265 (N.D. Miss. 1987); Carrollton NAACP Litig. (GA), discussion at 829 F.2d 1547 (11th Cir. 1987); Terrell Litig., discussion at 565 F. Supp. 338, 343 (N. D. Tex. 1983); Mobile School Board Litig., discussion at 542 F. Supp. 1078 (S.D. Ala. 1982); *Cf.* Escambia County Litig. (FL), discussion at 748 F.2d 1037, 1045 (11th Cir. 1984) (noting that "[A]lthough the court found that the commissioners had generally been responsive to the interests of black citizens, it noted two areas in which they had not: appointments of blacks to committees or boards and housing policy" but not resolving the question of responsiveness); *But see* LULAC-North East Independent School District Litig., discussion at 903 F. Supp. 1071, 1087 (W.D. Texas 1995) (considering failure to recruit minority teachers insufficient to show non-responsiveness); NAACP v. Fordice Litig. (MS), discussion at 252 F.3d 361 (5th Cir. 2001) (finding minorities making up less than 15% of entire Department of Transportation does not show unresponsiveness); City of Greenwood Litig., discussion at 599 F. Supp. 397 (N.D. Miss 1984) (stating low percentage of minorities appointed to boards does not establish unresponsiveness).

544. *See, e.g.*, Holder v. Hall Litig. (GA), discussion at 117 F.3d 1222, 1227 (11th Cir. 1997) (minorities hired); City of Chicago-Barnett Litig., discussion at 969 F. Supp. 1359, 1450 (N.D. Ill. 1997) (minorities "hold important and influential positions of power within the City's government," including appointive positions); Niagara Falls Litig., discussion at 913 F. Supp. 722, 749 (W.D.N.Y. 1994) (established affirmative action task force); City of Columbia Litig., discussion at 850 F. Supp. 404, 425 (D.S.C. 1993) (minorities "well represented" on boards); Calhoun County Litig., discussion at 813 F. Supp. 1189, 1201 (N.D. Miss. 1993) (minorities appointed); City of Austin Litig. (TX), discussion at 871 F.2d 529, 534 (5th Cir. 1989) (minorities hired and appointed); Houston v. Haley Litig. (MS), discussion at 859 F.2d 341, 347 (5th Cir. 1988) (minorities appointed); McCarty Litig. (TX), discussion at 749 F.2d 1134, 1137 (5th Cir. 1984) (recruitment attempts, minority appointments); City of Woodville Litig., discussion at 688 F. Supp. 255, 257 (S.D. Miss. 1988) (minorities appointed to commissions and hired as police officers); Houston v. Haley Litig., discussion at 663 F. Supp. 346 (N.D. Miss. 1987) (minority leadership on appointive boards); Baytown Litig., discussion at 696 F. Supp. 1128 (S.D. Tex. 1987) (minorities participate on boards and hired as city workers); Edgefield County Litig., discussion at 650 F. Supp. 1176, 1204 (D.S.C. 1986)

(minority teachers hired); County of Big Horn (Windy Boy) Litig., discussion at 647 F. Supp. 1002, 1020 (D. Mont. 1986) (minorities appointed); City of Fort Lauderdale Litig., discussion at 617 F. Supp. 1093, 1107 (S.D. Fla. 1985) ("intensive efforts" to hire minority police officers, even though under a consent decree); City of Norfolk Litig., discussion at 605 F. Supp. 377, 394 (E.D. Va. 1984) (minorities hired and appointed); City of Greenwood Litig., discussion at 534 F. Supp. 1351 (N.D. Miss. 1982) (minority appointments).

545. Montezuma-Cortez School District Litig., discussion at 7 F. Supp. 2d 1152, 1170 (D. Colo. 1998) (considering the lack of a bilingual education program despite minority requests, but not finding a lack of responsiveness); Aldasoro v. Kennerson Litig., discussion at 922 F. Supp. 339, 366 (S.D. Cal. 1995) ("Despite some deficiencies in the District's bilingual program in 1990-91, it is responsive today because it recruits teachers and while it has no bilingual stipend, it pays more than adjacent school districts that have a bilingual stipend); El Paso Independent School District Litig., discussion at 591 F. Supp. 802, 811 (W.D. Tex. 1984) (considering that El Paso County was a pioneer in bilingual education); Rybicki Litig., discussion at 574 F. Supp. 1082, 1122 (C.D. Ill. 1982) (noting the democratic party in Illinois "supported bilingual education, an issue of particular importance to Hispanics.") *Cf.* Montezuma-Cortez School District Litig., discussion at 7 F. Supp. 2d 1152, 1170 (D. Colo. 1998) (considering the absence of a bilingual education program as evidence of unresponsiveness but making no finding).

546. *See e.g.*, Black Political Task Force Litig., discussion at 300 F. Supp. 2d 291, 313 (D. Mass. 2004); Hamrick Litig., discussion at 155 F. Supp. 2d 1355, 1378 (N.D. GA. 2001); Town of Hempstead Litig. (NY), discussion at 180 F.3d 476, 487 (2d Cir. 1999); Montezuma-Cortez School District Litig., discussion at 7 F. Supp. 2d 1152, 1170 (D. Colo. 1998); Rural West II Litig., discussion at 29 F. Supp. 2d 448, 459-60 (W.D. Tenn. 1998); Chickasaw County II Litig., discussion at No. CIV.A. 1:92CV142-JAD, 1997 U.S. Dist. LEXIS 22087 (N.D. Miss. Oct. 28, 1997); City of LaGrange Litig., discussion at 969 F. Supp. 749, 770 (N.D. GA 1997); Liberty County Commissioners Litig., discussion at 957 F. Supp. 1522, 1566 (N.D. Fla. 1997); Holder v. Hall Litig. (GA), discussion at 117 F.3d 1222, 1227 (11th Cir. 1997); Calhoun County Litig. (MS), discussion at 88 F.3d 1393, 1400 (5th Cir. 1996); Town of Babylon Litig., discussion at 914 F. Supp. 843, 890 (E.D.N.Y. 1996); Aldasoro v. Kennerson Litig., discussion at 922 F. Supp. 339, 366 (S.D. Cal. 1995); Niagara Falls Litig. (NY), discussion at 65 F.3d 1002, 1023 (2nd Cir. 1995); City of Columbia Litig., discussion at 850 F. Supp. 404, 425 (D.S.C. 1993); City of Philadelphia Litig., discussion at 824 F. Supp. 514, 538 (E.D. Penn. 1993); Texarkana Litig., discussion at 861 F. Supp. 756, 765 (W.D. Ark. 1992); Monroe County Litig., discussion at 740 F. Supp. 417 (N.D. Miss. 1990); City of Dallas Litig., discussion at 734 F. Supp. 1317, 1406 (N.D. Tex 1990); City of Starke Litig., discussion at 712 F. Supp. 1523, 1538 (M.D. Fla. 1989); Jeffers Litig., discussion at 730 F. Supp. 196, 213 (E.D. Ark. 1989); Westwego Litig., discussion at CIV. A. NO. 84-5599, 1989 U.S. Dist. LEXIS 7298, at *14 (E.D. La. June 28, 1989); City of Austin Litig. (TX), discussion at 871 F.2d 529, 534 (5th Cir. 1989); City of Woodville Litig.(MS), discussion at 881 F.2d 1327, 1335 (5th Cir. 1989); City of Norfolk Litig., discussion at 679 F. Supp. 557, 585 (E.D. Va. 1988); City of Jackson, TN Litig., discussion at 683 F. Supp. 1515, 1535 (W.D. Tenn 1988); Springfield Park District Litig., discussion at 658 F. Supp. 1015, 1032 (C.D. Ill. 1987); Baytown Litig., discussion at 696 F. Supp. 1128 (S.D. Tex. 1987); Pomona

Litig., discussion at 665 F. Supp. 853, 862 (C.D. Cal. 1987); Houston v. Haley Litig. (MS), discussion at 859 F.2d 341, 347 (5th Cir. 1988); City of Fort Lauderdale Litig. (FL), discussion at 787 F.2d 1528, 1533 (11th Cir. 1986); Dallas County Board of Education Litig. (AL), discussion at 739 F.2d 1529, 1540 (11th Cir. 1984); Lubbock Litig. (TX), discussion at 727 F.2d 364, 381 (5th Cir. 1984); McCarty Litig. (TX), discussion at 749 F.2d 1134, 1137 (5th Cir. 1984); Escambia County Litig. (FL), discussion at 748 F.2d 1037, 1045 11th Cir. 1984); Opelika Litig. (AL), discussion at 748 F.2d 1473, 1476 (11th Cir. 1984); Chapman v. Nicholson Litig., discussion at 579 F. Supp. 1504, 1512 (N.D. Ala. 1984); City of Greenwood Litig., discussion at 599 F. Supp. 397 (N.D. Miss 1984); El Paso Independent School District Litig., discussion at 591 F. Supp. 802, 811 (W.D. Tex. 1984); Terrell Litig., discussion at 565 F. Supp. 338, 343 (N. D. Tex. 1983); Rocha Litig., discussion at No. V-79-26, 1982 U.S. Dist. LEXIS 15164, at *18 (S.D. Tex. Aug. 23, 1982).

547. *See supra* note 528.

548. *See supra* note 541.

549. *See, e.g.*, Calhoun County Litig. (MS), discussion at 88 F.3d 1393, 1400 (5th Cir. 1996) ("We offer no bright line here. We are content to note that paving roads left unpaved by years of discrimination and appointing a biracial redistricting commission do not reflect the comprehensive and systematic responsiveness to minority needs that is entitled to substantial weight in the totality-of-circumstances inquiry."); City of Dallas Litig., discussion at 734 F. Supp. 1317, 1406 (N.D. Tex 1990) (finding while city's spending of equal resources "may be enough to defeat a claim of current racial discrimination in the allocation of resources, it certainly does not show responsiveness to the particularized needs of the minority community -- which would often require unequal and higher expenditures of City resources in minority areas to remedy the effects of past discrimination.); *See also supra* note 530 (discussing road paving policies).

550. *See, e.g.*, Town of Hempstead Litig., discussion at 956 F. Supp. 326, 344 (E.D.N.Y. 1997); Columbus County Litig., discussion at 782 F. Supp. 1097, 1105 (E.D.N.C. 1991); *But see* City of LaGrange Litig., discussion at 969 F. Supp. 749, 770 (N.D. Ga. 1997) ("Several of Plaintiff's witnesses testified that the council had failed to address certain problems within the African-American community. However, these examples seemed to reflect the typical shortcomings of government entities rather than an institutional unresponsiveness to the minority community."); Texarkana Litig., discussion at 861 F. Supp. 756, 765 (W.D. Ark. 1992) ("In all of these issues…the Court believes the essential culprit is the same encountered by most cities in this country -- lack of sufficient money to address all of the city's problems."); Chapman v. Nicholson Litig., discussion at 579 F. Supp. 1504, 1512 (N.D. Ala. 1984) ("While there may be evidence of isolated incidents of specific requests not receiving immediate attention, said inattention appears more typical of a municipality being financially unable to immediately react to all its citizens' perceived needs, rather than being based on race.").

551. *See, e.g.*, City of Philadelphia Litig., discussion at 824 F. Supp. 514, 538 (E.D. Penn. 1993); *See also* City of Jackson Litig., discussion at 683 F. Supp. 1515, 1535 (W.D. Tenn 1988) (historical evidence).

552. *See, e.g.*, Terrell Litig., discussion at 565 F. Supp. 338, 343 (N. D. Tex. 1983); Rocha Litig., discussion at No. V-79-26, 1982 U.S. Dist. LEXIS 15164, at *18 (S.D. Tex. Aug. 23, 1982).

553. *See, e.g.*, Rural West II Litig., discussion at 29 F. Supp. 2d 448, 459-60 (W.D. Tenn. 1998) (considering representatives seeking appropriations for black constituents to illustrate, in part, their responsiveness); Chickasaw County II Litig., discussion at No. CIV.A. 1:92CV142-JAD, 1997 U.S. Dist. LEXIS 22087 (N.D. Miss. Oct. 28, 1997) (asserting responsiveness to be shown when at least half of the roads paved in the past five years were in predominately minority areas); Town of Babylon Litig., discussion at 914 F. Supp. 843, 890 (E.D.N.Y. 1996) (considering responsiveness shown in part by the fact that development funds are directed toward the minority community); Sanchez-Colorado Litig., discussion at 861 F. Supp. 1516 (D. Colo. 1994) (noting Representative Entz working in the state legislature to obtain funding for minority constituents); City of Columbia Litig., discussion at 850 F. Supp. 404, 425 (D.S.C. 1993) (stating a disproportionate amount of city budget spent in minority communities demonstrates responsiveness); Monroe County Litig., discussion at 740 F. Supp. 417, 424 (N.D. Miss. 1990) (observing a disproportionate amount of funds directed toward paving minority roads demonstrated responsiveness);.City of Austin Litig. (TX), discussion at 871 F.2d 529, 534-35 (5th Cir. 1989) (considering as evidence of responsiveness that, "Sixty percent of the city's $ 273,000,000.00 in community development bloc grant funds between 1979 and 1984 was related to housing. The city also funds a corporation to make mortgage loans to low-income persons, provides essential medical services for the poor, operates a shelter for transients and constructed a job training center. Forty-two percent of the city's parks and recreation facilities and forty-five percent of all city facilities are located in the three of Austin's eight fiscal districts having the highest minority populations.").

554. *See, e.g.*, Hamrick Litig., discussion at 155 F. Supp. 2d 1355, 1378 (N.D. GA. 2001) (surface pavement improvement, community policing and the development of a community service center); Liberty County Commissioners Litig., discussion at 957 F. Supp. 1522, 1566 (N.D. Fla. 1997) (bulk of grant money for water project and housing upgrades in African-American areas); Houston v. Haley Litig., discussion at 663 F. Supp. 346 (N.D. Miss. 1987) (city provided a swimming pool, baseball fields, a gym, tennis courts, and a recreation center in an area that is predominately black); Baytown Litig., discussion at 696 F. Supp. 1128 (S.D. Tex. 1987) (street and housing improvements, though this was criticized in the circuit opinion, it was affirmed as not clearly erroneous); City of Springfield Litig., discussion at 658 F. Supp. 1015, 1032 (C.D. Ill. 1987) (Fair Housing Board work and neighborhood renewal attempts through the Pioneer Park Project); Opelika Litig. (AL), discussion at 748 F.2d 1473, 1476 (11th Cir. 1984) (development funds, such as matching city water board funds directed at minority community); McCarty Litig. (TX), discussion at 749 F.2d 1134, 1137 (5th Cir. 1984) ("participation in funding programs for disadvantage students").

555. *See e.g.,* Hamrick Litig., discussion at 155 F. Supp. 2d 1355, 1378 (N.D. GA. 2001) (efforts in applying federal, state and local funds to improve housing conditions for certain lower income residents weighed in favor of responsiveness); Houston v. Haley Litig. (MS), discussion at 859 F.2d 341, 347 (5th Cir. 1988) (City has used federal grants to upgrade housing in minority neighborhoods); Dallas County Commission Litig. (AL), discussion at 739 F.2d 1529, 1540 (11th Cir. 1984) ("The Commission has funded or sought federal funding for a variety of projects that have benefited the black community, including drainage projects, water service, site preparation for industry, a regional comprehensive mental health center, the

county health department, and recreational facilities."); El Paso Independent School District Litig., discussion at 591 F. Supp. 802, 810 (W.D. Tex, 1984) (federally funded programs illustrate responsiveness because the school "must to administer them for the benefit of the students.").

556. City of Dallas Litig., discussion at 734 F. Supp. 1317, 1406 (N.D. Tex 1990) (discounting evidence of capital expenditure project because there was no showing of how much money came from the federal government); Lubbock Litig. (TX), discussion at 727 F.2d 364, 382 (5th Cir. 1984) ("The City cannot take credit entirely for the equal provision of City services; the funds for these derived largely from federal programs aimed at economically depressed areas."); *See also,* Montezuma-Cortez School District Litig., discussion at 7 F. Supp. 2d 1152, 1170 (D. Colo. 1998) (noting some of the attempts to implement changes to help meet the needs of minority community were federally funded but making no finding).

557. *See, e.g.*, Sisseton Independent School District Litig. (SD), discussion at 804 F.2d 469, 477 (8th Cir. 1986) (considering the few number of Indians on boards or commissions was due to federal mandates).

558. Hall Litig. (GA), discussion at 117 F.3d 1222, 1227 (11th Cir. 1997).

559. *See* Red Clay School District Litig. (DE), 116 F.3d 685, 698 (3rd Cir. 1997).

560. Bone Shirt Litig., discussion at 336 F. Supp. 2d 976, 1044 (D.S.D. 2004) (discussing numerous legislative bills that affect the Indian community and the consistent opposition of certain members of the legislature to any legislation that the Indian community lobbied for including voting against bills with overwhelming support and no organized opposition and keeping bills that affect only the minority community from reaching a floor vote).

561. *See e.g.*, Town Hempstead Litig. (NY), discussion at 180 F.3d 476, 487 (2d Cir. 1999) (considering denial or disregard of requests to fund minority community centers shows lack of responsiveness); Montezuma-Cortez School District Litig., discussion at 7 F. Supp. 2d 1152, 1170 (D. Colo. 1998) (considering school Board refusal of request of Indian community for bilingual education program and Native American education programs as wanting the curriculum to be "ethnically clean" but not finding a significant lack of responsiveness); Holder v. Hall Litig. (GA), 117 F.3d 1222, 1227 (11th Cir. 1997) (finding that nondiscrimination in road work where official campaigned on that issue established responsiveness); Ward v. Columbus County, 782 F. Supp. 1097, 1105 (E.D.N.C. 1991) (considering that minorities "particular requests have gone unmet."); Sisseton Independent School District Litig. (SD), discussion at 804 F.2d 469, 477 (8th Cir. 1986) (considering refusal to establish polling places despite Indian requests); *Cf.* Montezuma-Cortez School District Litig., 7 F. Supp. 2d 1152, 1170 (D. Colo. 1998) (noting "Parent Advisory Committee request for development of a mission statement for bilingual education and Native American education programs," and school board's response that its "District mission statements must be 'ethnically clean,'" but making no finding on responsiveness either way). Other courts not following this model have simply considered services in terms of what was provided to the minority community. *See e.g.*, City of Austin Litig. (TX), 871 F.2d 529, 534 (5th Cir. 1989) (considering the city had constructed a job training center but not discussing minority input); Dallas County Commission Litig. (AL), 739 F.2d 1529, 1540 (11th Cir. 1984) (finding roads have been maintained on a non-discriminatory basis).

562. Jeffers Litig., 730 F. Supp. 196, 214 (E. Ark. 1989).

563. *Id.; see also* Sanchez-Colorado Litig., 861 F. Supp. 1516, 1530 (D. Colo. 1994) (plaintiffs argued Representative Entz did not "speak out in favor of bilingual education for non-English speaking children" but court noted "Representative Entz has worked on education issues, housing issues, and economic development issues. He worked against the English Only Amendment, has worked to obtain funding through grants for local governments within H.D. 60 (Defendants' Exhibit B), has worked on a 1994 school financing act to obtain equality in school financing, and has helped constituents obtain jobs.").

564. *See e.g.*, Black Political Task Force Litig., discussion at 300 F. Supp. 2d 291, 313 (D. Mass. 2004) (evidence that officials sought out minority groups and implemented policies to address their concerns); Rural West II Litig., discussion at 29 F. Supp. 2d 448, 459-60 (W.D. Tenn. 1998) (considering representatives seeking appropriations for black constituents to illustrate, in part, their responsiveness); Rural West I Litig, discussion at 877 F. Supp. 1096 (W.D. Tenn. 1995) (supporting Martin Luther King holiday evidenced responsiveness); Cincinnati Litig., discussion at No. C-1-92-278, 1993 U.S. Dist LEXIS 21009, at *37 (S.D. Ohio July 8, 1993) (debating changing to a district-by district plan evidenced responsiveness); Monroe County Litig., discussion at 740 F. Supp. 417 (N.D. Miss. 1990) (plaintiff testified board of supervisors has "always been responsive to his requests."); Jeffers Litig., discussion at 730 F. Supp. 196, 213 (E.D. Ark. 1989) (noting that while the minority voters feelings of unresponsive were "not without basis…Members of the House like Representatives Cunningham, McGinnis, Flanagin, and Dawson are anything but unresponsive. They are well aware that a large proportion of their constituency is black, and they make assiduous and sincere efforts to represent these voters.").

565. *Id.* at *37-38.

566. *See e.g.*, Bridgeport Litig., discussion at Civ. No. 3:93CV1476(PCD), 1993 U.S. Dist. Lexis 19741 (D. Conn. Oct. 27, 1993) (no action taken on repeated minority community requests for a community center); Sisseton Independent School District Litig. (SD), discussion at 804 F.2d 469, 477 (8th Cir.1986) ("Appellants offered substantial evidence that the District was unresponsive to the Indian community…the District failed to establish additional polling places despite the request of appellants. The district court may not ignore this evidence."); *See also* LULAC – North East INDEPENDENT SCHOOL DISTRICT Litig., discussion at 903 F. Supp. 1071, 1087 (W.D. Texas 1995) (considering the failure of minority community to request the school not fly a confederate flag not to indicate a lack of responsiveness); Little Rock Litig., discussion at 831 F. Supp. 1453, 1461 (E.D. Ark. 1993) (noting the President of Local NAACP brought up issues to the School District in a letter but received no response).

567. *See e.g.*, Jeffers Litig., discussion at 730 F. Supp. 196, 214 (E. Ark. 1989) ("Some white members, on being approached by black citizens in their own districts for help, referred these constituents to black legislators representing other areas."); City of Springfield Litig., discussion at 658 F. Supp. 1015, 1032 (C.D. Ill. 1987) ("County Board member testified that he has had no success having city officials listen to him when he brings complaints from Springfield's black citizens about housing, employment and other government matters."); *See also* Suffolk County Litig., discussion at 268 F. Supp. 2d 243, 266 (E.D.N.Y. 2003) (considering a failure to respond to plaintiff's letter regarding redistricting plan "neutral at best").

568. Jeffers Litig., 730 F. Supp. 196, 214 (E. Ark. 1989).

569. *See e.g.*, Mehfoud Litig., discussion at 702 F. Supp. 588, 595 (E.D. Va. 1988) ("[N]one of the five sitting members of the Henrico Board of Supervisors could identify a single issue of unique concern to the black community -- despite notable publicity of, among other things, black efforts to have a black appointed to the school board. In fact, two of the five Supervisors had no idea what percentage of their constituencies are black."); *See also* Black Political Task Force Litig., discussion at 300 F. Supp. 2d 291, 313 (D.Mass. 2004) (plaintiffs provided testimony that officials were unaware of their concerns); *Cf.* LULAC - North East INDEPENDENT SCHOOL DISTRICT Litig., 903 F. Supp. 1071, 1087 (W.D. Texas 1995) (finding no lack of responsiveness because the minority community had not brought their concerns to the attention of the school board).

570. *See e.g.,* Holder v. Hall Litig. (GA), discussion at 117 F.3d 1222, 1227 (11th Cir. 1997) (county board advertises monthly public meetings); Liberty County Commissioners Litig., discussion at 957 F. Supp. 1522, 1567 (N.D. Fla. 1997) ("Blacks have no problem approaching county commissioners, and even those commissioners elected from other residential districts (outside of residential district 1, where most blacks are concentrated) listen to their complaints and are responsive to their needs."); City of Holyoke Litig., discussion at 960 F. Supp. 515, 524 (D. Mass. 1997) ("The administration of the new Mayor has witnessed a greatly increased effort to recruit Hispanic officials, include Hispanic viewpoints, and address the interests of all the citizens of Holyoke, Hispanic and non-Hispanic."); Niagara Falls Litig., discussion at 913 F. Supp. 722, 749 (W.D.N.Y. 1994) (city officials have an "open door" policy).

571. *See e.g.,* Black Political Task Force Litig., discussion at 300 F. Supp. 2d 291, 313 (D. Mass. 2004) (considering "evidence of instances in which legislators sought out minority groups and instituted programs designed to address the groups' requests."); Calhoun County Litig., discussion at 813 F. Supp. 1189, 1201 (N.D. Miss. 1993) (noting county made efforts to include black participation in the redistricting process through its biracial commission); Terrazas Litig., discussion at 581 F. Supp. 1329, 1350 (N.D. Tex. 1984) (considering the inclusion of minorities process of redistricting).

572. Terrazas Litig., discussion at 581 F. Supp. 1329, 1350 (N.D. Tex. 1984)

573. City of Rome Litig. (GA), discussion at 127 F.3d 1355, 1386-87 (11th Cir. 1997) ("Both voting statistics and testimonial evidence conclusively reveal that Rome's black community has political influence. This political influence naturally translates into political responsiveness.") (footnote omitted); Hamrick Litig., discussion at 155 F. Supp. 2d 1355, 1378 (N.D. Ga. 2001) (finding "there is evidence of record that the city council members are responsive to the black community and that many of them have been supported by the black community."); City of Chicago –Bonilla Litig., discussion at 969 F. Supp. 1359, 1450 (N.D. Ill. 1997) (noting African-Americans and Latinos holding many positions within Cook County government, and Latino and African-American aldermen testified that they found other white officials to be responsive.); Town of Babylon Litig., discussion at 914 F. Supp. 843, 890 (E.D.N.Y. 1996) (finding town board "very responsive" to minority concerns, partially because the two Democratic members of the board "owe their election to the African-American vote."); Attala County Litig., discussion at 1995 U.S. Dist. LEXIS 21569, at *19 (N.D. Miss. Mar. 20, 1995) (weighing "political veterans" testimony of the importance of the need for to get black support in favor

of responsiveness); Rural West I Litig., discussion at 877 F. Supp. 1096, 1106 (W.D. Tenn. 1995) ("A serious political candidate cannot ignore such a sizeable portion of the electorate."); Cincinnati Litig., discussion at No. C-1-92-278, 1993 U.S. Dist LEXIS 21009, at *36 (S.D. Ohio July 8, 1993) (considering officials need support of black community on a variety of issues, including any time they want to pass a tax levy, and many need it to get elected); Calhoun County Litig., discussion at 813 F. Supp. 1189, 1201 (N.D. Miss. 1993) (officials need minority vote to win elections); Ketchum Litig. (IL), discussion at 740 F.2d 1398, 1405 (7th Cir. 1984) (finding elected officials and the Democratic Party responsive to black and Hispanic concerns because of the number of minority candidates elected); Rybicki Litig., discussion at 574 F. Supp. 1147, 1151 (N.D. Ill. 1983) (considering many officials in the Chicago area are minorities, and the Democratic Party needs their votes to get elected); City of Greenwood Litig., 534 F. Supp. 1351 (N.D. Miss. 1982) (finding candidates must actively seek and gain the support of blacks to be elected); *Cf.* Kent County Litig., discussion at 790 F. Supp. 738, 749 (W.D. Mich. 1992) (evidence of racial appeals in campaigns "raises serious concerns about responsiveness."). *But see* Armour Litig., 775 F. Supp. 1044, 1058 (N.D. Ohio 1991) (considering that black voters always vote for the Democrat and the white voters swing between the two parties, so no candidate needs to be responsive to their concerns).

574. Armour Litig. (OH), discussion at 895 F.2d 1078 (6th Cir. 1990) (citing Marengo County) ("A plurality feature is of course more responsive to minority voter groups."); Brewer Litig. (TX), discussion at 876 F.2d 448 (5th Cir. 1989) (same).

575. City of Chicago-Barnett Litig. (IL), discussion at 141 F.3d 699, 703 (7th Cir. 1998) (remanding and criticizing the responsiveness finding as "flawed methodology of relying on its own estimation of the responsiveness of particular incumbents to particular groups" because of the extent of racial bloc voting); Metro Dade County Litig., discussion at 805 F. Supp. 967, 987 (S.D. Fla. 1992) (finding lack of responsiveness on remand because "there is severe racially polarized voting in Dade County Commission elections."); Haywood County Litig., discussion at 544 F. Supp. 1122 (W.D. Tenn. 1982) (not making a finding on responsiveness but crediting expert testimony that officials would not have to be responsive because of the polarization in voting).

576. Rural West II, discussion at 29 F. Supp. 2d 448, 459-60 (W.D. Tenn. 1998); Rural West I, discussion at 836 F. Supp. 453, 463 (W.D. Tenn. 1993); City of Jackson Litig., discussion at 683 F. Supp. 1515, 1535 (W.D. Tenn. 1988); Houston v. Haley Litig., discussion at 663 F. Supp. 346, 354 (N.D. Miss. 1987).

577. See France Litig., discussion at 71 F. Supp. 2d 317, 333 (S.D.N.Y. 1999) (substantial responsiveness demonstrated by congressman's testimony about voter registration drives, efforts to establish local political clubs, and initiatives to add minorities to the Democratic party's county executive committees); Chickasaw County II Litig., discussion at No. CIV.A. 1:92CV142-JAD, 1997 U.S. Dist. LEXIS 22087 (N.D. Miss. Oct. 28, 1997) (lack of responsiveness not found because of efforts to facilitate black voter registration through home visits and special assistants available at voting precincts); City of Lagrange Litig., discussion at 969 F. Supp. 749, 770 (N.D. GA 1997) (formation of biracial committee to study redistricting process weighs in favor of responsiveness); Calhoun County Litig., discussion at 813 F. Supp. 1189, 1201 (N.D. Miss. 1993) (appointment of biracial redistricting committee partial

evidence of responsiveness); El Paso Independent School District Litig., discussion at 591 F. Supp. 802, 811 (W.D. Tex. 1984) (deputizing high school principals as voting registrars so that they could register students upon turning 18 was evidence of responsiveness); Terrazas Litig., discussion at 581 F. Supp. 1329, 1350 (N.D. Tex. 1984) ("The process by which, following the 1980 census, the State of Texas drafted and adopted redistricting plans, culminating in the 1983 House plan, far from evidencing official discrimination, convincingly evidences full minority access to the redistricting process and a willingness on the part of almost all involved in that process to consider and effectuate minority proposals.").

578. Chickasaw County II Litig., discussion at No. CIV.A. 1:92CV142-JAD, 1997 U.S. Dist. LEXIS 22087, at *8 (N.D. Miss. Oct. 28, 1997).

579. Operation Push Litig., discussion at 674 F. Supp. 1245, 1265 (N.D. Miss. 1987) (unresponsiveness found based upon failure to appoint deputy registrar/white officials hinder black registration); Marengo County Litig., discussion at 731 F.2d 1546, 1572 (11th Cir. 1984) (failure to appoint minority registrars weighs in favor of finding lack of responsiveness); Citizen Action Litig., discussion at Civ. No. N 84-431, 1984 U.S. Dist. Lexis 24869 at *12-13 (D. Conn. Sept. 27, 1984) (responsiveness lacking based on jurisdiction's failure to use available resources to increase voter registration, the absence of door to door canvassing, the scarcity of outreach, the decision to ban volunteer registrars, and the registrar's failure to provide bilingual ballots available at no cost from the state); Terrell Litig., discussion at 565 F. Supp. 338, 343 (N. D. Tex. 1983) (refusal to open second more accessible polling station supports finding of lack of responsiveness); see also Sisseton Independent School District Litig., discussion at 804 F.2d 469, 477 (8th Cir. 1986) (remanding for more findings on failure to hire Native American teachers or appoint a Native American deputy registrar). But *cf.* Suffolk County Litig., discussion at 268 F. Supp. 2d 243, 266 (E.D.N.Y. 2003) (failure to respond to plaintiff's letters regarding redistricting made factor 8 "neutral at best").

580. SENATE REPORT at 28-30.

581. See Marengo County Litig. (AL), 731 F.2d 1546, 1571 (11th Cir. 1984).

582. See Master Lawsuit List. The lawsuits that held otherwise were: Southern Christian Leadership Litig. (AL), 56 F.3d 1281 (11th Cir. 1995) (tenuous policy but Section 2 no violation where racial bloc voting not established and no viable alternative to challenged plan presented); Wamser Litig. (MO), 883 F.2d 617 (8th Cir. 1989) (lower court found policy tenuous, but plaintiff involved lacked standing to bring challenge);

583. See Master Lawsuit List.

584. Armour Litig., 775 F. Supp. 1044 (N.D. Ohio 1991); Monroe County Litig., 740 F. Supp. 417 (N.D. Miss. 1990); Wamser Litig. (MO), 883 F.2d 617 (8th Cir. 1989); Smith-Crittenden County Litig., 687 F. Supp. 1310 (E.D. Ark. 1988); Baldwin Board of Education Litig., 686 F. Supp. 1459 (M.D. Ala. 1988); City of Jackson Litig., 683 F. Supp. 1515 (W.D. Tenn. 1988); Marengo County Litig., 623 F. Supp. 33 (S.D. Ala. 1985); City of Greenwood Litig., 599 F. Supp. 397 (N.D. Miss. 1984); El Paso Independent School District Litig., 591 F. Supp. 802 (W.D. Tex. 1984); Lubbock Litig. (TX), 727 F.2d 364 (5th Cir. 1984); McCarty Litig. (TX), 749 F.2d 1134 (5th Cir. 1984); Major Litig., 574 F. Supp. 325 (E.D. La. 1983).

585. *See, e.g.*, Armour Litig., 775 F. Supp. 1044 (N.D. Ohio 1991) (where state legislature gave no justification for reapportionment plan in two state house districts,

court found that there is "simply no defensible basis" for the current boundaries because they are in clear violation of the state constitutional requirement "that the integrity of political subdivisions be respected whenever possible."); Monroe County Litig., 740 F. Supp. 417 (N.D. Miss. 1990) (policy tenuous where county gave no justification for districting plan, the population was 30% African American, no district was majority African American, and "[t]here is no state or county policy requiring majority white voting age populations in all supervisory and justice court judge districts."); Baldwin County Bd. of Education, 686 F. Supp. 1459 (M.D. Ala. 1988) (where board of education gave no justification for at-large election system, the policy was tenuous because the board had a "pattern or practice" of shifting between at-large and single-member voting systems, which was motivated by a desire to prevent African-American candidates from winning school board seats); Wamser, 679 F. Supp. 1513 (E.D. Mo. 1987) (finding tenuous City Election Board's lack of a justification for not reviewing ballots uncounted by ballot machine on the ground that some justification was necessary), *finding of a violation later overruled on other grounds*, 883 F.2d 617 (8th Cir. 1989) (overturned and dismissed for lack of standing); City of Greenwood Litig., 599 F. Supp. 397 (N.D. Miss. 1984) (where city gave no justification for at-large election system, the court found the policy was tenuous where no state policy favored at-large elections, and there was a tendency in Mississippi cities with a population of 10,000 or more to elect their city councils by multiple districts.); Marengo County Litig., discussion at 731 F.2d 1546 (11th Cir. 1984) (where county gave no justification for at-large commissioner and school board elections, the policy was tenuous because no strong state policy for or against at-large elections, this system was in fact adopted in 1955, leading appellate court to infer that the goal of the plan was to prevent an increase in African-American political participation); El Paso Ind. Sch. Dist., 591 F. Supp. 802 (W.D. Tex. 1984) (finding tenuous no justification given for at-large system where the combination of a 1977 referendum and subsequent legislative approving single-member districts rendered suspect the continuation of the at-large election system; and finding only real reasons for system could be intent to discriminate); Major v. Treen, 574 F. Supp. 325 (D. La. 1983) (finding policy tenuous where the reapportionment plan was passed without the input of African-American groups after Governor's veto threat).

586. Smith-Crittenden County Litig., 687 F. Supp. 1310 (E.D. Ark. 1988); City of Jackson, TN Litig., 683 F. Supp. 1515 (W.D. Tenn. 1988); Lubbock Litig. (TX), 727 F.2d 364 (5th Cir. 1984); McCarty Litig. (TX), 749 F.2d 1134 (5th Cir. 1984).

587. Rural W. Tenn. African-American Affairs Council v. McWherter, 836 F. Supp. 453 (W.D. Tenn. 1993) (finding justification of respect for traditional political boundaries not tenuous); Frank v. Forest Co., 194 F. Supp. 2d 867 (E.D. Wis. 2002) (finding policy of respecting traditional political boundaries nontenuous); Chattanooga Board of Comm'rs, 722 F. Supp. 380 (E.D. Tenn. 1989) (considering at-large policy was necessary to keep the commission form of government); Buchanan v. City of Jackson, 683 F. Supp. 1515 (W.D. Tenn. 1988) (finding at-large policy was a "logical feature" of commission form of government);

588. *See, e.g.*, Rural West II Litig., 209 F.3d 835 (6th Cir. 2000) (rejecting as tenuous state's claim that it sought to maintain political boundaries and thus not fracture City of Jackson where challenged districting plan fractured cities in other parts of the state).

589. Liberty County Commissioners Litig. (FL), 221 F.3d 1218 (11th Cir. 2000); NAACP v. Niagara Falls, 913 F. Supp. 722 (W.D.N.Y. 1994); Reed v. Town of Babylon, 914 F. Supp. 843 (E.D.N.Y. 1996); City of Austin Litig., discussion at CIV. No. A-84-CA-189, 1985 WL 19986 (W.D. Tex. Mar. 12, 1985).

590. Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1048 (D.S.D. 2004) (finding that the policy was not supported by the idea that the people were happy with their districts because the only input the legislature had sought from the people was far away from the Indian Reservation, and the legislature did not make the plans accessible to the public); Political Civil Voters Organization v. Terrell, 565 F. Supp. 338, 341 (N.D. Tex. 1983).

591. Vecinos Debarrio Uno v. City of Holyoke, 960 F. Supp. 515 (D. Mass. 1997); Red Clay School Dist. Litig., 116 F.3d 685 (3rd Cir. 1997); City of Rome Litig. (GA), 127 F.3d 1355 (11th Cir. 1997); Hall v. Holder, 757 F. Supp. 1560 (M.D. Ga. 1991) (finding a single-member commission may be more responsive in a small county); Williams v. City of Dallas, 734 F. Supp. 1317 (W.D. Tex. 1990); Collins v. City of Norfolk, 679 F. Supp. 557 (E.D. Va. 1988); Perez v. Pasadena Indep. Sch. Dist., 958 F. Supp. 1196 (S.D. Tex. 1997).

592. Blaine County Litig. (MT), 363 F.3d 897 (9th Cir. 2004); Town of Hempstead Litig., 956 F. Supp. 326 (E.D.N.Y. 1997) (discounting the responsiveness argument after finding Senate Factor 8 (a significant lack of responsiveness) met); McMillan v. Escambia County, 748 F.2d 1037 (5th Cir. 1984) (affirming district court finding that the responsiveness explanation was inconsistent with the current operation of the Commission); McNeil v. City of Springfield, 658 F. Supp. 1015, 1033 (C.D. Ill. 1987) ("The claim of responsiveness of the officials to the electorate is tenuous in a community where racially polarized voting exists. The responsiveness of the elected official is, of course, to the white majority that elected him and not to the black minority which is without the ability to elect candidates of their choice to seats of power."); see also N.A.A.C.P. v. City of Columbia, 850 F. Supp. 404, 425 (D.S.C. 1993) ("Mixed systems provide neighborhood, and therefore often minority, representatives, but nevertheless avoid the factionalism and "turfism" often associated with all single-member districts. Mixed systems provide the advantage of a city-wide perspective, but nevertheless avoid the problems often associated with at-large systems of lack of diversity on the council and neglect of neighborhoods…The overwhelming weight of the evidence offered in this case suggests that Columbia's mixed system functions exactly as designed, in terms of attention to neighborhood concerns, but without resulting in factionalism or turfism.")

593. *See, e.g.,* Cousin v. Sundquist, 145 F.3d 818 (6th Cir. 1998); Prejean Litig. (LA), 227 F.3d 504, 516 (5th Cir. 2000); France v. Pataki, 71 F. Supp. 2d 317 (S.D.N.Y. 1999); Davis v. Chiles Litig. (FL), 139 F.3d 1414, 1421 (11th Cir. 1998); Southern Christian Leadership Conference Litig. (AL), 56 F.3d 1281, 1295 (11th Cir. 1995) (en banc); Nipper Litig. (FL), 39 F.3d 1494, 1534 (11th Cir. 1994) (en banc); LULAC v. Clements Litig. (TX), 999 F.2d 831, 857-58 (5th Cir. 1993); Magnolia Bar Ass'n, 793 F. Supp. 1386 (S.D. Miss. 1992).

594. See, e.g., Prejean v. Foster Litig., 83 Fed. Appx. 5, 11 (5th Cir. 2003) (finding that drawing district lines to protect incumbent judges who happened to be white was not tenuous and did not violate Section 2 or the Constitution, as politics not race was the primary motivation); Fund for Accurate & Informed Representation, 796 F. Supp. 662, 672 (N.D.N.Y. 1992) ("plaintiffs failed to demonstrate any linkage

between the alleged fragmentation of minority communities in Monroe, Nassau, Erie or Westchester Counties, and an alleged intent to preserve the incumbency of 'certain white incumbents,' " so not only could no intentional discrimination be shown, but also: "Plaintiffs have not convinced us that the state legislature's decision to heighten the minority population in certain Assembly districts is a pretext for an unworthy goal. Moreover, under some circumstances, the use of a lower population threshold for minority districts may lead to ineffective minority control districts. This choice is a matter of judgment, and we cannot say on this record that the legislature exercised its judgment unlawfully.").

595. See, e.g., Emison Litig., 782 F. Supp. 427 (D. Minn. 1992) (finding tenuous policy of pairing incumbents where doing so unnecessarily limited African-American voting strength) overturned on other grounds by 507 U.S. 25 (1993); Gingles Litig., 590 F. Supp. 345 (E.D.N.C. 1984) (protecting incumbents was "obviously" not enough to justify racial vote dilution).

596. See, e.g, Black Political Taskforce, 300 F. Supp. 2d 291 (D. Mass. 2004) (finding that "race [was] used as a tool to achieve incumbency protection" in the drawing of Massachusetts state legislative district lines after the 2000 census); Ketchum v. Byrne, 740 F.2d 1398, 1408 ("We think there is little point for present purposes in distinguishing discrimination based on an ultimate objective of keeping certain incumbent whites in office from discrimination borne of pure racial animus."); Buskey v. Oliver Litig., 565 F. Supp. 1473 (M.D. Ala. 1983) (drawing district to ensure defeat of political rival is tenuous where jurisdiction knew effect would be to dilute black voting power). But see Escambia County, 638 F.2d 1239, 1245 (5th Cir.) ("the desire to retain one's incumbency unaccompanied by other evidence ought not to be equated with an intent to discriminate against blacks qua blacks").

597. Westwego Litig., discussion at CIV. A. NO. 84-5599, 1989 U.S. Dist. LEXIS 7298, 1989 WL 73332 (E.D. La. June 28, 1989); Armstrong v. Allain, 893 F. Supp. 1320 (S.D. Miss. 1994) (60% requirement for school bond referenda was justified by the fact that school districts had a number of alternative sources of revenue for capital expenditures.); Clark v. Calhoun County, 813 F. Supp. 1189 (N.D. Miss. 1993) (policy of keeping districts with equal road mileage nontenuous); Aldasoro v. Kennerson Litig., 922 F. Supp. 339 (S.D. Cal. 1995) (noting the reasons for keeping an at-large system were El Centro was too small for single districts and finding the at-large system allowed minorities to elect); Houston v. Lafayette County, 841 F. Supp. 751 (N.D. Miss. 1993) (equal road mileage); Brown v. Chattanooga Board of Comm'rs, 722 F. Supp. 380 (E.D. Tenn. 1989) (necessary to keep the commission form of government); Buchanan v. City of Jackson, 683 F. Supp. 1515 (W.D. Tenn. 1988) (logical feature of commission form of government); Mississippi State Chapter, Operation Push v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987) ("The clerks are responsible for registering all voters and must have some discretion in selecting those agents and employees who will assist the circuit clerks in accomplishing their objective. n15 The court concludes that some measure of discretion and flexibility is needed for the registration process to work smoothly and efficiently."); Smith-Crittendon County Litig., 687 F. Supp. 1310 (E.D. Ark. 1988) (finding a state policy supporting multi-member districts is neither tenuous nor particularly strong); NAACP v. Fordice, 252 F.3d 361 (5th Cir. 2001) (finding requested reorganization would cost the state millions of dollars and finding cost efficiency reasons not

tenuous); Clarke v. Cincinnati, 40 F.3d 807, 814 (6th Cir. 1994) ("Moreover, given the difficulties experienced in the administration of PR, we cannot say that the policy underlying 9X is "tenuous.""); City of Philadelphia Litig., 28 F.3d 306 (3d Cir. 1994) (accepting a voter purge law as not tenuous because the policy was deemed to prevent voter fraud).

598. Mississippi State Chapter, Operation Push v. Allain, 674 F. Supp. 1245, 1266 (N.D. Miss. 1987).

599. Hall v. Holder, 757 F. Supp. 1560 (M.D. Ga. 1991) (finding use of single person commissioner historically fostered responsiveness); Dallas County Commission Litig., 636 F. Supp. 704 (S.D. Ala. 1986) (considering a long-standing state-wide policy in favor of at-large elections without regard to race, dating back to the first Alabama school board in 1854); McCord v. City of Fort Lauderdale, 617 F. Supp. 1093 (S.D. Fla. 1985) (noting the at-large system had been in place since 1911 and there was no evidence of invidious intent); Houston v. Haley, 663 F. Supp. 346 (N.D. Miss. 1987) ("Oxford held aldermen elections through single-member districts for as long as anyone could remember, except after the 1970 census when because of state statute and growth in population the city was required to hold at-large elections for a brief period."); Milwaukee Branch of N.A.A.C.P. v. Thompson, 935 F. Supp. 1419 (E.D. Wis. 1996) (The state of Wisconsin had history of using at-large elections for judges dating back to its 1848 constitution.).

600. 116 F. 3d 1194 (7th Cir. 1997).

601. Kirksey v. Allain Litig., 658 F. Supp. 1183 (S.D. Miss. 1987).

602. Terrazas v. Clements, 581 F. Supp. 1329 (N.D. Tex. 1984). (Even though incumbency was a factor in the reapportionment, the other factors were present as well such as the need to comply with one person one vote and the Section 5 of Voting Rights Act, and plaintiff failed to show that the policy behind it was tenuous.); Sanchez v. Colorado, 97 F.3d 1303, 1325 (10th Cir. 1996) (criticizing but not finding clearly erroneous the district courts finding that the underlying policy was VRA compliance, noting "[t]he record casts doubt on the court's finding the Commission from beginning to end observed the tenets of § 2.").

603. Bone Shirt Litig., 336 F. Supp. 2d 976, 1048 (D.S.D. 2004).

604. As explained by the Court, proportionality is distinct from proportional representation. The latter links the proportion of minority officeholders to the minority group's share of the relevant population. See *De Grandy* Litig., discussion at 512 U.S. 997, 1014 n.11 (1994).

605. *Id.* at 1020-21.

606. Black Political Task Force Litig., 300 F. Supp. 2d 291 (D. Mass. 2004); Rodriguez Litig., 308 F. Supp. 2d 346 (S.D.N.Y. 2004); Perry Litig., 298 F. Supp. 2d 451 (E.D. Tex. 2004); Bone Shirt Litig., 336 F. Supp. 2d 976 (D.S.D. 2004); Old Person Litig., 312 F.3d 1036 (9th Cir. 2002); Campuzano Litig., 200 F. Supp. 2d 905 (N.D. Ill. 2002); Rural West II Litig., 209 F.3d 835 (6th Cir. 2000); Liberty County Commissioners Litig., 221 F.3d 1218 (11th Cir. 2000); City of Chicago-Bonilla Litig., 141 F.3d 699 (7th Cir. 1998); County of Thurston Litig., 129 F.3d 1015 (8th Cir. 1997); African American Voting Rights LDF Litig., 994 F. Supp. 1105 (E.D. Mo. 1997); City of Holyoke Litig., 960 F. Supp. 515 (D. Mass. 1997); Rural West I Litig., 877 F. Supp. 1096 (W.D. Tenn. 1995); St. Louis Board of Education Litig., 90 F.3d 1357 (8th Cir. 1996); Little Rock Litig., 56 F.3d 904 (8th Cir. 1995); City of Columbia Litig., 33 F.3d 52 (4th Cir. 1994); Austin Litig., 857 F. Supp. 560 (E.D. Mich. 1994).

See also Rural West I Litig., discussion at 877 F. Supp. 1096, 1109-11 (W.D. Tenn. 1995) (addressing proportionality but not ultimately making a definitive finding on it); City of Chicago Litig. (IL), discussion at 141 F.3d 699, 705 (7th Cir. 1998) (finding proportionality absent and remanding for additional findings to determine whether the deviation from proportionality can be justified by reference to other appropriate districting factors because "[d]eviations from proportionality, especially small ones, can be justified by reference to other factors, such as the compactness of districts and the desirability of preserving continuity and recognizing topographical, cultural, and economic factors that may make one ward mapping preserve communities of political interest better than another.").

607. Rodriguez Litig., 308 F. Supp. 2d 346 (S.D.N.Y. 2004); Perry Litig., 298 F. Supp. 2d 451 (E.D. Tex. 2004); Campuzano Litig., 200 F. Supp. 2d 905 (N.D. Ill. 2002); Liberty County Commissioners Litig., 221 F.3d 1218 (11th Cir. 2000); African American Voting Rights LDF Litig., 994 F. Supp. 1105 (E.D. Mo. 1997); City of Holyoke Litig., 960 F. Supp. 515 (D. Mass. 1997); St. Louis Board of Education 90 F.3d 1357 (8th Cir. 1996); Little Rock Litig., 56 F.3d 904 (8th Cir. 1995); City of Columbia, 33 F.3d 52 (4th Cir. 1994); Austin, 857 F. Supp. 560 (E.D. Mich. 1994).

608. Bone Shirt Litig., 336 F. Supp. 2d 976 (D.S.D. 2004); Black Political Task Force Litig., 300 F. Supp. 2d 291 (D. Mass. 2004); Rural West II Litig.,, 209 F.3d 835 (6th Cir. 2000); Old Person Litig., 312 F.3d 1036 (9th Cir. 2002); County of Thurston Litig., 129 F.3d 1015 (8th Cir. 1997).

609. Bone Shirt Litig., 336 F. Supp. 2d 976 (D.S.D. 2004); Black Political Task Force Litig., 300 F. Supp. 2d 291 (D. Mass. 2004); Rural West II Litig. (TN), 209 F.3d 835 (6th Cir. 2000); County of Thurston Litig. (NE), 129 F.3d 1015 (8th Cir. 1997).

610. Old Person Litig. (MT), discussion at 312 F.3d 1036, 1050 (9th Cir. 2002). In ultimately affirming the judgment of the district court finding a lack of vote dilution, though, the 9th Circuit panel made clear that its decision to affirm the ultimate conclusions of the lower court had more to do with the standard of review than the weight which the panel would have accorded to some pieces of evidence. See id.

611. African American Voting Rights Legal Defense Fund, Inc v. Villa, 54 F.3d 1345 (8th Cir. 1995) ("We also hold that the district court properly granted summary judgment where the record before it demonstrated that sustained and substantial proportionality existed between the percentage of blacks in the citywide voting age population and the number of safe black wards.").

612. *De Grandy*, 512 U.S. at 1023

613. Black Political Task Force Litig., discussion at 300 F. Supp. 2d 291, 312 (D. Mass. 2004).

614. Perry Litig., discussion at 298 F. Supp. 2d 451, 494-95 & n. 134 (E.D. Tex. 2004) ("Plaintiffs' own experts and argument reminded this court that because of the lower turnout of Latino voters, a low majority of the Hispanic citizen voting age population does not produce an *effective* Latino opportunity district.")..

615. The Court explained that it examined allegations of dilution in the geographic terms stated by plaintiffs themselves who had specifically alleged dilution only in particular regions of the state rather than the plan as a whole. As such the Court "had no occasion to decide which frame of reference should have been used" had the matter not already been agreed upon by the parties in the district court. See *De Grandy*, 512 U.S. at 1022.

616. Rural West I Litig., discussion at 877 F. Supp. 1096, 1109-10 (W.D. Tenn. 1995); Rural West II Litig. (TN), discussion at 209 F.3d 835, 843-44 (6th Cir. 2000); Austin Litig., discussion at 857 F. Supp. 560, 569 (E.D. Mich. 1994); Bone Shirt Litig., discussion at 336 F. Supp. 2d 976, 1048-49 (D.S.D. 2004).
617. Rural West I Litig., discussion at 877 F. Supp. 1096, 1109 (W.D. Tenn. 1995).
618. Rural West II Litig. (TN), discussion at 209 F.3d 835, 843 (6th Cir. 2000).
619. Austin Litig., discussion at 857 F. Supp. 560, 569 (E.D. Mich. 1994).
620. Perry Litig., discussion at 298 F. Supp. 2d 451, 494 ("Because the Supreme Court has not yet provided precise guidance on the proper standard for assessing proportionality, however, we also examine proportionality on a statewide basis.")
621. Old Person Litig. (MT), discussion at 230 F.3d 1113, 1129-30 (9th Cir. 2000).
622. Blytheville School District Litig., discussion at 71 F.3d 1382, n.6 (8th Cir. 1995) ("De Grandy resolved a claim involving 'proportionality,' which 'links the number of majority-minority voting districts to minority members' share of the relevant population.' Here, because we address a claim involving a single at-large district, the analyses between proportionality and proportional representation are essentially the same."); City of St. Louis, 896 F. Supp. 929, 943 (E.D. Mo. 1995) ("In *Johnson v. De Grandy*, the Supreme Court indicated that even if a plaintiff succeeds in establishing the Gingles preconditions, a defendant may be able to defeat a § 2 claim by showing that the minority group in question has achieved, or will achieve, substantially proportional representation under the challenged districting plan.")
623. Liberty County Commissioners Litig., discussion at 957 F. Supp. 1522, 1570 (N.D. Fla. 1997) ("Proportionality, while not dispositive of a section 2 claim, is a relevant factor which should be examined under the totality of the circumstances. The proportionality inquiry is very straight forward in this case. Blacks have not achieved proportional representation on the Liberty County School Board. Not only is there no black currently serving on the school board, no black has ever served on the school board. The opposite is true with the Liberty County Commission. Since 1990, Earl Jennings, a black, has served as one of the five county commissioners. As stated earlier, blacks make up 17.63 percent of the total population and 25.03 of the voting age population of Liberty County. Thus, with blacks comprising twenty percent of the county commission's membership, blacks have clearly achieved proportional representation on the county commission. Such proportional representation does not automatically preclude a finding of section 2 liability, although it is obviously some evidence that blacks have equal access to the political process in Liberty County.") (internal citations omitted).
624. Liberty County Commissioners, discussion at 221 F.3d 1218, 1225 (11th Cir. 2000) (en banc) (quoting 42 U.S.C. § 1973(b)).

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JUSTICE THURGOOD MARSHALL

"AND WE MUST TAKE THE CURRENT WHEN IT SERVES, OR LOSE OUR VENTURES"

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EDITORS' INTRODUCTION

CHANDLER DAVIDSON AND BERNARD GROFMAN

PRESIDENT LYNDON B. JOHNSON signed the Voting Rights Act on 6 August 1965. Enacted to enforce the Fifteenth Amendment, the statute consists of both permanent features that apply to the United States as a whole and temporary features—special provisions—that largely apply to specific jurisdictions.[1] The initial duration of its nonpermanent parts was five years. However, Congress extended them in 1970, 1975, and 1982, in each case with some important amendments to the act. Initial passage and each subsequent extension occurred with substantial bipartisan support.

Extensions were necessary because many white officials continued to resist the full incorporation of blacks and certain language minorities into the polity. As direct disfranchising strategies were frustrated by the act, officials relied on more subtle mechanisms of vote restriction aimed primarily at preventing minority voters from electing the candidates of their choice. Widely employed throughout the South, these mechanisms included the submergence of minority voting strength in at-large or multimember districts and the gerrymandering of district lines. The story told in the chapters of this book is largely the story of the "quiet revolution" in voting rights that has occurred since 1965.[2]

Because the most frequent and the most severe discrimination against minorities in the United States has occurred against blacks in the South, the special provisions of the act have been targeted particularly toward that region. From 1965 to the present, seven of the eleven states of the former Confederacy, including all five Deep South states, have been continuously covered entirely or in large part by the act's special provisions: Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and forty of the hundred counties of North Carolina. Since 1975 Texas, an eighth former Confederate state with the largest black population of any southern state and the second largest Mexican-American population in the nation, has also been covered by the act's special provisions.[3]

Most of these states at one time or another employed a statewide literacy test, exclusive white primary elections, a poll tax, and a majority runoff requirement. These states were also more likely than others to employ at-large municipal election systems.[4] The use of such systems was much more widespread in these states than in the rest of the nation when the Voting Rights Act was passed, which Wolfinger and Field at the time attributed to the fact that in the South, "most municipal institutions seem to be corollaries of the region's traditional preoccupation with excluding Negroes from political power."[5]

We have chosen to focus on the eight southern states covered by the act's special provisions because the Voting Rights Act has had its greatest impact in the South and because, almost without exception, it is in these states that the key conceptual

underpinnings of vote dilution have come to be defined through litigation challenging election practices.

The Basic Research Goals

In anticipation of the twenty-fifth anniversary of the act in 1990, with funding from the National Science Foundation's Law and Social Science Program, we commissioned comprehensive studies of several facets of southern black political participation. These studies included research on gains in black registration, systematic state-by-state investigations of the relationship between the act and the electoral success of racial minorities for municipal office in each of the eight states,[6] and a study of black representation in southern legislatures and congressional delegations.[7] Each state chapter was to be written by students of that state's electoral history, including at least one lawyer and one political scientist, sociologist, or historian. Many of the authors, as it turned out, had had direct experience with voting rights litigation as attorneys or as expert witnesses.[8]

The central aims of the project reflected the two major purposes of the act. We wanted to determine what effect it had in *enfranchising blacks* in the South. We also wanted to know its impact on black representation by *preventing the dilution of minority votes*. Regarding dilution, we were particularly interested in whether the act enabled blacks (and Mexican Americans in Texas) to win local office.

More specifically, the task we set for the authors of the state chapters had five components. First, we asked them to cover the main voting rights developments in their state from Reconstruction to modern times in a relatively brief compass but to give special attention to the post–World War II period. Without this prelude, the significance of the events from the 1960s on would be difficult to appreciate.

The second component stems from the fact that the Voting Rights Act is complex and open to different readings; there has consequently been a considerable development over the past two decades of case law devoted to its interpretation. Voting rights litigation in the states discussed in this book has been voluminous. We asked the authors of the eight chapters to review the major constitutional and statutory cases in their state related to the act and also to discuss section 5 enforcement issues in the state.

Third, we wished to address a long-standing controversy over the precise effects of at-large election systems on local minority representation. Unfortunately, no research design that could definitively resolve the issue had been used by any of the numerous scholars in the debate. To attack the problem, we required the authors to generate a comprehensive longitudinal data base for cities in their state that would enable them to distinguish—in large part, at least—the consequences of multimember-district elections from the impact of other factors.

The fourth task concerned the direct effect of the Voting Rights Act on the election of minority candidates to local office. If, as we anticipated, our data revealed that the abolition of at-large election structures increased minority candi-

dates' chances of winning, we wanted to find out whether the act caused the adoption of district systems. To investigate the role of law—including the activities of voting rights organizations and attorneys—in promoting change, we required our authors to make an inventory of all litigation challenging at-large city council elections in the state over the previous twenty-five years. Our data include information on both the organizations and the individual attorneys involved in instigating such litigation.[9]

The fifth component allowed us to address a debate over how easy it is for minority candidates to win office in majority-white districts at the local level. The conventional view has been that minority success in these districts is difficult, especially when the white voters make up a substantial majority.[10] But recent claims to the contrary have raised a controversy on this point.[11] The authors of the state chapters have compiled evidence on the relationship between minority population in districts in a multidistrict system and the likelihood of minority electoral success, with an eye to determining what minority population proportion is sufficient to provide minority voters with a realistic opportunity to elect their candidates of choice at the local level.[12] The result is the most comprehensive data base extant with which to explore this question.

Previous Research on the Voting Rights Act

A survey of research on the Voting Rights Act reveals that while a number of useful studies of one aspect or another have been reported, no attempt has been made to understand the broad contours of its effects. And even the limited efforts to gauge its impact have often suffered from shortcomings in conceptualization, method, or both. We are struck, for example, by the dearth of hard evidence on the extent to which the remarkable gains in black officeholding in the South, and in Mexican-American officeholding in Texas and other southwestern states, could be attributed directly to the Voting Rights Act.[13] Most of the best scholarship has addressed legal or constitutional issues and has appeared in law-related journals, or it has been written from a nonquantitative or a journalistic vantage point.[14]

With some important recent exceptions,[15] most empirical work on the act's effects on minority representation has been either anecdotal or of a relatively low level of methodological sophistication. While there is a very important body of research that has examined minority officeholding under different election methods, those articles do not systematically investigate when and how changes in election type came about.[16] Also, remarkably, even the most basic facts about the implementation of the act, such as the number and results of post-1982 section 2 cases brought under it, have never been compiled, perhaps because many of these cases did not result in published opinions or were settled out of court before trial.[17]

It is true that many informative statistics have been made available in the various reports on the act's enforcement, published by the U.S. Commission on Civil Rights, and in the reports of groups such as the Southern Regional Council and the

Lawyers' Committee for Civil Rights Under Law. But much data that are publicly available, such as those contained in a list of Justice Department preclearance objections, have never been systematically examined to see what the consequences of Justice Department intervention have been.[18] Moreover, there has been too little thought given, even when statistics are published, to the overarching question of how the act's several mechanisms have directly or indirectly influenced minority registration and voting, on the one hand, and minority officeholding, on the other.

Our book is an attempt to remedy this situation. It gathers data systematically on southern voter registration and officeholding, keeping firmly in mind the questions of whether the Voting Rights Act has been responsible for the remarkable upsurge in black participation and electoral success, and, if so, how. We believe that the findings of our project constitute the best answer so far to the question of the Voting Rights Act's effect on minority representation in the South at the local level.[19]

The act's effect on black enfranchisement is treated by Alt in chapter 12. Alt's work is an advance over that of scholars who considered black registration separately from that of whites. He recognizes that the two are bound together in a dynamic system in which whites' behavior depends on blacks' potential to form a majority of the electorate in a jurisdiction. Following in the footsteps of Key, Alt explores the hypothesis that white efforts to reduce black electoral participation have traditionally depended upon the size of the black population. He provides a careful longitudinal investigation of the changing black-white registration ratio, which is the single most accessible measure of potential black voter mobilization in comparison with that of whites, and provides a comparison of that ratio with what would be expected if whites and blacks registered at equal rates relative to their pool of eligible voters. Alt's multivariate modeling allows him to assess the relative short- and long-run effects of several factors on changes in black and white registration, including the use of literacy tests, poll taxes, and the sending of federal registrars to various southern counties as authorized by the Voting Rights Act.

A different analytical framework allows us to examine systematically, using a quasi-experimental design, the impact of election type on changes in local minority officeholding. This framework is applied in the eight individual state chapters. In addition, chapter 11 presents data on the relation between black population concentration and black officeholding in the legislatures and congressional delegations of all eleven states of the former Confederacy, including the three states not covered by section 5 of the act.

The Controversy over Barriers to Minority Representation

A major purpose of the chapters on representation is to resolve an issue that since the 1970s has been sharply debated in academic journals and courtrooms. The refusal of the controversy to subside is undoubtedly tied to its continuing practical importance. The question goes to the heart of the meaning of racial and ethnic

representation in a democratic polity and how that representation is best achieved under the constraints imposed by considerations of fairness, constitutional norms, and statutory mandates. Chapter 1, which provides a brief introduction to voting rights case law, illuminates the importance of this question, and chapter 10 discusses the question in detail. But a brief description of it now is useful as well.

Most American local and state election schemes are basically of three kinds: at-large, single-member district, and *mixed* systems—the latter combining features of the first two. In an at-large system, all the contested seats on a governmental body, such as a city council, county commission, or school board, are filled by voters in the jurisdiction at large. If there are eight seats to be filled, all voters have eight votes and theoretically have a chance to influence who gets elected to all eight seats. In a single-member-district system, by contrast, the city is divided into geographical districts, and voters in each district, like voters in congressional elections, are limited to a vote for a single candidate running to represent their district. In a mixed system, some of the seats are voted on at large, and some by district.

In the nation and in the South, single-member districts or wards were widely used in the late nineteenth century. The Progressive movement (1896–1920) introduced the at-large election as a substitute for voting by ward, ostensibly to foster "good government," a notoriously vague idea.[20] In the North the imposition of such election procedures made it much less likely that European ethnics—many of them impoverished immigrants recently arrived from Ireland and from southern and eastern Europe—would be elected from the heavily ethnic wards. In the South, at-large elections were often seen as a way to make it harder for blacks, and sometimes poor whites as well, to win office. From the Progressive Era to the 1970s, the proportion of at-large elections in the nation's local election systems increased. They became especially common in the South.[21]

Students of local government structure have long known that at-large elections, whatever their benefits might be, disadvantage ethnic minorities, especially when there is strong resistance by the majority to minority officeholding.[22] In particular, scholars of southern politics have pointed to dramatic instances where district election structures in majority-white jurisdictions were changed to at-large ones in anticipation of minority officeholding.[23] In the 1970s social scientists conducted research that corroborated this commonsense idea. About the same time, expert witnesses for minority plaintiffs challenging at-large elections were citing this research in arguing that at-large elections, when whites were in the majority and voted overwhelmingly against minority candidates, prevented the election of those candidates even when they had strong and cohesive support in their own communities. District elections, by contrast, often enabled minority candidates to win.

An article written in 1981 reviewed fourteen studies of the effects of at-large elections on minority representation between 1969 and 1981 and found that eleven supported the conventional view that at-large and other multimember-district elections, ceteris paribus, reduced the representation of black officeholders.[24] An unpublished study that same year found that eighteen of twenty-three published

and unpublished studies also supported the conventional view.[25] The occasional study that did not find at-large elections to disadvantage minority candidates could usually be accounted for by small sample size or flawed methods, such as inclusion in the data base of cities with very small minority populations.[26] A text on political participation summed up the scholarly consensus in 1991 by observing that while some authors had denied the impact of at-large elections on minority officeholding, "there is persuasive evidence that the electoral structure has a significant, perhaps even dominant, impact on the extent of [minority officeholding]."[27]

Until 1981, the only approach to the question had been to examine samples of at-large, mixed, and single-member-district cities at a single point to see whether there were fewer minority officials on council, proportionally, in cities using one election type instead of another. The results were typically presented in a contingency table or a regression equation. This cross-sectional method, however, has serious shortcomings even when used correctly, which it sometimes was not.

One problem is that several other factors besides the election system can affect minority officeholding. Some factors can be measured without difficulty and with their effects controlled in a cross-sectional design. Among these are the size of the city's minority population and the socioeconomic differences between blacks and whites. Another factor, whose effects are more difficult to control, is minority residential segregation; it has typically not been measured in cross-sectional studies because segregation data are difficult to obtain for sizable samples of cities.[28] Other variables are also difficult to gauge. One is the existence of racially gerrymandered district boundaries in ward-based or mixed-system cities, which can lead to an underestimation of the differences in minority representation between at-large and district cities.

To resolve these and other problems of the cross-sectional research design, Davidson and Korbel conducted a longitudinal study of jurisdictions before and after a change from an at-large to a district or mixed system to determine what kind of election rules provided the most equitable minority representation. The advantage of this approach—especially when effects are measured immediately before and after the change in election rules—is that very little change takes place in the cities aside from the change in election structure. Thus the effects of other factors that could influence minority officeholding are held constant.

Davidson and Korbel examined the forty-one cases of political jurisdictions, including cities, they could identify as having changed from at-large plans in Texas during the 1970s. The proportion of minority officeholders in the forty-one units increased from 10 to 29 percent after the change occurred: from 6 to 17 percent for blacks and from 5 to 12 percent for Mexican Americans.[29] As a result, both minority groups were represented in rough proportion to their percentage in the population in the forty-one units as a whole; before the change, they had been underrepresented, roughly speaking, by a factor of three. The findings in this longitudinal research, combined with those of corroborating studies using the cross-sectional method, seemed to vindicate the conventional view, at least so far

as blacks were concerned.[30] (Some authors, however, while admitting that at-large elections disadvantaged Mexican Americans, questioned whether single-member-district remedies generally benefited them.)[31]

The controversy was revived in 1987 by Thernstrom, who claimed that whites had become increasingly accepting of minority candidates. And as it is the tendency of whites to bloc vote against minority candidates that gives at-large elections their force in diminishing minority officeholders, the implication of Thernstrom's claim was that at-large elections were not terribly different in their effects on minority officeholding from district elections. Consequently, most minority voters no longer needed the protections of the Voting Rights Act.[32] Although Thernstrom presented only the sketchiest of anecdotal evidence for her hypothesis, the spectacular success in 1989 of a few minority officeholders in predominantly white jurisdictions shortly after her book appeared gave some credence to her view. The mayoral victories of David Dinkins, John Daniels, and Norman Rice in New York City, New Haven, and Seattle, respectively, and Douglas Wilder's election as governor of Virginia were especially noteworthy.

More systematically gathered evidence also appeared to underscore Thernstrom's point. Welch, in the most comprehensive cross-sectional study that uses data from the 1980s rather than the 1970s, looked at the effect of election type on minority representation in 1988 in predominantly white cities of 50,000 or larger with at least 5 percent black or 5 percent Hispanic population. She found that the gap in black officeholding between at-large and mixed or district cities had narrowed sharply, in comparison to findings from earlier research, including her own. To be sure, in the nation as a whole blacks were still somewhat less well represented in at-large than in single-member-district cities, and the gap was greater in the South than in the non-South. But black representation in at-large cities generally had risen significantly, she concluded.[33]

However, Welch noted that her study, like earlier ones addressing this issue, used the cross-sectional design after the time when many cities—particularly in the South—had abandoned the at-large election system, and she acknowledged that this fact presents a problem of interpretation.[34] The problem is that some of the previously at-large cities are now in the sample of district or mixed cities that are compared to the remaining at-large ones. If the cities that changed election forms were more resistant than average to black candidates when they were using at-large systems, then more recent findings of small differences between at-large and districted systems in cross-sectional data may be biased by what is called a *selection effect*.

There is at least prima facie evidence to suggest that such a bias is operative. The cities that have abandoned at-large elections through litigation or threat of it have typically been cities that are vulnerable to legal challenge for having systematically defeated black or Hispanic candidates. In consequence, the disappearance from the at-large category of many such cities could lead to mistaken conclusions about the impact of at-large elections on minority representation, if the analysis

depends entirely on cross-sectional data. For this reason a longitudinal, or "before-and-after," design is clearly preferable, even though research on this issue has, almost without exception, continued to use cross-sectional data.

Previous longitudinal research has exibited shortcomings as well. Grofman has criticized Davidson and Korbel for failing to incorporate into their longitudinal design a control group consisting of a sample of cities that did not change their at-large structure during the period when other cities were changing theirs.[35] This precluded knowing whether minority representation had also increased in unchanged cities, which one would have expected if white voters' attitudes were changing in cities generally with the passage of time.[36]

In 1983 Heilig and Mundt presented longitudinal data based on a sample of 209 southern cities of at least 10,000 persons containing a black population of at least 15 percent.[37] They compared cities that retained their election structure in the 1970s (whether at-large, mixed, or district plans) with those which changed during the decade from at-large to either mixed or district plans. The cities that changed election structures had sharp increases in black officeholding, a finding that corroborated the findings by Davidson and Korbel. There was virtually no change in black representation in cities that maintained an at-large system during the same period, and relatively small gains in the cities that retained mixed or district plans.

While Heilig and Mundt's study represents an advance over Korbel and Davidson's, given its use of a control group of unchanged cities, it, too, has methodological problems. First, the cities' black equity scores (ratios) for the two time periods were not exactly comparable. Those for the earlier period were either means of the cities' scores over the entire decade of the 1970s or, alternatively, "for the years in the decade before the change to districts." Those for the latter were apparently based on a score at a single point in 1980 or 1981.[38] Second, like Davidson and Korbel, the authors failed to control for the effects of the city's black population percentage, a factor known to influence black officeholding. But perhaps the most serious problem with their design was pointed out by Engstrom and McDonald, who observed that the cities were not placed randomly in experimental and control groups. "This leaves open the possibility that another factor or factors may be responsible for both the change in the electoral system and the increase in the number of blacks elected to the councils," such as black political mobilization.[39]

To examine the impact of at-large elections by utilizing a design that would overcome some of the flaws in both the previous longitudinal and cross-sectional studies, we decided to conduct new research in each of the eight southern "section 5 states," focusing on city election system changes (and in three states, county changes as well) during the period when the Voting Rights Act may well have had its greatest effect on minority officeholding.[40] Our findings are based on data for two different times[41] in all cities above a certain population size[42] with a black population (or in Texas, black plus Hispanic population) of at least 10 percent.[43] Our analysis controls for the effects of minority population size by classifying cities as those with a minority population of 10–29.9 percent, 30–49.9 percent, and 50 or larger percent. The data base identifies the number of elected officials who were black (and in Texas and North Carolina, Hispanic and Native American, respectively) at each time and identifies the election system in use at each time.[44] Election type is classified as either at large, single-member district, or mixed.[45] In all of the state chapters the population thresholds of the analyzed cities are far below the 25,000 or 50,000 thresholds used in most of the earlier studies. Our response rate for cities above the requisite size and population minimum in each state is very near 100 percent.[46] Thus, our data base of over one thousand cities is considerably larger than that in virtually all earlier studies,[47] even though the cities are located in only eight states.[48]

In addition to measuring the impact of election systems on minority representation, we wanted to determine if the Voting Rights Act influenced changes in the cities' election structure. Therefore, for every lawsuit filed challenging at-large rules in a city (and, in three states, counties too), the data set includes the case citation, the name of the attorney bringing the lawsuit, the name of the sponsoring organization, if any, and information about the disposition of the case, including the final outcome.[49]

Moreover, for each instance where there was a change in election method over the period in question, information was collected about the factors that led to the shift. For most states, where the shift was not voluntary, the proximate legal cause is classified according to whether a section 5 preclearance denial by the Justice Department was involved, or alternatively, a Fourteenth Amendment or section 2 challenge. Many of the state chapters also distinguish cases where the threat of litigation influenced the decision, and a few also specify whether the change was brought about by referendum.

The Tables

There are several kinds of tables in this book, all of which appear at the end of the chapters' text. Chapters 1, 10, 11, and 12 contain tables whose formats are unique to each of the four chapters, and they are numbered sequentially, beginning with 1, as they are mentioned in the text. In contrast, the 8 state chapters (2 through 9) contain four types of tables: those whose format is virtually identical in all eight; those whose format is similar in all eight; those whose format is a variation of tables of the first two types; and those which are unique to a state chapter and are not a variation on any of the "standard" tables. Let us briefly describe and illustrate these four types in the eight state chapters.

First, there are five tables whose format is virtually identical from one state chapter to the next. They are numbered 1 through 5 in each chapter, and they contain data on city election structures and minority equity of representation.[50] They can be found in the table section of any of the eight state chapters, and the reader will find it easy to compare, say, Alabama's table 5 with Georgia's or South Carolina's table 5.

Second, there are tables whose format is similar in all eight chapters, but not quite so much so as in the first five tables, and so their data are only roughly comparable. These are numbered 6 through 10. Thus, tables 1–10 can be thought of as "standard" tables, although 1–5 are more similar to their analogues in other states than 6–10 are. A glance at table 6 for Texas and Georgia will illustrate this. The Texas table presents a more complicated data configuration than the Georgia table, although the tables both address similar questions about city election structures in their state. Again, table 10 in both the Texas and Alabama chapters gives the percentage of minority officeholders, but the Texas table focuses on the statewide officeholding population, while the Alabama table presents data only on legislative officeholding.

Third, there are tables that are variations of standard tables in the state chapters, and as such they are designated with an A. For example, three state projects collected data for county office and presented them in a format similar to that for cities in their states' tables 1–5. Tables 1A–5A in the three chapters present the county data. To take another example of a variation on a standard table, Alabama table 5A presents data on changed city election structures for a time period different from that in Alabama table 5, in order to illustrate the way in which the selection effect can bias data in cross-sectional studies. Or, to mention yet another example, the Louisiana project composed a set of variations to Lousiana tables 1–5 using voting-age population, rather than total population, for the percentage base, to see if their test results would be different. These variations, too, are designated as tables 1A–5A in the Louisiana chapter.

Fourth, there were a few tables in the state chapters that were not variations on standard tables. They were given numbers above 10. For example, Lousiana table 11 presents black registration rates for Louisiana parishes in 1964. No equivalent data were gathered by other state projects. While we believe the four kinds of tables in the state chapters will be easy for the reader to distinguish once the tabular data are examined, we nonetheless urge him or her to pay attention to the table titles, which give full and accurate descriptions of each table's contents—especially when analogous tables in two or more state chapters are being compared.

A word should be said about one table composed for each of the eight state chapters that is not included in this book. Designated as table Z, it is a listing of all lawsuits filed between 1965 and 1989 under the Fourteenth Amendment, the Fifteenth Amendment, or the Voting Rights Act by private plaintiffs or the Justice Department that challenged at-large elections in municipalities in these states, as well as the disposition of the case, the ensuing changes in election structures, if any, and the names of plaintiffs' attorneys and their organizational affiliations. Some of these tables (or variations on these tables) also contain information on challenges to county election systems as well. Because of the length of these tables, and the fact that table 8 in each state chapter makes use of much of the information in it for analytic purposes, we have chosen not to include table Z.

Nonetheless, it is archived along with the other data bases of this project, and can be obtained through the International Consortium for Political and Social Research at the University of Michigan.

The most important data on minority election success in the eight states provide the basis for tables 1–5 and their variations. Table 1 reports minority officeholding percentages in 1989 or 1990 for cities classified according to election type and minority population percentage. Table 2 reports minority officeholding percentages in terms of before-and-after comparisons (most commonly in 1974 and 1989) for cities that elected council at large at the beginning point of the study. The changes in minority representation in the cities that retained at-large systems over the entire period constitute a type of control for effects independent of change in election type. Table 3 refers only to cities with mixed election plans and reports the minority officeholding percentages in both the at-large and district components. Table 4 makes use of the data in table 1 to report two measures of minority representational equity in 1989 or 1990 for cities with each of the three election plans.[51] Both measures—one involving an arithmetic difference, the other a ratio—gauge proportionality of minority representation by comparing the percentage of minority officeholders on the governing body with the percentage of the total minority population in the jurisdiction. (A variation of table 4 in chapter 4—table 4.4A—substitutes minority voting-age population for minority total population in the state of Louisiana, thus providing a comparison between results using these two population measures.)

Table 5 makes use of the data in table 4 to report the ratio measure of minority representational equity for cities of the various types at both the beginning and the end of the period under study. It shows how equity has changed over time in cities that changed election plan and in those that did not.[52]

Among other things, these five tables allow us to develop a clear picture of the growth since the early 1970s in the number of black (and, in Texas, Hispanic) council members in cities with varying minority population proportions and election structures. The size of our data base allows us to establish with more confidence than would otherwise be possible the effect of the act on minority electoral success at the local level within individual southern states. Moreover, because our data permitted comparisons between changes in minority representation in the cities that retained at-large systems and those which did not, we can make some cautious inferences—as we do in chapter 10 for blacks—about how much of the growth in the number of minority officials is the result of change in election systems as distinct from change in other respects, including the willingness of whites to vote for minority candidates.

Tables 6 and 7 examine the racial characteristics of districts in relation to the race of the officeholder elected from those districts, in cities with single-member-district or mixed plans. They tell us how likely blacks are to be elected from districts with various percentages of whites and, in particular, how likely blacks are to be elected from majority-white districts. These two tables, then, are

equivalent—for cities in the eight states—to various tables in chapter 11, which present similar information for legislative and congressional districts in all eleven southern states.

Table 8 contains a complete list, by city, of the reasons why cities changed to district or mixed plans during the period under analysis and enables us to estimate the extent to which the Voting Rights Act or Fourteenth Amendment litigation was directly responsible for abolition of at-large systems.[53] Thus, by examining table 8 in conjunction with table 5, we can model a three-step process in which voting rights litigation is either brought or threatened, which may lead to a change in election system, which in turn may lead to a change in minority electoral equity.

Table 9 focuses on disfranchisement. It contains a sobering list of each of the major disfranchising mechanisms used at some time between the end of the Civil War and the present era. Table 10 contains figures on black and white (and in Texas, Mexican-American and Anglo) registration at the time the Voting Rights Act was passed and in the late 1980s or early 1990s; it also contains figures on black and white officeholding in the 1960s and recent years. These data are presented as a percentage of total registrants and total officeholders (or, in some chapters, officeholders in each of the two statehouses), respectively, to provide a depiction of the changes in racial composition of these aggregates in the years since 1965.

Third- and Fourth-Generation Voting Research

As straightforward as our research goals were, they required a massive effort to gather and analyze several kinds of data and to situate them within a historical setting that gives them meaning. We nonetheless anticipate that some readers of this volume will charge us with not having addressed the question of whether the act has made a difference to ordinary southern blacks and Latinos. These readers will want to know: Has the federal guarantee of minority persons' right to vote and to elect candidates of their choice measurably changed their daily lives for the better?

We call *first-generation research questions* those having to do with minority enfranchisement, and *second-generation* those dealing with vote dilution and minority candidate electoral success. *Third-generation* issues concern the extent to which minority elected officials become an integral part of the political process: operating inside the system without being discriminated against, forming multiethnic coalitions, and working out resolutions to problems with fellow officials—in short, finding acceptance as active, influential players in the mainstream political game. *Fourth-generation* issues examine that game's output so far as minority citizens at the grass roots are concerned. Of concern here are the substantive policies that minority officeholders are able to get enacted and the impact these policies have on the life chances of their minority constituents. In these terms, it is

clearly first- and second-generation questions that our project set out to answer definitively. By contrast, we asked the authors of the state chapters to ignore third- and fourth-generation problems. There were several reasons for this decision.

First and most obvious, the impact of the Voting Rights Act on minority registration and voting and the election of minority officials is a large and important topic in itself, requiring careful and time-consuming investigation. The act's impact has been the subject of much controversy. In particular, as we have already said, some scholars and political commentators claim that increased willingness of whites to vote for black candidates had by the 1980s largely obviated the need to make further changes in election methods. Only a comprehensive longitudinal data set on minority representation in southern jurisdictions, of the kind we have developed, permits this controversy to be adequately addressed.

Second, we are putting first things first. Before one can sensibly talk about policy consequences of the minority vote and minority officeholding, it is important to ascertain the pattern and causes of minority registration and electoral success. While it is widely assumed that the act has been responsible for increases in minority officeholding, there has been almost no systematic effort to test this assumption. The work reported in this book is the most extensive effort so far. We believe that it will, in itself, contribute to our understanding of law as an instrument of social change. In addition, we anticipate that it will facilitate an informed discussion of the act's implications for the theory of democratic representation. Until certain key factual issues are settled, however, we submit that such normative inquiry lacks guidance. In particular, we doubt the usefulness of an abstract debate over the merits of color-blind redistricting that ignores the issue of the prevalence of racially polarized voting and its effects in various types of election system.[54]

Third, relative to what is needed to study the policy consequences of black elected officials, our resources were prohibitively small. There have been a few serious efforts to answer third- and fourth-generation questions in selected southern jurisdictions, but this kind of research, even when focused on a small sample, requires a labor-intensive case-study approach carried out over a considerable period of time.[55] An attempt to provide a systematic answer to these questions based on an adequate, carefully selected sample of cities across the South would be a major undertaking—one, we believe, that would require at least the resources and time that went into our own project. In the absence of such an enterprise, comments on third-generation questions would necessarily be speculative. For this reason we encouraged our authors to forgo them.[56]

There is yet another reason why we decided not to pursue this line of inquiry here. Where the rights of long-excluded minority groups to vote and to elect candidates of their choice against concerted white opposition are concerned, we firmly believe that these two rights are not contingent on the groups' ability to demonstrate that their exercise results in measurable political incorporation or in policy benefits to the minority communities, even though common sense tells us

that over time such results will come to pass. These voting rights can be justified—quite aside from their link to better police protection, job opportunities, and the like, in minority communities—solely on the basis of their power to confer full citizenship on the members of the group.[57]

Karst, the constitutional scholar, quotes Judge Learned Hand to make this point about the right to vote. "Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture." Karst adds, "Voting is the preeminent symbol of participation in the society as a respected member, and equality in the voting process is a crucial affirmation of the equal worth of citizens."[58] What is true of voting is also true of electing candidates of choice. Where the ability to elect such candidates is systematically denied, a group long frozen out of the political process is denied the full measure of citizenship that has long remained beyond its grasp.

Tom McCain was one of the first blacks elected to office since Reconstruction in Edgefield County, South Carolina—home of racist firebrand Benjamin "Pitchfork Ben" Tillman and of long-time opponent of desegregation J. Strom Thurmond. Speaking in 1981, McCain said, "There's an inherent value in officeholding that goes far beyond picking up the garbage. A race of people who are excluded from public office will always be second class."[59]

We believe that the questions about whether black officeholding leads directly to political incorporation, whether it has immediate policy consequences, and if so in either case, under what circumstances, are important ones for social scientists to address.[60] However, to pursue them in this book, within the context of the history of black voting rights in the South, could easily muddy Karst's and McCain's distinction between, on the one hand, the justification of those rights on the basis of their conferring full citizenship and, on the other, justification on the basis of their enabling those who exercise them to achieve preferred policy goals. This confusion would be unfortunate.

All of these reasons, then, have militated against our attempting to answer third- and fourth-generation questions in this book.[61] Rather, the key issue we have tried to resolve is whether, during the first quarter century of its existence, the Voting Rights Act has made it possible for southern blacks (and in Texas, Mexican Americans) to vote without hindrance and to elect candidates of their choice.

The data sets that provide the basis for our authors' conclusions about the effects of the act on minority representation will be made publicly available through the computerized data archives of the Inter-university Consortium for Political and Social Research at the University of Michigan within six months of this book's publication. Thus, if there are disagreements with the conclusions reached by the authors, they can be debated with respect to a common comprehensive data base. Even more important, we see the comprehensive data base that has been generated by our authors as one of the project's lasting legacies, one that will be of use for some time to come, we hope, to students of voting rights and broader issues of race and politics in the South.[62]

Chapter Organization

Chapter 1 describes the legal context in which the recent battle for minority participation was fought. It attempts to show how the act evolved synergistically with the constitutional voting rights protections that were elucidated in a remarkable series of federal court decisions beginning in 1960 and continuing into the 1980s. Chapters 2 through 9 contain individual accounts of the impact of the act, particularly on local election systems, in the eight southern states covered entirely or in substantial part by the section 5 preclearance provision.

The data on voting rights litigation and minority officeholding in the eight state chapters are summarized and commented upon in chapter 10. Changes in city election structure are gauged. Then the effect of these changes on minority officeholding is measured. Further, the ability of blacks to win office from districts of varying black population proportions is examined. Taken together, this information allows inferences about the direct link between enforcement of the act and minority officeholding. Chapter 10 also contains a discussion of the issues that led us to adopt the longitudinal design that served as the unifying framework for the individual state chapters.

Chapter 11 examines the relationship between the black population proportion in state legislative and congressional districts in the eleven southern states and the ability of blacks to win election there. It provides an overview of minority legislative and congressional representation in the South (including states not covered under section 5) and links changes in minority representation to voting rights litigation and preclearance decisions. Chapter 12 answers the first-generation question of how the act affected the black-white registration rates in the eleven-state South. Chapter 13 summarizes and interprets the larger significance of the book's major findings.

PART ONE

The View from the States

CHAPTER ONE

The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities

CHANDLER DAVIDSON

THE VOTING RIGHTS of American ethnic minority groups are guaranteed primarily by two documents: the United States Constitution—especially the Fourteenth and Fifteenth amendments—and the Voting Rights Act of 1965. Some of the same principles are contained in both, but there are important differences between the two, including differences in coverage, legal standing of parties, methods of enforcement, and standards of proving discrimination.

This volume examines the effects of the Voting Rights Act. Yet the act, as it has evolved, is interwoven with constitutional voting rights law that grew out of a series of judicial decisions enunciating the rights of racial and language minorities as these groups were making an extraordinary push for inclusion in the American polity. An understanding of the act therefore requires an appreciation of the synergystic relation between the mandates of the act and those of the Constitution regarding the rights of minority voters. There has yet to appear a standard legal history of the modern development of minority voting rights, from the abolition of the white primary by the Supreme Court in 1944[1] to the Court's latest full-dress interpretation of the Voting Rights Act's prohibition of minority vote dilution in 1986.[2] In the absence of such a history, I will sketch the merest outline of one as a road map for reading the chapters that follow.

After the Civil War, southern states were required by the Military Reconstruction Acts of 1867 to adopt new constitutions granting universal male suffrage regardless of race as a precondition for readmission to the Union. The Fifteenth Amendment, ratified in 1870, seemed to guarantee blacks the franchise by prohibiting vote discrimination on the basis of "race, color, or previous condition of servitude."[3] Nonetheless, by the turn of the century white conservative officials had effectively nullified the black vote as a political force in the eleven states of the former Confederacy. The elimination of black suffrage was made possible by northern indifference to the plight of southern blacks after the Hayes-Tilden Compromise in 1877, southern intimidation of potential black voters, corruption and fraud at the ballot box, Supreme Court decisions striking down various provisions of the Enforcement Act of 1870 and the Force Act of 1871, and subsequent court decisions permitting southern states to rewrite their constitutions to exclude blacks by devices such as literacy and good character tests and the poll tax. The Fifteenth

Amendment, ignored by racist southern officials and racist courts, was a dead letter. As a weapon to protect black voting rights, another Civil War amendment, the Fourteenth, with its potentially powerful equal protection clause, suffered the same fate.

Southern blacks continued to fight for the franchise that had been promised them. The National Association for the Advancement of Colored People, founded in 1910, became the main organization through which the laws preventing black voting were attacked. The first significant breakthrough came in 1944, when the Supreme Court unanimously held that the Texas Democratic party's exclusive white primary elections violated the Fifteenth Amendment. It was not until passage of the Voting Rights Act, however, that the last major barriers to voting were breached.

Minority Vote Dilution

The original purpose of the act was primarily to destroy the remaining barriers to the full exercise of the black franchise. But the act would soon be used to confront a quite different problem: electoral devices that operated to restrict the impact of black votes. Their establishment was in many instances the result of white southern politicians' recognition after World War II that, since black enfranchisement was probably inevitable and the white primary no longer existed as a force to prohibit black voters from participating in the all-important nominating elections, new means would have to be found to limit black voters' effectiveness. The fear of black voting—and in Texas, of Mexican-American voting as well—led southern officials, years before the Voting Rights Act was passed, to enact laws to prevent minority candidates from gaining office when barriers to voting fell. Whites had used such laws in the nineteenth century both during and after Reconstruction to dilute or curtail the power blacks had obtained at the ballot box.[4]

The distinction between disfranchisement and dilution can be made as follows. Disfranchisement prohibits or discourages a group from voting—for example, through making it difficult to register, intimidating would-be voters from entering the polling booth, declaring ballots invalid for specious reasons, stuffing the ballot box, or inaccurately tallying votes. Dilution, on the other hand, can operate even when all voters have full access to the polling place and are assured that their votes will be fairly tallied.

Vote dilution is a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable group to diminish the voting strength of at least one other group. The idea is that one group, voting cohesively for its preferred candidates, is systematically outvoted by a larger group that is also cohesive. If both groups are cohesive or, in other words, vote as opposing blocs, then *racially polarized voting* exists. Dilution can occur as a result of polarization between Democrats and Republicans, between rural voters and urban ones, or between any other identifiable factions in the electorate.[5]

Ethnic or racial vote dilution takes place when a majority of voters, by bloc voting for its candidates in a series of elections, systematically prevents an ethnic minority from electing most or all of its preferred candidates—candidates who will probably be members of the minority group—in an election system to which there is a feasible alternative. Vote dilution not only can deprive minority voters of the important symbolic achievement of being represented by preferred members of their own group, it can deprive them of a committed advocate in councils of government. In doing this, it may also deprive them of the substantial benefits that government bestows—from streetlights to storm sewers, municipal employment to fire protection, fair law enforcement to efficient public transportation.

Several election rules or practices may have a dilutionary impact when used in a setting of racially polarized voting. One of the most familiar is the gerrymander, by which district lines are drawn either to diminish the proportion of minority voters in districts or, alternatively, to pack far more minority voters in a district than is necessary for their candidates to win, thus reducing the number of districts with a substantial minority population or voter preponderance. Another is the at-large election plan (a type of multimember district), which has instead of several single-member districts or "wards"—some of which might contain a majority of minority voters—only one district, all of whose members are chosen by an electorate in which the ethnic minority may also be an arithmetic minority. If voting is polarized, then the majority in an at-large system will be able to elect all its candidates, and the minority will not be able to elect any. Even if the degree of polarization is less than absolute, the ability of minority voters to elect their candidates can be severely diminished.

Yet a third election practice that sometimes dilutes minority votes is the majority-runoff requirement. A runoff is a two-stage election procedure whose second stage comes into effect only if no candidate wins a majority of the votes. In the first election, the white majority may split among several candidates, with the result that a candidate favored by the minority would obtain a plurality. Under a plurality-win arrangement (which is a very common one in U.S. cities), the minority candidate in this situation would win. Under a majority-win rule, however, a runoff is required if no majority is obtained in the first election. If in the runoff the white majority coalesces behind the white candidate who was runner-up in the first contest, the white bloc vote can often defeat the front-running minority candidate, even if the minority bloc is strongly behind that person. This arrangement has sometimes been adopted by white officials soon after minority voters enter the electorate in large numbers, or after a minority candidate has won or come close to winning under the plurality-win rule.[6]

A fourth dilution measure, of which there are two common types, is the anti-single-shot device. The first type operates in elections where all candidates run against each other and the top vote getters fill the available seats. The device restricts the ability of voters to single-shoot (sometimes called "bullet vote"), that is, to withhold votes for some candidates in order to help their favored one. Blacks, for example, have often decided as a group before an election that the white bloc

vote will defeat their preferred candidate if blacks vote not only for their candidate but for as many others as they have votes to cast. So they decide on the candidate they will vote for while witholding votes for the other candidates, who are, in effect, her competitors. This strategy has often led to the election of a black in a polarized setting, although it requires black voters to forgo having a say in the election of other officials. The single-shot strategy is frustrated by the full-slate rule, requiring voters to cast all their available votes or to have their ballots invalidated. Another device is the numbered place system, whereby every candidate is required to declare for "place" 1, 2, 3, and so forth, on the ballot rather than run against all other candidates in a single contest. As voters can cast only one vote per place, this system prevents them from withholding votes from their favored candidate's competitors. It is sometimes resorted to when more straightforward prohibitions against single-shot voting are not feasible.[7] In a racially polarized setting, both anti-single-shot devices prevent a successful single-shot strategy to elect a minority candidate.

As Kousser has shown, southern white officials have long known the dilutionary effects of these arcane laws when used in a racially polarized setting.[8] While it is true that ordinary voters show little interest in the intricacies of voting laws, the politicos of even the smallest towns make it their business to understand how voting rules advantage some groups over others. This knowledge, after all, can powerfully influence who wins and who loses; and election results can affect how and to whom city contracts are let, on whose property the county airport will get built, how high the tax rate will be, who gets on the city payroll, in whose neighborhood the waste treatment plant will be located, or how aggressively environmental regulations will be enforced.[9] This practical political knowledge of election rules was used by southern whites against blacks from the end of the Civil War until disfranchisement, when the black vote was no longer a serious factor.[10]

But when it threatened to become one again, efforts were mounted throughout the former Confederacy to establish laws that would dilute minority voting strength. The chapters that follow provide detailed accounts of these efforts from the 1940s onward. The methods were the same ones that had been used during Reconstruction. Rosenberg provides a useful laundry list of the tactics—some disfranchising, some diluting—that whites have employed in recent decades when confronted by the prospects of black officeholding:

> When blacks attempted to run as candidates, discriminatory administration of neutral laws resulted in the following: abolition of the office; extension of the term of the white incumbent; substitution of appointment for election; increase in filing fees; raising of requirements for independent candidates; increase in property qualifications; withholding information on how to qualify; withholding or delaying required certification of nominating petitions. And finally, of course, there are the time-honored practices of gerrymandering, county consolidation, switching to at-large elections, and the like, which all can act to continue to deprive blacks of any political representation.[11]

The Alabama legislature in 1951, for example, enacted a full-slate law preventing single-shot voting, a law that applied to every election in the state.[12] The city

of Tuskegee, with its large black population, was specifically mentioned by one white legislator who said the law was necessary because "there are some who fear that the colored voters might be able to elect one of their own race" to Tuskegee's city council.[13] But when the full-slate law proved insufficient to this end, the legislature went a step further by redrawing the city's boundaries to exclude virtually all of the city's black voters but none of its white ones. In *Gomillion v. Lightfoot* (1960) the Supreme Court held that the law violated the Fifteenth Amendment.[14] Justice Felix Frankfurter, who wrote the opinion, saw the boundary manipulation as vote denial rather than vote dilution,[15] but the decision called attention to the way in which drawing boundaries could affect the political strength of blacks; and Frankfurter cited one of the Court's earlier opinions, *Lane v. Wilson* (1939)[16] in holding that "the [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination."[17] The quoted passage continues: "It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."

When the Voting Rights Act was passed, Alabama blacks began to vote in significant numbers. But the white registration rate also shot upward. Indeed, the net gain in white registration between 1964 and 1967 outstripped that of blacks, thanks to the efforts of Governor George Wallace and his followers. The fear of black officeholding in the state was no doubt partially responsible for this upsurge. Shortly after the Selma-to-Montgomery march the spring preceding passage of the act, a state senator pushed through a bill to require at-large commission elections in Barbour County, which till then had had districts. The reason he gave was to restrict the impact of "the block vote."[18] The first minority vote dilution suit, *Smith v. Paris*,[19] was filed in Alabama in 1966, challenging another switch in Barbour County elections—this one pertaining to the county's Democratic Executive Committee.

In 1947 the first southern black running against whites was elected to public office since the turn of the century. He won a seat on the Winston-Salem, North Carolina, Board of Aldermen under a ward system. Soon afterward a new district plan was adopted to restrict black officeholding to one ward out of eight.[20] After a black was elected in Wilson, a town in eastern North Carolina, in 1953 and 1955, the legislature changed the election plan from district to at large, resulting once more in an all-white council.[21]

These stratagems were harbingers of more widespread resistance to black officeholding in North Carolina, a state that has long prided itself on its relative moderation in racial matters. In 1966, shortly after the Voting Rights Act was passed, the general assembly in special session authorized almost half the state's counties' governing bodies to adopt at-large elections. Departing from past practice, the state would also require at-large elections in every school district in North Carolina.[22] In South Carolina between 1965 and 1973, eleven of nineteen counties that elected at least some members of their governing board from districts had switched to at-large systems.[23]

In Georgia, the legislature responded to a federal court order in 1962 requiring

reapportionment by presenting a plan that maintained single-member districts in most areas of the state but that created multimember districts in counties with more than one state senator, which included Fulton County, with its heavily black areas. During debate on the bill, a senator had warned his colleagues of the danger that a black might be elected in Fulton County under a single-member-district scheme. The plan was narrowly averted only hours from election day by a court order holding that the scheme violated the state constitution's prohibition of multimember elections in senate races; thus Georgia's first black senator since Reconstruction was subsequently elected.[24]

When the Supreme Court struck down the Georgia county-unit system, a malapportionment mechanism that diluted the votes of blacks, among others, the legislature passed majority-vote and numbered-place requirements in all state and federal elections. The bill, introduced in 1963, thus changed the plurality requirement in as many as 100 of the state's 159 counties. The law's sponsor spoke openly of its purpose "to thwart election control by Negroes and other minorities." In 1968, shortly after passage of the Voting Rights Act, the legislature extended the majority-vote requirement to many municipalities.[25] In Louisiana several police juries—the county governing bodies in the state—switched from district to at-large elections in the late 1960s and early 1970s.[26]

Soon after *Brown v. Board of Education* the Texas legislature began passing laws with increasing frequency that enabled school districts and cities to adopt the place voting system. One purpose, according to a student of place voting, was to prevent the election of minority officeholders by preventing single-shot voting.[27] In 1966, as a result of court-mandated reapportionment, the legislature gerrymandered district lines to dilute minority votes. It also imposed a minority-runoff requirement for school board elections in Houston, site of the state's largest school district, after two blacks and a white liberal had won election under the plurality rule. In the same period conservative Democrats set in motion an effort to shift elections for state office to off years. When the effort succeeded in the early 1970s, voter turnout, which had gradually been rising since the abolition of the state's white primary in 1944, decreased in state elections by about one-third.[28] In Mississippi in 1962, as black voter registration drives were beginning, the legislature passed a law requiring a large number of municipalities to elect aldermen on an at-large basis.[29] In Virginia, the legislature blatantly diluted the black vote in its 1964 reapportionment plan by creating a two-member senate district in Richmond and by joining the city of Richmond, 42 percent black, with Henrico County to form an eight-person multimember house of delegates district that was only 29 percent black.[30]

In short, there was widespread hostility among southern whites to black officeholding before passage of the Voting Rights Act—a hostility that found ready expression in legislation designed to curtail minority political strength even as the civil rights movement was expanding it. Once the act was passed, efforts to undercut blacks' newly gained voting strength continued, not only by creating at-large or multimember districts in many kinds of jurisdictions but by gerrymandering existing single-member districts to restrict the possibility of black (and Mexican-American) officeholding.[31] These efforts continued into the 1980s, and if they have begun to diminish, it is at least partly because the evolution of voting rights law has made them more difficult and more costly to white officials in southern jurisdictions.[32]

Vote Dilution and the Constitution

The Supreme Court's involvement in the question of vote dilution followed on the heels of *Gomillion*, the case that originated in Tuskegee, Alabama, where blacks were gerrymandered out of the city's municipal boundaries. The Court held in a case originating in Tennessee, *Baker v. Carr* (1962),[33] that legislative apportionment was justiciable. In *Reynolds v. Sims* (1964),[34] decided the year before the Voting Rights Act was passed, it held that because Alabama legislative districts contained unequal numbers of voters, the state's apportionment diluted the votes of inhabitants of the heavily populated districts and thus violated the equal protection clause of the Fourteenth Amendment. The Court required the legislature to reapportion itself on the basis of population equality.

In *Reynolds*, Alabama plaintiffs had sued to rectify the dilution of white suburban votes by a rural-dominated legislature at a time when few blacks could vote in that state.[35] Race was not explicitly at issue. Nor was it in *Fortson v. Dorsey*,[36] a Georgia dilution case that the Supreme Court decided in 1965. Rejecting a claim by Georgia voters that a combination of single-member and multimember legislative districts diluted the votes of residents of the multimember districts, the Court nonetheless said that while multimember districts were not inherently unconstitutional, they might be if they operated "designedly or otherwise . . . to minimize or cancel out the voting strength of racial or political elements of the voting population."[37] The Court was silent as to how that might happen.

Black plaintiffs then filed class actions trying to convince the courts that multimember districts, including at-large election systems, did in fact violate their constitutional rights.[38] These cases typically invoked the Fifteenth Amendment and the equal protection clause of the Fourteenth Amendment (claiming that plaintiffs' right to equal political participation was denied), and they sought as a remedy the creation of single-member-district plans. But not until 1973 did the Court hold that unconstitutional minority vote dilution had been proven. In *White v. Regester*,[39] an action filed in Texas by Mexican-American and black voters who challenged multimember legislative districts in Bexar County and Dallas County, respectively, after the 1970s round of redistricting, the Court unanimously found for the plaintiffs. However, its reasoning as to why the districts were unconstitutional was vague. The Court cited a number of factors: the long history of state-sanctioned discrimination against blacks in Texas and the history of discrimination against Mexican Americans as well; the small number of blacks and Mexican Americans elected to office in Dallas and Bexar Counties, respectively; and the

existence of a powerful white-dominated slating group in Dallas that ignored blacks' interests and engaged in racial campaign tactics to defeat candidates of blacks' choice. The Court also cited cultural and language barriers that had depressed Mexican-American registration and Bexar County legislators' lack of responsiveness to Mexican-American interests. It pointed to the existence of the majority-vote and numbered-place rules as enhancing the opportunity for racial discrimination in the counties' multimember settings. There was no indication, however, that the Court considered any of the items on this laundry list to be determinative. It simply approved the trial court's conclusion based on its examination of the "totality of the circumstances." Taken together, the high court said, they revealed that blacks and Mexican Americans "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."[40]

The vagueness of the opinion bothered voting rights lawyers, especially inasmuch as the justices did not even try to explain why the record in *White* differed from an earlier case with similar facts, in which the Court had found for the defendants.[41] A subsequent circuit court opinion, *Zimmer v. McKeithen*,[42] systematized the facts to be considered in a dilution case and, drawing on *White*, listed eight criteria as relevant. Four of these it called "primary" and four others "enhancing." But, like *White*, it did not specify determinative factors: "The fact of dilution is established," the Court said, "upon proof of the existence of an aggregate of these factors."[43]

The heavy burden of proof plaintiffs in these cases were required to shoulder is indicated by the list of "*Zimmer* criteria."

> Where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying their preference for multimember or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions, and the lack of provision for at-large candidates running from particular geographical subdistricts.[44]

In spite of this burden, minority plaintiffs in the years following *White* filed a number of constitutional challenges to at-large election schemes throughout the eight states covered by section 5—at least forty from 1973 through 1980. City councils, county commissioners' courts, and school boards—often in large cities—were the main targets of these suits, which were litigated primarily by attorneys with the Legal Services Corporation, the American Civil Liberties Union, the Lawyers Committee for Civil Rights Under Law, the NAACP Legal Defense Fund, the Mexican American Legal Defense and Educational Fund, the Southwest Voter Registration Education Project, and various private attorneys who began to specialize in voting rights cases. In some instances the U.S. Department of Justice also filed suit or was involved as intervenor or amicus curiae.[45]

The task of the plaintiffs was formidable. Because *White* and *Zimmer* presented

a list of relevant factors without specifying any as determinative, plaintiffs' lawyers tried to cover all the bases. They hired experts to investigate the racial history of the jurisdiction's major institutions, the history of its electoral system, and the socioeconomic situation of minorities compared to that of the majority in recent decades. The experts conducted detailed demographic studies of the ethnic groups to establish whether single-member districts would in fact remedy the vote dilution that existed under the challenged at-large system. Experts closely examined many kinds of statistics on local government hiring of minorities over time, government responsiveness to minority concerns, and government appointments to boards and commissions. They scrutinized newspapers and other documents for signs of racial appeals to white voters in elections involving minority candidates. They developed and applied methodological and statistical techniques for measuring such things as racial polarization and residential segregation—techniques that were sometimes refined after courtroom cross-examination by defense lawyers and criticism by opposing experts. Lawyers submitted interrogatories to officials requesting numerous records. They deposed potential witnesses. "Visuals" presenting many kinds of social science data were constructed. By the time these cases went to trial, the evidence, marshaled and systematized by lawyers and expert witnesses for both sides, often resembled huge, historically framed ethnographies of the jurisdiction's race relations and politics, sometimes spanning many decades.

The burdensome nature of these cases at the trial court level alone should be obvious from this description. The data-gathering process sometimes had to be extended when cases were appealed and then remanded to the trial courts for further fact-finding. In the intervening period, statistics might become dated as the factual situation evolved or new statistical sources became available. In the case that was ultimately styled *City of Mobile v. Bolden*,[46] black plaintiffs' lawyers filed suit in 1975 challenging the city's at-large election system; the case worked its way to the Supreme Court, which announced its decision in 1980 and remanded the case to the district court for further factual findings. The case was reheard in 1981 after extensive new evidence by four expert witnesses for the plaintiffs and the Justice Department and was finally decided in 1982. The first elections under the new district plan were held in 1985, ten years after the case was originally filed. Plaintiffs' lawyers logged 5,525 hours and spent $96,000 in out-of-pocket fees, which were exclusive of expenses incurred by Justice Department lawyers after the department intervened and the costs of expert witnesses and paralegals.[47] While *Bolden* was not typical, many other Fourteenth Amendment cases also involved massive data collection efforts and bounced back and forth between district and appeals courts for years.

The Origins of the Voting Rights Act of 1965

In 1940 approximately 3 percent of the black voting-age population in the South was registered to vote, which was about the same proportion it had been forty years

earlier.[48] After World War II that figure began to rise, and by 1964 it stood at 43.3 percent. However, in many areas, particularly where the racial caste system was strongest, white resistance to black voting was adamant. Blacks who attempted to register risked economic reprisals, violent repression, and sometimes death. In spite of courageous efforts by civil rights groups and local black leaders to increase registration and in spite of the Civil Rights Acts of 1957, 1960, and 1964, with their relatively weak voting provisions, little progress was made enforcing the Fifteenth Amendment in the areas of greatest resistance—five southern states with large black populations: Alabama, Georgia, Mississippi, North Carolina, and South Carolina. In 1964 average black registration in the five was 22.5 percent; in Mississippi it was 6.7.[49]

Lyndon Johnson's decision in late 1964 to press forward with a voting rights statute reflected a combination of factors: the inability of previous civil rights laws to crack white resistance to black voting,[50] a changing climate of public opinion outside the Deep South, the heroism exhibited by many civil rights activists, Johnson's concern with his place in history as well as his genuine desire to guarantee black voting rights, and calculations of Democratic advantage at a point when white southern support for the Democratic national ticket was eroding. Barry Goldwater's 1964 sweep of the Deep South, a bastion of Democratic strength since Reconstruction, had underscored the erosion.

About the same time Johnson reached his decision, the Southern Christian Leadership Conference, a civil rights group led by the Reverend Martin Luther King, Jr., chose Selma, Alabama, to be the battleground for a do-or-die push for black voting rights. Another civil rights group, the Student Nonviolent Coordinating Committee, and the Department of Justice had been working unsuccessfully for some time to register black voters in Selma and surrounding Dallas County. The drive, launched on 2 January 1965, provoked violence against the demonstrators and eventually led to the deaths of one black and two white protesters. The national outrage over the brutality of Alabama lawmen and of white terrorists galvanized Congress to enact Johnson's bill by a very large margin, even in the face of bitter resistance from most southern white congressmen.[51]

Provisions of the 1965 Voting Rights Act, as Amended

Until the 1980s the key components of the original act were the temporary provisions contained in sections 4 through 9, which were renewed and amended in 1970, 1975, and 1982, the last time for a period of twenty-five years.[52] They will come up again for congressional consideration in 2007. As with its original passage in 1965, extensions and amendments of the act in all three years reflected a strong bipartisan consensus, although there were initial attempts by presidents Nixon and Reagan in 1970 and 1982, respectively, to sabotage extension of various important provisions of the act.[53]

In 1965 the most imposing barrier to the black franchise was the literacy test in the seven southern states of Alabama, Georgia, Louisiana, Mississippi, North

Carolina, South Carolina, and Virginia. Even when fairly employed, this test often kept a disproportionate number of blacks from registering, since the South's unequal school system had provided blacks with an inferior education. But it was not always fairly administered, and then the effects were even more discriminatory than they otherwise would have been. Section 4 of the act contained a triggering formula that originally abolished literacy tests for a five-year period in any state or subdivision that used a test or similar device as a voting requirement on 1 November 1964 and had a voter registration rate on that date (or a voter turnout in the 1964 presidential election) of less than 50 percent of the voting-age residents. Between 1965 and 1975 six southern states and much of a seventh were the primary areas covered by this formula: Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and forty counties in North Carolina.

A major expansion of section 4 coverage occurred in 1975, when an additional language-minority trigger formula was added. A jurisdiction would be covered according to this formula if more than 5 percent of the voting-age citizens belonged to a single language minority group (defined as Asian Americans, American Indians, Alaskan natives, and persons of Spanish heritage), if, furthermore, fewer than 50 percent of voting-age citizens had voted in the 1972 presidential election, and if that election had been conducted only in English. Jurisdictions thus covered were required to provide election materials, including ballots, in the appropriate language in addition to English.[54] This new formula brought under the umbrella of section 4 the state of Texas—also a part of the old Confederacy, with its large black and Mexican-American populations—as well as the entire states of Alaska and Arizona and a number of counties in other states.

Section 5, which pertains only to the jurisdictions covered as a result of section 4's triggering formula, froze in place all voting statutes, pending federal approval of proposed changes. Jurisdictions were required to submit to the Attorney General (who normally had sixty days to object) or to the U.S. District Court for the District of Columbia all proposed changes having to do with voting that were in force before coverage. In the areas originally covered, the freeze date was 1 November 1964. In others, it was a later date, depending on when coverage first occurred. The proposed changes would be "precleared" for approval, each jurisdiction separately, after federal scrutiny of the particular facts if and only if the changes did not have the purpose or effect of denying or abridging the right to vote on account of race, color, or (after 1975) language-minority status. Section 5 preclearance requirements have, at one time or another, covered all or part of twenty-two states, although the focus has consistently been on the South. Today, section 5 covers nine states entirely and counties in seven additional ones.[55]

Sections 6 and 7 gave the Attorney General authority to appoint federal officials as voting examiners, or "registrars," who could be sent into jurisdictions covered by section 4 to ensure that legally qualified persons were free to register in federal, state, and local elections. Section 8 provided for the Attorney General to assign, when needed, federal observers to oversee the actual voting process in covered jurisdictions. Section 9 spelled out the procedures for challenging lists of eligible voters drawn up by federal registrars.

Other sections of the original act instructed the Attorney General to challenge the constitutionality of the poll tax as a voting requirement in the four states that still retained it for state elections (it had just been outlawed at the federal level by the Twenty-fourth Amendment, ratified in 1964); prohibited, under threat of penalty, interfering with the voting rights of qualified voters or engaging in voting fraud; and spelled out in detail the meaning of *vote* or *voting* for purposes of the act.[56] In *South Carolina v. Katzenbach* (1966)[57] the Supreme Court found constitutional all those sections of the act challenged by the state of South Carolina, including most of section 4 and all of section 5.

Vote Dilution Issues under Section 5 of the Act

Initially the key provisions of the Voting Rights Act were those dealing with voter registration. For almost four years after passage, the Justice Department did not apply the section 5 preclearance mechanism to proposed changes in voting laws that threatened to dilute minority votes. The situation changed dramatically as a result of *Allen v. State Board of Elections*,[58] a 1969 Supreme Court decision based on suits filed in Virginia and Mississippi. The facts in Mississippi were particularly egregious. The 1966 legislature, without public debate, passed a package of election laws that would diminish black voting strength. Among them was a bill requiring at-large election of all county boards of supervisors and boards of education. A senator explained that the change from wards to countywide elections would protect "a white board and preserve our way of doing business."[59] Lawyers for black voters argued that these bills should have been cleared with the Justice Department under section 5; Mississippi disagreed. After reviewing the Voting Rights Act's legislative history, the Supreme Court held that preclearance was required, reasoning that the act "gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.'"[60]

Preclearance decisions are not subject to judicial review. Thus section 5, as interpreted by *Allen* in 1969, gave the Justice Department unprecedented authority to monitor election procedure in covered areas for evidence not only of disfranchisement but of vote dilution and to force compliance. Whereas the department had not objected to a single instance of vote dilution before 1969, it began to object that year and continued to do so thereafter with increasing frequency,[61] signaling to the multitude of covered jurisdictions that attempts to make dilutionary changes in their election laws would encounter difficulties.

Allen was a tremendously important decision for two reasons. By interpreting section 5 as requiring preclearance of election changes that could affect black representation as well as black voting, it gave the Justice Department's review powers a much broader scope than they otherwise would have had. But equally as important, in this decision the Court expanded the notion of vote dilution beyond that developed in the reapportionment cases—where an *individual's* vote was diluted by virtue of unequally populated districts—to include the dilution of a

group's vote by any number of devices, including submersion in an at-large election system. The expanded idea of dilution in *Allen* was implicit in *White v. Regester* in 1973, although the Court was still struggling to articulate it.[62] Indeed, the idea would not be spelled out precisely by the Court until *Thornburg v. Gingles*,[63] decided more than a decade later. But minority vote dilution as a group-based phenomenon was clearly the target of the Fourteenth Amendment voting rights cases growing out of *White* and *Zimmer*; and so in an important sense the Voting Rights Act from 1969 on has influenced the development of the constitutional case law on this subject. As the Fourteenth Amendment was the primary weapon by which minority plaintiffs could attack at-large elections and other multimember districting schemes that diminished their voting strength until section 2 was amended in 1982, the synergistic relation between the U.S. Constitution and the act is obvious.

The reach of section 5 in protecting against dilution was limited in four respects, however. First, its coverage was restricted to a minority of the states and to a small number of jurisdictions within several of these. In 1981, for example, all or parts of twenty-two states were covered by the preclearance provisions, but only nine (seven in the South) were entirely covered, and in the remaining thirteen states, ten had fewer than six covered counties. Second, dilutionary laws on the books at the time jurisdictions were first covered by section 5 could not be challenged unless officials proposed changes. In many instances, dilutionary laws already in place simply remained unchanged. Third, when officials decided to pass a dilutionary law, they sometimes failed to submit it to the Justice Department or the Washington, D.C., court for preclearance, despite the section 5 requirement to do so. Once enacted, the changes might escape detection indefinitely. This was especially a problem in the early years of the act. Fourth, under the standard enunciated by the Supreme Court in *Beer v. United States* (1974),[64] only those proposed electoral changes in covered jurisdictions that were "retrogressive" or, in other words, would actually diminish minority voting strength from what it had been, were prohibited under section 5. Thus if the election law to be supplanted by the proposed change already diluted minority voting strength and the proposed change would not dilute it more, the change was permissible.[65]

In short, while section 5 was enforced by the Justice Department with growing effectiveness from the early 1970s on, especially with respect to state legislative redistricting, and while it undoubtedly prevented numerous dilutionary devices from being implemented, it was an instrument with serious limitations. These limitations led plaintiffs and their lawyers to continue to press suits in the federal courts, claiming that election structures violated the constitutional right of the minority group to an equal opportunity to elect candidates of its choice.

Bolden and the Amendment of Section 2

City of Mobile v. Bolden was a major turning point in the evolution of voting rights law, both constitutional and statutory. The Supreme Court in 1980 handed down

the decision, sending shock waves through the voting rights community. A plurality of the badly divided Court held that the Fifteenth Amendment prohibited only formal barriers to registration and voting—not vote dilution. And it held that a Fourteenth Amendment violation required a showing of racially invidious purpose in creating or maintaining a dilutionary system such as at-large elections. The decision indicated, in the words of two voting rights lawyers, that "the justices confronted the lingering problem of adjudicating at-large vote dilution cases caused by the lack of clearly enunciated standards, but no five justices could agree on a solution."[66]

The intent requirement seemed to be the straw that would break the camel's back in voting rights cases, where the load borne by the plaintiffs' camel was already heavy. It was not simply one more burden equal in importance to the eight other *Zimmer* factors. Often the at-large system, like that in Mobile, had been established at the turn of the century as part of a Progressive Era reform package described by its advocates as a "good government" measure but often intended to get socialists, blacks, and white ethnic or working-class representatives off city council.[67] The likelihood was remote that plaintiffs in these cities could uncover "smoking guns" indicating reformers' racial intent more than half a century after the fact. In some cities there were not even extant public records or newspaper accounts that described the events leading to the adoption of such reforms. While this was not true for Mobile, the complexity of that city's racial politics in the early twentieth century was such that, when forced to present evidence of racially discriminatory purpose after the case was remanded to the district court, plaintiffs' lawyers and the Justice Department, intervenor in the case, felt compelled to hire three historians to comb the record—which stretched back to the early nineteenth century—for months. The results of this research led to the discovery of evidence of discriminatory intent in the *Bolden* case and an ultimate victory for the plaintiffs. But the hundreds of hours of historical research that might go into the discovery of incriminating racial motives would very likely have been prohibitive in most cases.

Faced with the new *Bolden* requirements, the voting rights bar mobilized the national civil rights lobby to press for a statutory response to the Court's decision. As fate would have it, the Voting Rights Act was coming up for renewal in 1982, and civil rights strategists decided to try to convince Congress to amend section 2—a permanent feature of the act covering the entire nation—to restore the *White-Zimmer* factors as the criteria for proving minority vote dilution. While this tactic appeared in 1981 to be a long shot, given the recent election of Ronald Reagan as president and his appointment of a quite conservative attorney general and assistant attorney general for civil rights—William French Smith and William Bradford Reynolds, respectively—it ultimately succeeded. In 1982 the Voting Rights Act was extended and the amendments to section 2 that the voting rights bar sought were made, thanks partly to clarifying compromise language introduced by Republican senator Robert Dole of Kansas. The amendment passed both houses of Congress by veto-proof majorities, despite strong initial opposition of the White

House and the continued spirited opposition of such Republican stalwarts as senators John East of North Carolina and Orrin Hatch of Utah. President Reagan signed the amended bill into law.[68]

As amended, section 2 explicitly prohibited any voting procedure that so much as resulted in members of the protected classes having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." The law went on to say that "the extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."[69] Shortly thereafter, ironically, the Supreme Court in *Rogers v. Lodge*[70] softened its intent standard to the extent that plaintiffs' burden of proof was essentially what it had been in *White* and *Zimmer*. By the end of 1982, therefore, amended section 2 enabled either the Justice Department or private plaintiffs to sue jurisdictions anywhere in the nation without having to prove intent.

Vote Dilution and Section 2 of the Voting Rights Act

Yet another irony in the train of events set in motion by the plurality ruling in *Bolden* became manifest when the Court gave its interpretation of amended section 2 in *Thornburg v. Gingles* (1986). In a decision written by Justice William Brennan, the Court adopted criteria for claims of at-large dilutionary effects similar to those proposed in a law review article by James Blacksher and Larry Menefee, plaintiffs' lawyers in *Bolden* whose criticism of *White* focused on its lack of judicial manageability.[71] Thenceforth, the Court held, claims of dilutionary effects under section 2 must meet a three-pronged test. First, the minority group must be "sufficiently large and geographically compact" to constitute a majority in at least one single-member district. Second, the group must be "politically cohesive," or in other words, tend to vote as a bloc. Third, the majority must also vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[72] This test, which was significantly different from the *White* standards, streamlined the evidentiary requirements for minority plaintiffs.

With the exception of one feature—the Court's introduction of a population size and geographic compactness standard for minority groups that was not explicitly contained in the statute—the new test for dilution was immediately welcomed by most voting rights lawyers as a major advance.[73] Many dilution cases were filed in the 1980s, some of which were settled out of court in a manner favorable to plaintiffs, as the chapters to come make clear. Many at-large jurisdictions in the South (and to a lesser extent in the Southwest), having seen the handwriting on the wall, decided to adopt at least some single-member districts before someone filed a section 2 case in their locale, just to be on the safe side. As a city attorney in Texas whose municipality had shifted to single-member districts put it, "Because of

recent changes in the law, [our city] felt a voluntary move to single-member districts to be more efficient from an economic and political standpoint."[74]

Conclusion

The Voting Rights Act of 1965, one of the most important civil rights statutes in American history, is part of a struggle for the minority franchise reaching back across centuries. Since its enactment, it has evolved beyond its original primary purpose of securing the black franchise (see table 1.1). Congress and the federal courts have gradually developed a theory of voting rights—one that extends to certain language minorities as well as to blacks—that includes protection against vote dilution. Constitutional protection is found in the language of the Fourteenth Amendment, so long as minority plaintiffs can show under the preponderance of the evidence an intent to diminish their voting strength through racial gerrymanders, at-large election systems, and the like. Vote dilution is also subject to protection under the Voting Rights Act, both in sections 2 and 5. Under both sections intent to discriminate need not be proved.[75] The achievement of these protections is a long and complicated story, not easily captured in statistics, although the authors of the essays in this volume present a good many of them. In fact, as the chapters that follow demonstrate, there is not one single story but at least eight: one for each southern state covered by section 5. To speak even more accurately, there are thousands of stories, each detailing the amazing efforts by determined men and women in communities throughout the former Confederacy to make good on this nation's promise of an inclusive democracy. While the research reported here only hints at these rich and varied local histories, it makes clear, through its integrated design and, chapter by chapter, its reiteration of common themes, how important the Voting Rights Act of 1965 has been its first twenty-five years.

Table 1.1
Major Legal Developments Involving Vote Dilution, 1960–1990

Year	*Development*	*Significance*
1960	*Gomillion v. Lightfoot*	Disfranchisement through racial gerrymandering is unconstitutional.
1962	*Baker v. Carr*	Legislative reapportionment is held justiciable.
1964	*Reynolds v. Sims*	Alabama legislature must reapportion itself under "one-person, one-vote" principle.
1965	Voting Rights Act is passed	Jurisdictions covered by section 5 must preclear voting changes.
1965	*Fortson v. Dorsey*	Multimember districts might possibly be unconstitutional in some cases.
1966	*South Carolina v. Katzenbach*	Voting Rights Act is constitutional.
1969	*Allen v. State Board of Elections*	Laws potentially causing minority vote dilution are subject to section 5 preclearance.
1970	Voting Rights Act is extended, amended	Section 5 remains in force.
1973	*White v. Regester*	Invoking "the totality of the circumstances," Court invalidates a legislative plan that diluted minority voting strength.
1973	*Zimmer v. McKeithen*	*White* standards are codified into eight factors.
1975	Voting Rights Act is extended, amended	Section 5 is expanded to cover language minorities and hence some other states (including Texas).
1976	*Beer v. United States*	Retrogression standard applies to section 5.
1980	*City of Mobile v. Bolden*	Evidence of discriminatory intent is required in Fourteenth Amendment and section 2 dilution cases.
1982	Voting Rights Act is extended, section 2 amended	Congress adopts a "results" standard for section 2 cases.
1982	*Rogers v. Lodge*	*Bolden* standards are softened in Fourteenth Amendment dilution cases.
1986	*Thornburg v. Gingles*	Three-prong dilution test in section 2 cases is established; polarized voting is the linchpin.

CHAPTER TWO

Alabama

PEYTON McCRARY, JEROME A. GRAY, EDWARD STILL, AND HUEY L. PERRY

WHEN COLONEL AL LINGO'S state troopers charged onto the Edmund Pettus Bridge in Selma, Alabama, on Sunday, 7 March 1965, their violent assault on unarmed civil rights demonstrators unwittingly dealt the cause of white supremacy a mortal blow. Television cameras recorded the entire scene as troopers attacked with nightsticks and tear gas, to the cheers of white onlookers, and Sheriff Jim Clark's mounted posse chased the panic-stricken demonstrators back across the bridge.[1] That footage on the evening news, followed by a mass march from Selma to Montgomery and the deaths of two civil rights workers at the hands of Klansmen and their sympathizers, prompted Congress to demand federal intervention in the black struggle for voting rights. President Lyndon B. Johnson personally addressed the Congress, urging passage of the administration's voting rights bill and stirring a nationwide television audience with an eloquent defense of political equality for southern blacks.[2]

Alabama was at the heart of the resistance to minority voting rights. Only 19 percent of the black voting-age population was registered in 1964, the lowest proportion in the South except for Mississippi. By contrast, 69 percent of the white voting-age population was registered. Discriminatory application of a literacy test—a requirement that two registered voters "vouch" for each new applicant—and a cumulative poll tax were the most effective tactics used to inhibit black political participation.[3]

The recently enacted Civil Rights Act of 1964 prohibited use in federal elections of different qualifications for blacks and whites, or disqualification of applicants for minor errors, and made a sixth-grade education prima facie proof of literacy.[4] The Alabama Supreme Court, charged by state law with responsibility for the literacy test, then developed a new set of short-answer quizzes; these were struck down, in turn, by the federal courts.[5]

The Voting Rights Act, passed by Congress a few months after the Selma-to-Montgomery march, was a watershed in the history of Alabama politics. By suspending literacy tests and the voucher system, this powerful new statute moved the state far along the road to universal suffrage.[6] The threat that federal examiners might intervene in the registration process throughout the state, as they did in a few counties that had registered virtually no blacks, helped persuade white officials to

give up their discriminatory manipulation of registration laws.[7] The federal courts also struck down state court injunctions that would have prevented registrars in several black-belt counties from complying with the act.[8] Elimination of the state poll tax by federal court action also made it easier to add new voters to the rolls.[9] By October 1967, 248,432 blacks (52 percent of the black population) had registered in Alabama, more than doubling the black registration rate in only three years.[10] The fact that most blacks could now vote, in turn, brought a dramatic reduction in the use of traditional white supremacist rhetoric in most areas of the South. Because of the extraordinary strength of the George Wallace movement, however, Alabama was among the slowest to put away old habits. As late as the 1970 gubernatorial runoff against the moderate incumbent, Albert Brewer, Wallace's charge that his opponent was the candidate of "the bloc vote (Negroes and their white friends)" helped him come from behind and eke out a narrow victory over the governor.[11]

The effort of Wallace and his supporters to mobilize white voters after 1965 had, in fact, facilitated a great expansion in white registration in Alabama, now that the literacy test and the poll tax were gone. In absolute numbers the new white voters actually outstripped new black voters: 276,622 whites registered between 1964 and 1967, bringing the proportion registered to 90 percent.[12] In all except a few localities, blacks remained a political minority; outside of black-majority jurisdictions, no blacks were elected to public office.[13]

When the Voting Rights Act was adopted, most Alabama jurisdictions already used citywide or countywide elections designed, together with a "numbered-place" requirement, to dilute black voting strength. The state could thus prevent black officeholding without having to change its election laws (and thus be subject to the preclearance provision of section 5). Politicians in Alabama, as in the rest of the South, had long understood that at-large elections enable a white majority—if it chooses to vote as a cohesive bloc—to prevent minority representation altogether.[14] Black officeholding in Alabama was achieved, by and large, only as a result of successful voting rights litigation challenging the use of at-large elections.

THE FIRST VOTE-DILUTION LAWSUIT

Barbour County, which George Wallace called home, was among those still electing county commissioners by single-member district in 1965. Shortly after the Selma-to-Montgomery march, Senator James S. Clark of Barbour County pushed through the legislature a bill that required at-large elections for the county commission.[15] The local paper quoted him as saying that one of the reasons for switching to countywide elections was "to lesson [*sic*] the impact of any block vote."[16] Clark, a Wallace floor leader in the legislature, used the term *block vote* as a code word for the black vote, as was customary in the 1960s.[17]

Barbour County's change from district to at-large elections for the county com-

mission escaped federal detection until 1978.[18] When party officials attempted the same change in 1966 for the Barbour County Democratic Executive Committee, however, it sparked the very first minority vote-dilution lawsuit, *Smith v. Paris*.[19] Veteran civil rights lawyer Fred Gray, who had been a close associate of Martin Luther King, Jr., from the Montgomery bus boycott of 1955 to the Selma demonstrations in 1965, filed the case as a cooperating attorney of the NAACP Legal Defense and Education Fund. On behalf of the county's black citizens, Gray alleged that the elimination of ward elections by the executive committee was intentional discrimination designed to dilute the black vote, and thus violated the Fourteenth and Fifteenth amendments.[20]

For many years voters in each of sixteen districts had chosen their own representatives in the party primary, with only five members elected on an at-large basis. Between the passage of the Voting Rights Act and 21 February 1966, however, the number of blacks on the registration rolls increased from 723 to 3,100, approximately one-third of the total county electorate. In four districts blacks were now a majority of the registered voters.[21] After six blacks filed as candidates for the county executive committee, the incumbents adopted a resolution requiring all members to run countywide, rather than just within their districts.[22]

The plaintiffs were fortunate that their lawsuit was before Judge Frank Johnson, the legendary federal district judge in Montgomery who had heard most of the important civil rights cases in Alabama for more than a decade. The "clear effect of the resolution" adopted by the county executive committee, declared Johnson, was that "predominantly Negro beats now have their representatives determined for them by the predominantly white majority of voters in the county as a whole."[23] In that first election the black candidates received a majority of the votes cast in their districts but lost countywide. The defendants conceded that at-large elections had a discriminatory impact, disputing only the claim that the executive committee acted with a racial motive.[24]

As to motive, Judge Johnson's experience with racial attitudes in Barbour County went back to 1959, when he had ordered George Wallace, then a circuit judge in Barbour County, to allow the staff of the U.S. Commission on Civil Rights to examine voter registration records. Preston Clayton, Wallace's personal attorney in the earlier dispute, was now attorney for the County Democratic Executive Committee.[25] The court, however, saw the elimination of ward elections as just another in a history of efforts by Alabama whites to keep blacks from power. "If this court ignores the long history of racial discrimination in Alabama," declared Johnson, "it will prove that justice is both blind and deaf."[26] Johnson outlawed future use of the at-large scheme because "its passage was racially motivated" and thus violated the Fifteenth Amendment.[27] The Fifth Circuit Court of Appeals upheld Johnson's finding of unconstitutionality, and ordered new elections to be held on a single-member-district basis in 1968.[28]

Amazingly, the Barbour County Democratic Executive Committee defied both courts. At a meeting on 17 February 1968, the committee voted to elect new members in the May primary on an at-large basis, without requiring candidates to

reside in a particular district.[29] "The majority of people in Barbour County," Senator Clark explained, wanted "to keep the Democratic Committee on an at-large basis and 'free from federal intervention.'"[30]

This time the United States government sued the Barbour County Democratic Executive Committee, charging that the resolution "was adopted with the purpose and effect of diminishing the effectiveness of the Negroes' vote."[31] This appears to be the first vote-dilution case filed by the Department of Justice, and the first in which it challenged the adoption of at-large elections as a violation of section 5 of the Voting Rights Act.[32] Seeing this case as "a sequel to *Smith v. Paris*," the court found the 1968 resolution "purposeful discrimination against Negroes in violation of the Fourteenth and Fifteenth Amendments."[33] When a new election was held on a single-member-district basis, four blacks were elected to the Barbour County Democratic Executive Committee.[34]

The history of racial discrimination mattered a great deal in Judge Johnson's court. His willingness to make judicial findings of invidious intent seems to have been based, in part, on his personal knowledge of that history. This tendency to focus on the question of motivation was more pronounced among federal judges in Alabama than elsewhere, for reasons that appear rooted in the individual biographies of the judges themselves. Vote-dilution lawsuits in the state for the next two decades, in any event, often turned on historical evidence of discriminatory intent. This historical evidence is worth a closer look.

The History of Discrimination in Alabama Politics

The Reconstruction Period

In 1867, two years after the end of the Civil War, the United States government sought to "reconstruct" the southern states by requiring the election of new constitutional conventions. Blacks were able to register freely, but many whites who had supported the Confederacy were disqualified under the terms of the Fourteenth Amendment. The convention elected under the new suffrage requirements was overwhelmingly Republican; it left voter registration open to blacks and continued, for a time, the restrictions on former Confederates.[35]

The state government elected under the new constitution, like the convention that had preceded it, was dominated by white Republicans, a majority of whom were residents of Alabama before the Civil War. These "scalawags," as native white Republicans were called by hostile white Democrats, represented predominantly white counties, especially in the northern half of the state. Northern whites who had moved to Alabama after the war ("carpetbaggers," in the Democratic lexicon), tended to represent black-majority constituencies, especially in the plantation counties of the south.[36] Except in counties or city wards where their race was in the majority, however, black officeholders were rare.[37]

The Democrats often used violence and intimidation as political weapons. During a special legislative election in 1869, for example, Mobile Democrats

wheeled a piece of field artillery from a firehouse and trained it on a crowd of perhaps a thousand blacks waiting to cast their ballots. The crowd scattered without waiting to vote; the Democrat won the election.[38] The Ku Klux Klan was active in rural areas of the state between 1868 and 1872, beating and killing Republican leaders, burning their houses, lynching several blacks, and sending armed bands of as many as 160 white horsemen to break up Republican political rallies and intimidate voters.[39]

In the 1874 elections the Democrats again used violence and intimidation to secure permanent control of Alabama state government. In Mobile white horsemen shot down black voters on their way to the polls, killing one, wounding four, and intimidating countless others. Another major election riot in black-majority Barbour County left three dead and over forty wounded.[40] Systematic use of political violence, intimidation, and economic coercion played a pivotal role in the Democrats' "redemption" of Alabama from Republican rule.[41]

Minimizing the Effectiveness of Black Voting

The likelihood of federal intervention prevented the Democrats from simply disfranchising blacks and made it necessary to find alternative methods of assuring white supremacy.[42] The first legislature controlled by the Democrats enacted a statute designed, among other things, to punish election fraud. Under the new law, changing the preferences marked on a voter's ballot, bribing a voter, deterring a voter from casting his ballot, or failing to open the polling place at all—practices in which white election officials or party representatives routinely indulged—were illegal, but were only misdemeanors. The statute made it a felony, however, to vote more than once for any office during an election.[43] Democrats charged that blacks—but not whites—were often guilty of voting "early and often." "It is an established fact that a white man cannot easily vote more than once at one election," said one legislator during debate over the bill, because whites "do not all look alike."[44]

The prohibition on multiple voting was clearly intended as a device to limit primarily black election fraud, and perhaps to intimidate honest black voters as well. "Governor Houston has approved the new election law for the State," reported the *Montgomery Advertiser*: "Good-bye to negro repeating and packing of negroes around the Courthouse on election day."[45]

Democrats in Montgomery and Selma persuaded the legislature to remove predominantly black sections from each city's boundaries, so that whites would have a safe majority.[46] Mobile Democrats pushed successfully for the adoption of at-large elections for the county school board, replacing a "limited vote" procedure enacted in 1871 to allow minority representation. The new system of countywide elections eliminated black, as well as white Republican, membership on the school board.[47]

With the exception of a few predominantly white counties, most county commissions were already elected at large in Alabama.[48] Thus only in the black belt was white domination of local governing bodies in jeopardy. In 1876 the Democratic legislature eliminated elections altogether for county commissions in eight black-majority counties, authorizing the governor to appoint county commissioners. In several counties the legislative delegation was still Republican, and these bills were passed over their opposition.[49] The legislature also set unusually high security bonds for elected officials in certain black-belt counties, and Democrats tried to assure through community pressure that no whites would help Republicans raise the money for these bonds. The governor could then appoint a Democrat to the vacant office. The legislature also abolished the criminal court in black-majority Dallas County, solely because the judge was a black Republican, and created a new court to perform the same functions.[50]

Thereafter county commissioners and election officials in these counties were Democrats committed to the principle of white supremacy. Often they refused to open the polling places at all, or kept them open for only a few hours, in overwhelmingly black precincts. They used wholesale election fraud to win congressional, legislative, and gubernatorial races, regularly casting black votes intended for Republican or Populist candidates on behalf of their own conservative Democratic ticket, and justifying these tactics as a necessary evil to prevent a return to the "horrors" of Reconstruction.[51]

Widespread outcry against the conservatives' use of black votes in 1892 to defeat the Populist gubernatorial candidate, who was, after all, a white man, led the Alabama legislature to adopt an alternative approach: a restrictive voter registration and election law. Drafted by A. D. Sayre, a powerful committee chairman from black-majority Montgomery County, the bill authorized the governor to appoint all registration boards, provided that voters could register only in the month of May, and required the voter to produce his registration certificate in order to vote. Ostensibly a "reform" bill because it provided an official secret ballot for the first time instead of relying on the traditional "party ballot," it actually created a de facto literacy test. The complex form of the ballot, in which candidates were arranged alphabetically without party labels, was designed to confuse those who could not read well; illiterate or semiliterate voters could be assisted only by an election official and could remain in the voting booth only five minutes.[52] The complexities of casting the new official ballot were widely recognized as providing a "legal and honest way of preventing Negro control in the black counties."[53]

The Sayre Law cut black voter participation dramatically, to be sure: Kousser estimates that turnout among blacks dropped from 64 percent in 1892 to 42 percent in 1894. White participation also declined from 80 to 67 percent in the same period, however, and the decline was greatest among whites who had supported the Populist party in 1892. Thus the secret ballot "reform" broke the back of Alabama Populism and prepared the way for the wholesale disfranchisement of blacks and poor whites in 1901.[54]

Disfranchisement

By the late 1890s southern white conservatives no longer feared federal intervention to enforce the voting rights extended to blacks by the Reconstruction amend-

ments. Northern whites were often disenchanted with the principle of Negro suffrage, and the theme of sectional reconciliation was dominant in the literature of the period. The Spanish-American War and U.S. intervention in the Philippines led a growing number of Americans to speak of the "white man's burden" to rule colored peoples throughout the world. The Supreme Court, reflecting (or perhaps even leading) this drift to the right, accepted the idea that state-sanctioned racial segregation was not unconstitutional.[55]

When the conservative wing of the Alabama Democratic party took firm control of state politics in 1900, it called an election for delegates to a constitutional convention to eliminate the black vote. Against the opposition of the few surviving Populist and Republican delegates, the convention enacted a cumulative poll tax, a literacy test, a long residency requirement, and required gainful employment for the past year.[56] Another provision disfranchised persons convicted of a variety of specific crimes, usually misdemeanors perceived by delegates as more often committed by blacks than whites.[57] These disfranchising devices were effective. In 1900 there were over 180,000 blacks eligible to vote in Alabama; by 1 January 1903, there were fewer than 3,000. Many whites, especially poorer whites, also lost their right to vote: over 230,000 whites qualified in 1900, but only 191,000 were registered at the beginning of 1903. As a result of disfranchisement, voter turnout in the presidential election of 1904 was only 24 percent of adult males. This figure represented an estimated 19 percent reduction among whites, when compared with the 1900 election, but an extraordinary 96 percent reduction in black voter turnout.[58]

"But if the Negroes did learn to read, or acquire sufficient property, and remember to pay the poll tax and to keep the record on file," notes Woodward, "they could even then be tripped by the final hurdle devised for them—the white primary."[59] As in other states, Alabama laws regulating primary elections allowed party officials to determine the rules for voting, thus providing the legal fiction that it was the party, not the state legislature, that limited participation to whites.

The possibility that litigation might persuade the federal courts to strike down the disfranchising devices enacted in 1901 was still a concern, even after the Supreme Court refused to take action in *Giles v. Harris*.[60] With the white primary as an insurance policy against such legal threats, however, white supremacy seemed to be safe at last. Then black-majority counties that had relied on gubernatorial appointment of county commissioners to maintain white supremacy felt safe in returning to popular elections, and many other counties switched to district elections.[61] The state legislature also adopted a new municipal code requiring larger cities to use ward elections for city council seats.[62]

The return to a ward system caused a brief controversy in Mobile, where close to two hundred blacks remained on the voter registration rolls, many in the overwhelmingly black seventh ward.[63] In 1908 opponents of Mayor Pat Lyons accused his "machine" of using the black vote to elect its aldermanic candidate in what was supposed to be a white primary. The mayor's supporters did, in fact, seem unusually tolerant, for their day, of black voting rights. In the next session the business-

oriented Mobile legislative delegation, avoiding open reference to the race issue and employing the "good government" arguments common to advocates of at-large elections elsewhere, began the drive that culminated in the adoption of a commission form of government in 1911. Adopted at least in part to prevent Lyons from capitalizing on his strength in the overwhelmingly black seventh ward, the commission system eliminated the election of council members by single-member districts and thus added a new layer of insurance against black electoral influence.[64]

The Restoration of Black Voting Rights

For decades the multilayered system of discriminatory election laws enacted between 1893 and 1911 denied Alabama's black citizens any voice in the election of state or local officials. In 1944, however, the Supreme Court struck down the white primary in *Smith v. Allwright*.[65] Thereafter, the federal courts offered an arena where blacks might sometimes find vindication of their political rights.

Immediately blacks in Mobile, Birmingham, and the college town of Tuskegee began to register in larger numbers and tried unsuccessfully to vote in the Democratic primary. The governor and legislature pushed through a state constitutional amendment, drafted by Representative E. C. Boswell, that gave local registrars greater discretion to disqualify prospective voters. Black citizens in Birmingham, represented by local black attorney Arthur Shores with the assistance of the NAACP Legal Defense Fund, and in Mobile, represented by Chicago attorney George Leighton of the American Civil Liberties Union, successfully challenged the "Boswell Amendment" in federal court.[66]

Subsequently, however, the legislature adopted and voters ratified a new constitutional amendment prescribing a uniform registration application to be drawn up by the Alabama Supreme Court. Designed to accomplish the same goal of minimizing black voter registration by requiring applicants to fill out a complex, legalistic form and read portions of the Constitution, the new amendment was adopted in a deliberately quiet campaign and was not challenged in court for a decade.[67]

In addition to its continuing effort to prevent blacks from registering and voting, the Alabama legislature developed new tactics to minimize the effectiveness of black voting strength. The most flamboyant approach was conceived by state senator Sam Engelhardt of Macon County to deal with the rapidly growing black electorate of Tuskegee, the county seat and home of famed Tuskegee Institute.[68] Engelhardt persuaded the legislature to redraw Tuskegee's municipal boundaries in such a way that virtually all blacks found themselves residents of the rural portions of Macon County.[69]

Because the discriminatory purpose of his "Tuskegee gerrymander" was so obvious, it was immediately challenged in court in *Gomillion v. Lightfoot*.[70] On behalf of the local black political organization, the Tuskegee Civic Association, Montgomery attorney Fred Gray, with the assistance of the NAACP Legal Defense

Fund, challenged the act in federal court. The plaintiffs lost in the trial court because Judge Johnson felt obliged to follow the strong precedents against entering what Justice Felix Frankfurter had called the "political thicket" of redistricting.[71] On appeal, however, the plaintiffs won a unanimous victory before the Supreme Court. Although "cloaked in the garb of the realignment of political subdivisions," the gerrymander had the "inevitable effect" of depriving black citizens of the right to vote in municipal elections, according to Justice Frankfurter's opinion, which found that Engelhardt's legislation was "solely concerned with" the achievement of this racially discriminatory goal.[72]

The Perfection of Vote-Dilution Measures

Far less obvious in its racial purpose, and perhaps for that reason not challenged in court, was an "anti-single-shot" law Engelhardt persuaded the legislature to apply to all Alabama municipalities in 1951. Under the municipal election code, some cities used a *simple* at-large system that made it possible for a politically cohesive minority group to elect one representative if several council seats were to be filled in the same election. In order to accomplish this goal, the minority group must concentrate its votes on one of the candidates, and not cast the full number permitted. This practice, which increases the mathematical weight of the vote for the preferred candidate, is called single-shot, or "bullet," voting.[73] Engelhardt's law made single-shot voting impossible by disqualifying any ballot not including a full slate of preferences. As one black-belt legislator explained, the bill was necessary because "there are some who fear that the colored voters might be able to elect one of their own race to the [Tuskegee] city council by 'single shot' voting."[74] This is the first modern example of an Alabama statute designed explicitly to dilute minority voting strength.

Engelhardt's full-slate law remained in effect until 1961, when the Alabama legislature replaced it with another statewide law accomplishing the same purpose by requiring the use of numbered places for all elections.[75] Single-shot voting is impossible if each candidate is required to qualify for a separate *place* or *post* (i.e., place no. 1, place no. 2, and so forth). Because every seat on the governing body is filled through a head-to-head contest in which only one vote can be cast, there is no way to increase the mathematical weight of one's ballot by denying votes to other candidates.[76]

Democratic party leader Frank Mizell of Montgomery explained both the dangers of single-shot voting and the advantages of the place requirement to the State Democratic Executive Committee. "If you have a group of people who want to vote as a bloc, whether they be negroes or otherwise," he said, "it would be easy under the single shot voting for all of them to come in, to put a scallowag [*sic*] or put a negro in there." Mizell reminded his colleagues of "increasing Federal pressure" from the Department of Justice, which sought to "register negroes en masse, regardless of their criminal records." In light of changing circumstances,

concluded Mizell, "it has occurred to a great many people, including the legislature of Alabama, that there should be numbered places."[77]

By the time the Voting Rights Act was adopted, Alabama had perfected a system of local and state laws that, for most jurisdictions, required at-large elections, numbered places, and a majority vote, making it virtually impossible for blacks to elect candidates of their choice without substantial white crossover voting. In a handful of counties or municipalities with substantial black majorities, unrestricted voter registration would inevitably give black voters effective majorities at the ballot box. Otherwise, only a change to district elections could provide black voters with an opportunity to elect representatives of their choice. With a few rare exceptions, such changes occurred over the next quarter century only as a result of successful voting rights litigation or objections by the Department of Justice.

Implementation of the Voting Rights Act

Section 5 Review by the Department of Justice

In the first few years after passage of the act, the Department of Justice concentrated on attacking barriers to registration, to participation in elections, and to filing of candidacies.[78] Not until 1969 did the Supreme Court make clear that section 5 required *all* proposed voting changes, including measures that could dilute minority voting strength, to be precleared by the Department of Justice before implementation.[79] Thereafter the Voting Section of the department, guided by evolving federal case law, scrutinized the adoption of potentially dilutive electoral procedures.[80]

The Attorney General first objected to a dilutive device in Alabama on 9 July 1971. The Jefferson County legislative delegation had imposed a numbered-place requirement on the election of Birmingham city council members shortly after the council appointed black attorney Arthur Shores to a vacant seat. Until then, Birmingham's at-large system was among the few in the state exempted from the 1961 numbered-place requirement; thus it would have been possible for Shores to win election in 1971 without substantial white crossover voting. Sponsored by Representative Bob Gafford, long an ardent segregationist and Wallace supporter, the bill's purpose was, according to the *Birmingham News*, "to minimize chances of election of Negroes to the council by forcing them to run head-to-head with white candidates for specific places."[81]

Most municipalities already used at-large elections and numbered places before 1965 and thus had no need to enact new laws that would require preclearance. Three small cities did adopt district elections in order to secure approval of annexation plans to which the department had objected.[82] Phenix City found itself confronting a Justice Department objection when the local legislative delegation tried to shorten the terms of unpopular city commissioners by imposing staggered terms. Knowing that it was under section 5 scrutiny, the city switched to a mayor-

council form of government; it included two at-large seats but, at the request of the black community, three single-member districts.[83] One black council member was elected from the 62 percent black district.[84]

Approximately one-third of Alabama's county commissions were elected by single-member districts in 1965; sixteen sought to adopt at-large elections during the next two decades.[85] The Department of Justice objected to eleven of these changes and precleared the remainder because the black population was either too small or too geographically dispersed to constitute a black-majority district. Justice also objected to the adoption of at-large elections for three county school boards.[86]

Section 5 review was sometimes the cause of changes to district elections in Alabama. In most jurisdictions, however, the principal means of securing equitable election plans was through litigation. A number of federal court decisions in the early 1970s signaled that black plaintiffs in such cases would receive a fair hearing.

The Influence of Sims v. Amos *and* White v. Regester

In 1972 a three-judge panel decided in *Sims v. Amos* to outlaw further use of multimember districts in the apportionment of seats in the Alabama legislature, at least in part as a remedy for racial vote dilution.[87] Newspaper coverage of public reaction to the decision displayed widespread agreement among attorneys, legislators, local officials, and political observers that elimination of multimember districts would substantially increase black representation.[88] Implementation of the court's districting plan in 1974 increased the number of black legislators from two to fifteen.[89]

Three weeks after the court struck down multimember districts as racially discriminatory in *Sims v. Amos*, the Selma city council discovered that it had to change its method of elections. Because the city's population had passed the 20,000 mark by 1970, the state's municipal election code required Selma to choose between going to ward elections or cutting the number of council seats from ten to five. The black community petitioned for acceptance of single-member districts, and city council members agreed. Mayor Joe Smitherman seems to have played a role in persuading the council to choose ward elections, despite their recognition that such a change would "lead to the election of the council's first black members."[90]

Two communities apparently switched on their own initiative to district elections; the change even seems to have been motivated, in part, by a desire to provide minority representation. In 1972 the college town of Auburn adopted a mixed plan, with two members elected by each of four wards, plus a council president elected citywide.[91] More surprising was the switch to single-member districts in the state's capital city. Under the leadership of Mayor James Robinson, Montgomery adopted the mayor-council form of government with nine single-member districts. According to a recent study, "Montgomery adopted districts as the price

to be paid for black assent to, and Justice Department approval of, a referendum to change from a commission to a strong-mayor system."[92] The county's two white state senators successfully fought to eliminate all at-large seats on the grounds that "having at-large councilmen would discriminate against blacks since the city has a greater percentage of whites," warning opponents that the federal courts might strike down the new law if at-large seats were included.[93]

Two weeks earlier, on 18 June 1973, the Supreme Court had for the first time found the use of at-large elections, together with numbered-place and majority-vote requirements, unconstitutional on the grounds of racial vote dilution in a Texas redistricting case, *White v. Regester*.[94] In the same year the Fifth Circuit set forth specific guidelines by which trial courts should decide such vote-dilution lawsuits in a Louisiana case, *Zimmer v. McKeithen*.[95] Alabama politicians now had fair warning that the at-large numbered-place system was open to legal challenge.

The Creation of an Alabama Voting Rights Bar

Thereafter, a new generation of voting rights lawyers challenged the use of at-large elections in community after community; when successful, as they usually were, these lawsuits transformed the racial politics of Alabama beyond recognition. Most of the work was done by young Alabama whites, educated at the University of Alabama Law School but affiliated with public-interest legal organizations, such as the NAACP Legal Defense and Educational Fund and the American Civil Liberties Union.[96] The Voting Section of the Department of Justice brought numerous cases; most of its attorneys handling Alabama cases were young whites from outside the South.[97] The so-called voting rights bar proved to be far more successful than its opponents were, at least in part because plaintiffs' attorneys and lawyers from the Justice Department were specialists who knew more about case law in this complex field than did those who represented state and local defendants.

The ability of private attorneys to bring successful voting rights litigation, which as a rule involved heavy expenses and a lengthy appeals process, was dependent on their ability to recover reasonable fees and expenses. In *Sims v. Amos*, the court had awarded the plaintiffs' attorneys fees under the established theory that lawyers representing class-action members in public-interest litigation acted as "private attorneys general" in seeking enforcement of federal law.[98] This prospect was thrown into doubt in 1975 by a Supreme Court decision in an unrelated case.[99] Congress revised the Voting Rights Act in 1975 to clarify its intention that private attorneys successfully representing the claims of minority voters receive expenses and reasonable fees for their time.[100]

White attorneys took great pains to consult closely with local black plaintiffs, most of whom were members of the Alabama Democratic Conference (ADC), the leading statewide black political organization. In 1972 loyalist party chairman Robert Vance, who had persuaded the State Democratic Executive Committee to remove the white supremacy symbol of a rooster from its campaign literature only

six years earlier, persuaded fellow whites on the committee to bring blacks into the Alabama Democratic Party; ADC president Joe Reed of Montgomery became the party's vice-chairman for minority affairs.[101] By the 1980s Jerome Gray, ADC field director, worked closely with plaintiffs' attorneys in virtually all Alabama voting rights litigation, and ADC members provided most of the financial support.[102]

Initially the going was uncertain. In the fall of 1973, black plaintiffs in Pickens County challenged the use of at-large elections for the county commission, school board, and Democratic executive committee. The court required the school board and party committee plans, which were adopted after 1965, to be submitted for preclearance; the Department of Justice objected to the use of at-large and numbered-place requirements for both.[103] The county had long elected its commissioners by districts in the Democratic primary, however, using at-large elections only in the general election. The court required reapportionment of the district lines to comply with one-person, one-vote standards for the all-important primary, but let the at-large system stand for the general election. This decision was upheld on appeal.[104]

Fairfield, a small city in Jefferson County, was 48 percent black. Its city council was elected at large, with two seats to be filled by residents of each of six wards, and a council president to be elected without regard to residence. In 1968 blacks elected six council members; in 1972, however, whites won all thirteen seats. A suit was subsequently filed by blacks. Although Judge Sam Pointer did not conclude that the at-large system was intentionally discriminatory, he found that voting was racially polarized to a substantial degree, and ruled for the plaintiffs. The appeals court declared that finding at-large elections discriminatory in effect due to polarized voting was not sufficient to outlaw their use.[105] Judge Pointer then decided in favor of the city, and was upheld on appeal.[106]

Judge Frank Johnson in 1974 found in favor of the plaintiffs in a challenge to at-large council elections in Dothan, but stayed proceedings for a year because a black had been elected citywide.[107] On the basis of similar evidence, on the other hand, he outlawed the use of at-large elections for the Montgomery County commission.[108] Judging from these early cases, the standards of proof in dilution cases were still in flux.[109]

Challenging At-Large Elections in Mobile

The Alabama case that played the most important role in shaping national voting rights law was *Bolden v. City of Mobile*.[110] In 1975 black plaintiffs led by octagenarian Wiley L. Bolden, a voting rights activist since the days of the white primary, filed their challenge to the at-large election of three city commissioners, a system that had resulted in the total exclusion of blacks from office. Shortly thereafter a white state senator introduced a mayor-council bill that would require election to seven district seats and two at-large posts. The senator later testified that district elections provided the only way black voters could secure representation in

Mobile city government; he included the at-large seats in the hope of winning the support of "certain established members of the community."[111] Nevertheless, the conservative daily newspaper opposed any use of ward elections, explaining that the plan would have the effect of "assuring representation from the black community."[112] The bill did not pass.

Judge Virgil Pittman cited the defeat of this plan as evidence that the at-large system was being maintained with a racially discriminatory purpose. He also found that the city government was unresponsive to the black community in the delivery of municipal services, that city police continued to be guilty of brutality against blacks in law enforcement, that city agencies were desegregated only by court order, that few blacks were appointed to boards or committees, and that socioeconomic disparities between blacks and whites continued to inhibit black political participation.[113]

The most compelling aspect of the plaintiffs' case, however, was expert testimony that racially polarized voting made it unlikely that black candidates could ever win office in citywide elections. In addition, observed the judge, "practically all active candidates for public office testified it is highly unlikely that anytime in the foreseeable future, under the at-large system, that a black can be elected against a white."[114]

Under the prevailing *Zimmer* standard, the court had little alternative but to find for the plaintiffs. The question of remedy was more troublesome; because commissioners under the existing plan performed specific administrative functions of a citywide nature, Judge Pittman found it necessary to order replacement of the commission system by a mayor-council form of government patterned after that established in Montgomery.[115]

Some lower federal courts were beginning to require proof of racial purpose, however, not just discriminatory impact, before striking down dilutive election structures. The appeals court ruled in 1978 that proof of discriminatory intent was required, but held that Judge Pittman's findings "compel the inference that the system has been maintained with the purpose of diluting the black vote."[116] In 1980, however, the U.S. Supreme Court overruled the lower courts in *City of Mobile v. Bolden* and surprised knowledgeable observers by setting forth an "intent standard" for judging vote-dilution lawsuits. In a plurality opinion by Justice Potter Stewart, the Court held that plaintiffs must prove at-large elections were adopted or maintained with a racially discriminatory *purpose*. Arguing that plaintiffs had not presented such "intent" evidence in the first trial, a majority of the justices agreed to remand the case to the lower courts.[117] When the case was tried a second time, expert testimony concerning the historical evidence discussed earlier in this chapter demonstrated to the court that racial concerns played a significant role in the adoption of at-large elections in 1911.[118]

The intent standard set forth by Justice Stewart in the Mobile case, however, had aroused a furor in national civil rights circles. In hearings before subcommittees in both House and Senate, voting rights lawyers, black political leaders, and an increasingly broad spectrum of white public officials urged Congress to revise the

Voting Rights Act in such a way as to eliminate the need for this sort of detailed historical inquiry. A revision of section 2, known as the *Bolden* Amendment, made clear that Congress intended that the courts outlaw election practices that were discriminatory in effect, without requiring proof of invidious racial purpose.[119]

Litigation by the Department of Justice

The Department of Justice sometimes had to go to court to defend its objections to voting changes covered by section 5.[120] In such cases the act places the burden of proof on the jurisdiction. One such case involved Hale County, Alabama, which had switched from district to at-large elections for its county commission pursuant to a 1965 statute adopted the day after it was assigned federal registrars under the act. The county, contrary to the law, did not submit the change for a decade. Although it was a black-majority county, half of its registered voters and a majority of those turning out to vote were white, due to the low participation rate of its poverty-stricken black citizens. Regression analysis by a Department of Justice expert demonstrated, furthermore, that voting was highly polarized along racial lines. The court found Hale County's at-large election system racially discriminatory in purpose and effect.[121] Other counties recognized that they could not sustain the burden of proof in a section 5 challenge and agreed to return to district elections.[122]

The department's two most difficult Alabama cases were Fourteenth Amendment challenges to the at-large election of commissioners in the black-belt counties of Marengo and Dallas. Both were filed in 1978 and tried before Judge W. Brevard Hand of Mobile, who had almost always found for defendants in civil rights cases. Judge Hand concluded in both cases that there was no evidence of discriminatory intent; although he found evidence that voting was racially polarized to a significant degree, he ruled that blacks were close enough to a majority of the electorate that they could win if they worked harder to turn out the vote.[123]

The appeals court, however, refused to attribute the exclusion of blacks to the failure of blacks to work hard enough. In both cases it viewed the lower level of registration and turnout among blacks as a lingering effect of past discrimination in education and employment, and thus a factor favoring the plaintiffs. More importantly, the overwhelming evidence of racially polarized voting in both cases, which made it clear that blacks could not expect to win countywide elections, led the appeals court to rule in favor of the plaintiffs. By 1988 effective remedies were put into place, and black citizens in Marengo and Dallas counties were able to elect representatives of their choice.[124]

The Winning Coalition

More victories were won by the private voting-rights bar, working in close coalition with the Alabama Democratic Conference. ADC members were the plaintiffs

in *Burton v. Hobbie*, a legal challenge to the legislative redistricting plan enacted by the state after the 1980 census.[125] The Department of Justice objected to the initial plan on 6 May 1982, and to a new legislative plan on 2 August 1982, on the grounds that both reduced black voting strength by comparison with the previous system imposed by *Sims v. Amos*.[126] Chairman Joe Reed of the ADC was the principal drafter for the districting arrangements proposed by the plaintiffs, adopted by the legislature, precleared by the Department of Justice, and approved by the court for use in new elections in the fall of 1983.[127]

In *Harris v. Graddick*, black plaintiffs successfully challenged the underrepresentation of blacks among poll officials in the state.[128] ADC members gathered the lists of county poll officials and identified their race in exhibits used at trial, as well as testifying about conditions in their counties. Not only was the quantitative evidence of white domination of the administration of Alabama elections dramatic, but the case revealed ongoing evidence of racial animosity like that found two decades earlier.[129] After the plaintiffs won a preliminary injunction, the state agreed to appoint substantial numbers of black poll officials and to establish a program of training and certification for all those who worked at the polls; staff members of historically black Alabama State University were actively involved in the training program and in a voter outreach project targeting young black adults. The state also agreed to gather and maintain precinct-level voter registration data by race, and to provide the court with detailed records of its efforts to implement the numerous changes.[130]

In a case tried under the Constitution such as *Underwood v. Hunter*, initiated in the late 1970s but not decided by the Supreme Court until 1985, evidence of a racially discriminatory purpose is essential. A challenge to the section of the 1901 state constitution disfranchising individuals convicted of various enumerated "petty crimes," *Underwood* turned on historical evidence that the framers of this provision explicitly intended that it eliminate black voters in significant numbers. The state's defense was that in addition to disfranchising blacks, the provision was also intended to prevent many poor whites from voting. The trial court agreed with this reasoning but was reversed on appeal; in a unanimous Supreme Court opinion, Justice William Rehnquist ruled that the state could not discount the compelling evidence of racial intent in the record merely by showing that the convention was also motivated by distaste for the poor. In light of this evidence of discriminatory purpose, moreover, only a modest additional showing of disparate impact was necessary for the plaintiffs to prevail.[131]

The 1982 revision of section 2 of the Voting Rights Act makes it unnecessary for plaintiffs to prove discriminatory intent in order to win a dilution case. Nevertheless, black plaintiffs in Alabama managed to turn the intent standard into a weapon to advance minority voting rights on a wholesale basis. In *Dillard v. Crenshaw County*, black citizens challenged the at-large election of commissioners in nine counties in one consolidated lawsuit.[132] The linchpin of their case was evidence of discriminatory purpose in the adoption of the statewide anti-single-shot and

numbered-place requirements in 1951 and 1961 discussed above. In addition, the plaintiffs' expert historian testified that a third of the state's counties shifted from district to at-large elections between 1947 and 1971, after blacks began to register and vote in large numbers. On the basis of this historical evidence, Judge Myron Thompson ruled that "the plaintiffs have shown a substantial likelihood of prevailing," and enjoined further use of at-large elections in those counties.[133]

All of the defendants adopted single-member district plans for their county commissions. Then the plaintiffs added all the municipalities and school boards where at-large elections still resulted in the dilution of black votes (in the end some 180 jurisdictions). Most agreed to settle on election plans acceptable to local ADC leaders. Many of the changes to district elections documented in the next section of this chapter emanate from *Dillard* and its progeny. In a few jurisdictions, settlement talks between ADC leaders and local officials led to the adoption of cumulative or limited voting plans rather than single-member districts. These remedies succeeded in providing a substantial degree of black representation throughout Alabama.[134]

Changes from At-Large to District Elections in Alabama

At the time the Voting Rights Act was adopted, as we have noted, the handful of black elected officials in the state were restricted entirely to communities in which blacks constituted a majority of the registered voters. Nor did the removal of legal barriers to registration and voting lead immediately to black representation in white-majority jurisdictions. In 1970 only two white-majority cities, Auburn and Birmingham, had elected a black at large.[135] By 1989, however, black officeholding in Alabama approached the level of proportional representation. To what factors must we attribute this extraordinary change?

The existing social science literature provides two alternative hypotheses. Some accounts argue that racial attitudes have changed so markedly in the South during the last two decades that whites are generally willing to vote for qualified minority candidates; thus the increase in black officeholding in Alabama cities between 1970 and 1989 might result from a decline in the degree of racially polarized voting.[136] Most empirical studies, however, indicate a strong correlation between the use of single-member districts and the election of racial and ethnic minority officials. This evidence suggests that the increase in black representation results largely from the abolition of at-large elections.[137] In order to test these conflicting hypotheses, we compare the method of electing municipal governing bodies with the degree of representation for blacks in Alabama city government over the last two decades.[138]

Our principal concern is to identify the racial effect of changing from citywide to district elections. We measure the degree of black representation by an equity ratio (the percentage of elected officials who are black divided by the proportion of the

jurisdiction's population that is black).[139] Between 1970 and 1989, 37 of the 48 cities with 6,000 or more inhabitants having a population at least 10 percent black switched to single-member districts, and another 5 to mixed plans (see table 2.2).[140] As a result, the degree of black representation in white-majority cities using single-member districts increased from zero in 1970 to slightly better than proportional representation in 1989 (see table 2.5). For mixed plans, the small number of cases renders any conclusion suspect; the equity ratios are significantly lower than under single-member district plans, primarily because no blacks were elected to any at-large seats in those cities (see table 2.3).[141]

To control for the possibility that declining racial prejudice alone explains the dramatic increase in black representation, we sought to identify a control group of cities retaining at-large elections. The success of minority plaintiffs and the Department of Justice in eliminating at-large elections, however, complicates the analysis. By 1989 the use of at-large elections, once ubiquitous, had all but disappeared in Alabama.

Only 6 of the 48 cities in our sample retained at-large elections (see table 2.1). This is a small and arguably unrepresentative sample. Three of the 6 were black-majority cities where at-large elections should benefit rather than disadvantage blacks; predictably, blacks were more than proportionally represented in 1989 (see table 2.4). Only 3 of the 42 white-majority cities in our sample elected their councils at large. The fact that blacks had proportional representation in these 3 cities, as well as in the 36 using single-member districts (see table 2.4), should not be taken as proof that at-large elections are no longer racially discriminatory. Indeed, the fact that blacks were adequately represented in these cities helps explain why their at-large systems went unchallenged in the 1980s.[142]

Had our survey been conducted a mere two years earlier, in January 1987, our control group would have included 31 cities still using at-large elections. As the data presented in table 2.5A demonstrate, the 27 white-majority cities in this control group had only minimal black representation. In contrast, blacks in the 11 cities electing council members by single-member districts had proportional representation.[143]

Between 1970 and 1989, 42 of the 48 Alabama cities of 6,000 or larger switched from at-large to district or mixed plans. Litigation was the principal cause of these changes, accounting for 26 of the new district systems and 1 of the shifts to a mixed plan (see table 2.8). Four of the changes came in response to objections by the Department of Justice.[144] Thus, in 31 of the 42 changes, some degree of coercion was involved. Voluntary decisions by city leaders accounted for only 11 of the shifts to district elections.[145] In many of those instances, furthermore, jurisdictions were well aware of the possibility of lawsuits or objections by the Department of Justice.[146]

Our findings provide little support to the view that a significant increase in minority representation occurred in Alabama merely because white voting behavior had changed. (Indeed, in districted cities, we found only two instances out of

148 white-majority districts in which blacks were elected. See table 2.6.) Instead, we provide new evidence to reinforce the conclusion of most empirical studies that district elections played a major role in increasing black officeholding.

Conclusion

As long as at-large elections were in place, white majorities voting as a bloc were able to prevent black citizens enfranchised by the Voting Rights Act from winning local office. Most changes from at-large to district elections in Alabama resulted either from litigation or, to a lesser degree, objections by the Department of Justice. Although lawsuits won by the department played a key role in eliminating at-large elections in various black-belt counties, most of the changes were due to litigation by private attorneys. These changes substantially increased minority representation on local governing bodies, both rural and urban. Indeed, black representation in our sample has now reached the level of proportional representation in Alabama.

The act has played a critical role in this achievement. Its first great success, the enfranchisement of the black population, brought less immediate change in black representation to Alabama than to some other southern states, because state election laws already in place effectively diluted black voting strength. The evolution of case law in the voting area, however, ultimately provided civil rights lawyers with the weapons necessary to eliminate those barriers to minority representation. In most of the successful lawsuits in Alabama, historical evidence of discriminatory intent played a key role in the outcome. The story we have chronicled is controversial, we recognize, among those who believe that federal intervention with state and local control of elections in the South, either by administrative action or as a result of court decisions, is no longer warranted. In the best of worlds, effective minority representation would not depend on such intrusive legal action. Our findings make clear, however, that at least in Alabama, effective minority representation could have been achieved in no other way.

Table 2.1
Black Representation on Council in 1989 by Election Plan, Alabama Cities of 6,000 or More Population with 10 Percent or More Black Population in 1980

Type of Plan by % Black in City Population, 1980	N	*Mean % Black in City Population, 1980*	*Mean % Black on City Council, 1989*
SMD plan			
10–29.9	23	19	20
30–49.9	13	37	38
50–100	1	74	80
Mixed plan			
10–29.9	1	16	11
30–49.9	2	38	30
50–100	2	52	51
At-large plan			
10–29.9	3	20	20
30–49.9	0	—	—
50–100	3	68	74

Table 2.2
Changes in Black Representation on Council between 1970 and 1989, Alabama Cities of 6,000 or More Population with 10 Percent or More Black Population in 1980

Type of Change by % Black in City Population, 1980	N	*Mean % Black in City Population, 1980*	*Mean % Black on City Council*	
			Before Change (1970)	*After Change (1989)*
		Changed Systems		
From at-large to SMD plan				
10–29.9	23	19	0	20
30–49.9	13	37	0	38
50–100	1	74	0	80
From at-large to mixed plan				
10–29.9	1	16	11	11
30–49.9	2	38	0	30
50–100	2	52	0	51
		Unchanged Systems		
At-large plan				
10–29.9	3	20	0	20
30–49.9	0	—	—	—
50–100	3	68	46	74

TABLE 2.3
Black Representation in 1989 in Mixed Plans by District and At-Large Components, Alabama Cities of 6,000 or More Population with 10 Percent or More Black Population in 1980

% Black in City Population, 1980	N	*Mean % Black Councilpersons in District Components, 1989*	*Mean % Black Councilpersons in At-Large Components, 1989*
10–29.9	1	13	0
30–49.9	2	42	0
50–100	2	59	0

TABLE 2.4
Two Equity Measures Comparing Percentage Black on Council in 1989 with Percentage Black in City Population in 1980, Alabama Cities of 6,000 or More Population with 10 Percent or More Black Population in 1980

Type of Plan by % Black in City Population, 1980	N	*Difference Measure (% on Council − % in Population)*	*Ratio Measure (% on Council ÷ % in Population)*
		Changed Systems	
From at-large to SMD plan			
10–29.9	23	1	1.10
30–49.9	13	1	1.03
50–100	1	6	1.08
From at-large to mixed plan			
10–29.9	1	−5	0.69
30–49.9	2	−8	0.78
50–100	2	−1	0.98
		Unchanged Systems	
At-large plan			
10–29.9	3	0	1.00
30–49.9	0	—	—
50–100	3	18	1.09

TABLE 2.5
Changes in Black Representation on Council between 1970 and 1989, Alabama Cities of 6,000 or More Population with 10 Percent or More Black Population in 1980 (Ratio Equity Measure)

Type of Change by % Black in City Population, 1980	N	*Black Representational Equity on Council*	
		1970	*1989*
		Changed Systems	
From at-large to SMD plan			
10–29.9	23	0.00	1.10
30–49.9	13	0.00	1.03
50–100	1	0.00	1.08
From at-large to mixed plan			
10–29.9	1	0.11	0.69
30–49.9	2	0.00	0.78
50–100	2	0.00	0.98
		Unchanged Systems	
At-large plan			
10–29.9	3	0.00	1.00
30–49.9	0	—	—
50–100	3	0.46	1.09

TABLE 2.5A
Changes in Black Representation on Council between 1970 and 1986, Alabama Cities of 6,000 or More Population with 10 Percent or More Black Population in 1980 (Ratio Equity Measure)

Type of Change by % Black in City Population, 1980	N	*Black Representational Equity on Council*	
		1970	*1986*
	Changed Systems		
From at-large to SMD plan			
10–29.9	4	0.00	1.00
30–49.9	7	0.00	1.00
50–100	0	—	—
From at-large to mixed plan			
10–29.9	2	0.35	1.06
30–49.9	2	0.00	0.79
50–100	2	0.00	0.87
	Unchanged Systems		
At-large plan			
10–29.9	21	0.00	0.32
30–49.9	6	0.00	0.26
50–100	4	0.49	1.09

TABLE 2.6
Black Representation in Council Single-Member Districts in 1989, Alabama Cities of 6,000 or More Population with 10 Percent or More Black Population in 1980

% Black Population of District	N[a]	*Mean % Black Population in Districts, 1980*	*Mean % Black Councilpersons in Districts, 1989*
0–29.9	139	8	0
30–49.9	9	41	22
50–59.9	0	—	—
60–64.9	2	61	100
65–69.9	17	67	100
70–100	38	82	100

[a]Racial composition of single-member districts was not available for the following cities (each of which had five districts): Athens, Brewton, Lanett, Prichard, and Russellville.

TABLE 2.7
Black Council Representation in Single-Member Districts in 1989 by Racial Composition of District, Alabama Cities of 6,000 or More Population with 10 Percent or More Black Population in 1980

Racial Composition of District	N	*Mean % Black Population in Districts, 1980*	*Mean % Black Councilpersons in Districts, 1989*
Black majority[a]	57	74	100
White majority	148	10	1

[a]There were no districts in the 50–59.9 percent black range.

TABLE 2.8
Cause of Change from At-Large to Mixed or District Plan between 1970 and 1989, Alabama Cities of 6,000 or More Population with 10 Percent or More Black Population in 1980

City	*Did Lawsuit Accompany Change?*	*Reason for Change*
		Changed to Single-Member Districts
Alabaster	No	Objection of Department of Justice to annexations in 1977; objection withdrawn in 1983 upon submission of a single-member-district plan.
Alex City	No	Objection by Department of Justice to annexations in 1986; withdrawn upon submission of a single-member-district plan in 1987.
Andalusia	No	Voluntary change to single-member districts in 1988, at the request of the black community.
Athens	Yes	*Dillard v. Crenshaw County;* consent decree implemented in 1988.
Atmore	Yes	*Dillard v. Crenshaw County;* consent decree implemented in 1988.
Attalla	No	Ordinance, 1988; supported by local black leaders; in 1984 Attalla had switched from at-large elections to a mixed plan, also voluntarily.
Bay Minette	No	Objection by Department of Justice to annexations in 1986; withdrawn upon submission of single-member-district plan in 1987.

(continued)

TABLE 2.8 (*Continued*)

City	Did Lawsuit Accompany Change?	Reason for Change
Brewton	Yes	*Dillard v. Crenshaw County;* consent decree implemented in 1988.
Decatur	Yes	*Dillard v. Crenshaw County;* consent decree implemented in 1988.
Demopolis	Yes	*United States v. City of Demopolis;* consent decree implemented in 1986.
Enterprise	Yes	*McClain v. City of Enterprise;* consent decree implemented in 1986.
Eufaula	Yes	*Dillard v. Crenshaw County;* consent decree implemented in 1988.
Florence	Yes	*Dillard v. Crenshaw County;* consent decree implemented in 1988.
Gadsden	Yes	*Adams v. City of Gadsden;* consent decree implemented in 1986.
Greenville	No	Legislation upon request of local chapter of Alabama Democratic Conference.
Guntersville	Yes	*Dillard v. Crenshaw County;* consent decree implemented in 1988.
Huntsville	Yes	*Grayson v. Madison County;* consent decree implemented in 1988.
Jackson	Yes	*Elliott v. City of Jackson;* consent decree implemented in 1985 (3 districts; 2 members per district).
Jasper	No	Legislation adopted following unsuccessful challenge to at-large elections (*Chapman v. Nicholson*).
Lanett	Yes	*Reese v. Yeargan;* consent decree implemented in 1988.
Leeds	Yes	Objection by Department of Justice to annexations in 1985; subsequently sued in *Dillard v. Crenshaw;* consent decree implemented in 1988.
Mobile	Yes	*Bolden v. City of Mobile;* plaintiffs won at trial; court-ordered legislation implemented in 1985.
Montgomery	No	Legislation adopted in 1973 as a result of voluntary action initiated by Mayor James Robinson and the county's legislative delegation; change approved in referendum and implemented in 1975.
Northport	No	Voluntary change at request of black community; implemented in 1988.
Opelika	Yes	*Lee County Branch of NAACP v. City of Opelika;* consent decree implemented in 1986.
Opp	Yes	*Dillard v. Crenshaw County;* consent decree implemented in 1988.
Pell City	Yes	*Dillard v. Crenshaw County;* consent decree implemented in 1988.
Prichard	No	Legislation adopted voluntarily at the behest of black-majority city government.
Prattville	Yes	*Dillard v. Crenshaw County;* consent decree implemented in 1988.
Russellville	Yes	*Dillard v. Crenshaw County;* consent decree implemented in 1988.
Sheffield	Yes	*Dillard v. Crenshaw County;* consent decree implemented in 1988.
Sylacauga	No	Voluntary change adopted at the request of black community.
Talladega	Yes	*Taylor v. City of Talladega;* consent decree implemented in 1988.
Tarrant City	Yes	*Dillard v. Crenshaw County;* consent decree implemented in 1988.
Troy	Yes	*Henderson v. City of Troy;* consent decree implemented in 1986.
Tuscaloosa	Yes	*Mallisham v. City of Tuscaloosa;* consent decree implemented in 1985.
Tuscumbia	Yes	*Dillard v. Crenshaw County;* consent decree implemented in 1988.
		Changed to Mixed Plan
Anniston	No	Legislation prompted by threat of litigation by Department of Justice.

(*continued*)

TABLE 2.8 (*Continued*)

City	Did Lawsuit Accompany Change?	Reason for Change
Auburn	No	Legislation; voluntary change in 1972; liberal sentiment in a university town.
Bessemer	Yes	*Tolbert v. City of Bessemer;* consent decree implemented in 1986.
Phenix City	No	Objection by Department of Justice to adoption of staggered terms, combined with local dissatisfaction with existing city commissioners; under pressure from black leaders, and aware of federal scrutiny, legislative delegation adopted a mixed plan, which was precleared in 1977.
Selma	No	1970 census showed Selma's population was over 20,000; state municipal code required Selma to use districts or cut the size of its council; aware of federal court rulings concerning at-large elections, and pressed by black leaders, council agreed to a mixed plan with 5 double-member districts and an at-large council president; in 1980s council was reduced to 1 member per ward and ward lines were redrawn pursuant to court order in a one-person, one-vote lawsuit brought by whites; in 1988 legislation adopted with consent of city government created 8 single-member districts, with the council president continuing to be elected at large.
SUMMARY	Yes 27 (64%) No 15 (36%)	

TABLE 2.9
Major Disfranchising Devices in Alabama

Device	Date Established	Date Abolished
Restricting voter assistance	1893	1988[a]
Literacy test, voucher system	1901	1965[b]
Poll tax	1901	1966[c]
Long residency requirement	1901	1972[d]
Petty crimes provision	1901	1985[e]
White primary	1902	1944[f]
Registrar discretion in judging applicant's interpretation of state or federal constitutions	1946	1949[g]
Court-prepared educational test	1951	1964[h]

[a] *Harris v. Siegelman*, 695 F. Supp. 517 (M.D. Ala. 1988).
[b] Voting Rights Act.
[c] *United States v. Alabama*, 252 F. Supp. 95 (M.D. Ala. 1966).
[d] Unconstitutional in light of *Dunn v. Blumstein*, 405 U.S. 330 (1972).
[e] Ruled unconstitutional in *Underwood v. Hunter*, 730 F.2d 614 (11th Cir. 1984), *aff'd*, 471 U.S. 222 (1985).
[f] Unconstitutional in light of *Smith v. Allwright*, 321 U.S. 649 (1944).
[g] *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949), *aff'd*, 336 U.S. 933 (1949).
[h] *United States v. Hines*, 9 Race Rel. L. Rep. 1332 (N.D. Ala. 1964) [Sumter County]; *United States v. Cartwright*, 230 F. Supp. 873 (M.D. Ala. 1964) [Elmore County]; and *United States v. Parker*, 236 F. Supp. 511 (M.D. 1964) [Montgomery County].

TABLE 2.10
Black and White Registered Voters and Officeholders in Alabama, Selected Years[a]

	Black		White	
	N	%	N	%
Registered Voters				
1964[b]	92,737	9	935,695	91
1966[c]	246,396	17	1,192,072	83
1992[d]	373,205	22	1,335,837	78
Officeholders[e]				
State house				
1964	0	0	105	100
1966	0	0	105	100
1992	18	17	87	83
State senate				
1964	0	0	35	100
1966	0	0	35	100
1992	5	14	30	86

[a]Mean black Alabama population, 1960–90 = 26.8%.
[b]U.S. Commission on Civil Rights 1968.
[c]Southern Regional Council (Voter Education Project), "Voter Registration in the South, 1966."
[d]Data submitted by the state of Alabama in connection with its legislative and congressional redistricting plans, 1992.
[e]U.S. Commission on Civil Rights 1968; Joint Center for Political and Economic Studies 1990.

CHAPTER THREE

Georgia

LAUGHLIN McDONALD,
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THE IMPACT of the Voting Rights Act in altering the political environment in Georgia has been substantial. Dramatic changes have come in the registration of eligible black voters, and, with more equitable forms of voting, in the election of black candidates to office. The degree of change is all the more impressive given the background of intentional discrimination against black political participation in this state.

On the eve of passage of the act, fewer than a third of age-eligible blacks in Georgia were registered to vote.[1] The disparities were even greater in the state's twenty-three counties with black voting-age majorities, where an average of 89 percent of whites, but only 16 percent of blacks, were registered. Despite the fact that blacks were 34 percent of the voting-age population, there were only three black elected officials in the entire state, and they had been elected only in the preceding three years.[2] This exclusion from the normal political processes was not fortuitous; it was the result of two centuries of deliberate and systematic discrimination by the state against its minority population.

THE HISTORY OF DISCRIMINATION: THE EARLY YEARS

Blacks first got the right to vote in Georgia in 1867 as a result of federal military reconstruction.[3] The state held a constitutional convention the following year—roundly denounced by white Democrats as a "nigger–New England" convention—and formally guaranteed blacks citizenship, equal protection of the law, and the right to vote.[4] Because of the intense opposition of whites, the convention did not expressly guarantee the right of blacks to hold office.

At the ensuing elections, which were accompanied by an extremely high level of racial violence, twenty-five blacks were elected to the house and three to the senate. They were promptly expelled from office. Four mulattoes were also elected to the house and were originally targeted for expulsion, but they were granted the status of "honorary white men" and allowed to keep their seats.[5] Because of the expulsions, as well as continuing violence and white terrorism across the state,

Georgia was again placed under federal military reconstruction. The expelled blacks were returned to the general assembly, certain Democrats were disqualified under the Fourteenth Amendment, and control of the lower chamber returned to the Republicans.

The change in political fortune of blacks was short-lived. With the election of James Smith as governor in 1872, full control of the executive and legislative branches passed to white Democrats. This shift signaled that blacks were no longer a viable element in state politics and paved the way for the complete restoration of white supremacy. The state was assisted in its efforts by the U.S. Supreme Court, which weakened civil rights enforcement in a series of decisions, including *United States v. Cruikshank*[6] and *United States v. Reese*,[7] holding that the right to vote was a state-created, not a federal, right.

The "redeemed" legislature moved quickly to roll back Reconstruction and nullify the effects of black suffrage. It reimplemented proof of payment of the poll tax as a condition for voting;[8] abolished ward voting for the city of Atlanta, which had allowed the election of blacks to office; eliminated local elections altogether in majority-black McIntosh County; and abolished district elections for county school boards in favor of a system of appointments by white grand jury "elites."[9]

In 1873, the general assembly increased the residency requirements for voters in order to take advantage of the supposed itinerant habits of blacks and disfranchise them.[10] Local officials also closed their registration books except during planting time, when many blacks would find it difficult, if not impossible, to register.[11] Aside from these "legal" methods of limiting the black vote, the state resorted to such time-honored stratagems as intimidation, violence, vote buying, ballot-box stealing, and the use of "tissue ballots" that facilitated stuffing ballot boxes and altering the results of elections.[12]

The state adopted a new constitution in 1877. Robert Toombs, the acknowledged leader of the constitutional convention, consigned blacks to a status that was less than human when he boasted: "Give us a convention, and I will fix it so that the people shall rule and the Negro shall never be heard from."[13] The convention incorporated the new statutory residency requirements and added bribery and larceny to the list of disfranchising offenses that blacks were thought more likely to commit than whites.[14] But the main work of disfranchisement was the adoption of a cumulative poll tax, requiring proof of payment of past as well as current poll taxes as a condition for voting.[15] The tax could accumulate indefinitely and was described by one observer as "the most effective bar to Negro suffrage ever devised."[16]

The poll tax finally was abolished in Georgia in 1945.[17] Leaders of the general assembly assured their colleagues that repeal would increase white voter participation and would not affect the state's white primary.[18]

In an additional effort to consolidate power in the hands of ruling white Democrats, the legislature passed a law in 1890 giving party officials the duty of conducting primary elections.[19] This allowed parties to enact rules excluding blacks, which the Democratic party eventually did, thereby adopting into its formal rules

what its general practice had been.[20] Since victory in the Democratic primary was tantamount to election, exclusion from the primary effectively eliminated blacks from meaningful participation in Georgia politics. Further exclusionary efforts included a law passed in 1894 that required registration by race on separate lists.[21] Given the climate of the times, this law merely facilitated fraud and discrimination against blacks.[22]

While the state moved relentlessly toward white hegemony, the Populist revolt of the early 1890s, led by Georgia firebrand Tom Watson, provided a countervailing tendency. The Populists, composed of agrarian masses and an emerging blue-collar proletariat, urged a united front of black and white farmers to oppose the oppressive forces of capitalist finance and industrialism. Its platform called for racial cooperation and justice, and repudiated race hatred and lynch laws. The Populist movement failed in Georgia by the middle of the decade—with Watson himself turning to virulent racism and anti-Semitism—in large measure because of the demagogic and destructive use of the race issue by other white state and local politicians at the time.[23]

As effective as the prior disfranchising measures were, the centerpiece of Georgia's efforts to deny the vote to blacks, the Disenfranchisement Act of 1908, came later.[24] Governor Hoke Smith's naming of the act in his message to the legislature left no doubt as to its goal.[25] This law provided for registration by any male who was sane, had no criminal record, had paid all taxes since 1877, had met the existing residency requirements, and had satisfied one of the following additional requirements: (1) had served honorably in wars of the United States or in the forces of the Confederate states; (2) had descended from persons who had such service records; (3) was of "good character" and could understand the duties of citizenship; (4) could read and write in English any paragraph of the state and federal constitutions or could understand and give a reasonable interpretation of any paragraph of such constitutions; or, (5) owned at least forty acres of land or property assessed for taxation at the value of at least five hundred dollars.[26]

Few blacks could meet any of these requirements as they were administered. They had not fought in wars in significant numbers, nor had their ancestors. The good character, literacy, and understanding tests, aside from the fact that they were designed to exclude uneducated blacks, were administered by white Democrats who made sure that blacks did in fact fail. Qualification through property ownership, given the disadvantaged economic position of blacks in the South, was for them a virtual impossibility. In *South Carolina v. Katzenbach* (1966)[27] the 1908 Georgia scheme was described as "specifically designed to prevent Negroes from voting." Five years after passage of the act, disfranchisement was intensified by a system of permanent registration requiring all voters to submit to examination by a board of registrars.[28] Since the boards were composed of whites who were hostile to black voting, many blacks were denied registration or were discouraged from even attempting it.[29]

A contemporary publication noted that Georgia had "closed the door of political hope in the faces of one million of its citizens."[30] A commentator writing more

than twenty years later reported that following passage of the Disenfranchisement Act, there was "almost absolute exclusion of the Negro voice in state and federal elections."[31]

Abolition of the White Primary

The white primary was successfully challenged in Georgia in 1945 in *King v. Chapman*,[32] after the Supreme Court's decision in *Smith v. Allwright*[33] invalidated the white primary system in Texas. Eugene Talmadge, a candidate for governor the following year and a confirmed white supremacist, responded by orchestrating a series of challenges to blacks around the state for allegedly being improperly registered and thus ineligible to vote in the primaries.[34] These challenges were a stopgap measure and, despite their *in terrorem* effect, did not keep a significant number of blacks from the polls. The challenges collapsed under their own administrative weight, and most of the challenged blacks actually voted.[35]

The legislature made a final attempt to salvage the white primary in 1947. It enacted a white primary bill repealing all statutes linking the primary to the state in an attempt to remove the primary from state control and thus from federal judicial oversight. The bill was vetoed by Governor M. E. Thompson, who questioned the legality of the bill and said it was an invitation to fraud.[36]

After the White Primary: Black Mobilization and New Restrictions on Registration

The demise of the white primary set in motion two opposing forces in the state: mobilization in the black community and efforts by the white leadership to make the registration process more restrictive. In 1940, before the end of the white primary, estimates placed the black registration in Georgia at 20,000.[37] After its abolition in 1945, black voter-registration organizations sprang up across the state, including the All-Citizens Registration Committee of Atlanta (ACRC), which has claimed the distinction of being "the oldest continuous political education and registration organization of its kind in the South."[38] It was through the efforts of ACRC and other groups that 125,000 blacks, 18.8 percent of the eligible population, were registered by late 1947.[39] The political leadership of the state was not slow in responding to these political stirrings in the black community.

By the time Eugene Talmadge's son Herman became governor in 1948, the decision in *King v. Chapman* had made the outright exclusion of blacks from the primary no longer possible. Accordingly, the state turned its attention once again to making the registration process more difficult. In 1949, it passed a reregistration and purge law.[40] Voters who failed to vote in at least one election in a two-year period were automatically purged, unless they requested a renewal of their registration.

The most innovative feature of the new law was a requirement that all who sought reregistration on the basis of good character and understanding of the duties of citizenship—that is, those who could not qualify under the literacy provisions—were required to take a test and successfully answer ten of thirty questions. The law proved to be as burdensome to whites as to blacks, and as a result, the Talmadge administration secured passage of a bill allowing those registered under the preexisting statutes to remain on the voter rolls.[41]

The traditional leadership of the state felt a new urgency to shore up the state's registration laws and protect white supremacy when Congress enacted the Civil Rights Act of 1957, the first civil rights act since Reconstruction.[42] The act prohibited discrimination in voting and authorized the Attorney General to bring suit for injunctive relief. That same year, the Georgia General Assembly adopted a resolution calling for the repeal of the Fourteenth and Fifteenth amendments to the Constitution because they "were malignant acts of arbitrary power" and "are null and void and of no effect."[43]

In 1958, the state enacted a new registration act,[44] which incorporated the provisions of the old one but added an even more stringent test for the registration of those who could not read or write. They were required under the "good character and understanding" qualification to correctly answer twenty of thirty questions propounded by the registrar. The questions were difficult for even the best educated person to answer. They were an insurmountable barrier to illiterate blacks, particularly since the tests were administered by unsympathetic whites.[45]

Among the thirty questions were: What is a republican form of government? How does the Constitution of the United States provide that it may be amended? What does the Constitution of the United States provide regarding the suspension of the privilege of the writ of habeas corpus? How does the constitution of Georgia provide that a county site may be changed? How may a new state be admitted to the Union? One question, with no irony apparently intended, was: What does the Constitution of the United States provide regarding the right of citizens to vote? The thirty questions were rewritten and reduced to twenty in 1964, with fifteen correct answers considered a passing score.[46] Robert Flanagan, for many years the field director of the Georgia National Association for the Advancement of Colored People (NAACP), says that there was actually only one correct answer to each question, and that was "white folks ain't going to let black folks vote."[47]

The difficulty blacks had in registering under restrictive statutes that gave total discretion to hostile local officials, and the failure of existing civil rights laws to remedy the problem, were exemplified by Terrell County. Although it was 64 percent black, only 48 blacks—compared to 2,810 whites—were registered to vote in 1958.[48] The reasons for the disparities were simple. Registration was segregated; whites were given white application forms, and blacks were given green application forms. The white forms were processed, and the green forms were not. The literacy test was administered in a racially discriminatory manner, and blacks were held to a higher standard of literacy than were whites.

The Department of Justice brought one of its first suits under the Civil Rights

Act of 1957 against Terrell County in 1959, seeking an injunction against discriminatory local registration practices.[49] The case was bitterly contested, and although the department eventually won an injunction, only five blacks were added to the county voter rolls by 1960.

Despite the federal court order, opposition to black registration remained unabated in Terrell County, appropriately dubbed by civil rights activists "Terrible Terrell." In 1963, Sheriff Zeke Mathews locked up two Student Nonviolent Coordinating Committee (SNCC) workers engaged in voter registration on trumped-up charges of vagrancy. The federal court again stepped in and enjoined local officials from interfering with black registration efforts.[50]

Similar strong-arm tactics were used in nearby Sumter County, in which 44 percent of the population was black but only 8.2 percent of the black voting-age population was registered. Voting was segregated, and the Jaycees, an all-white organization, ran county elections. In 1963, four civil rights workers, John Perdew, Don Harris, and Ralph Allen of SNCC, and Zev Aeloney of the Congress of Racial Equality (CORE), were arrested because of their voter-registration and civil-rights activities and were charged with insurrection, at that time a capital offense in Georgia. A federal court eventually ruled the insurrection statute unconstitutional, ordered the four defendants admitted to bail, and enjoined their prosecutions.[51]

Clearly, if the problems of discrimination in voting were to be effectively redressed in places like Terrell and Sumter counties, some method other than the time-consuming, expensive, case-by-case litigation method of enforcing civil rights would have to be devised.

The County Unit System and the Statewide Majority-Vote Rule

Georgia's unique and complex county unit system was adopted in statutory form in 1917.[52] Described by Key as the "Rule of the Rustics," it applied to primary elections for United States senator and statewide offices.[53] This unique system institutionalized malapportionment and also served to minimize black political power.

Unit votes were assigned on the basis of the apportionment (in fact, malapportionment) of the Georgia House of Representatives. The candidate who received the highest number of popular votes in a county received all the county's unit votes. A majority of county unit votes nominated a senator and the governor, while a plurality of county unit votes nominated others. The system allowed for control by the rural counties and insured the containment of the voting power of blacks and other elements concentrated in the urban areas of the state, both of which were regarded with suspicion by the Democratic party.[54] The federal district court for the District of Columbia found that one of the purposes of the county unit system in Georgia was "to destroy black voting strength."[55]

The county unit system was a highly inequitable way of apportioning electoral

power, and in 1963, in an opinion by Justice William O. Douglas, the Supreme Court, agreeing with the decision of the lower court, held that the county unit system violated the concept of "one person, one vote," which was the first use of the phrase.[56] The response of the state's white leaders to the overthrow of the county unit system was swift and predictable. Representative Denmark Groover, a former floor leader for segregationist governor Marvin Griffin, introduced a bill in the general assembly in 1963 requiring a majority vote for election to all county, state and federal offices.[57] The majority-vote law was enacted, with the support of the administration of Governor Carl Sanders, the following year.[58]

Prior to 1963, county officials—unlike statewide officeholders, who were selected under the county unit system—were nominated in primary elections conducted by the political parties. There was no statewide majority-vote requirement, and local party committees were free to determine whether a majority or a plurality vote would decide winners in their county's elections. The use of the plurality vote was widespread. Party officials estimated that as many as 100 of Georgia's 159 counties used a plurality vote, and that "it had been a 'toss up' between the two systems."[59]

Representative Groover was reported in several newspapers as saying the purpose of the majority-vote legislation was to "again provide protection which . . . was removed with the death of the county unit system" and to "thwart election control by Negroes and other minorities."[60] According to Groover, without a majority-vote requirement, "special interests and bloc groups" could control elections "by entering several candidates to split the field."[61] Speaking a week later, he warned that the federal government had been trying "to increase the registration of Negro voters" in Georgia and that his bill "would prevent the election by plurality vote of a candidate supported only by a local courthouse ring or by a bloc vote group."[62]

The general assembly also enacted a numbered-post provision to accompany the majority-vote rule requiring that candidates run for specific seats. The Supreme Court later ruled in a case from Burke County that the numbered-post law further enhanced minority vote dilution because it prevented a cohesive political group from concentrating on a single candidate.[63]

The majority-vote requirement was extended to municipalities in 1968,[64] but exempted from coverage were those whose charters expressly provided for plurality vote. More than fifty cities and towns that had plurality-vote provisions in their charters eventually adopted a majority-vote requirement, and often under overtly racial local circumstances—for example, after the near win, by a plurality vote, of a black to municipal office; after the resignation of a long-term white incumbent; after a black entered a contest with several white candidates who would likely split the white vote; or after an increase in black voter registration.[65]

The majority-vote requirement, currently under attack in *Brooks v. Harris*[66] and *United States v. Georgia*,[67] has survived two prior federal court challenges. The first was dismissed in 1971 as too speculative and not ripe for adjudication.[68] The second, an action to enforce section 5 brought by the Department of Justice, was

also dismissed when it was discovered that the Attorney General had in fact precleared the majority-vote rule.[69] The evidence of purposeful discrimination discussed above, however, as well as evidence of the impact of the majority-vote requirement on the outcome of elections and its depressant effect on black candidacies, was not presented in either case. In the current litigation, the state has argued that Groover "did not have any power at all" in the general assembly, and that the majority-vote requirement was part of an election law reform bill pushed by the Sanders administration for nonracial reasons.[70]

The effect of abolition of the majority-vote requirement is to some extent speculative, for it is not possible to predict accurately, among other things, the extent to which whites would choose consensus candidates prior to the primary and impose the functional equivalent of a majority-vote requirement or would simply bolt the Democratic party in the event blacks were nominated in the primary and vote for white Republicans in the general election.[71] It seems likely, though, that abolition of the majority-vote requirement would result in an increase in the number of blacks nominated in the primaries, and thus elected in general elections, and would increase black political participation, including the number of black candidacies in majority-white jurisdictions.

Reapportionment: The Opening Round

A three-judge court in 1962 invalidated the apportionment of the Georgia General Assembly because it underrepresented the most populous counties.[72] The allocation system under the old arrangement insured that the smallest counties, containing less than one-fourth of the state's total population, comprised constitutional majorities in both houses. The court indicated that at least one house elected by the people had to be apportioned according to population. The general assembly went into a special session and reapportioned the senate into single-member districts on the basis of population, but it was very careful to devise procedures that would preclude blacks from being elected from the majority-black areas of Fulton County. Heeding the warning of house floor leader Frank Twitty that "district elections almost inevitably would lead to the election of a Negro in one of Fulton County's seven districts," the general assembly included a provision in the legislation requiring candidates in counties with more than one senatorial district to be elected at large on a countywide basis.[73]

The disfranchising provision was thrown into doubt, however, when legislative counsel advised the general assembly that at-large voting would violate the state constitution, which required senators to be elected from single-member districts. Twitty, vowing that he would "not . . . vote for anything that would automatically put a member of a minority race in the Senate," helped push through an amendment to the state constitution allowing at-large voting for senators in multidistrict counties.[74] The drawback of this tactic from its sponsor's point of view was that the constitutional amendment could not be presented to the voters for approval until the November general election—one month after the scheduled 16 October primary.

The stratagem to exclude blacks from the senate unraveled further when a would-be candidate challenged the at-large voting requirement for Fulton County in federal and state court. The federal court abstained, but Judge Durwood T. Pye of the Fulton County Superior Court issued an order less than seven hours before the polls were to open on election day holding that the at-large provision was in violation of the state constitution.[75] The elections were held on a district basis, and Leroy Johnson, a black attorney, defeated three white opponents for the majority-black District 38 seat. He went on to win the general election against a black Republican opponent and became the first black to serve in the general assembly since Reconstruction.[76] Horace Ward, another black attorney and presently a federal district court judge in Atlanta, won a second seat in the senate from a majority-black district in 1964.

The significance of the dispute over district as opposed to countywide voting in Fulton County, which Twitty and his colleagues thoroughly understood, is apparent from the district and countywide totals for Johnson's election. He got a majority of 70 percent of the votes in District 38, but only a plurality of 47 percent countywide.[77] Had countywide voting been in effect, Johnson would have been forced into a runoff, and given the prevailing pattern of racial bloc voting, he would doubtlessly have been defeated by his white opponent.

When the Supreme Court upheld the constitutionality of the Voting Rights Act of 1965, it described the voting practices of various southern states as "an invidious and pervasive evil which has been perpetuated . . . through unremitting and ingenious defiance of the Constitution."[78] Given its remarkable and relentless history of discrimination, that characterization was particularly accurate for Georgia.

The Voting Rights Act of 1965: A Watershed Event

The Voting Rights Act abolished Georgia's literacy test for voting, including its "good character and understanding" questions and a 1964 law requiring poll officials to be "judicious, intelligent and upright,"[79] and required the state under section 5 of the act to prove, before its new voting practices could be implemented, that they were not discriminatory.[80] This combination of abolition of barriers to registration and federal supervision of new voting procedures has had a profound impact on the state. Voter registration has increased dramatically, and black officeholding, while still disproportionately low, has steadily advanced.

The Increase in Black Voter Registration

The U.S. Commission on Civil Rights estimated that the number of blacks registered to vote in Georgia in 1964 was 270,000, or 27.4 percent of the eligible black citizens.[81] Figures from the Georgia secretary of state's office show that by 1980, 464,783 black registered voters were reported—69.7 percent of the black voting-

age population. As of 1988, 644,500 registered blacks were on the voter lists. Data for black and white registration have shown consistently that since 1988 about 10 percentage points more eligible white voters register than black ones.

Some of the black increase can be traced to the early efforts of federal examiners appointed under the Voting Rights Act, who in 1967 registered 1,465 blacks in Terrell County, 475 in Lee County, and 1,448 in Screven County.[82] However, the main work of voter registration has been done by civil rights organizations such as the Voter Education Project (VEP), the Southern Christian Leadership Conference (SCLC), NAACP, SNCC, CORE, and literally hundreds of local black clubs and civic leagues from around the state.[83]

Although Georgia's literacy test was abolished by the act, and the state was prevented by section 5 from enacting new, equally discriminatory practices to take its place, the state's cumbersome registration process remains in place. Faithful to its white redeemer roots, Georgia's procedures are now needlessly complex. They place the burden of registration on the voter and vest enormous discretion in local officials. Registration, for example, may be conducted only at fixed sites designated by local registrars and must be advertised in advance.[84]

After passage of the Voting Rights Act, fraud and intimidation as methods of blunting black voter registration gradually faded away. They were replaced with what the director of VEP has described as "an adversarial relationship."[85] Local officials simply refused to designate additional registration sites in the black community or canceled previously authorized neighborhood registration drives.

Some of these restrictive practices have been challenged in state and federal court, but with mixed results. Blacks were successful in securing an injunction in 1980 under section 5 against the implementation of a new policy prohibiting neighborhood registration drives in DeKalb County, where only 24 percent of the black eligible voters were registered, as compared with 81 percent of eligible whites.[86] Blacks failed in their state court efforts to have additional registration sites designated in the black areas of Muscogee County, where 60 percent of whites, but only 48 percent of blacks, were registered. In a show of remarkable legal obfuscation and indifference to the depressed levels of minority registration, the state supreme court held that the plaintiff should have filed an action for mandamus, rather than declaratory judgment, and that the discretion of the local registrar in designating, or refusing to designate, registration sites was judicially unreviewable.[87]

In another case, *VEP v. Cleland*,[88] a federal court dismissed a statewide challenge to Georgia's registration system when the state agreed in the stipulation of dismissal that it would "encourage" registrars to appoint black deputy registrars and establish additional registration sites. While *VEP v. Cleland* did not succeed in restructuring the state's system of voter registration, VEP's director said it precipitated a change in the relationship between state officials and voter registration groups. "Since 1984 there has been more cooperation. I think Max Cleland [secretary of state] was hurt by the suit and realized the adversarial relationship was self-defeating. It's not ideal now, but at least we talk. It's definitely better."[89] As

evidence of the thaw in relations, state and local officials entered into consent decrees in two subsequent cases facilitating access to voter registration by minority and poor citizens. In *Project VOTE! v. Ledbetter*,[90] the state consented to allowing registration at food-stamp distribution centers, and in *Spalding County VEP v. Cowart*,[91] the defendants agreed to establishing registration sites in the black community in Spalding County.

One improvement in the registration process would be a simplified system using mail-in registration and motor vehicle files. This change—inexpensive and easy to administer—would undoubtedly increase registration for all voters and reduce existing racial disparities.[92]

Changes in City and County Electoral Structures

To assess the impact of the Voting Rights Act in Georgia on local electoral systems (principally at-large elections), we surveyed in 1989–90 all cities in the state of 10,000 or more people that had 10 percent or more black population in 1980. Thirty-four cities met these criteria. We asked whether the cities had made changes in their method of elections in response to the act, and whether the changes were associated with increased minority officeholding.

Because of the historical significance of county government in Georgia, we also surveyed counties regarding the electoral changes they had made. A substantial number of counties in Georgia had changed their method of elections since 1965 from at-large to district voting. In order to include these jurisdictions in our study and make our analysis more comprehensive, we surveyed all counties in the state with 10 percent or more black population; 129 counties fit this standard, including a number of very small rural counties. By including city and county governments in our analysis, we feel confident that our conclusions are not limited to city environments but apply to both major types of local government affecting the lives of Georgians.

The survey was done by mail questionnaires, with a follow-up mailing and, when necessary, follow-up telephone calls. We were able to obtain the appropriate information for virtually all cities and counties. Local registrars and voting officials cooperated fully in the project.

We had originally wanted to learn, for each jurisdiction, the method of electing the governing body at three points—1964, 1980, and 1990. Preliminary discussions with election officials and civil rights workers, however, led us to select 1980 and 1990 as years for which accurate data on election methods and black officeholding could be obtained. Moreover, because many changes in Georgia election structure occurred between these two years, we believed we would have a good sample of jurisdictions for a before-and-after study of the results of those changes. We therefore tried to determine the election method—whether at large, district, or mixed—in the two years. If it had changed, we discovered when the change had occurred. We collected the racial and gender makeup of the council or

commission in both pre- and post-change formats, although we do not report gender data here. We also sought information about whether the change was a result of litigation or threat of litigation, or was simply voluntary.

A Summary of Findings

We discovered a striking pattern of changes over time in electoral structures from at-large to district voting in the surveyed jurisdictions, for both cities and counties. The changes were particularly marked after 1982, the year in which section 2 of the Voting Rights Act was amended to make voting practices unlawful if they resulted in discrimination, whether intentional or not.[93] The switch from at-large to single-member-district or mixed plans invariably led to an increase in the number of black elected officials. In contrast, there was not a consistent increase in black officeholding in the jurisdictions that retained their at-large systems, nor was the black increase as great when it occurred. These changes correspond with the general findings in the social science literature regarding form of election and minority representation.[94]

Our findings are also consistent with the conclusions expressed by knowledgeable local observers of politics in some jurisdictions that have switched from at-large to district elections. According to one of the leaders in the drive for single-member districts in Baldwin County, "We've tried many, many times to get blacks elected [at large] and we've never been able to do it, even when most everybody turns out to vote. We finally made the decision that the only thing we could do was sue."[95] One of the two blacks elected to the Mitchell County Commission following a successful legal challenge to at-large voting in 1984 underscored the importance of district elections. "District voting, as we had alleged all the time, resulted in people being elected who really represent the community."[96]

The massive shift to district voting usually was caused by litigation or threat of it. Seventy-seven law suits were filed against the surveyed jurisdictions alone, challenging at-large elections under the Fourteenth and Fifteenth amendments, the preclearance provisions of section 5, and amended section 2. While the Justice Department played a key role in the enforcement of section 5, virtually all of the litigation challenging election structures was brought by civil rights organizations on behalf of the minority community.

Increased Minority Officeholding

The changes brought to Georgia's electoral systems by the Voting Rights Act have been broad and systematic, and are only now beginning to reveal themselves in increased electoral representation of blacks. That these changes have come from the passage and implementation of the act, and the parallel development of vote-dilution jurisprudence in constitutional litigation, is undeniable. Virtually every

change was from a more dilutive to a more representative form of government. At-large elections were once the dominant form of election in both cities and counties in Georgia; now, single-member-district and mixed plans predominate.

Cities that changed to multimember plans also experienced increased black officeholding. These cities, and three additional cities with multimember plans in place before 1980, show how adopting minority-controlled districts increases black representation. With usually two to three members representing each district, these plans, by allowing voters of different districts to use the same polling place, permit small cities to have relatively large governing councils even when they have only a few voting precincts.

Of the 34 cities of 10,000 or more we surveyed, 29 reported previously having had an at-large system, but only 6 still maintained that method. We found evidence of legal action in 17 cities. (Twenty-three suits were also brought in cities with fewer than 10,000.) Table 3.8 shows that in many of the unsued cities making changes in their method of elections, litigation was threatened or was implicit in demands of the minority community for the abolition of at-large voting. In 1990, 9 of the surveyed cities reported pure single-member districts, and 12 had mixed plans. Over one-half of the changes occurred in the seven years following the amendment of section 2.

Of the 129 counties surveyed in our study, 115 had at-large systems prior to passage of the Voting Rights Act. Only 12 counties made changes to mixed or single-member-district plans between 1965 and 1980. By 1990, only 30 at-large systems remained. Over one-half of the changes have occurred since 1984. Fifty-seven of the counties—more than one-half of those making changes—faced direct legal challenges to their systems of electing commissioners. The other counties making changes often did so under the threat, direct or implied, of litigation.

Of the 30 counties retaining at-large voting, 9 used a sole commissioner form of government. The sole commissioner system, unused outside of Georgia, combines all county legislative and executive authority in a single official.[97] In majority-white counties where voting is racially polarized, the sole commissioner system, coupled with the state's majority-vote requirement, effectively denies blacks the equal opportunity to elect candidates of their choice to the legislative and executive branches of county government. Several of the single commissioner counties have sizable black populations; when an entire county is represented by one white male commissioner, the result there is substantial underrepresentation of minorities. Sole commissioner systems have come under increasing attack under section 2, and as a result, several jurisdictions have abandoned this form of government in favor of boards of commissioners elected from districts.[98]

Generally speaking, there is a moderate-to-strong correlation in both the cities and the counties between the proportion of the population that is black and the percentage of the governing body that is black. The Pearson product-moment correlations are .79 in the cities and .53 in the counties. Both of these correlations are substantially stronger than the relationship under the at-large form of election.

Our data from the thirty-four cities are presented in tables 3.1–3.7, and the county-level data are reported in the corresponding tables 3.1A–3.5A. Tables 3.1 and 3.1A show the expected connection between the proportion of the population that is black and the percentage of black officeholders. These two tables also show the continuing underrepresentation of blacks in majority-white jurisdictions under all plans. In only one instance, involving multimember district plans with low percentages of black residents, did the mean percentage of black officials meet or exceed the mean population figures. This anomaly was based on one case.

Tables 3.2 and 3.2A show the dramatic increase in representation in the last ten years in majority-white cities and counties that abandoned at-large plans, in contrast to those that did not. The 6 cities and 30 counties that retained at-large systems show only minimal increases in the level of black representation. Of the counties retaining at-large systems, only the 7 with majority-black populations showed a substantial increase, and this increase (7.8 percentage points) still leaves blacks woefully underrepresented. The remarkable lack of change in black representation in cities and counties that maintained at-large systems is quite significant. Without electoral changes and the potential empowerment of the black electorate that they provide, very little forward movement in the electoral fortunes of Georgia blacks would have occurred.

The source of black success in mixed plans is exhibited in tables 3.3 and 3.3A. In majority-white jurisdictions, the district arrangements reported there (and in table 3.6) were much more conducive to black electoral success than the at-large components. In short, most local black officials in these Georgia cities and counties were elected from single-member districts, either in pure district systems or in the district component of mixed plans. Tables 3.3, 3.3A, and 3.6 point to the conditions that encourage election of blacks in these districts: a sizable black population.

Tables 3.4 and 3.4A show two measures of black representational equity in 1990—the percentage of blacks on a government body compared to their percentage of the jurisdiction's population, expressed as a difference and as a ratio. Blacks were much more equitably represented on governing bodies in district systems than in at-large ones, by either measure.

Table 3.5 reports the degree of change in black representational equity between 1980 and 1990, using the ratio measure. Only cities that changed electoral systems after 1980 are included. The results are clear and consistent: changing from at-large to some variety of district plan markedly increased black representation on city councils. Unchanged cities had minuscule changes in black representation, however. Table 3.5A reports similar data from Georgia counties. Again, the evidence is clear. Changing the method of electing the county commission substantially increased black representation, particularly in majority-white counties. Counties that did not alter their election systems continued to show very low levels of black representation, even in majority-black counties. The results envisioned by those who see the Voting Rights Act as a weapon to attack vote dilution were occurring in Georgia in the 1980s.

The connection between a majority-black constituency and black electoral success in cities is obvious in tables 3.6 and 3.7. Multimember systems are included because there is evidence that these plans were introduced to provide at least some level of minority representation. Excluding multimember systems does not substantially affect the results of tables 3.6 or 3.7. While blacks occasionally won in majority-white districts, it was rare. Even in cities 50–59.9 percent black, only a little over one-half of the council members were black. As black majorities increased, so did black electoral success. Racially polarized voting may very well have accounted for the results in these tables.

To summarize, the empirical evidence reflects the strong impact of the Voting Rights Act on black electoral success in Georgia. Through the introduction of single-member-district and mixed plans, which the act facilitated, blacks have been able to sharply increase their representation. Even so, measures of equity show that in 1990 blacks were still underrepresented in all types of systems, and at all levels of black population.

Litigation and the Role of the Civil Rights Community

Georgia has had an extraordinary amount of voting rights litigation at the local level. Between 1974 and 1990 there were lawsuits challenging at-large systems in forty Georgia cities and fifty-seven counties, respectively. A few jurisdictions were sued more than once. Augusta, for example, was sued in separate actions by the U.S. Attorney General and private plaintiffs. In addition, cities and counties were often joined as defendants in the same suit. Bleckley County and Cochran, the county seat, for example, were both defendants in *Hall v. Holder*.

A review of the litigation makes at least two things clear. First, most changes in voting that occurred were forced upon the cities and counties by the preclearance process and by litigation (see table 3.8 for cities).[99] There is no basis for concluding that jurisdictions voluntarily abandoned past discriminatory practices. Second, most of the litigation was brought by the civil rights community itself. Of the 86 cases filed against a city or county, at least 68 were brought by the legal staffs of civil rights organizations: 54 by the American Civil Liberties Union; 5 by Georgia Legal Services; 4 by the Voter Education Project; 3 by the Southern Poverty Law Center; 2 by the Legal Defense Fund; 1 by the NAACP; and 1 by the Center for Constitutional Rights. In five cases, two or more of the organizations shared representation of the plaintiffs, and each organization is separately credited in the numbers listed immediately above. Three cases were brought by the Department of Justice.

Shift by Counties from District to At-Large Elections

The continuing effort by Georgia whites to exclude blacks from effective participation is particularly apparent in the shift by a number of counties from district to at-large voting soon after the passage of the Voting Rights Act. An intentional shift to

a more dilutive form of elections in the face of the act cannot be interpreted as anything other than a continuing resistance to black political participation.

Although the vast majority of the state's counties elected their county government at large at the time of the act's passage, some did use single-member districts. Thirteen of those with significant black populations, which almost certainly would have had one or more majority-black districts as a result of increasing black registration, abolished district voting in favor of at-large elections after the passage of the act. The counties, with black populations ranging from 28 to 61 percent, were: Miller, Dooly, Calhoun, Clay, Early, Henry, Walton, Meriwether, Morgan, Newton, Twiggs, McDuffie, and Wilkes. Two additional counties, Bacon (13 percent black) and Crisp (40 percent black), switched from district to at-large voting in 1963 and 1964 respectively, but with implementation of the changes to take place after 1 November 1964, which later became the effective date for preclearance under section 5.

Since passage of the act, such changes in voting are presumed by law to be discriminatory.[100] Presumptions aside, in view of the 1962 senate reapportionment battle described earlier, there can be little doubt that local officials and their representatives in the general assembly were aware that at-large voting would make it more difficult for blacks to win elective office in these counties. Although the act required that at-large changes be submitted for preclearance, most of them were not.

All the above fifteen counties eventually returned to district elections, but only because they were forced to do so by lawsuits, threats of such, and/or Department of Justice denial of preclearance to their at-large systems.[101] After these counties returned to district elections 17 percent of the county commissioners elected were black.

One county with district elections before passage of the act that did not change to at-large voting was Seminole County. Its districts, which were grossly malapportioned, already discriminated against minority voters. The county's plan had been enacted in 1933,[102] and the most populous district, with the majority of the county's black voters, was over ten times larger than the smallest one. After local blacks filed a one-person, one-vote lawsuit, the court in 1980 ordered a new, properly apportioned plan into effect.[103] To no one's surprise, a black commissioner was elected after the new system was implemented.

Rogers v. Lodge *and the Acceleration of Change*

One of the most important modern voting cases in Georgia is *Rogers v. Lodge*,[104] a successful challenge to at-large elections in Burke County. *Pitts v. Busbee*,[105] a similar challenge to at-large elections in Fulton County, and *Paige v. Gray*,[106] the first successful challenge to at-large elections for a Georgia city (Albany), were earlier cases that set important precedents, but it was not until *Rogers* that much of the confusion over appropriate standards in vote-dilution cases was resolved and the change to district voting began to escalate throughout the state.

The first decision of the U.S. Supreme Court invalidating at-large elections on the grounds that they diluted minority voting strength was *White v. Regester*, a case from Texas.[107] In reaching its decision, the Court looked at a broad range of factors affecting minority participation, such as the history of discrimination, a depressed minority socioeconomic status, the small number of minorities elected to office, and so forth. The *White* analysis, which examined the effect of a challenged practice to determine its lawfulness, was applied in subsequent voting cases, including *Pitts v. Busbee* and *Paige v. Gray*.

In 1980, a sharply divided court in *City of Mobile v. Bolden*[108] held that minority plaintiffs must prove that a challenged voting practice was adopted or was being maintained with a racially discriminatory intent, and essentially repudiated *White*. *Bolden* was a highly controversial and much criticized decision.[109] In response to it, Congress amended section 2 in 1982 to provide that, whatever the standard of the Constitution, voting practices were in violation of the statute if their "result" was to discriminate on the basis of race or color.[110]

Two days after Congress amended section 2, the Supreme Court decided *Rogers v. Lodge* and essentially reversed its earlier decision in *City of Mobile*. While the Court continued to require proof of racial purpose, it said that such purpose could be inferred from circumstantial evidence: "discriminatory intent need not be proved by direct evidence. 'Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts.'"[111]

The decision in *Rogers* and the amendment of section 2 represented the renewal of a strong judicial and congressional commitment to equal voting rights. They also accelerated the pace of litigation and the adoption of district elections in Georgia.

The facts in *Rogers* were egregious, but Burke County was fundamentally no different from other counties in the state that had a significant black population and used at-large elections. All of them had a common history of discrimination; minorities were a depressed socioeconomic group; there were few, if any, elected black officials; voting was racially polarized; housing, churches, civic, and social organizations were largely segregated as a matter of practice. *Rogers* was a clear signal, as the subsequent litigation bore out, that every at-large system in the state was vulnerable to challenge under the Voting Rights Act.

Another factor contributing to change was that jurisdictions which lost in court were required to pay the costs and attorneys' fees of the prevailing plaintiffs. In *Rogers*, Burke County not only had to pay its own lawyers, but it had to pay the plaintiffs' attorneys $294,584.41.[112] Poor odds and the costs of losing were strong disincentives for jurisdictions to fight to keep their at-large systems. According to a survey of probate judges conducted by the *Atlanta Constitution*, "the threat of costly lawsuits is prompting more and more local officials to adopt district elections."[113]

The Supreme Court first construed amended section 2 in 1986 in *Thornburg v. Gingles*,[114] a case involving multimember legislative districts in North Carolina. The court simplified proof of vote dilution by focusing on whether voting was

racially polarized and whether majority-black single-member districts could be created. As a result of the amendment of section 2 and the decisions in *Rogers* and *Gingles*, many jurisdictions in Georgia and throughout the South have bowed to the inevitable and have adopted less dilutive forms of elections. Linda Meggers, the director of the state's reapportionment office, described the change to district voting as "the most revolutionary change in Georgia since the Civil War. You're having a whole new distribution of power."[115]

Polarized Voting

Elections in Georgia in which voters have a choice between viable black and white candidates are, with occasional exceptions, polarized on the basis of race. This is true whether the definition of polarized voting is the one adopted by the Supreme Court of "black voters and white voters vot[ing] differently,"[116] or a more stringent definition, such as a majority of each race voting differently.

The fact that voting behavior may also be correlated with other factors, such as voters' socioeconomic characteristics or place of residence, or candidates' expenditures, is legally irrelevant to a section 2 racial bloc voting analysis. Not only are many of these factors themselves strongly related to race, but the Supreme Court held in *Gingles* that "all that matters under §2 and under a functional theory of vote dilution is voter behavior, not its explanation."[117] Thus, where black and white voters are actually voting differently, it is immaterial that nonracial factors may play a role in explaining voter behavior.

Reported decisions have explicitly or implicitly found polarized voting in a number of Georgia jurisdictions, including Bleckley County, where "the evidence conclusively established a pattern of racially polarized voting";[118] Burke County, where the evidence of bloc voting "was clear and overwhelming";[119] Carrollton, where voting was "racially polarized";[120] Colquitt County, where there was evidence of "racial bloc voting";[121] Albany, where the at-large system amounted to "the winner take all";[122] Fulton County, where "the government ha[d] never become equally open to participation by black and white members of the community";[123] Putnam County, where elections were characterized by "racially polarized white voting";[124] and Wilkes County, where "racial bloc voting exist[ed] in the county."[125]

A 1989 analysis by the ACLU confirmed the continuing existence of polarized voting in the state. The analysis was conducted as part of a challenge to the at-large, circuitwide election of superior court judges. The state, which contended that statutes affecting the election of judges were not subject to the Voting Rights Act, was ordered by a three-judge court to comply with section 5 and to submit for preclearance statutes enacted since 1 November 1964 affecting the election of forty-eight judgeships.[126]

The ACLU analyzed all known judicial, legislative, and at-large county office elections since 1980, in the counties affected by the litigation (principally those

with substantial concentrations of black population) in which there was a "serious" black candidate, defined as a black who received at least half of the black vote in a primary or general election. Fifty-one elections from twenty counties were examined. Regression analysis showed that, on average, 86 percent of whites voted for the white opponent(s) of the black candidate.[127] Given such a pattern of voting, it is apparent why black candidates with strong black support have found it difficult to win majority-white districts. Conversely, it is equally clear why serious black candidates have enjoyed success primarily in those districts where members of their own race were in the majority.

The three most notable exceptions to the pattern of blacks losing in majority-white districts involved Andrew Young, elected to the then majority-white Fifth Congressional District in 1972; Robert Benham, elected to the court of appeals in 1984 and the state supreme court in 1990, becoming the first black ever to win statewide office in Georgia; and Clarence Cooper, elected as a member of the court of appeals in 1990.

In his 1972 contest, Young got 25.3 percent of the white vote. In 1981, however, after serving in Congress for three terms and as U.S. ambassador to the United Nations under President Carter, and after raising more money than in any of his previous campaigns, he got only 8.9 percent of the white vote in his successful runoff election against a white for mayor of majority-black Atlanta.[128] In 1990 Andrew Young ran for governor of Georgia, receiving 28.8 percent of the primary vote. In the required runoff election, he increased his share to 38.1 percent, far short of the majority he needed. Ecological regression analysis of the county returns showed strong evidence of racially polarized voting in both Young efforts that year. The slope of his regression lines mirrored that of Jesse Jackson's 1988 presidential primary bid in Georgia, indicating that in all these races, the black candidate received less than 26 percent of the white vote.[129]

Judicial elections are unique in that they are subject to considerable control by the bar and the political leadership of the state. Candidates are essentially preselected through appointment by the governor to vacant positions upon the recommendation of a judicial nominating committee dominated by the bar. The chosen candidate then runs in the ensuing election with all the advantages of incumbency. Judicial elections are low-key, low-interest contests in which the voters tend to defer to the choices that have previously been made.[130] Benham, following this pattern of preselection, was appointed by the governor to the court of appeals in 1984. He ran for the position in August of that year, and was elected with 58.5 percent of the vote. His election was unusual in that he faced three white opponents, whereas most court appointments have very little opposition.

Benham received special political treatment. According to state representative Tyrone Brooks, "the governor felt they could sell Benham in the white community, with the support of the bar and the Democratic leadership, because nobody knew he was black. The plan was to get out the vote in the black community in the traditional way, but to ignore race in the white community. Benham's picture could appear only on brochures distributed in the black community and there could be no

endorsements of Benham by Maynard Jackson, Julian Bond, Jesse Jackson, or anybody in the civil rights community."[131] Ironically, but not surprisingly, the result of this consciously racial campaign was that Benham's election revealed very little racial polarization. Benham's election to the state supreme court in 1990 resulted from much the same strategy, and he was again successful.

In 1990, Clarence Cooper became the second black to win statewide judicial office by following Benham's strategy. He was appointed to the court of appeals and then ran for election to a full term. Ecological regression analysis showed strong similarities in racial voting patterns between the Benham and Cooper contests; white support for black candidates was decidedly greater than in either Andrew Young's 1990 or Jesse Jackson's 1988 statewide contest.

Legislative Reapportionment

The increased use of single-member districts in the general assembly, implemented as a result of litigation and section 5 review, has also resulted in a corresponding increase in the number of black legislators. Following decisions of the Supreme Court holding that the one-person, one-vote principle required a state to apportion both houses of its legislature on the basis of population, the district court in *Toombs v. Fortson*[132] ordered further reapportionment in Georgia. This litigation created a series of interim plans and special elections, and culminated in the adoption of single-member and multimember districts for the house.[133]

One of the first blacks elected was Julian Bond, former communications director of SNCC. After his election in 1965 but before he took office, he issued a SNCC-endorsed statement strongly critical of the Vietnam War and of continued racial discrimination in the United States. "We are in sympathy with and support the men in this country who are unwilling to respond to a military draft," the statement said, "which would compel them to contribute their lives to United States aggression in Viet Nam in the name of 'freedom' we find so false in this country."[134]

The statement was triggered by the death of Samuel Younge, Jr., a Tuskegee Institute student and navy veteran, who had been killed while trying to use the segregated bathroom of a local service station. According to Bond, "the irony of Younge losing the life he had offered his country over a segregated toilet" prompted the release of the antiwar statement by SNCC.[135]

Before the house convened, seventy-five members petitioned to have Bond excluded on the grounds that he could not validly take the oath of office to support the constitutions of the United States and Georgia. When he appeared for the swearing-in ceremony, Bond felt that "the hostility from white legislators was nearly absolute."[136]

In an action reminiscent of that of the general assembly of 1868, the house in 1966 passed, 184 to 12, a resolution that "Bond shall not be allowed to take the oath of office . . . and . . . shall not be seated as a member of the House of Representatives."[137] Undaunted, Bond ran in the special election to fill his vacant

seat and was reelected by an overwhelming majority. He refused to recant his statement and was denied the oath of office a second time.

The U.S. Supreme Court held that he had been improperly excluded and his freedom of expression had been violated. The court found it unnecessary to reach the issue of whether Bond's exclusion had also been because of race. He was seated and served several terms in both the house and later the Georgia senate.

After the 1970 census, the state enacted a new legislative apportionment plan. Under the preclearance process, the Attorney General objected to the original plan because various discriminatory features—including multimember districts, numbered posts, a majority-vote requirement, and changes in the structure of potential black-majority single-member districts for the house—enhanced the possibility of discrimination against minority voters.[138] He also objected to the senate plan because of the potentially discriminatory way in which districts had been drawn in Fulton and Richmond counties.

Once again, the state was compelled by section 5 to construct a more racially fair reapportionment plan. The new plan corrected the objection to senate redistricting, increased the number of single-member house districts from 105 to 128, and reduced the number of multimember house districts from 49 to 32. The Attorney General approved the senate changes but rejected the house reapportionment plan again. He concluded that the house plan did not remove the objectionable combination of multimember districts, numbered posts, and the majority-vote requirement. The state resolved to take no further steps to rectify the matter. The Attorney General brought suit, and the state eventually lost. It was required to reapportion in conformity with section 5.[139] The general assembly adopted a new plan in 1974 and used fewer multimember districts. It provided for 180 house members elected from 154 districts. As a result of the 1974 changes, the number of blacks in the house increased from fourteen to twenty.

It is difficult to overstate the impact on minority officeholding of single-member-district elections for the general assembly. Of the six black state senators and twenty-two representatives, only one—Michael Thurmond, whose district included the university town of Athens—was elected from a majority-white (57 percent) district.[140] The remaining black members were elected from districts 56 percent to 99 percent black.

Congressional Reapportionment

Georgia's 1971 and 1981 congressional reapportionments were the products of intentional discrimination and are dramatic examples of the extraordinary lengths to which the legislature was prepared to go to exclude blacks from the congressional delegation. They also show how effective the preclearance provisions of section 5 have been in blocking certain forms of vote dilution and facilitating minority officeholding.

The congressional reapportionment enacted in 1931 was invalidated in *Wes-*

berry v. Sanders (1964)[141] because of severe malapportionment of the Fifth District, comprising Fulton, DeKalb, and Rockdale counties. This district was the largest in the state and contained 823,680 people, while the smallest district, the Ninth, had only 272,154 people—fewer than one-third as many as the Fifth. After *Wesberry*, the general assembly enacted a new plan with acceptable population deviations.[142] The apportionment process following the 1970 census was the first reapportionment subject to section 5 review.

The original 1971 plan discriminated in three distinct ways. First, it divided the concentration of black population in the metropolitan Atlanta area into the Fourth and Fifth districts to insure that the Fifth would be majority-white. Second, it excluded the residences of black persons from the Fifth District who were known to be potential candidates: Andrew Young, who had run in the previous Fifth District election in 1970; and Maynard Jackson, the vice-mayor of Atlanta. The homes of both men were located about one block from the new district line. The 1970 contest between Young and a white opponent, Fletcher Thompson, had been particularly divisive, and, according to a federal judge, was characterized by "racist campaign tactics."[143] Third, to maximize the chances of white control, the residences of whites who were recognized as potential candidates were included in the district bounds.[144] Although there is no candidate residency requirement in congressional elections, nonresidence would have been an obvious political obstacle.

The plan was submitted for preclearance, and the Attorney General objected to it. He said that he was unable to conclude "that these new boundaries will not have a discriminatory racial effect on voting by minimizing or diluting black voting strength in the Atlanta area."[145] Under the duress of section 5, the general assembly enacted a new plan in 1972, increasing the black percentage in the Fifth District from 38 to 44 percent and including the residences of Young and Jackson. The plan was precleared. Young, an adroit politician and campaigner, ran in the ensuing 1972 election and, with crossover support from progressive white in-town Atlanta neighborhoods, became the first black elected to Congress from Georgia since Reconstruction.[146]

When the state reapportioned its congressional districts after the 1980 census, it tried once again to minimize black voting strength in the metropolitan Atlanta area. The 1980 figures revealed that the state's ten congressional districts, while having become severely malapportioned since they were drawn in 1972, were still majority white, with the exception of the Fifth. This district contained a slight (50.33 percent) black population majority.

The new plan drawn in 1981 maintained white majorities in nine of the ten districts and increased the black population in the Fifth to 57.28 percent. Although majority-black in total and voting-age populations, the district actually contained a 54 percent white majority among registered voters. The state submitted the plan for preclearance and argued that the Fifth District's configuration could not be discriminatory because it increased the black percentage over the 1972 plan. The Attorney General did not agree, and denied section 5 approval.[147]

The state then filed a declaratory judgment action in the district court for the District of Columbia, arguing that under the retrogression standard of section 5, it

was entitled to have its congressional reapportionment plan precleared. The Supreme Court had previously held in *Beer v. United States*[148] that the purpose of section 5 was to maintain the status quo in voting, and that a plan that was ameliorative instead of retrogressive could not violate the effect standard of the statute. The evidence at trial showed that the 1981 plan, while not technically retrogressive, was the product of intentional discrimination. The court denied preclearance, and the Supreme Court affirmed on appeal.[149]

Given the rich history of chronic vote discrimination against blacks, it is not surprising that the 1981 congressional redistricting process was influenced by race, despite the vigorous denials by white officials. What is surprising was the extent of that influence. Senator Julian Bond had introduced legislation that would have created a Fifth District that was 69 percent black. Several senators opposed the so-called Bond Amendment because it would, they said, cause "white flight," divide the congressional districts into "black and white," and "bring out resegregation in a fine county like Fulton and a fine city like Atlanta."[150] Nonetheless, the final plan adopted by the senate contained the Bond Amendment.

The leadership of the house rejected the Bond plan for the Fifth District. Joe Mack Wilson, chairman of the House Reapportionment Committee and the person who dominated the process in the lower chamber, frankly explained to his colleagues that "I don't want to draw nigger districts."[151] Wilson freely used the term "nigger," and he regularly characterized legislation of benefit to blacks as "nigger legislation." The District of Columbia court, in an extraordinary but factually based finding, concluded that "Representative Joe Mack Wilson is a racist."[152] The speaker of the house, Tom Murphy, while not as antagonistic in his language, was equally opposed to the Bond plan for the same reasons. "I was concerned," he said later, "that . . . we were gerrymandering a district to create a black district where a black would certainly be elected."[153] On the basis of these overt racial statements, as well as on the absence of a legitimate nonracial reason for adopting the plan, the conscious minimizing of black voting strength, and the history of discrimination in Georgia, the court concluded that the state's submission had a discriminatory purpose and violated section 5.

Forced yet again by the Voting Rights Act to construct a racially fair plan, the general assembly in a special session enacted an apportionment plan for the Fifth District with a black population exceeding 65 percent. The plan was approved by the court. In 1986, black civil rights activist John Lewis was elected in this district, defeating Julian Bond, a former SNCC colleague and the principal architect of the redistricting plan.

Conclusion

Against formidable odds, and checked at every turn, blacks in Georgia have made impressive advances in political participation. The number of black elected officials grew from 3 in 1964 to 495 in 1990.[154] During the same period, black registration increased from 270,000 to 608,000.

The Voting Rights Act was a decisive event in Georgia's political history and continues to be the major weapon in the civil rights armamentarium in the battle to bring about a more equitable role for blacks in the political system. Section 5 has successfully blocked the introduction of many new attempts at vote dilution. Section 2, since its amendment in 1982, has proved a potent force in challenging existing discriminatory practices.

The increase in black officeholding can in large measure be traced directly to the gradual demise of at-large elections and the implementation of single-member districts containing effective black voting majorities. These changes were neither self-executing nor voluntary, but were coerced through a combination of congressional legislation, favorable judicial decisions, the enforcement of the preclearance requirement, and litigation efforts of the civil rights and minority communities.

Significant racial disparities remain, however. Blacks are 25 percent of Georgia's voting-age population, but constitute only 7.6 percent of the elected officials in the state. Not only is black registration depressed, but black voter turnout is lower than white voter turnout. According to Bureau of the Census surveys taken after the 1988 presidential election, 53.2 percent of age-eligible whites in Georgia, but only 42.4 percent of age-eligible blacks, reported voting in the election.[155]

Bloc voting, evidence of a continuing racial schism, remains a political fact of life in the state, as does the use of election practices that enhance discrimination, such as at-large voting and the majority-vote and numbered-post requirements. The state's system of voter registration is needlessly rigid and cumbersome and is in need of overhaul. The fight for equal voting rights in Georgia, therefore, is far from over. Much remains to be done. But the Voting Rights Act, in conjunction with alert and active civil rights and minority communities, should continue to serve well the citizens of the state, both black and white.

TABLE 3.1
Black Representation on Council in 1990 by Election Plan, Georgia Cities of 10,000 or More Population with 10 Percent or More Black Population in 1980

Type of Plan by % Black in City Population, 1980	N	*Mean % Black in City Population, 1980*	*Mean % Black on City Council, 1990*
SMD plan			
10–29.9	3	23.5	15.0
30–49.9	6	44.1	33.3
50–100	0	—	—
Mixed plan			
10–29.9	0	—	—
30–49.9	9	40.9	32.2
50–100	3	57.8	45.8
MMD plan[a]			
10–29.9	1	27.4	30.0
30–49.9	6	43.0	31.9
50–100	0	—	—
At-large plan			
10–29.9	5	21.7	10.0
30–49.9	1	41.0	16.7
50–100	0	—	—

[a]These are multimember-district plans in which all councilpersons are elected from districts, but typically two or three members are elected per district.

TABLE 3.1A
Black Representation on Commission in 1990 by Election Plan, Georgia Counties with 10 Percent or More Black Population in 1980

Type of Plan by % Black in County Population, 1980	N	*Mean % Black in County Population, 1980*	*Mean % Black on Commission 1990*
SMD plan			
10–29.9	7	24.0	11.4
30–49.9	25	37.6	24.6
50–100	5	35.7	36.0
Mixed plan			
10–29.9	26	22.5	15.0
30–49.9	28	36.4	22.8
50–100	8	55.4	38.1
At-large plan			
10–29.9	18	17.2	2.2
30–49.9	5	40.8	10.0
50–100	7	61.4	27.6

TABLE 3.2
Changes in Black Representation on Council between 1980 and 1990, Georgia Cities of 10,000 or More Population with 10 Percent or More Black Population in 1980

Type of Change by % Black in City Population, 1980	N[a]	*Mean % Black in City Population, 1980*	*Mean % Black on City Council*	
			Before Change (1980)	*After Change (1990)*
		Changed Systems		
From at-large to SMD plan				
10–29.9	1	28.2	0.0	25.0
30–49.9	3	44.4	13.3	30.0
50–100	0	—	—	—
From at-large to mixed plan				
10–29.9	0	—	—	—
30–49.9	3	38.7	6.7	32.1
50–100	2	53.4	22.5	35.4
From at-large to MMD plan				
10–29.9	0	—	—	—
30–49.9	4	42.3	23.3	31.7
50–100	0	—	—	—
		Unchanged Systems		
At-large plan				
10–29.9	5	21.7	8.5	10.2
30–49.9	1	41.0	20.0	16.7
50–100	0	—	—	—

[a] The number of cities in table 3.2 is smaller than in table 3.1 because the change to an at-large plan in some cities occurred before 1980.

TABLE 3.2A
Changes in Black Representation on Commission between 1980 and 1990, Georgia Counties with 10 Percent or More Black Population in 1980

Type of Change by % Black in County Population, 1980	N[a]	*Mean % Black in County Population, 1980*	*Mean % Black on County Commission*	
			Before Change (1980)	*After Change (1990)*
		Changed Systems		
From at-large to SMD plan				
10–29.9	5	22.8	2.9	12.0
30–49.9	21	37.9	16.2	25.5
50–100	4	55.8	0.0	35.0
From at-large to mixed plan				
10–29.9	14	22.0	0.0	16.6
30–49.9	19	34.4	19.2	23.8
50–100	4	54.5	30.0	33.3
		Unchanged Systems		
At-large plan				
10–29.9	18	17.2	0.0	2.2
30–49.9	5	40.8	8.3	10.0
50–100	7	61.4	19.8	27.6

[a]The number of counties in this table is smaller than in table 3.1A because the change to an at-large plan in some counties occurred before 1980.

TABLE 3.3
Black Representation in 1990 in Mixed Plans by District and At-Large Components, Georgia Cities of 10,000 or More Population with 10 Percent or More Black Population in 1980

% Black in City Population, 1980	N	*Mean % Black Councilpersons in District Components, 1990*	*Mean % Black Councilpersons in At-Large Components, 1990*
10–29.9	0	—	—
30–49.9	9	41.5	12.0
50–100	3	44.6	38.9

TABLE 3.3A
Black Representation in 1990 in Mixed Plans by District and At-Large Components, Georgia Counties with 10 Percent or More Black Population in 1980

% Black in County Population, 1980	N[a]	*Mean % Black Commissioners in District Components*	*Mean % Black Commissioners in At-Large Components*
10–29.9	5	18.0	0.0
30–49.9	2	43.8	8.3
50–100	2	50.0	33.3

[a]Missing data reduced the number of mixed county plans for analysis.

TABLE 3.4
Two Equity Measures Comparing Percentage Black on Council in 1990 with Percentage Black in City Population in 1980, Georgia Cities of 10,000 or More Population with 10 Percent or More Black Population in 1980

Type of Plan by % Black in City Population, 1980	N	*Difference Measure (% on Council − % in Population)*	*Ratio Measure (% on Council ÷ % in Population)*
		Changed Systems	
From at-large to SMD plan			
10–29.9	3	−2.40	0.90
30–49.9	6	−9.91	0.74
50–100	0	—	—
From at-large to mixed plan			
10–29.9	0	—	—
30–49.9	14	−10.45	0.75
50–100	3	−11.87	0.78
		Unchanged Systems	
At-large plan			
10–29.9	5	−12.15	0.37
30–49.9	1	−24.30	0.40
50–100	0	—	—

TABLE 3.4A
Two Equity Measures Comparing Percentage Black on Commission in 1990 with Percentage Black in County Population in 1980, Georgia Counties with 10 Percent or More Black Population in 1980

Type of Plan by % Black in County Population, 1980	N	*Difference Measure (% on Commission − % in Population)*	*Ratio Measure (% on Commission ÷ % in Population)*
		Changed Systems	
From at-large to SMD plan			
10–29.9	7	−12.54	0.52
30–49.9	25	−11.43	0.66
50–100	5	−19.70	0.65
From At-large to mixed plan			
10–29.9	26	−13.34	0.68
30–49.9	28	−13.49	0.64
50–100	8	−18.67	0.69
		Unchanged Systems	
At-large plan			
10–29.9	18	−76.00	0.10
30–49.9	5	−30.40	0.25
50–100	7	−33.69	0.42

TABLE 3.5
Changes in Black Representation on Council between 1980 and 1990, Georgia Cities of 10,000 or More Population with 10 Percent or More Black Population in 1980 (Ratio Equity Measure)

Type of Change by % Black in City Population, 1980	N[a]	*Black Representational Equity on Council*	
		1980	*1990*
		Changed Systems	
From at-large to SMD plan			
10–29.9	1	0.00	0.89
30–49.9	3	0.30	0.68
50–100	0	—	—
From at-large to mixed plan			
10–29.9	0	—	—
30–49.9	3	0.17	0.83
50–100	2	0.42	0.66
From at-large to MMD plan			
10–29.9	0	—	—
30–49.9	4	0.55	0.75
50–100	0	—	—
		Unchanged Systems	
At-large plan			
10–29.9	5	0.39	0.47
30–49.9	1	0.49	0.40
50–100	0	—	—

[a] The number of cities in this table is smaller than in tables 3.1 and 3.4 because some changes in form occurred before 1980.

TABLE 3.5A
Changes in Black Representation on County Commission between 1980 and 1990, Georgia Counties with 10 Percent or More Black Population in 1980 (Ratio Equity Measure)

Type of Change by % Black in County Population, 1980	N[a]	*Minority Representational Equity on Commission*	
		1980	*1990*
	Changed Systems		
From at-large to SMD plan			
10–29.9	5	0.13	0.53
30–49.9	21	0.43	0.67
50–100	4	0.00	0.63
From at-large to mixed plan			
10–29.9	14	0.00	0.75
30–49.9	19	0.56	0.69
50–100	4	0.55	0.61
	Unchanged Systems		
At-large plan			
10–29.9	18	0.00	0.10
30–49.9	5	0.20	0.25
50–100	7	0.32	0.42

[a]These data exclude counties that changed plans prior to 1980 or that maintained single-member-district or mixed plans throughout this period. Thus the *N*s may be smaller than in tables 3.1A and 3.4A.

TABLE 3.6
Black Representation in Council Single- and Multimember Districts in 1990, Georgia Cities of 10,000 or More Population with 10 Percent or More Black Population in 1980

% Black Population of District	N[a]	*Mean % Black Population in Districts, 1980*	*Mean % Black Councilpersons in Districts, 1990*
0–29.9	65	13.2	0.0
30–49.9	8	38.7	25.0
50–59.9	13	54.6	53.8
60–64.9	8	62.3	75.0
65–69.9	4	65.7	100.0
70–100	35	85.3	94.3

[a]Of the 162 single- or multimember district cities in Georgia, we were able to obtain data on 133 districts. We received data from 26 of the 27 cities.

TABLE 3.7
Black Council Representation in Single- and Multimember Districts in 1990, by Racial Composition of District, Georgia Cities of 10,000 or More Population with 10 Percent or More Black Population in 1980

Racial Composition of District	N	*Mean % Black Population in Districts, 1980*	*Mean % Black Councilpersons in Districts, 1990*
Black majority	60	74.3	83.3
White majority	73	16.0	2.7

TABLE 3.8
Cause of Change from At-Large to Mixed, Single-Member-, or Multimember-District Plan between 1974 and 1990, Georgia Cities of 10,000 or More Population with 10 Percent or More Black Population in 1980

City	*Did Lawsuit Accompany Change?*	*Lawsuit/Reason for Change*
	Changed to Single-Member Districts	
Albany	Yes	*Paige v. Gray*, 1977
Milledgeville	Yes	*NAACP v. City of Milledgeville*, 1983
Newnan	Yes	*Rush v. Norman*, 1984
Waycross	Yes	*Ware County VEP v. Parks*, 1985
	Changed to Mixed Plan	
Americus	Yes	*Wilkerson v. Ferguson*, 1981
Atlanta	No	Legislative change
Augusta	Yes	*United States v. City of Augusta*, 1988
Bainbridge	No	Legislative change
Carrollton	Yes	*Carrollton Branch NAACP v. Stallings*, 1985
Columbus	No	City/county consolidation
Cordele	Yes	*Dent v. Culpepper*, 1988
Covington	Yes	*Newton County Voters League v. City of Covington*, 1977

(*continued*)

TABLE 3.8 (*Continued*)

City	Did Lawsuit Accompany Change?	Lawsuit/Reason for Change
Decatur	Yes	*Thrower v. City of Decatur, Georgia*, 1984
Douglas	Yes	*NAACP Branch of Coffee County v. Moore*, 1978
Dublin	Yes	*Sheffield v. Cochran*, 1975
Griffin	Yes	*Reid v. Martin*, 1986
Macon[a]	No	Legislative change after dismissal of lawsuit, *Walton v. Thompson*, 1975
Moultrie	Yes	*Cross v. Baxter*, 1984
Savannah	No	Legislative change
Statesboro	Yes	*Love v. Deal*, 1983
Thomasville	No	Threat of litigation
Valdosta	Yes	*United States v. Lowndes County*, 1984
Vidalia	No	Legislative change
SUMMARY	Yes 16 (70%) No 7 (30%)	

Sources: Legal research and interviews with civil rights attorneys.

[a]Macon was sued under section 2, but the lawsuit was unsuccessful. The subsequent change to a new system was legislative.

TABLE 3.9
Major Disfranchising Devices in Georgia

Device	Date Established	Date Abolished
Poll tax	1868; repealed in 1870; reenacted in 1871; made cumulative in 1877	1945[a]
Payment of taxes	1868	1931[b]
Durational residency requirements	1868; lengthened in 1873	1972[c]
Grand jury appointment of school boards	1872	Gradually by local referendums in individual counties, statewide in 1992[d]
White primary	By party rules, late nineteenth century	1945[e]
Disfranchising offenses	1877	Still in use[f]
Registration by race	1894	Still required
Literacy, good character and understanding tests	1908	1965[g]
Grandfather clause	1908	1915[h]
Property ownership alternative	1908	1945[i]
County unit system	By party rules, late nineteenth century; by statute, 1917	1963[j]
Thirty questions test	1949, revised 1958	1965[g]
Majority vote and numbered posts requirements	Late nineteenth century, local option; replaced by statute county- and statewide in 1964; operative for municipalities in 1968	Still in use

[a]Georgia Laws 1945, 129.
[b]Georgia Laws, 1931, 102.
[c]*Abbott v. Carter*, 356 F. Supp. 280 (N.D. Ga. 1972).
[d]Georgia Laws 1991, 2032 (approved by referendum on 3 November 1992).
[e]*King v. Chapman*, 62 F. Supp. 639 (M.D. Ga. 1945).
[f]Upheld in *Kronlund v. Honstein*, 327 F. Supp. 71 (N.D. Ga. 1971).
[g]Voting Rights Act of 1965, 42 U.S.C. §1973b.
[h]Georgia Laws 1908, 29 (providing expiration data).
[i]Georgia Laws 1945, 15.
[j]*Gray v. Sanders*, 372 U.S. 368 (1963).

TABLE 3.10
Black and White Registered Voters and Officeholders in Georgia, Selected Years[a]

	Black		White	
	N	%	N	%
Registered voters				
1964[b]	270,000	16.2	1,399,778	83.8
1966[c]	289,545	17.4	1,378,005	82.6
1990[d]	607,782	21.9	2,143,121	77.3
Officeholders[e]				
State house				
1964	0	0.0	100	100.0
1966	9	5.0	171	95.0
1990	27	15.0	153	85.0
State senate				
1964	2	3.6	54	96.4
1966	2	3.6	54	96.4
1990	8	14.3	48	85.7

[a]Mean black Georgia population, 1960–90 = 27.0%.
[b]Estimate reported by U.S. Commission on Civil Rights
[c]Southern Regional Council 1966.
[d]Secretary of state.
[e]All data on officeholding were provided by the clerks of the house and senate.

FOUR

Louisiana

RICHARD L. ENGSTROM,
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Historically, Louisiana's political environment has been hostile to the aspirations of blacks for equal political participation. Any alteration in this basic environment has been largely the result of "outside interference" in the form of federal intervention.

—*Jewel L. Prestage and Carolyn Sue Williams*[1]

EFFORTS TO RESTRICT black participation in the governmental process have been a permanent feature of Louisiana's political environment. Prior to the Civil War the state's constitutions prohibited blacks, whether free or slave, from voting. Today, while allowed to vote, blacks must constantly challenge electoral schemes that dilute their new voting strength. Discriminatory election laws, in short, continue to be a serious problem in Louisiana. The fact that the nature of the discrimination has changed from disfranchisement to vote dilution, however, does reflect progress toward a more open electoral process.

This progress has been the consequence of one of the most significant manifestations of "outside interference" in Louisiana's political process—the federal Voting Rights Act. As a result primarily of that act, blacks now register to vote in Louisiana at a rate approaching, but still not equal to, that for whites. Among blacks of voting age, 66.9 percent were registered to vote at the beginning of 1990, compared to 72.6 percent of the whites, resulting in a registered electorate that was 26.2 percent black.[2] This new black voting strength has been the principal reason there were over five hundred black elected officials in Louisiana by 1990—about 11 percent of all elected officials.[3] There were twenty-four black members (22.9 percent) of the state's house of representatives and eight members (20.5 percent) of the senate in 1992. Blacks now serve on the governing boards of parishes (counties), municipalities, and education authorities throughout Louisiana. In the state's largest city, New Orleans, both the mayor and a majority of the city council are

black. Although the registration and representation figures for Louisiana continue to be low when compared with the percentage of blacks in the state's population—30.8 percent in 1990—and although blacks still have to fight efforts to dilute their votes, the situation today is a major improvement over that in 1965, when the Voting Rights Act was adopted.

Vote Denial

On 8 March 1965, only a few months before President Lyndon Johnson signed the Voting Rights Act, the Supreme Court unanimously concluded that Louisiana was guilty of unconstitutionally depriving its black residents of their right to vote. In *Louisiana v. United States* the state was enjoined from continuing to require potential voters to pass its constitutional "interpretation" test.[4] This test required applicants for registration to "understand and give a reasonable interpretation" of a passage from either the three-volume state constitution or the federal Constitution.[5] It was the latest in a series of unlawful devices that the state had employed to disfranchise its black residents.

Their disfranchisement was initially straightforward. The state's first three constitutions—those of 1812, 1845, and 1852, as well as the secessionist constitution of 1861—simply restricted the franchise to white males who could satisfy other registration requirements.[6] The constitution of 1864, written by delegates from the federally occupied southern part of the state, did not lift this racial ban. Blacks were registered to vote, however, under the federal Military Reconstruction acts, and a report by the state board of registration in 1867 revealed that 65.2 percent of the state's registrants were black at that time. About 90 percent of the black males of voting age were reportedly registered in 1867, compared to less than half of the white males.[7]

The state prohibition on blacks voting was removed by the state constitution adopted in 1868, under which Louisiana was readmitted to the Union. This constitution was written by an elected convention in which half of the delegates were black. In 1870 the state legislature, also about half black at this time, required voters to register under the new requirements.[8]

Blacks were a significant political force in Louisiana during this period of black enfranchisement. They developed political organizations of their own, and participated actively in Republican party politics. Blacks were not only elected in large numbers to the state legislature, three were also elected to the statewide offices of lieutenant governor, superintendent of education, and state treasurer. One lieutenant governor, Pinckney Benton Stewart Pinchback, served briefly as governor. At the local level blacks served as mayors, sheriffs, assessors, tax collectors, coroners, and in a variety of other elective positions.[9]

Black enfranchisement and its consequence, an integrated elected elite, did not sit well with Louisiana's whites. New means were developed to minimize black

participation. These methods could not be direct, as the old ones had been, because of the Fifteenth Amendment to the federal constitution, adopted in 1870. The new methods had to be "facially neutral," but they were effective nonetheless.

The Grandfather Clause

In 1896 blacks still constituted 44.8 percent of Louisiana's registered voters. Four years later they composed only 4.0 percent.[10] Their virtual elimination from the electorate was accomplished initially through the discriminatory application of a new registration law adopted in 1896 that required voters to register between 1 January 1897 and 1 January 1898. Black registration was reduced during this period by about 90 percent, leaving only 9.5 percent of the adult black males with the franchise.[11] This was followed by the adoption of new registration requirements in the constitution of 1898. According to its presiding officer, this constitution was written by a convention that had been called for one primary purpose—"the purification of the electorate."[12] As part of the scheme to accomplish this, it invented the now infamous "grandfather" clause.

The constitution of 1898 established an educational or property ownership requirement for voters. Applicants for registration were required to read and write, and to demonstrate this ability by completing without assistance a complicated application form (which demanded, for example, that the applicant express his age in years, months, and days), or alternatively, to own property with an assessed valuation of at least three hundred dollars and to have paid all taxes due on that property. Anyone registered to vote on or before 1 January 1867, however, as well as the son or grandson of any such person, was exempted from these new requirements, as were immigrants who had come to the United States after that date. Only 111 blacks qualified to vote under this exemption in 1898, compared to 37,877 whites.[13]

The intended effect of the new registration provisions was of course the disfranchisement of blacks. According to the convention's president, if the delegates had been free of federal constraints, they would have again provided explicitly for "the exclusion from the suffrage of every man with a trace of African blood in his veins."[14] The federal constraints, however, required only a slightly more complicated procedure. The convention's president undoubtedly spoke for the delegates when he commented on the new scheme:

> What care I whether it be more or less ridiculous? Doesn't it meet the case? Doesn't it let the white man vote, and doesn't it stop the negro from voting, and isn't that what we come here for?[15]

The purpose was achieved. By 1900, after a reregistration of voters based on the new requirements, blacks constituted about 4.0 percent of those registered, despite still comprising half of the state's population. Registration figures showed that

while 29,189 whites had been exempted from the new requirements by the grandfather clause in 1900, not a single black person was any longer enfranchised as a result of that clause.[16]

The White Primary

Although Louisiana invented the grandfather clause, it was the Oklahoma version that was struck down in 1915 by the Supreme Court in *Guinn and Beal v. United States*.[17] The opinion, ironically, was written by the only person from Louisiana ever to sit on the Court, Chief Justice Edward D. White. Unable to rely any longer on that provision as a means to keep whites in and blacks out of the electorate, Louisiana in 1921 adopted new barriers to black participation. A new state constitution adopted that year contained two devices widely regarded as disfranchising mechanisms—the "interpretation" test and the white primary.[18] This layered approach was designed to minimize black participation. The interpretation requirement would be used to keep blacks from becoming registered, while any who did so would be precluded from voting in the only elections of any consequence in one-party Louisiana, the Democratic primaries.

The white primary so effectively prevented meaningful participation by blacks that the interpretation test was rarely needed prior to the 1950s. The state constitution did not explicitly preclude blacks from voting in primaries, but rather authorized political parties to require registered voters to possess "other and additional qualifications" as prerequisites to participating in the selection of party nominees.[19] The state's Democratic party decided that being white was an additional qualification. The white primary not surprisingly had a chilling effect on black interest in attempting to surmount the registration hurdle.[20] From 1921 to 1944, when the Supreme Court declared that whites-only primaries were unconstitutional, blacks never made up more than 1 percent of the state's registered voters.[21]

The "Interpretation" Test

Following the invalidation of the white primary, black registration increased in Louisiana. It did so, however, very unevenly, with substantial gains in some parishes and next to none in others. By 1964 just over 30 percent of voting-age blacks across the state were registered to vote, and they constituted 13.7 percent of all registered voters. Registration rates for the individual parishes that year, however, ranged from only 1.7 percent in Tensas to 93.8 percent in Evangeline. The distribution of parish-based registration rates for 1964, in deciles, is reported in table 4.11. Fewer than 20 percent of voting-age blacks were registered in twenty of Louisiana's sixty-four parishes, while over 70 percent were registered in eight.[22]

Much of the variation in registration rates can be accounted for by two variables, the location of the parishes and the potential black electorate within them.[23] This is

highlighted by the two extremes, Tensas and Evangeline. Tensas, a northern parish, had a potentially large black electorate (60.7 percent of the voting-age population was black in 1960). In contrast, Evangeline, a French-Catholic parish in the southern part of the state, had a black voting-age population the same year of only 19.7 percent.

Black registration rates tended to vary *inversely* with the relative presence of blacks in the parish populations. This relationship was not unique to Louisiana,[24] but simply reflected the fact that in Louisiana, as in the South generally, "the greater the potential for meaningful black impact on politics in the immediate geographic area the more rigid were the barriers to such impacts."[25] The other relationship between the location of parishes and registration rates was a more uniquely Louisiana phenomenon. The southern part of the state, unlike the rest of the American South, is largely French Catholic. The white population in this area (known as Acadiana), while segregationist, was generally less hostile to blacks voting, a trait attributed to the influence of the Catholic clergy there. Blacks therefore faced fewer barriers to registration in most of the Acadiana parishes. As described by Wright, "Catholicism in southern Louisiana fashioned a different political perimeter for blacks living there. The record clearly indicates that black political participation was not enthusiastically sought or even welcomed. However, the evidence is just as clear that black participation was nonetheless tolerated."[26]

The demise of the white primary brought the interpretation test to the fore, and the different registration rates across the parishes undoubtedly reflected the different manner in which the "test" was applied by parish registrars.[27] Evidence demonstrating the racially selective application of the interpretation requirement was marshaled for twenty-one parishes in *United States v. Louisiana*, initiated by the federal government under the Civil Rights Act of 1960. Only one of the twenty-one parishes, Plaquemines, controlled by the archsegregationist Leander Perez,[28] was located in south Louisiana. In these selected parishes only 8.6 percent of voting-age blacks were registered at the end of 1962, compared to 66.1 percent of the whites.[29] The Supreme Court concluded that evidence of the application of the interpretation requirement in these parishes showed that it had been employed "not [as] a test but a trap."[30]

The test required applicants for registration to provide "a reasonable interpretation" of a section of either the federal or state constitution.[31] Enormous discretion was provided in its application. Parish registrars decided which applicants would be confronted with it, what constitutional passage they would have to interpret, and whether their interpretation was "reasonable." Needless to say, the discretion was abused; the test was a trap for black applicants. The evidence revealed a pattern of "regular, consistent, predictable, unequal application" so as to disfranchise black but not white residents in these parishes.[32]

In parishes in which substantial numbers of blacks had registered, the discriminatory application of the interpretation test was preceded by a purge of the black registrants.[33] This two-step approach to black disfranchisement was advocated in a

pamphlet, *Key to Victory*, published by the Association of Citizens Councils of Louisiana and distributed to parish registrars by the state.[34] Louisiana law allowed any two registered voters to file affidavits challenging the registration of another person. This law was used by local white citizens councils to challenge the registration status of numerous blacks, along with a token number of whites. For example, in October 1956 the Citizens Council of Jackson Parish successfully challenged the registration of 953 of the 1,122 blacks registered to vote in that parish, along with 13 of the 5,450 whites. A federal district court found that "the challenges were based on alleged errors, omissions, and handwriting differences on the original application cards of the voters. These alleged deficiencies were not deficiencies under the standards applied by the registrar at the time these voters registered and the application cards of approximately 75 percent of the white voters who were not challenged contained similar deficiencies."[35]

Following the purges, registrars became more rigorous in their review of applicants' qualifications, or at least those of the black applicants. For example, in Jackson Parish during the period beginning just after the purge in October 1956 and ending in September 1962, the registrar rejected the applications of about 64 percent of the blacks but only 2 percent of the whites.[36]

The interpretation test, as noted above, was invalidated by the Supreme Court in 1965, just prior to the adoption of the Voting Rights Act. It was found to be discriminatory in purpose and effect and, therefore, a violation of both the Fourteenth and Fifteenth amendments. The Court concluded that it was a trap "sufficient to stop even the most brilliant [black] man on his way to the voting both."[37] Indeed, its purpose was so clear that many blacks were deterred from even attempting to register, knowing that the registrar would find any answers from a black applicant unsatisfactory.[38]

Despite the invalidation through litigation of several barriers to black disfranchisement, black participation in Louisiana's electoral process was still restricted as late as 1965. Litigation victories had been important, but they had not provided blacks with anything approaching equal access to the voting booth. It would take a more forceful form of "outside interference" for that to happen. The successful antidote to disfranchisement in Louisiana, as elsewhere, was the expanded federal protection authorized by the Voting Rights Act.

The Voting Rights Act

The act suspended the use of discriminatory tests and devices as a prerequisite for voting, authorized federal officials to register voters in selected areas (at the discretion of the Attorney General), and required "preclearance" for any changes in the election and registration laws in those states and local political subdivisions covered by section 5.[39] All of these provisions affected Louisiana. The impact was rapid and dramatic.

Louisiana was one of the seven states initially covered entirely or in large part by

section 5. It was therefore precluded once again from simply substituting a new discriminatory trap for its invalidated literacy test. Black and white applicants for registration were to be treated equally beginning in 1965. To assist in the attainment of that goal, federal registrars were sent into nine of the parishes with the worst history of discrimination. By the fall of 1967 over 24,000 blacks had been added directly to the registration rolls in these parishes by the federal officials.[40] Their presence undoubtedly had a catalytic effect, as there were simultaneously "phenomenal increases" in black registration in parishes near those to which federal registrars had been sent.[41] By October 1967 overall black registration is reported to have increased by 84.2 percent. Blacks at that time constituted about 20 percent of the state's registered electorate, with just over half of voting-age blacks registered.[42]

Louisiana continued to be covered as the preclearance provision of the act was extended in 1970, 1975, and again in 1982. These extensions preserved the gains in black registration. Indeed, black registration continued to improve, with over 60 percent of voting-age blacks registered by the early 1970s, and close to 70 percent by the end of that decade.[43] As noted above, in 1990 about two-thirds were registered, comprising over a fourth of the state's registrants.

One consequence of the act therefore has been the virtual elimination of vote denial as an issue in Louisiana politics.[44] While racial disparities in registration rates remain, they are attributable largely to the socioeconomic disparities that continue to distinguish the black and white residents of the state, rather than to formal legal barriers or to the discriminatory behavior of local registrars. But while disfranchisement is now a thing of the past, the issue of "voting rights" is still very much alive in Louisiana. Efforts to combat discrimination in the electoral process have had to continue as blacks in Louisiana quickly learned that election systems could be arranged in ways that reduced their right to vote to a right to cast "meaningless ballots."[45]

Equal access to the voting booth is a necessary but not a sufficient condition for a fair electoral process. Louisiana unfortunately was not immune to efforts to minimize systematically, or dilute, the impact that black voters could have on election outcomes. This "second-generation" type of electoral discrimination had to be confronted as well.[46] Fortunately, the Voting Rights Act proved to be almost as powerful an antidote for this type as it had been for disfranchisement.

Vote Dilution

As the black vote in Louisiana grew, so did the number of black elected officials. There were over 100 in the state by 1972, over 200 by 1975, over 300 by 1978, and over 400 by 1984. The number in January 1990 stood at 527. Only two states, Alabama and Mississippi, had more.[47] This has been "the most striking payoff" from the registration gains reported above, as these officials were heavily dependent on black voters for their electoral support.[48] Indeed, almost all of them were

elected from units (districts, cities, and so forth) in which blacks constituted a majority, as Louisiana's white voters have not been very receptive to black candidates.[49]

The payoff was not automatic, however. Resistance to integrating the elected elite continued. The state and various local governments adopted schemes that would impede the ability of blacks to use their new voting strength to elect black officials. Given the marked racial divisions in candidate preferences among Louisiana voters when they were presented with a choice between or among black and white candidates, the election of blacks has almost always depended on how electoral competition has been structured. Attempts to structure it to the disadvantage of blacks have been common.[50]

The major mechanisms for diluting the black vote have been elections held at large in majority-white political jurisdictions, the use of majority-white multimember geographic districts that submerge black voters, and the discriminatory delineation, or gerrymandering, of election district boundaries.[51] Both the preclearance requirements contained in section 5 and the general prohibition on dilutive electoral arrangements contained in section 2, as amended in 1982,[52] have served as important protections against these and other dilutive schemes in Louisiana. Had these protections not been available, there can be little doubt that the growth in the number of black elected officials in the state would have been severely attenuated.

SECTION 5

The preclearance requirement contained in section 5 precludes the state of Louisiana, as well as its local governments, from implementing any changes in laws relating to elections until those changes have been approved by either the Attorney General or the United States District Court in the District of Columbia. In this process, the state or local unit making the change has the responsibility of demonstrating that no discriminatory intent lies behind the alteration and that no discriminatory effect will result from it. The burden of proof, in short, rests with the governmental jurisdiction proposing the change.

The impact that this provision has had on Louisiana cannot be quantified for the simple reason that its major consequence has undoubtedly been its deterrent effect. There is no way to identify the number of times discriminatory changes would have been adopted had this requirement not been in effect, but the number must be large. Despite this deterrent effect, the Attorney General still found it necessary between 1965 and the middle of 1989 to issue sixty-six objection letters nullifying approximately two hundred of the changes that had been submitted for review. Eleven letters concerned changes proposed by the state government, and fifty-five, changes by local governments.[53] These objections have played a critical role in protecting the black vote from efforts to minimize its impact on Louisiana elections.

Among the most important objections under section 5 have been those preventing the state from implementing racially discriminatory districting plans for the state legislature. Objections were issued to the state's redistricting proposals following both the 1970 and 1980 censuses.

Both the house and senate plans adopted by the legislature in 1971 contained a mixture of single- and multimember districts that disadvantaged black voters. Multimember districts can be used to submerge black voters in large majority-white districts,[54] and the Attorney General identified a number of instances of these in Louisiana's proposed schemes. Concentrations of blacks sufficient to have formed majorities in single-member districts had simply been swallowed by larger majority-white multimember districts. The Attorney General noted that other black concentrations had been dissected by the proposed district boundaries, resulting in black voters being dispersed among majority-white districts. In one instance, a majority-black parish was joined with two majority-white parishes with which it was not even contiguous in order to form a majority-white state senate district. There were also instances of blacks being overconcentrated in a systematic fashion. For example, the only black person serving in the legislature at the time the plans were adopted, Dorothy Mae Taylor from New Orleans, was given a new nineteen-sided house district in which 33,364 of the 36,598 residents (91.3 percent) were black. Many of the black voters in this district could have helped to constitute a second black-majority district.[55]

The dilutive consequences of the legislature's schemes were so blatant that a federal district judge stated in 1971 that if the Attorney General had not objected to their implementation, he would have found them to be unconstitutional for, among other reason, "employing gerrymandering in its grossest form."[56] In response to Fourteenth Amendment–based "equal protection" challenges to these legislative acts, the judge ordered forthcoming legislative elections to be held under an alternative districting arrangement adopted by him.[57] This decision brought about a change in Louisiana's legislative election system that would be of profound importance to the state's blacks: the court-ordered arrangement relied exclusively on *single-member* districts.

Single-member districting unquestionably facilitated the election of blacks to the legislature.[58] By the end of the decade the voters in ten of these judicially imposed house districts and in two of the senate districts had elected black people as their representatives.[59] Since their imposition by the court, single-member districts have become a state constitutional requirement.[60]

The 1980 census necessitated another thorough revision of legislative districts. The state's plan for new senate districts, which contained five districts having a black population majority, was approved by the Attorney General's office, but the plan for the lower house once again failed to meet preclearance standards. The house plan was found to be unnecessarily retrogressive, even given the state's own districting criteria, as the number of black-majority districts was reduced from seventeen to fourteen. The state subsequently revised that plan, creating four more black-majority districts, and this second effort was granted preclearance.

The denial of preclearance to the legislature's redistricting products highlights the importance of section 5 in Louisiana. By 1990 there were fifteen state house districts and five senate districts in which blacks constituted a majority of the registered voters, and the voters in each of those districts (and only those districts) had chosen to be represented by a black legislator. It is extremely unlikely that there would have been twenty blacks serving in the legislature in 1990 had it not been for these section 5 objections and the federal court–ordered single-member districts.

The vast majority of the black elected officials in Louisiana serve in local legislative bodies. The fact that Louisiana ranked third in the nation in 1990 in the size of its black elected elite was due primarily to the 116 blacks elected to parish governing bodies, the 128 elected to local school boards, and the 173 elected to municipal councils.[61] As was the case with the state legislature, these numbers would also have been substantially lower had Louisiana not been subject to the preclearance requirement.

Probably the most important section 5 objections in Louisiana were the very first two, issued together on 27 June 1969. The state in 1968 had adopted statutes that authorized the election at large of the general governing boards (called police juries) and the school boards of parishes. These units had previously been required by state law to be elected through districts. The dilutive consequences of switching to at-large elections were obvious. Given the residential segregation of blacks, fairly drawn districting schemes would certainly have resulted in many majority-minority districts from which blacks would be elected. At-large elections, like the multimember state legislative districts, would have submerged this black voting strength within the overall white majority and often precluded the election of blacks.[62] These legislative acts were the first changes submitted for preclearance from Louisiana, and the Attorney General objected to both because of their dilutive nature. These objections, along with six others to subsequent attempts by specific police juries to switch to at-large elections in the early 1970s,[63] combined with the nearly forty objections the Attorney General had made to the redistricting schemes adopted by police juries and school boards following the 1970 and 1980 censuses, have been a critical factor in the successful conversion of black votes into black representation at the parish level.

Changes in Municipal Election Structures

Prohibiting these parish bodies from switching to at-large elections set an important precedent for cities as well. Indeed, municipal changes went in the opposite direction: from at-large elections to district or mixed plans (the latter containing both district and at-large seats). A survey in December 1989 of the state's eighty-seven municipalities having populations of 2,500 or more and in which blacks constituted at least 10 percent of the voting-age residents in 1980 revealed that one-half of the fifty-four cities that had at-large council plans in 1974 had adopted

district or mixed plans by 1989 (table 4.12).[64] Whereas over 60 percent of the cities surveyed had an at-large plan in 1974, this arrangement was the least frequent of the three basic election types by 1989.

Many of these changes were stimulated by actual or expected legal challenges to the at-large system under either the Voting Rights Act or the Fourteenth Amendment. Local informants in nine of the twenty-seven cities switching from at-large systems stated that the change had been ordered by a court; in another four, change resulted from the voluntary settlement of a legal challenge; and in three others, it came from the threat of litigation (see table 4.8A). No information on the cause of change could be ascertained in the remaining eleven.

The shift to districts contributed to the increase in the number of black elected officials. Table 4.1A shows comparisons between the mean percentage of council seats held by blacks and the mean percentage of the voting-age population that was black in the surveyed municipalities, grouped by types of electoral systems and the percentage black. Two measures of how proportionately blacks were represented in 1989 are shown in tables 4.4 and 4.4A.[65]

Blacks were close to being, or were more than, proportionally represented in almost every category in 1989, according to table 4.4A. The only exceptions were the two categories (containing twenty-four cities in all) in which blacks were a minority of the voting-age population and elections were held at large. In 33.3 percent of these twenty-four at-large cities, blacks were completely absent from the council. This was true in only 3.3 percent of the cities using mixed systems and in none of the districted cities. The close correspondence between the black percentage of the voting-age population and number of black-held seats in the mixed systems was, in addition, due entirely to the districted portions of those systems. As disclosed in table 4.3A, blacks tended to be severely underrepresented in the at-large seats within these cities, but close to proportionately represented in the districted components, which contained some majority-black districts. These results demonstrate the critical importance of districts to black officeholding. While black representation in at-large systems overall was no longer as low as it had been, more equitable levels were achieved in municipalities that adopted districts. (See tables 4.2A and 4.5A for comparisons between 1974 and 1989.)[66] These results were not unique to Louisiana,[67] and were consistent with the well-established generalization that the less municipalities rely on at-large elections, the more proportionately blacks are likely to be represented within them.[68]

Although the Attorney General often objected to the districting plans proposed by police juries and school boards, only rarely did he object to the redistricting of municipal councils in Louisiana. As reported above, there was a close correspondence between black voting-age population percentages and black seat percentages in districted cities; in these municipalities, the percentage of majority-black districts was roughly proportional to the percentage of the voting-age population that was black. As with state legislative districts, there was a pronounced relationship between the racial composition of council districts and the race of the person

elected to represent the district. Voters in majority-black districts almost invariably elected a black to represent them, while voters in majority-white districts elected whites (tables 4.6A and 4.7A).[69] As a consequence of the creation of the black-majority districts in these plans, the Attorney General rarely objected to them. Following the 1970 census he twice objected to efforts at revising the council districts in New Orleans, and he also objected to a redistricting in the city of Many. Only a single objection—to New Iberia's proposed districts—followed the next round of municipal redistricting based on the 1980 census.

New Orleans's second effort at redistricting in the 1970s became the subject of an important Supreme Court decision concerning section 5 preclearance criteria. The city council did not accept the Attorney General's decision and sought preclearance from the federal judiciary. The Supreme Court in *Beer v. United States* (1976),[70] its first review of a districting proposal under section 5, ruled in favor of the council. This decision affected far more than New Orleans, however, as the standard adopted in *Beer* seriously restricted the grounds upon which the Attorney General could deny preclearance generally.

At issue in *Beer* was the redrawing of the city's five single-member council districts and the continued use of at-large elections for two seats. This "five plus two" arrangement had been adopted in 1954 as part of a new city charter. The five districts had always been constructed by combining the seventeen wards of the city, which tended to follow a north-south pattern. By 1970 the city's blacks constituted 45 percent of the population and about 35 percent of the registered voters, and they tended to reside in an east-west pattern. The north-south districting configuration therefore dispersed the city's black vote across districts.

Despite the city's growing black electoral strength, no black had ever been elected to council, and the 1970s redistricting was controlled by whites. Not surprisingly, the council continued with a basically north-south districting scheme (although ward boundaries were now violated in order to comply with the one-person, one-vote rule). The result was two districts with black population majorities, but one was only 50.6 percent black. The other was 64.1 percent black and had a 52.6 percent black majority in voter registration. The black percentages among registered voters in the other four districts were 43.2, 36.8, 23.3, and 22.6.[71] After the Attorney General objected because of the dispersion of black electoral strength, the council sought permission from the federal district court in Washington, D.C., to use the plan.

A unanimous three-judge panel found, as had the Department of Justice, that the plan had a discriminatory effect, and refused to allow it to be implemented. The court concluded that the number of seats that blacks could expect to win under this plan, given the racially polarized voting patterns in the city, was considerably fewer than the number of seats that both the citywide black population and black registration percentages suggested as their "theoretical entitlement." The arrangement therefore was found to be an unjustified dilution of the black voting strength. The court also concluded, in response to an issued raised by the New Orleans

blacks who had intervened in the case, that the two at-large seats, by themselves, diluted the city's black vote.[72]

The council appealed this decision to the Supreme Court, arguing that the at-large seats adopted in 1954 were not part of any voting change and therefore not covered by section 5, and that the district court had incorrectly adopted a rule that required districting plans to maximize black electoral opportunities. The Court agreed that the at-large seats were not part of the change and therefore should not be considered.[73] More important, however, was the Court's approach to the proposed division of the city into five districts.

In its review of the districting arrangement, a five-member majority adopted a new interpretation of section 5's purpose. The Court concluded that it was not a protection against dilutive changes per se, but only against *retrogressive* changes: it was the intent of Congress to ensure that "no voting procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[74] If a redistricting plan was not retrogressive—that is, not worse for blacks than the plan it was to replace—it should not be denied preclearance (unless the plan was clearly unconstitutional).[75] As for New Orleans's five proposed districts, the Court found that they were not retrogressive but ameliorative. The districting plan being replaced, at the time it was adopted in 1961, had contained only one district with a black population majority and none with a black voter registration majority. The city's new proposal included two districts with a population majority and one with a registration majority. It was therefore an "improvement" over the old arrangement and, the Court concluded, entitled to be precleared.

The *Beer* decision was, from the black perspective, an unfortunate step backward. The retrogression test established a *relative* vote dilution standard under section 5 rather than an absolute standard. In the words of one scholar, this approach to preclearance had the perverse consequence of "rewarding those jurisdictions with a history of the worst dilution of black electoral strength."[76] In addition, the Court's application of the retrogression criterion in *Beer* was itself problematic. The Court compared the racial composition of the districts in the city's proposed plan with those of the previous plan at the time that plan had been adopted (1961) rather than at the time it was revised (1973). The more appropriate comparison would have been with the districts as they stood at the time of revision. If the point of comparison is the time of initial adoption, then even plans that are in fact retrogressive could receive section 5 approval, given the usual ten-year period that elapses between redistricting efforts. In the New Orleans situation the comparison of the voter registration figures for the new districts with those for the old districts as of 1961, prior to the adoption of the Voting Rights Act, is particularly difficult to understand. Only about 17 percent of New Orleans's registered voters were black in 1961, compared to about 35 percent in 1973. It is hard to imagine how any set of districts proposed in 1973 would not be ameliorative if the comparison was to the 1961 figures.

The impact of *Beer*'s retrogression test was to restrict, at least for a while, the range of dilutive redistricting proposals that could be prevented from being implemented by the preclearance requirement.[77] This retrogression standard became less important, however, following the extension and amendment of the Voting Rights Act in 1982. Section 2 was revised to provide a "results" test for dilution, and the Attorney General held that changes creating arrangements that would violate the new results test would be denied preclearance under section 5. Nonretrogressive yet dilutive changes therefore could be objected to once again.[78]

The *Beer* decision highlighted two limitations of the preclearance requirement as a protection against dilution. First, section 5 applies only to *changes* in election procedures; it does not reach dilutive structures, such as at-large elections, that were in place prior to 1 November 1964. Second, until the 1982 amendment to section 2, changes could be dilutive and still precleared, provided they were not deemed to be retrogressive (or so blatant as to have been motivated by racial considerations). In Louisiana, however, blacks confronted with dilutive arrangements that were in place prior to 1965 or that have been granted preclearance by the Attorney General have had considerable success in overturning these schemes. The medium for these challenges has been the other provision of the Voting Rights Act mentioned above—the more general results test contained in section 2. Indeed, much of the effort at combating dilution in Louisiana since 1982 has relied on this provision.

Section 2

Section 2 was a relatively unimportant provision, at least in impact, before 1982. The Supreme Court had even held in *City of Mobile v. Bolden* (1980) that it was merely a restatement in statutory form of the Fifteenth Amendment prohibition on race-based disfranchisement and therefore was not a protection against dilution of the franchise.[79] The Court in *Bolden* also held that the Fourteenth Amendment, while a protection against dilution, prohibited only those schemes that had been adopted or retained for the purpose of diluting minority votes. Proof of the discriminatory effects of an electoral arrangement would not be sufficient for the plaintiffs to prevail on a Fourteenth Amendment claim; victory would require a demonstration of discriminatory motives as well.[80]

Bolden elevated seriously the burden of proof that black plaintiffs in Louisiana would have to meet in their constitutionally based challenges to dilutive schemes. Prior to *Bolden* the prevailing precedents, at least in cases involving claims of dilution by submergence in at-large or multimember districts, were *Whitcomb v. Chavis* (1971)[81] and *White v. Regester* (1973).[82] These cases had required not proof of discriminatory motives but demonstration by the plaintiffs that as a consequence of an electoral scheme, minority residents "had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice."[83] Federal district courts in Louisiana had been instructed by an *en banc* decision of the Fifth Circuit Court of Appeals, *Zimmer v. McKeithen* (1973), to examine a variety of evidentiary considerations when determining whether this "opportunity" was in fact equal.[84]

The *Zimmer* decision blocked a shift from district to at-large elections for the East Carroll Parish police jury and school board that had been ordered by a federal district court in response to a complaint that the districts violated the one-person, one-vote standard. Blacks alleged that the initial malapportionment case had been a "sweetheart" white-on-white lawsuit, and challenged the constitutionality of the at-large remedy on dilution grounds. The Fifth Circuit agreed that the system would be dilutive in the East Carroll context. In reaching this conclusion, the court cited specifically the "protracted history" of discrimination against blacks in the parish, the persistent "debilitating effects" of previous disfranchisement schemes on black electoral participation, the "firmly entrenched state policy" in favor of district elections prior to the growth in the black electorate, and the fact that the at-large system in question required a majority vote for election to specific seats or places (thereby precluding "single-shot" voting). Under *Zimmer*, courts were instructed to examine "the confluence of factors" such as these to determine whether impermissible dilution was or would be present.[85]

There were a number of successful challenges to dilutive systems in Louisiana under the *Zimmer* standard. After the *Bolden* decision, however, constitutionally based litigation came to a virtual standstill. This halt to Fourteenth Amendment cases was not unique to Louisiana but a common phenomenon throughout the South, as many voting rights attorneys viewed litigation under *Bolden*'s intent requirement to be relatively useless.[86] Direct evidence of discriminatory motives would rarely be available, and judges were not expected to infer a racial intent readily from circumstantial evidence.[87]

Voting rights advocates proposed an amendment to section 2 as a way to minimize the impact of the *Bolden* ruling. The amendment was to provide a general statutory protection against dilutive schemes that would serve as an alternative to the now weakened constitutional protection. In a major lobbying victory, civil rights forces persuaded Congress in 1982 to prohibit electoral schemes that resulted in vote dilution, regardless of the purpose behind their use.[88] This revision gave new life to the fight against dilution, particularly in Louisiana.[89]

One of its first applications was in a successful challenge to the division of the state's eight congressional districts after the 1980 census. The New Orleans black community was split into two districts. Both of these districts, which extended into white suburban areas outside the city, had white population and voter registration majorities. New Orleans had a population of 557,482, which was only 0.06 percentage points over the ideal population size for a congressional district. Blacks constituted 55.3 percent of the city's residents in 1980. Therefore, a congressional district centered on the city could have been a racially competitive district in which black voters would have had an opportunity to elect a black to Congress.

The state chose instead to divide the city's black vote, placing about 43 percent of the black residents in the new First District and 57 percent in the new Second

District, each of which had a white incumbent. This division left blacks as only 29.5 percent of the population (and 21.4 percent of the registered voters) in the First, and 44.5 percent of the population (38.7 percent of the registered voters) in the Second. The division was accomplished geographically by a contorted boundary line that left the shape of the Second resembling a duck (fig. 4.1), prompting the scheme to be labeled derisively as a "gerryduck."[90]

The design of the districts was initially decided upon at an unofficial meeting attended by several legislators and other interested parties, but to which no blacks were invited. Although the group was conscious of the need to obtain section 5 preclearance and therefore avoided a configuration that was racially retrogressive, the dominant consideration was the impact the configuration of the districts would have on incumbents, all of whom were white. The "cracking" of the black vote could therefore charitably be viewed simply as a by-product of an incumbent protection plan. The plan was later formally adopted over the objections of all of the black state legislators. It was then granted preclearance by the Attorney General, despite an internal staff recommendation from Justice Department lawyers that an objection should be issued, because the state had failed to demonstrate the absence of a discriminatory purpose behind the division. (Blacks alleged, during the subsequent section 2 litigation, that this preclearance decision had been motivated by partisan politics. The plan was largely the result of the intervention of Louisiana's Republican governor, David Treen, in the interest of the Republican congressman from the New Orleans area, Robert Livingston. The decision to preclear the plan, despite the staff recommendation, was made by Republican political appointees in the Justice Department in response, blacks claimed, to Treen's lobbying for section 5 approval of the plan.)[91]

Only the 1982 congressional elections were held under this controversial districting arrangement, however. The following year a three-judge federal court in New Orleans ruled unanimously, in *Major v. Treen* (1983), that the plan was a violation of the new section 2.[92] Black plaintiffs characterized the arrangement as an "outrageous racial gerrymander," for which there were no legitimate nonracial explanations. They maintained that it was a conscious effort to accommodate the political ambitions of white incumbents at the expense of black voters. The state attempted to justify the arrangement by arguing that it reflected an effort to continue to locate two congressional districts in New Orleans and that its racial impact was therefore benign, not dilutive, in that New Orleans's blacks could influence the election of two members of Congress rather than one.[93] The court was not persuaded that the arrangement was benign, however, and held instead that the dissection of the city had been performed in a "racially selective manner" that would result in the dilution of the black vote. Neither the decision to continue to base two districts in New Orleans nor a desire to protect the electoral future of incumbents could justify this discriminatory result.[94] According to the court, "If [the] sundering of the black populace of New Orleans were allowed to stand, the effective independent impact of black voters would be unfairly and illegally minimized."[95]

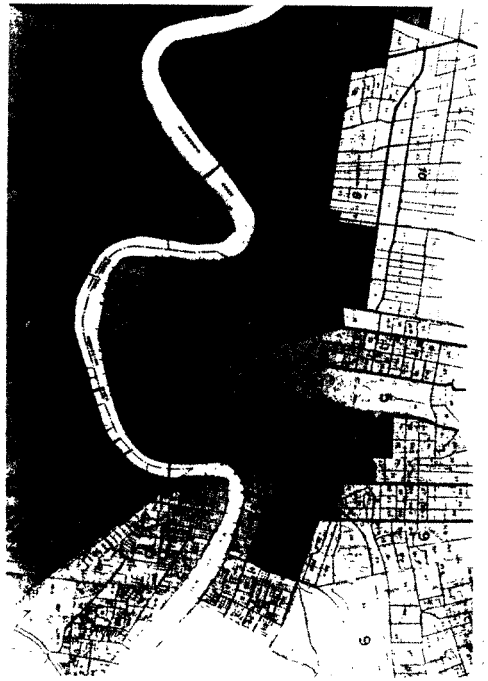

Figure 4.1. New Orleans "Gerryduck" Congressional District

The crack in the black vote was repaired when the legislature, in a special session in late 1983, adopted a new congressional districting scheme for the New Orleans metropolitan area. This arrangement contained a district, the Second, that was located entirely within the city, and had both a black population and black voter registration majority (58.6 percent and 53.9 percent, respectively). This was not a "safe" black district, as many critics of the court's intervention complained, but it did provide potential black candidates with their first opportunity since Reconstruction to compete seriously for a congressional seat in Louisiana. A black state court judge, Israel Augustine, attempted to unseat the incumbent in the district, Democratic congresswoman Lindy Boggs, in the 1984 open primary. Although Augustine was the preferred choice of the black voters in that election, winning an estimated 64 percent of their votes, he won only a paltry 7 percent of the white vote and therefore lost to Boggs by a substantial margin.[96] Boggs, the most liberal member of Louisiana's congressional delegation, enjoyed considerable support from New Orleans blacks and did not face serious opposition again. In 1990, however, she announced her retirement from Congress, and the voters in the Second District chose a black, William Jefferson, to be her successor.

Section 2 has also been invoked in Louisiana to invalidate election systems that dilute through submergence. These efforts had been facilitated greatly by the Supreme Court's first decision involving the amended section, *Thornburg v. Gingles* (1986), in which multimember state legislative districts in North Carolina were found to have a dilutive effect.[97] They were facilitated further in Louisiana by the first post-*Gingles* decision of the Fifth Circuit Court of Appeals, which involved a Louisiana municipality. That decision, *Citizens for a Better Gretna v. City of Gretna*, handed down in 1987, contained important pronouncements concerning the plaintiff's burden of proof on the critical evidentiary issue of whether voting in the jurisdiction in question was "racially polarized."[98]

Blacks constituted about 30 percent of Gretna's population but no black had ever been elected to the city's at-large five-member council. Blacks had attempted to win seats on three occasions, but each attempt had failed because, as plaintiffs demonstrated, these candidates received only minimal support from the city's white voters. Additional evidence of black support for and white opposition to black candidates in Gretna was marshaled through an analysis of voting within Gretna in statewide elections involving black candidates. Plaintiffs claimed this pattern of voting precluded Gretna's blacks from electing candidates of their choice in the at-large context. The city attempted to rebut this evidence by arguing that some of the white candidates elected to the council had been supported by a majority of the black voters, and therefore blacks were electing candidates of their choice. The city argued that plaintiffs' focus on the fortunes of the black councilmanic candidates was misplaced and that the analysis of "exogenous" (i.e., noncouncilmanic) elections was irrelevant in a dispute involving a city's election system.

The Fifth Circuit, in upholding a district court judgment in favor of the plaintiffs, rejected the city's suggestion that as long as blacks supported some winning

white candidates, their inability to elect a black was legally inconsequential. The court noted that the at-large elections in Gretna were five-seat contests in which each voter had five votes. Given that no more than one candidate in any councilmanic election had been black, it was "virtually unavoidable" that some white candidates would receive substantial black support. The fact that some of these white candidates were successful did not negate the existence of the veto white voters exercised over black candidates.[99] The plaintiffs' focus on the racial divisions in the vote for black candidates was found to be proper. The court concluded that elections involving "a viable minority candidate" provided the best context for determining whether the candidate preferences of whites and blacks diverged.[100] In addition, exogenous elections involving black candidates, because they provide information about "local voting patterns," were found to be relevant to the section 2 inquiry.[101]

The *Gretna* decision was an important precedent. Prior to the Supreme Court's decision in *Gingles*, defendants in vote-dilution cases typically argued that plaintiffs, in order to demonstrate that voting was "racially polarized," had to show that race was itself the cause of the voting divisions.[102] This argument was rejected in *Gingles* when the Supreme Court held that plaintiffs need show only the existence of the divisions, not the reasons for them.[103] Following *Gingles* the standard defense strategy was to argue, in effect, that as long as blacks were often on the winning side in white-on-white elections, they had no valid claim of dilution. The fact that blacks could not elect blacks was somehow cleansed of any discriminatory consequences by this ability to elect candidates of their "choice" in the white-on-white context. This argument was especially pernicious in light of the chilling effects that dilutive arrangements often have on black candidacies. Campaigns can be expensive in both time and money, and the probability of success is one factor that candidates, black or white, consider when deciding whether to run.

The Fifth Circuit's focus on black-on-white contests in *Gretna*, including those for other offices in which voters in the jurisdiction at issue participate, has virtually eliminated this argument as an efficacious defense in Louisiana.[104] Indeed, just such a defense was rejected the following year when a federal district court, based on evidence from numerous exogenous elections, found that voting in Louisiana's major suburban parish, Jefferson, was racially polarized. The finding was critical to the court's conclusion in *East Jefferson Coalition for Leadership and Development v. Parish of Jefferson* (1988) that the three-tiered election system (four single-member districts, two half at-large districts, and one parishwide district) employed to select the parish council had a dilutive result and therefore violated section 2.[105]

Section 2 and the Election of Judges

The section 2 case that may have the most profound impact in Louisiana, however, involves not the election of legislators but rather of judges. In *Clark v. Edwards* (1988), the systems through which judges are elected to serve on the state's basic

trial courts—called judicial district courts—and on its intermediate courts of appeals, were challenged under section 2 by black plaintiffs.[106]

The systems at issue were at-large (jurisdictionwide) elections to specific places or divisions on the respective court, with winners determined by a majority-vote rule, with the top two vote recipients entering a runoff if no candidate received a majority in the first election. Blacks have been especially underrepresented in the state's judiciary. At the time of the trial in *Clark*, only 5 of the state's 178 district court judges and only 1 of the 48 court of appeals judges were black. Blacks had made numerous efforts to be elected to the bench, but their candidacies were consistently rebuffed by the state's white voters.[107] Relying heavily on the Supreme Court's *Gingles* decision, a federal district court in Louisiana found that black voters were being submerged in a number of the judicial jurisdictions, resulting in a dilution of their vote under section 2.[108]

The state attempted to remedy the dilution identified in *Clark* by proposing a constitutional amendment authorizing the election of judges through "subdistricts" within the geographical jurisdiction of each court. Only voters residing within a subdistrict would be able to vote for judges apportioned to that subdistrict, but candidates living elsewhere within the overall jurisdiction could run in any of the subdistricts. The state also adopted a districting scheme, contingent on approval of the amendment, through which forty trial judges and twelve appellate judges would have been elected by voters in majority-black districts. White incumbents who would be adversely affected by this new arrangement were provided with the option of assuming a new "senior" status, through which they could remain on the bench (retaining their salaries) without standing for reelection. When this arrangement was presented to the voters for their approval in October 1989, however, the proposed amendment was rejected in a racially divided response. An estimated 66.4 percent of blacks voting on the amendment voted in favor of it, but only 17.2 percent of the whites supported it.[109] Had the amendment passed, the number of black judges in Louisiana would have increased dramatically after the 1990 elections.

The subdistricting remedy was subsequently adopted by the federal court for ten trial court jurisdictions and one appellate court district. A total of nineteen trial court judges and one appellate court judge were to be elected from within black-majority subdistricts in these new arrangements.[110] While the *Clark* case was on appeal before the Fifth Circuit, the plaintiffs and the state settled the suit. Under the settlement, even more trial court judges and more appellate court judges would be elected from black-majority subdistricts than would have been in the federal court's remedial order.

The system for electing state supreme court judges was also challenged There are seven members of this court, five of whom are elected from single-member districts, the other two from a two-member district (with staggered terms) made up of the City of New Orleans and three surrounding parishes, Jefferson, St. Bernard, and Plaquemine. No black was ever elected to the supreme court under this arrangement. The plaintiffs in this case, *Chisom v. Edwards*, later *Chisom v. Roemer*,[111] asserted a standard claim of dilution by submergence, relying on the *Gingles* precedent. The four-parish two-member district was majority white in both population and voter registration. Given the racially polarized nature of voting within the four-parish area and the majority-vote requirement for election to the supreme court, blacks did not have a realistic opportunity of electing a black candidate of their choice within this district. If it were divided into two single-member districts, however, a district centered on New Orleans in which blacks would have a population and a registration majority could have been created. Plaintiffs argued that a New Orleans–based district would provide blacks with their first real opportunity to elect a candidate of their choice to the supreme court.[112]

The *Chisom* case was also settled in 1992, again while it was on appeal before the Fifth Circuit. Unlike the *Clark* case, the state had won the *Chisom* case in the federal district court. Although it was undisputed that no black candidate for any type of judgeship had been supported over a white candidate by white voters in any of the four parishes in the district, the federal judge concluded that there was an emerging crossover vote in the district, and therefore the black vote was not illegally submerged.[113] The case was settled, however, when the legislature created a new, temporary "supreme court" judgeship that would be filled in a 1992 election in which only New Orleans voters would participate.

The state constitution specifies that the state supreme court shall consist of seven justices, and therefore the new eighth member was to be elected, technically, to the state court of appeals and then assigned to serve on the supreme court. The eight-member court would then hear cases in rotating seven-member panels, with cases assigned to panels randomly. This is to be a temporary arrangement; the legislature is required to adopt, in 1998, a new districting plan containing a single-member district with a black voting-age majority that includes Orleans Parish in its entirety. This new districting arrangement will be in place starting with an election in 2000. If a vacancy should occur in one of the two seats in the existing First District prior to the year 2000, Orleans Parish voters only will vote in a special election to fill the seat.[114] This is the result of a compromise obviously intended to add a black justice to the court without abbreviating the term of one of the two white incumbents in the First District. A new black justice assumed the new seat on 1 January 1993, as only black candidates filed to run in the 1992 election for that position.

The *Chisom* case also served as the medium for an important Supreme Court decision in 1991 concerning section 2's application to judicial election systems. Following the trial court decisions in *Clark* and *Chisom*, the Fifth Circuit Court of Appeals held, in an *en banc* decision involving Texas judgeships, that section 2 did not provide a protection against dilution in the *judicial* election context. The majority in that case concluded that the language in subsection b concerning minority voters' opportunities "to elect *representatives* of their choice" was intended to exclude judges because judges, unlike other elected officials, were not "representatives."[115] The Supreme Court, in reviewing this issue in the *Chisom* context, held otherwise. Congress, the Court concluded, did not intend any ex-

emption of judicial elections from this protection against vote dilution. The word *representatives* simply referred to "the winners of representative, popular elections," which included successful candidates in judicial elections.[116] Judicial election systems that dilute minority votes, therefore, are invalid under the Voting Rights Act.

Section 2 has become an important supplement to the preclearance requirement contained in section 5. Since its revision in 1982, section 2 has provided blacks in Louisiana with a means through which to challenge election systems not subject to the preclearance rule and, also, arrangements such as the 1981 congressional redistricting that are not retrogressive but are still viewed by blacks as discriminatory. The two sections together have proven overall to be very effective protections against dilution. The number of black elected officials in Louisiana today would be much smaller had it not been for these provisions.

Conclusion

Efforts to integrate the elected elite have been resisted by whites throughout Louisiana's history. This resistance was initially operationalized through schemes that disfranchised black voters. The first of these schemes explicitly established racial qualifications for voting; the later ones were "facially neutral" but discriminatory in application. This denial of the franchise on the basis of race was not successfully attacked in Louisiana until the adoption of the Voting Rights Act. Although there had been federal court decisions in favor of the plaintiffs in some voting rights cases prior to that act, it was the special provisions of the act that ultimately opened the franchise to Louisiana's black residents.

The consequent growth in the black vote did not end electoral discrimination in Louisiana, however. As the black vote expanded, a second-generation type of electoral discrimination became prevalent, the dilution of the black vote. Although the Fourteenth Amendment provides a constitutional protection against dilution, it requires plaintiffs to assume the difficult burden of proving racially discriminatory motives behind the use of these arrangements. In Louisiana as elsewhere blacks have had to rely heavily on the statutory protections of the Voting Rights Act to combat dilutive schemes. Both the preclearance provision of section 5 and the more general results tests contained in amended section 2 have provided critical protections against such schemes.

In 1990 Louisiana had the third largest number of black elected officials among the fifty states. This remarkable progress toward integrating the elected elite is the direct result of the Voting Rights Act. Both the enfranchisement of blacks and the subsequent protection against the virtual nullification of their votes were made possible by the act. This extraordinary form of "outside interference" in Louisiana was necessary to begin to open the electoral process to blacks. More remains to be done before blacks have a truly equal opportunity to participate politically, however, and any further progression toward that ultimate goal will undoubtedly be very dependent on the act's protections as well.

TABLE 4.1
Black Representation on Council in 1989 by Election Plan, Louisiana Cities of 2,500 or More Population with 10 Percent or More Black Population in 1980*

Type of Plan by % Black in City Population, 1980	N	*Mean % Black in City Population, 1980*	*Mean % Black on City Council, 1989*
SMD plan			
10–29.9	9	24.1	25.2
30–49.9	16	42.2	34.9
50–100	6	56.6	50.0
Mixed plan			
10–29.9	13	22.7	20.4
30–49.9	13	36.9	25.9
50–100	4	52.8	47.2
At-large plan			
10–29.9	16	17.5	10.0
30–49.9	7	39.7	20.0
50–100	6	63.8	53.3

*This table contains data on three cities not included in table 4.1A because this table employs a threshold of 10 percent black total population rather than voting-age population.

TABLE 4.1A
Black Representation on Council in 1989 by Election Plan, Louisiana Cities of 2,500 or More Population with 10 Percent or More Black Voting-Age Population (VAP) in 1980

Type of Plan by % Black in City VAP, 1980	N	*Mean % Black in City VAP, 1980*	*Mean % Black on City Council, 1989*
SMD plan			
10–29.9	12	21.9	28.6
30–49.9	14	38.6	34.5
50–100	4	55.0	55.0
Mixed plan			
10–29.9	19	22.3	21.0
30–49.9	11	39.4	35.6
50–100	0	—	—
At-large plan			
10–29.9	16	18.4	11.2
30–49.9	8	41.9	27.5
50–100	3	71.7	66.7

TABLE 4.2
Changes in Black Representation on Council between 1974 and 1989, Louisiana Cities of 2,500 or More Population with 10 Percent or More Black Population in 1980[a]

Type of Change by % Black in City Population, 1980	N	*Mean % Black in City Population, 1980*	*Mean % Black on City Council*	
			Before Change (1974)	*After Change (1989)*
		Changed Systems		
From at-large to SMD plan				
10–29.9	3	25.4	0.0	26.7
30–49.9	9	43.0	1.6	38.4
50–100	2	61.6	0.0	50.0
From at-large to mixed plan				
10–29.9	7	23.5	3.2	19.4
30–49.9	6	36.4	0.0	24.2
50–100	1	51.1	0.0	25.0
		Unchanged Systems		
At-large plan				
10–29.9	16	17.5	0.0	10.0
30–49.9	7	39.7	0.0	20.0
50–100	6	63.8	26.7	53.3

[a]This table contains data on three cities not included in table 4.2A because this table employs a threshold of 10 percent black population rather than voting-age population.

TABLE 4.2A
Changes in Black Representation on Council between 1974 and 1989, Louisiana Cities of 2,500 or More Population with 10 Percent or More Black Voting-Age Population (VAP) in 1980

Type of Change by % Black in City VAP, 1980	N	*Mean % Black in City VAP, 1980*	*Mean % Black on City Council*	
			Before Change (1974)	*After Change (1989)*
		Changed Systems		
From at-large to SMD plan				
10–29.9	5	22.9	2.9	32.6
30–49.9	7	38.3	0.0	37.6
50–100	1	64.9	0.0	60.0
From at-large to mixed plan				
10–29.9	10	23.2	2.2	20.1
30–49.9	4	38.3	0.0	26.9
50–100	0	—	—	—
		Unchanged Systems		
At-large plan				
10–29.9	16	18.4	0.0	11.2
30–49.9	8	41.9	2.5	27.5
50–100	3	71.7	40.0	66.7

TABLE 4.3
Black Representation in 1989 in Mixed Plans by District and At-Large Components, Louisiana Cities of 2,500 or More Population with 10 Percent or More Black Population in 1980

% Black in City Population, 1980	N	*Mean % Black Councilpersons in District Components, 1989*	*Mean % Black Councilpersons in At-Large Components, 1989*
10–29.9	13	30.5	0.0
30–49.9	13	30.7	6.9
50–100	4	50.8	37.5

TABLE 4.3A
Black Representation in 1989 in Mixed Plans by District and At-Large Components, Louisiana Cities of 2,500 or More Population with 10 Percent or More Black Voting-Age Population (VAP) in 1980

% Black in City VAP, 1980	N	*Mean % Black Councilpersons in District Components, 1989*	*Mean % Black Councilpersons in At-Large Components, 1989*
10–29.9	19	29.2	2.1
30–49.9	11	40.3	18.2
50–100	0	—	—

TABLE 4.4
Two Equity Measures Comparing Percentage Black on Council in 1989, Louisiana Cities of 2,500 or More Population with 10 Percent or More Black Population in 1980[a]

Type of Plan by % Black in City Population, 1980	N	*Difference Measure (% on Council − % in City)*	*Ratio Measure (% on Council ÷ % in City)*
SMD plan			
10–29.9	9	1.1	1.04
30–49.9	16	−7.2	0.84
50–100	6	−6.6	0.88
Mixed plan			
10–29.9	13	−2.4	0.93
30–49.9	13	−11.0	0.70
50–100	4	−5.6	0.89
At-large plan			
10–29.9	16	−7.1	0.60
30–49.9	7	−19.7	0.52
50–100	6	−10.4	0.80

[a]This table contains data on three cities not included in table 4.4A because this table employs a threshold of 10 percent black total population rather than voting-age population.

TABLE 4.4A
Two Equity Measures Comparing Percentage Black on City Council in 1989, Louisiana Cities of 2,500 or More Population with 10 Percent or More Black Voting-Age Population (VAP) in 1980

Type of Plan by % Black in City VAP, 1980	N	*Difference Measure (% on Council − % in City VAP)*	*Ratio Measure (% on Council ÷ % in City VAP)*
SMD plan			
10–29.9	12	6.7	1.31
30–49.9	14	−4.1	0.89
50–100	4	0.0	1.00
Mixed plan			
10–29.9	19	−1.3	1.00
30–49.9	11	−3.8	0.90
50–100	0	—	—
At-large plan			
10–29.9	16	−7.1	0.62
30–49.9	8	−14.4	0.66
50–100	3	−5.0	0.93

TABLE 4.5
Changes in Black Representation on Council between 1974 and 1989, Louisiana Cities of 2,500 or More Population with 10 Percent or More Black Population in 1980* (Ratio Equity Measure)

Type of Change by % Black in City Population, 1980	N	*Black Representational Equity on Council*	
		1974	*1989*
	Changed Systems		
From at-large to SMD plan			
10–29.9	3	0.00	1.04
30–49.9	9	0.04	0.90
50–100	2	0.00	0.80
From at-large to mixed plan			
10–29.9	7	0.11	0.85
30–49.9	6	0.00	0.65
50–100	1	0.00	0.49
	Unchanged Systems		
At-large plan			
10–29.9	16	0.00	0.60
30–49.9	7	0.00	0.52
50–100	6	0.33	0.80

*This table contains data on three cities not included in table 4.5A because this table employs a threshold of 10 percent black total population rather than voting-age population.

TABLE 4.5A
Changes in Black Representation on Council between 1974 and 1989, Louisiana Cities of 2,500 or More Population with 10 Percent or More Black Voting-Age Population (VAP) in 1980 (Ratio Equity Measure)

Type of Change by % Black in City VAP, 1980	N	*Black Representational Equity on Council*	
		1974	*1989*
	Changed Systems		
From at-large to SMD plan			
10–29.9	5	0.12	1.40
30–49.9	7	0.00	0.99
50–100	1	0.00	0.92
From at-large to mixed plan			
10–29.9	10	0.08	0.90
30–49.9	4	0.00	0.70
50–100	0	—	—
	Unchanged Systems		
At-large plan			
10–29.9	16	0.00	0.62
30–49.9	8	0.06	0.66
50–100	3	0.56	0.93

TABLE 4.6A
Black Representation in Council Single-Member Districts in 1989, Louisiana Cities of 2,500 or More Population with 10 Percent or More Black Voting-Age Population (VAP) in 1980

% Black VAP of District	N	*Mean % Black Population in Districts, 1980*	*Mean % Black Councilpersons in Districts, 1989*
0–29.9	59	10.8	1.7
30–49.9	14	38.3	14.3
50–59.9	7	57.9	85.7
60–64.9	1	62.5	100.0
65–69.9	3	67.8	100.0
70–100	30	86.0	100.0

TABLE 4.7A
Black Council Representation in Single-Member Districts in 1989 by Racial Composition of District, Louisiana Cities of 2,500 or More Population with 10 Percent or More Black Voting-Age Population (VAP) in 1980

Racial Composition of District	N	*Mean % Black VAP in Districts, 1980*	*Mean % Black Councilpersons in Districts, 1989*
Black majority	41	79.3	97.6
White majority	73	16.1	4.1

TABLE 4.8A
Cause of Change from At-Large to Mixed or District Plan between 1974 and 1989, Louisiana Cities of 2,500 or More Population with 10 Percent or More Black Voting-Age Population in 1980

			Results		
City[a]	*Did lawsuit Accompany Change?*	*Year of Change*	*District Seats (Number)*	*At-Large Seats (Number)*	*Reason for Change*[b]
		Changed to Single-Member Districts			
Amite	Yes	1984	5	0	Settlement
Breaux Bridge	No	1976	5	0	Threat of lawsuit
Hammond	Yes	1977	5	0	Court-ordered
Homer	Yes	1975	5	0	Settlement
Lake Charles	Yes	1974	4	0	Court-ordered
Lafayette	Yes	1975	5	0	Court-ordered
Marksville	No	1978	5	0	—
Minden	Yes	1978	5	0	Court-ordered
Monroe	Yes	1980	5	0	Court-ordered
Shreveport	Yes	1978	7	0	Court-ordered
Springhill	Yes	1974	5	0	Settlement
Tallulah	Yes	1979	5	0	Court-ordered
Winnfield	Yes	1982	5	0	Settlement
		Changed to Mixed Plan			
Bogalusa	No	1978	5	2	—
Bossier City	No	1977	5	2	—
Broussard	No	1986	4	1	—
Bunkie	No	1984	4	1	Threat of lawsuit
Covington	No	1978	5	2	—
Crowley	No	1974	8	1	Threat of lawsuit
Donaldsonville	No	1975	3	1	—
Gretna	Yes	1987	4	1	Court-ordered
Kenner	No	1974	5	2	—
Leesville	No	1978	4	2	—
Natchitoches	No	1975	4	1	—
Ponchatoula	No	1980	4	1	—
Thibodeaux	No	1975	3	2	—
Ville Platte	Yes	1975	5	1	Court-ordered
SUMMARY	Yes 13 (48%)				
	No 14 (52%)				

[a]Voting age population by race was not provided in the 1980 census for Farmerville, a city which switched, under threat of a lawsuit, from at-large elections to a single-member-district system; therefore it is not included in this table.

[b]Some cities would not or could not supply reasons for the change.

TABLE 4.9
Major Disfranchising Devices in Louisiana

Device	*Date Established*	*Date Abolished*
Explicit racial exclusion	1812	1868[a]
Grandfather clause (educational and property requirements)	1898	1915[b]
White primaries	1921	1944[c]
Interpretation test	1921	1965[d]

[a]Congressional Reconstruction.
[b]*Guinn and Beal v. United States*, 238 U.S. 347 (1915).
[c]*Smith v. Allwright*, 321 U.S. 649 (1944).
[d]*Louisiana v. United States*, 380 U.S. 145 (1965).

TABLE 4.10
Nonwhite and White Registered Voters and Officeholders in Louisiana, Selected Years[a]

	Nonwhite		*White*	
	N	%	N	%
Registered voters				
1964	164,601	13.7	1,037,184	86.3
1967	303,148	20.2	1,200,517	79.8
1988	571,453	26.4	1,589,942	73.6
Officeholders				
1964	—	—	—	—
1969	64	1.0[b]	—	—
1988	524	11.1	4,196	88.9

Sources: Registration figures for 1964 and 1967 are based on United States Commission on Civil Rights 1968, 242–43. Registration figures for 1988 are based on the end-of-year report for that year by the Louisiana Department of Elections and Registration. Figures for the number of elected officials are taken from the Joint Center for Political Studies 1970 and 1989.
[a]Mean black Louisiana population, 1960–90 = 30.5%.
[b]Rough estimate.

TABLE 4.11
Black Voter Registration Rates for Louisiana Parishes, 1964

Registration as % of Black VAP[a]	*Parishes* N	%
0–10	13	20.3
10–20	7	10.9
20–30	8	12.5
30–40	8	12.5
40–50	5	7.8
50–60	7	10.9
60–70	8	12.5
70–80	4	6.2
80–90	3	4.7
90–100	1	1.6
TOTAL	64	99.9

Source: United States Commission on Civil Rights 1968, 240–43.
[a]Registration figures are for 3 October 1964.

TABLE 4.12
Municipal Election Systems, 1974 and 1989, Louisiana Cities of 2,500 or More Population with 10 Percent or More Black Voting-Age Population in 1980

Type of Election System	*1974* N	%	*1989* N	%
Districts	17	19.5	30	34.5
Mixed	16	18.4	30	34.5
At-large	54	62.1	27	31.0
TOTAL	87	100.0	87	100.0

CHAPTER FIVE

Mississippi

FRANK R. PARKER, DAVID C. COLBY, AND MINION K. C. MORRISON

"I OPPOSE the bringing of the negro back into politics, which . . . allowing the wards to select their Aldermen, will surely do," argued Mississippi state senator J. L. Hebron in 1906, during a debate on whether to change Greenville's electoral structure from at-large to district elections.[1] In 1962, the Mississippi legislature required all code charter cities with mayor–board of aldermen governments to switch from district to at-large aldermanic elections to prevent the election of black aldermen. "This is needed to maintain our southern way of life," a supporter of this legislation argued.[2] In Mississippi, exclusion of black representatives was at least one reason for the widespread adoption of at-large municipal voting. In this chapter we analyze the impact of the Voting Rights Act and litigation under it on changes from at-large to district city council elections, as well as on the election of black city council members in Mississippi. We do not discuss the impact of the act on other governmental structures, such as congressional, state legislative, and county redistricting, which has been discussed elsewhere.[3]

Intense social and political mobilization by blacks seeking the right to vote in the most "redeemed" of the former Confederate states significantly contributed to the passage of the Voting Rights Act.[4] The history of Mississippi race relations and black disfranchisement is therefore important for understanding the changes in black municipal political participation. The state came into the Union in 1817 and, unlike some other southern states, had essentially a one-crop cotton economy. Most slaves were occupied with hoeing and picking cotton "from sunup to sundown." This regimen was sustained by harsh regulations that amounted to a police-state apparatus. Notwithstanding factionalism among themselves, whites were in sufficient agreement on African-American inferiority to produce greater resistance to change in race relations than in any other state in the South.[5]

Despite the harshness of the slave system before the Civil War, the Reconstruction Act of 1867 enabled blacks to achieve some quick successes in political participation from 1867 to 1870. For example, they sent sixteen delegates to the hundred-member constitutional convention in 1868. From 1870 to 1875, they enjoyed their greatest participation in politics until the present period. Blacks teamed up with their white allies to control the legislature. In 1870, 30 of 107 representatives in the lower house and 5 of 30 senators were black.[6] In the 1870s, other blacks occupied national, state and local offices: there were 2 U.S. senators,

a U.S. representative, a lieutenant governor, 5 secretaries of state, a superintendent of education, and 2 speakers of the state house of representatives. Blacks also controlled some county governments, notably in the Delta region. Nevertheless, in a state that was 54 percent black in 1870, black representation in government was never proportional to the black population.[7]

This period of participation ended in 1875, when blacks were disfranchised by fraud and intimidation, or co-opted into arrangements controlled by whites.[8] This de facto disfranchisement received the sanction of law in 1890 when a new constitution was written by an almost all-white convention. The convention adopted a cumulative poll tax of two dollars per year and a literacy requirement for voter registration (see table 5.9). The poll tax created an economic hardship for blacks and poor whites alike. The literacy provision—requiring an applicant to read, understand, or interpret any section of the state constitution (later changed to read, write, *and* interpret) to the satisfaction of the circuit clerk, a local white official—gave circuit clerks wide discretion to allow illiterate whites to vote and to prevent even literate blacks from doing so. Previously, blacks had made up a majority of the registered voters; by 1896 only 9 percent of adult blacks were registered to vote.[9]

These constitutional measures were reinforced by the adoption of party primaries to nominate candidates for office and the "white primary" rule that excluded blacks from these crucial elections. They were barred from participating in the Democratic primaries beginning in 1907.[10] In response both to the U.S. Supreme Court's decisions, in 1944 and 1954, respectively, that white primaries and racially segregated schools were unconstitutional and to growing black mobilization, Mississippi erected further barriers to black enfranchisement.[11] The legislature conditioned participation in party primaries upon adherence to "party principles," and the political parties adopted principles supporting racial segregation, in effect excluding anyone who did not support segregation. In addition, the legislature adopted statutes and constitutional amendments that strengthened the literacy test and added a "good moral character" test that required the names of persons applying for voter registration to be published in the local newspaper. Some blacks whose names were published were then evicted from their homes and fired from their jobs.

The systematic exclusion of blacks from electoral participation came under increasing attack in Mississippi as early as the 1940s. At that time, groups composed mainly of black professionals, such as clergy, schoolteachers, and doctors, along with the National Association for the Advancement of Colored People (NAACP), began to take independent action to secure voting rights and greater respect in general for blacks.[12] Their efforts culminated in the 1960s in a civil rights campaign for voter registration, school desegregation, and a wide range of other rights commonly denied blacks. The collective activation of their groups' resources resulted in broad mobilization for the acquisition of social and political goods.[13] In its organized form this activation occurred under the sponsorship of the NAACP, the Student Nonviolent Coordinating Committee, the Congress of Racial Equality, the Mississippi Freedom Democratic Party, the Council of Federated Organizations, and numerous local leaders. These forces worked with federal

officials and civil rights lawyers to challenge Mississippi's racist laws and to seek new legislation to strengthen black rights. The Voting Rights Act is the crowning achievement of the civil rights agitation and litigation campaign.

Passage of the act in 1965 dramatically changed Mississippi politics. The most obvious change was the enfranchisement of blacks. But as Chief Justice Earl Warren stated in *Allen v. State Board of Elections*, a case interpreting the scope of the act, "the Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race. . . . The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."[14] The Voting Rights Act invalidated Mississippi's literacy test as well as other voter registration tests, and led to the abolition of the the poll tax in state elections; consequently, black registration increased sharply.[15] However, other obstacles to registration, such as the requirement of dual registration for state and municipal elections, and a prohibition against registrars enrolling voters outside their offices, remained in effect in Mississippi until the 1980s. Barriers that diluted black voting power were more resistant to change. After passage of the act, the goal of white segregationists was mainly to dilute black voting power, not only through legislation but through deceit, intimidation, and violence.[16]

The Impact of Litigation on At-Large Municipal Elections

Twenty-two of the twenty-six largest incorporated cities in Mississippi had at-large city council elections in 1965. Today most cities have changed to district-based election systems. This change is the product of a new, post-1965 voting rights movement that has relied primarily on litigation under the Fourteenth and Fifteenth amendments and the Voting Rights Act to mount court challenges to at-large election systems that dilute minority voting strength. To the extent that this new movement protests denials and abridgments of black citizens' right to vote, it reflects a historical continuity with the goals of the civil rights struggles of the 1960s. The success of the later movement resulted not only from black initiatives but from congressional legislation and Supreme Court decisions that made the litigation possible. The 1965 passage of the act, which broadly prohibited racial discrimination in voting, and the 1982 amendment to section 2, which eliminated the necessity of proving discriminatory intent in challenges to voting systems and adopted a more liberal "results" test, were key to the movement's success.

To study the impact of the act on municipal election structures and black officeholding, we have conducted research on litigation challenging at-large city council elections, including the collection of information on all lawsuits against Mississippi cities with at-large elections. Since many of these cases were unreported or were settled out of court, we surveyed legal organizations and attorneys filing voting rights cases in the state to obtain information on their lawsuits. For each case, we obtained the name of the city involved, the case name,-the case particulars (date filed, date resolved), the attorneys for the plaintiffs, how the case

was resolved, the legal basis for the case, and the type of election system challenged.

Between 1965 and 1989, seventy-one Mississippi cities of 1,000 or more with at least 10 percent black population switched from systems under which all the city council members were elected at large to either district elections or to mixed plans in which some council members were elected by district and others at large (see tables 5.8 and 5.11). Fifty-nine of the seventy-one cities went to district elections as a result of court injunctions in contested litigation, settlement of pending litigation, or threat of litigation; four (including three that were also targets of litigation) switched as a result of Justice Department section 5 objections to the adoption of at-large voting or to municipal annexations; and eleven switched voluntarily.

The Section 5 Preclearance Requirement

Section 5 requires covered states, including Mississippi, to submit all proposed new voting laws either to the U.S. Attorney General or to the U.S. District Court for the District of Columbia for preclearance before they can be implemented. The state has the burden of proving that the change is not racially discriminatory in purpose or effect. If the Attorney General objects or the court denies approval, the change cannot be implemented. In *Allen v. State Board of Elections*, the Supreme Court interpreted the section 5 preclearance requirement to cover not only changes affecting registration and voting, but also any changes that might dilute minority voting strength, including adoption of at-large elections.

The first municipal at-large election challenge in Mississippi was *Perkins v. Matthews*,[17] filed by the Jackson office of the Lawyers' Constitutional Defense Committee (LCDC), a national coalition of groups that opened offices in the South to assist the civil rights movement. In this case, black voters challenged Canton's switch in 1969 to at-large elections without section 5 preclearance. The city contended that although it had conducted the 1965 city elections under a district system, the 1969 change to at-large voting was not covered by section 5 because it was authorized by a state statute adopted in 1962, before section 5 went into effect. A three-judge district court agreed with the city's position and went on to rule that the change was not discriminatory, since black voters had an overwhelming majority in only one district. If one black alderman were elected, the district court reasoned, it "would, in practical effect, amount to nothing" because "the one Negro member of the board [of aldermen] would always be outvoted by the four white members."

On appeal, the Supreme Court reversed the district court's ruling.[18] The decision was significant for Voting Rights Act enforcement throughout the South because it reaffirmed the Court's ruling in *Allen* that all voting law changes adopted after 1965 must be precleared under section 5, and it expressly applied section 5 to changes in at-large municipal elections (as well as municipal annexations and polling place changes). The Court ruled that section 5 covers any change in actual voting practices since the effective date of the Voting Rights Act. Thus, because

Canton conducted district elections in 1965, the 1969 switch to at-large voting was a covered change. Further, the Court held that the question of whether Canton's changes were racially discriminatory was an issue specifically reserved by section 5 to the Attorney General or the district court for the District of Columbia to decide.

However important the Supreme Court's *Perkins* decision was to the issue of what changes are covered by section 5, it had little impact upon at-large voting structures in Mississippi. Most of the state's cities had adopted at-large voting before 1965, and their systems therefore were not subject to federal preclearance. As table 5.11 shows, only three cities were blocked by section 5 objections from adopting at-large elections after 1965, although undoubtedly the *Perkins* decision and these objections deterred some cities from switching to at-large voting. As a result, most at-large challenges in Mississippi have been based on the Fourteenth and Fifteenth amendments or, after 1982, on section 2.

Fourteenth Amendment Challenges

The first, and most important, Mississippi lawsuit challenging the constitutionality of at-large municipal elections was filed in 1973. *Stewart v. Waller*[19] is important not only because it was one of the first such lawsuits in the South, but also because it was the first multijurisdictional one, ultimately requiring thirty-one municipalities to abolish at-large voting. In 1962, as the state's first black voter registration drives of the decade were getting underway, the Mississippi legislature passed one of its first political "massive resistance" statutes, requiring all code charter municipalities (cities organized under the state's municipal code but not those municipalities incorporated under private charters from the legislature) with a mayor–board of aldermen form of government to elect all board members on an at-large basis. Previously, code charter municipalities over 10,000 in population were required to elect six aldermen by district and one at large, while those under 10,000 had the option of either electing five aldermen at large or four by district and one at large. To challenge the constitutionality of this statute, the Lawyers' Committee for Civil Rights Under Law—a national civil rights group with an office in Jackson—and the Washington law firm of Covington and Burling filed *Stewart* on behalf of eight black voters in four cities.

In 1975, a three-judge district court held that the statute violated the Fourteenth and Fifteenth amendments because it was adopted with "an intent to thwart the election of minority candidates to the office of alderman." The court's ruling was based on direct evidence of discriminatory motivation, the absence of an adequate nonracial explanation for the change, Mississippi's long history of official racial discrimination, and the foreseeable and actual impact of the law in defeating black candidates' efforts to win at-large municipal elections. The district court's 1975 injunction required thirty municipalities to revert to the district voting systems they had used prior to the enactment of the statute. In 1977 an additional city, West Point, which had been severed from the principal case, was also enjoined from holding at-large elections. The district court, however, rejected the plaintiffs'

request to expand its injunction to cover all at-large municipal elections in Mississippi, holding that the constitutionality of at-large elections in municipalities that did not rely on the 1962 statute would have to be litigated on a case-by-case basis.

Stewart was atypical because there was direct evidence of discriminatory intent supplied by newspaper reports of the state senate floor debate on the statute. Most of the Mississippi lawsuits of the 1970s were litigated under what became known as the *White-Zimmer* standard, which did not require proof of discriminatory intent. In *White v. Regester*[20] the Supreme Court held that at-large voting violated the Fourteenth Amendment if minority voter plaintiffs could prove on the basis of a number of evidentiary factors that "the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." This decision was first implemented by the U.S. Court of Appeals for the Fifth Circuit in the Louisiana case of *Zimmer v. McKeithen*,[21] hence the *White-Zimmer* standard. Racially polarized voting, which was an element of the district court's decision in *White v. Regester* but which was not cited in the Supreme Court's decision, subsequently was added as an element of proof in the subsequent *White-Zimmer* line of cases.

Although this standard required a complex multifactor analysis, it nevertheless established a favorable legal standard for black plaintiffs to litigate at-large election challenges because it did not depend on proof of discriminatory intent. Between 1976 and 1980, twelve lawsuits were filed against eleven cities in Mississippi, challenging at-large city council elections for violating the Fourteenth Amendment. Seven of the twelve cases were settled with agreements to eliminate at-large elections and to institute district voting systems.

The Impact of *City of Mobile v. Bolden*

The first wave of legal attacks on at-large voting came to a screeching halt in 1980 with the Supreme Court's decision in *City of Mobile v. Bolden*.[22] Plaintiffs in Fourteenth Amendment challenges were now required to prove that the at-large system had been adopted or maintained for a discriminatory purpose, a difficult burden of proof. Even worse for voting rights plaintiffs, the court rejected as not probative of discriminatory intent the evidentiary factors (e.g., past history of discrimination, absence of minority officeholders, discriminatory election rules) on which the *White-Zimmer* line of cases was based.

The damaging impact of the *Mobile* decision on at-large election challenges throughout the South has been widely noted.[23] In Mississippi, district courts employing the *Mobile* intent standard for the first time rejected constitutional challenges to at-large voting in two of the four cities against which cases were pending—Jackson (*Kirksey v. City of Jackson*)[24] and Greenwood (*Jordan v. City of Greenwood*).[25] In a third case pending against the city of Hattiesburg, the Justice Department on its own motion dismissed its lawsuit challenging at-large city

council elections after the *Mobile* decision, sending the district court a signal that the intent standard could not be met in that case and undermining the viability of a companion case filed by black voters.

The district courts ruled against black voter plaintiffs in the Jackson and Greenwood cases even though at-large voting had resulted in the total exclusion of black representation on the city councils of both cities and even though there was strong but circumstantial evidence that discriminatory intent had been a factor in the adoption and retention of at-large elections. In the Jackson case, both the district court and the court of appeals rejected as failing to prove discriminatory intent strong circumstantial evidence that at-large voting had been adopted and retained for racial reasons. Most damaging to the plaintiffs in this case, the courts refused to accept as relevant evidence an analysis of a 1977 referendum showing that 72 percent of the whites voted to retain at-large elections, while 98 percent of the blacks voted to change to district elections. The courts also excluded from consideration an opinion survey in which 61 percent of the white respondents who voted against the change gave at least one racial reason for their vote, and 44 percent gave two or more racial reasons, including unsolicited comments such as "I don't want a 'Nigra' representing me" and "blacks are human but whites are more efficient."[26] On appeal, the Fifth Circuit upheld the district court's decision to exclude this evidence for the reason that white voters' motives in retaining at-large elections were protected under the First Amendment from judicial inquiry. This ruling made it impossible to satisfy the *Mobile* requirement of proving discriminatory intent in cases in which at-large elections were adopted or retained by popular referendum because it excluded the voters' motivations from judicial consideration.

Section 2 Litigation

Responding to the outcry against the *Mobile* decision from civil rights groups and legal scholars, Congress amended section 2 in 1982 to prohibit voting practices that result in discrimination, regardless of the motivation behind them.[27] Congress's stated purpose was to restore the *White-Zimmer* legal standard, under which proof of discriminatory intent was not required. Then in *Thornburg v. Gingles*[28] the Supreme Court simplified the new section 2 standard even further by adopting a three-part legal test of discriminatory results based on proof that (1) a single-member district could be created in which minorities have a majority; (2) minority voters bloc vote for certain candidates; and (3) minority-preferred candidates usually are defeated by white bloc voting. The new section 2 standard, then, as interpreted by the Supreme Court in the *Gingles* decision, emphasizes proof of racially polarized voting that results in the systematic defeat of minority-backed candidates.

If the Justice Department's refusal to pursue its Hattiesburg case under the Fourteenth Amendment indicated that the case would be lost under the intent test, Congress's enactment of the section 2 amendment made the case winnable. In the

first court ruling under the new section 2 standard in Mississippi—and one of the first in the South—the district court in *Boykins v. City of Hattiesburg*[29] ruled that Hattiesburg's at-large city council elections violated the section 2 standard. The court cited evidence of a history of official discrimination against black voters in Mississippi, statistical proof of racially polarized voting that resulted in the defeat of all black candidates, and election rules—including a majority-vote requirement, a prohibition on single-shot voting, a numbered-post system, and the absence of a district residency requirement—that disadvantaged black candidates. The district court also relied on data showing severe socioeconomic disparities between whites and blacks that hindered black political effectiveness, evidence of racial campaigning, and proof that white officials had been unresponsive to the needs of the black community.

All the Mississippi cases that had been lost under the *Mobile* intent standard were won or settled under the new section 2 results standard. The district court's earlier adverse decision against the black voter plaintiffs in the Greenwood case was vacated on appeal by the Fifth Circuit and remanded for reconsideration. The district court then reversed its prior ruling for the city and held that at-large voting violated section 2. The lawsuit against the Jackson City Council that was lost under the *Mobile* standard was refiled as a section 2 case, and in 1985—responding to newspaper advertisements that if the city's voters did not adopt a district voting system, the federal court would do it for them–Jackson's voters by referendum eliminated at-large voting and adopted ward elections.

The 1982 amendment has had great impact in eliminating at-large city council elections in Mississippi. Altogether, section 2 lawsuits were filed against forty-three cities. Four of these cities litigated, three unsuccessfully, and thirty-two settled the lawsuits The remaining seven were still pending at the time of our survey. In addition, twenty-three other cities abandoned at-large voting voluntarily or under threat of litigation.[30] Indeed, it is likely that the successes in the section 2 cases may have persuaded cities that converted to district systems to change without the direct threat of litigation.

The Election of Black Council Members

Having reviewed the history of voting rights litigation in Mississippi, we now turn to a systematic analysis of black officeholding in the state's cities. In this analysis, we examine the relationship between council election systems and the election of black council members.

In the spring of 1989, to gather data for this study, we conducted a telephone survey of all Mississippi cities with 1980 populations of at least 1,000 (N = 148). Of the 145 cities that responded to the survey, our analysis considers only those with a black population of 10 percent or more (N = 133). The data include information on the type of electoral structure, the number of city council members, the racial composition of the city council, and the race of the mayor. For those

cities with district elections, we have collected information about the date of change to this system and the racial composition of the council in 1980. We have supplemented our survey with information from sources such as the U.S. Bureau of the Census and the Joint Center for Political Studies' annually published *National Roster of Black Elected Officials*.

Table 5.1, showing black officeholding in 1989, confirms the findings of several previous studies: in cities with a black population of less than 50 percent, black council members were most likely to be elected in pure single-member-district systems and least likely to be elected in at-large ones; cities with mixed plans fell in between. In those Mississippi cities with *any* seats elected at large, blacks were less likely to be elected to council than in pure single-member-district cities.

Why do the mixed plans occupy the middle status? To answer this question, we compared the results of elections for single-member-district seats with at-large seats in the 43 cities with mixed plans (see table 5.3). We found that black officials in mixed systems were elected overwhelmingly from district seats. Indeed, in cities with a black population of less than 50 percent, no blacks were elected to the at-large seats under mixed plans, showing that at-large seats in mixed plans continued to dilute black voting strength, just as they did in pure at-large systems.

From the survey data and section 5 records obtained from the Justice Department, we were able to calculate the black percentage of the population in each single-member district in 40 cities (see table 5.6). In districts with a black population of less than 65 percent, blacks were dramatically underrepresented. In districts with a higher black percentage, blacks were elected in about the same proportion as their percentage of the city's population. Thus, even in single-member districts, blacks in Mississippi needed a supermajority to win elections.

A Longitudinal Measure of the Impact of Election Structures on Black Representation

In our cross-sectional analysis of cities discussed so far, we have shown a positive relationship between district elections and the presence of blacks on city councils—a fact noted in other such studies as well.[31] Although there have been only a few before-and-after studies of this relationship, they reached the same conclusion.[32] Nevertheless, one of these longitudinal studies lacked a control group of unchanged at-large cities. The other did not randomly assign cities to the experimental and control groups. On the other hand, as Davidson and Grofman argue in chapter 10 of this volume, cross-sectional studies also have serious methodological problems.[33] Our research remedies this by adopting the research design similar to that used in the other state chapters in this book: it compares the racial makeup of city councils before and after cities shifted from at-large to mixed or single-member-district plans in the period between 1974 and 1989; it then compares the racial makeup of councils in 1974 and 1989 in the control group of cities that retained their at-large system throughout the period.

By 1974, nine years had elapsed since passage of the Voting Rights Act, allowing time for the act's effect on black registration and mobilization to be felt. Nevertheless, Mississippi was still resistant to equal black participation in many ways.[34] In the 130 cities with at-large elections in 1974, there were very few black council members, and they were elected in cities that were virtually all black (see table 5.2).

In cities that later switched electoral structures, a dramatic change occurred in the black percentage on council (see table 5.2). In cities less than 50 percent black that switched to pure single-member districts or mixed plans, the proportion of black council members increased noticeably; in cities that did not switch, the increase was minimal. In cities less than 50 percent black, district voting led in every category to significant increases in numbers of black elected officials.

Since the black population ratio varies among city election types, a comparison of standardized measures of black "equity of representation" provides a clearer analysis of the impact of these changes than does the comparison in table 5.2. Table 5.4 presents two measures of representational equity in 1989—a ratio and a difference measure—for cities with different types of elections. Our findings can be summarized as follows: When the effects of the size of black population are controlled, blacks in majority-white cities were best represented in 1989 in pure district cities, less well represented in mixed ones, and least well represented in at-large ones.

Finally, we compare the three types of cities' equity ratios for 1974 and 1989 (see table 5.5). For all types of cities, these improve over time. Nevertheless, the improvement in black representation in majority-white cities changing to district or mixed plans was much greater than in cities that retained at-large elections.

Conclusion

Black electoral power was dramatically diluted in Mississippi cities following passage of the Voting Rights Act, largely due to the use of at-large elections. As our data show, the abolition of this system in many cities has brought about fairer representation for blacks. Majority-white cities that switched from at-large to single-member districts had the fairest representation, followed by cities with mixed electoral systems.

Most at-large systems in Mississippi cities have been eliminated through litigation under the Voting Rights Act and, prior to 1980, the Fourteenth Amendment. Moreover, section 5 was successfully used to block changes from ward to at-large elections.

Of the fifty-five lawsuits that were filed challenging at-large elections in Mississippi cities, only seven of them—*Stewart v. Waller* and the individual cases against Greenwood, Hattiesburg, Houston, Jackson (the first case filed in the state), West Point, and Woodville—actually went to trial on the merits of at-large challenges (exclusive of remedy hearings on a redistricting plan). The degree of resistance in these cases, however, should not be minimized. The state strenuously

defended the 1962 statute at issue in *Stewart* even when it became patently obvious that the law was racially motivated. After that decision, resistance was strongest in the state's most populous cities, which had large black concentrations and the financial resources to pay their attorneys for years of resistance. The cities that most strongly resisted eliminating their at-large systems included Jackson, which bitterly contested the lawsuits against it through two separate trials and two appeals to the Fifth Circuit—litigation lasting from 1977 to 1985. Greenwood, Greenville, and Hattiesburg all fought to retain at-large elections from 1977 to 1984. After section 2 was amended and the demise of their at-large election systems seemed inevitable, all four cities in effect gave up. The Jackson City Council supported the 1985 referendum that created ward voting. The Greenwood council, although it did not settle, in the end did not contest the evidence that demonstrated a section 2 violation. Greenville agreed to a mixed four–two voting plan in 1984. Hattiesburg decided not to appeal the district court decision striking down at-large elections under section 2.

In resisting other applications of the Voting Rights Act, Mississippi created ingenious devices, engaged in persistent resistance, and, during the Reagan presidency, had the implicit support of a federal administration that was hostile to the act.[35] Mississippi racially gerrymandered its congressional and state legislative districts, and numerous counties gerrymandered their county election district lines after the 1970, 1980, and 1990 censuses. Between 1965 and 1980, fourteen of the state's eighty-two counties attempted to switch to at-large elections for county supervisor positions, twenty-two counties switched to at-large elections for school boards, and from 1966 to 1975 the legislature increased the number of multimember districts for the election of state senators and representatives.[36] Additionally, some cities annexed white residential areas to dilute black electoral strength.

Mississippi resisted in other ways. Under pressure from U.S. Senator Thad Cochran and Congressman Trent Lott, the Justice Department in 1981 violated its own procedures for preclearance when it withdrew an objection to a municipal annexation.[37] In a 1980 amicus curiae brief in *City of Rome v. United States*,[38] a Georgia case, Mississippi argued that section 5 was unconstitutional twelve years after the Supreme Court had sustained its constitutionality.

Approximately 125 years have passed since Mississippi blacks registered to select delegates to the constitutional convention during Reconstruction. Between that time and passage of the Voting Rights Act, Mississippi thwarted black voter registration with literacy tests, white primaries, and poll taxes as well as with violence and intimidation. After passage of the act, the state has used barriers to candidacy, relocation of polling places, denial of the ballot, racial gerrymandering, at-large elections, and annexations to deny or dilute black voting. Yet in spite of this massive and unceasing resistance, the act has advanced Mississippi toward the ideal expressed in the Fifteenth Amendment that "the right of citizens . . . to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude."

TABLE 5.1
Black Representation on Council in 1989 by Election Plan, Mississippi Cities of 1,000 or More Population with 10 Percent or More Black Population in 1980

Type of Plan by % Black in City Population, 1980	N	*Mean % Black in City Population, 1980*	*Mean % Black on City Council, 1989*
SMD plan			
10–29.9	5	24	20
30–49.9	14	42	36
50–100	12	57	41
Mixed plan			
10–29.9	18	20	12
30–49.9	13	40	30
50–100	12	63	37
At-large plan			
10–29.9	20	22	9
30–49.9	15	35	9
50–100	24	71	49

TABLE 5.2
Changes in Black Representation on Council between 1974 and 1989, Mississippi Cities of 1,000 or More Population with 10 Percent or More Black Population in 1980

Type of Change by % Black in City Population, 1980	N*	*Mean % Black in City Population, 1980*	*Mean % Black on City Council*	
			Before Change (1974)	*After Change (1989)*
		Changed Systems		
From at-large to SMD plan				
10–29.9	5	24	0	20
30–49.9	14	42	0	36
50–100	11	58	0	43
From at-large to mixed plan				
10–29.9	16	20	0	11
30–49.9	13	40	0	30
50–100	12	63	5	37
		Unchanged Systems		
At-large plan				
10–29.9	20	22	0	9
30–49.9	15	35	0	9
50–100	24	71	23	49

*Two cities with mixed plans and one with a single-member-district plan listed in table 5.1 are excluded from this table because they had adopted their plans before 1974.

TABLE 5.3
Black Representation in 1989 in Mixed Plans by District and At-Large Components, Mississippi Cities of 1,000 or More Population with 10 Percent or More Black Population in 1980

% Black in City Population, 1980	N	*Mean % Black Councilpersons in District Components, 1989*	*Mean % Black Councilpersons in At-Large Components, 1989*
10–29.9	18	15	0
30–49.9	13	37	0
50–100	12	46	25

TABLE 5.4
Two Equity Measures Comparing Percentage Black on Council in 1989 with Percentage Black in City Population in 1980, Mississippi Cities of 1,000 or More Population with 10 Percent or More Black Population in 1980

Type of Plan by % Black in City Population, 1980	N[a]	*Difference Measure (% on Council − % in Population)*	*Ratio Measure (% on Council ÷ % in Population)*
		Changed Systems	
From at-large to SMD plan			
10–29.9	5	−4	0.84
30–49.9	14	−6	0.85
50–100	11	−15	0.74
From at-large to mixed plan			
10–29.9	16	−8	0.58
30–49.9	13	−11	0.74
50–100	12	−26	0.59
		Unchanged Systems	
At-large plan			
10–29.9	20	−13	0.41
30–49.9	15	−26	0.26
50–100	24	−21	0.70

[a]Two cities with mixed plans and one with a single-member-district plan listed in table 5.1 are excluded from this table because they had adopted their plans before 1974.

TABLE 5.5
Changes in Black Representation on Council between 1974 and 1989, Mississippi Cities of 1,000 or More Population with 10 Percent or More Black Population in 1980 (Ratio Equity Measure)

Type of Change by % Black in City Population, 1980	N[a]	*Black Representational Equity on Council*	
		1974	*1989*
		Changed Systems	
From at-large to SMD plan			
10–29.9	5	0.00	0.84
30–49.9	14	0.00	0.85
50–100	11	0.00	0.74
From at-large to mixed plan			
10–29.9	16	0.00	0.58
30–49.9	13	0.00	0.74
50–100	12	0.07	0.59
		Unchanged Systems	
At-large plan			
10–29.9	20	0.00	0.41
30–49.9	15	0.00	0.26
50–100	24	0.32	0.70

[a]Two cities with mixed plans and one with a single-member-district plan listed in table 5.1 are excluded from this table because they had adopted their plans before 1974.

TABLE 5.6
Black Representation in Council Single-Member Districts in 1989, Mississippi Cities of 1,000 or More Population with 10 Percent or More Black Population in 1980

% Black Population of District	N[a]	*Mean % Black Population in Districts, 1980*	*Mean % Black Councilpersons in Districts, 1989*
0–29.9	84	10	0
30–49.9	26	39	0
50–59.9	11	56	27
60–64.9	6	62	33
65–69.9	15	67	53
70–100	53	89	94

[a]Of the 347 single-member districts in Mississippi cities of 1,000 or more population with 10 percent or more black population, we were able to obtain usable data on 195.

TABLE 5.7
Black Council Representation in Single-Member Districts in 1989, by Racial Composition of District, Mississippi Cities of 1,000 or More Population with 10 Percent or More Black Population in 1980

Racial Composition of District	N	*Mean % Black Population in Districts, 1980*	*Mean % Black Councilpersons in Districts, 1989*
Black majority	85	79	74
White majority	110	17	0

TABLE 5.8
Cause of Change from At-Large to Mixed or District Plan between 1974 and 1989, Mississippi Cities of 1,000 or More Population with 10 Percent or More Black Population in 1980

City	*Did Lawsuit Accompany Change?*	*Reason for Change*
Changed to Single-Member Districts		
Aberdeen	Yes	Consent decree
Belzoni	Yes	Settlement
Biloxi	No	Voluntary
Carthage	No	Voluntary
Charleston	Yes	Consent decree
Clarksdale	Yes	Consent decree
Columbia	Yes	Court order
Columbus	Yes	Consent decree
Gloster	Yes	Settlement
Greenwood	Yes	Court order
Grenada	Yes	Consent decree
Gulfport	No	Voluntary
Hattiesburg	Yes	Court order
Hazelhurst	Yes	Consent decree
Indianola	Yes	Settlement
Jackson	Yes	Settlement
Laurel	Yes	Consent decree
Leland	Yes	Settlement
Lumberton	No	Voluntary
Macon	Yes	Court order
Meridian	Yes	Settlement
Monticello	No	Voluntary
Newton	Yes	Settlement
Okolona	No	Threat of litigation
Picayune	Yes	Consent decree
Port Gibson	Yes	Settlement
Tutwiler	No	Voluntary
Vicksburg	No	Section 5 negotiation
West Point	Yes	Court order
Yazoo City	Yes	Consent decree
Changed to Mixed Plan		
Bay St. Louis	No	Voluntary
Brandon	No	Voluntary
Brookhaven	Yes	Court order
Canton	Yes	Settlement
Centreville	Yes	Settlement

(*continued*)

TABLE 5.8 (*Continued*)

City	Did Lawsuit Accompany Change?	Reason for Change
Cleveland	Yes	Court order
Coffeeville	Yes	Consent decree
Collins	No	Voluntary
Crenshaw	Yes	Settlement
Crystal Springs	Yes	Settlement
Drew	Yes	Consent decree
Ellisville	Yes	Court order
Forest	Yes	Court order
Hollandale	Yes	Consent decree
Holly Springs	Yes	Court order
Houston	Yes	Court order
Itta Bena	Yes	Settlement
Kosciusko	Yes	Court order
Lexington	Yes	Court order
Louisville	No	Threat of litigation
Magee	Yes	Court order
Magnolia	Yes	Court order
Marks	Yes	Settlement
Mendenhall	No	Threat of litigation
Moss Point	Yes	Court order
New Albany	Yes	Court order
Oxford	Yes	Court order
Pass Christian	Yes	Court order
Pearl	Yes	Court order
Philadelphia	Yes	Court order
Pontotoc	Yes	Court order
Ridgeland	Yes	Court order
Ripley	No	Voluntary
Rolling Fork	Yes	Settlement
Sardis	Yes	Court order
Starkville	Yes	Court order
Tupelo	Yes	Court order
Tylertown	Yes	Court order
Water Valley	Yes	Court order
Wesson	Yes	Court order
Wiggins	No	Voluntary
SUMMARY	Yes 56 (79%)	
	No 15 (21%)	

TABLE 5.9
Major Disfranchising Devices in Mississippi

Device	Date Established	Date Abolished
Literacy test: Must be able to read or understand or interpret any section of the state constitution (1890); amended to read *and* write any section *and* give a reasonable interpretation (1955)	1890	1965[a]
Poll tax	1890	1964 for federal elections;[b] 1966 for state elections[c]
Durational residence requirement: 2 years in state, 1 year in precinct (1890); amended to 1 year in state, 6 months in precinct (1972)	1890	1972[d]
Disfranchising crimes list	1890	Still in effect
Dual registration requirement (voters must register with both county registrar and municipal clerk)	1892	1984, 1987[e]
White primary	1907	ca. 1947[f]
Party principles loyalty oath	1947	1987[g]
Citizenship understanding test	1955	1965[h]
Prohibition on satellite registration	1955	1987[e]
Good moral character test	1960	1965[h]
Newspaper publication of names of applicants for registration; procedure for challenging moral character	1962	1965[h]

Sources: U.S. Commission on Civil Rights 1965; U.S. Commission on Civil Rights 1968; Parker 1990.

[a] Voting Rights Act of 1965, 42 U.S.C., Section 1973 et seq.

[b] Twenty-fourth Amendment to the U.S. Constitution.

[c] *United States v. Mississippi*, 11 Race Relations Law Reporter 837 (S.D. Miss. 1966) (three-judge court).

[d] *Graham v. Waller*, 343 F. Supp. 1 (S.D. Miss. 1972) (three-judge court) (limited to thirty days in state, county, and precinct).

[e] *Mississippi State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff'd*, 932 F.2d 400 (5th Cir. 1991).

[f] *Smith v. Allwright*, 321 U.S. 649 (1944).

[g] Mississippi legislature.

[h] Mississippi legislature, passed in July 1965 in hopes of evading coverage of the Voting Rights Act.

TABLE 5.10
Black and White Registered Voters and Officeholders in Mississippi, Selected Years[a]

	Black		White	
	N	%	N	%
Registered voters[b]				
1964	28,500	5.1	525,000	94.9
1968	181,233	23.6	589,066	76.4
1988	—[c]	32.5	—[c]	67.0
Officeholders				
1965	6	0.1	5,272	99.9
1968	29	0.5	5,249	99.5
1989	646	12.2	4,632	87.8

Sources: U.S. Commission on Civil Rights 1968; voter registration statistics of the Voter Education Project of the Southern Regional Council; Joint Center for Political Studies 1989.

[a] Mean black Mississippi population, 1960–90 = 37.4%.

[b] Voter registration statistics for 1964 and 1968 are estimates, and voter registration statistics for 1988 are based on census survey results and probably exaggerate the total number of registered voters, on which these percentage calculations are based, and the number of black registered voters.

[c] Black and white registration combined was 945,712 in 1988.

TABLE 5.11
Reasons for Changes from At-Large to Mixed and Single-Member-District Plans in Mississippi Cities of 1,000 or More Population with 10 Percent or More Black Population in 1980

Reason	N[a]
Injunction, contested litigation	29
Settlement of litigation	27
Threat of litigation	3
Voluntary, no litigation	11
Section 5 objection to switch to at-large voting	3
Section 5 objection to municipal annexation	1
TOTAL	74

[a] Three cities—Grenada, Kosciusko, and Lexington—that were required to revert to ward elections by litigation are listed twice. These cities later attempted to switch to at-large elections and were blocked by section 5 objections.

CHAPTER SIX

North Carolina

WILLIAM R. KEECH AND
MICHAEL P. SISTROM

> It has been the vogue to be progressive. Willingness to accept new ideas, sense of community responsibility toward the Negro, feeling of common purpose, and relative prosperity have given North Carolina a more sophisticated politics than exists in most southern states.
>
> —*V. O. Key, Jr.*[1]

KEY RECOGNIZED North Carolinians' self-conscious and self-perpetuated image of themselves as a "progressive plutocracy." For black Tar Heels, however, the long struggle for voting rights and racial equality has been a paradox. For example, North Carolinians have been taught to remember Governor Charles Brantley Aycock as the "education governor," bringing progressive reform in public education at the turn of the century.[2] Blacks might also recall that Aycock came to power as an advocate of black disfranchisement

Similarly, in 1954 Greensboro, North Carolina, became the first city in the South to announce that it would comply with the Supreme Court's school desegregation edict. However, the Pearsall Plan, the state law passed in response to *Brown v. Board of Education*, provided that local school districts or individual schools within them could close down rather than desegregate. In 1971, after loss of federal funds and under court order, Greensboro finally integrated its public schools, making it one of the last in the region to do so.[3]

Among southern states, North Carolina has often been perceived as different, usually in a way that reflected favorably on it as more progressive or less blatantly racist than other southern states. The Voting Rights Act itself recognized that North Carolina was different by originally including fewer than half its hundred counties under coverage of the special provisions. Before the act was passed in 1965, an estimated 46.8 percent of the state's black voting-age population was registered, the most of any of the seven states originally covered.[4]

Clearly North Carolina's performance has been "better" in some respects, but there are limits to its racial progressivism. One observer contends that North Carolina, as "one of the few Southern states that has been moderate in race

relations has been most effective in belittling the voting strength of a sizable black population."[5] Perhaps projecting the progressive image was a less blatant and therefore more effective way to maintain a system of white supremacy.

The groundbreaking 1984 lawsuit, *Gingles v. Edmisten*,[6] was a response to the facts that rates of black officeholding still lagged, state election law and local government were slow to reform, and racially polarized campaigns and voting still characterized North Carolina elections. Yet by now, a quarter century after the passage of the Voting Rights Act, the barriers of tradition have been substantially broken. The purpose of this chapter is to examine the effects of the act on black registration and officeholding in North Carolina. In general, we will show that there has been substantial progress, much of which resulted from the act. After a look at North Carolina politics, we will consider changes in voter activity and officeholding by race.

Demographic and Historical Context

North Carolina's black population is 22 percent of the total. Much of it is concentrated in the historical black belt in the eastern section of the state. There is also substantial black population in the cities of the Piedmont. These cities—Raleigh, Durham, Greensboro, Winston-Salem, and Charlotte—are the largest in what is still one of the least urban of American states.

North Carolina's Native American population, 1.1 percent of the total, is the largest east of the Mississippi, and is the second largest minority population in the state. It is concentrated in three counties—Robeson, Hoke, and Swain—in two of which it is a plurality. The Voting Rights Act in 1975 placed those counties under the new language-minority provisions.

Blacks played an important role on the political stage throughout the postbellum period. The state's Reconstruction constitution of 1868 established universal manhood suffrage, thus eliminating racial and property qualifications for voting. In the registration rolls created by the ruling Republicans in 1868, 36 percent of the new voters were former slaves.[7] The freedmen continued to register and cast ballots, with their turnout reaching 83 percent of registered blacks in the 1880 elections, surpassing the white rate.[8]

The restoration of county government under the new constitution and the existence of strong alternatives to the dominant Democratic party (Republicans and later the Republican/Populist Fusion movement) gave North Carolina blacks access to a variety of elected and appointed positions until the turn of the century. As a rule, "the darker the district"—whether city or county ward, legislative or congressional seat—the more frequent was its black representation. Four blacks represented the Second Congressional District, the "Black Second," between 1868 and 1901, serving a total of seven terms.[9] George White, the last of these, was the last black member of Congress until 1929, and the last from the South until 1973.[10]

These representatives were able to secure a measure of federal patronage for their black constituents, especially jobs as postmasters, recorders of deeds, tax collectors, and even collector of customs for the Port of Wilmington.[11]

Between 1876 and 1900, fifty-nine blacks sat in the state house and eighteen were elected to the state senate, all from districts drawn from sixteen majority-black counties. They were almost without influence in the white-dominated legislature, and were truly active only on "race issues" such as black education, election laws, and convict labor, but they did hold some important committee assignments.[12] Local black communities also captured county and municipal posts. Numerous blacks were elected as magistrates, and a handful became sheriffs and county commissioners. A scattering of black aldermen were also on the boards of several eastern and Piedmont cities, including Raleigh, Wilmington, Tarboro, and New Bern.[13] Still, white allies were unenthusiastic about black officeholding, and blacks never exercised political power commensurate with their numbers.

White Democrats, motivated by the specter of "Negro domination" and the desire for one-party hegemony, sought to eliminate this limited black political strength from the time Democrats regained control of state government in 1870 until the culmination of their efforts in the disfranchising constitutional amendments of 1900. They experimented with a number of intermediate steps both to deny the ballot to the blacks and poor whites who made up the Republican and Populist constituencies and to dilute black voting strength. In 1877 the general assembly replaced the popular vote with legislative control of county government. Other bills redrew ward lines in cities with heavy black populations, either to limit black influence to one district or to disperse it through several. This maneuvering, along with violent terror, gave the white Democratic minority control over the eastern black belt.[14]

One of the most effective early disfranchisement measures was the centralization of control over elections and the establishment of intricate procedures for voter registration. A new and highly partisan state board of elections supervised the appointment of local registrars and judges of elections. The key features of the statutes were the wide discretion granted to the local clerks, the specificity of the information required of the registrant, the limited time periods the books were open, and the provisions allowing challenges of a voter's qualifications to be made on the day of the election, thus making it more difficult for the challenged would-be voters to clear their record in time to vote.[15] Even where impartially administered, such laws significantly diminished turnout from their inception in the late nineteenth century to the 1960s.

The registration scheme, however, like the other election chicanery, was by no means foolproof. Since the techniques relied on discriminatory administration, a change in the control of state government might reverse the direction of discrimination in voter registration. Federal regulation of voter registration and elections, a feature of the narrowly defeated "Force Bill" of 1890, might eliminate the advantage entirely. In fact, Democrats lost control of the legislature in 1894 to a "Fusion"

ticket of Populists and Republicans, which replaced the Democratic registration schemes with what Kousser has called "probably the fairest and most democratic election law in the post-Reconstruction South."[16]

With this law, the Fusion ticket prevailed again in the 1896 legislative elections, when Republican Daniel Russell won a four-year term as governor. But the Democrats regained the legislature in 1898 and reformulated the election law again. This time, however, Democratic leaders sought the permanent and constitutional elimination of blacks from the electorate. In the face of opposition from blacks and some white dissenters, the 1900 election returned a victory for Democratic gubernatorial candidate Charles Aycock and for a package of disfranchisement amendments that differed only in minor ways from those used in the rest of the South. The central provision was a requirement that "persons offering to vote shall be at the time a legally registered voter." In order to be registered, potential voters had to "be able to read and write any section of the constitution in the English language" and to have paid a poll tax.

Lawmakers faced a problem: one-fifth of the white population was illiterate and one-half of the adult black population was literate. A fair application of the test would have disfranchised over 50,000 whites and left almost 60,000 blacks on the rolls.[17] A grandfather clause excused voters from the literacy test if they had been entitled to vote in any state in 1867, or were a lineal descendent of such a person. (In order to be eligible for this possibility, voters had to be registered as such by 1908.)[18] North Carolina has never had a system of white primaries, and the poll tax was repealed as a requirement for voting in 1920. Thus the main institutional feature of black disfranchisement in North Carolina was the literacy test as a part of the registration requirement and the discretion granted to local registrars—precisely what was suspended by the Voting Rights Act of 1965.

The suffrage restriction mechanisms secured white supremacy and Democratic solidarity. The Fusion movement had collapsed, the Republican party turned lily-white, and black efforts to challenge the amendments in court failed. By 1910 almost no blacks voted, and white turnout had dropped substantially.[19] Apathy spread throughout the electorate as blacks all but disappeared from the public life of the state.

Black plaintiffs challenged the legality of the literacy requirement in court, but without success. In 1936, two black schoolteachers who had been prevented from voting sued their county registrar and the state for a judgment outlawing the literacy test. The state supreme court, limiting its inquiry to whether the test was correctly applied in the teachers' case, ruled that they were clearly literate and qualified to vote, a fact the defendants had admitted. The literacy test itself, however, was not struck down as a voting prerequisite. In a curious non sequitur, the court endorsed the test, saying that "this constitutional amendment providing for an educational test . . . brought light out of the darkness as to education for all people of the state. Religious, educational, and material uplift went forward by leaps and bounds."[20]

The courts continued to protect North Carolina's registration procedures

through the 1950s. In 1959, the U.S. Supreme Court affirmed a decision by the state supreme court upholding the use of the literacy requirement.[21] In 1961, the state supreme court qualified its earlier rulings, striking down the practice of requiring registrants to write a chosen section of the North Carolina constitution from dictation, but it upheld the requirement that all applicants of uncertain ability be required to show a capacity to read and write a section of the state constitution.[22] The ruling seemed to have little effect in easing restrictions, as evidenced by 750 complaints filed by blacks in 1962 with the North Carolina Advisory Committee to the Civil Rights Commission, documenting discriminatory application of the literacy test.[23]

Meanwhile, the black electorate struggled to grow. In 1940 only 5 percent of the eligible black electorate was registered, but by 1956 the fraction had risen to one-fifth, by 1960 to one-third, and by 1965 to over 45 percent.[24] The proportions registered were lower in the heavily black counties in the east than in the whiter western counties. In 1960, in the twenty-three majority-black counties, fewer than 20 percent of eligible blacks were registered.[25]

In contrast, pockets of black voting and even black officeholding developed in some Piedmont cities. For example, in Winston-Salem a militant black labor union local began building a black electorate in the mid-1940s, and by 1947 a black was voted onto that city's board of aldermen, becoming the first black public official elected in North Carolina in this century. In Durham an upper-middle-class black community had begun a political organization in the 1930s. This group, which was associated with the city's black insurance and banking industry, increased the local black electorate until it became an important force in local elections, and by 1953 a black insurance executive had been elected to the city council. The tradition of black politics continued in these cities until, by 1960, 62 percent of Durham's eligible black population was registered, as was 54 percent of Winston-Salem's, 34 percent of Greensboro's, and 27 percent of Raleigh's.[26]

After blacks were elected to public office in several cities in the 1940s and 1950s, concerned whites borrowed from the earlier strategies of the 1870s and 1880s to dilute black voting strength by changing district lines or electoral systems. In Winston-Salem, the prospective election of a black led to a demand for citywide elections, but this was denied by the city council. After the election of a black to the board of aldermen in 1947, however, a new single-member-district plan was implemented. This arrangement split a previous two-member district and localized black influence in a single "safe" ward.[27] When a black won election in 1953 and 1955 in Wilson, a small city in eastern North Carolina, the legislature changed the city's electoral system from district to at large, and Wilson's city council became all-white again.[28]

The state legislature mounted a more concentrated effort to dilute black votes in the 1950s as the threat of the black vote loomed larger and the national legal campaign against disfranchisement gained momentum. While passing anti-integration legislation for the public schools, the general assembly also passed a law that would prohibit "bullet voting" in fourteen mostly eastern counties. The law invali-

dated votes cast for only one candidate in a multimember district, and was obviously aimed at black strategies of voting for a single black, thereby denying any of their votes to a competitor who might defeat him. (This act was declared unconstitutional by the federal courts in 1972.)[29] Lawmakers also turned aside a bill that would have made school board positions elective instead of appointive.

The Effect of the Voting Rights Act on Voter Registration

Section 2 of the Voting Rights Act prohibited all practices that denied or abridged the right to vote on grounds of race or color. Section 4 identified "covered jurisdictions" for special treatment if they used a literacy test and had had a black registration rate on 1 November 1964 or a black turnout rate in the 1964 presidential election of less than 50 percent. Six southern states were entirely covered on these grounds, and some forty of North Carolina's one hundred counties were covered by this presumption of discriminatory use of a test. Wake County, which includes Raleigh, the state capital, successfully sued for exemption, while Gaston County was denied exemption in an important case defining a limit on the possibilities of becoming exempt.[30] In the latter case, the Supreme Court held that the Gaston County black schools were so poor that no literacy test could avoid discriminating on the grounds of race.[31]

Literacy tests were automatically suspended in all covered counties. The act also provided that federal registrars or observers could under certain conditions be sent into covered jurisdictions by the Attorney General. Although the state's black leadership urged oversight from Washington, no North Carolina county was ever designated for federal examiners.[32]

Therefore, when we assess the direct consequences of the act on voter registration in North Carolina, we are assessing suspension of the literacy test in the covered counties. (The test continued to be used in some noncovered counties as late as 1970, the year that an amendment to the Voting Rights Act suspended literacy tests nationwide; the state board of elections did not instruct these counties to discontinue such use until December 1970.)[33] The political atmosphere may well have changed after passage of the act, and this may have affected behavior in both covered and uncovered jurisdictions. We do not have direct knowledge that literacy tests were suspended in the covered jurisdictions, although this is implied by the fact that no examiners were sent.

Thompson has carefully documented changes in voter registration in both covered and uncovered counties. He found that the percentage of eligible blacks registered to vote in the covered counties increased from 32.4 percent in 1964, before passage, to 54.0 percent in 1976—a change of over 20 percentage points. In the same period, white registration increased by only 3.1 points, to just over 80 percent. There was less than 1 percentage point net change in both white and black registration in forty matched counties that were not covered by the act.[34] There have been even more spectacular gains since 1965 in individual covered counties.

In thirty, black voter registration rates have doubled, while in seven, they have more than tripled; in three, blacks have become a majority of the registered electorate.[35]

Thompson's figures provide powerful support for the claim that coverage made a difference, even without external enforcement by federal examiners. They suggest also that section 4 standards (less than 50 percent black registration or total voter turnout) were reasonable ways to identify discriminatory use of the literacy test. A measure of what the act did *not* do for voter registration can be found in the continuing difference as of 1976 between black and white registration rates in both covered counties (54 and 81 percent, respectively) and uncovered ones (65 and 89 percent, respectively), and also in the difference between black registration rates in the covered and uncovered counties (54 and 65 percent, respectively).[36]

In the state as a whole, there has been a unique pattern of change since 1965. There has not been the dramatic statewide increase in black registration found in some states, such as Mississippi, where black registration was previously much lower than in North Carolina. Instead, there has been a convergence of black and white rates that reflects slow and steady growth of black registration and a slight decline in that of whites. The fraction of the electorate that was black grew from 18 to almost 27 percent in covered counties between 1966 and 1988, while the fraction grew from 12 to 15 in the uncovered counties in the same period. As of 1990 the statewide proportion of eligible blacks registered (63 percent) approached that for whites (69 percent), while 47 percent of the Native American population was registered.

The Effect of Section 5 on Election Laws

Section 5 demands that proposed electoral changes in covered jurisdictions be precleared—submitted for approval to the U.S. Attorney General or to the Federal District Court for the District of Columbia. Such changes include "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." According to Thernstrom, preclearance had originally a very limited aim, "guarding against renewed disfranchisement, the use of the back door once the front door was blocked,"[37] although, according to the Civil Rights Commission, "Congress intended to include a very broad range of subjects under section 5."[38]

There has been a variety of efforts in covered states to dilute the impact of the newly enfranchised black electorate by, for example, redrawing district lines or shifting from single-member districts to at-large elections. Some of the most flagrant of these efforts were in Mississippi.[39] In *Allen v. State Board of Elections* (1969),[40] the Supreme Court held that section 5 preclearance applied to such changes. Speaking for the Court, Chief Justice Warren said that the Voting Rights Act "was aimed at the subtle, as well as the obvious, state regulations which would have the effect of denying citizens their right to vote because of race."[41]

In response to the act's unprecedented challenge to prevailing practice, North Carolina quickly employed some of the strategies used by Deep South states to dilute the emerging black vote. The general assembly relinquished its central powers and authorized some localities to alter their election procedures. In a 1966 special session, the legislature authorized forty-nine boards of county commissioners that had had some form of election or residency requirements by districts to adopt an at-large election system. Twelve counties took immediate steps: six converted to at-large elections, and six changed the boundaries of their wards. The state also shifted from past practice and required at-large election of all school boards.

The North Carolina government's extensive revisions of election law took place under the purview of the Voting Rights Act and the preclearance requirements of section 5, but very few changes were submitted for review and none was objected to before 1971. Of the 88 changes in election law proposed between 1965 and 1971, only 12 were submitted, and all 12 were approved. In 1971 the Justice Department interceded in 6 cases to block the continued application of the literacy test, and it ruled on a few at-large election schemes, annexations, and the procedure for voting for multimember house and senate seats. According to Suitts's 1981 tabulation, there were 193 legislative acts passed by the general assembly between 1965 and 1979 affecting local electoral schemes in the forty covered counties. Of these, only about 20 percent were submitted for review under section 5.[42] Subsequently the number of such acts has risen, and, according to Justice Department data that do not entirely agree with Suitts's figures, a total of 4,416 changes were submitted from North Carolina between 1970 and 1987. According to the same data, 107 objections were interposed in the same period.[43] (Some apparent discrepancies between the tabulations may be due to the fact that Suitts's unit of analysis was individual laws, each of which may have included multiple changes in voting procedures.)

Although Suitts acknowledged some margin of error in his figures, he argued that "the overwhelming majority of legislative changes has not been submitted for review and does not comply with the law. . . . A benign explanation for these nonsubmissions has not been readily apparent."[44] He contended that North Carolina's failure to submit changes could not be attributed to ignorance of the act's requirements. The fact that some submissions have been made for each of the covered counties indicates that officials have made selective judgments about what needed to be submitted for review.

While North Carolina lawmakers were not eager to change the racial complexion of state politics, they may not have been as conspiratorial as Suitts implied. Given a Justice Department that did not vigorously act on its own interpretations, it was up to states and localities to initiate the process of preclearance. North Carolina had to wait along with the rest of the South for the language of the Voting Rights Act to be interpreted in the series of precedent-setting lawsuits of the late 1960s and 1970s—particularly *Allen*—over what kinds of legislative changes required preclearance. The increase in submissions in the 1980s suggests that *Gingles* helped to further clarify what issues were subject to preclearance. North

Carolina has the added confusion of having only forty of its one hundred counties covered by the federal mandate. Decisions regarding election law and the Voting Rights Act have thus rested with forty different elections boards and county attorneys, who have little or no supervision from the legislature or the state board of elections.

The Election of Blacks to Public Office

The remainder of this chapter assesses the consequences of the Voting Rights Act on the election of blacks to public office. This is, of course, only one of the consequences that might be investigated. There are many kinds of public policy results to be expected from the effective enfranchisement of the black population.[45] The election of blacks is by far the most easily measured—the main reason it is the focus of our attention. In effect, we are investigating in this section the effect of the Voting Rights Act on descriptive representation (based on race) rather than on substantive representation (based on interests and preferences). As Swain documents and explains, the relationship between descriptive and substantive representation of African Americans is far from simple. Fortunately, the election of blacks to public office is not the only way to assure that black interests are considered in public life.[46]

As the unique experience of the urban Piedmont showed and the subsequent history of the state in the wake of the Voting Rights Act continues to illustrate, white voters have not uniformly refused to vote for black candidates. Furthermore, a black electorate has often supported and at times provided the margin of victory for sympathetic white candidates.

As of 1990 there were 453 black elected officials in North Carolina serving in a variety of state, county, and municipal posts.[47] At each level of government the act's effect on black voting strength, districting arrangements, minority officeholding, and the relationship between minority candidates and white voters is different.

Statewide Executive and Congressional Office

Before the 1992 election, no blacks had been elected to statewide executive office or to Congress, though a few had run. Reginald Hawkins ran for the Democratic gubernatorial nomination in 1968 and 1972. He came in third both times, with 18.5 and 8 percent of the votes cast in the first primary, respectively. In 1976, Howard Lee, a black former mayor of majority-white Chapel Hill, narrowly led in the first primary for the Democratic nomination for lieutenant governor. But Jimmy Green (a white who had received 27.35 percent to Lee's 27.71) defeated Lee in the runoff by 56 to 44 percent. In 1977 Lee was appointed head of the state Department of Environment, Health and Natural Resources, a post he held for over four years. In February 1990 he was appointed to fill a vacancy in the state senate, and was elected to that post later in that year.

Lee's experience, along with that of some blacks running for congressional

offices discussed below, contributed to a belief that runoffs reduced the chances for blacks to win nomination and election to public offices that they might otherwise win. In response to pressures from the black community, the state law was changed in 1989 to provide that a runoff be held only if the leading candidate in the first primary received less than 40 percent of the vote.

In 1990, Harvey Gantt, a black former mayor of majority-white Charlotte, sought the Democratic nomination for the United States Senate, and won the first primary with 37.51 percent, which was short of the new threshhold. Even though a second primary was called, forcing a two-person race between a white and a black, Gantt was able to win the nomination with almost 57 percent, showing that in a Democratic primary, a runoff provision does not necessarily disadvantage a black candidate in a majority-white electorate. In a race that commanded international attention, Gantt received 47 percent of the general election vote against three-term incumbent Jesse Helms, even though Gantt had led in some polls taken before the final week of the campaign. As the figures below indicate, Gantt's losing margin was similar to that of the three white candidates who had lost to Helms in earlier senate races, even though Helms introduced racial appeals in the campaign. (The main example was a television advertisement suggesting that white workers would lose jobs if the congressional civil rights bill supported by Gantt were to pass.)

1972	Helms	54%	Galifianakis	46%
1978	Helms	55%	Ingram	45%
1984	Helms	52%	Hunt	48%
1990	Helms	53%	Gantt	47%

Black candidates ran strong races to be the Democratic nominee for Congress in the Second District—38 percent black in 1980—but none won. In 1972, Howard Lee ran unsuccessfully against incumbent L. H. Fountain, who was first elected in 1952. In 1982, the year in which Fountain retired, H. M. "Mickey" Michaux ran first with 44 percent in the first primary to 33 percent for I. T. "Tim" Valentine. Valentine subsequently won the second primary with 54 percent and then won the general election; he has held the seat since that time. This election inspired much of the effort to create the threshold change for avoiding a second primary.[48] Valentine was challenged in the Democratic primary in 1984 by Kenneth Spaulding, a black, who lost with 48 percent.

Statewide Judicial Office

More than a dozen blacks have been elected to statewide judicial office. In the state judicial system, overhauled in the mid-1960s, there are three tiers that involve statewide election: the supreme court, the court of appeals, and the superior court.

Elections to all three are partisan. Vacancies are filled by gubernatorial appointments, which last until the next general election, at which time the seat is filled for the remainder of the original term.[49]

The supreme court has seven judges elected to eight-year terms. One of these judges, Henry Frye, is black. Justice Frye was appointed to fill a vacancy in 1983, elected in 1984, and reelected to a full term in 1988 The court of appeals has twelve judges elected for eight-year terms. Of these twelve seats, one has been occupied by black judges since 1978, and another since 1982. Blacks first came to these seats by appointment, but they have won five different statewide elections for the two seats. The only black to lose was a Republican appointee who lost to a black Democrat in the general election.

One seat on the court of appeals has been occupied continuously since 1982 by Judge Clifton E. Johnson, who was first appointed and then elected in that year, and reelected in 1990. The other seat has had four black occupants since 1978, when Judge Richard Erwin was appointed and subsequently elected. He resigned in 1980, and was replaced in 1981 by Judge Charles L. Becton, who was elected in 1984 and resigned in 1990. He was replaced by Judge Allison Duncan, a Republican, who was defeated for reelection by Judge James A. Wynn, Jr., another black, in that same year. Other than Judge Duncan, all were Democrats.

The trial level of the statewide judicial system is called the superior court. These judges are nominated in partisan primaries in electoral districts, but they are elected in statewide partisan elections for eight-year terms. The question whether to elect trial court judges from districts or statewide has been a serious and persistent one in North Carolina since Reconstruction. In 1868 the Republican-dominated constitutional convention first created a system of popularly elected superior court judges. The convention mandated that the elections be held in districts in order to ensure that Republican strength, which was concentrated in pockets across the state, would be protected. In 1875, after regaining control of the legislature, the Democrats amended the state constitution to shift to statewide election of superior court judges. This change was intended to increase Democratic power across the state, dilute the Republican strongholds, and prevent the election of black judges. Statewide election of superior court judges remained in place until it was amended by a 1987 lawsuit inspired by the Voting Rights Act.

The number of superior court judges is set by the general assembly. Before 1987, there were sixty-four "regular" judges, supplemented by from two to eight "special" judgeships. The special judgeships were created by the general assembly and the judges were appointed by the governor for four-year terms. Between 1900 and 1986, two blacks had served as "regular" superior court judges. One was Clifton Johnson, mentioned above, who was elected in 1978 and subsequently elevated to the court of appeals in 1982. The other was Terry Sherrill, who resigned in 1990 after he was convicted for cocaine possession. The special judgeships had been an important vehicle for the appointment of blacks in the 1960s and 1970s, but few became regular judges.[50]

The system of selecting superior court judges was changed in 1987 in response

to several lawsuits filed under the Voting Rights Act. The first suit, *Haith v. Martin*,[51] decided in 1985, determined that the state had failed to submit for preclearance several acts regarding judicial election passed in the 1960s and 1970s. After subsequent submission, the Department of Justice rejected features involving numbered seats and staggered terms, both of which can sometimes operate to dilute black votes through frustrating the black strategy of single-shot voting.

The state changed the law in response to the numbered seat issue, but was challenging the decision on staggered terms when another suit was filed under amended section 2. *Alexander v. Martin*[52] challenged the use of staggered terms, large multijudge districts for primaries, and statewide general elections. The remedies under section 2 could be much broader than simply rejection of the proposed changes, as provided by the preclearance features of section 5, and the state responded to the suit by changing the law before a judgment was issued.

The new law was introduced by a black representative from Durham, and after it passed in 1987,[53] the relevant litigation was dropped. The legislation created nine new judgeships and eliminated the special judges. It subdivided six former single-county, multijudge districts into multiple districts providing for several safe black seats, and it eliminated staggered terms in these counties.[54] The law also split ten multicounty, multijudge districts into twenty single-judge districts, of which two had majorities of black or other minority groups.[55] Subsequently, eleven black judges and one Native American were elected to superior court. Two of the black judges were elected from seats that were not created especially to elect blacks.[56]

The experience with judgeships shows that it is possible for blacks to be elected statewide in North Carolina, a state with a black population of 22 percent. All of the elections have come after passage of the Voting Rights Act. Most of them have been a direct result of litigation under the 1982 amendments to the act, and have been based on nominations from districts designed to generate black nominees. Still, several elections, especially those to the supreme court and the court of appeals, demonstrate the possibility that blacks can win open statewide election under more normal circumstances. The general rule seems to have been for black judges to run for reelection as incumbents after initially gaining the office by appointment. Since judicial elections did not in the past involve much campaigning, they were not very visible. This fact as well surely helped blacks to win these statewide elections. However, this advantage for blacks may not last because partisan competition and open campaigning for judicial office have increased steadily in recent years.[57]

The General Assembly

Black representation in the state legislature increased substantially after 1968, when the first black in this century was elected to the house (see table 6.10). The number rose by 1990 to 5 blacks among 50 senators, and to 13 blacks among 120 house members. The largest jump was from 3 to 11 black members of the house after the 1982 election. There was also one Native American, representing Robeson County. The post-1982 changes followed the 1982 filing of *Gingles v. Edmisten*,[58] which was to become on the national level one of the most important cases implementing the Voting Rights Act, but change in North Carolina came before the decision was handed down.

The suit challenged the 1981 redistricting of general assembly seats and the provision of the North Carolina constitution that counties not be divided in creating election districts. The suit contended that the constitutional provision had been in use since 1967, without having been precleared as required by section 5. After the suit was filed, the state did submit the questioned practices, and both the constitutional provision and the 1981 districting plan were denied preclearance.

The general assembly responded to the objections by enacting a new redistricting plan that contained five majority-black house districts and one majority-black senate district. As indicated, the result was an increase of eight black house members, although no additional blacks were elected to the senate until 1984. The *Gingles* decision, which was handed down by the district court in 1984 (after the 1982 amendents to the Voting Rights Act became law), rejected the redistricting plan that had been adopted after the suit was brought. In a special session in 1984, the legislature adopted single-member districts in lieu of several former multimember districts, and postponed the primary elections until the new districts could be drawn. The increases that followed the *Gingles* decision were modest in the house (from eleven to thirteen by 1985), but more dramatic in the senate (from one to four by 1989).

The relationship between the act, the *Gingles* case, and increases in the number of blacks in the legislature is complicated While the biggest changes came before the suit was resolved, it would be difficult and unreasonable to deny that they came in response to the filing of the suit. The mere existence of the act was not enough to bring very substantial changes in the election of blacks to the legislature. Private litigation under the act was necessary to get officials to request preclearance as required by section 5. Yet, the initiation of litigation was able to produce substantial changes even before a decision was issued. The court itself acknowledged the claim that the election of additional blacks in 1982 was a special case: "In some elections the pendancy of this very litigation worked a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting."[59] Clearly the threat of litigation under the act is capable of generating changes even before a verdict. North Carolina legislators were doubtless mindful of the *Gingles* experience as they carried out the 1991 redistricting process.

Blacks have achieved an important presence in the general assembly in terms of policy impact and leadership positions.[60] Shortly after Harvey Gantt lost the 1990 election, which, had he won, would have made him the first black U.S. senator from the South since Reconstruction, Daniel T. Blue achieved a different historic first. A five-term (ten-year) member of the house, Blue was chosen speaker of that body. This choice of the Democratic house caucus made him the first black state house speaker in modern southern history.[61]

The more long-term effects of the Voting Rights Act on the general assembly

remain to be seen. The results of the 1990 census have already begun another round of high-stakes redistricting for seats in Congress and in the state house and senate, perhaps the most significant redistricting since passage of the act. While largely beyond the scope of this essay, a more recently recognized and unanticipated effect of the shift to single-member legislative districts in southern states like North Carolina has been to narrow the reach of the black electorate by excluding blacks from larger multimember districts. This in turn has made some Democratic incumbents more vulnerable to Republican challengers. Some formerly heterogeneous multimember districts like Wake County (from which Representative Blue had been elected prior to the 1984 shift) have, in essence, been split into black Democratic, white Democratic, white Republican, and rural and urban districts.

County Commissions

We consider next the relationship between districting arrangements and the election of black and Native American officials in county governments. We begin with counties and follow with cities because counties are more comprehensive administrative units. Every citizen lives in one of these jurisdictions, while not every citizen is included in cities. While we concentrate on county commissions, blacks served in several other county-level offices as of 1990. In addition to the forty-four black county commissioners (roughly 5 percent of the total membership on county boards), there were sixty-four black members of county boards of education and four black sheriffs. Native American officeholding at the county level was limited to three members of Robeson County's seven-member commission and two members of the county board of education, all of whom were elected at large.

The series of tables comparing districting arrangements, minority population, and minority officeholding of counties are designated with an A, while those tables without an A refer to cities.[62] Table 6.1A shows that in 1989, nine out of ten counties had at-large systems for election of county commissioners. Among these counties, there was a positive relationship between the size of the black population in the county and the percentage of commissioners who were black, though at most a quarter of the commissioners were black, even in the eight majority-black counties. The fraction of officials who were minority was consistently less than the minority fraction of the population.

Only four counties had pure district systems. Curiously, none of them was one of the eight counties in which minorities were a majority of the population. The fact that blacks were so underrepresented in majority-black counties retaining at-large schemes would seem to indicate a situation ripe for change in districting arrangements. In the handful of counties with district elections, there was a much more nearly proportionate relationship between the black percentage in the electorate and on the county commission than in the at-large counties in the same population categories. The four counties with mixed systems fell in between.

Table 6.2A, containing longitudinal data, shows that there were small increases in black elected officials between 1973 and 1989 even in majority-white counties

with unchanged electoral systems. This indicates that there were other changes besides electoral arrangements during the sixteen years covered by the table. We should keep in mind that the effects of these nonelectoral changes were also likely to to felt, to some degree, in the counties where the electoral arrangements were changed. Thus, not all changes in black officeholding in these locales can be attributed to the creation of districts. On the other hand, to the extent that the electoral changes were the result of preclearance objections or lawsuits, the counties in which these took place may have been especially resistant to black officeholding.

Still, there is clear evidence that electoral arrangements made a difference. In the three counties that changed from at-large to single-member status between 1973 and 1989, and in the four that changed from at-large to mixed systems, all of the black elected officials were elected after the change. Table 6.3A allows an assessment of the consequences of the electoral arrangements on minority officeholding in counties with mixed plans. In the four counties with both district and at-large components, most of the black commissioners were elected from the districts rather than from the entire county.

Two measures of representational equity are reported in tables 6.4A and 6.5A. One measures the *difference* between the minority percentage in the county population and on the commission, while the other measures the *ratio* of the same percentages. Blacks and Native Americans were consistently underrepresented on county commissions regardless of districting arrangements and time. Nevertheless, the equity measures confirm the observations of tables 6.1A and 6.2A that in majority-white counties single-member districts were the most proportionately representative system, followed by mixed systems. At-large plans were the least proportional. Comparing the equity ratios across time, as table 6.5A does, one can also see that while the ratios in the unchanged counties increased slightly, much more substantial increases occurred after the adoption of some form of district election.

Tables 6.6A and 6.7A allow a more detailed analysis of the influence of district elections in North Carolina counties. The tables compare percentages of minority populations with those of minority elected officials in each of the fifteen wards composing the four counties with single-member district plans. Within these few districts it appears that minorities needed a substantial majority (over 60 percent) before they could be assured of electing their own or of controlling county boards with people of their own ethnic group. (None of the three Native American counties employed district elections.)

City Councils

We now consider the relationship between districting arrangements and the election of black and Native American officials in North Carolina cities. The picture in many ways parallels that presented above for counties. There were 260 black city council members (around 10 percent of the total), 18 black mayors, and 19 black

members of city school boards governing North Carolina cities, towns, and villages.

As table 6.1 shows, over 90 percent of city councils were elected at large, and in them the fraction of minority elected officials was minuscule, even in majority-black municipalities. As with counties, there was a very small number of cities with mixed or single-member district arrangements. These were the cities in which the percentage of minority council members approximated the minority percentage of the population.

Over time there have been dramatic increases in the fraction of black elected officials in most of the groups of cities with changed arrangements, regardless of the system adopted. As table 6.2 shows, in the great majority of cities there was no change in electoral arrangements, and in such cities there was much less of an increase in the proportions of minority officials than there was in the changed cities. Even in the 144 majority-black cities, the jump in black officeholding between 1973 and 1989 was many times higher in the changed as compared with the static at-large plans.

There was an important difference between city and county patterns that is not shown in the tables. For both counties and cities, some at-large jurisdictions had district residence or nomination requirements. Counties with these arrangements, like pure at-large systems, elected very few blacks. In the cities, however, this system did almost as well as single-member districts in producing minority officials. We speculate that this is because minority residential concentration was greater in cities than in counties. When a district is largely black, a candidate who must be a resident or nominated by residents is likely to be black. Under such circumstances, district residence or nomination with at-large election can approach the success possible in single-member districts in securing the election of blacks. We suspect that these conditions of black residential concentration in districts are more likely to exist in cities than in more sparsely populated counties.

In cities with mixed plans (table 6.3), districts produced substantially larger numbers of blacks than did the at-large system. This is not surprising, though it is an even more dramatic pattern than that found in the mixed systems in the counties. Of the fifteen black council members from the fourteen cities with mixed plans, only one was elected at large. Here too, we suspect that the districting arrangements paralleled segregated residential patterns in the cities more than in the counties. That is, we expect more black-dominated districts in cities than in counties, and therefore even more blacks are likely to be elected from districts under these circumstances. A comparison between counties and cities of the numbers of districts in each population category (tables 6.6A and 6.6) bears out this expectation.

In single-member districts in the counties, 27 percent of the districts had majorities composed of minority groups, while roughly 42 percent of such districts in the cities are dominated by minorities. Ironically, residential segregation of the races is important for allowing single-member districts to facilitate the election of blacks. In the absence of such segregation, single-member districts are far less

effective in doing so. These points are illustrated by a Granville County case discussed below.

The equity scores for the changed cities (tables 6.4 and 6.5) were substantially higher than they were in the counties, but differences in scores among the three types of electoral systems were similar to those in the counties. In no case were minorities better represented than whites, but mean equity ratios in majority-white cities ranged between 0.82 and 0.98 for blacks and Native Americans combined in single-member district and mixed systems. In none of the at-large cities did the ratio rise above 0.14.

Tables 6.6 and 6.7 allow a more detailed analysis of the influence of district election in North Carolina cities. In contrast to the counties analyzed above, it was possible to elect blacks in city single-member districts where blacks were only a minority of the electorate. Not surprisingly, even larger proportions of council members were black in black-majority districts.

The fact that most North Carolina Native Americans lived in a cluster of towns retaining at-large plans makes it difficult to discuss multiethnic voting within district systems. We can, however, take a closer look at the towns in Robeson County, where the Native American population was concentrated. (All but the county seat of Lumberton operated without district elections.) The voter registration rates for blacks and Native Americans in these towns were both very high. Assuming that Native Americans, blacks, and whites have comparable opportunities to vote, Native Americans were more seriously underrepresented than blacks on the local boards.

The Role of Litigation

As indicated in tables 6.8 and 6.8A, most of the changes from at-large to single-member district or mixed systems in North Carolina counties and cities involved litigation or the threat thereof under section 2 as amended in 1982. Of the forty-nine (fifty-four) changes in county and city electoral systems that took place between 1973 and 1989 (1965 and 1991), twenty-nine (thirty-two) were induced by lawsuits and two (two) by threatened suits. Very few resulted from section 5 preclearance objections. Out of the thirty-four changes induced between 1965 and 1991 by real or threatened legal action, twenty-one occurred in covered jurisdictions, while five counties and eight cities not originally covered under section 5 were successfully sued under amended section 2.

There were very few suits on the county or city level before *Gingles*, and only five suits were filed while that case was pending in district court. Soon after *Gingles* was decided, however, the plaintiffs in a suit against Halifax County won a favorable decision.[63] In response to these decisions, at least thirty lawsuits were filed in the state pursuant to the Voting Rights Act, and at least five more controversies were resolved before filing by the threat of litigation. The use of at-large elections was challenged for at least twelve cities or towns, twenty counties, and

seven boards of education. The majority of these suits were sponsored by the NAACP or the NAACP Legal Defense and Educational Fund. North Carolina's voting rights case law has been constructed largely by a group of committed black and white attorneys: Leslie Winner, Romallus Murphy, Ronald Penny, Angus Thompson, and a few others.

The results of the litigation have been basically favorable to the plaintiffs, resulting about half the time in a negotiated agreement regarding the use of some districts and some at-large seats before the case was even brought to trial. In only two lawsuits were plaintiffs offered no relief.[64] Of the county and city government controversies that have been resolved by the courts, thirteen resulted in pure district systems and nineteen in mixed ones. Four resulted in either limited voting or a combination of districts and limited voting, and two resulted in the elimination of the residency requirement that had been used in conjunction with at-large elections. In several jurisdictions, such as Guilford, Wilson, Halifax, and Pasquotank counties, and in Elizabeth City, High Point, and Lexington, litigation was associated with the creation of majority-black districts from which blacks were elected.[65]

A limit on the possibility of using the Voting Rights Act to secure the representation of blacks has been defined in Granville County.[66] This county was 43 percent black, but a maximum of two of seven districts could be drawn with a black majority. The U.S. Court of Appeals for the Fourth Circuit overturned a district court decision that had mandated a limited voting system. Specifically, the district judge had provided for election of four and three seats at a time for staggered terms, but with each voter allowed only two votes per election. This was seen as a way to allow blacks to control more seats in a county where their substantial numbers were too dispersed to elect commissioners in proportion to their numerical strength. The argument was rejected by the higher court.[67]

Granville County had not contested the fact that the original at-large system was discriminatory, and the plaintiffs had agreed that the county's new plan for seven single-member districts was drawn as well as could be expected, but they still pushed for a limited voting scheme as an alternative. The appellate court rejected the district judge's decision to dismiss the county's plan as an overtly political ruling that substituted the judge's wisdom for the county's preference.

The influence of the Voting Rights Act has also been felt on the remaining twenty-five county commissions and city councils that appear to have shifted from at-large systems "voluntarily," that is, without the impetus of a lawsuit or threatened litigation. We suspect that the fear of possible litigation, especially in the post-*Gingles* environment, was enough to convince moderate white politicians who may have been wavering to undertake reform. Tables 6.8A and 6.8 reveal that all five of the counties and nine of the fifteen cities which shifted on their own (i.e., without a lawsuit filed) to single-member or mixed plans were subject to the direct scrutiny of the Justice Department under section 5. In retrospect, the fact that plaintiffs have tended to seek relief under section 2 does not diminish the perceived power of section 5 with its specific coverage. The minority population of the

counties and cities that changed voluntarily is also, on average, about 9 percentage points higher than the minority population in the counties and cities undergoing legal action. While not a startling difference, the political incentives of a larger black population may have made the extra push of a lawsuit unnecessary.

A comparison of tables 6.8A and 6.8 also reveals that litigation inspired by the act appears to have been much more instrumental in altering county systems than municipal bodies. About three-fourths of the changes in county government were the result of lawsuits, while fewer than half of the new city systems had their genesis in court. While the voluntary counties were not geographically clustered, many of the cities that implemented changes on their own were large (over 25,000) and were located in the Piedmont region of the state (for example, Winston-Salem, Tarboro, Wilson, Raleigh, Cary, Charlotte, Greensboro, and Fayetteville). These facts bear out a general pattern in which the racial politics of the urban Piedmont has been relatively more progressive than in the rest of North Carolina.

The Granville case may be an important indicator for the future of litigation under the Voting Rights Act concerning methods of election in North Carolina. Specifically, the appellate ruling established the precedent for balancing plaintiffs' desires with the ability of local governments to comply within the bounds of reason and fairness. More generally, the case suggests that after the first wave of suits following *Gingles*, which aimed at some of the most obvious county and city targets, future legal battles will more likely occur in locales where there are not simple remedies for an underrepresentation of blacks in elective office. On the other hand, the evidence from tables 6.5 and 6.5A, in particular, on majority-black jurisdictions with at-large systems suggests that there are still many locales awaiting basic reform.

Conclusion

The Voting Rights Act of 1965 has had a substantial impact in North Carolina. It capped the sixty-five-year struggle of black Tar Heels to rebuild the political community destroyed by disfranchisement and opened up an entirely new realm of possibilities. Most immediately, the act facilitated substantial increases in black voter registration in the covered counties. On the other hand, the preclearance provisions were largely ignored by the state and the Justice Department until the 1970s. It took litigation to change this. The most notable cases targeted the judicial system and the state legislature, and the response was substantial.

The possibility of minority voters suing to demand preclearance obviously made a difference in the behavior of white officials. State resistance was not substantial in the case of the judicial system, and the state's resolution of the problem led to the withdrawal of the lawsuit. For the legislative changes, the state did not give up its resistance until *Gingles* was resolved. The 1982 amendments to section 2 have surely made a difference in North Carolina by calling attention to the possibility of the use of the act to block some changes and to secure others. The changes in the

judicial election system show that substantial "voluntary" compliance may occur when litigation becomes a real option.

Recently, political and legal energies have been focused on North Carolina counties and cities, for it is in these jurisdictions that the act has opened up both the greatest opportunities and challenges for black electoral equality. Litigation inspired by the act has led to the adoption of districting arrangements that, in turn, have led to much more nearly proportional representation for blacks. For a variety of reasons, however, an overwhelming number of cities and counties have retained at-large elections, and blacks and Native Americans continue to be underrepresented on local boards, even when they are a majority of the population.

The North Carolina experience, however, raises questions about the common presumption that blacks cannot be elected in majority-white districts. On the statewide level, Harvey Gantt came as close to winning a U.S. Senate seat as had three previous white opponents of Senator Helms. Although nine of the judges elected statewide are products of a nominating system that is designed to assure the choice of a black, the fact remains that there are fourteen black judges elected statewide, and five of these are not products of such engineering. In 1991 five black members of the state house of representatives (including Representative Michaux) and the one Native American member were elected from majority-white multimember districts. The remaining eight black house members came from majority-black single-member districts. In the state senate Howard Lee and one other black senator served majority-white multimember districts. The other three black senators were elected from majority-black single-member districts.

There have also been important local examples of blacks being elected in majority-white districts. Howard Lee's election as mayor of Chapel Hill in 1969 (then about 13 percent black) was the first modern election of a black to such a position in a predominantly white community in the South. Harvey Gantt in 1983 was elected mayor of Charlotte, the state's largest city, which was then about 31 percent black. At this writing, the sheriff and the register of deeds of Wake County, the site of the state capital, are black, as is the district attorney for Orange and Chatham counties. However, as our discussion of local elections makes clear, blacks, whatever the election system, are still not elected to county boards and city councils to a degree that approaches their fraction of the population. This is particularly true in at-large jurisdictions.

North Carolina's progressive image has surely exaggerated the nature of the reality, as many of the observations in this essay make clear. It is true that the victories of Justice Frye, Speaker Blue, Representative Michaux, Senator Lee, Mayor Gantt, Sheriff Baker, and numerous other minority candidates prove that North Carolina whites are not consistently unwilling to support blacks for public office. But it cannot be ignored that in voting rights as in school desegregation, the state has also resisted movements toward racial equality and fairness. Many of the changes regarding voting rights issues would not have been made without the reality or the threat of litigation.

The Voting Rights Act has clearly reshaped North Carolina politics, both in

increasing black participation and in securing procedural arrangements that facilitate the possibility of electing blacks to public office. North Carolina's experience a quarter century after passage of the act suggests both the importance of the federal mandate and the uniqueness of the state within the region. It is also clear that there are many perplexing issues regarding voting rights and political equality still to be faced.

TABLE 6.1
Minority Representation on Council in 1989 by Election Plan, North Carolina Cities with 10 Percent or More Combined Black and Indian Population in 1980

Type of Plan by % Minority in City Population, 1980	N	*Mean % Minority in City Population, 1980*			*Mean % Minority on City Council, 1989*		
		Black	*Indian*	*Black + Indian*	*Black*	*Indian*	*Black + Indian*
SMD plan							
10–29.9	0	—	—	—	—	—	—
30–49.9	9	39.8	0.2	**39.9**	39.3	0.0	**39.3**
50–100	4	47.2	8.8	**56.0**	44.0	2.8[a]	**46.8**
Mixed plan							
10–29.9	5	22.0	0.2	**22.2**	18.2	0.0	**18.2**
30–49.9	8	32.7	0.4	**33.1**	31.8	0.0	**31.8**
50–100	1	76.4	0.1	**76.3**	40.0	0.0	**40.0**
At-large plan[b]							
10–29.9	346	18.8	0.4	**19.2**	2.7	0.0	**2.7**
30–49.9	216[c]	38.2	1.0	**39.2**	5.3	0.0	**5.3**
50–100	140	56.5	9.0	**65.5**	8.5	0.7[d]	**9.2**

Note: In tables 6.1–6.7A, the "Black + Indian" percentages are not the summed row values of blacks and Indians. Rather, these percentages are derived from the raw data.

[a] Lumberton had one Native American on its nine-member board in addition to three blacks

[b] The at-large cells include nineteen cities that were "other" systems, i.e., systems that had a residence requirement and/or nomination requirement.

[c] Durham had six members elected at large and six elected at large to wards. There were seven blacks on the board.

[d] Pembroke's board was 100 percent Native American. It was the only city other than Lumberton with Native Americans on the city governing body.

TABLE 6.1A
Minority Representation on Commissioners Court in 1989 by Election Plan, North Carolina Counties of 10 Percent or More Black and Indian Population in 1980

Type of Plan by % Minority in County Population, 1980	N	*Mean % Minority in County Population, 1980*			*Mean % Minority on County Commission, 1989*		
		Black	*Indian*	*Black + Indian*	*Black*	*Indian*	*Black + Indian*
SMD plan							
10–29.9	1	25.0	0.4	**25.4**	14.3	0.0	**14.3**
30–49.9	3	37.5	0.1	**37.6**	30.5	0.0	**30.5**
50–100	0	—	—	—	—	—	—
Mixed plan							
10–29.9	1	26.5	0.3	**26.8**	14.3	0.0	**14.3**
30–49.9	3	38.6	0.8	**39.4**	12.2	0.0	**12.2**
50–100	0	—	—	—	—	—	—
At-large plan[a]							
10–29.9	29	17.9	11.5	**29.4**	5.8	0.0	**5.8**
30–49.9	26	37.8	0.6	**38.4**	5.2	0.0	**5.2**
50–100	8	50.8	6.6	**57.4**	25.0	5.4[b]	**30.4**

[a] The at-large category includes thirty-four counties with "other" types of at-large systems, i.e., those combining at-large election with district residency and/or nomination requirements. Twelve of these had a 10–29.9 percent minority population, and about 6 percent of their board membership was minority. Sixteen had a 30–49.9 percent minority population, and just over 3 percent of their commissioners were minority. Six of these counties were majority black, and their boards were 20 percent minority.

[b] Robeson County had three Native Americans on its seven-member county commission, in addition to four whites. The population of the county was 35 percent Native American and 25 percent black. The commissioners were nominated by district but elected at large. Robeson was the only county with Native Americans on its governing body.

TABLE 6.2
Changes in Minority Representation on Council between 1973 and 1989, North Carolina Cities with 10 Percent or More Combined Black and Indian Population in 1980[a]

Type of Change by % Minority in City Population, 1980	N[b]	Mean % Minority in City Population, 1980			Mean % Minority on City Council					
					Before Change (1973)			After Change (1989)		
		Black	Indian	Black + Indian	Black	Indian	Black + Indian	Black	Indian	Black + Indian
Changed Systems										
From at-large to SMD plan										
10–29.9	0	—	—	—	—	—	—	—	—	—
30–49.9	6	40.7	0.2	**40.9**	5.2	0.0	**5.2**	36.0	0.0	**36.0**
50–100	3	54.9	0.0	**54.9**	5.6	0.0	**5.6**	47.6	0.0	**47.6**
From at-large to mixed plan										
10–29.9	5	22.0	0.3	**22.2**	8.3	0.0	**8.3**	18.2	0.0	**18.2**[c]
30–49.9	7	33.2	0.5	**33.7**	11.2	0.0	**11.2**	32.3	0.0	**32.3**
50–100	1	76.3	0.1	**76.4**	0.0	0.0	**0.0**	40.0	0.0	**40.0**
Unchanged Systems										
At-large										
10–29.9	346	18.8	0.4	**19.2**	0.8	0.0	**0.8**	2.7	0.0	**2.7**
30–49.9	216	38.2	1.0	**39.2**	1.2	0.0	**1.2**	5.3	0.0	**5.3**
50–100	140	56.5	9.0	**65.5**	1.9	0.0	**1.9**	8.5	0.7	**9.2**

[a] The cells in this table submerge in the general at-large categories the cities in the "other" category of at-large election and district residency and/or nomination requirements. Four cities shifted from simple at-large to "other" at large, and two with majority-black populations went from having 0 to 60 percent minority membership on their city boards. Four cities shifted from "other" to single-member districts. Two had a 30–49.9 percent minority population and one was majority-black. In all three, the percentage of minority officials on city boards rose from between 0 and 0.35 percent to almost 43 percent. Three cities shifted from "other" to mixed systems. In the two cities 30–49.9 percent minority, the percentage of minority officials rose from 8.35 to 41.7 percent. Fifteen cities retained their "other" systems through 1989 and so remained "unchanged," but the percentage of minority officials rose. Twelve of these cities had a 10–29.9 percent minority population, and the percentage of minority officials increased from 5.4 to 13.1 percent. Two cities had a 30–49.9 percent minority population, and their percentage of minority officials jumped from 8.4 to 37.5 percent. In the one majority-black city that retained its "other" system, the percentage of minority officials stayed at 20 percent.

[b] Five cities are excluded from this table because shifts from at-large systems occurred before 1973. The five are composed of one mixed system and four single-member districts. The cities are Tarboro, Winston-Salem, Raleigh, Plymouth, and Lumberton.

[c] This picture is somewhat distorted by lumping the "other" at-large and the simple at-large categories together. The two pure at-large cities in this cell went from 0 to 16.7 percent minority officials when they changed from at-large to mixed. The one "other" at-large city lost minority representation (16.7 to 0 percent) when it shifted from "other" at-large to mixed.

TABLE 6.2A
Changes in Minority Representation on Commissioners Court between 1973 and 1989, North Carolina Cities with 10 Percent or More Combined Black and Indian Population in 1980[a]

Type of Change by % Minority in County Population, 1980	N[b]	Mean % Minority in County Population, 1980			Mean % Minority on County Commission					
					Before Change (1973)			After Change (1989)		
		Black	Indian	Black + Indian	Black	Indian	Black + Indian	Black	Indian	Black + Indian
Changed Systems										
From at-large to SMD plan										
10–29.9	1	25.0	0.4	**25.4**	0.0	0.0	**0.0**	14.3	0.0	**14.3**
30–49.9	2	34.9	0.1	**34.8**	0.0	0.0	**0.0**	35.8	0.0	**35.8**
50–100	0	—	—	—	—	—	—	—	—	—
From at-large to mixed plan										
10–29.9	1	26.5	0.3	**26.8**	0.0	0.0	**0.0**	14.3	0.0	**14.3**
30–49.9	3	38.6	0.1	**38.7**	0.0	0.0	**0.0**	12.2	0.0	**12.2**
50–100	0	—	—	—	—	—	—	—	—	—
Unchanged Systems										
At-large plan										
10–29.9	29	18.5	1.6	**20.1**	1.8	0.0	**1.8**	3.4	0.0	**3.4**
30–49.9	25	38.8	0.9	**39.7**	3.2	0.0	**3.2**	4.7	0.0	**4.7**
50–100	8	50.8	6.6	**57.4**	5.0	0.0	**5.0**	25.0	5.4	**30.4**

[a] The categories in this table submerge the 32 counties with "other" at-large systems (those with district residency and/or nomination requirements) into the overall at-large category. Four counties (all less than 30 percent minority) shifted from simple at-large to "other" at-large systems but still had no minority representation on their boards. Three counties (all 30–49.9 percent minority) shifted from "other" at-large to mixed systems. The percentage of minority commissioners rose from 0 to 12.2 percent. Twenty-five counties retained their "other" at-large systems. The change in those 25 counties in minority officeholding over time very nearly paralleled that for the unchanged at-large counties without residence or nomination requirements.

[b] Washington and Cherokee counties were excluded because of the 1973 cutoff date. Washington adopted a SMD system before 1973. Cherokee had a SMD system until 1978 and then shifted to an at-large system.

TABLE 6.3
Minority Representation in 1989 in Mixed Plans by District and At-Large Components, North Carolina Cities with 10 Percent or More Black and Indian Population in 1980

% Minority in City Population, 1980	N	Mean % Minority Councilpersons in District Components, 1989			Mean % Minority Councilpersons in At-Large Components, 1989		
		Black	*Indian*	*Black + Indian*	*Black*	*Indian*	*Black + Indian*
10–29.9	5	31.0	0.0	**31.0**	0.0	0.0	**0.0**
30–49.9	8	35.9	0.0	**35.9**	3.1	0.0	**3.1**
50–100	1	50.0	0.0	**50.0**	0.0	0.0	**0.0**

TABLE 6.3A
Minority Representation in 1989 in Mixed Plans by District and At-Large Components, North Carolina Counties with 10 Percent or More Black and Indian Population in 1980

% Minority in County Population, 1980	N	Mean % Minority Commissioners in District Components, 1989			Mean % Minority Commissioners in At-Large Components, 1989		
		Black	*Indian*	*Black + Indian*	*Black*	*Indian*	*Black + Indian*
10–29.9	1	25.0	0.0	**25.0**	0.0	0.0	**0.0**
30–49.9	3	30.5	0.0	**30.5**	16.7	0.0	**16.7**
50–100	0	—	—	—	—	—	—

TABLE 6.4
Two Equity Measures Comparing Percentage Minority on Council in 1989 with Percentage Minority in City Population in 1980, North Carolina Cities with 10 Percent or More Combined Black and Indian Population in 1980[a]

Type of Plan by % Minority in City Population, 1980	N	Difference Measure (% on Council − % in Population)			Ratio Measure (% on Council ÷ % in Population)		
		Black	*Indian*	*Black + Indian*	*Black*	*Indian*	*Black + Indian*
Changed Systems							
From at-large to SMD plan							
10–29.9	0	—	—	—	—	—	—
30–49.9	9	−0.5	−0.1	**−0.6**	0.98	0.00	**0.98**
50–100	4	−3.1	−6.0	**−9.2**	0.93	0.32	**0.84**
From at-large to mixed plan							
10–29.9	5	−3.7	−0.2	**−4.0**	0.83	0.00	**0.82**
30–49.9	8	−1.0	−0.4	**−1.5**	0.97	0.00	**0.96**
50–100	1	−36.3	−0.1	**−36.4**	0.52	0.00	**0.52**
Unchanged Systems							
At-large plan							
10–29.9	346	−16.1	−0.4	**−16.6**	0.14	0.00	**0.14**
30–49.9	216	−32.9	−1.0	**−33.9**	0.14	0.00	**0.13**
50–100	140	−48.1	−8.2	**−56.3**	0.15	0.07	**0.14**

[a]This table includes five cities not included in tables 6.2 and 6.5, cities that changed prior to 1973.

TABLE 6.4A
Two Equity Measures Comparing Percentage Minority on County Commission in 1989 with Percentage Minority in County Population in 1980, North Carolina Counties with 10 Percent or More Combined Black and Indian Population in 1980*

Type of Plan by % Minority in County Population, 1980	N	*Difference Measure (% on Commission − % in Population)*			*Ratio Measure (% on Commission ÷ % in Population)*		
		Black	*Indian*	*Black + Indian*	*Black*	*Indian*	*Black + Indian*
Changed Systems							
From at-large to SMD plan							
10–29.9	1	−10.7	−0.4	**−11.1**	0.57	0.00	**0.56**
30–49.9	3	−7.0	−0.1	**−7.1**	0.81	0.00	**0.81**
50–100	0	—	—	—	—	—	—
From at-large to mixed plan							
10–29.9	1	−12.2	−0.3	**−12.5**	0.54	0.00	**0.53**
30–49.9	3	−26.4	−0.8	**−27.2**	0.32	0.00	**0.31**
50–100	0	—	—	—	—	—	—
Unchanged Systems							
At-large plan							
10–29.9	29	−12.1	−11.5	**−23.6**	0.32	0.00	**0.20**
30–49.9	26	−32.6	−0.6	**−33.2**	0.14	0.00	**0.13**
50–100	8	−25.8	−1.2	**−27.0**	0.49	0.83	**0.53**

*This table includes two counties not included in tables 6.2A and 6.5A, counties that changed prior to 1973.

Camden, a county with a mix of at-large and multimember districts, is treated as having a mixed plan in this table. Mitchell County shifted to at-large elections after 1989.

TABLE 6.5
Changes in Minority Representation on Council between 1973 and 1989, North Carolina Cities with 10 Percent or More Combined Black and Indian Population in 1980 (Ratio Equity Measure)

Type of Change by % Minority in City Population, 1980	N	*Minority Representational Equity on Council*					
		1973			*1989*		
		Black	*Indian*	*Black + Indian*	*Black*	*Indian*	*Black + Indian*
Changed Systems							
From at-large to SMD plan							
10–29.9	0	—	—	—	—	—	—
30–49.9	6	0.12	0.00	**0.12**	0.89	0.00	**0.89**
50–100	3	0.10	0.00	**0.10**	0.87	0.00	**0.87**
From at-large to mixed plan							
10–29.9	5	0.38	0.00	**0.38**	0.83	0.00	**0.82**
30–49.9	7	0.34	0.00	**0.33**	0.97	0.00	**0.96**
50–100	1	0.00	0.00	**0.00**	0.52	0.00	**0.52**
Unchanged Systems							
At-large plan							
10–29.9	346	0.04	0.00	**0.04**	0.14	0.00	**0.14**
30–49.9	216	0.03	0.00	**0.03**	0.14	0.00	**0.13**
50–100	140	0.03	0.00	**0.03**	0.15	0.07	**0.14**

TABLE 6.5A
Changes in Minority Representation on Commission between 1973 and 1989, North Carolina Counties with 10 Percent or More Combined Black and Indian Population in 1980 (Ratio Equity Measure)[a]

Type of Change by % Minority in County Population, 1980	N	*Minority Representational Equity on Commission*					
		1973			*1989*		
		Black	*Indian*	*Black + Indian*	*Black*	*Indian*	*Black + Indian*
Changed Systems							
From at-large to SMD plan							
10–29.9	1	0.00	0.00	**0.00**	0.57	0.00	**0.56**
30–49.9	2	0.00	0.00	**0.00**	1.03	0.00	**1.03**
50–100	0	—	—	—	—	—	—
From at-large to mixed plan							
10–29.9	1	0.00	0.00	**0.00**	0.54	0.00	**0.53**
30–49.9	3	0.00	0.00	**0.00**	0.32	0.00	**0.31**
50–100	0	—	—	—	—	—	—
Unchanged Systems							
At-large plan							
10–29.9	29	0.10	0.00	**0.09**	0.18	0.00	**0.17**
30–49.9	25	0.08	0.00	**0.08**	0.12	0.00	**0.12**
50–100	8	0.10	0.00	**0.09**	0.49	0.83	**0.53**

[a]Mitchell County changed from at-large elections before 1965.

TABLE 6.6
Minority Representation in Council Single-Member Districts in 1989, North Carolina Cities with 10 Percent or More Combined Black and Indian Population in 1980

% Ethnic Population of District	N[a]	*Mean % Minority Population in Districts, 1980*			*Mean % Minority Councilpersons in Districts, 1989*		
		Black	*Indian*	*Black + Indian*	*Black*	*Indian*	*Black + Indian*
Black							
0–29.9	30	15.2	1.6	**16.8**	3.2	0.0	**3.2**
30–49.9	15	37.3	3.8[b]	**41.1**	29.4	5.9	**35.3**
50–59.9	7	55.8	0.2	**56.0**	100.0	0.0	**100.0**
60–64.9	2	63.6	0.0	**63.6**	33.3	0.0	**33.3**
65–69.9	3	67.8	0.2	**68.0**	100.0	0.0	**100.0**
70–100	20	86.3	0.4	**86.7**	100.0	0.0	**100.0**
Indian							
0–29.9	76	45.1	0.1	**45.2**	51.1	0.0	**51.1**
30–49.9	1	34.4	46.6	**81.0**	0.0	100.0	**100.0**
50–100	0	—	—	—	—	—	—
Black + Indian							
0–29.9	29	15.0	1.3	**16.3**	0.0	0.0	**0.0**
30–49.9	14	35.6	1.5	**37.1**	31.3	0.0	**31.3**
50–59.9	8	55.1	0.3	**55.4**	100.0	0.0	**100.0**
60–64.9	2	63.6	0.0	**63.6**	33.3	0.0	**33.3**
65–69.9	3	67.8	0.2	**68.0**	100.0	0.0	**100.0**
70–100	21	83.8	2.6	**86.4**	96.6	3.4	**100.0**

[a]The number of seats does not match the number of districts because some districts elect multiple members. There are 77 districts and 90 seats.

[b]The Indian population percentage in this cell is inflated by one district in the town of Lexington that was 44.6 percent Indian. Excluding this district, the Indian population percentage for the 30–49.9 percent black population range was 1.2 percent.

TABLE 6.6A
Minority Representation in Commission Single-Member Districts in 1989, North Carolina Counties with 10 Percent or More Combined Black and Indian Population in 1980

% Ethnic Population of District	N	Mean % Minority Population in Districts, 1980			Mean % Minority Commissioners in Districts, 1989		
		Black	*Indian*	*Black + Indian*	*Black*	*Indian*	*Black + Indian*
Black							
0–29.9	7	12.0	0.2	**12.2**	0.0	0.0	**0.0**
30–49.9	4	36.6	0.3	**36.9**	0.0	0.0	**0.0**
50–100	4	63.4	0.1	**63.5**	100.0	0.0	**100.0**
Indian							
0–29.9	15	37.3	0.2	**37.5**	33.3	0.0	**33.3**
30–49.9	0	—	—	—	—	—	—
50–100	0	—	—	—	—	—	—
Black + Indian							
0–29.9	7	12.0	0.2	**12.2**	0.0	0.0	**0.0**
30–49.9	4	36.6	0.3	**36.9**	0.0	0.0	**0.0**
50–100	4	63.4	0.1	**63.5**	100.0	0.0	**100.0**

TABLE 6.7
Minority Council Representation in Single-Member Districts in 1989, by Ethnic Composition of District, North Carolina Cities with 10 Percent or More Combined Black and Indian Population in 1980

Ethnic Composition of District	N	Mean % Minority Population in Districts, 1980			Mean % Minority Councilpersons in Districts, 1989		
		Black	*Indian*	*Black + Indian*	*Black*	*Indian*	*Black + Indian*
Black Majority	32	76.5	0.3	**76.8**	95.2	0.0	**95.2**
Indian Majority	0[a]	—	—	—	—	—	—
White Majority	43	21.7	1.3	**23.0**	10.9	0.0	**10.9**
Black Plurality	1	49.8	0.9	**50.7**	100.0	0.0	**100.0**
Indian Plurality	1	34.5	46.6	**81.0**	0.0	100.0	**100.0**
White Plurality	0	—	—	—	—	—	—

[a] Native Americans were a plurality of the population in three North Carolina cities and a majority in thirteen, but all sixteen had at-large systems and so are excluded.

TABLE 6.7A
Minority Commission Representation in Single-Member Districts in 1989 by Ethnic Composition of District, North Carolina Counties with 10 Percent or More Combined Black and Indian Population in 1980

Ethnic Composition of District[a]	N	Mean % Minority Population in Districts, 1980			Mean % Minority Commissioners in Districts, 1989		
		Black	*Indian*	*Black + Indian*	*Black*	*Indian*	*Black + Indian*
Black majority	4	63.4	0.1	**63.5**	100.0	0.0	**100.0**
Indian majority	0	—	—	—	—	—	—
White majority	11	22.5	0.2	**22.7**	0.0	0.0	**0.0**

[a] There were no pluralities in counties.

TABLE 6.8
Cause of Change from At-Large to Mixed or District Plan between 1973 and 1989, North Carolina Cities with 10 Percent or More Combined Black and Indian Population in 1980

City	Year of Change	Covered by Section 5?[a]	Did Lawsuit Accompany Change?	Reason for Change
		Changed to Single-Member Districts		
Princeville	1977	Yes	No	Ordinance
New Bern	1985	Yes	No	Ordinance
Rocky Mount	1985	Yes	Yes	Settled
Wilson	1986	Yes	No	Ordinance
Elizabeth City	1986	Yes	Yes	Settled[b]
Dunn	1987	Yes	Yes	Consent decree
Freemont	1987	Yes	No	Ordinance, lawsuit threat
Goldsboro	1987	Yes	No	Ordinance
Clinton	1989	No	Yes	Consent decree
		Changed to Mixed Plan		
Raleigh	1973	No	No	Referendum
Cary	1975	No	No	Ordinance
Charlotte	1977	No	No	Referendum
Greensboro	1983	No	No	Ordinance[c]
Statesville	1985	No	Yes	Consent decree
Fayetteville	1986	No	No	Ordinance
Greenville	1986	Yes	No	Ordinance
Henderson	1986	Yes	No	Ordinance
High Point	1986	Yes	Yes	Consent decree
Lexington	1986	No	Yes	Settled
Enfield	1987	Yes	No	Ordinance, lawsuit threat
Mooresville	1987	No	No	Ordinance
Thomasville	1987	No	Yes	Settled
Albemarle	1988	No	Yes	Settled
Edenton	1989	Yes	No	Ordinance
Benson	1989	No	Yes	Settled
Siler City	1989	No	Yes	Plan adopted after suit filed
Smithfield	1989	No	Yes	Plan adopted after suit filed

SUMMARY (Were changes accompanied by lawsuits?)
Yes 12 (44%)
No 15 (56%)

[a] This column in tables 6.8 and 6.8A is unique to this chapter on North Carolina. It indicates whether the county or city in question is covered by section 5 of the Voting Rights Act. Only 40 of North Carolina's 100 counties—and the towns and cities within—were in 1989 included in the preclearance provisions of section 5.

[b] The lawsuit was settled after two injunctions had been granted and after the city's alternative plan had been rejected by the Justice Department.

[c] The city council passed an ordinance to create the plan after it had been defeated in five referendums since 1968. Under the at-large scheme, however, blacks had been elected to the city council and school board in roughly proportionate numbers since the 1950s.

TABLE 6.8A
Cause of Change from At-Large to Mixed or District Plan between 1973 and 1989, North Carolina Counties with 10 Percent or More Combined Black and Indian Population in 1980

County	Year of Change	Covered by Section 5?[a]	Did Lawsuit Accompany Change?	Reason for Change
		Changed to Single-Member Districts		
Guilford	1983	Yes	Yes	Settled
Wilson	1985	Yes	Yes	Summary judgment
Vance	1987	Yes	Yes	Settled
Craven	1987	Yes	No	Ordinance
Nash	1988	Yes	Yes	Preliminary injunction, then settled
Pitt	1988	Yes	Yes	Consent decree
Duplin	1989	No	Yes	Consent judgment
Anson	1989	Yes	No	Ordinance
Granville	1989	Yes	Yes	Court-ordered remedy
Harnett	1989	Yes	Yes	Settled
Sampson	1989	No	Yes	Settled
		Changed to Mixed Plan		
Mecklenburg	1984	Yes	No	Referendum[b]
Halifax	1984	Yes	Yes	Preliminary injunction, then settled
Camden	1986	Yes	No	Ordinance[c]
Pasquotank	1986	Yes	Yes	Settled
Chowan	1987	Yes	No	Ordinance
Bladen	1988	Yes	Yes	Consent judgment
Lenoir	1988	Yes	Yes	Consent decree
Pamlico	1988	No	Yes	Consent decree
Wayne	1988	Yes	Yes	Settled
Caswell	1989	Yes	Yes	Settled
Forsyth	1989	No	Yes	Settled

SUMMARY (Were changes accompanied by lawsuits?)
Yes 17 (77%)
No 5 (23%)

[a] This column in tables 6.8 and 6.8A is unique to this chapter on North Carolina. It indicates whether the county or city in question is covered by section 5 of the Voting Rights Act. Only 40 of North Carolina's 100 counties—and the towns and cities within—were in 1989 included in the preclearance provisions of section 5.

[b] Voters rejected the referendum for a switch from a five-commissioner at-large system to one with three commissioners elected at large and four elected at large to represent districts. They approved the shift to a mixed system with three at-large and four district seats.

[c] The county commission enacted the mixed plan in 1977. The Justice Department did not approve it until 1986.

TABLE 6.9
Major Disfranchising Devices in North Carolina

Device	*Date Established*	*Date Abolished*
Literacy test	1900[a]	1965, 1970[b]
Grandfather clause	1900[a]	1908[c]
Poll tax	1900[a]	1920[d]

[a] Constitutional amendment.
[b] Voting Rights Act of 1965 and amendments of 1970.
[c] Automatic expiration in constitutional amendment.
[d] Repealed.

TABLE 6.10
Black and White Registered Voters and Officeholders in North Carolina, Selected Years[a]

	Black		*White*	
	N	%	N	%
Registered voters				
1962[b]	—	10.0	—	89.6
1966	281,134	14.2	1,653,796	85.1
1990	635,045	19.0	2,677,162	80.0
Officeholders				
State house				
1962	0	0.0	120	100.0
1966	0[c]	0.0	120	100.0
1990	13[d]	10.8	120	89.2
State senate				
1962	0	0.0	50	100.0
1966	0[c]	0.0	50	100.0
1990	4[f]	8.0	46	92.0

Sources: North Carolina Advisory Committee 1962; North Carolina State Board of Elections (for 1966 and 1990 registration data); U.S. Census of the Population for North Carolina, 1960, 1970, and 1990.

[a] Mean black population in state 1960–90 = 22.8%.
[b] The most recent pre-Voting Rights Act registration figures are those for 1962. These data—and those for 1966—are for blacks and whites only, and do not sum to 100 percent.
[c] The first black representative was elected in 1968.
[d] A Native American was elected in 1990.
[e] The first black senator was elected in 1974.
[f] An additional black senator was elected in 1990.

CHAPTER SEVEN

South Carolina

ORVILLE VERNON BURTON,
TERENCE R. FINNEGAN,
PEYTON McCRARY, AND
JAMES W. LOEWEN

SOUTH CAROLINA, first in nullification and first in secession, was also the first state to challenge the constitutionality of the Voting Rights Act.[1] It was fitting that the state should have taken a central role in this challenge. After all, it had served as the leading advocate for the rights of slaveholders in the debates over the Declaration of Independence and the Constitution. Under the leadership of John C. Calhoun, South Carolina had attempted to "nullify" a federal tariff law in 1832 in order to establish a constitutional precedent for voiding future antislavery legislation. It was the first state to secede from the Union, and a few months later, South Carolinians fired the first shot of the Civil War at Fort Sumter. During the seven decades following Reconstruction, the state legislature devised election laws that effectively disfranchised African Americans; and when the Supreme Court outlawed the white primary, South Carolina led the way in devising substitutes to keep blacks out of the Democratic primary. In 1948 Governor J. Strom Thurmond became the standard bearer of the "Dixiecrat" revolt against the civil rights plank of the Democratic party. A few years later, the South Carolina attorney general's office vociferously defended the principles of public school segregation before the Supreme Court in *Brown v. Board of Education*, and the state's congressional delegation resolutely opposed every civil rights bill proposed in Congress from 1957 to 1965.

Despite this history, South Carolina attorneys, in challenging the Voting Rights Act, maintained that it subjected the state to unnecessary intrusive supervision without proof of intentional discrimination. In denying their challenge and affirming the constitutionality of the act in *South Carolina v. Katzenbach*, Chief Justice Earl Warren stated, "Congress felt itself confronted by an insidious and pervasive evil." He noted the long history of racial discrimination in the voter registration process in South Carolina, directly quoting some of the more outrageous remarks of Benjamin R. "Pitchfork Ben" Tillman at the 1895 disfranchising convention as evidence of the discriminatory purpose of the literacy test suspended by the act. Warren stated that "the constitutional propriety of the Voting Rights Act of 1965

must be judged with reference to the historical experience which it reflects."[2] History had finally caught up with South Carolina.

Voting Rights and Racial Politics from 1865 to 1965

"The central fact in the history of black Carolina," concludes Newby, "has been the racism of white Carolina."[3] The degree to which African Americans have held public office in South Carolina since the Civil War was largely determined by the state's election laws and the manner in which they were implemented. White officials made their intentions clear from the beginning. The South Carolina constitutional convention of 1865, with the approval of President Andrew Johnson, restricted voting and officeholding to white males. "This is a white man's government," explained Governor Benjamin Perry, "and intended for white men only."[4] In an attempt to buttress white supremacy, southern state legislatures enacted "black codes" that severely restricted the rights of freedpersons. The South Carolina black code required agricultural workers to sign away most of their rights as citizens in annual labor contracts with landowners or risk prosecution for vagrancy.[5] The enactment of black codes throughout the South played a key role in persuading Congress to enfranchise African Americans and temporarily restrict the suffrage of some Confederates.

Enfranchised by the Fourteenth and Fifteenth amendments, South Carolina's black majority elected Republican candidates to the bulk of the seats in a new constitutional convention, which then granted the right to vote to every adult male, "without distinction of race, color, or former condition."[6] Subsequently, blacks controlled a majority of seats in the lower house (and from 1874 to 1876 in both the senate and the house), and they won elections as lieutenant governor, secretary of state, and state treasurer. Equally important, they were elected to a significant number of local offices, such as sheriff, county commissioner, magistrate, school commissioner, and alderman.[7] Reconstruction in South Carolina lasted as long as in any other state, and the black Republicans there achieved as great a degree of political power as did African Americans anywhere.

Disfranchisement

Some whites bitterly opposed black equality and endorsed systematic political violence to overcome Republican control. Whether through secretive activity by the Ku Klux Klan or open mob violence, Democrats often resorted to political assassination and murder, although physical beatings, arson, and threats of death were more common. Seven state legislators were murdered between 1868 and 1876.[8] Violence was so severe in nine upcountry counties that the federal government intervened in 1871 and declared martial law, making hundreds of arrests; a few dozen indictments led to guilty pleas and prison sentences. In the black-controlled town of Hamburg, Democrats under former Confederate general Matthew Calbraith Butler's leadership brought a cannon and several hundred armed horsemen to do battle with the African-American militia, killing six (four by firing squad) and pillaging the homes and shops of the town's black population and their white allies.[9] In the wake of the Hamburg massacre, Butler and another former Confederate general, Martin Witherspoon Gary, orchestrated a violent "redemption" of state government from Republican control. Gary had announced as early as 1874 that political contests in South Carolina were "a question of race and not of politics."[10] While Civil War hero General Wade Hampton ostensibly advocated moderation, Gary favored all-out guerilla warfare and organized Democrats into three hundred "rifle clubs" throughout the state. Armed bands of horsemen attired in symbolically defiant red shirts intimidated and attacked potential black voters.[11]

Although violent clashes between whites and blacks occurred in Charleston and in low-country plantation counties, the scale of battle in 1876 was nowhere as great as in Edgefield County, home of Gary and Butler. Over seven hundred armed and mounted Democrats in red shirts seized control of the county courthouse and, despite the presence of federal troops, prevented African Americans from voting. "Gary's doctrine of voting early and often changed the republican majority of 2,300 in Edgefield to a democratic majority of 3,900," recalled Gary protégé and future governor Benjamin Tillman, a participant in the Edgefield violence, "thus giving Hampton a claim to the office of governor." Hampton's victory resulted from the casting of 2,252 more votes than there were eligible voters.[12]

Although Hampton owed his election to the political violence of the "Edgefield plan," in his campaign speeches he pledged to treat blacks fairly in the new order. For Hampton and the "moderates," blacks who "knew their place" had a place in the system, and he did appoint some to local offices. Later, however, as a U.S. senator, Hampton justified fraud, intimidation, and violence to deny South Carolina blacks the franchise, claiming "the very civilization, the property, the life of the State itself, were involved."[13] Black-majority counties elected some African-American legislators, but the overwhelmingly white legislature determined to combat these successes. It adopted a law intended to eliminate federal scrutiny of state affairs by requiring separate ballot boxes for state and federal elections.[14] In addition, the legislature abolished a large number of precincts in heavily Republican counties, requiring voters to travel long distances in order to vote.[15]

After the end of Reconstruction, the Democrats manipulated election laws to institutionalize their control of state politics (see table 7.9). In 1882 a new law required all citizens to reregister or face permanent disfranchisement; registrars had great discretion in applying the law so that they could avoid striking white voters from the rolls. A companion statute, the Eight Box Law, intended as a de facto literacy test, required voters to place ballots for various offices in separate boxes, which election officials periodically shuffled. These discriminatory tactics effectively cut the African-American electorate in half.[16]

Even so, black voters remained numerous enough to be troublesome to white supremacists. Consequently, the legislature adopted a congressional redistricting plan that packed blacks into a malapportioned district where they made up 82

percent of the population, thereby diluting their voting strength in the rest of the state. The "black district," as it was called, ran from the city of Columbia to the coast, divided six counties, incorporated most black neighborhoods of Charleston, and, according to the *New York Times*, resembled a boa constrictor. Although this district generally elected a black Republican to the U.S. House of Representatives until 1896, the gerrymander assured Democrats safe contests for the remaining seats.[17]

The second stage of disfranchisement, designed to eliminate the African-American vote altogether, took place in the 1890s after former "red shirt" Ben Tillman gained control of the Democratic party. Brown has described Tillman as the "best known and most vitriolic Negrophobe in America" and the undisputed leader of black disfranchisement.[18] Tillman's biographer, Simkins, maintained that between Reconstruction and World War I, "Ben Tillman fostered the modern reaction against the Negro. This stance was one of his most significant influences on American life."[19] Tillman's movement to purge the black vote in South Carolina was as openly racist and its postdisfranchisement regime as rigidly committed to white supremacy as any in Dixie. In the U.S. Senate, Tillman declared defiantly: "We have done our level best. We have scratched our heads to find out how we could eliminate every last one of them. We stuffed ballot boxes. We shot them. We are not ashamed of it."[20] Openly avowing their intention to disfranchise blacks through the rewriting of the state constitution, the Tillman forces secured passage of a new registration law designed to eliminate as many African-American voters as possible before the referendum on calling a constitutional convention (see table 7.9). Governor John Gary Evans, Tillman's successor and General Gary's nephew, ordered election officials not to issue registration forms to blacks.[21] "The whites," Tillman announced, "have absolute control of the government, and we intend at any hazard to retain it."[22]

In 1895, now U.S. Senator Tillman chaired the convention's committee on the rights of suffrage. At his urging the convention established as prerequisites for registration the payment of a poll tax at least six months before the election and proof of payment of all other taxes. In addition, a prospective voter had to satisfy a literacy test or demonstrate an understanding of any constitutional provision read to him by the registrar. The discretion of the registrar was unlimited. The convention also adopted a "petty crimes" provision that disfranchised all those convicted of certain crimes that whites believed blacks frequently committed. Conservative historian David Duncan Wallace referred to this provision as "the black squint of the law."[23]

In 1896 the South Carolina legislature authorized statewide party primaries.[24] Henceforth the State Democratic Executive Committee prohibited all African Americans from voting in the primary, which was, in the one-party system after disfranchisement, the only election that mattered. The state poll tax requirement never applied to these primary elections, presumably because party rules already excluded African Americans.[25]

These changes affected both black and white political participation. As of October 1896, only 5,500 blacks were registered to vote in South Carolina, a mere

10 percent of all registered voters.[26] Kousser estimates that 45 percent of white adult males and 11 percent of black adult males voted in the 1896 presidential election.[27] This low turnout was the norm between 1920 and 1946. On average, only 27 percent of the state's adults voted in the Democratic primaries for governor and U.S. senator.[28]

Controlling election laws and voter registration was crucial to maintaining white supremacy. Congressman James F. Byrnes, who eventually became a U.S. senator, Supreme Court justice, U.S. secretary of state, and governor of South Carolina, cautioned in 1920: "It is certain that if there was a fair registration they [African Americans] would have a slight majority in our state. We cannot idly brush the facts aside. Unfortunate though it may be, our consideration of every question must include the consideration of this race question."[29] A year later, historian Francis Butler Simkins confirmed the intent of his native state's legislation. "Reviewing the South Carolina law in respect to the Negro since 1876, it is apparent that its frank purpose is to perpetuate the division of society into two distinct castes—the white, or dominant ruling class, and the Negro, or subject class."[30]

Democratic party officials unabashedly did their part for the cause of white supremacy. "There are dam [*sic*] few negroes registered in any way," observed a local executive committee spokesman to a journalist in 1940. "If a coon wants to vote in the primary, we make him recite the Constitution backward, as well as forward, make him close his eyes and dot his *i*'s and cross his *t*'s. We have to comply with the law, you see."[31] The effect of disfranchising legislation was profound: only fifteen hundred African Americans in South Carolina were registered to vote in 1940.[32]

When the Supreme Court overturned the white primary in 1944,[33] Governor Olin D. Johnston called a special session of the legislature to repeal all laws relating to primary elections in the hope that this would remove the element of "state action" and make the white primary invulnerable to legal challenge. "After these statutes are repealed," Johnston told the legislature, "we will have done everything in our power to guarantee white supremacy in our primaries."[34] Voters then approved a constitutional amendment erasing all mention of primaries from the state constitution, and the Democratic party adopted rules excluding African Americans from its "private" primary elections.[35]

When the NAACP challenged the private primary in federal court, Judge J. Waties Waring of Charleston ruled that because the Democratic primary was the vehicle through which all public officials were chosen, it remained a state action. Because the governor and legislature acted "solely for the purpose of preventing the Negro from gaining a right to vote," the judge ruled the change violated the Fourteenth and Fifteenth amendments.[36] The Democratic party then adopted new rules, not explicitly barring African Americans but requiring voters to swear to uphold segregation and for the first time extending the literacy test required for general elections to the primary.[37] Judge Waring struck down the required oath and prohibited the party from barring black participation.[38]

In 1950 the general assembly adopted a new election law restoring state regula-

tion of primary elections.[39] The proposal to extend the literacy test to party primaries occasioned great debate. Some up-country legislators feared the measure would disfranchise their poor white constituents. In the end, however, the appeal to racial solidarity was successful, and Governor J. Strom Thurmond signed the bill into law.[40]

Among the electoral devices restored to the primary election laws were statewide full-slate and majority-vote requirements, which would dilute the votes of blacks now eligible to participate in the Democratic primary.[41] Although these features of the statute were reenacted without comment, contemporary accounts attributed the same purpose to the statute as a whole. "Conservative lawmakers admit that the bill is designed to control Negro voting in primaries," reported a Charleston newspaper in 1950.[42]

At the same time, Governor Thurmond was pushing to remove the state poll tax requirement from the state constitution, apparently with the intention of weakening congressional support for a federal anti–poll tax bill. Ogden noted that "many South Carolinians recognized that their tax had little significance since it did not apply to primary elections nor to women, was non-cumulative and amounted to only $1.00 per year."[43]

These machinations in election law, such as the repeal of the poll tax, mark a departure from the hard-line posturing of other states. In 1950 James F. Byrnes ran for governor and continued South Carolina's shift toward a "calculated moderation." Byrnes's experience on the Supreme Court and in national politics provided him a sophisticated and subtle approach in resisting racial integration. In order to forestall desegregation, for example, he used a significant portion of a new sales tax for the education of black children, and white leaders throughout the state began equalizing the facilities of white and black schools in a desperate attempt to salvage segregation. Byrnes urged the creation of a committee to find ways to maintain segregation and staffed it with some of the state's most prominent lawyers. Chaired by state senator L. Marion Gressette, this special school committee coordinated efforts to maintain the racial status quo.[44] This technique of bending a little to prevent larger changes, aptly termed "firm flexibility" by Sproat,[45] gave the state another decade of segregation. Byrnes's approach also ostensibly brought South Carolina back to the constitutional high ground. Just as it had argued for states' rights instead of slavery in both nullification and Civil War, so South Carolina appealed to constitutional precepts in opposing civil rights and voting rights in the modern period.

African-American Activism

During these many years of oppression, blacks regularly sought to reassert their right to vote. When women secured the ballot in 1920, a group of black women tried to exercise this newfound right, but were forcibly ejected from the registration office in Columbia.[46] In 1939 an African-American labor group in Greenville joined with the local NAACP and the Negro Youth Council in a voter registration

drive, only to be quashed by police intimidation. To raise money to challenge the white primary and to increase voter registration, blacks founded the South Carolina Negro Citizens Committee in 1942. Led by black journalist John McCray in 1944, they formed a statewide protest organization, the Progressive Democratic party, with chapters in every South Carolina county. This group unsuccessfully challenged the seating of South Carolina's all-white delegation at the 1944 Democratic national convention, and sponsored Osceola McKaine, an African American, as a candidate for the U.S. Senate against Democrat Olin Johnston.[47] Between 1940 and 1946 the Progressive Democrats and the NAACP mounted a registration drive that increased the number of black voters on the rolls from 1,500 to 50,000.[48] Despite Klan marches and cross burnings, 35,000 black voters went to the polls in the 1948 primary. In the primary race that year for the U.S. Senate seat between William Jennings Bryan Dorn and Burnet Maybank, Dorn denounced Judge Waring because of his decision outlawing the white primary. The black vote went solidly to Maybank, sending a clear signal to the state's Democratic politicians that black voters would seek to punish blatant appeals to white supremacy.[49]

During the next decade journalist McCray, NAACP leader Reverend I. DeQuincey Newman, activist Modjeska Simkins, and other African Americans encouraged sustained activism as a means of effecting racial change. Esau Jenkins, a black businessman from Charleston, with help from NAACP activist and native Charlestonian Septima Clark, Highlander Folk School founder Myles Horton (who was white), beautician Bernice Robinson, and Guy and Candie Carawan (whites who moved to Johns Island), began citizenship schools in the late 1940s and early 1950s to help African Americans obtain the right to vote and overcome the "yoke of [white] domination."[50] The Southern Christian Leadership Conference established citizenship schools in low-country Georgia in the early 1960s under Clark's direction, where African Americans from South Carolina and other states of the Deep South learned about their legal rights and about strategies for civil disobedience. These schools became one of "the most effective organizing tools of the [civil rights] movement." Citizenship schools taught democratic rights and encouraged thousands to take part in demonstrations.[51]

African Americans believed that education was a key to freedom; consequently, separate and unequal education was the foremost target of the civil rights movement in South Carolina. In the early 1940s the NAACP brought court cases to equalize teachers' salaries. Black South Carolinians' most dramatic and influential success against institutionalized white racism involved the *Briggs v. Elliot* case against Clarendon County. This case led to the *Brown* decision, which eventually outlawed segregated schools.[52]

Other important developments in South Carolina included James McCain's work with the Congress of Racial Equality (CORE). Under the leadership of McCain, CORE launched a sustained effort to register African Americans during the late 1950s. A former head of the black teachers' association in South Carolina, McCain established throughout the state seven CORE groups, which later proved

instrumental in the South Carolina sit-in movement during the 1960s.[53] In 1958, McCain's troops actually gained control of the Democratic organization in a black-majority precinct in Sumter and supported, without success, an African-American candidate for city council. Despite the urging of CORE's national leadership that he enlist as many whites as possible, McCain found that for white Carolinians, joining an interracial civil rights organization or even supporting a black voter registration drive was unthinkable at the height of "massive resistance" to school desegregation. Rivalry with the NAACP was also a problem, but the two organizations eventually worked out a tacit division of the state.[54]

Black voter registration did not increase dramatically for more than a decade; in 1960 it was still only 58,000, 16 percent of the black voting-age population.[55] By 1962 around 91,000 blacks (23 percent of the black voting-age population) were on the rolls.[56] As in the rest of the South, black registration in South Carolina was still low in counties with a high percentage of African Americans in their population.[57] These old plantation counties, mostly in the low country but including some Piedmont counties, provided most of the members of the White Citizens' Councils formed in the state in the 1950s to rally opposition to school desegregation.[58]

White Reaction to the Civil Rights Movement

Many whites in South Carolina agreed with Governor James F. Byrnes's 1954 declaration that if the state could not "find a legal way of preventing the mixing of the races in the schools, it will mark the beginning of the end of civilization in the South as we have known it."[59] South Carolina whites bitterly opposed federal court decisions that ruled segregated schools unconstitutional, and the NAACP, which organized most African-American plaintiffs in desegregation lawsuits, became the focus of white resistance. NAACP members and their relatives were fired as teachers, and in some cases black leaders fled the state to avoid terrorist activity and legal prosecution.[60] In 1956 the general assembly adopted laws making NAACP members ineligible for state employment, requiring investigation of NAACP activity at traditionally black South Carolina State College, and revising the state's barratry laws so that they could be used against NAACP lawyers who "stirred up" civil rights litigation.[61] CORE organizer Frank Robinson was forced out of his real estate and home-building business when local banks cut off his credit because of his voter registration activities. Students engaging in demonstrations went to jail throughout the state in the early 1960s.[62]

In 1964 South Carolina whites revolted openly against the national Democratic ticket; the Democratic party's commitment to civil rights so alienated Senator Strom Thurmond that he permanently switched to the Republican party. Conservative whites voted as a bloc for Republican presidential nominee Barry Goldwater, enabling him to win 59 percent of the state's vote. Despite overwhelming support from those African Americans able to cast ballots, incumbent Lyndon B. Johnson garnered only 41 percent.[63] More important than all other issues, according to

Fowler, was "the race question, and, more specifically, the fact that Goldwater voted against the Civil Rights Act of 1964 while Johnson was chiefly responsible for its passage."[64] An intensive case study of Ridgeway, South Carolina, found that "a large number of nominal Democrats consistently vote Republican. Virtually all of them cite the Civil Rights issue as their reason."[65]

On the eve of passage of the Voting Rights Act, South Carolina remained thoroughly in the grip of white supremacy. Although 37 percent of the 1964 black voting-age population was registered, this represented only 17 percent of the state's voters on the rolls.[66] South Carolina elected no black officials in the twentieth century before the Voting Rights Act.[67] Whites kept black registration down and sometimes did not count all the votes cast by blacks who did register. Charged with telling a black voter during the 1964 presidential election "to place his ballot in the wrong box," precinct manager Wade H. Ratcliffe explained, "I knew this was wrong but we have always done these things."[68] Immediately following the enactment of the Voting Rights Act, African-American leaders formally complained about white officials' deliberate slowdown of the voter registration process for blacks in Allendale, Barnwell, Charleston, Dorchester, Jasper, and Orangeburg counties, and federal observers were sent to Clarendon and Dorchester.[69]

Despite heroic voter registration drives mounted by CORE, the Voter Education Project,[70] the Southern Christian Leadership Conference, and the NAACP—all involved in "combined efforts" in July and August 1965—these organizations faced great difficulty in overcoming the effects of long years of racial discrimination.[71] Education in particular failed the black community of South Carolina. In his 1911 inaugural gubernatorial address, demagogue Cole Blease stated, "I am opposed to white people's taxes being used to educate Negroes."[72] An analysis of educational expenditures from 1896 to 1960 demonstrates how inequitably the state funded black education.[73] In 1940, for example, South Carolina spent only 30 percent as much to educate a black child as a white child, a lower percentage than any southern state except Mississippi. By 1952, per-pupil expenditures for black children were only 60 percent of the amount spent to educate white children, still behind all southern states except Mississippi. In 1960, half a decade after *Brown*, South Carolina still spent on average 50 percent more per white than per black pupil, a greater disparity than had existed in 1896.[74] Students graduating from high school in 1940 were only in their forties in 1964; those who finished in 1952 were just turning thirty; and those who graduated in 1960 were barely old enough to vote. Thus, given the well-known correlation between educational attainment and voter turnout, the effects of educational disparities lingered for decades as a deterrent to African-American political participation.

Despite the insistence of some Carolinians upon white supremacy, during the 1960s the state continued its move toward "calculated moderation," parting company with the forces of hard-core resistance. Black voter registration drives aroused sporadic violence from angry whites and occasional stalling devices from local officials, although not the massive opposition found in Mississippi, Alabama, Louisiana, or Georgia.[75]

At this time, federal intervention could have proven quite useful. Since adoption of the 1957 Civil Rights Act, the Justice Department had been empowered to bring lawsuits challenging racial discrimination in the registration process. However, because it concentrated its meager resources on even more recalcitrant states, the department's Civil Rights Division as late as 1965 had not filed a single lawsuit challenging South Carolina officials with racial discrimination.[76] Thus, during the debate that year over the Voting Rights Act's section 5 provisions, South Carolina attorney general Daniel R. McLeod and U.S. Representative William Jennings Bryan Dorn pointed to Justice Department inaction to buttress the charge that their state was being labeled guilty without trial. The act's extraordinary intrusion into matters reserved to the states, they argued, was unjustified without proof of intentional discrimination by state or local registration officials. McLeod and Dorn attributed the low level of black voter registration in South Carolina to apathy, not official discrimination.[77]

After the act's passage, the state echoed these protestations of innocence in *South Carolina v. Katzenbach*, but, speaking for an eight-to-one majority, Justice Warren made clear, even while conceding that evidence of recent voting discrimination was more "fragmentary" for South Carolina than for states in the Deep South, that Congress had assembled ample proof that white officials in the covered southern states enforced the literacy test and other devices in a purposefully discriminatory manner against black citizens. The formula for determining the jurisdiction of the act was "rational in both practice and theory," declared Warren, because long-standing use of tests and devices was a direct cause of low black voter registration.[78]

The Continuing Struggle over Voting Rights

With passage of the Voting Rights Act in August 1965, black voter registration soared.[79] By 1967 it had climbed to 51 percent of the age-eligible population. By and large, South Carolina's white officials grudgingly conceded that as in the rest of the South, the Voting Rights Act made it impossible to prevent African-American citizens from registering and casting their ballots.[80] Yet barriers to registration and voting have continued until recently, especially in some rural areas. State law specified that voter registration always occur in a public place, often the courthouse, a potentially intimidating place to many black southerners, for whom it symbolizes the locus of white power. As recently as 1987, according to the director of the Voter Education Project, "in rural areas, some precincts are in all-white areas, and blacks just don't cross the railroad tracks." Local voting registration boards had the discretion to appoint deputies and set office hours. Often offices were not open when black laborers might be available to register.[81]

Registration procedures in Fairfield County exemplify the complications that African Americans encountered as late as the 1980s. The local NAACP, the Progressive Citizens Organization, and Fairfield United Action had been successful in increasing black registration from about 20 percent of potential voters prior to the Voting Rights Act to a majority of them in the mid-1980s. But the county's board of registration continued to resist black registration efforts. The governor, who appoints each county's board upon recommendation from the senate (that is, the county senator), in 1986 appointed two white members and one black member (a domestic worker employed by the Fairfield senator).[82] The board refused requests to allow door-to-door registration drives. It also refused to accept one black deputy registrar's voter applications because the deputy registrar used a computer code instead of the full name for precincts; the following week the board rejected the same deputy's applications because the computer code was not supplied. In 1983, only five deputy registrars were appointed for all the African-American communities in the county. The board refused fourteen applications because a check was not on the registration form next to an item that had no box to check. Only an appeal to the South Carolina Elections Commission forced the acceptance of these new applications.[83] South Carolina now has a postcard registration procedure, which has significantly diminished registration restrictions in South Carolina.[84]

In 1965 it seemed to some observers that black registration increases augured significant change in South Carolina in the near future. The act's ban on the literacy test had "the potential for a political upheaval," warned one reporter, who projected the election of at least twenty-two blacks to the general assembly under the existing districting plan.[85] Two developments, among others, helped avert black officeholding. First, even as black registration increased, so did white registration: from 76 to 82 percent in 1967. Thus, in spite of sharp black registration gains, African Americans that year still comprised a mere 21 percent of total registrants in a state that was 30 percent black.[86]

Another strategy for minimizing the effectiveness of the growing black vote was to enact election laws designed to "dilute" minority voting strength, such as at-large elections, full-slate requirements, or runoff provisions. South Carolina already had a full-slate law (prohibiting the casting of a "single-shot" vote) and a majority vote requirement for most elections. These procedures enhanced the racially discriminatory effects of at-large elections and multimember legislative districts, which were the cornerstone of southern efforts to minimize the impact of increased black voting strength after 1965.[87] When the Voting Rights Act was passed, however, nineteen South Carolina counties elected at least some members of their county governing body by single-member districts, according to a survey by the U.S. Bureau of the Census. By 1973, the bureau's survey indicated that eleven counties had switched entirely to at-large elections.[88]

Many of these changes were challenged in federal court during the next two decades, and their purposes often became a matter of public record. This was not true of the switch to at-large elections for the Charleston County Council in 1969. Available evidence suggests, however, the possibility of an underlying racial purpose. J. Mitchell Graham, who had formerly chaired the county council, explained to a reporter not long after passage of the Voting Rights Act that the

existing election plan gave Charlestonians "the guarantee of representation from their own districts."[89] In 1967, however, with blacks running for office throughout the state, the county council asked the local legislative delegation to draft a statute requiring countywide election of council members.[90] The person who chaired the council and pushed successfully for the adoption of at-large elections was Micah Jenkins, who ten years earlier had been among the most visible leaders of the Citizens Council movement in South Carolina.[91] Because a constitutional amendment was a prerequisite for other features of Jenkins's proposed reform of county government, the legislature did not adopt the change until 1969.[92]

The Nexus between Legislative Redistricting and Home Rule

All politics, it is said, is local. Thus when the Voting Rights Act was passed, African Americans hoped it would enable them to wield significant influence at the community level through the election of black candidates. These hopes did not materialize. Political power in South Carolina was not directly responsive to local electorates. A system of legislative county government, established by the Tillman forces during the struggle for disfranchisement in the 1890s, had eliminated county and township elections because conservative whites disliked elected local governments with their "identification with black political power, as well as with high taxes."[93] Since that time, the general assembly provided that the governor appoint county officials upon recommendation of a county's state senator and representatives. This law effectively eliminated the opportunity of African Americans to elect local officials of their choice, even where they were an overwhelming majority of the population.[94]

The power of legislative delegations over county government remained largely intact from 1895 until 1965, even in those few counties where some form of elected councils had been established through local legislation.[95] The general assembly was the center of governmental power in South Carolina, and the senate was clearly the dominant house. Each of the forty-six counties had one senator, elected countywide, and one or more representatives, also elected at large. In no other state was legislative dominance over local government so strong. Key put it succinctly: "County legislative delegations constitute the real governing bodies of their respective counties."[96]

The local legislative delegation often appointed the county governing body as well as local school boards, public service districts, and park boards. Sometimes the legislators themselves served as members of the county council. The delegation supervised the selection of employees and appointments to boards and committees. Most importantly, the delegation set tax levels and submitted the county budget, which was adopted by the entire legislature as the county's "supply bill."[97] Each county's senator, because he could veto any local legislation, usually became its "first-ranking politician."[98]

In December 1965 this system suddenly faced the risk that rural counties would

lose their resident senator when the federal court in *O'Shields v. McNair*[99] gave the legislature four months to redistrict the state senate according to the one-person, one-vote principle articulated by the U.S. Supreme Court.[100] Senator Edgar A. Brown of Barnwell County, a thirty-six-year veteran known as the dean of the senate and described as "the most powerful man in South Carolina's government,"[101] characterized reapportionment as the "political crisis of my time." The court's decision, he declared, "invites a return to the kind of government that Wade Hampton had to stamp out in 1876."[102] Warning of a resurgence of the evils of "Black Reconstruction" was a time-honored tactic of southern white Democrats concerned about black voting strength.[103]

Brown and other veteran legislators, however, devised a redistricting plan that minimized the chances of the election of African-American legislators.[104] Its essence was to use as many at-large multimember districts as possible. In order to satisfy the one-person, one-vote rule, the all-white general assembly reapportioned the state senate by shifting from a plan in which all senators were elected from single-member districts (i.e., one per county) to a system relying primarily on multimember senatorial districts. Reapportionment did not require use of multimember districts, however, even in rural areas and certainly not in urban counties.[105] In *O'Shields* the court in 1966 approved an interim reapportionment plan that replaced many of the existing single-member districts with multimember districts.[106] A year later the legislature adopted a permanent plan that included only five single-member districts, dividing the state into fifteen multimember senatorial districts, all of which had a white majority.[107] Only one African American was ever elected to the senate under either of these plans.[108] With that exception, the senate maintained its all-white membership and its at-large elections until 1984, when it became the last southern state legislative body to acquire either single-member districts or African-American members.

Multicounty senatorial districts created a major difficulty for many rural counties because under the redistricting plan adopted in response to *O'Shields*, those counties would no longer be represented by a senator residing within county borders. Having an "outsider" exercise the extraordinary control over local government traditionally accorded the local senator was unacceptable to many Carolinians.[109] The movement to secure local autonomy for South Carolina counties and cities, which culminated in the adoption of a statewide Home Rule Act in 1975, grew directly from resentment over the effects of court-ordered redistricting.[110]

As if increased black voter registration and court-ordered redistricting were not enough for South Carolina whites, a new element entered the picture in 1969. In *Allen v. Board of Elections*, a consolidated case involving various Mississippi and Virginia voting changes, the U.S. Supreme Court ruled that under section 5 of the Voting Rights Act, potentially dilutive procedures such as at-large elections, numbered posts, residency districts, majority-vote requirements, and districting plans were not legally enforceable until submitted for preclearance, either by a three-judge panel in the District of Columbia or by the Department of Justice.[111] Section

5 provided a powerful weapon for enforcing minority voting rights if the jurisdiction had altered its electoral procedures since 1 November 1964 in a manner that had the potential for diluting minority voting strength. The Justice Department then created a special section to review such electoral procedures.[112]

When the South Carolina legislature redistricted after the 1970 census, plaintiffs challenged the plan for each house in court, and each plan underwent section 5 review by the Justice Department.[113] On 6 March 1972, in the first of a series of controversial decisions, the Attorney General objected to the use of multimember districts, numbered posts, majority-vote requirements, and some of the specific district lines in the senate plan, which had no black-majority seats.[114] The general assembly then drew a new plan, which a three-judge court in South Carolina ruled constitutional; the Attorney General, deferring to the court, did not object to its implementation.[115]

A three-judge court also rejected the claim of African-American plaintiffs that the house plan was racially discriminatory; on the other hand, however, it struck down the state's full-slate law on the grounds that to require a person to vote for every office on the ballot was an unreasonable restriction on the right of suffrage.[116] The South Carolina legislature immediately replaced the full-slate law with a numbered-place rule, which required each candidate to qualify for a particular seat (that is, place no. 1, place no. 2, and so forth).[117] Every seat would then be decided through a head-to-head contest in which only one vote could be cast, making single-shot voting impossible.[118] The Department of Justice, in turn, objected to this change under section 5.[119] The house plan was implemented in the 1972 house elections, but without the full-slate requirement. In 1973 the U.S. Supreme Court summarily reversed the decision of the three-judge court that had upheld the constitutionality of the house plan.[120] Forced to redistrict once again, the general assembly nevertheless rejected the complaints of African-American legislators against multimember districts, numbered seats, and the majority-vote requirement. The Department of Justice cited these dilutive devices as evidence of racial discrimination when it objected to the plan under section 5.[121] The legislature finally acquiesced and adopted a single-member district plan, under which the number of African-American representatives increased from four to thirteen in the 1974 elections.[122]

The presence of these new members made a significant difference in the debate over the Home Rule Act in 1975. This omnibus legislation transferred much of the authority for local legislative or administrative decision making away from the county delegation in the general assembly to a popularly elected county council. The Home Rule Bill, as originally passed by the house at the urging of the black caucus, would have required all counties to elect their governing bodies by single-member districts. At one point, racial tensions in the debate threatened to get out of hand when a black Democrat and a white Republican from Columbia "exchanged heated remarks on the single-member provision . . . punctuated by mild profanity."[123] White legislators accepted single-member districts in part because of

general awareness that the changes resulting from the Home Rule Act had to undergo Department of Justice scrutiny.[124]

The all-white senate, however, adamantly refused to require district elections, even at the risk of passing no bill at all. Ultimately, a compromise provision required all county councils to be elected from single-member districts, with two exceptions: (1) the voters could approve the use of at-large plans in a referendum; or (2) counties that failed to hold a referendum would be assigned one of five specific forms of government by default. Under the second option, a county was assigned the form most closely approximating its current system, which usually included at-large elections.[125] More than half the counties (twenty-five of forty-six) held referendums; citizens of twenty opted in the referendums for single-member district elections.[126] The Home Rule Act accounted for more than 40 percent (fifteen of thirty-five) of the changes from at-large to district election plans that have occurred in South Carolina county councils between 1974 and 1989 (see table 7.8A).

In South Carolina, the civil rights movement, the Voting Rights Act, one-person, one-vote senate reapportionment, and the rise of the Republican party were intertwined. At the same time that the state's traditional white leadership was faced with increased black and white voting, it was also losing control of day-to-day oversight of county offices. With a political culture constructed on constituent service, loss of control at the local level was a critical challenge. Court-ordered redistricting, which suddenly rendered the traditional system of legislative county government unacceptable to political leaders throughout South Carolina, provided the major stimulus for the home rule movement after 1965. The state legislature and many county governmental bodies shifted to at-large election methods.

In the early 1970s African-American plaintiffs filed and lost a challenge to the process that left the South Carolina senate all white. Plaintiffs, however, won their challenge to the electoral system that resulted in a nearly all-white house of representatives. Consequently, African Americans were a significant force in the new general assembly when the Home Rule Act came up for final passage in 1975. On the county level, however, it was not until the mid-1970s that voting rights lawyers filed the first racial vote-dilution challenges to at-large county governments; almost all the suits were wholly unsuccessful.

The Nexus between Section 5 Enforcement and Litigation

In the 1970s South Carolina had few active voting rights lawyers. Black attorney Matthew Perry, retained by the NAACP, handled much of the civil rights litigation in South Carolina until he was named to the U.S. Court of Military Appeals in 1976.[127] In legislative redistricting cases Perry was cocounsel with Armand Derfner of Washington, D.C., with the Lawyers' Committee for Civil Rights Under Law. Derfner, who had litigated voting rights cases in Mississippi in the 1960s

with the Lawyers' Constitutional Defense Committee, moved to Charleston in 1974 and opened a private practice. He was involved in many of the key South Carolina cases, often in cooperation with Laughlin McDonald, a white native of Fairfield County who has directed the Southern Regional Office of the American Civil Liberties Union (ACLU) in Atlanta for over two decades. Other attorneys, both white and black, like John Roy Harper II, an African-American native of Greenwood who grew up in Camden, occasionally brought voting rights cases in the 1970s, but the ACLU was virtually the only source of funds available in South Carolina in the 1970s to cover the heavy expenses of vote-dilution lawsuits.[128]

The experience of private attorneys convinced them that the federal bench in South Carolina was generally unsympathetic to African-American plaintiffs in civil rights cases.[129] In Lee County, for example, where a change from district to at-large elections in 1968 had been precleared by the Department of Justice, Derfner and McDonald thought the facts in the case might nevertheless sustain a constitutional challenge. In 1966, following increased black voter registration in this 60 percent black county, an African-American candidate ran for the board of commissioners and lost by only a few votes. Before the next election Lee County switched to a county council elected at large. Although the plaintiffs provided undisputed evidence of racially polarized voting, racial disparities in socioeconomic status and education, and the virtual exclusion of African Americans from the ranks of poll workers and election officials, Judge Robert F. Chapman in 1976 decided in favor of the county.[130]

The same fate awaited a 1977 challenge to the at-large election of city council members in Columbia filed on behalf of members of the local NAACP by McDonald, black attorneys I. S. Leevy Johnson and John Roy Harper II, and white Columbia attorney Herbert Buhl and tried once again before Judge Chapman.[131] Both Chapman and the three-judge appeals court ruled against the plaintiffs, finding that racially polarized voting was significant but did not "approach totality" because an estimated 25 percent of the vote in predominantly white areas went to an African-American candidate in the most recent election.[132] The courts also rejected the NAACP's claim that the city had been unresponsive to the needs of the African-American community, and dismissed the significance of earlier discrimination such as the literacy test, poll tax, and full-slate requirement on the grounds that, having been struck down by the federal courts or outlawed by the Voting Rights Act, these devices were no longer a barrier to African-American participation. The courts also ruled that the city had adopted at-large elections in 1910 with no discriminatory purpose.[133] Following this ruling, however, the city held a referendum in which voters approved a change to a mixed election system, with four council members elected from single-member districts and two at large, in addition to the mayor. Although devised by a biracial committee and supported by the mayor, the change to district elections occurred only because of overwhelming support in African-American precincts.[134]

Faced with the prospects of trying cases before unsympathetic judges, the

voting-rights bar in South Carolina came to appreciate the virtues of the preclearance requirements of section 5, which put the burden of proof on the jurisdiction proposing election law changes, not on minority citizens. Justice Department objections under section 5 caused about one-fourth of the changes in county election method from 1974 to 1989 (nine of thirty-two; see table 7.8A); section 2 litigation prompted about 29 percent of changes (ten of thirty-two); and one county voluntarily changed its method of election after pressure from the NAACP.[135]

The Attorney General objected to the adoption of at-large elections for nine county councils and four school boards during the 1970s.[136] Often litigation was necessary to enforce these objections. With the exception of Charleston County, which successfully challenged the timeliness of the objection in court, all thirteen governments ultimately adopted single-member districts.[137]

Some cities as well as counties switched to district elections as a result of Department of Justice scrutiny. Most cities and towns in South Carolina already used at-large elections, and the Home Rule Act did not require a change. Municipal annexations had to be precleared, however. In 1974, for example, the Attorney General objected to seven annexations of predominantly white areas by the city of Charleston.[138] Polarized voting patterns had characterized recent city elections, and the votes of whites in the annexed areas had a substantial impact on the outcome of the close mayoral election in 1971, swinging the victory to the incumbent mayor.[139] In order to secure preclearance of the annexations, Charleston agreed to adopt a ward election system.[140] As of 1990, the city had six African-American council members out of twelve. Section 5 objections to annexations of white subdivisions led to single-member districts in other cities as well.[141]

Attorneys for plaintiffs were sometimes able to use requirements of section 5 to good advantage in forcing political jurisdictions to change from at-large to district elections. Dorchester County, for example, came under section 5 scrutiny following a previous challenge for faulty redistricting on the basis of the one-person, one-vote rule. In 1973 Derfner and McDonald successfully challenged the districts used in Dorchester county council elections on one-person, one-vote grounds.[142] Rather than redress the malapportionment through redistricting, the county adopted at-large elections. The Department of Justice refused preclearance, noting that racial bloc voting had prevented all African-American candidates from being elected to the council in a county that was 35 percent black.[143] Dorchester then devised a seven-district plan, with two black-majority districts, which the department approved.[144]

Private voting rights attorneys and the Department of Justice have cooperated in attacking South Carolina's at-large voting system. Still, because the department had precleared some changes before the Home Rule Act, some voting rights attorneys believe that in the early years of the Voting Rights Act, "while concentrating on cleaning up barriers to black voter participation, the Justice Department failed to enforce preclearance requirements which allowed many South Carolina counties to establish at-large election methods without objection."[145] Wherever

the department failed to file an objection, private attorneys had to bring costly and time-consuming lawsuits. Key cases in South Carolina involved Sumter and Edgefield counties.

Litigation in Sumter County

Litigation regarding the use of at-large elections was complex and produced important struggles on both sides. The Sumter County Council case involved legislative redistricting, fear of black influence after the Voting Rights Act, objections by the Department of Justice, and private litigation. In 1967 Sumter County adopted an elective form of government to replace its appointive system.[146] Sumter was among those counties which chose not to hold a referendum under the 1975 Home Rule Act. The act, therefore, assigned to Sumter the council-administrator form of government, with council members to be elected at large. On 3 December 1976, however, the Attorney General objected to the at-large feature of the plan. Both the Department of Justice and local African-American plaintiffs, represented by white attorney Herbert Buhl of Columbia and black attorney Donald Sampson of Greenville, challenged the unpreclearead use of at-large elections for county council in 1978; the court agreed that under the terms of section 5, the county's at-large system was legally unenforceable.[147] In November 1978, the county held a referendum to determine the preference of the electorate, and, in a racially polarized vote, a majority supported the at-large option over a district plan.[148] The county asked that the previous objection be withdrawn in light of the referendum results, but the Department of Justice declined.[149] The county then persuaded a three-judge court in South Carolina that its request for reconsideration was actually a new submission and that, because the department had failed to object within the required sixty days, it had, in fact, precleared the change.[150]

The Department of Justice chose not to appeal this ruling. Sampson, joined by attorney Armand Derfner, took the case to the U.S. Supreme Court and won a reversal.[151] Sumter County then filed a lawsuit seeking preclearance by a three-judge panel in the District of Columbia. After a full trial on the merits, the court refused to preclear the switch to at-large elections, ruling that the county had not met its burden of proof that the original change in 1967 was racially discriminatory in neither purpose nor effect. The court found that the decision to eliminate the legislative appointment of county government was motivated in part by a concern "that a black senate district would be created and the person elected from that district might control appointments to the Sumter County governing body."[152]

Expert testimony in the trial clarified the racial motivation behind the shift from appointive to at-large elected officials in 1967. Sumter was a bastion of racial conservatism, and its resident senator, Henry Richardson, had actively supported the county's White Citizens Council in the 1950s.[153] When the senate redistricting committee broached a plan that would have put Sumter County into a black-majority senatorial district with Clarendon and Williamsburg counties, Richardson and his colleagues threatened a filibuster. The incumbent senator from Williamsburg predicted bluntly that the proposed three-county district might actually elect a black senator.[154] The more likely prospect, at least for the near future, was the election of a white who, in order to attract the support of black voters, might agree to appoint African-American members to the county governing body. The influential Richardson pushed through the legislature a statute creating an elected county council, with all members elected at large, and then managed to force black-majority Williamsburg into another district. Under the state's full-slate law, such a council was more likely to remain all white than it would be under the traditional appointive system.[155] In 1984, after eight years of litigation, Sumter County adopted a plan with seven single-member districts. The council held its first election since 1976; African Americans won three seats.

Litigation in Edgefield County

An even more complex lawsuit, *McCain v. Lybrand* arose in Edgefield County, home of U.S. senator J. Strom Thurmond, who had bitterly opposed the original Voting Rights Act in 1965 and who fought not only the extensions of section 5 in 1970, 1975, and 1982, but the 1982 amendment to section 2.[156] Ten years of lawsuits and proceedings, with an ultimate objection by the Department of Justice in 1984, finally ended the use of at-large elections for the Edgefield county council. In 1969 black activist Tom McCain began efforts to open local governing bodies to African Americans. In 1974, on behalf of African-American plaintiffs led by McCain, attorneys Derfner and McDonald filed a lawsuit challenging the county council's at-large elections. After a trial on the merits in 1975, Judge Robert Chapman took five years to rule.[157] In following the Supreme Court guidelines set forth in *White v. Regester*,[158] Chapman decided that the plaintiffs' expert had presented statistical evidence of "bloc voting by the whites on a scale that this Court has never before observed."[159] When, in 1980, the judge ruled in favor of the plaintiffs, Derfner almost cried. "I have never been more surprised in my life as a lawyer," he said.[160]

Chapman vacated his own opinion, however, when the Supreme Court abruptly enunciated a new "intent standard" in *City of Mobile v. Bolden*, which meant that plaintiffs would have to prove that at-large elections were adopted or maintained with a racially discriminatory purpose.[161] Because of Edgefield's long history of racial discrimination, which continued up to the time of trial, Derfner and McDonald pressed their constitutional claim and began amassing "smoking gun" evidence concerning the change from appointed to elected county council in 1966.[162] At the same time, they amended their complaint to challenge the county's failure to submit the 1966 change to at-large elections for section 5 preclearance. In 1981 a weary McDonald wrote to interested parties of "this seemingly interminable lawsuit."[163] The three-judge district court in South Carolina, however, ruled that the Department of Justice had already precleared this change when it failed to

object to a 1971 modification of the at-large system.[164] On behalf of the plaintiffs, McDonald, Derfner, and Buhl appealed to the Supreme Court, which finally in 1984 unanimously reversed the South Carolina panel.[165] The department then objected to the change to at-large elections, and Judge William W. Wilkins, Jr., former assistant to Thurmond, ordered implementation of a single-member-district plan, under which African Americans won three of five seats on the Edgefield county council.[166]

Immediately following this case, black parents sued the Edgefield school board to change from at-large to single-member districts. Because of the tremendous costs incurred by the county during *McCain v. Lybrand*, some prominent Edgefield citizens wanted to change to single-member districts. Instead, school board members insisted on retaining at-large districts. In *Jackson v. Edgefield County, South Carolina, School District*, the school board, like the county council, spared no expense in the defense of discrimination.[167]

Plaintiffs presented evidence at trial of the school board's racially discriminatory behavior for years after the adoption in 1968 of at-large elections to reinforce the inference that the change was racially motivated and that at-large elections were maintained with discriminatory intent. When Congressman Butler Derrick, a native Edgefieldian, testified as a witness for the school board, he conceded that Edgefield County voting was racially polarized. Again Edgefield African-American plaintiffs prevailed; again the cost to the county's citizens was extraordinary. This time the school board did not appeal.[168]

The Edgefield and Sumter cases were important precedents for other counties, cities, and school districts. They encouraged other municipalities to settle out of court. In the city of Sumter, for instance, which was 39 percent black but had only had one African American on council in more than one hundred years, the Justice Department objected to the annexation of a white suburb, and the local NAACP approached the city council about changing to district elections.[169] Mayor W. A. "Bubba" McElveen, having observed Sumter County spend eight years and more than half a million dollars in an unsuccessful attempt to preserve at-large elections, introduced single-member districts in the city. As a result, blacks won three of six single-member-district seats.[170] Following *Jackson v. Edgefield County, South Carolina, School District*, Edgefield County African Americans filed lawsuits to change the method of election from at-large to single-member districts in the cities of Edgefield, Johnston, and Trenton. These cities immediately negotiated settlements.

"When Sumter and Edgefield fell, the rest came tumbling down," said longtime NAACP activist Adell Adams. The *Columbia State*, arguably the most influential newspaper in South Carolina, agreed. Coming on the heels of the 1982 revision of section 2, which made it possible for minority plaintiffs to win vote-dilution lawsuits without proof of discriminatory intent, the lengthy and costly court losses by Sumter and Edgefield counties "marked the beginning of the end of at-large governments in South Carolina."[171] *McCain v. Lybrand* clarified section 5 preclearance in the state, and gave the section 5 unit of the Justice Department firmer precedents with which to insist on changes in other jurisdictions.

After the *McCain* Supreme Court decision affecting Edgefield, adjacent Saluda County settled out of court. Several other counties and cities adopted single-member districts under similar litigation or threat thereof. In 1987 Laurens County, facing objections from the NAACP, the ACLU, and the Justice Department to its at-large system, approved a single-member-district plan, and two African Americans were elected to its council. Abbeville County had never elected a black county council member until the NAACP and ACLU sued the county and the city. When the county went to district elections in 1989, two African Americans were elected. In Barnwell County the NAACP and ACLU again sued, and the county, under its first district elections, elected three black council members. In 1988 Columbia attorney John Roy Harper II and NAACP attorney Willie Abrams sued Richland County. The county settled before trial; eleven districts were drawn, and four African Americans won election out of the first six districts phased in that year (see table 7.8A).[172]

Role of the NAACP in Litigation

In voting rights litigation, local NAACP members and officers were generally the plaintiffs in suits brought by Buhl, Derfner, Harper, McDonald, and other attorneys in the 1970s and early 1980s. At its annual meeting in 1980, the South Carolina State Conference of Branches resolved to dismantle all at-large systems of elections that diluted African-American voting strength. In 1981 the national NAACP's general counsel, Thomas Atkins, visited the state and brought Margarett Ford, an assistant general counsel. Ford was assigned to South Carolina and worked primarily on the South Carolina House and Senate redistricting as well as on congressional issues. In 1985, Dennis Hayes, NAACP staff attorney responsible for the voting rights docket, joined Ford in South Carolina to work on reapportionment and redistricting. Hayes encouraged local NAACP branches to broaden their grass-roots activism and local participation. His proddings to file section 2 lawsuits in South Carolina fell on the receptive ears of Adell Adams, chair of the Political Action Committee of the state NAACP; John Roy Harper II, general counsel of the South Carolina NAACP; Dr. William E. Gibson, president of the South Carolina State Conference of Branches; and Nelson Rivers, who was hired as executive secretary of the state conference at about the same time Hayes began work in the state. With a statewide network of local branches, the NAACP, beginning in November 1986, made its primary focus local at-large election systems that diluted the votes of South Carolina's African Americans. Rivers, who characterized the at-large system as a dinosaur and "a thing of the past," told NAACP branch presidents that "where there is an NAACP branch president and at-large voting system in the same city or town, one of the two must go."[173] Thus in the late 1980s the South Carolina NAACP, with the full backing of the national office in Baltimore, initiated a number of successful voting rights lawsuits.

Beyond litigation, the NAACP branches have been successful in political negotiations to convince counties, cities, towns, and school boards to voluntarily dismantle at-large systems. For example, the city of Spartanburg, which is 41 percent black, had one African-American city council member, a successful and popular high school football coach. Black citizens wanted more representation, and the local branch of the NAACP in 1987 convinced Hayes, along with Greenville black attorney Michael Talley, to bring suit against the city council. The Justice Department subsequently intervened (having objected to the annexation of a predominantly white area in Spartanburg as early as 16 July 1985). The case in Spartanburg was settled, and African Americans were elected in three of the six single-member districts.[174] Following the successful settlement of the suit against the city, the local NAACP approached the county council with its maps and plans; the county council, in light of the city's decision to settle its lawsuit, agreed to adopt a district plan. A referendum passed in March 1990, and a district plan was implemented that year.

Although litigation was not involved in the Spartanburg County Council change, threat of litigation was clear to all involved. In response to the question, "Do you know the reason the county changed to a district method of electing county officials?" a city official answered, "The NAACP forced the district method."[175] The ACLU, often working with the NAACP, continued its attack in other jurisdictions as well. Cases were often settled; believing that chances of successfully defending citywide or countywide voting were small, local governments adopted district election plans (see table 7.8A). As a result, black representation increased dramatically (see tables 7.5 and 7.5A).

Racial Bloc Voting

Proof of racial bloc voting was a crucial element to the success of lawsuits. In 1965 a Columbia newspaper concluded that "bloc voting in the Piedmont State exists, among Negroes and whites." As evidence, the paper pointed to the 1964 Democratic primary for the South Carolina House of Representatives. "In several local elections of recent vintage," it continued, "with Negro and white candidates in the field, both races have voted with color-consciousness, as blocs."[176] Even in recent years, courts have found that racially polarized voting characterized South Carolina jurisdictions.[177] Defendants in other lawsuits agreed to go to district plans after courts ruled that plaintiffs had established a prima facie case of racial bloc voting.[178] In a recent statewide redistricting lawsuit, the court relied on extensive expert testimony demonstrating ongoing evidence of racially polarized voting.[179] The Department of Justice has also referred to evidence of bloc voting in thirty-eight separate section 5 objections between 1974 and 1992.[180]

A recently published statewide study reinforces judicial findings for particular jurisdictions in South Carolina. Loewen examined precinct-level data from 130 contests held from 1972 to 1984 between black and white candidates. Over two-thirds were elections for local office in both rural and urban jurisdictions from every section of South Carolina. An average of 90 percent of white voters cast their ballots as a bloc for white candidates; African Americans were almost as cohesive, voting for candidates of their own race 85 percent of the time.[181] With such racially polarized electoral behavior, at-large elections in majority-white jurisdictions inhibit African-American representation to a substantial degree. State officials conceded in 1987 that "there are few methods other than at-large election methods to dissuade blacks from voting or seeking council seats."[182] And the research director of the Atlanta-based Voter Education Project observed that "the at-large election system is the most effective tool to deny blacks equal representation. Until the fundamental question of at-large systems is addressed, we're going to have places like South Carolina and North Carolina where blacks are largely underrepresented."[183]

The Impact of Single-Member Districts

A simple method of measuring the impact of election methods on minority representation is to compare the percentage of black officeholders in at-large systems with the percentage elected under district plans.[184] A better method is to compare the proportionality of black officeholders in the two types of system, using an "equity measure," such as the ratio of blacks on council to blacks in the city population. As in the other state chapters in this volume, we have used such measures of black representation to examine the impact of changes in election structure on black officeholding.

County governing bodies are the primary focus of our analysis of South Carolina for several reasons (although data on cities are presented in several tables). Relatively few cities had changed to single-member districts by 1989, and the paucity of cases made it difficult to draw firm conclusions. Moreover, in recent years county councils (along with the state legislature) have been the central battleground in the conflict over election methods. At the time of our survey, voting rights lawsuits and objections by the Department of Justice had affected South Carolina counties to a greater degree than cities. Black electoral efforts, as well as black electoral success, had come mainly on the county level. Finally, we focus on county government because of its significance in South Carolina, especially in rural counties. As recently as 1980, 49.1 percent of all the state's African Americans still lived in rural areas. County governments maintain roads and operate schools. As Blough puts it, counties "have been the most important kind of local government during much of the history of this rural state . . . [and] in recent years counties have undergone the most radical transformation of all local governments."[185]

The indisputable finding of our survey is that African Americans in white-majority counties are more fully represented under single-member-district plans than under at-large systems (see table 7.1A).[186] Counties with mixed plans also

elected a higher percentage of African Americans than those with at-large systems, but no blacks were elected to the at-large seats within mixed plans in 1989 (see table 7.3A). Only in black-majority counties did method of election make little difference. Where African Americans were no longer in the minority, at-large elections did not prevent them from winning. The equity measures presented in table 7.4A reveal the same pattern, but demonstrate that even in counties using district elections, African Americans were not elected in numbers corresponding to their percentage of the population.

A before-and-after comparison, as displayed in table 7.2A, demonstrates that changes from at-large to single-member district systems substantially increased minority representation on South Carolina county councils between 1974 and 1989. Whatever their racial composition, counties using at-large elections in 1974 had only a small share of African-American council members. The equity ratio employed in table 7.5A measures the same trend more effectively. In counties between 10 and 29.9 percent black that changed from at-large to districts, the proportionality of black representation increased from a score of 0.15 to 0.82 between 1974 and 1989. In counties between 30 and 49.9 percent black, it increased from 0.08 to 0.72. Although single-shot voting (i.e., voting for only one person when more than one could be elected—a method that sometimes enables blacks to win at-large seats) was possible in at-large systems in South Carolina, counties that retained at-large elections witnessed only a minimal increase in black representation between 1974 and 1989, except where blacks were a majority.[187]

The discriminatory effects of at-large elections are consistent with the evidence presented earlier that voting behavior in South Carolina remains highly polarized along racial lines. The district-by-district results presented in table 7.6A further strengthen this conclusion. In districts less than 30 percent black, only 2 percent of the council members elected in 1989 were African Americans; in those between 30 and 49.9 percent black, only 10.2 percent were. Districts between 50 and 59.9 percent black were, in effect, swing districts; blacks made up, on average, 54.3 percent of the population but comprised only 36.4 percent of the council members elected. In districts 60 percent and above, by contrast, a minimum of 82.2 percent of the council seats were filled by African Americans.

Only a few cities had adopted single-member districts by the time of our survey.[188] For purposes of comparison with other states, we display election results in tables 7.1 through 7.6 for cities of at least 10,000 with a black population of at least 10 percent. (South Carolina has no cities in this category with an African-American majority.) The small number of cities involved minimizes the statistical significance of the findings. We have, however, included every city in each category.

City election results are similar to our findings concerning county councils. The most obvious finding is that single-member-district plans in cities afforded African Americans the best opportuntity to elect candidates of their choice (see table 7.1). Although minority representation in mixed plans was also significantly higher than minority representation in at-large plans, black candidates won only in the district

portions of these plans; none won at-large seats in cities with mixed plans (see table 7 3).

The effectiveness of single-member districts in terms of minority representation in cities can be seen clearly from table 7.4. By 1989 the nine white-majority cities that used single-member-distict plans had gone beyond representational parity. The dramatically divergent record of the seven white-majority cities that still used at-large elections demonstrates the detrimental effects of this dilutive device on minority officeholding.

The pattern of change over time in cities is also analogous to the pattern found in county councils. The change from at-large to single-member districts in white-majority cities greatly increased minority officeholding between 1974 and 1989. While black representation in the nine cities that changed to single-member districts increased tremendously in 1989 over 1974, in the seven cities that retained at-large systems black representation increased only modestly (see tables 7.2 and 7.5).

Table 7.6, showing city data, reinforces our conclusion in Table 7.6A, showing county data, that voting patterns in South Carolina remain divided by race. White-majority districts elected not a single African American to city office. In black-majority districts, on the other hand, African Americans held three-quarters of the seats in districts between 50 and 59.9 percent black and all seats in districts 60 percent black or greater.[189]

Conclusion

Although the struggle for fair elections continues in South Carolina, the Voting Rights Act brought enormous change to the state's politics. The increase in African-American voter registration and turnout almost immediately eliminated the white supremacist rhetoric that had been a hallmark of the state's political leaders. Increased African American representation has come more slowly. Even today, black representation on county councils, city governing boards, and school boards is in general far from proportional. The number of African Americans in state elected offices remains woefully small (see table 7.10). Still, the equity ratio for all county councils at least 10 percent black more than tripled between 1974 and 1989, from 0.21 to 0.71; for the cities we surveyed it increased from 0.07 to 0.85. Most of this increase resulted from the change from at-large to single-member-district plans.

Lawsuits by private plaintiffs, along with Department of Justice objections and litigation, have played a significant role in the shift of South Carolina counties to single-member districts since 1974. Often litigation, or the threat of litigation, prompted a county to submit a change to the Department of Justice, leading then to an objection. Voluntary changes, especially those adopted pursuant to the Home Rule Act in 1976, indicate a growing willingness on the part of some whites in some counties to accommodate minority representation, as well as a growing

preference for district elections among whites for nonracial reasons. Not all were as resistant as Edgefield or Sumter.

Nowhere in the state were the changes wrought by the Voting Rights Act more dramatic than in Edgefield County, home of "Pitchfork Ben" Tillman and Senator J. Strom Thurmond. On 1 January 1985, three African Americans were sworn in as county council members, giving them majority control. The ceremony took place in the same courthouse seized at gunpoint by the "Redeemers" of 1876 to prevent African Americans from voting and to control the ballot count.[190] Even when whites later recaptured the majority on the county council in 1986, African Americans retained political influence. In 1984, when African Americans won majority control of the county council, the lame-duck white incumbents responded by signing an unprecedented two-year contract with the incumbent white administrator, in an attempt to tie the hands of the incoming black majority.[191] In 1985 the newly inaugurated county council replaced the incumbent anyway with Dr. Thomas McCain, the black educator who had led the court battles responsible for the victory.[192] When the 1986 elections swung the margin back to a three-two white majority, however, the new council did not replace Dr. McCain, and he remains as Edgefield County administrator today. In the words of local white businessman and publisher of the *Edgefield Citizen-News*, Bettis C. Rainsford, "I think he's done a helluva job and everybody else does, too."[193] The white-majority council's and white Edgefieldians' acceptance of McCain as county administrator proves that single-member districts can make a difference, even in the home county of "Pitchfork Ben" Tillman.

TABLE 7.1
Black Representation on City Councils in 1989 by Election Plan, South Carolina Cities of 10,000 or More Population with 10 Percent or More Black Population in 1980

Type of Plan by % Black in City Population, 1980	N	*Mean % Black in City Population, 1980*	*Mean % Black on City Council, 1989*
SMD plan			
10–29.9	2	18.65	25.00
30–49.9	7	41.73	45.24
50–100	0	—	—
Mixed plan			
10–29.9	1	29.47	25.00
30–49.9	4	40.43	33.33
50–100	0	—	—
At-large plan			
10–29.9	5	15.56	3.33
30–49.9	2	37.08	15.48
50–100	0	—	—

TABLE 7.1A
Black Representation on County Council in 1989 by Election Plan, South Carolina Counties of 10 Percent or More Black Population in 1980[a]

Type of Plan by % Black in County Population, 1980	N	*Mean % Black in County Population, 1980*	*Mean % Black on County Council, 1989*
SMD plan			
10–29.9	9	23.79	14.93
30–49.9	14	40.35	27.45
50–100	9	58.00	41.82
Mixed plan			
10–29.9	2	23.45	19.05
30–49.9	2	34.11	14.29
50–100	0	—	—
At-large plan			
10–29.9	2	22.24	8.33
30–49.9	2	32.77	7.14
50–100	3	56.79	42.86

[a]Colleton had a multimember district plan, but is included in the single-member-district category. Colleton had two large districts that elected three members from each district. Beaufort had one multimember district, three single-member districts, and three at-large seats and is included in the mixed category.

TABLE 7.2
Changes in Black Representation on City Councils between 1974 and 1989, South Carolina Cities of 10,000 or More Population with 10 Percent or More Black Population in 1980

Type of Change by % Black in City Population, 1980	N	*Mean % Black in City Population, 1980*	*Mean % Black on City Council*	
			Before Change (1974)	*After Change (1989)*
		Changed Systems		
From at-large to SMD plan				
10–29.9	2	18.65	0.00	25.00
30–49.9	7	41.73	2.14	45.23
50–100	0	—	—	—
From at-large to mixed plan				
10–29.9	1	29.47	0.00	25.00
30–49.9	4	40.43	4.17	33.33
50–100	0		—	—
		Unchanged Systems		
At-large plan				
10–29.9	5	15.56	0.00	3.33
30–49.9	2	37.08	8.34	15.48
50–100	0	—	—	—

TABLE 7.2A
Changes in Black Representation on County Councils between 1974 and 1989, South Carolina Counties of 10 Percent or More Black Population in 1980

Type of Change by % Black in County Population, 1980	N[a]	*Mean % Black in County Population, 1980*	*Mean % Black on County Council*	
			Before Change (1974)	*After Change (1989)*
		Changed Systems		
From at-large to SMD plan				
10–29.9	4	25.06	3.85	20.59
30–49.9	11	40.01	3.39	28.75
50–100	7	56.74	11.43	37.21
From at-large to mixed plan				
10–29.9	1	22.13	0.00	16.67
30–49.9	1	35.31	0.00	0.00
50–100	0	—	—	—
		Unchanged Systems		
At-large plan				
10–29.9	2	22.24	0.00	8.33
30–49.9	2	32.77	7.14	7.14
50–100	3	56.79	15.38	42.86

[a]*N*s differ from those in table 7.1A because some counties did not have at-large plans in 1974.

TABLE 7.3
Black Representation in 1989 in Mixed Plans by District and At-Large Components, South Carolina Cities of 10,000 or More Population with 10 Percent or More Black Population in 1980

% Black in City Population, 1980	N	*Mean % Black Councilpersons in District Components, 1989*	*Mean % Black Councilpersons in At-large Components, 1989*
10–29.9	1	33.00	0.00
30–49.9	4	53.33	0.00
50–100	0	—	—

TABLE 7.3A
Black Representation in 1989 in Mixed Plans by District and At-Large Components, South Carolina Counties with 10 Percent or More Black Population in 1980[a]

% Black in County Population, 1980	N	*Mean % Black Councilpersons in District Components*	*Mean % Black Councilpersons in At-large Components*
10–29.9	2	21.05	0.00
30–49.9	2	28.57	0.00
50–100	0	—	—

[a]Beaufort had three at-large representatives, three single-member districts, and one multimember district from which three representatives were selected. Aiken, Horry, and Saluda county chairpersons were elected at large. These three counties listed their method of election as single-member district. However, because one member was elected at large, the counties were categorized as mixed. Saluda County had no black representatives from the four districts. The black population was dispersed throughout the county so that a district could not be created to give black candidates a majority district.

TABLE 7.4
Two Equity Measures Comparing Percentage Black on City Council in 1989 with Percentage Black in City Population in 1980, South Carolina Cities of 10,000 or More Population with 10 Percent or More Black Population in 1980

Type of Plan by % Black in City Population, 1980	N	*Difference Measure (% on Council − % in Population)*	*Ratio Measure (% on Council ÷ % in Population)*
		Changed Systems	
From at-large to SMD plan			
10–29.9	2	6.35	1.34
30–49.9	7	3.51	1.13
50–100	0	—	—
From at-large to mixed plan			
10–29.9	1	−4.47	0.85
30–49.9	4	−7.1	0.82
50–100	0	—	—
		Unchanged Systems	
At-large plan			
10–29.9	5	−12.23	0.23
30–49.9	2	−21.6	0.42
50–100	0	—	—

TABLE 7.4A
Two Equity Measures Comparing Percentage Black on County Council in 1989 with Percentage Black in County Population in 1980, South Carolina Counties with 10 Percent or More Black Population in 1980[a]

Type of Plan by % Black in County Population, 1980	N	*Difference Measure (% on Council − % in Population)*	*Ratio Measure (% on Council ÷ % in Population)*
		Changed Systems	
From at-large to SMD plan			
10–29.9	4	−4.47	0.82
30–49.9	11	−11.26	0.72
50–100	7	−19.53	0.66
From at-large to mixed plan			
10–29.9	1	−5.46	0.75
30–49.9	1	−35.31	0.00
50–100	0	—	—
		Unchanged Systems	
At-large plan			
10–29.9	2	−13.91	0.37
30–49.9	2	−25.63	0.22
50–100	3	−13.93	0.75

[a]These data are calculated directly from 1989 figures in table 7.2A.

TABLE 7.5
Changes in Black Representation on City Councils between 1974 and 1989, South Carolina Cities of 10,000 or More Population with 10 Percent or More Black Population in 1980 (Ratio Equity Measure)

Type of Change by % Black in City Population, 1980	N	*Black Representational Equity on Council*	
		1974	*1989*
		Changed Systems	
From at-large to SMD plan			
10–29.9	2	0.00	1.34
30–49.9	7	0.05	1.13
50–100	0	—	—
From at-large to mixed plan			
10–29.9	1	0.00	0.85
30–49.9	4	0.09	0.82
50–100	0	—	—
		Unchanged Systems	
At-large plan			
10–29.9	5	0.00	0.23
30–49.9	2	0.21	0.42
50–100	0	—	—

TABLE 7.5A
Changes in Black Representation on County Councils between 1974 and 1989, South Carolina Counties with 10 Percent or More Black Population in 1980[a]
(Ratio Equity Measure)

Type of Change by % Black in County Population, 1980	N	*Minority Representational Equity on Council*	
		1974	*1989*
	Changed Systems		
From at-large to SMD plan			
10–29.9	4	0.15	0.82
30–49.9	11	0.08	0.72
50–100	7	0.20	0.66
From at-large to mixed plan			
10–29.9	1	0.00	0.75
30–49.9	1	0.00	0.00
50–100	0	—	—
	Unchanged Systems		
At-large plan			
10–29.9	2	0.00	0.37
30–49.9	2	0.22	0.22
50–100	3	0.27	0.75

[a]These data are calculated from the data in table 7.2A.

TABLE 7.6
Black Council Representation in City Council Single-Member Districts in 1989, South Carolina Cities of 10,000 or More Population with 10 Percent or More Black Population in 1980[a]

% Black Population of District	N	*Mean % Black Population in Districts, 1980*	*Mean % Black Councilpersons in Districts, 1989*
0–29.9	35	9.38	0.00
30–49.9	4	33.75	0.00
50–59.9	4	57.20	75.00
60–64.9	4	63.58	100.00
65–69.9	9	66.13	100.00
70–100	15	77.30	100.00

[a]Complete information was obtained on districts in twelve of fourteen cities.

TABLE 7.6A
Black Representation in County Council Single-Member Districts in 1989, South Carolina Counties of 10 Percent or More Black Population in 1980[a]

% Black Population of District	N	*Mean % Black Population in Districts, 1980*	*Mean % Black Councilpersons in Districts, 1989*
0–29.9	99	15.16	2.00
30–49.9	49	39.82	10.20
50–59.9	22	54.31	36.40
60–64.9	17	62.38	88.20
65–69.9	17	67.20	82.40
70–100	11	75.89	90.90

[a]Complete information was obtained for districts in 30 of 36 counties.

TABLE 7.7
Black City Council Representation in Single-Member Districts in 1989 by Racial Composition of District, South Carolina Cities of 10,000 or More Population with 10 Percent or More Black Population in 1980

Racial Composition of District	N	*Mean % Black Population in Districts, 1980*	*Mean % Black Councilpersons in Districts, 1989*
Black majority	32	70.35	96.88
White majority	39	11.88	00.00

TABLE 7.7A
Black County Council Representation in Single-Member Districts in 1989 by Racial Composition of District, South Carolina Counties with 10 Percent or More Black Population in 1980

Racial Composition of District	N	*Mean % Black Population in Districts, 1980*	*Mean % Black Councilpersons in Districts, 1989*
Black majority	67	63.17	70.15
White majority	148	23.33	4.73

TABLE 7.8
Cause of Change from At-Large to Mixed or District Plan between 1974 and 1989, South Carolina Cities 10,000 or More Population with 10 Percent or More Black Population in 1980

City	Did Lawsuit Accompany Change?	Lawsuit/Reason for Change[a]
	Changed to Single-Member Districts	
Charleston	No	Change necessary to secure Justice Department preclearance of annexations; redistricting, 1983
Easley	No	—
Greenwood	No	Change to districts, 1988. Voluntary; consulted with NAACP
Greer	No	Voluntary change at the request of local NAACP in 1987; two black-majority districts out of six; phased in, so that the second black district did not elect until 1989
Laurens	Yes	*Glover v. Laurens*
Orangeburg	Yes	*Owens v. City of Orangeburg*
Rock Hill	No	Annexation objection and negotiations with NAACP.
Spartanburg	Yes	*NAACP and United States v. Spartanburg*
Sumter	No	Change necessary to secure Department of Justice preclearance of annexations, 1986. Negotiations with NAACP

(continued)

TABLE 7.8 (*Continued*)

City	Did Lawsuit Accompany Change?	Lawsuit/Reason for Change[a]
	Changed to Mixed Plan	
Aiken	No	—
Anderson	No	Voluntary change, Home Rule Act, 1976; redistricting, 1985
Columbia	No	Voluntary change by referendum to mixed plan in 1982 following successful defense of at-large elections in *Washington v. Finlay*
Florence	Yes	*Jones v. Tedder*, C.A. No. 76-831 (D.S.C.), consent decree, 1977; one councilmember elected at large, three from single-member districts, plus mayor; redistricting 1984
Greenville	No	Voluntary change, Home Rule Act, 1977; redistricting, 1983
SUMMARY	Yes	4 (28.6%)
	No	10 (71.4%)

Source: Legal research and interviews with civil rights attorneys; Municipal Association of South Carolina.

[a]Cities of Easley and Aiken could not provide information on reasons for change.

TABLE 7.8A
Cause of Change from At-Large to Mixed or District Plan between 1974 and 1989, South Carolina Counties with 10 Percent or More Black Population in 1980

County	Did Lawsuit Accompany Change?	Lawsuit/Reason for Change
		Changed to Single-Member Districts
Abbeville	Yes	Litigation by NAACP and ACLU: *Robinson v. Savitz*, Consent Decree (D.S.C.), 1989
Allendale	Yes	Litigation by NAACP: *Allendale County NAACP v. Henry Laffitte* (D.S.C.), 1976
Anderson	No	Home Rule Act[b]
Bamberg	No	Department of Justice objection, 20 September 1974
Barnwell	Yes	Litigation by NAACP and ACLU: *Houston v. Barnwell County* (D.S.C.), 1988
Berkeley	No	Home Rule Act
Calhoun	No	Home Rule Act
Cherokee	No	Home Rule Act; referendum
Chester	Yes	Department of Justice objection, 28 October 1977; *King v. Roddey*, consolidated with *United States v. Chester County*, (D.S.C.), 1979
Chesterfield	No	Home Rule Act
Colleton	Yes	Department of Justice objections, 6 February 1978, 19 December 1979; *Colleton County Council v. United States* (D.D.C.), 1982
Darlington	Yes	*United States v. Darlington County* (D.S.C.), 1986
Dorchester	Yes	Department of Justice objection, 22 April 1974; *DeLee v. Branton* (D.S.C.), 1974
Edgefield	Yes	*McCain v. Lybrand* (D.S.C.), 1974–84; Department of Justice objections, 8 February 1979, 11 June 1984
Fairfield	Yes	Litigation by ACLU: *Walker v. Fairfield County Council* (D.S.C.), 1988; Council asked the ACLU to bring suit. Majority-black county

(*continued*)

TABLE 7.8A (*Continued*)

County	Did Lawsuit Accompany Change?	Lawsuit/Reason for Change
		had already elected three of five black council members when elections were at large
Florence	No	Home Rule Act
Georgetown	Yes	Consent Decree; *Watkins v. Scoville* (D.S.C.), 1982–84
Greenville	No	Home Rule Act
Greenwood	No	Voluntary, but NAACP worked behind scenes
Laurens	Yes	Litigation by ACLU; *Beasley v. Laurens County, United States v. Laurens County* (D.S.C.), 1988 Consent Decree
Lee	No	Home Rule Act
Marion	No	Home Rule Act
Marlboro	No	Home Rule Act
Newberry	No	Home Rule Act
Orangeburg	No	Home Rule Act
Richland	Yes	*NAACP v. Richland County* (D.S.C.), 1988
Sumter	Yes	Department of Justice objection, 3 December 1976, *Blanding v. Dubose*, joined with *United States v. Sumter County* (D.S.C.), 1978; *Sumter County v. United States* (D.D.C.), 1982
Union	Yes	*Lytle v. Commissioners of Election of Union County* (D.S.C.), 1974; Home Rule Act
York	No	Department of Justice objection, 12 November 1974; Home Rule Act; referendum
		Changed to Mixed Plan
Aiken	No	Department of Justice objection, 25 August 1972; Home Rule Act
Horry	Yes	Department of Justice objection, 12 November 1976; *Horry County v. United States* (D.D.C), 1978

(*continued*)

TABLE 7.8A (*Continued*)

County	Did Lawsuit Accompany Change?	Lawsuit/Reason for Change
Saluda	Yes	Litigation by ACLU: *Lewis v. Saluda County* (D.S.C.), 1983–85, Consent Decree
SUMMARY	Yes	16 (50%)
	No	16 (50%)

[a] Beaufort is not included in this table because it changed before 1974. Spartanburg is not included because it changed after 1989.

[b] In 1975 the Home Rule Act (explained in text) required every county to select a form of government. Twenty-four of the forty-six counties held referendums. If a county did not schedule a referendum, the Home Rule Act assigned, of five government systems, that nearest to the county's 1975 form of government.

TABLE 7.9
Major Disfranchising Devices in South Carolina

Device	Date Established	Date Abolished
White primary	Selected places 1876; statewide, 1896	1947[a] 1947[a]
Separate ballots and boxes for state and federal elections	1878	1895[b]
Reregistration of all voters	1882	One-time measure
Eight Box Law	1882	1895[b]
Appointment of all legislature by local officials	1894	1975[c]
Poll tax	1895	1951[d]
Denial of right to vote for commission of certain crimes	1895	1982[e]
Reregistration of all voters	1896	One-time measure
Literacy test	1895	1965[f]
Understanding clause	1896	1965[f]
Short registration hours and time	1896	1967, 1968, 1986[g]
Lengthy residency requirement	1896	1972[h]
Party loyalty oath	1944	1947, 1948[i]
Local private party clubs	1944	1947, 1948[i]

[a] *Elmore v. Rice*, 72 F. Supp. 516 (E.D.S.C. 1947), *aff'd sub nom. Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948).

[b] State constitution (1895). Rendered superfluous by disfranchising features in state constitution.

[c] State legislature (1975).

[d] Amendment to state constitution (1951).

[e] State Legislature (1981); influenced by *Allen v. Ellisor*, 477 F. Supp 321 (D.S. C. 1979), *rev'd and remanded*, 664 F.2d 391 (4th cir. 1981).

[f] Voting Rights Act (1965).

[g] Act 443 State Legislature (1967); creation of South Carolina Election Commission (1968); postcard registration (1986).

[h] Unconstitutional in light of *Dunn v. Blumstein*, 405 U.S. 330 (1972).

[i] *Elmore v. Rice* (1947); *Brown v. Baskin, 78 F. Supp. 933* (E.D.S.C. 1948); *aff'd*, 174 F.2d 391 (4th Cir. 1949).

TABLE 7.10
Black and White Registered Voters and Officeholders in South Carolina, Selected Years[a]

	Black		White	
	N	%	N	%
Registered voters				
1964	144,000	17	703,000	83
1966	191,000	21	718,000	79
1990	354,000	26	1,000,000	74
Officeholders				
State house				
1964	0	0	124	100
1966	0	0	124	100
1990	16	13	108	87
State senate				
1964	0	0	46	100
1966	0	0	46	100
1990	5	11	41	89

Sources: South Carolina Election Commission 1990 and 1991; Joint Center for Political and Economic Studies 1990 and 1991; U.S. Commission on Civil Rights 1968, 219, 252–53.
[a]Mean black South Carolina population, 1960–90 ≈ 31.4%.

CHAPTER EIGHT

Texas

ROBERT BRISCHETTO, DAVID R. RICHARDS, CHANDLER DAVIDSON, AND BERNARD GROFMAN

TEXAS is not one of the seven states originally covered by the special provisions of the Voting Rights Act,[1] but it has been a major battleground on which the struggle over minority voting rights has occurred. While the African-American population in Texas is proportionally smaller than that in any of the other seven states, in absolute numbers it is larger. In fact, Texas blacks and Hispanics[2] together—6.3 million strong in 1990—slightly outnumbered the black population of the entire Deep South region composed of Mississippi, Alabama, Louisiana, Georgia, and South Carolina.

The proportion of Texas blacks and Hispanics combined is as great as the black proportion in Mississippi, which has the largest black ratio of any state. In 1990 blacks and Hispanics made up 11.9 and 25.6 percent of the state's population, respectively, for a total of almost 37 percent. Over 96 percent of the remaining inhabitants were Anglos, that is, white non-Hispanics.[3]

A review of the history of minority voting rights in Texas provides a short course in the evolution of the federal government's role in protecting the franchise. At the turn of the century the state established by statute and practice formidable barriers to voting.[4] Today, almost entirely as a result of federal litigation, only vestiges remain to remind us of the lengthy struggle by the state's two largest minority groups for access to the ballot. But voting rights encompass more than the right to cast a ballot and have it fairly counted. They include the right of previously excluded minority groups to have an equal chance to elect their candidates to office. The attack on the infringement of this right is of more recent vintage, and it is far from completion. The present chapter tells the story of minority efforts both to vote without hindrance and to overcome barriers to fair representation.

AFRICAN AMERICANS

The emancipation of slaves in Texas began with the arrival of federal troops in Galveston on 19 June 1865, although some slaveholders refused to free blacks until the fall.[5] An all-white constitutional convention met the following year. The new constitution it produced did not extend the suffrage even to literate blacks; and

the first legislature thereafter prohibited "intermarriage, voting, officeholding, and jury service by freedmen."[6] Only with congressional passage of the Reconstruction acts in 1867 were the state's African Americans enfranchised.[7] Thus was established a century-long pattern following emancipation in which Texas officialdom denied the political rights of blacks, whose only recourse was to the federal government.

Congressional Reconstruction, as a precondition for Texas's reentry into the Union, required the enfranchisement of blacks and the convening of a new constitutional convention, which was held in 1868–69. It was dominated by Radical Republicans as a result of widespread refusal by white voters to participate, in protest of federal military rule.[8] Although two-thirds of the votes polled on the convention question were cast by African Americans, who were voting in their first election in Texas, only ten of the ninety-three delegates were black. All but one of the black delegates were from heavily black counties.[9]

Edmund J. Davis, a Republican, became Texas's Reconstruction governor in 1870, and over the next three years black participation in state and local politics was greater than at any time until quite recently.[10] Several black political organizations quickly flourished, and two black senators and twelve representatives were elected to the Twelfth Legislature, the first to be convened under the new constitution. They, too, were mostly elected from heavily black counties.[11] Radical Republicans dominated the legislature for a brief period, and among the most important policies they enacted were ones creating a state police and militia, both of which blacks could join. These organizations helped deal with the violence—much of it racial—that was rampant in the state during that era. Many whites resented them for actions they took against the Ku Klux Klan and for guarding the polls during elections.[12]

The heavy influx of white settlers in the early 1870s enabled the Democrats to recapture both houses of the legislature in the elections of 1872, and the number of black lawmakers was reduced to seven. Governor Davis was defeated by a vote of two to one in 1873. A former Texas governor called the Democrats' victory "the restoration of white supremacy and Democratic rule."[13] Reconstruction in Texas was over.

Another constitutional convention was held in 1875, this one, as in 1866, controlled by white Democrats. The six black delegates, however, were among a bloc that prevented establishment of a poll tax as a voting requirement. But they were unable to derail a bill mandating segregated schools. The gerrymandering of predominantly black counties diminished black and Republican candidates' opportunities for judicial and legislative seats.[14] An Austin newspaper, speaking of the black-belt counties, said "districts were 'Gerrymandered,' the purpose being, in these elections, and properly enough, to disfranchise the blacks by indirection."[15]

From the end of Reconstruction to the turn of the century, the political situation of Texas blacks declined, slowly at first and then, in the 1890s, with increasing momentum. The result, as in the other southern states, was disfranchisement.[16] In the 1870s, associations of whites had sprung up in the black-belt counties, the

purpose of which was to prevent the election of blacks to office. When this failed, "local whites, as in other parts of the South, resorted to extra-legal devices such as fraud, intimidation, intrigue, and murder."[17] Pitre gives a chilling and detailed account of this terror in the Texas black belt following Reconstruction—a terror that differed little, according to Smallwood, from that in the Deep South states during the same period.[18]

White conservative opposition to black political participation increased with the growth of third parties, in which blacks played a significant though not a leading role. The most famous of these was the Populist party, which developed rapidly as an expression of agrarian discontent and peaked in 1896. As a result of the intimidation and violence that white Democrats directed at the Populists—basically a biracial coalition of impoverished farmers—the extremely high voting rates in gubernatorial races of the 1880s and 1890s dropped sharply from over 80 percent of adult males, black and white combined, to about 50 percent in 1902.[19]

In 1901 the legislature voted to submit a constitutional amendment to the electorate requiring payment of a poll tax as a voting requirement. Ratified the following year, it went into effect in 1904, by which point the turnout rate of adult males had dropped still further to 37 percent.[20] The legislature in 1903 and 1905 enacted laws that codified the poll tax, encouraged use of the exclusive white primary by the major parties, and established an annual four-month registration period that ended nine months before the general election. The effect of these developments, along with the discouragement of black participation by the "lily white" faction of the Republicans, was to depress black voter participation from 100,000 in the 1890s to about 5,000 by 1906.[21] Exclusion of African Americans from the two major parties was virtually complete, and inasmuch as nomination in the Democratic primary was tantamount to election, black disfranchisement was a fait accompli.

The banning of Texas blacks from the political system a generation after emancipation was a terrible blow to them, for they had not only enjoyed the freedom to vote but had elected several of their number to state and local office. Between 1871 and 1895 at least forty-one served in the legislature—thirty-seven in the house and four in the senate.[22] Many more were elected to city and county office during this period, largely from counties that were majority black or contained a significant black minority.[23]

Mexican Americans

Mexican Americans also were gradually disfranchised in Texas in the late-nineteenth and early twentieth centuries, although never to the extent as were blacks. From one perspective, they did not represent as great a threat to local Anglo domination as did blacks at the time because, except in a few counties between the Mexican border and the Nueces River, they made up only a small percentage of the population. In 1887, when blacks comprised 20 percent of the state's population, Tejanos made up 4 percent.[24] Only in the late 1940s did Tejanos

numerically surpass blacks, as the black ratio continued to decline. By 1960 "Spanish-heritage" people—to use the census term—constituted 15 percent of the Texas population, while blacks comprised 12 percent.[25] The 15 percent figure, however—the highest up to that point in the twentieth century—overstates the size of the potential Hispanic electorate; throughout the century, many Tejanos were not citizens and could not vote.[26]

Even so, from the state's earliest days Mexicans in South Texas counties were a matter of political concern to the Anglos, some of whom tried during the 1845 Texas constitutional convention to exclude them as voters. While these efforts failed, Tejanos were nonetheless subsequently denied the vote in certain districts. Even where they had voting rights, "protests and threats from Anglo-Americans were constant reminders of a fragile franchise."[27] Their ability to influence election results was greatest in the urban areas along the border, where they were concentrated. In the rural areas they were powerless. Here, it was only as Anglo *patrones* (bosses), typically large landholders whose relation to the *peones* was almost feudal, began to organize the Mexican vote around the time of the Civil War did their vote become relatively secure. But under these circumstances, it was a manipulated vote.

The possibilities for political access that an urban setting offered were demonstrated in San Antonio, which had a large Mexican population when Texas became part of the United States.[28] In the decade between 1837 and 1847, fifty-seven of the city's eighty-eight aldermen were Spanish-surnamed. As the Mexican proportion of the population dropped, however—which it did throughout the century—so did the number of Mexican officials. In the decade between 1875 and 1884, for example, only two of the sixty-nine aldermen had Spanish surnames.[29]

The rise of boss rule along the Rio Grande in the latter half of the nineteenth century led to sharp and sometimes bitter disputes in the early twentieth century between "reformers" and the machines.[30] The conflict was typical of Progressive Era battles over control of the electoral structure in that the challengers, some of whom organized into Good Government Leagues, used the rhetoric of "good government" and "honest elections" to justify their politics of self-interest. Often the reformers were small Anglo farmers newly arrived in the fertile Rio Grande Valley and resentful of the large landholders—also usually Anglos—and their control of the Mexican-American vote. A particularly bitter conflict of this kind in Dimmit County led the reformers to create a White Man's Primary in 1914. The local newspaper announced that the organization "absolutely eliminates the Mexican vote as a factor in nominating county candidates, though we graciously grant the Mexican the privilege of voting for them afterwards."[31] The conflicts between South Texas reformers and machine bosses, therefore, offered Tejanos a choice between disfranchisement and a manipulated vote.

Some of the machines continued into the post–World War II era. Duval County, whose stuffed ballot boxes were crucial for Lyndon B. Johnson's razor-thin senatorial victory in 1948, remained under the control of the notorious Parr machine until 1975.[32] Key found in the late 1940s that several South Texas counties exhibited the tell-tale signs of machine control in their voting returns: many victories of landslide proportions and voters' "remarkable fickleness in attachment to particular candidates." When LBJ defeated former governor Coke Stevenson in the 1948 senatorial election thanks to the lopsided Duval County vote, the loser complained about the landslides there and in surrounding counties. Boss George Parr pointed out that Stevenson had solicited his support in four previous elections and won by similar margins. "And I never heard a complaint from him then about the bloc vote in Duval County," Parr remarked.[33]

The disfranchisement of Tejanos through exclusive primaries was not unique to Dimmit County. Democrats in Gonzales County had barred both blacks and Tejanos from their primaries in 1902.[34] "White men's primaries" at the local level were frequently mentioned in the literature on Tejano politics. M. C. González, for example, a founder of the League of United Latin American Citizens (LULAC) in 1929, listed among the conditions facing Mexican Americans in Texas during the 1920s "the establishment of 'white man's' primaries to prevent blacks and Mexican Americans from exercising their right of suffrage."[35] Kibbe, writing in the 1940s, mentions the existence of a local white primary, called the White Man's Union, in four South Texas counties.[36] De Leon mentions a White Man's party in Duval County existing in 1892.[37] Shelton quotes the constitution of the White Man's Union Assocation in Wharton County as excluding "any Mexican, who is not a full Spanish blood."[38]

Restrictive registration rules, too, were directed at Mexicans. Laws making it difficult for Mexican citizens to vote in Texas were opposed at the time of passage by Jim Wells, a conservative Democrat who was one of the most powerful South Texas bosses.[39] (A county was later named for him.) In 1918 the legislature passed a bill prohibiting interpreters at the polls. This law was clearly aimed at voters who had difficulty with English—a lack of proficiency that was undoubtedly encouraged by discrimination in the schools, including the widespread segregation of Tejanos.[40] Thus, like blacks, Texas Mexicans were not only victims of an oppressive social and economic system that in many respects resembled a classic caste society; by law and custom they were deprived of the means to change their situation through effective political participation.

The Battle to Abolish the White Primary

Soon after turn-of-the-century disfranchising laws were passed, Texas blacks, supported by the newly formed National Association for the Advancement of Colored People (NAACP), began to challenge the system of political discrimination. They focused their first major efforts on the white primary. In varying numbers, blacks actually had continued to vote in some Texas nonpartisan municipal elections after 1905. Through litigation, blacks in Waco successfully challenged a nonpartisan white primary in 1918. This and some notable manifestations of black voter influence in San Antonio were apparently behind the legislature's 1923 law

providing that "in no event shall a negro be eligible to participate in a Democratic primary election held in the State of Texas."[41] While county Democratic parties across the state had already pretty thoroughly prohibited black participation by that time, the new law gave explicit state sanction to the practice.

Dr. Lawrence A. Nixon, a black El Paso physician, was quick to challenge this law, and the Supreme Court in *Nixon v. Herndon* (1927)[42] concluded that it violated the Fourteenth Amendment's equal protection clause, holding that "color cannot be made the basis of a statutory classification affecting the right set up in this case."[43] To circumvent the ruling, the legislature soon enacted a replacement statute designed to shift the burden of disfranchisement from the state to political parties. The new law authorized "every political party in the State through its State Executive Committee . . . to prescribe the qualifications of its own members."[44] The State Democratic Executive Committee (SDEC) took this cue and adopted a resolution limiting participation to "white Democrats . . . and none other."[45] Dr. Nixon, with NAACP counsel, sued again, and the Supreme Court in *Nixon v. Condon* (1932)[46] also invalidated that scheme as simply an extension of the earlier unconstitutional exclusion. The Court reasoned that the SDEC did not have the authority to act for the party; consequently, it was simply acting for the state and, in so doing, violated once again the equal protection clause. But the party's state convention, said the Court, had such authority. Within a month after the opinion, to no one's surprise, the convention adopted a resolution prohibiting African Americans from participation in the Democratic primary.

Richard Randolph Grovey, a black Houstonian, attacked the new rule in yet another suit. At issue was whether the party was a private, voluntary organization or an instrument of the state. Plaintiffs argued that the primary was conducted under state authority and thus was protected by the Fifteenth Amendment. The unanimous Court, in *Grovey v. Townsend* (1935)[47] held otherwise, invoking an earlier Texas supreme court decision which declared that political parties were voluntary associations, not creatures of the state.[48]

The single most important organization concerned with African American voting rights in Texas or elsewhere at this time was the NAACP. Urbanization and the growth of a black middle class in Texas cities provided the basis for a black leadership class that was somewhat freer to participate in civil rights activities than was possible in small towns. Beginning in the late 1930s, a new generation of leaders, typified by Dallas businessman A. Maceo Smith, revived existing local chapters, created new ones, and developed a dynamic statewide conference. Working with such figures in the national office as Walter White and Thurgood Marshall, the new black Texas leadership—including Juanita Craft in Dallas; and Lulu White, Carter Wesley, and Hobart Taylor, Sr., in Houston—coordinated and funded a number of major legal efforts.[49]

Largely as a result of this group's work, in collaboration with Thurgood Marshall, general counsel of the newly formed NAACP Legal Defense Fund, the Supreme Court again addressed the constitutionality of the white primary in 1944. The Court's membership was changing. In an earlier case involving New Orleans

voting fraud, *United States v. Classic* (1941),[50] it had held that "where the state law has made the primary election an integral part of the procedure" of choice, "or where in fact the primary effectively controls the choice, the right of the qualified elector to vote and have his ballot counted at the primary, is part of the right" protected by article I of the Constitution.[51] This led Dr. Lonnie Smith, a Houston dentist, to challenge the Texas white primary using the same logic as the Court espoused in *Classic*. Capping twenty years of litigation on the issue, the Court, in *Smith v. Allwright* (1944),[52] overrode its prior reasoning in *Grovey* that the Texas Democratic primary was distinct from the state electoral apparatus. On the contrary, the Court now said, because state law regulated the Democratic primary, which selected nominees to be included on the general election ballot, the primary was an agency of the state. The exclusion of blacks from the party's nominating process thus violated the Fifteenth Amendment, which forbids denial of the franchise on the basis of race.

The Smith decision was announced in April, and significant numbers of Texas blacks voted in the July 1944 Democratic primary. In 1946 their turnout in the primary was estimated at 75,000–100,000, in about the numbers at which they had voted during the high point of black participation in the 1890s.[53] Yet the raw figures are deceiving. Whereas a turnout of 100,000 in 1896 represented perhaps as much as 90 percent of the black potential (male) electorate of the day, in 1946 it constituted only about 20 percent of the (male and female) black electorate.

Litigation over racially exclusive primaries concluded with *Terry v. Adams* (1953).[54] The Supreme Court there condemned the "Jaybird primary" that had arisen in Fort Bend County in the nineteenth century to exclude African Americans from meaningful electoral participation. Strictly speaking, this device was not a primary but an exclusively white pre-primary conducted by the local Jaybird party to determine the preferred candidate of white voters, thereby avoiding the risk of dividing their vote in the Democrat primary. Defendants, who described their whites-only group in court as a "good government" measure,[55] argued that the Jaybirds, unlike the Democratic party, were not part of the state's official election machinery and, hence, were constitutional. The Court held otherwise.

Barriers to Registration

Texas, unlike most other southern states, never had a literacy test. However, the poll tax in Texas operated as a limitation upon the right to vote in federal elections until 1964 and in state elections until 1966. Statewide constitutional referendums to abolish the tax had failed, although evidence indicated that it still had an impact on turnout in the 1960s, especially among low-income voters. Simmons reported in the early 1950s that the tax, "although a small sum ($1.75), costs the [South Texas Mexican] laborer most of a day's wage."[56] The same was true of many blacks in rural East Texas, and of poor whites generally.

The Twenty-fourth Amendment, prohibiting the tax as a voting requirement in

federal elections, was ratified by the required thirty-eight states in 1964. Texas was one of five at that time which still maintained the tax.[57] The Voting Rights Act of 1965 instructed the U.S. Attorney General "forthwith" to challenge in court the enforcement of any poll tax used as a voting requirement. He quickly brought suit against Texas, and a federal court in *United States v. State of Texas* (1966)[58] found that the state's poll tax was unconstitutional, having originally been imposed for the purpose of disfranchising black voters. The legislature, dominated by the conservative Democratic wing led by Governor John Connally, promptly replaced the tax with an almost equally onerous annual voter registration system. The new law, which, like the recently invalidated one, required the voter to register in a four-month period ending 31 January in order to vote in November elections, was ruled unconstitutional by a federal court in *Beare v. Smith* (1971).[59] The court concluded that "it is beyond doubt that the present Texas voter registration procedures tend to disenfranchise multitudes of Texas citizens otherwise qualified to vote."[60]

Texas did not surrender gracefully. In 1975 the legislature enacted a new voter registration statute that would effectively have purged the state's entire election rolls and required reregistration of the state's voters. As Congress the same year had extended coverage of section 5 of the Voting Rights Act to Texas, the new voter registration system became the first Texas statute challenged under it.

The state, in *Briscoe v. Levi* (1976),[61] failed in its attempt to block extension. At about the same time, a federal court enjoined the implementation of the proposed statutory purge of the voter rolls in *Flowers v. Wiley* (1975).[62] Since then Texas has had a registration statute that permits enrollment up to thirty days before any election. The system seems to have operated without objection for a number of years.

An impediment that disproportionately burdened minority candidates for office was removed by elimination of the excessive candidate filing fees required by Texas law. The Supreme Court in *Bullock v. Carter* (1972)[63] concluded that "the very size of the fees imposed under the Texas system gives it a patently exclusionary character . . . [and] there is the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community."[64] That segment was disproportionately made up of minority persons.

No story of minority registration efforts in Texas would be complete without mention of the prolonged struggle of students at Prairie View A. & M. to register to vote. Prairie View is a predominantly black university located in rural Waller County near Houston, the only Texas county in 1970 with a majority-black population. Texas by statute attempted to prevent students from registering to vote in the communities where they attended college, a limitation declared unconstitutional in *Whatley v. Clark* (1973).[65] Nonetheless, the local tax assessor steadfastly frustrated attempts of Prairie View students to register in Waller County.[66] The extension of section 5 to Texas finally enabled a successful attack upon this exclusion of African American voters in *Symm v. United States* (1979).[67] Immediately thereafter a successful attack was made on the apportionment of the Waller County commissioners court for its failure to include students in determining county

population. The resulting reapportionment produced the county's first black county commissioner.[68]

Minority Groups in the Voting Rights Movement

Most of the voting rights litigation in Texas until the 1970s focused on the unconstitutional barriers to participation faced by blacks rather than Mexican Americans, for various reasons: the degree of black exclusion was more extreme; blacks had historically been a larger group in the state; and, perhaps for the first two reasons, blacks were more inclined toward litigation. It was only in the 1960s that Tejanos began to come into their own as a statewide political force, although they had been emerging as an important part of the Texas liberal coalition at least since the 1950s.[69]

The decade of the 1960s witnessed the rise of the Chicano movement, a surge of militant activity among the younger generation of Mexican Americans that quickly spread throughout the Southwest. In Texas, the decade began with the involvement of old-line Tejano organizations in the 1960 presidential campaign. The Viva Kennedy clubs played an important role in carrying Texas by a narrow margin for the Democratic ticket, and gave impetus to a broad-based coalition formed in 1962, the Political Association of Spanish-Speaking Organizations (PASO). In 1963 the teamsters union, PASO, and a number of independent militants joined in a historic uprising in which the city council of a small South Texas town, Crystal City, was entirely filled by an all-Tejano slate. This victory, while short-lived, received nationwide coverage in the news media and presaged a new day for Mexican Americans in Texas politics. A farmworkers movement, along the lines of the one led by Cesar Chavez in California, was also partly inspired by PASO, and confrontations between strikers and the Texas Rangers, long considered by growers and the local Anglo establishments of South Texas as their personal police force, fanned a wave of militance that surged across Texas college campuses, leading to such Chicano groups as the Mexican American Youth Organization (MAYO) that established La Raza Unida party. High school students in South and West Texas towns in the late 1960s boycotted classes in support of fair treatment and greater prominence for the teaching of Mexican culture.

These developments had their roots in self-help groups that Mexican-American veterans founded soon after World War I, such as Sons of Texas, Sons of America, and Knights of America, all of which were united into LULAC in 1929. This organization would play a significant role in politicizing Tejanos locally and fighting discrimination through legal means. Recent scholarship, moreover, has revised the notion that these early organizations, as well as the G.I. Forum, founded by World War II veterans, were primarily concerned with assimilation into Anglo culture and politically ineffective.[70] Considering the racist Texas milieu of the period, the accomplishments of LULAC, the G.I. Forum, and leaders of those groups, such as Professor George I. Sanchez and Dr. Hector Garcia, were in the long term quite effective.

Grass-roots organizations, for example, played a significant role in the 1948 election of Gustavo Garcia to the San Antonio school board, a watershed event in Texas electoral politics. LULAC was active in the 1957 election in El Paso of Raymond Telles, a moderate reformer and the first Hispanic mayor of a major southwestern city in the twentieth century.[71] Such groups were involved in Henry B. Gonzalez's election to the San Antonio city council in 1953 and to the Texas senate in 1956, where he immediately became an eloquent opponent of discrimination against not only Tejanos, but blacks and poor whites.[72]

Yet not until the Mexican-American statewide political mobilization during the 1960s did voting rights litigation begin to shift its focus of concern toward Mexican Americans.[73] This was due largely to the establishment of two organizations. Modeled on the NAACP Legal Defense Fund, the Mexican American Legal Defense and Educational Fund (MALDEF) was created in 1968 with financial support from the Ford Foundation, and the lawsuits brought by its attorneys focused increasingly on the special electoral problems confronting Tejano voters. The Southwest Voter Registration Education Project (SVREP) was founded by San Antonio activist Willie Velásquez in 1974. One of its primary purposes was to register Tejanos, and it appears to have made great strides on that score. When the project began its work in 1976, 488,000 Mexican Americans were registered in Texas. Ten years later, approximately 1 million were, even though their registration rates remained much lower than those of blacks or Anglos.[74] But in addition to its registration drives, SVREP's legal staff also became involved in voting litigation. Between 1974 and 1984 SVREP and MALDEF filed eighty-eight suits in widely scattered Texas jurisdictions.[75]

One of the first successful voting cases brought by MALDEF was *Garza v. Smith* (1970).[76] This action challenged Texas election laws that enabled voting officials to assist physically handicapped voters but did not permit assistance to voters who were not proficient in English. The argument in *Garza* foreshadowed the broadening of section 5 coverage to Texas five years later. In its 1975 extension of the act, Congress concluded that "where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process."[77] Congress therefore brought under section 5 coverage some of those states and counties that had historically failed to provide multilingual election materials.[78]

Various private attorneys and legal aid lawyers, including liberal Anglos, were also active in voting rights litigation during this period. Litigation by attorneys with the federal Legal Services Corporation was partly responsible for efforts by conservative Republicans during the Reagan and Bush administrations to abolish the organization, or, failing that, to at least prohibit it from filing voting suits.

Minority Vote Dilution

The elimination of barriers to registration and voting in Texas often did not result in the election of minority candidates, even in jurisdictions with significant numbers

of minority voters. Several structural roadblocks remained, the most noteworthy of which were multimember districts (including at-large elections), racial gerrymandering, and malapportionment. Such barriers diluted minority voting strength when bloc voting among Anglos combined with certain election rules to prevent a cohesive bloc of minority voters from electing candidates of their choice. Largely for this reason it was not until 1966 that the first African Americans in this century became nominees of the Democratic party for any elective public office in Texas above the level of voting precinct official, even though black candidates had run for office at least as far back as 1920.[79]

Mexican Americans, too, faced numerous barriers to political office, although by 1967 there were ten Tejano state legislators—nine in the house and one in the senate—compared to only three blacks.[80] While Mexican-American voters as early as the 1940s were described as tending to prefer candidates of their own ethnicity "on the rare occasions when they appear on the ballot," the same electoral mechanisms that prevented blacks from winning office operated against their candidates, too. "Anglo American politicians have always recognized this tendency," wrote Simmons in 1952, "and have tried to cope with it, when no other means were available, by putting up a second Mexican candidate of their own choosing in order to split the Mexican vote."[81]

Simmons also pointed to the well-known phenomenon of a nonpartisan slating group operating through at-large elections. He quoted a county commissioner: "Candidates are usually nominated on a ticket which is made up by a private group that invites the candidate to run." While any candidate was free to oppose the ticket, "independent candidates seldom have a chance."[82] Several lawsuits in the 1970s and 1980s pointed to the existence of the standard electoral mechanisms of minority vote dilution operating against Tejano candidates: at-large elections, gerrymandered districts, the numbered-place system, and others.[83]

The first successful challenge to legislative malapportionment in Texas, at least in modern times, occurred after the 1960 census, when population disparities in legislative districts were huge. The boundaries had not changed significantly since 1921.[84] A state constitutional prohibition on the number of legislative seats per county had contributed to overrepresentation of the shrinking rural population at the expense of the rapidly expanding urban one, which contained great numbers of minority voters. The largest senatorial district, for example, contained 1,243,158 persons, while the smallest one had 147,454. A majority of the senators could be elected by as few as 30 percent of Texas voters.[85] *Kilgarlin v. Martin* (1966)[86] was a broad-based attack on the 1960 Texas legislative redistricting plans. In preliminary rulings, the senate and house apportionment was found to violate the one-person, one-vote principle recently established by the Supreme Court in *Reynolds v. Sims* (1964).[87] Texas constitutional provisions limiting the number of senators and legislators who could be elected from any given county were invalidated, and apportionment of the Texas senate was required on the basis of population equality.

The legislature responded with a new apportionment plan that, among other changes, increased the number of legislators in Harris County (Houston) from twelve to nineteen and in Dallas County from nine to fourteen. In the case of Harris

County, for the first time state representatives were to be elected in three county multimember subdistricts rather than countywide. Senate districts—which had been and remained single-member districts—were also carved into subdistricts of Dallas and Harris counties to meet one-person, one-vote criteria. In spite of clear instances of racial gerrymandering against blacks in the Harris County state representative districts under the new apportionment scheme,[88] the initial result of these changes in 1966 was the election of the first three black Texas legislators to serve since 1895.

Barbara Jordan, who had twice failed to win election to the state house of representatives when she ran at large in Harris County, was elected from one of the new Houston senate districts (one, significantly, that contained a black and Mexican-American majority), becoming the first black Texas senator to hold office since 1883. Curtis Graves won a house seat from a multimember Harris County subdistrict. In addition to these two victories resulting from boundary changes, Joe Lockridge, also black, was elected at large to the state house from Dallas County after being slated by the Dallas Committee for Responsible Government (DCRG), a powerful white-dominated slating group that would soon receive federal court scrutiny.[89]

A major breakthrough in minority legislative representation came after the 1970 census. Blacks and Tejanos—aided by a group of minority and Anglo lawyers and political scientists—jointly attacked the system of multimember countywide legislative districts in Dallas and Bexar counties, arguing that, in conjunction with other discriminatory actions, the arrangement diluted minority votes in violation of the Fourteenth Amendment. In *Graves v. Barnes* (1972)[90] the three-judge federal court agreed, mandating single-member legislative districts for both counties. This decision was unanimously affirmed by the Supreme Court in *White v. Regester* (1973),[91] the first case in which it sustained claims of at-large vote dilution.

The Court had earlier asserted in *Whitcomb v. Chavis* (1971) that multimember district systems "may be subject to challenge where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.' "[92] However, until *White* the Supreme Court had never been persuaded that such circumstances existed. In fact, in *Whitcomb* the Court had rejected a trial court finding that an at-large legislative districting scheme in Indiana operated unconstitutionally to cancel out minority voting strength. Similarly, the Supreme Court had upheld a Texas trial court conclusion in *Kilgarlin v. Hill* (1967)[93] that the state's at-large legislative districts did not unconstitutionally deprive African Americans of their voting rights. Against this discouraging backdrop, the plaintiffs' victory in *White* took on special significance.

The *Graves* decision had both immediate and long-term consequences. The immediate result was a significant increase in the number of blacks and Mexican Americans from Dallas and San Antonio, respectively, elected to the Texas legislature in November 1972. In the second round of *Graves v. Barnes* (1974),[94] the state's remaining multimember legislative districts were also found to dilute minority voting strength. Single-member legislative districts were created in the Texas counties of Tarrant (Fort Worth), El Paso, Travis (Austin), Nueces (Corpus Christi), Jefferson (Beaumont), McLennan (Waco), Lubbock, and Galveston. In most instances, this resulted in the election of the first minorities to the legislature from those counties.

An upsurge in voting litigation across Texas followed *White*. Applying the principles established in that case, minority plaintiffs made a number of Fourteenth Amendment attacks on at-large elections to city councils and school boards. Using one-person, one-vote arguments under *Avery v. Midland County* (1968)[95] and *White* minority vote-dilution principles, black and Tejano voters also attacked county government apportionment schemes throughout Texas, the 254 counties of which have long been governed by a commissioners court consisting of four commissioners elected from single-member districts and a county judge elected at large. The first city to change its at-large council elections as a result of vote-dilution litigation was Nacogdoches in deep East Texas; after black plaintiffs won at trial, the city in 1975 settled a lawsuit while the case was on appeal, and subsequent elections produced the city's first black council member. The first successful legal attack on at-large elections to a Texas city school board occurred in Waco. The trial court ordered the creation of single-member districts for both the city council and school board, and this arrangement was sustained in *Calderon v. McGee* (1978).[96]

After the extension of section 5 to Texas in 1975 as a result of the state's large Spanish-language population, attacks based on Fourteenth Amendment arguments developed in *White* and section 5 objections by the Justice Department produced some form of single-member-district elections in most major Texas cities, including Houston, San Antonio, and Dallas. These changes led to noteworthy increases in the number of elected minority officials, as will be shown below. Vote-dilution litigation, however, has affected not simply the large urban centers but cities as small as Jefferson, with a 1980 population of fewer than 3,000, where plaintiffs won at trial and a single-member-district plan was imposed.[97]

Similar breakthroughs occurred in county reapportionment litigation. For example, a federal court ruling in *Weaver v. Nacogdoches County* (1974)[98] produced a new reapportionment plan and the election of the first black Texas county commissioner in this century. Another East Texas reapportionment case resulted in the first federal court finding of a racial gerrymander in the drawing of district lines. In *Robinson v. Commissioners Court, Anderson County* (1974)[99] the court held that "the most crucial and precise instrument of the Commissioner's denial of the black minority's equal access to political participation, however, remains the gerrymander of precinct lines so as to fragment what could otherwise be a cohesive voting community. . . . This dismemberment of the black community . . . had the predictable effect of debilitating the organization and decreasing the participation of black voters in county government."[100]

The extension of section 5 to Texas was a major advance in securing minority voting rights. Justice Department intervention in Texas after 1975 either prevented

many potentially dilutionary measures or required them to be counterbalanced with additional election changes that restored or enhanced minority voting strength. Thus, when the city of Houston annexed territory, some of which included virtually all-white suburbs, and thus diminished the proportion of blacks and Mexican Americans in the city, the Justice Department entered an objection, based in part on evidence of racially polarized voting in Houston council elections presented by plaintiffs in *Greater Houston Civic Council v. Mann*,[101] an unsuccessful constitutional challenge to the city's electoral structure tried in 1975. The city's options were to contest the objection in federal court in Washington, D.C., deannex the territory, or change the council's at-large election system to include at least some single-member districts. The city took the latter course, following a citywide referendum, and adopted a mixed plan of nine single-member districts and five at-large posts, in addition to the mayor's at-large office.[102] Justice Department intervention under section 5 was also instrumental in San Antonio's change from an at-large to a pure single-member-district plan in 1977.

Between the time Texas was brought under section 5 coverage in 1975 and December 1990, the Justice Department interposed 131 objections to voting procedures in the state. Many of these objections were to multiple infractions of voting law within a single jurisdiction.[103] The infractions embraced the spectrum of illegal procedures: racial gerrymandering, discriminatory purges of registered voters, imposition of numbered posts and the majority runoff requirement, annexations that diluted minority votes, a faulty bilingual oral assistance program, reduction in the number of elected officials, transfer of duties from one official to another, and unfair changes in election dates. One can only speculate about the number of discriminatory changes that would have occurred but for the deterrent effect of section 5.

Reviewing the results in the forty-one instances in Texas where they could identify a change from at-large to mixed or district plans in the 1970s, Davidson and Korbel found the percentage of black and Mexican-American officeholders had increased from 11 to 29 percent of the total in those jurisdictions (6 to 17 percent for blacks, 5 to 12 percent for Mexican Americans). Put differently, before the change, minority officeholders were underrepresented by a factor of three; afterward, they were almost proportionally represented. City councils, school boards, junior college boards, and multimember legislative districts were included in the study; increases in minority representation occurred in every type of unit.[104] This was the only before-and-after study published in the 1970s or 1980s that examined the impact of at-large elections on Mexican Americans, and its findings contrasted sharply with most of the research on this issue that utilized cross-sectional data. The reason, we believe, is that cross-sectional studies seldom control for residential dispersion of Mexican Americans, which is greater than it is for blacks.[105] Our own data, reported below, corroborate Davidson and Korbel's findings.[106]

One of the most far-reaching results of Texas voting litigation is contained in the

1982 congressional amendments of section 2 of the Voting Rights Act, passed to overcome the effects of *City of Mobile v. Bolden* (1980),[107] in which a plurality of the Supreme Court held that at-large elections were not unconstitutional unless the they had been "conceived or operated" intentially to discriminate. In amending section 2 to allow a showing of discriminatory result as sufficient proof of dilution, Congress explicitly incorporated into the statute the vote-dilution principles first established in 1972 by the federal trial court in *Graves v. Barnes* and then adopted in the language of *White v. Regester*.[108]

The impact of amended section 2 was clearly seen in *Campos v. City of Baytown* (1988).[109] The appeals court affirmed a trial court finding that the at-large election system for Baytown's city council violated section 2. Despite the presence of sizable black and Mexican-American communities in the city at the time of trial, no minority member had ever been elected to the Baytown council. Yet the plaintiffs would have been hard put to show that the at-large system, which dated from 1947, was adopted to frustrate minority candidates. Under amended section 2, however, plaintiffs used voting statistics to prove the dilutionary effect of the at-large system.

The pace of section 2 voting rights litigation in Texas remained lively at the end of the 1980s. In 1989 courts first heard attacks on the at-large election of trial and appellate judges in Texas. In both cases the trial courts concluded that at-large electoral systems violated section 2, and required single-member districts as a remedy. In *Rangel v. Mattox* (1989),[110] the trial court found that the at-large electoral system of the Thirteenth Court of Appeals, situated in South Texas, discriminated against the Tejano voters of the Lower Rio Grande Valley. The court sanctioned a plan consisting of six single-member districts. In *LULAC v. Mattox* (1989),[111] the trial court concluded that at-large election of district judges in the state's urban counties similarly violated minority voting rights of blacks and Mexican Americans under section 2.

On appeal of the *LULAC* decision, the Fifth Circuit, sitting *en banc*, held that section 2 did not apply to judicial elections. This decision effectively blocked any immediate change in Texas judicial elections. The Supreme Court reversed in *Houston Lawyers Association v. Attorney General of Texas* (1991),[112] holding that judicial elections were indeed covered by section 2. As a result, the issues presented in *Rangel* and *LULAC* are now back before the Fifth Circuit. These cases would seem to portend significant changes in the method of selecting the Texas judiciary.

The extent and diversity of voting rights actions and Justice Department intervention in Texas is suggested by a list compiled by Korbel in connection with lawsuits challenging the method of electing judges. The list contains Justice Department objections or privately brought actions concerning vote dilution between 1972 and 1989 in a mere twenty-county area of South Texas. (The state contains 254 counties.) Targeted were voting procedures for school boards, city councils, county commissioners courts, the state legislature, and justice of the peace courts.

There were fourteen objection letters from the Justice Department in seven of the counties, and at least fourteen vote dilution cases won by plaintiffs or settled out of court in a manner favorable to plaintiffs.[113]

The Impact of Voting Rights Litigation in Texas Cities

We now systematically examine changes in voting structures in Texas cities. As part of a collaborative effort in several states, we measured the extent of change between 1974—the year before section 5 was extended to the state—and 1989 in all Texas municipalities of 10,000 or more persons that had a combined black and Hispanic population of at least 10 percent according to the 1980 census.[114] The purposes were, first, to learn how rapidly black and Tejano officeholding had progressed; second, to determine the extent to which such progress was linked to the existence of single-member-district and mixed plans (the latter composed of both district and at-large seats); and, third, in the event that there was a linkage, to find out whether the creation of districts was the result of litigation under the Fourteenth Amendment (as in *Graves* and its progeny), litigation or Justice Department objections under the Voting Rights Act, or voluntary action by city governments.

Methods

Our research design followed in broad detail the above-mentioned longitudinal study by Davidson and Korbel.[115] However, as Grofman pointed out soon after the research was reported, the design lacked a control group.[116] The design for the present study therefore includes not only cities that abandoned at-large elections for district or mixed plans but those comparable Texas municipalities which did not change their at-large council structure between 1974 and 1989.[117] During this period the number of African-American and Hispanic elected municipal officials in all Texas cities increased from 59 to 138 and from 251 to 463, respectively.[118]

Minority Representation in Texas Cities

Table 8.1 is a cross-sectional view of minority representation on city councils in 1989 by type of election plan and percentage of minority population within each type.[119] Because most studies examining the relation between election plans and minority representation have used a cross-sectional design, table 8.1 provides a point of comparison with them. It shows that in cities that were majority Anglo, combined minority representation in 1989 was greater in district than in at-large systems, when the effects of minority population size were controlled for. However, at-large cities had better minority representation than districted ones in cities where blacks and Hispanics were a majority, although this seemed to be at least partly the result of the at-large cities having, on average, a larger minority population percentage than either mixed or district plans. (In other words, if the effects of minority population were controlled in the 50–100 percent category, as they are, in effect, in table 8.5, the at-large advantage in these cities would diminish.) But this latter finding should not be allowed to obscure the most important pattern in table 8.1: the advantage to minorities in district-based *majority-Anglo* cities—for it is in these cities where the at-large system is said to be particularly dilutive of minority votes.

As explained in the Editors' Introduction, cross-sectional studies typically do not control for a number of factors besides minority population that can affect minority representation. In addition, cross-sectional data collected from a sample of cities after many of them have changed their method of election may reflect a "selection bias" because the remaining at-large cities may not be typical of at-large cities in general—a possibility that is examined in chapter 10.

Table 8.2, utilizing a before-and-after design with a control group, measures minority percentages on all city councils at two points fifteen years apart: in changed cities before and after the shift from at-large elections occurred; and in unchanged cities at the same two points, 1974 and 1989.[120] Among majority-Anglo cities, those changing from at-large to single-member districts between 1974 and 1989 witnessed sharply increased minority (black plus Hispanic) percentages on council following the change. Large changes also occurred in the cities that adopted mixed plans. These positive changes occurred for both blacks and Tejanos separately, generally speaking. Among unchanged at-large cities, on the other hand, there was an actual decrease in minority representation in one population category, and only a modest rise in the other.

So far we have controlled only roughly for the effects of a city's minority population on minority representation, by categorizing the data according to three sets of minority population ranges. To refine this control, we employ the concept of representational equity, or proportionality, which is simply a comparison of cities' percentage of minority council members with their percentage of minority inhabitants. There are two standard measures of proportionality—differences and ratios—the strengths and limitations of which Grofman has discussed elsewhere.[121]

Table 8.4, presenting 1989 cross-sectional data, shows some of the same patterns in tables 8.1 and 8.2. Whether using the difference measure or the ratio measure of equity, we find in majority-Anglo cities that single-member-district and mixed cities were generally more representative than at-large ones, and usually they were strikingly so—at least where blacks were concerned. Tejanos did not follow this pattern so clearly. They were less well represented than blacks in every type of system, except in some minority-Anglo cities (where the majority of the population was overwhelmingly Hispanic, not black). Nonetheless, it was generally true that in majority-Anglo cities, Tejanos were more equitably represented in cities that had adopted at least some districts than in those that had not.

Table 8.5, comparing equity ratios in 1974 with those in 1989, gives an even clearer picture than does table 8.2 of the effects of the shift from at-large elections

in those cities of less than 50 percent minority population. It essentially corroborates the findings in tables 8.1, 8.2, and 8.4. The experimental cities underwent sharp increases in combined minority representational equity during the fifteen years, while the control cities made generally unremarkable gains when they made any gains at all.[122] The impact of the new election systems is best seen by focusing on equity ratios in the majority-Anglo cities that changed to pure single-member districts, and comparing them to ratios in the cities that remained at-large.

	1974		*1989*	
	Blacks	*Hispanics*	*Blacks*	*Hispanics*
		Changed to Districts		
10–29.9%	0.38	0.18	1.32	0.35
30–49.9%	0.13	0.15	1.12	0.95
		Remained at large		
10–29.9%	0.62	0.37	0.80	0.21
30–49.9%	0.58	0.24	0.75	0.50

Within each population category, mean minority equity scores in the control cities were better in the early year—1974—than in cities that later changed to districts, a fact that was true for both ethnic minorities. This was at a time, obviously, when all the cities in the table elected council at large. *By 1989, the situation was completely reversed*: the mean equity scores in all categories of the cities that switched to districts were greater than those, in the comparable population categories, in the cities that had kept their at-large systems. Again, this was true for both blacks and Mexican Americans. This consistent reversal was the result, in most cases, of hefty increases in minority equity scores as cities switched to district elections. Part of the reversal, on the other hand, was due to the fact that in the twenty-six cities of less than 30 percent minority population that kept at-large systems—representing one-fourth of the total number of cities analyzed—there was an actual drop in the mean equity score of Mexican Americans (0.37 to 0.21) and only a modest rise for blacks (0.62 to 0.80) over the fifteen-year period. This is an important finding, we believe, in light of the claim by some critics of the Voting Rights Act that Anglo Texas voters were much more likely to vote for minority candidates in at-large settings by the end of the 1980s than they were even a decade or two earlier.

In 1989 both Tejanos and blacks in the majority-Anglo unchanged cities were still underrepresented, although Tejanos were more so. Had the changed cities not adopted new election structures—so the data for the cities in the control group suggest—their minority voters would still be far less well represented than they were in 1989, and perhaps, in some cases, even less well represented than in 1974. In summary, table 8.5 presents strong evidence for a causal link between election

systems and proportionality of minority representation in majority-Anglo cities.[123] This link exists for both Tejanos and African Americans.

The findings in table 8.5 contrast to those of a recent cross-sectional study of American cities of at least 50,000 population with minority populations of less than 50 percent, which found a relatively small difference in 1988 black representational equity scores between at-large and districted cities.[124] This may well be the result, in part, of the studies' different population thresholds, assuming that racially polarized voting is greater in smaller cities.

There may be another reason for the different results as well. Table 8.5 shows clearly that the cities that changed election systems had, on average, significantly lower minority equity scores in 1974 than those which remained at-large. This suggests that any cross-sectional study today of Texas cities which attempts to measure the impact of election structures on minority representation may be subject to a bias resulting from the *selection effect*: Our sample of cities that in 1989 were districted contained a disproportionate number that in 1974 were among the "worst cases" of at-large cities, in terms of minority representation. Assuming that the worst cases were most liable to vote-dilution litigation and thus were most likely to change to districts, a cross-sectional study in 1989 would contain a sample of at-large cities from which the worst ones in 1974 were removed ("selected"), in which case the comparison of at-large and district cities would understate the difference in minority representation between at-large and districted cities, in contrast to what it would have been had the changes to district systems not occurred.

Yet another important fact emerges from table 8.5. Despite the frequently heard assertion that the evolving nature of voting rights law now requires at-large cities to adopt district systems, the Texas case shows otherwise. There are 83 cities in the table with a minority population between 10 and 50 percent, yet 38 (46 percent) still maintained at-large systems in 1989, in spite of two decades of aggressive legal challenges to such structures across the state and seven years of section 2 litigation—some of it in these very cities. Nor is it true that these at-large cities failed to change because minorities were proportionally represented on council. As the table shows, minority populations in the majority-Anglo unchanged cities were only about half as well represented as one would expect if ethnicity were not a factor. In 22 of the 38 unchanged cities, moreover, no blacks sat on council in 1989; in 30 of these cities, no Tejanos did; and in 19 cities—exactly half—neither a black nor a Tejano was a council member. The number of cities among the 38 that had neither blacks nor Tejanos on council actually increased slightly between 1974 and 1989: from 21 to 22.

The dynamics of change in the minority-Anglo cities are difficult to fathom, given only the data in table 8.5. Contrary to the facts in majority-Anglo cities, when predominantly minority cities (which in our sample are all predominantly Hispanic ones) switch to districts, there is either little increase in representational equity or an actual decrease. In fact, minority equity of representation increased

more sharply in the unchanged cities where, at 0.97, it was greater by 1989 than in either other type of changed cities (0.80 and 0.72, respectively).

What could account for this? The minority-Anglo unchanged cities had an average minority population of close to 80 percent. If voting were racially polarized, as in the case of many at-large majority-Anglo cities, then the Mexican-American population could easily have determined the makeup of city council. Why they were less equitably represented in changed cities—particularly pure district ones—is unclear. One possible answer is that because changes from at-large plans in minority-Anglo cities are less likely to be the result of litigation or Justice Department objections, the drawing of district boundaries may not be as closely supervised, and this might work to the disadvantage of minority voters. On the other hand, inasmuch as there was significant minority representation on these cities' councils even before the changes occurred, one would expect the boundaries not to be patently disadvantageous to minority voters.

Whatever the explanation of this anomaly in majority-minority cities, the focus of our inquiry must be kept on the Anglo-majority cities, because they are the ones that present the classic conditions for minority vote dilution. Our findings in table 8.5 demonstrate clearly that when such cities shifted to districts, minority representation increased sharply, in contrast with cities that retained at-large elections.

The Effects of Mixed Plans on Minority Representation

A significant proportion of cities shifting from at-large plans chose mixed systems. Past research indicates that they typically fall between single-member-district systems and at-large ones in the equity of black representation. The data on blacks in table 8.5 conform to that pattern. The most plausible reason is that a mixed system is made up of both the least and most representative election methods. It is useful to examine the results of these two methods separately in order to see how mixed systems work.

Table 8.3 compares minority representation in the at-large and district components of mixed cities in 1989. It shows that most of the black representation can be attributed to the district rather than to the at-large component of the majority-Anglo plans. For Hispanics, the pattern was less clear, primarily because they were sharply underrepresented in both components. It is noteworthy, in light of these findings on blacks, that a federal court in *Williams v. City of Dallas* (1990) held that the at-large seats in the Dallas city council's mixed system diluted the voting strength of blacks.[125]

The Link between Minority Population Percentage and Minority Representation in Single-Member Districts

Table 8.6 shows 1989 minority representation in single-member districts in cities with mixed or pure single-member-district plans. There were 57 cities with at least some districts, but we were unable to obtain 1980 population data for districts in

12. The data base consists of the 257 districts in the 45 cities for which we did obtain complete information. The rule of thumb often mentioned is that a district must have a population of about 65 percent of a particular minority group in order to provide that group with a realistic opportunity to elect a minority candidate.[126] Table 8.6 indicates that for blacks in Texas, majority-black districts somewhat below that level were usually sufficient. However, about 5 percent of the nonblack population in majority-black districts was Hispanic, and the presence of Hispanics in such districts, as we shall see, can provide an advantage to black candidates.

In contrast to blacks, Hispanic candidates at no level were assured of victory, although their chances increased sharply when districts became majority-Hispanic. Yet even here, Hispanic districts often had significant numbers of blacks in the population. For minorities in general—where African Americans and Hispanics are treated as one group—the finding is much the same as for Hispanics. At the 70 percent level and above, 91.7 percent of officials were minority members.

Tables 8.6 and 8.7 shed light on another question: How well were blacks and Hispanics represented in majority-Anglo districts? If race did not play a significant role in whites' voting behavior, we would expect the answer to be, very well. The most useful data in table 8.6 for addressing this issue is the third set, which allows us to determine how likely it was that either blacks or Hispanics were elected from districts that were less than 50 percent black and Hispanic combined. The answer is, relatively few. Only 2.5 percent of the council members in the 147 districts less than 30 percent black and Hispanic belonged to the two ethnic minorities. The figure increased to 16.7 percent in the 29 districts 30–49.9 percent black and Hispanic. But it is obvious that the overwhelming majority of black and Hispanic council members were elected from districts in which Anglos were a relatively small minority. Data in table 8.7 corroborate this. In the 176 districts that were majority-Anglo, only 4.5 percent of the council members from those districts were black or Hispanic. Anglos did not fare much better in the 32 majority-black and 31 majority-Hispanic districts: they comprised 6.2 and 12.9 percent of the council members, respectively. These findings are consistent with the assumption that racially polarized voting was strong in most Texas cities during this period.

Minority Representation in Multiethnic Districts

Blacks and Tejanos often reside in contiguous or overlapping neighborhoods. Census data indicate that in 1980 both groups' residences were still highly segregated from those of Anglos in most of the larger Texas cities.[127] Many districts contained large numbers of both ethnic groups, although not a majority of either. In this circumstance, did minority candidates have a reasonable chance of winning office? The answer is provided by table 8.7, which contains data on the 257 districts analyzed in table 8.3 above. By examining minority council representation in districts with different ethnic compositions, we are able to see the benefits accruing to minority candidates in situations where minority coalitions are possible.

As might be predicted on the basis of table 8.3, table 8.7 shows that minority candidates had a very good chance in districts with a sizable African-American or Tejano majority and a very poor chance in districts with a sizable Anglo majority. The average black-majority district was 66.5 percent black, and the average percentage of minority officeholders was 93.8 percent. The average Hispanic-majority district was 66.4 percent Hispanic, and the average percentage of minority officeholders was 87.1 percent. The average Anglo-majority district was 82.3 percent Anglo, and the average percentage of minority officeholders was 4.5 percent. The table also shows that minority-plurality districts elected a significant number of minority candidates, as did Anglo-plurality districts in which blacks and Hispanics combined made up a slight majority. This is consistent with the interpretation that the minority groups help each other's candidates in these circumstances.

The Causes of Structural Changes in Texas Cities

In a fifteen-year period, fifty-two cities in our sample changed to some form of district plan; this represents structural change of a magnitude not witnessed in Texas since the widespread adoption of at-large plans in connection with the commission form of government during the Progressive Era.[128] The foregoing evidence, moreover, points to a causal link between the adoption of district systems and greatly increased minority representation on city councils.

To determine the causes of the structural changes, we sent questionnaires to all city attorneys in municipalities in our sample that had shifted from at-large to district or mixed systems between 1974 and 1989. Follow-up questionnaires were sent to nonrespondents after three weeks, and then telephone calls were made to those cities still not responding. The reasons officials gave for the changes were tabulated, and then compared with a data set obtained from voting rights lawyers throughout the state, consisting of lawsuits challenging at-large elections in Texas municipalities going back to the late 1960s. The information from these two sources was then combined and presented in table 8.8.

The table shows that twenty-nine (56 percent) of the fifty-two cities of 10,000 people or more that adopted single-member-district or mixed plans did so after a lawsuit was filed. (An additional city changed solely as the result of a section 5 objection.) In some cases, the suit alleged unconstitutional vote dilution; in others, it alleged violation of sections 2 or 5 of the Voting Rights Act.

There is not always a direct relation between the filing of a lawsuit (several of which were settled out of court) and a change in election structure. In some instances, city councils had already begun to discuss changing the election structure when the suit was filed. On the other hand, it is clear that in numerous cities, suits were necessary to compel councils to create districts in which minority candidates could have a fair opportunity to win.

Even where no suit was filed, it is obvious from the replies of various city

attorneys that some of the changes had resulted from petitions by minority citizens for a change or from threats of a suit that the city could well have lost while incurring considerable costs. As one attorney put it who described his city's 1984 change as voluntary: "There was some perception among council members that districts were the wave of the future and would best be determined locally rather than by a lawsuit." Another attorney who described his city's change as voluntary said, "Because of recent changes in the law, [our city] felt a voluntary move to single member districts to be more efficient from an economic and political standpoint." Referring to changes that occurred shortly after the congressional amendment to section 2, these remarks demonstrate that the Voting Rights Act was very much on the minds of city council members in deciding to make the change. Earlier research on the causes of election law shifts in Texas corroborates this fact.[129]

Other city attorneys who described the process in their municipality as voluntary pointed out that there is no sharp distinction between voluntary and legally forced change. In reality, most cities changed because minority leaders or city officials were at least aware of the evolution in voting rights law, the effects of which they had heard about as other jurisdictions underwent legal challenges to their at-large elections. (One of the best-attended sessions of the annual meeting of the Texas Municipal League in the late 1970s was a workshop for city attorneys on voting rights litigation.) While some cities that changed voluntarily may have done so simply because they believed it was the right thing to do, legal developments in neighboring jurisdictions made the decision much easier.

Conclusion

A historical examination of minority voting rights in Texas from 1865 to the present reveals a continuing struggle by blacks and Mexican Americans to realize their voting rights in full measure. The very touchstone of democratic citizenship, these rights confer not only the ability to cast a vote without hindrance in every type of public election, but to have a reasonable chance to elect a candidate of one's choice. At the very least, this means an equal opportunity for a cohesive group of minority voters to elect their candidates when cohesive Anglo opposition systematically prevents them from doing so.

The struggle has been difficult and expensive, and at times has cost the lives of those who have taken part. White Texas officialdom, until the mid-1970s dominated by the conservative wing of the Democratic party, generally opposed the minority communities' quest for equal access to the ballot. The battles won by minority plaintiffs and their Anglo allies—most of whom belonged to the liberal wing of the Democrats—have taken place almost exclusively in federal courtrooms as a result of constitutional challenges, the extension of section 5 coverage to Texas in 1975, and the amendment of section 2 in 1982, which has eased burdens on plaintiffs in proving vote dilution.

Black Texans were actively involved as plaintiffs, lawyers, and fund-raisers in the series of white primary cases from the early 1920s until *Terry v. Adams* in 1953, which opened party activity once again to many southern blacks. Soon after the Voting Rights Act was signed, lawsuits began to challenge malapportioned districts and multimember election structures. The battle between racial liberals and conservatives over restrictive registration laws was fought until 1971, when, in *Beare v. Smith*, the liberals prevailed, even though rearguard efforts by white registrars in various counties to exclude blacks continued into the 1990s.[130]

Invoking the Fourteenth Amendment, MALDEF began its attack, in *Garza v. Smith* (1970), on the failure of registrars to allow assistance to voters not proficient in English. Also in the early 1970s minority plaintiffs and lawyers belonging to the three major ethnic groups, aided by academic experts, launched a series of constitutional challenges against dilutionary structures in municipalities, school districts, community college districts, the legislature, and Congress. These efforts played an important role in increasing the number of black and Tejano officeholders in these bodies. *White v. Regester* (1973), a Texas legislative redistricting case, was the first minority vote-dilution challenge in the United States to win in the Supreme Court.

In 1975, ten years after passage of the Voting Rights Act, its special provisions, including those in section 5, were extended to Texas. Bilingual ballots in Tejano areas became the norm. The Justice Department began to object to changes in election structures, and Texas jurisdictions were soon the target of the largest number of objections in any covered state. In just five years, between 1975 and 1980, the Attorney General objected to eighty-six proposed changes in Texas, significantly more than the fifty-three changes objected to in Mississippi in the fifteen-year period between 1965 and 1980.[131]

In the 110 Texas cities of 10,000 or more persons with a 1980 combined minority population of at least 10 percent, 52, including the state's 4 most populous, changed from at-large to single-member-district or mixed plans between 1974 and 1989. Of those, more than half—29—changed after a lawsuit was filed. Nineteen of the 29 suits were resolved after 1982, when section 2 was amended. This suggests that a decisive majority of the lawsuits that accompanied change were tried under the Voting Rights Act. In 3 of the 52 cities that changed—2 in which a lawsuit was filed, 1 in which it was not—section 5 objections also entered into the process, resulting in change. Finally, of the 22 changed cities in which neither a lawsuit nor an objection was instrumental in the switch, most of them adopted single-member districts after 1982, and city attorneys in some of them acknowledged frankly that the change came about as a result of amended section 2. Their cities decided to adopt districts before a lawsuit would have forced the issue. For this reason it seems probable that the great majority of the 52 cities adopted some form of districting plan as a direct or indirect result of the act.[132] And as we have demonstrated, the creation of districts has been responsible for much of the increase in minority officeholding.

This survey has shown how the evolution in constitutional and statutory law

from the 1940s to the 1990s has developed in response to the growing demand for equal participation of previously unrepresented blacks and Mexican Americans. In the course of this evolution, powerful tools have been fashioned that make manipulation of the election system by racial conservatives more difficult. While this achievement alone is not sufficient to enable racial and language minorities to achieve full integration into American society, it certainly represents necessary and important progress toward that goal.

TABLE 8.1
Minority Representation on Council in 1989 by Election Plan, Texas Cities of 10,000 or More Population with 10 Percent or More Combined Black and Hispanic Population in 1980[a]

Type of Plan by % Minority in City Population, 1980	N	Mean % Minority in City Population, 1980			Mean % Minority on City Council, 1989		
		Black	Hispanic	Black + Hispanic	Black	Hispanic	Black + Hispanic
SMD plan							
10–29.9	12	14.9	8.9	**23.9**	19.6	3.8	**23.4**
30–49.9	10	22.2	14.5	**36.6**	25.5	10.8	**36.2**
50–100	4	3.4	66.5	**69.9**	2.5	53.3	**55.8**
Mixed plan							
10–29.9	15	10.0	12.4	**22.3**	9.9	9.8	**19.7**
30–49.9	14	17.8	22.1	**39.9**	18.5	10.4	**28.9**
50–100	2	3.3	58.3	**61.6**	0.0	35.4	**35.4**
At-large plan							
10–29.9	26	8.5	9.8	**18.4**	6.8	2.1	**8.8**
30–49.9	12	17.7	20.6	**38.3**	13.3	10.4	**23.6**
50–100	15	0.9	76.4	**77.3**	1.7	71.3	**73.0**

[a]One city is omitted from this table because it elected council from multimember districts.
Note: In tables 8.1–8.7, the "Black + Hispanic" percentages are not the summed row values of blacks and Hispanics. Rather, these percentages are derived from the raw data.

TABLE 8.2
Changes in Minority Representation on Council between 1974 and 1989, Texas Cities of 10,000 or More Population with 10 Percent or More Combined Black and Hispanic Population in 1980

Type of Change by % Minority in City Population, 1980	N[a]	Mean % Minority in City Population, 1980			Mean % Minority on City Council					
					Before Change (1974)			After Change (1989)		
		Black	Hispanic	Black + Hispanic	Black	Hispanic	Black + Hispanic	Black	Hispanic	Black + Hispanic
Changed Systems										
From at-large to SMD plan										
10–29.9	9	14.6	10.6	**25.1**	5.6	1.9	**7.4**	19.3	3.7	**23.0**
30–49.9	9	23.9	12.5	**36.4**	3.2	1.9	**5.1**	26.7	11.9	**38.6**
50–100	4	3.4	66.5	**69.9**	3.1	47.5	**50.6**	2.5	53.3	**55.8**
From at-large to mixed plan										
10–29.9	14	10.3	12.7	**23.0**	2.6	1.8	**4.4**	9.5	10.5	**20.0**
30–49.9	13	17.5	23.2	**40.6**	7.6	3.8	**11.4**	19.0	11.1	**30.2**
50–100	1	5.1	46.6	**51.8**	16.7	50.0	**66.7**	0.0	37.5	**37.5**
Unchanged Systems										
At-large plan										
10–29.9	26	8.5	9.9	**18.4**	5.3	3.7	**8.9**	6.8	2.1	**8.8**
30–49.9	12	17.7	20.6	**38.3**	10.2	4.9	**15.1**	13.3	10.4	**23.6**
50–100	14	0.9	77.0	**77.9**	0.0	65.4	**65.4**	1.8	73.6	**75.4**

[a]The number of cities in table 8.2 (102) is smaller than that in table 8.1 (110) because in five cases the changes from an at-large plan occurred before 1974 or the change was not from an at-large but from a mixed plan; and in three cases data on minority council members for the year 1974 were not available.

TABLE 8.3
Minority Representation in 1989 in Mixed Plans by District and At-Large Components, Texas Cities of 10,000 or More Population with 10 Percent or More Combined Black and Hispanic Population in 1980

% Minority in City Population, 1980	N	Mean % Minority, Councilpersons in District Components, 1989			Mean % Minority, Councilpersons in at-Large Components, 1989		
		Black	Hispanic	Black + Hispanic	Black	Hispanic	Black + Hispanic
10–29.9	16	13.8	9.3	**23.0**	2.1	9.4	**11.5**
30–49.9	13	24.8	12.3	**37.1**	9.5	7.9	**17.4**
50–100	2	0.0	63.3	**63.3**	0.0	0.0	**0.0**

TABLE 8.4
Two Equity Measures Comparing Percentage Minority on Council in 1989 with Percentage Minority in City Population in 1980, Texas Cities of 10,000 or More Population with 10 Percent or More Combined Black and Hispanic Population in 1980

Type of Plan by % Minority in City Population, 1980	N[a]	Difference Measure (% on council − % in Population			Ratio Measure (% on Council ÷ % in Population		
		Black	Hispanic	Black + Hispanic	Black	Hispanic	Black + Hispanic
Changed Systems							
From at-large to SMD plan							
10–29.9	9	4.7	−6.9	**−2.2**	1.32	0.35	**0.92**
30–49.9	9	2.8	−0.5	**2.3**	1.12	0.95	**1.06**
50–100	4	−0.9	−13.2	**−14.1**	0.74	0.80	**0.80**
From at-large to mixed plan							
10–29.9	14	−0.8	−2.2	**−3.0**	0.92	0.83	**0.87**
30–49.9	13	1.6	−12.0	**−10.4**	1.08	0.48	**0.74**
50–100	1	−5.1	−9.1	**−14.3**	0.00	0.80	**0.72**
Unchanged Systems							
At-large Plan							
10–29.9	26	−1.8	−7.8	**−9.6**	0.80	0.21	**0.48**
30–49.9	12	−4.4	−10.3	**−14.7**	0.75	0.50	**0.62**
50–100	14	0.9	−3.4	**−2.5**	1.96	0.96	**0.97**

[a]The cities in this table are the same ones as in table 8.2.

TABLE 8.5
Changes in Minority Representation on City Council between 1974 and 1989, Texas Cities of 10,000 or More Population with 10 Percent or More Combined Black and Hispanic Population in 1980 (Ratio Equity Measure)

Type of Change by % Minority in City Population, 1980	N[a]	Mean Minority Representational Equity on Council					
		1974			1989		
		Black	Hispanic	Black + Hispanic	Black	Hispanic	Black + Hispanic
Changed Systems							
From at-large to SMD plan							
10–29.9	9	0.38	0.18	**0.29**	1.32	0.35	**0.92**
30–49.9	9	0.13	0.15	**0.14**	1.12	0.95	**1.06**
50–100	4	0.91	0.71	**0.72**	0.74	0.80	**0.80**
From at-large to mixed plan							
10–29.9	14	0.25	0.14	**0.19**	0.92	0.83	**0.87**
30–49.9	13	0.43	0.16	**0.28**	1.08	0.48	**0.74**
50–100	1	3.27	1.07	**1.29**	0.00	0.80	**0.72**
Unchanged Systems							
At-large Plan							
10–29.9	26	0.62	0.37	**0.48**	0.80	0.21	**0.48**
30–49.9	12	0.58	0.24	**0.39**	0.75	0.50	**0.62**
50–100	14	0.00	0.84	**0.84**	1.96	0.96	**0.97**

[a]The cities in this table are the same ones as in table 8.2.

TABLE 8.6
Minority Representation in Council Single-Member Districts in 1989.[a] Texas Cities of 10,000 or More Population with 10 Percent or More Combined Black and Hispanic Population in 1980

		Mean % Minority Population in Districts, 1980			*Mean % Minority Councilpersons in Districts, 1989*		
% Ethnic Population	N	*Black*	*Hispanic*	*Black + Hispanic*	*Black*	*Hispanic*	*Black + Hispanic*
Black							
0–29.9	212	6.4	20.6	**27.0**	3.3	16.0	**19.3**
30–49.9	13	37.1	22.8	**59.8**	53.8	7.7	**61.5**
50–59.9	3	55.5	2.4	**58.0**	100.0	0.0	**100.0**
60–64.9	13	62.4	4.2	**66.6**	84.6	0.0	**84.6**
65–69.9	7	67.2	4.8	**72.0**	100.0	0.0	**100.0**
70–100	9	75.7	5.1	**80.8**	100.0	0.0	**100.0**
Hispanic							
0–29.9	200	17.2	8.6	**25.7**	18.0	2.0	**20.0**
30–49.9	26	13.0	39.5	**52.5**	19.2	26.9	**46.1**
50–59.9	10	9.5	54.3	**63.9**	10.0	80.0	**90.0**
60–64.9	6	9.4	63.2	**72.6**	16.7	66.7	**83.4**
65–69.9	6	5.8	67.3	**73.1**	16.7	66.7	**83.4**
70–100	9	2.6	81.3	**83.9**	0.0	88.9	**88.9**
Black + Hispanic							
0–29.9	147	5.3	8.2	**13.5**	0.6	1.9	**2.5**
30–49.9	29	12.4	26.8	**39.2**	6.7	10.0	**16.7**
50–59.9	13	26.9	28.9	**55.8**	53.3	26.7	**80.0**
60–64.9	16	34.1	29.3	**63.4**	58.8	29.4	**88.2**
65–69.9	16	37.1	30.0	**67.1**	43.8	43.8	**87.6**
70–100	36	37.5	41.6	**79.1**	55.6	36.1	**91.7**

[a]Data were available for 45 of the 57 cities with districts.

TABLE 8.7
Minority Council Representation in Single-Member Districts in 1989 by Ethnic Composition of District, Texas Cities of 10,000 or More Population with 10 Percent or More Combined Black and Hispanic Population in 1980

		Mean % Minority Population in Districts, 1980			*Mean % Minority Councilpersons in Districts, 1989*		
Ethnic Composition of District	N	*Black*	*Hispanic*	*Black + Hispanic*	*Black*	*Hispanic*	*Black + Hispanic*
Black majority	32	66.5	4.4	**71.0**	93.8	0.0	**93.8**
Hispanic majority	31	6.8	66.4	**73.2**	9.7	77.4	**87.1**
Anglo majority	176	6.5	11.3	**17.7**	1.1	3.4	**4.5**
Black + Hispanic majority (no single group a majority) with:							
Black plurality	2	46.0	21.0	**67.0**	100.0	0.0	**100.0**
Hispanic plurality	8	22.1	44.9	**67.0**	50.0	50.0	**100.0**
Anglo plurality	8	28.7	27.5	**56.2**	37.5	12.5	**50.0**

TABLE 8.8
Cause of Change from At-Large to Mixed or District Plan between 1974 and 1989, Texas Cities of 10,000 or More Population with 10 Percent or More Combined Black and Hispanic Population in 1980

City	Did Lawsuit Accompany Change?	Lawsuit/Reason for Change[a]
	Changed to Single-Member Districts	
Beeville	No	City secretary said 1974 change was the result of pressure brought by Hispanic leaders. School district system had recently been overturned through voting rights litigation.
Cleburne	No	City Attorney said change was the result of black leaders' activities.
Corsicana	No	There were no activities or threats by minority leaders, but city attorney said city was mindful of changes elsewhere.
El Paso	No	Threat of a lawsuit from an Anglo civic club that felt its interests were slighted; also some Hispanic involvement.
Ennis	No	Not due to activities of minority leaders, but charter commission was made up of people "from all ethnic groups."
Fort Worth	No	Voting rights attorney George Korbel said change was made "under threat"; city attorney said it was voluntary, but was seen "as necessary and would have been required in the future."
Henderson	No	City attorney said minorities requested change but made no threat.
Jacksonville	No	City attorney refused interview.
Laredo	No	Voting rights attorney Korbel said threat was necessary; city attorney denied it.
Levelland	Yes	*Esparza and Herrera v. City of Levelland*; settled, 1986.
Longview	No	No threat of suit or minority activity.
Lubbock	Yes	*Jones v. City of Lubbock*; plaintiffs won at trial, 1981.

(*continued*)

TABLE 8.8 (*Continued*)

City	Did Lawsuit Accompany Change?	Lawsuit/Reason for Change
Lufkin	Yes	*David v. Garrison*; plaintiffs won at trial; 5th Cir. reversed; parties settled, 1978.
Marshall	Yes	*Wilson v. City of Marshall*; settled before trial.
Palestine	Yes	*Robinson v. Rodgers*; settled in 1976.
Plainview	No	City attorney imputed change to "recent changes in the law," referring to amended section 2.
Port Lavaca	Yes	*Rodriguez v. City of Port Lavaca*; settled in 1984.
San Angelo	No	Voting rights attorney Korbel said change occurred "under threat"; city attorney said it was voluntary, resulting from a petition from minorities and others.
San Antonio	Yes	*Martinez v. Becker*; after suit was filed, section 5 objection to annexation triggered establishment of new plan. City attorney nonetheless described the change as "voluntary." New plan adopted in 1977.
Sweetwater	No	City attorney said change was voluntary.
Terrell	Yes	*PCVO v. City of Terrell*; plaintiffs won at trial.
Texarkana	No	City acceded in minority leaders' request.
Tyler	Yes	*Square v. Halbert*; settled in 1976.
Waco	Yes	*Calderon v. Waco I.S.D. and City of Waco*; plaintiffs won. Sustained by 5th Cir. in 1978.
	Changed to Mixed Plan	
Alvin	Yes	*Binkerhoff v. City of Alvin*; settled in 1985.
Baytown	Yes	*Campos v. City of Baytown*; plaintiffs won at trial, and city in 1989 adopted an interim plan while case was on remand from 5th Cir. (In 1992 a permanent single-member district plan was adopted.)

(*continued*)

TABLE 8.8 (*Continued*)

City	Did Lawsuit Accompany Change?	Lawsuit/Reason for Change
Beaumont	Yes	*Moore v. City of Beaumont*; city adopted plan in 1984 after suit was filed. City attorney said process began before suit was filed.
Big Spring	Yes	*LULAC v. City of Big Spring*; settled in 1983.
Brenham	No	City attorney said change was not connected to racial issues.
Brownfield	Yes	*Davila v. City of Brownfield*; settled in 1986.
Corpus Christi	Yes	*Alonzo v. Jones*; plaintiffs won at trial, new plan adopted in 1983.
Dallas	Yes	*Lipscomb v. Wise*; plaintiffs won at trial in 1975. (Mixed system was later challenged and replaced with a single-member-district plan in 1991.)
Denison	No	City attorney said there were no threats, but plan was adopted because it was "the wave of the future."
Denton	No	City attorney refused interview.
El Campo	No	City attorney said there were no threats, no racial activists.
Grand Prairie	No	Blacks filed petition; leadership was provided by white "populist" mayor.
Hereford	Yes	*Aguero v. City of Hereford*; settled in 1985.
Houston	Yes	*Greater Houston Civic Council v. Mann*; city won at trial, but changed system in 1979 following section 5 objection to subsequent annexations. Objection was based in part on data collected by plaintiffs at trial.
La Porte	No	Section 5 objection to intended charter revision led to change in 1979.
Lamesa	Yes	*Sorola v. City of Lamesa*; settled in 1984.
McKinney	No	Request was made by black leaders.
Midland	Yes	*LULAC v. City of Midland*; settled in 1985.

(*continued*)

TABLE 8.8 (*Continued*)

City	Did Lawsuit Accompany Change?	Lawsuit/Reason for Change
Nacogdoches	Yes	*Weaver v. Muckleroy*; plaintiffs won at trial. Case settled in 1975 while on appeal.
New Braunfels	Yes	*Torres v. City of New Braunfels*; settled in 1984.
Odessa	No	Black council member requested change, according to city attorney.
Port Arthur	Yes	*City of Port Arthur v. United States*; original plaintiffs lost constitutional case (*Mosley v. Sadler*). City then tried to annex white residential areas. Private plaintiffs and the Department of Justice filed suit under section 5 and ultimately won, in a case that was decided by the Supreme Court in 1982. City attorney refused interview.
Snyder	Yes	*Peña v. City of Snyder*; settled in 1987.
Taylor	Yes	*Thompson v. City of Taylor*, settled in 1985. Earlier plaintiffs, who had filed suit in the 1970s, nonsuited in the wake of *Bolden v. City of Mobile*, for lack of evidence of discriminatory intent.
Temple	No	Voting rights attorney Korbel said change made "under threat"; city attorney said it was voluntary. City changed twice: once in 1977, again in 1989.
Texas City	Yes	*United States v. City Commission of Texas City*; the Department of Justice filed a constitutional and section 2 suit in 1977. Shortly before trial in 1978 the city, by referendum, adopted a charter amendment creating a mixed plan; the case was dismissed without prejudice as moot.
Victoria	Yes	*Mata v. City of Victoria*; settled. But city attorney's office, almost a decade after the suit was filed, said the change was "completely voluntary."

(*continued*)

TABLE 8.8 (*Continued*)

City	Did Lawsuit Accompany Change?	Lawsuit/Reason for Change
Wichita Falls	Yes	*Vasquez v. City of Wichita Falls*; settled before trial in 1985.
SUMMARY	Yes 29 (56%) No[b] 23 (44%)	

Sources: Plaintiffs' attorneys' records; telephone interviews with city attorney's or secretary's office in cities; interviews with George Korbel, voting rights attorney with Texas Rural Legal Aid, and Gerald Hebert, Department of Justice.

[a] There are minor discrepancies between the classification of a few cities' election plans in this table—derived from a telephone survey of the cities in 1989—and that derived from records of plaintiffs' attorneys who tried the cases between 1974 and 1989. In some instances, the attorneys classified a city as single-member district, and the city classified it as mixed, or vice versa. Two cities in table 8.1 are absent from this table because they changed from mixed to single-member-district plans rather than from at-large plans.

[b] One of these twenty-three cases involved a change resulting from a section 5 objection.

TABLE 8.9
Major Disfranchising Devices in Texas

Device	Date Established	Date Abolished
White primaries (major parties)		
Locally, on a county-by-county basis (Democrats)	At least as early as 1888[a]	Unknown
Virtually statewide, regulated by state party (Democrats)	1904[b]	1923[c]
Statewide, mandated by state law	1923[c]	1927[d]
Statewide, mandated by State Democratic Executive Committee (Democrats)	1927[e]	1932[f]
Statewide, mandated by Democratic state convention (Democrats)	1932[e]	1944[g]
Local so-called nonpartisan white men's parties and preprimary groups	Beginning in 1874[h]	1953[i]
Poll tax		
State elections	1902[j]	1964[k]
Federal elections	1902[j]	1966[l]
Early and short registration period	1903[m]	1971[n]

[a] Barr 1971, 195–96.
[b] Ibid., 201.
[c] Barr 1982, 134.
[d] *Nixon v. Herndon*, 273 U.S. 536.
[e] Key 1949, 622.
[f] *Nixon v. Condon*, 286 U.S. 73.
[g] *Smith v. Allwright* 321 U.S. 649.
[h] Rice 1971, 113.
[i] *Terry v. Adams*, 345 U.S. 461.
[j] Barr 1971, 205.
[k] Twenty-fourth Amendment to the U.S. Constitution.
[l] *United States v. State of Texas*, 252 F. Supp 234 (1966).
[m] Barr 1971, 206.
[n] *Beare v. Smith*, 321 F. Supp. 100 (S.D. Tex. 1971), *aff'd sub nom. Beare v. Briscoe*, 498 F.2d 244 (5th Cir. 1974).

TABLE 8.10
Ethnic Registered Voters and Officeholders in Texas, Selected Years[a]

	Black		Hispanic		Anglo	
	N	%	N	%	N	%
Registered voters						
1964	375,000	12.4	—	—	—	—
1968	540,000	13.2	—	—	—	—
1988[b]	832,610	11.0	1,169,736	15.5	5,549,520	73.5[c]
Officeholders						
1965	<7	<0.1	—	—	—	—
1971	45	<1.0	—[d]	—	—	—
1989	312	1.2	1,693	6.3	25,036	92.5

Sources. The 1964 and 1968 registration data were supplied by the Voter Education Project (1976) of the Southern Regional Council; 1988 registration data were from U.S. Department of Commerce, Bureau of the Census 1989, 39. The 1965 officeholder data are found in U.S. Commission on Civil Rights 1968, 221; 1971 officeholder data are reported in Joint Center for Political Studies 1971, 113–17; 1988 officeholder data are from Joint Center for Political Studies 1989, 11, and the National Association of Latino Elected and Appointed Officials 1989, vi.

[a] Mean black and Hispanic populations 1960–90: 12.3% and 19.9%, respectively.

[b] Registration figures for 1988 are based on postelection surveys of self-reported registration. Respondents tend to overreport their degree of participation; some evidence points to disproportionate overreporting by minority respondents

[c] Includes a small number—less than 1 percent of total registrants—of Asians and other nonblack, non-Hispanic minorities.

[d] An early attempt at a systematic count of Tejano elected officeholders was made in 1973 by George Korbel, a voting rights lawyer, and revealed a total of 565.

CHAPTER NINE

Virginia

THOMAS R. MORRIS AND NEIL BRADLEY

VIRGINIA has always clung to an image of moderation in race relations, even though it was one of the original six states deemed by Congress to warrant being covered entirely under the special provisions of the Voting Rights Act. In 1960, five years before passage of the act and just as the state's "massive resistance" to school desegregation had been struck down by the courts, blacks made up 20.6 percent of the state's population. Public schools in Prince Edward County had been closed in 1959 and would not reopen until 1964. Only about 23 percent of voting-age blacks were registered to vote.[1] The political organization that had become synonymous with the name of Senator Harry F. Byrd, Sr., reigned supreme in Virginia, easily defeating antiorganization candidates supported by black voters in the Democratic primary and Republican challengers in the 1961 elections.

Key wryly observed in 1949 that Mississippi was a "hotbed of democracy" in contrast with Virginia. Only once between 1925 and 1945 did the winning candidate in the Democratic primary receive more than 8.6 percent of the vote of the adult population.[2] Virginia had the distinction during this period of turning out the smallest proportion of its potential vote for governor of any of the southern states. Suffrage restrictions effectively minimized voting by blacks and poor whites. These restrictions were crucial to the successful operation of the Byrd organization and its predecessor, the Martin organization, headed by U.S. Senator Thomas Staples Martin from the late nineteenth century until his death in 1919. The increasing black voting strength made possible by the removal of suffrage restrictions in the 1960s paralleled the demise of the Byrd organization.

NINETEENTH- AND EARLY TWENTIETH-CENTURY SUFFRAGE RESTRICTIONS

After the fall of the Confederacy, Virginia avoided a period of radical Reconstruction such as most other southern states experienced. The Virginia constitutional convention of 1867–68 originally proposed a document known as the Underwood Constitution, which incorporated universal adult male suffrage for blacks as well as whites. Seventy-two radicals (twenty-five of whom were black) had overwhelmed the thirty-three conservatives, and the convention majority delivered its harshest blows by supporting the "disfranchisement" and "test-oath" clauses.[3] Those clauses would have denied the ballot and public office to the vast majority of

white Virginians who had held civil or military office under the Confederacy. Shocked by the provisions of the proposed Underwood Constitution, conservatives from both the Whig and Democratic parties came together to form the Conservative party of Virginia. A united assault by white voters against the Underwood Constitution was avoided when moderates from the Republican and Conservative parties joined together to support "universal suffrage and universal amnesty": the enfranchisement of blacks without the disfranchisement of former Confederates.[4] White Conservatives and moderate Republicans accepted a liberal state constitution, which included black suffrage, in exchange for being allowed separate votes on the two disqualifying clauses when the constitution was put before the voters for approval in 1869.

In the 1869 elections, the disfranchisement and test-oath clauses, aimed at secessionist whites, were soundly defeated at the same time the new constitution was overwhelmingly adopted. The gubernatorial candidate supported by most conservative whites, Gilbert Walker, was also elected by a majority of over eighteen thousand votes.[5] Faced with the prospects of dividing the vote of those opposing the biracial Republican ticket, the Conservative party candidates for statewide office resigned in favor of the nominees of the conservative Republicans who ran on the "True Republican" ticket. Some blacks voted for Walker, the True Republican nominee, but most supported the losing Republican candidate.[6] Meanwhile, the Conservative party (destined to become the Democratic party in 1883) won solid majorities in both houses of the legislature and five of the nine seats in Congress.

In the election of delegates to the 1867–68 convention, 95,145 blacks but only 76,084 whites voted; 88 percent of registered blacks voted, whereas only 63 percent of registered whites did. Two years later, in 1869, whites outvoted blacks 125,114 to 97,205 in the referendum on the Underwood Constitution and the statewide and legislative elections.[7] The increased voting by whites ensured that, despite the dominant role played by radicals and blacks in drafting the new constitution, the Conservative party presided over its application and shaped state policies during the 1870s. Reconstruction ended for Virginia in early 1870, and, from the perspective of Virginia traditionalists, the state had been "redeemed" in 1869 from the prospect of rule by blacks and their radical Republican allies, who had controlled the Underwood Convention.[8]

In 1870 the state legislature enacted a statute requiring separate registration books for blacks and whites. This law made chicanery easier by limiting through technical delays the number of blacks who could vote in the allotted time or allowing local registrars to "lose" the black voter list. Gerrymandering to break up black pockets of voters took place during reapportionment in 1874–76, 1883, and 1891, first by the Conservatives and then by the Democrats.[9] In 1876, the Conservatives amended the state constitution to make payment of the poll tax a prerequisite for voting, and conviction for petty larceny grounds for disfranchisement. According to the Richmond *State* and *Petersburg Index and Appeal*, these amendments constituted "almost . . . a political revolution" in reducing the black vote in 1877.[10] Black voting had already begun to decline and was further diminished in importance by the amendments.

A brief period of control by the Readjuster party, which gained broad support from blacks and sought to ease (or "readjust") the burden of prewar debt, led to the repeal of the poll tax in 1882, but the exclusion of blacks from public office continued unabated. Twenty-seven blacks had been elected in 1869 among the 180 members of the new general assembly, but that number fell to 17 two years later and plummeted to 2 in 1885.[11] By 1891 no blacks sat in the state legislature, and only 3 Republicans remained. Moreover, Virginia's first and only black congressman, John Mercer Langston (1890–91), was defeated in the 1890 congressional elections along with all other Republican candidates. (Langston had been elected in 1888 but did not take his seat until 1890 because of an election contest.)

During the early stages of the Democratic organization under Senator Thomas Martin (1893–1919), black citizens were virtually eliminated from electoral participation in Virginia. The two-step disfranchisement included election "reform" and a new constitution. The Democrats passed a secret-ballot law in 1894 known as the Walton Act. It provided for a publicly printed ballot to be marked secretly in booths. Neither party names nor symbols were permitted on the ballots. Provision was made for special election judges (i.e., Democrats) to assist illiterates, but the practical effect was to end voting by most blacks in Virginia. One scholar has estimated that the percentage of blacks voting for the candidate opposing the Democratic nominee dropped from 46 percent in 1893 to 2 percent in 1897.[12]

In 1902 Virginia ranked seventh among the states in the percentage of blacks in its total population (35.7 percent); moreover, blacks constituted a majority of the population in thirty-five of the state's one hundred counties.[13] The Virginia constitutional convention of 1901–02 took the second step in disfranchisement in its provisions for a framework of poll taxes, an "understanding clause," and literacy tests designed explicitly for the purpose of disfranchising black voters. The overall effect of the new requirements, which affected poor whites as well as blacks, was to decrease dramatically the total vote in the state; the presidential vote declined almost 50 percent from 264,240 votes in 1900 to 135,865 in 1904. The restricted electorate once again aided the Democratic organization in tightening its grip on state politics.

Even though voter turnout for all races and regions in Virginia was shockingly low, black voter participation was even more dismal. Of the estimated 147,000 blacks of voting age at the time the 1902 constitution was adopted, only 21,000 were on the registration lists once Virginia's registrars began applying the understanding clause. After the poll tax became a voting requirement in 1905, it was estimated that fewer than one-half of that 21,000 met both poll tax and registration requirements. In Richmond the number of blacks qualified to vote shrank from 6,427 in 1900 to 228 in 1907.[14]

Black Participation under the Martin and Byrd Organizations

With the work of the disfranchising convention completed, the way was cleared for the Martin organization to acquiesce in the demands of the antiorganization reformers for a direct primary in Virginia. Without the dramatic reduction in the black vote, it is doubtful that the organization would have agreed to the primary system.[15] Discriminatory application of registration procedures by local registrars against black citizens also was used to exclude Republicans and other white voters who refused to support organization candidates, thus serving the additional purpose of reducing the competitiveness of the Republican party to which most blacks gave their support. Nomination in the Democratic primary became tantamount to election in Virginia.

Until 1912 blacks were legally eligible to vote in the Democratic primary, although the black vote in the first primary of 1905 was "minuscule and inconsequential."[16] In 1912 the legislature passed a statewide primary law introduced by Richard Byrd, the father of Harry Byrd and speaker of the house of delegates at the time. Known as the Byrd Law, it gave the party wide discretion to regulate its affairs. The Virginia Democratic party promptly affirmed a policy of limiting participation in its primary to qualified white voters.[17]

Little action was taken from 1912 through 1925 to challenge Virginia's white primary policy. But when the U.S. Supreme Court in 1927 struck down a 1923 Texas law prohibiting black participation in Democratic primary elections, blacks attempted to vote in a 1928 primary in Richmond. After election judges denied them the opportunity to participate, one black plaintiff challenged the constitutionality of the Byrd Law. It had been drafted with foresight to avoid charges of discriminatory state action by permitting parties to make their own regulations, but the law fell as a result of one of its progressive elements—public financing of the primary election. A 1930 federal appeals court decision invalidated Virginia's publicly financed white primary, and the state did not appeal. This legal development gave Virginia the distinction of being the only southern state at the time with no racial restrictions on primary participation.[18]

But while invalidated by the federal courts, the white primary statute remained on the books, even though unenforced. As late as 1947 party leaders counseled against updating the party rules rather than creating, according to Key, "an opportunity for intolerant elements to sound off, unnecessarily and undesirably opening the whole race issue, which is little discussed in Virginia politics."[19] Key in 1949 observed an Upper South attitude among Virginia whites toward blacks, which resulted in a proportionally larger black vote in primaries and general elections.[20] Blacks were permitted to vote in primaries and serve as delegates in conventions. The Byrd organization was not troubled by this black participation because blacks made up such a small percentage of the registered voters and other suffrage restrictions were still in force. In addition to being registered, voters also had to be

current in the payment of the poll tax six months before an election. Moreover, citizens who had been lax in payment of the tax had to pay for the two preceding years as well, for a total of $4.50, to be eligible to vote.

Blacks rarely sought office prior to 1945, but black voting increased markedly in Virginia cities following World War II, especially where there were black candidates seeking local offices. Oliver Hill, a black attorney in Richmond respected by both races, came within 191 votes in 1947 of being nominated to the state legislature in the Democratic primary. The legislative seat he ran for encompassed the entire city of Richmond. The following year he garnered an estimated 3,000 white votes and won the ninth of nine at-large seats on Richmond City Council.[21] Two years later, in 1950, Hill was narrowly defeated for reelection when blacks opted to support a seven-person biracial ticket rather than cast single-shot ballots for Hill, as they had done in 1948.

Hill's success encouraged other black candidates in the early fifties. The coming of white massive resistance to the U.S. Supreme Court's 1954 school desegregation decision, however, was a sharp setback to black aspirations. In his book on massive resistance, Robbins Gates summarized black participation at the time in this manner:

> In states of the Upper South [including Virginia], Negroes can be conceded political "participation" without a commensurate concession of political "power." Participation without power makes for hat-in-hand politics. Negroes are to be found in both Virginia parties, and in both factions of the dominant party, but in no party or faction do they have any real political power "as Negroes." No party or faction thereof in the state is in a position to yield to any Negro demands that fail to conform to basic tenets of white supremacy.[22]

Between the 1870s and 1960s, therefore, various suffrage restrictions effectively limited black voting to a level that was not threatening to white supremacists and virtually eliminated black officeholding.

Political Change Comes to Virginia

Prior to 1964 the black vote in Harry Byrd's Virginia had not been significant, much less decisive. The end of the Byrd era was foreshadowed when the state Democratic convention repudiated Byrd's position of "golden silence" on the 1964 presidential election and endorsed the candidacy of Lyndon Johnson. Increasingly sophisticated voter registration drives inspired by the successes of the civil rights movement, abolition of the poll tax, and near unanimous black support for the initiatives of the new Johnson administration resulted in blacks providing the winning margin of 76,704 votes for the Democratic ticket in Virginia. Estimates of the number of blacks voting varied from 100,000 to "at least 160,000."[23] Whatever the figure, it was evident that with blacks casting well over 90 percent of their

vote for the Democratic ticket, Johnson could not have won in Virginia without them.

The Voting Rights Act, passed the next year, ended Virginia's literacy test for voting. The adoption of the Twenty-fourth Amendment to the U.S. Constitution in 1964 eliminated the poll tax for federal elections, and the Supreme Court's decision in *Harper v. Virginia State Board of Elections*[24] invalidated the poll tax for state elections as well.

The importance of the tax for the Byrd organization was highlighted by the call of a special session of the state legislature in the fall of 1963 to design an alternative way of limiting the electorate, once it became clear that the tax would soon be invalidated. To replace it, legislation was enacted requiring voters to file a "certificate of residence" six months prior to each federal election to prove continuing residence in the state. In May 1964 a federal district court invalidated the legislation, clearing the way for Virginia citizens to vote, for the first time in sixty years, without paying the poll tax.[25] An estimated 55,000 blacks registered as part of an increase of 224,305 new voters from April to October 1964.[26] The number of votes cast by Virginians in 1964 topped 1 million for the first time in history, an increase of 270,000 over the 1960 presidential election. Voter turnout in the state moved from 33.3 percent in 1960 to 41.2 percent of the adult population in 1964; while representing a significant increase, the 1964 figure was still 20 percentage points below the national average.[27]

The 1965 gubernatorial election proved to be a transition to a new political era in state politics. Lieutenant Governor Mills E. Godwin, Jr., who had supported massive resistance as a member of the state senate, acknowledged the changes taking place by endorsing the Democratic presidential ticket in 1964, the year President Lyndon B. Johnson was challenged by Barry Goldwater. He benefited the following year when he received the gubernatorial nomination without opposition and enjoyed labor and black support in the general election. In part because the poll tax still applied to state elections in 1965, far fewer blacks voted than in 1964. The Democratic majorities in black precincts were less than for the Johnson ticket, but once again the victorious Democratic nominee would not have been elected without black voters.[28]

In 1966 a solid black vote was essential to William Spong's upset victory by 611 votes over the aging incumbent senator, A. Willis Robertson, in the Democratic primary. Spong won an easy victory in the general election on the basis of urban and black votes. In the other Senate race that year, blacks overwhelmingly supported the Republican candidate against Harry Byrd, Jr., who had been appointed to his father's seat. The black vote reduced Byrd's support, but not enough to deny him a majority of the popular votes.[29] The decade of the 1960s ended with the 1969 election of the first Republican governor of the century. A divisive Democratic runoff primary enabled the moderate Republican candidate, Linwood Holton, to win this first gubernatorial election after the removal of the poll tax in state elections. Holton's triumph demonstrated that Republicans could run well in urban Virginia in races for state offices, just as their presidential nominees had done for

years. Moreover, Holton's 37.2 percent share of the black vote was a key factor in his victory.

The Voting Rights Act was one of a number of interrelated factors shaping the changes in Virginia's electorate during the sixties. The act's elimination of the literacy test, the removal of the poll tax at the federal and state level, the increasing urbanization of the state, and the more competitive status of Republicans were all important components of the changes taking place. The potency of the black vote in general elections from 1964 to 1966 subsided, however, as the registration of white voters, too, increased dramatically. From 1965 to 1973 the black vote steadily declined as a percentage of the total vote in general elections. Voting in selected black precincts during that period remained relatively constant in general elections even as overall participation within the electorate increased.

The erosion of black influence was dramatically demonstrated in populist Democrat Henry Howell's narrow loss to Mills Godwin in the 1973 race for governor. Given the near unanimous black support for Howell, he would have won the election if the black participation rate had approached that of whites. Sabato quoted black leaders as conceding a loss of "intensity" following the initial surge of black registration in the 1960s and interpreted the low participation level as an indication that "many blacks are disillusioned with the political process or question the fruits of participation in the system."[30]

In the Democratic primary, in contrast to general elections, black influence was increasing even as their participation rates in general elections declined. Blacks, labor, and liberals became disproportionately represented in the Democratic primary as conservative voters dropped out of it, shifting their focus to the general election in November. Blacks overwhelmingly supported nominees of the Democratic party who were shut out of the governorship and both U.S. Senate seats during the 1970s. Only in 1977, when a moderate, Marshall Coleman, was elected as the state's first Republican attorney general, did a Republican candidate for statewide office even approach Linwood Holton's 37.2 percent of the black vote in 1969. Coleman received 32.7 percent of that vote against a conservative Democrat who had supported massive resistance legislation in the late 1950s. In the 1980s, only two Republican candidates for statewide offices received any significant black vote. John Warner garnered 21.2 percent when he was reelected to the U.S. Senate in a landslide in 1984. Maurice Dawkins, the black nominee in the 1988 race for a U.S. Senate seat, received 16.3 percent of the black vote, losing badly to former governor Charles Robb.[31]

The major surge in black registration and voting took place in the mid-1960s. But even though increased participation in state elections thereafter was primarily attributable to new white registrants, black registration went forward. From 1960 to 1984 the proportion of blacks among registered voters in Virginia increased from 10 to 17 percent, figures consistent with those for the rest of the southern electorate.[32] The long-term significance of this newly enfranchised minority in statewide elections was evident in the resurgence of the Virginia Democratic party in the 1980s as it swept all three statewide offices in three consecutive elections

(1981, 1985, and 1989). The vital role of black support was underscored by the fact that none of the successful gubernatorial nominees of the Democratic party received a majority of the white vote in the three general elections.[33] Moreover, in all three, the turnout rate of blacks exceeded that of whites. This record of support by black voters undoubtedly contributed to the nomination by convention of state senator L. Douglas Wilder without opposition for lieutenant governor in 1985 and for governor in 1989. Virginia Democrats, who abandoned the runoff primary following the divisive gubernatorial primary of 1969, turned to state conventions for the purposes of nominating statewide candidates in the 1980s.

As the nation's first elected black governor, Wilder is a poignant reminder of the progress being made in overcoming racial barriers. Race undoubtedly continues to be an issue in Virginia politics, but Wilder's victory, although by the closest margin in a Virginia gubernatorial election in this century, means race is not always the determining factor in the outcome of elections. His winning margin came largely from Northern Virginia and Hampton Roads, the fastest growing regions of the state with the largest nonnative populations. So dramatic was the population shift within Virginia that he was able to win by carrying only twenty-two of forty-one cities and twenty-two of ninety-five counties. Wilder received 41 percent of the white vote and benefited from a turnout rate among black registered voters that was 8 percentage points higher than the figure for white voters; four years earlier the black rate had been only about one point higher.[34]

Rarely has a minority candidate been as well positioned to win statewide office as was Wilder in 1989. A majority-black state senate district had assured him electoral security and legislative seniority. As the state's leading black politician for twenty years, and as a candidate who had never lost an election, he had earned a reputation as a seasoned insider within the majority Democratic party. He had moderated his views over the years to espouse fiscal conservativism and hard-line positions on crime, including support for the death penalty. Like his white predecessors, he had used his four years as lieutenant governor to expand his contacts around the state. Wilder pursued a "deracial" political strategy designed to avoid racial polarization and emphasize the nonthreatening nature of his campaign. He ran "not as a black politician, but as a politician who happened to be black."[35] He was nominated without opposition by a fully unified party, was well financed, and ran as the successor to two popular Democratic administrations. Moreover, his prochoice position on the dominant issue of the campaign—abortion rights—gave him an advantage without which it is difficult to imagine him winning. His victory underscores the capability of a black candidate to win the votes of a large number of whites. "Wilder's campaign," in the cautionary evaluation of one observer, "offers a formula, albeit not an easily followed one, for doing that."[36]

Virginia Resists the Voting Rights Act

On key 1965 congressional votes, only Mississippi opposed President Johnson's positions and a larger federal role through Great Society programs more often than

Virginia did.[37] All of the Virginia congressional delegation voted against the Voting Rights Act except for Representative W. Pat Jennings, a liberal Democrat from the southwestern district containing many straight-ticket, anti-Byrd Democrats.

Support for the act and its extensions was limited to a handful of the state's twelve-member congressional delegation. Only Senator Spong, who was defeated for reelection in 1972, and Republican representative William Whitehurst, whose district included a black population of 22 percent, voted for the 1970 extension. However, even Whitehurst voted against extending the act in 1975, leaving only two Democrats elected from northern Virginia in 1974 to cast affirmative votes. In 1982 the only Virginia votes supporting final passage of that year's extension and amendments were two Republicans: Senator Warner and Congressman Frank Wolf of northern Virginia. Overall, the minimal level of support by the delegation for the act's initial passage and its three extensions can best be explained by the predominance of two groups least likely to provide support: Old South Democrats and Republicans.[38] By 1968 Republicans had won half of the state's ten house seats, and at the time of the 1982 vote for extension controlled nine of ten House seats and one Senate seat.

In 1973 the Virginia General Assembly passed a resolution directing the state attorney general to take action necessary to bail out Virginia from coverage of the special provisions of the act, including section 5. Accordingly, Attorney General Andrew Miller filed suit that same year in the U.S. District Court for the District of Columbia, making Virginia the first southern state to seek exemption from the act. The state maintained that it met the statutory requirement at that time—a ten-year absence of any discriminatory device for voting—since its literacy test had been fairly administered in the years immediately before it was suspended by the act. Miller estimated that as many as 90,000 blacks might have registered between 1962 and 1964. He pointed to the growth of black registration prior to 1965 and the failure of the Civil Rights Commission and the Department of Justice to "find substantial discrimination." In fact, no federal observers or examiners had ever been assigned to Virginia under the provisions of the act.[39]

However, estimates of the number of blacks registering to vote in Virginia during the 1960s varied widely. The Civil Rights Commission estimated that almost 100,000 more blacks were registered in 1967 than in 1965, when the act was passed. The commission also found a gap of over 22 percentage points between white and black registration rates prior to passage of the act.[40] The federal district court hearing Virginia's bail-out arguments acknowledged in a footnote the dispute over registration statistics as well as the state's concession that the black registration rate was "significantly lower" than the white rate. The court commended the state for "its good faith efforts in voter registration in the sixties," but estimated that the black registration rate was about 10 percent below that of whites from 1963 to 1965.[41] Virginia was denied exemption from the act on the ground that the state's record of segregated, inferior education for blacks contributed to low literacy rates, which affected the ability of persons to satisfy literacy requirements prior to 1965.

Vote Dilution in State Legislative Redistricting

The state's 1964 reapportionment of the legislature was challenged in federal court for,[42] among other reasons, diluting the black vote by establishing a two-member senate district in Richmond and by combining Richmond with Henrico County into an eight-person at-large district for the purpose of electing members to the house of delegates. While blacks made up 42 percent of the Richmond population, they constituted only 29 percent of the combined Richmond-Henrico house district. In a decision handed down on 9 April 1965, less than four months before the signing of the Voting Rights Act, a federal district court dismissed the complaint on the grounds the state had traditionally used multimember districts in other areas of Virginia.[43]

William Ferguson Reid of Henrico County narrowly lost his campaign for a seat from that Richmond-Henrico district in 1965, but in 1967 he became the first black to serve in the Virginia legislature since 1891. Reid, a physician, placed fourth overall in 1967, winning handily against three opponents in the Richmond-Henrico district, along with the other seven Democratic candidates. Turnout in Richmond, where Dr. Reid led the ticket, exceeded the 1965 turnout for the gubernatorial election by some eight thousand votes.[44] In 1969 attorney Douglas Wilder was elected state senator from Richmond in a special election in which he won slightly less than 50 percent of the vote against two white candidates. There was no runoff requirement. The citywide election took place in a jurisdiction that had a black population majority but a substantial white registration edge. Even though the bulk of his support came from black voters, Wilder acknowledged on election night that he received some white votes and benefited from the decision of some whites not to vote. He said he "look[ed] forward to the time when all men can run as candidates on their qualifications, and not as a 'Negro' candidate or a 'white' candidate."[45]

The decision of the state senate in 1971, under pressure from the Justice Department, to elect all senators from single-member districts signaled the end of Richmond's multimember senate district. Most of the city's black population was put in Wilder's district, giving him a politically safe constituency that was 71 percent black. Wilder ran without opposition and served until he resigned following his election as lieutenant governor in 1985. Delegate Reid was not so fortunate in the changes affecting his district. The new house districts created in 1971 separated Richmond and Henrico County, leaving Reid, a county resident, to run in a single-member floater district composed of the two jurisdictions and containing a black population of 29 percent. In 1971 he won reelection against an independent, but he was unseated two years later by a white Richmond city council member running as an independent in a three-way race involving a Republican candidate and heightened public attention to the busing issue. In 1977 two blacks were elected to the house of delegates from Richmond as part of the victorious Democratic ticket, when two incumbents relinquished their seats to seek statewide offices.

Following the 1970 census count, the Department of Justice objected under section 5 to Virginia's redistricting plans for both houses of the legislature. The objections for the senate plans found that a multimember district diluted the black vote in Norfolk. In 1971 the senate responded to the objections by creating single-member districts, including a heavily black district there. Meanwhile, Henry Howell, the white liberal state senator from Norfolk, complained that he had been placed in a "Goldwater" district as a result. Invoking the one-person, one-vote principle, he challenged the legislature's decision to include all shipboard naval personnel in his district despite the fact they were residentially scattered throughout the Norfolk area.[46] The federal district court agreed with Howell and restored a multimember senate district for Norfolk, subsequently upheld in *Mahan v. Howell*.[47] This litigation headed off the probable candidacy of Delegate William Robinson, Sr., of Norfolk, a black college professor first elected in 1969, for the abolished single-member senate seat.

On the house side, the Department of Justice objected to the retention of multimember districts in areas with heavy concentrations of black voters—Hampton, Newport News, Norfolk, Portsmouth, and Richmond. The house of delegates received an unexpected reprieve, however, when the U.S. Supreme Court declined to invalidate multimember districts on Fourteenth Amendment grounds in an Indiana case, *Whitcomb v. Chavis*.[48] The Department of Justice withdrew its objections, and multimember districts were retained.

As Virginia turned to redistricting for the 1980s, its record of four blacks in the hundred-member lower house and one senator in the forty-member upper chamber gave it the lowest level of black legislative representation in the South. This was in a state with a black population of 19 percent. Legislative redistricting following the 1980 census was not one of Virginia's finer moments. In 1981–82 there were some fourteen legislative sessions, six redistricting plans, a ruling of unconstitutional population disparities by a three-judge federal panel, a gubernatorial veto, and Justice Department section 5 objections to plans for both houses. Buffeted by the court and the Department of Justice, the legislature ended up sharing its power to redraw district lines with lobbyists for the American Civil Liberties Union (ACLU) and the NAACP, and was required to hold house of delegates elections one year after the normal 1981 elections because the districts had been declared unconstitutional. No wonder that syndicated columnist Carl Rowan wrote a well-publicized piece entitled "Don't Carry Us Back . . ." in August 1981, citing Virginia's record of legislative redistricting as a prime reason for the need to extend the Voting Rights Act in 1982.[49]

As had been the case ten years before, single-member districts for Norfolk were a source of controversy. The senate's plan to divide Norfolk so that neither of its two districts would have more than a 37 percent black population was criticized by Wilder for diluting black votes, and it predictably drew an objection from the Justice Department.[50] On the house side, incumbency protection and preservation of 1971 district lines wherever possible received the highest priority in the original plans. These criteria were not utilized for black areas, however.

Applying 1980 census data to the 1971 district lines would have meant the direct election of seven delegates from predominantly black districts. Instead, the initial 1981 house plan decreased the number of delegates elected in such districts from seven to four.

The house of delegates finally shifted to a plan of one hundred single-member districts, nine of which were majority-black. Black community groups uniformly supported the shift to single-member districts, but black legislators were divided in their views. Delegate William P. Robinson, Jr., of Norfolk disagreed with the two black delegates from Richmond about the appropriateness of single-member districts. Delegate Robert C. Scott of Newport News generally agreed with Robinson that single-member districts could isolate minorities and discourage racial cooperation, but he ultimately voted for the single-district plan while Robinson abstained.[51]

Seven of the nine majority-black districts provided for in the final house plan were at least 59 percent black, and as of 1990, all were held by black Democrats; the two districts with smaller black majorities elected white Democrats. On the senate side, black representation increased from one to three members in the 1980s in a body of forty members. Black delegates moved up in 1985 and 1987 to fill vacant seats in majority-black senate districts in Norfolk and Richmond and joined Delegate Scott of Newport News, who won a seat in a senate district that was 65 percent white. Along with Delegate Reid's victory in 1971, Scott's election in 1982 and reelection in 1983 and 1987 to his senate seat constitute the only times blacks have been elected to majority-white, single-member districts for the state legislature. Scott, as an incumbent state senator, ran for a congressional seat in 1986, challenging a Republican in a majority-white district. He lost, garnering 44 percent of the vote.

Vote Dilution through Muncipal Annexations

By 1966, following passage of the Voting Rights Act, black registration in Richmond had surged to over a third of the total, compared with a little over one-fourth in 1964. The white power structure responded by proposing a system of staggered terms—a device that can have dilutive effects by diminishing the probability of a successful bullet-vote strategy—and the endorsement of two black businessmen in the 1966 at-large councilmanic elections. A bitter campaign marked by a record black turnout culminated in the defeat of the staggered-term proposal and the election of three blacks to the city council, including the two backed by the white, business-oriented group Richmond Forward.[52] Turnout in predominantly black precincts reached a new high in 1968 when the black organization Crusade for Voters made a determined effort to win control of the nine-member council. The Crusade did not endorse two black incumbents, B. A. Cephas, Jr., and Winfred Mundle, who had been backed by both the Crusade and Richmond Forward in 1966. The influence of the Crusade became evident when the two white candidates it endorsed ran much better in black precincts than did the two black incumbents supported by Richmond Forward.[53] Even though three candidates endorsed by the

Crusade won, its effort to win control of city council failed, and only one black, Henry Marsh, won a seat on city council.

In the early 1970s, the issue of fair representation of blacks in local government was raised by the annexations of surrounding counties by the cities of Richmond and Petersburg. Richmond did not submit its annexation for review by the Justice Department in accordance with section 5 until after the decision of the Supreme Court in *Perkins v. Matthews*[54] left no doubt about the city's obligation to do so. The Justice Department objected to the dilution of the black vote in both cities. The annexation reduced the black proportion in Richmond, which had recently grown rapidly, from 52 to 42 percent in Richmond and in Petersburg from 55 to 46 percent. Richmond was enjoined by the federal courts for seven years from holding councilmanic elections in what has been described as a classic confrontation "between the powerful white elite and growing numbers of central city blacks."[55]

The U.S. District Court for the District of Columbia, after hearing Richmond's section 5 suit for preclearance, concluded the annexation discriminated against blacks in purpose and effect. It viewed the action as a move by the white political leadership, frightened by the new electoral strength of black voters, to maintain control of city council. The court pointed to Richmond's focus in the negotiations on the number of new white voters and its insistence in the annexation agreement that citizens in the annexed area be able to vote in the 1970 city council election.[56] In 1975, the Supreme Court in *City of Richmond v. United States*[57] held that the reduction in the black proportion of the population was permissible as long as blacks were afforded an opportunity to elect candidates in proportion to their political strength in the newly enlarged city. In lieu of deannexation, Richmond, as had been the case with Petersburg, was permitted to shift from at-large to single-member-district elections. In both cities only one black was sitting on city council at the time of the annexations. Black majorities were installed on the city councils under the new ward systems, albeit in Petersburg the majority was short-lived and became a four-to-three white majority.

Two other jurisdictions received much less attention when they made changes in their at-large electoral systems in the mid-1970s. Lynchburg's annexation of portions of two surrounding counties in 1975 was met by a Department of Justice objection and a suit by a local citizens' committee opposing the annexation. Lynchburg chose to implement a mixed plan, including three at-large seats and four single-member wards, one of which was majority black. In 1972 Nansemond County consolidated with its two small towns as the city of Nansemond. Two years later, Nansemond City merged with the city of Suffolk. The newly enlarged city of Suffolk was precleared by the Department of Justice when Suffolk opted for a mixed plan with one two-member ward and five single-member wards.

Vote Dilution through At-Large City Elections

To assess the impact of changes in local electoral systems on minority officeholding, we surveyed all twenty-six Virginia cities with black populations of 10 percent

or higher in 1980. In addition to the consolidated city of Suffolk and the three cities making changes in the 1970s because of the addition of new population through annexation, six cities shifted from at-large city council elections as a result of the Voting Rights Act—Hopewell, Fredericksburg, Franklin, Emporia, Covington, and Norfolk. The first lawsuit challenging at-large city council elections apart from annexation was filed by black plaintiffs, represented by the Lawyers' Committee for Civil Rights Under Law, against Hopewell on 22 January 1982. Hopewell's council had always been all white under its at-large system, despite the fact that blacks constituted about 20 percent of the city's population. As a result of the litigation, which was resolved by a settlement, Hopewell in January 1983 adopted a system of two at-large seats and five wards, one of which was nearly 75 percent black. Subsequently, the council consisted of one black and six whites.

A suit challenging Norfolk's at-large elections was first filed in August 1983. Six years later the U.S. Court of Appeals for the Fourth Circuit, in a two-to-one decision, directed the district court to oversee the establishment of ward-based voting. From 1968 to 1984 Norfolk's city council had a single black member. After the suit had been filed in August 1983, Norfolk's white mayor supported the election of a second black candidate and publicly stated his election could render "the issue of black representation . . . a moot point."[58] Citing *Thornburg v. Gingles*, the Supreme Court's interpretation of amended section 2, the Fourth Circuit panel found the 1984 election of a second black candidate who was reelected in 1988 to be the result of "special circumstances." In 1991 Norfolk, a city with a black population of 39 percent, drew seven single-member districts, three of which were majority-black.

Litigation filed by blacks represented by the American Civil Liberties Union led to the creation in Emporia of three majority-black districts in a mixed plan of eight seats. Emporia, a city with a 44 percent black population, had never elected more than one black to serve on council at any time since 1970. Another ACLU suit prompted Covington (13 percent black) to shift to a five-ward plan with one majority-black district. In Franklin, which elected its council at large, an objection by the Department of Justice led to a new electoral system when an annexation changed the city's voting population from 51.9 percent black to 51.7 percent white. Three majority-black districts were established as part of a mixed plan, increasing the size of council from five to seven with a mayor elected at large. A local referendum establishing a modified ward system in Fredericksburg was followed by a Department of Justice objection. The three-ward, four at-large plan was changed to a four-ward, three at-large system with a majority-black district.

Vote Dilution in Counties, Towns, School Boards, and Judicial Elections

Whereas Virginia cities have traditionally used at-large elections to select their council members, the state's counties have historically utilized magisterial (i.e., "magistrate") districts for electing boards of supervisors.[59] Of Virginia's ninety-five counties, only four rely exclusively on at-large elections. Eleven counties have mixed plans, with one or two supervisors elected at large; nine other counties employ one or more two-member districts, or in the case of one county, a three-member district. Otherwise, Virginia counties utilize single-member districts to elect members of their governing bodies.

Despite the historic use of single-member magisterial districts in Virginia, a number of southside counties made selective use of multimember districts to dilute the black vote. In May 1983 ACLU lawyers filed a lawsuit on behalf of black plaintiffs against Prince Edward County, challenging a three-member district that diluted the black vote. The county promptly changed to a pure single-member-district plan and, in so doing, created two black-majority districts. Subsequent litigation was responsible for the adoption of pure district systems in five counties—Buckingham, Lunenburg, Mecklenburg, Prince Edward, and Richmond. In Dinwiddie County, following litigation, a two-person district was preserved, but districts with 62 and 64 percent black populations replaced districts with black majorities of about 55 percent. Prior to the litigation, the only black to win a supervisor's seat in the county since Reconstruction did so in 1987 with a plurality of the vote in a contest against two white candidates.

A successful district court challenge to the racial makeup of the five single-member districts for Brunswick County was dismissed on appeal on the technical defense of laches, the appellate court ruling that plaintiffs waited too long to sue.[60] After the 1990 census, the county adopted a new districting plan, which was again challenged unsuccessfully by black residents; the court of appeals ruled that the plan did not dilute minority voting strength.[61]

As a result of lawsuits filed by the ACLU on behalf of black plaintiffs, blacks have been elected to sit on county governing boards for the first time in this century in the counties of King and Queen, Lunenburg, and Richmond. In Mecklenburg County, where two blacks had been elected in the 1970s, no blacks were serving when a consent decree was entered in June 1989 in litigation filed by the ACLU that created districts with black population majorities of 57, 61, and 65 percent. Pittsylvania County drew new district lines in 1988 to make adjustments for the loss of population through annexation. A new plan composed of seven districts failed to produce a black-majority district despite the county's 33 percent black population and the failure of any black to serve on the board of supervisors since Reconstruction. A public hearing on the plan attended by over three hundred members of a concerned citizens group organized by local black leaders, and the threat of a lawsuit, eventually led to the drafting of another plan with a 63 percent black-majority district.

Of the 188 towns in Virginia, all but 7 elect their town councils at large; 6 of the 7 changed from at large as a result of litigation filed under the Voting Rights Act.[62] Five switched to mixed systems combining at-large and single-member districts, and another, South Hill, now contains a two-member black-majority district and two three-member districts. Except in Blackstone, where there was a 43 percent

black population, no black had ever been elected to the at-large town councils before the voting rights lawsuits led to changes in the 1980s.

Prior to 1992, when the state legislature permitted localities to authorize elected school boards following a local referendum, Virginia was the only state that did not elect any school board members. A proposal for elected school boards had been defeated in the 1901–2 constitutional convention explicitly because the delegates feared blacks would be elected. The convention left the method of selection to the legislature, which adopted an appointive method, and school boards continue to be appointed. The proportion of blacks serving on these boards—about 18 percent—is roughly equal to their proportion in the population, but they are far more likely to be appointed in districts with few blacks than in those with many. In 1988, for example, blacks were underrepresented, sometimes severely, in twenty of the forty jurisdictions with black populations exceeding 30 percent.

For a ten year period between 1947 and 1956, Arlington County had an elected board under state legislation. When the board adopted a school desegregation proposal in 1956, the legislature immediately repealed the provision that allowed it to be elected. A 1988 lawsuit challenging these discriminatory decisions was unsuccessful. Though the courts found the acts intentionally discriminatory, they rejected plaintiffs' claims under constitutional provisions and under section 2 of the Voting Rights Act, holding that the existence of a 1984 legislative study which "set forth solely legitimate reasons" for appointed school boards was sufficient evidence that the school boards "had met their burden of rebutting the inference of discriminatory intent," and that while there was a "significant disparity" in board appointments in a number of jurisdictions, there was "no proof that the appointive process caused the disparity."[63]

Virginia is one of four states in which judges are elected by the state legislature. The election of judges actually takes place in the house and senate caucuses of the Democratic party. A unit rule binds caucus members to vote for the candidates embraced by the caucus majority.[64] In 1990 there was 1 black justice on the 7-person state supreme court, 1 black judge on the 10-person intermediate court of appeals, 5 blacks among the 127 circuit court judges, and 9 among 184 district court judges. In short, fewer than 5 percent of Virginia's judges were black in a state whose black population was 19 percent in 1990.

Litigation and the Civil Rights Community

Voting Rights Act litigation came late to Virginia. After the annexation litigation in the 1970s involving section 5, no dilution suit was filed until 1982. The late start of litigation may be attributed to the lack of a state civil rights organization interested in black political representation, and consequently, to a lack of lawyers within the state willing to undertake such cases. This lack is striking, and several factors could have contributed to it. Some national organizations had placed their

resources elsewhere, possibly because they believed that there was a greater need for litigation in Georgia and Mississippi, for example, than in Virginia. Dilution litigation was not well funded in the late 1970s until after the *Bolden*[65] decision in the Supreme Court, and resources were limited. Additionally, dilution litigation is fact-intensive and difficult to handle long-distance. There were no voting rights litigation offices located in Virginia.

The first two lawsuits against at-large city systems in Hopewell and Norfolk were filed by Frank Parker of the Lawyers' Committee for Civil Rights Under Law, in Washington, D.C. The Hopewell case initiated the challenges in the 1980s to Virginia's local governing boards. Meanwhile, the Atlanta ACLU office, headed by Laughlin McDonald, initiated action against Prince Edward County in May 1983. No group of cases was filed until the ACLU of Virginia began operating a voting rights project, with a staff lawyer working on these cases. The project recruited Gerald Zerkin and Steve Bricker, both Richmond civil rights lawyers, to handle voting rights cases. In addition to the eighteen cases handled by the ACLU since the extension of the Voting Rights Act in 1982, local NAACP units have handled two cases, and the Department of Justice has entered section 5 objections in Southampton and Greensville counties, and in Franklin and Fredericksburg. Of the lawsuits that have been resolved, all have resulted in the creation of majority-black districts except for the suit filed against Charlotte County by the local NAACP. The case was dismissed when the plaintiffs were unable to produce a remedy plan with a black district made up of a "minority" population of 65 percent or a black voting-age population of 60 percent.[66]

The absence of an active statewide black organization left most of the initiative for voting rights changes in Virginia to the ACLU and the Lawyers' Committee. In comparison, during the period following *Brown v. Board of Education*, the Virginia Conference of the NAACP put together an impressive team of thirteen lawyers headed by Oliver Hill, a respected Richmond attorney who had served one term on the Richmond city council. More school desegregation lawsuits were filed in Virginia than in any other southern state.[67] Later, the first voting rights staff lawyer, Richard Taylor, also a black, joined the Virginia ACLU, where he worked on a number of voting rights cases for two years. Taylor eventually joined the firm of Hill, Tucker, and Marsh, and along with Henry L. Marsh, Richmond's first black mayor, filed the section 2 case against Henrico County in 1988. But the litigation task in the 1980s largely passed to a new generation of mostly white civil rights attorneys.

An Analysis of Changes in City Election Structures

Our scheme for assessing the impact of city election structure on minority officeholding involves observing the changes in minority officeholding in those cities with a black population of at least 10 percent that changed from an at-large system between 1977 and 1989. The changes in minority officeholding are then

compared with those in a control group of seventeen at-large cities that did not change their election structure during the same period.

The total number of jurisdictions surveyed is relatively small because of the state's unique, statewide practice of city-county separation. Cities and counties are entirely separate from each other as governmental entities. This arrangement means that Virginia's ninety-five counties and forty-one independent cities are the primary political subdivisions in the state and helps explain Virginia's small number of local governments. Virginia ranks forty-second among the states in number of local governments, lower than any of the other southern states.[68] Unlike cities, the 188 towns in Virginia remain a part of the county in which they are located, and their citizens are subject to the exercise of power by county government.

Table 9.1 presents a cross-sectional view of the mean percentage of blacks elected to council in independent cities in 1989, by election plan and proportion of black population in the city. Unfortunately, the small number of cities in most black population categories makes generalizations quite tentative. The data in table 9.1 indicate, nonetheless, that in population categories where comparisons are possible, blacks in majority-white cities are significantly better represented in districted than in at-large jurisdictions—a pattern that has generally been found to be true throughout the South.

Changes in black representation over time are shown in table 9.2, which presents data from 1977, two years after Virginia was denied exemption from the Voting Rights Act, and from 1989.[69] Here again, in conformity with the conventional wisdom on the subject, the table shows that in majority-white cities switching from at-large to either single-member districts or mixed systems, blacks increased their percentage on council at a greater rate than in those cities remaining at large, although there were appreciable gains in some of the latter ones. This pattern is corroborated in table 9.5, where the data present black representation in terms of proportionality, as measured by the black percentage on council divided by the black percentage in the city's population. In the cities 10–29.9 percent black—the only category in which comparison is possible between each of the three types of election structure—the data show blacks sharply overrepresented (1.54) in single-member-district plans, slightly overrepresented (1.05) in mixed plans, and underrepresented by a factor of about two (0.56) in plans that remained at large over the twelve-year period. It is also noteworthy that in 1977, blacks in the majority-white cities that later abandoned at-large elections were less well represented than in those cities that remained at large. In the intervening years, the pattern was completely reversed.

All gains in black representation in the seven cities changing from at-large to single-member-district and mixed plans occurred as a result of the creation of black-majority districts where none had previously existed. Covington and Hopewell each elected one black council member for the first time. In both Franklin and Emporia black representation increased from one to three council members and in Fredericksburg it improved from two of eleven to two of seven members.

Table 9.3 examines cities with mixed plans in 1989. It demonstrates, as other

studies have done, that most of the black officeholders in such plans are elected from the district rather than the at-large component. This was true even in the majority-black city. In line with this finding, the data in table 9.6, which examines black electoral success within the districts of districted cities, show that black officeholding is closely linked to the racial makeup of the districts. In districts less than 30 percent black, no blacks were elected; and in districts less than 30 percent white, only blacks were elected. Looked at from a slightly different perspective in table 9.7, the data show that in the 26 majority-white districts, the mean proportion of black council members was 7 percent. In the 22 majority-black districts, by contrast, the figure was 91 percent. The data discussed here are consistent with the view that a significant degree of racially polarized voting exists in the cities under analysis.

Table 9.8 lists the nine independent cities that changed from at-large to single-member-district or mixed plans during the period studied. Eight of the nine converted as a result of litigation under the equal protection clause, Justice Department intervention under the Voting Rights Act, or both, and provide a striking example of the effectiveness of the freezing principle of section 5. Six of the nine cities switched to some form of district elections because they wished to change their city boundaries, five by annexation, and one by merger. These cities were compelled by a combination of litigation and Justice Department objection to adopt districts as a way of compensating black voters for the increase in white voters resulting from city boundary changes.

While blacks were still underrepresented, the four Tidewater city councils of Norfolk, Hampton, Newport News, and Portsmouth had two of seven members who were black in 1989. Black candidates in urban Tidewater, unlike their counterparts in rural southside Virginia, obviously benefited from relatively well organized voter mobilization efforts. In Portsmouth, a city with a 1980 black population of 41.1 percent, James A. Holley was directly elected as the city's first black mayor in 1984, with 52 percent of the vote. Moreover, as a result of the 1984 council elections in Portsmouth, blacks held four of the seven seats until the defeat of a black incumbent in 1986 and the recall of Mayor Holley in December.[70]

The fluid nature of black representation in Tidewater cities was poignantly demonstrated in the 1990 elections. Bolstered by citizen discontent over the Portsmouth city council's failure to appoint a black to the school board and united by broad support for a biracial ticket, blacks regained a four-to-three majority in a city where the black percentage of the population increased from 41.1 to 47 percent in the 1980s.[71] In Newport News (with a 34 percent black population), both of the black incumbents, one of whom had been continuously elected since 1970, were defeated, leaving the council with seven white members. The elections were the first held following an objection by the Department of Justice to the city's proposal to replace one at-large member of council with a mayor directly elected by the voters, which would have reduced the opportunity for effective bullet voting. In a 1987 public referendum, the voters had approved direct election of the mayor and nonpartisan city council elections. The Department of Justice's analysis revealed

"an apparent pattern of racially polarized voting in city elections."[72] Black candidates had narrowly won election to the third of three seats and the fourth of four seats in the at-large elections of 1984 and 1986, respectively. Moreover, on several occasions when only three seats were being contested, black candidates finished fourth in the at-large voting.

Two other Tidewater cities lost black representation in the 1990 elections. The lone black incumbent on a council of eleven members was defeated in Virginia Beach. In Suffolk, where a mixed plan was implemented in 1974 following an enlarged jurisdiction resulting from a merger of two cities, blacks lost their four-to-three majority on city council with the defeat of a black incumbent. Since 1986 blacks had been able to hold a majority in an electoral system with only two black-majority wards. A white-majority ward alternately selected a black candidate and a white candidate over a period of three terms and, in another district with a white majority, a black candidate won narrow plurality victories against two white opponents.

Direct election of black mayors in two Virginia cities is noteworthy, considering that cities and towns nationwide with majority-white populations have been highly reluctant to choose black mayors. Roanoke and Fredericksburg, with black populations in 1980 of 22 and 20 percent, respectively, elected black mayors over a prolonged period of time. Noel Taylor of Roanoke was first selected as mayor by the city council in 1975 to fill a vacancy and then got elected in his own right in 1976. That same year, Lawrence Davies, who had first been elected to an at-large seat on city council in 1966, was elected mayor of Fredericksburg. Both men are ministers and are now serving their fourth terms as mayor.

Conclusion

The number of local jurisdictions in Virginia switching to single-member districts or mixed plans due to the Voting Rights Act is small yet significant. With Norfolk's change in 1991, nine of the state's forty-one cities (constituting a little over one-third of those municipalities with 10 percent or greater black populations) abandoned at-large council elections. Nine counties created black-majority districts for the first time due to the act, and six towns changed from at-large to mixed electoral plans. Without these changes based on the Voting Rights Act, blacks would have undoubtedly been denied participation or accorded only token representation on governing bodies in many jurisdictions. Even then, only Texas, of the seven southern states covered entirely by the Voting Rights Act, had a smaller percentage of blacks among its elected officials at the end of the 1980s—and Texas had a black population proportion only about half as large as Virginia's.

After a century of suffrage restrictions following the Civil War were lifted, blacks in Virginia have begun to win office in significant numbers, thanks to Justice Department intervention under section 5, litigation under the Fourteenth Amendment and section 2, and the help of various organizations: the Lawyers'

Committee, the ACLU, and the NAACP, in particular. Among the most notable achievements of black candidates have been those of Douglas Wilder, first elected as state senator, then as lieutenant governor, and finally in 1989 as the first black governor of any state in the union. Nor should the elections of four-term black mayors in Roanoke and Fredericksburg be overlooked.

Yet while Virginia today projects an image of moderation in race relations, and the above-mentioned achievements give some evidence of this, the truth is more complicated. The virtual absence of blacks from the state's town councils indicates a continuing racial polarization at the grass-roots level—a polarization also reflected in the difficulty blacks have in winning in majority-white jurisdictions (see tables 9.3, 9.5, 9.6 and 9.7). The continuing underrepresentation of blacks in many at-large county and city governments drives this fact home, as does the resistance of at-large jurisdictions to adopting an election structure that gives blacks a better chance of representation. As we have shown, virtually all of the changes in these structures have come about through federal intervention.

And even within the bosom of the Democratic party, the party with which blacks in Virginia have largely cast their lot, the facts are not as happy as the state's moderate image suggests. It is true that some of the greatest political triumphs on the race front have come about within the party. Wilder's 1989 election illustrates the success of the biracial coalition within it. But black Democrats have not begun to reap the benefits that one could reasonably expect to issue from their vastly increased political participation, their loyalty to the party, and their support of the party's successful white nominees. Democratic white incumbents have been re-elected to the legislature in a number of instances where they found themselves in newly created, majority-black districts. And despite the Democratic party's control of the legislature, which directly elects the state's judges, the paucity of blacks in the Virginia judiciary is striking.

Our story of the Voting Rights Act in Virginia, then, is one of successes mixed with failures. There is no question that the act has dramatically reshaped the state's political landscape. But as elsewhere in the South, the work begun by the Second Reconstruction is far from done.

TABLE 9.1
Minority Representation on Council in 1989 by Election Plan, Virginia Independent Cities with 10 Percent or more Black Population in 1980

Type of Plan by % Black in City Population, 1980	N	*Mean % Black in City Population, 1980*	*Mean % Black on City Council, 1989*
SMD plan			
10–29.9	1	13	20
30–49.9	0	—	—
50–100	2	56	50
Mixed plan			
10–29.9	3	21	19
30–49.9	2	44	45
50–100	1	50	43
At-large plan			
10–29.9	11	18	10
30–49.9	6	35	29
50–100	0	—	—

TABLE 9.2
Changes in Black Representation on Council between 1977 and 1989, Virginia Independent Cities with 10 Percent or More Black Population in 1980

Type of Change by % Black in City Population, 1980	N[a]	*Mean % Black in City Population, 1980*	*Mean % Black on City Council*	
			Before Change (1977)	*After Change (1989)*
		Changed Systems		
From at-large to SMD plan				
10–29.9	1	13	0	20
30–49.9	0	—	—	—
50–100	1	51	11	56
From at-large to mixed plan				
10–29.9	2	20	5	21
30–49.9	1	40	10	38
50–100	1	55	20	50
		Unchanged Systems		
At-large plan				
10–29.9	11	18	8	10
30–49.9	6	35	15	29
50–100	0	—	—	—

[a]The number of cities in this table ($N = 23$) is smaller than that in table 9.1 because three of the cities in that table changed their election system prior to 1977.

TABLE 9.3
Black Representation in 1989 in Mixed Plans by District and At-Large Components, Virginia Independent Cities with 10 Percent or More Black Population in 1980

% Black in City Population, 1980	N	*Mean % Black Councilpersons in District Components, 1989*	*Mean % Black Councilpersons in At-Large Components, 1989*
10–29.9	3	23	13
30–49.9	2	58	0
50–100	1	50	0

TABLE 9.4
Two Equity Measures Comparing Percentage Black on Council in 1989 with Percentage Black in City Population in 1980, Virginia Independent Cities with 10 Percent or More Black Population in 1980

Type of Plan by % Black in City Population, 1980	N[a]	*Difference Measure (% on Council − % in Population)*	*Ratio Measure (% on Council ÷ % in Population)*
		Changed Systems	
From at-large to SMD plan			
10–29.9	1	7	1.54
30–49.9	0	—	—
50–100	1	5	1.10
From at-large to mixed plan			
10–29.9	2	1	1.05
30–49.9	1	−2	0.95
50–100	1	−5	0.91
		Unchanged Systems	
At-large plan			
10–29.9	11	−8	0.56
30–49.9	6	−6	0.83
50–100	0	—	—

[a]The number of cities in this table ($N = 23$) is smaller than that in table 9.1 because three of the cities in that table changed their election system prior to 1977.

TABLE 9.5
Changes in Black Representation on Council between 1977 and 1989, Virginia Independent Cities with 10 Percent or More Black Population in 1980 (Ratio Equity Measure)

Type of Change by % Black in City Population, 1980	N[a]	*Black Representational Equity on Council*	
		1977	*1989*
		Changed Systems	
From at-large to SMD plan			
10–29.9	1	0.00	1.54
30–49.9	0	—	—
50–100	1	0.22	1.10
From at-large to mixed plan			
10–29.9	2	0.25	1.05
30–49.9	1	0.25	0.95
50–100	1	0.36	0.91
		Unchanged Systems	
At-large plan			
10–29.9	11	0.44	0.56
30–49.9	6	0.43	0.83
50–100	0	—	—

[a]The number of cities in this table ($N = 23$) is smaller than that in table 9.1 because three of the cities in that table changed their election system prior to 1977.

TABLE 9.6
Black Representation in Council Single-Member Districts in 1989, Virginia Independent Cities with 10 Percent or More Black Population in 1980

% Black Population of District	N	*Mean % Black Population in Districts, 1980*	*Mean % Black Councilpersons in Districts, 1989*
0–29.9	21	10	0
30–49.9	5	32	40
50–59.9	4	55	75
60–64.9	0	—	—
65–69.9	4	67	75
70–100	14	86	100

TABLE 9.7
Black Council Representation in Single-Member Districts in 1989, by Racial Composition of District, Virginia Independent Cities with 10 Percent or More Black Population in 1980

Racial Composition of District	N	*Mean % Black Population in Districts, 1980*	*Mean % Black Councilpersons in Districts, 1989*
Black majority	22	77	91
White majority	26	14	7

TABLE 9.8
Cause of Change from At-Large to District Plan between 1973 and 1989, Virginia Independent Cities of 10,000 or More Population with 10 Percent or More Black Population in 1980

City	*Year of Change*	*Did Lawsuit Accompany Change?*	*Reason for Change*
		Changed to Single-Member Districts	
Covington	1989	Yes	Suit by blacks challenging at-large elections; settled by consent decree
Petersburg	1973	Yes	Annexation diluted black vote; Department of Justice objection; city sought and lost declaratory judgment
Richmond	1977	Yes	Annexation diluted black vote; Department of Justice objection; black plaintiff brought suit; city sought and received declaratory judgment when it adopted ward system
		Changed to Mixed Plan	
Emporia	1988	Yes	Suit by blacks challenging at-large elections
Franklin	1987	No	Annexation diluted black vote; Department of Justice objection
Fredericksburg	1988	No	Local referendum approved modified ward plan; Department of Justice objection to the plan
Hopewell	1983	Yes	Suit by blacks challenging at-large elections
Lynchburg	1976	Yes	Annexation diluted black vote; Department of Justice objection; suit by predominantly white citizens' committee opposing annexation was joined by predominantly black organization favoring annexation if ward system adopted
Suffolk	1974	No	Merger of cities of Nansemond and Suffolk diluted black vote; mixed plan precleared by Department of Justice
SUMMARY[a]		Yes 6 (67%) No 3 (33%)	

[a]Eight of nine cities changed as a result of section 5 intervention, voting rights litigation, or both.

Major Disfranchising Devices in Virginia

Device	*Date Established*	*Date Abolished*
Poll tax	1876 1905	1882[a] 1964, 1966[b]
Publicly printed ballot without party names or symbols	1894	Still in effect[c]
Understanding clause	1902	1904[d]
Requirement to apply to registrar "in his own handwriting" stating name, age, date and place of birth, residence, occupation, etc.; to answer all questions submitted by registrars affecting the individual's qualifications as a voter	1904	1965[e]
White primary	1912	1930[f]

[a]Repealed by legislature in response to Readjuster movement allied with the predominantly black Republicans.

[b]Twenty-fourth Amendment (1964) for federal elections; *Harper v. Virginia State Board of Elections* (1966) for state and local elections.

[c]Party names listed today on presidential ballot only.

[d]Understanding clause was a temporary act intended to be window dressing to get other provisions approved in a constitution referendum. See Kousser 1974, 59–60.

[e]Proscribed by the Voting Rights Act.

[f]Struck down by a federal court three years after the Supreme Court first held the Texas white primary unconstitutional.

TABLE 9.10
Black and White Registered Voters and Officeholders in Virginia, Selected Years[a]

	Black		*White*	
Year	N	%	N	%
Registered voters				
1964	144,259	12	1,070,168	88
1966	243,000	18	1,140,000	82
1990	478,000	17	2,331,000	83
Officeholders				
State house				
1964	0	0	100	100
1966	0	0	100	100
1990	7	7	93	93
State senate				
1964	0	0	40	100
1966	0	0	40	100
1990	3	7.5	37	92.5

[a]Mean black Virginia population, 1960–90 = 19.2%.

PART TWO

The Southwide Perspective

TEN

The Effect of Municipal Election Structure on Black Representation in Eight Southern States

BERNARD GROFMAN AND CHANDLER DAVIDSON

THE PRECEDING CHAPTERS on the eight southern states covered by section 5 of the Voting Rights Act demonstrate how long and difficult has been the struggle for blacks, and Mexican Americans in Texas, to achieve full voting rights, and how various have been the devices and practices hindering their ability to elect their candidates of choice. In this chapter we provide a synoptic overview of the findings from these states about the effects of election type on black representation.

The chapter consists of four sections. In the first, we discuss the nature of the data from the state chapters and the features of the longitudinal design they share. In the second, we summarize evidence from the states on the relation between changes in local election systems and gains in black representation. In the third, we compare our findings with those of other scholars and explain the advantages of our research design over the cross-sectional design customarily employed to examine the impact of election structures. Finally, we consider the implications of our findings.

DATA BASE AND RESEARCH DESIGN

The proposal in 1988 to the National Science Foundation that originated the projects reported in this volume had as one of its central aims the generation of a data set that could be used to resolve a continuing controversy about the causes of the gains in black officeholding in the South over the past two decades. The conventional view holds that at-large and multimember election systems are barriers to the election of blacks and that a central cause of gains in black representation at the state and local level in the South has been the change from at-large or multimember plans to single-member-district ones. As the state chapters have shown, black political leaders and interest groups have challenged at-large elections throughout the South in both the nineteenth and twentieth centuries,[1] acting on the premise that in local jurisdictions with substantial black voting strength where previous black success was minimal or nonexistent, the replacement of at-large elections by single-member districts that fairly reflected black population concentrations would increase black representation. Recently, however, some

authors have disputed the claim that changes to single-member districts are necessary to increase black officeholding.[2]

In order to measure appropriately the impact of electoral systems on minority representation at the local level for the eight southern states that have been the chief focus of litigation under the Fourteenth Amendment and the Voting Rights Act and to address issues of causal inference that cannot be resolved with cross-sectional analysis—the approach typically used to investigate the impact of election type on minority representation—the authors of the state chapters contributed to the development of a large data base for southern cities. Data collection was linked to a longitudinal research design that required a detailed inventory of the changes that occurred in municipal election structures in these states over the course of recent decades.[3]

Research Design

Generally speaking, each of the state chapters as well as this one use information gathered for the early 1970s and the late 1980s to measure changes in minority representation on city council in two types of cities: those which changed from at-large to either single-member-district or mixed plans and those at-large cities which did not change.[4] The data base for each state identifies the number of black local officials at each of two times for each city in the state above a certain population size and minority percentage.[5] It also identifies the election system in use at each time: at-large, single-member district, or mixed.[6]

Special features of the research design are noteworthy. First, because the data collected are from two different periods, they allow before-and-after comparisons of minority representation in cities that replaced at-large elections with either district or mixed systems. Because each before-and-after comparison pertains to the same city, this approach "holds constant," roughly speaking, those factors which might vary if the comparison were between sets of cities grouped according to their present-day election system.[7]

Second, the design includes a control group of cities that did not change election type. This allows a direct comparison over time between results in the changed cities and those in the control cities, an improvement on certain earlier before-and-after studies of minority representation.[8] The unchanged cities control for other effects besides election structures that might have impinged on all cities over time, such as general changes in political culture resulting from, say, white voters' increased willingness to vote for black candidates.

Third, the chapter authors have generated several data sets that together provide important information about minority representation, changes in election system, and voting rights litigation. In particular, there is information about temporal changes in minority representation in cities that shifted wholly or in part from at-large elections to districts. Too, there are cross-sectional data from all cities both at the starting point and the end point of our studies, allowing comparisons at two different times. There is also information that allows us to compare the representation of blacks in the at-large and district components of mixed plans. Moreover, one type of data enables us to combine information on individual single-member districts in districted cities (both pure single-member district and mixed cities) to determine the extent of black officeholding at each level of black population in these districts and, in particular, the degree to which black officeholding in districts depends upon their having a black population majority.

Characteristics of the Data Set

Table 10.1 presents basic characteristics of the principal data set used in all the state chapters.[9] The data were collected for two points separated on average by about fifteen years. The earlier time was 1974 in a plurality of states, but for Alabama it was 1970; for North Carolina, 1973; for Virginia, 1977; and for Georgia, 1980. The later time was 1989 for all states except Georgia, for which it was 1990.

Another measurement variation in the state chapters is the minority population proportion. In all but two of the states, only cities with a black population of 10 percent or more were examined.[10] Exceptions are Texas, where a combined black and Hispanic population of 10 percent is the threshold for most of the tables in that chapter,[11] and North Carolina, where a combined black and American Indian population threshold of 10 percent is used.[12]

A third variation in the state chapters is city size. Data were collected in each state, using 1980 census figures for cities over a certain size. The population threshold is 1,000 in Mississippi; 2,500 in Louisiana; 6,000 in Alabama; and 10,000 in Georgia, Texas, and South Carolina. In North Carolina all incorporated cities are examined, including cities with population of fewer than 500.[13] The Virginia chapter reports on all cities that are "independent." As a result, cities with as few as 4,840 inhabitants are included for that state.

By focusing on the southern states with the greatest black population proportion and by developing data on a large set of cities, we have enough cases to ascertain patterns of black officeholding in each state and thus to detect variations and similarities among the states. Because most of the state projects gathered data on cities within a broad population range, this is one of the largest data bases (over 1,000 cities) ever used to examine the impact of election structure on minority representation, despite the fact that it is drawn from only eight states.

The Effect of Election Type on Black Representation in Cities in Eight Southern States

The primary purpose of our analysis is to determine the effects of election structure on black officeholding. However, if we were to use election structure as the sole independent variable, we would risk ignoring important nonelectoral differences and reaching erroneous conclusions. Our research design was developed to allow

us to isolate certain other factors that are thought to have an independent influence on black officeholding. Because our analysis focuses solely on the eight southern states now covered entirely or in large part by section 5, possible differences between the South and the rest of the country are effectively controlled. Because we have data for individual states, the differential influence of statewide cultural norms or political practices can also be controlled. And because we categorize cities by their black population percentage, the independent impact of that variable is also controlled.[14]

City size is another variable alleged to have an independent influence on minority officeholding in the South. Our data, indeed, suggest that at-large elections have a more constraining influence on black officeholding in small towns than anywhere else. Because the state chapters differ in the population threshold used to select cities for inclusion in their data base, the inclusion of very small cities in some states but not in others could bias our conclusions. Later in this chapter, therefore, we will report certain key data only for cities that are 10,000 or larger in total population.

Tables 10.2A–C reports data separately for each state on the black percentage among elected city council members at the beginning and end of the period under investigation. The last row reports a mean value for the eight states, which is the simple unweighted average of the individual state values.[15] To control for the effects of black population size, we use the same three black population categories in tables 10.2A–C that are used in the state chapters.[16] The figures shown are only for those cities for which we had complete longitudinal data that elected all council members at large at the starting point of our study. Thus tables 10.2A–C presents results in those at-large cities which changed election system and those which did not. The data reported in tables 10.2A–C allow inferences to be made about what happened when at-large elections in southern cities were replaced by district or mixed systems.

There are six basic components in this set of tables. These components are linked together in pairs ("before" and "after"): the initial percentage of black elected officials in cities that changed from an at-large to a district plan and the subsequent percentage in those cities; the initial percentage of black officials in cities that changed from an at-large to a mixed system and the subsequent percentage in those cities; and the initial percentage of black officials in the unchanged cities and the subsequent percentage in those cities. These six values are reported in the first six data columns of tables 10.2A–C. The columns also show the number of cases in each cell. Examination of each of the before-and-after comparisons tells how much black officeholder percentages changed in each of the three types of cities.

The data from Louisiana provide a convenient illustration of how to read the three parts of the table. In that state's cities that were 10–29.9 percent black, table 10.2A shows that in the period from 1974 to 1989 there were dramatic gains in black representation. Among the cities in that population category that changed

election system, the black percentage on council rose from 0 to 27 percent in cities that shifted from an at-large to a district plan and from 3 to 19 percent in the those that shifted from an at-large to a mixed plan.[17] While jumps of 27 percentage points (27 − 0) for the single-member-district cities or 16 percentage points for the mixed cities may not look all that large, they are in fact very large relative to black population proportions, since the mean black population in the cities that were between 10 and 29.9 percent black was only 25.4 percent among the Louisiana cities that shifted to single-member districts and only 23.5 percent among the cities that shifted to a mixed plan. Thus the *growth* in black representation *relative to black population* in the Louisiana cities that shifted to single-member districts was 105 percent (26.7/25.4), and it was 69 percent (16.2/23.5) in the cities that shifted to mixed plans—a dramatic increase.[18]

However, not all of the growth in black representation can be attributed to change in election type. Even in the Louisiana cities that retained at-large systems, black representation increased from 0 to 10 percent. Therefore, because the gain in black representation in cities shifting to districts was 27 percentage points as compared to a gain of only 10 points in cities that retained their at-large plan, the shift to single-member districts can be thought of as having yielded a *net increase* in black representation of 27 − 10 = 17 points. In like manner, table 10.2B shows that the shift to districts yielded a net increase of 17 points in Louisiana cities that were 30–49.9 percent black, and table 10.2C shows a net gain of 24 points as a result of changing to districts even for the state's majority-black cities.

The information in table 10.2 can thus be used to gauge the independent effect of adopting a new type of election system. By looking at the difference between the growth in black representation in the jurisdictions shifting from an at-large to a single-member or mixed system and the growth in the jurisdictions that remained at-large throughout the entire period of roughly fifteen years, one can determine whether or not the gains in minority representation were greater in the cities that changed election systems than in those which remained at large. The value of this "difference resulting from change" variable is reported in the last two columns of tables 10.2A–C for single-member-district and mixed systems. In effect, by subtracting values for the unchanged cities from those for the cities that changed election type,[19] we are using change in black officeholding in the units that did not change election type as a base-line control for *maturation effects*—changes in the dependent variable that are unrelated to the impact of the changes whose consequences we are investigating, such as increased willingness among white voters to support black candidates.[20]

The tables show that in a substantial number of states, the level of black representation in majority-white cities that continuously elected at large did not change much over the previous two decades. In Georgia, North Carolina, South Carolina, Texas, and Virginia, the growth in black representation in cities that were 10–29.9 percent black ranged between 1 and 3 percentage points; while in North Carolina and South Carolina cities that were 30–49.9 percent black, the growth was only 4

and 7 points, respectively. Indeed, in the one Georgia at-large city in this population category, there was actually a decline in black representation during the period under investigation.[21]

Majority-White Cities that Changed from At-Large to Single-Member-District Systems

If the conventional view of at-large elections is true, majority-white cities changing to a pure district system are the ones where we would expect to observe the largest increases in black officeholding. That is exactly what we find in tables 10.2A–C. On average, across the eight states, black gains in majority-white cities were considerably larger in those adopting single-member districts than in those that remained at large.[22] For cities that were 10–29.9 percent black, the average gain in those shifting to districts was 23 points, and for cities that were 30–49.9 percent black, 34 points. In contrast, for cities that were 10–29.9 percent black that remained at large, the gain was only 6 percentage points, and for cities that were 30–49.9 percent black, 14 percentage points. The average net gain for cities that changed to districts relative to those that remained at-large was 16 and 19 points for those that were 10–29.9 and 30–49.9 percent black, respectively.[23] Relative to the black population levels in those cities, the gains attributable *directly* to change in election type were quite large.

The same general pattern is found in virtually all eight individual states, in eleven of the thirteen instances for which data are available to make comparisons.[24] Moreover, one of the two deviant cases is based on a single observation. On the face of it, the Texas case would seem to indicate that a 50 percent black council in 1989 was elected in a majority-white city. But although we present the case in this table for consistency of our treatment of the data, it is misleading, inasmuch as the city's population actually changed from majority white to majority black between 1980 and 1990, a change not reflected in the table because we used 1980 as a measure of both our 1970 and 1990 black population proportions.[25] Furthermore, treating this now majority-black city in table 10.2 as a majority-white city visibly increases the eight-state average we report for the at-large cities in the 30–49.9 percent category, inasmuch as the results in this single city are the results reported for the state of Texas a whole. Had we simply excluded that city, the average gains in at-large cities that were 30–49.9 percent black would have been only 9 percentage points rather than 14, and the net advantage of single-member districts over at-large plans would have increased from 19 to 25 points.

The other case with unexpected results involves three Alabama cities that were 10–29.9 percent black and remained at large, whose gains were equal to those in cities which adopted districts. However, we believe this anomaly can also be accounted for. The discrepancy between observed and predicted results is based on the only majority-white cities in Alabama that retained at-large elections in 1989. There were forty-two cities that elected at large in 1970, compared to only three in

1989. To anticipate our discussion of selection bias, the evidence suggests that the three Alabama cities retaining at-large elections as late as 1989 were atypical of the broader set of forty-two cities in the degree to which black candidates were elected.

Majority-White Cities that Changed from At-Large to Mixed Systems

The general expectation is that majority-white cities changing from an at-large to a mixed plan will also witness an increase in black officeholding, although not as great as in cities changing to a pure district plan, given the continued presence of some at-large seats. This is precisely what the data in tables 10.2A–C show, on average, across the eight states. For cities that were 10–29.9 percent black, the average gain among those shifting to a mixed plan was 13 points, and in cities that were 30–49.9 percent black, 25 points, for a gain over equivalent unchanged cities of 6 and 10 points, respectively. This compares to the corresponding net gains in the cities that shifted to single-member districts of 16 and 19 points, respectively.

The same pattern is found in virtually every state, in eleven of the fourteen instances for which data are available to make such comparisons. Moreover, as in the comparison between at-large systems and those changing to districts, the Texas exception results from mischaracterizing a city as majority white in 1989 because we use 1980 rather than 1990 population data; the Alabama exception is based on the only three majority-white cities in our data set that were still electing at large in 1989.

Majority-Black Cities

In majority-black jurisdictions, if blacks voted as a bloc, common sense might suggest that they should be able to elect their preferred candidates and perhaps even exclude whites from office if they wished, just as majority-white populations often have done to black candidates when elections are conducted at large. On the other hand, majority-black cities are disproportionately in the rural black belt, where black registration has historically been low and where whites have been particularly resistant to black strivings for equality.[26] Thus another version of common sense might predict, alternatively, that black representation would be low in majority-black areas electing at large—initially, at least.

In actuality, the mean growth in black representation in the majority-black cities adopting disticts was 53 percentage points in the five states for which there were such cities, while in the majority-black cities that changed to a mixed plan in the six states containing such cities, the gain was 32 points These changes compare to a gain of 22 points in cities remaining at-large in the four states where there were such unchanged cities. In short, even for majority-black cities, the change to single-member districts yielded a considerable net advantage in minority representation; further, a change to a mixed plan also produced greater gains in black representation than was true for cities that remained at large.[27]

Summary of Findings in Tables 10.2A–C

On average,[28] the greatest effect of a change from an at-large plan to single-member districts occurred in majority-black cities (53 percentage points); the next greatest effect occurred in cities that were 30–49.9 percent black (34 points); and the lowest but still substantial effect occurred in cities that were 10–29.9 percent black (23 percentage points).[29] In terms of the net difference measure, the equivalent net gains were 33, 19, and 16 percentage points, respectively.

Results of changes to mixed systems, measured in terms of net gain, paralleled those of changes to pure district systems in that the greatest net effect of change to a mixed plan occurred in majority-black cities, followed by that in cities that were 30–49.9 percent black, and then by that in cities that were 10–29.9 percent black; but the net change values were not nearly as great: 15, 10, and 6 points, respectively, compared to 33, 19, and 16 points, respectively, for cities that changed to single-member districts.

In sum, the overall patterns in the three tables reveal the effects of change to single-member districts on black representation levels to be quite substantial, relative to black population percentage, even after we imposed a control for possible maturation effects by subtracting the growth in black representation that takes place in unchanged at-large cities. There were smaller but still significant gains in black representation achieved in the cities that shifted to mixed plans. The fact that the greatest net gains occurred in majority-black cities was unexpected, but the pattern of an increasing net impact of change in election systems as black population proportion increases is consistent with the view that whites' concern about black electoral impact becomes greater as the possibility grows that blacks can actually elect their preferred candidates in significant proportions and is greatest where blacks might actually be able to control the system.[30] It is also important to recognize that majority-black cities in the 1970s were likely to have been ones in which white bloc voting was especially high and black registration low. Moreover, many of the majority-black cities in our data base were unlikely to have been majority black in either registration or turnout in the early 1970s. Also, as noted earlier, some of the majority-black jurisdictions in our data set were only slightly more than 50 percent black and may not even have had black voting-age majorities.[31]

The Effect of Election Type on Representational Equity

An alternate use of the data in tables 10.2A–C is to transform the percentages of black elected officials into a ratio measure of black representational equity. Tables 10.3A–B, analogous to table 5 in each of the state chapters, presents a snapshot of the situation in the cities at the beginning (10.3A) and end (10.3B) of the period.[32]

The values of the black ratio equity measure (referred to from now on as *equity scores*) indicate the percentage of black officials on city council as a proportion of the percentage of blacks in the city.[33] A value of 1.00 indicates that black representation is perfectly proportional to black population, while smaller values indicate less, and larger values greater, than proportional representation.[34] The virtue of the ratio measure is that it controls for black population percentage across cities. Our use of this measure, however, is strictly a mathematical convenience.[35] It is not intended to imply that the legal standard for an ethnic minority group's right to participate equally in the political system is or should be proportional representation by officeholders of that ethnic group.

Table 10.3A demonstrates two very important facts. First, on average, majority-white single-member-district cities provided very close to proportional representation for blacks as the 1980s came to a close: cities that were 10–29.9 percent black had a mean equity score of 1.14, and cities that were 30–49.9 percent black had a score of 0.92. Second, black representation in majority-white at-large cities was very much lower: 0.53 and 0.56, respectively.

If we look at the data on a state-by-state basis, there are no exceptions to the first generalization. As for the second one, if we exclude as misleading the at-large Texas city 30–49.9 percent black that was majority black in 1990 but is classified as majority white, the only real exceptions are the three Alabama at-large cities already referred to, although Virginia at-large cities that were 30–49.9 percent black also had unusually high equity scores (0.83), as did Texas at-large cities that were 10–29.9 percent black (0.75).[36]

In majority-white cities, table 10.3A shows that, on average, black representation in mixed plans was intermediate between that in district and at-large plans but closer to the equity scores in the district ones. Cities 10–29.9 percent black had a mean equity score of 0.85, as did those 30–49.9 percent black. The generalization that equity of black representation in mixed plans was intermediate between that in district and at-large plans holds for most of the states where comparisons are possible.[37]

In majority-black cities in all states that had them, districted systems provided very close to proportional representation for blacks; the mean equity score was 0.92. We have data for only four states showing what happens in majority-black jurisdictions that elected at large. (South Carolina and Texas had no majority-black cities in the data set; in Georgia and Virginia, none of the handful of majority-black cities elected at large.) In Alabama, majority-black cities electing at large had high levels of black representation (a mean equity score of 1.09). In two other states black representation was moderate in majority-black at-large cities: Louisiana had a score of 0.80 and Mississippi, 0.70. However, North Carolina was a dramatic exception to this pattern of high or moderate black representation in majority-black jurisdictions electing at large, with an equity score of only 0.14. Black representation in majority-black jurisdictions was actually lower for mixed cities than for at-large cities in three of the four states for which direct comparisons are possible (with North Carolina the exception), but differences were not large.

Table 10.3B demonstrates that in the early period, usually the early 1970s, at-large cities—either those which subsequently changed election system or the ones

that did not—were providing nothing close to proportional representation for blacks. Indeed, the equity scores of majority-white at-large cities at this time were minuscule Only in five categories of cities out of forty-four were mean equity scores above 0.40, and in twenty-one categories the score was 0.00. Data for the 1970s are not shown for Georgia, which has a starting point of 1980. However, even as late as 1980, black representation in the majority-white at-large cities in that state was far from proportional, although it was greater than that reflected in the 1970s data for most of the other states in table 10.3B.[38]

Black Representation at the District Level

If, as tables 10.2 and 10.3 indicate, at-large elections depressed the share of offices held by blacks, the reason seems clear. In many cities employing this method, whites voted largely as a bloc for white candidates, and, constituting the majority of the electorate, they were able to prevent the election of blacks. Thus our findings indirectly lend weight to the view that many whites in southern cities have not been receptive to black candidacies. As this is contrary to the recent views of a number of media commentators and a few scholars, it is useful to pursue the matter of white voting preferences further. Thanks to other information our state chapter authors collected, we are able to do this.

The additional information is contained in two data sets. Unlike the information on which tables 10.2A–C and 10.3A–B are based, where cities are the units of analysis, these data sets include information at the level of individual districts. One set, for cities with mixed plans, allows us to compare the percentage of black officials in 1989 (or in 1990 where Georgia is concerned) who were elected from both district and at-large seats in the same city. Another data set for cities with mixed and pure district plans allows us to compare the percentage of black officials in districts of varying racial composition. If white voting patterns were changing significantly in the 1980s, the evidence should indicate, first, that in mixed cities blacks would be elected from both districted and at-large components in similar proportions and, second (when black population proportion is controlled), that in single-member-district cities, numerous blacks would be elected from majority-white as well as from majority-black districts. Neither of these expectations is fulfilled.

Table 10.4 shows the mean equity score in the at-large and districted components of mixed plans.[39] In a majority-white city the constituency for the at-large seats will be majority white too, while some individual districts will probably have black majorities. The obverse is true for at-large majority-black cities. Therefore, by comparing the results of district and at-large elections in mixed cities, we can determine whether blacks fare better in majority-white constituencies (the at-large component of majority-white cities) than in constituencies of which some are majority black. Inasmuch as the comparison is between results from two types of election *in the same city*, many of the variables that might affect black representation independently of election type are controlled in a way they would not be in a cross-sectional comparison of results *between cities*.

The findings are clear. In majority-white cities, blacks were very rarely elected at large, but in the district components, they were elected in proportions roughly comparable to their population percentage in the cities. Indeed, in Alabama, Mississippi, and South Carolina, *all* black representation in the *majority-white mixed cities* came from the district components.[40] In point of fact, even in the majority-black cities with a mixed election system, blacks were more nearly represented proportionally in the district than in the at-large component. In Alabama, North Carolina, and Virginia, the at-large components in the *majority-black mixed* cities elected *no* blacks at all.[41]

Further evidence bearing on the inability of blacks in majority-white venues to win city council offices in the eight states is found in table 10.5. Containing data from pure district and mixed plans, this table shows the percentage of black officials elected in districts of varying racial composition.

In districts less than 30 percent black, the likelihood of blacks being elected was virtually nil. Indeed, even in districts 30–39.9 percent black, the percentage of black elected officials was zero in four of the seven states for which we have data, although it was not far from proportional in two of the remaining three states. The pattern in districts 40–49.9 percent black was more varied: in two of the four states for which we have data, no blacks were elected from such districts, but in the remaining two states, black representation was close to proportional.[42]

There was also a varied pattern in districts 50–59.9 percent black, but much less so, and a threshold was apparently reached in five of the seven states for which data are available. In these states black representation was greater than black population proportion, and in a sixth state, Louisiana, districts 50–59.9 percent black provided very close to black proportional representation.[43] On average across the states, 74 percent of the districts elected a black representative. In fact, in states such as North Carolina, Texas, and Virginia, a 50–59.9 percent black district population was sufficient to guarantee election of a black. In districts more than 60 percent black, black representation was either 100 percent or close to it in all southern states except Mississippi, where the likelihood of black representation remained below one-half until districts were over 65 percent black.[44]

Summarizing the Findings in Tables 10.4 and 10.5

The patterns in tables 10.4 and 10.5 are even starker than those in tables 10.2 and 10.3 and point to the persistence of racially polarized voting not only in at-large cities but in the at-large component of mixed cities and at the level of individual districts in cities that were districted.[45] However, the level of black disadvantage varied. In pure at-large elections in majority-white cities, the degree of black success, although far below that in the pure district cities, still was considerably greater than that in the at-large components of mixed systems in majority-white cities, or than that in individual districts that were majority white. Indeed, table 10.5 shows black officeholding in single-member districts 10–29.9 percent black to be at or near zero and to be dramatically low even in the single-member districts 30–49.9 percent black.[46]

Comparisons between Southern Regions

Considering the scholarly attention traditionally given to differences in race relations between the Deep South and the Outer South, we compared these two regions in our eight-state sample, treating Alabama, Georgia, Louisiana, Mississippi, and South Carolina as Deep South states and North Carolina, Texas, and Virginia as belonging to the Outer South. Surprisingly, differences between Deep South and Outer South states in the effects of at-large elections on black representation were not that large, and in many ways North Carolina, despite its reputation for liberalism, had one of the poorest records of black representation of any state, especially in at-large settings.[47] However, especially with respect to table 10.5, it is Mississippi, as might be expected, that appears to have white behavior least likely to be conducive to black electoral success.

Comparing Results of Changed Election Plans on Black Representation in Cities and Counties

The findings on minority representation at the county level in the three states for which county data were collected closely mirror those for cities. On the one hand, relatively high levels of minority representation were observed in the majority-white counties that used single-member districts or mixed plans. On the other hand, at-large majority-white counties scored quite low on black representational equity.

Comparing cities and counties with the same levels of black population, we find a consistent pattern of differences between the two levels of governments in only one of the three states. Equity scores were consistently lower in Georgia counties than in Georgia cities for all types of election systems and levels of black population.[48] In North Carolina and South Carolina, however, for given levels of black population and election type, there was higher representational equity sometimes at the city level and sometimes at the county level.[49]

Comparing Results from Cross-Sectional and Longitudinal Data

The findings so far summarized in this chapter might appear to be old news. As we noted in the Editors' Introduction, numerous studies published in the 1970s and 1980s comparing black candidates' success in different election systems led to a scholarly consensus that single-member districts were in general far more advantageous to blacks than were multimember ones. Yet this consensus has been challenged by recent data suggesting that racial polarization is declining and that at-large elections are no longer as pernicious as they once were, even in the South. For example, Thernstrom, in a 1987 book sharply critical of the use, generally, of the Voting Rights Act to compel the creation of majority-minority districts, has argued that racial polarization was a much less serious problem than many minority leaders and voting rights attorneys and experts believed it to be.[50]

The most important study on the effects of election structure on black representation using data more recent than that from the 1970s or very early 1980s is by Welch, a leading specialist in minority representation.[51] Her well-designed and methodologically sophisticated cross-sectional study analyzed all U.S. cities with a 1984 population of at least 50,000 and containing a black or Hispanic population in 1980 of at least 5 percent but less than 50 percent. There were 218 cities with the requisite black population that she analyzed and 155 with the requisite Hispanic population, although many of the same cities composed her two ethnic subsamples.[52] Because her data were gathered in 1988, at least seven years after the previous major study, she could rightly claim to shed light on minority representation near the end of the 1980s and on changes from earlier patterns.[53] Her 1990 study is also important because her previous work had done much to buttress the conclusion that at-large elections sharply reduced minority representation.

Welch's most striking finding was that by 1988, black representational equity in at-large elections in majority-white cities of at least 50,000 population had increased significantly, while it remained high in majority-white cities with district and mixed plans. After controlling for the effects of black population percentage, she reported a significant closing of the gap in black officeholding between at-large and districted majority-white cities above this population threshold. In particular, Welch found that by 1988, black representation in southern majority-white at-large cities of 50,000 or more with a black population of at least 10 percent[54] had grown to the point where the ratio equity score in such cities was 0.83.[55] In contrast, studies of the 1970s had found scores in comparable cities nationwide to range roughly between 0.50 and 0.60.[56] Welch found that at-large cities had progressed in the South by another measure as well: the proportion of cities of at least 50,000 with a black population of at least 10 percent in which no blacks sat on council had dropped to 9 percent as compared to the 44 percent at the national level reported in an earlier study she had coauthored.[57] Moreover, contrary to findings for earlier decades, black representational equity in at-large plans in majority-white southern cities was actually greater than that in comparable cities in the North.[58]

Relying on evidence such as that reported in Welch's 1990 study, and also placing reliance on the results of certain highly visible political contests, particularly the election of Douglas Wilder as governor of Virginia, some observers profess to see a dramatic change in the past decade or so in white willingness to vote for black candidates in majority-white southern venues. A few observers have suggested that some or even most lawsuits in recent years seeking to effect a change from at-large to district elections were unnecessary and perhaps even injurious to the best interests of blacks.[59] This claim, we believe, is erroneous.[60]

It is important not to overstate the extent of differences between Welch's findings and earlier ones—something she herself is careful not to do. As she points out, while black representational equity had risen to 0.83 in the southern majority-white at-large cities of at least 50,000 population with a 10 percent or greater black population, the equity score for comparable districted cities in the South was still higher: 0.95. Also, when Welch compared at-large and district components of mixed systems in 1988, she, like us, found few black officeholders elected from

the at-large components. For the southern majority-white mixed cities above 10 percent black, the black equity score she found was 1.05 in the districted component but only 0.24 in the at-large one.[61] Moreover, she found that representational equity in the at-large component of mixed plans in majority-white cities had actually *declined* at the national level since the 1970s. These findings alone undercut an unqualified claim that at-large elections no longer significantly disadvantage black voters, and they raise serious questions about claims of a sharp decline in racially polarized patterns of voting in the South.[62]

However, there are important differences between Welch's findings and ours that need to be discussed and explained. In particular, in majority-white southern cities for 1989–90, our cross-sectional data in table 10.3A show a far greater gap in black officeholding between at-large and district plans than Welch's study revealed for majority-white southern cities in 1988. We find a mean equity score for at-large cities that were 10–29.9 percent black of only 0.53, and we find an equity score of only 0.56 for cities that were 30–49.9 percent black—both far lower success rates than the 0.83 figure Welch reports for the combined set of southern majority-white cities that were at least 10 percent black.[63] And while it is true that in the eight states studied in this volume—with only one exception[64]—cities retaining at-large systems also showed gains in the proportion of black elected officials, these gains were far smaller than those in the cities which abolished at-large elections.

How can we explain the apparent contradiction between the Welch study and the data presented here? There are two reasons for the differences. One critical reason is that her 1988 data are restricted to cities of 50,000 or larger. When smaller cities and towns are examined, a very different picture emerges of the impact of at-large elections on black officeholding in recent years.[65] A second reason is that we employ a research procedure that, unlike hers, allows for a test of the hypothesis that at-large cities today are not representative of at-large cities of twenty years ago because of selection bias. For selection bias renders highly suspect claims about what the level of black officeholding would have been if the cities adopting mixed or district plans had remained at large—claims based on the assumption that the cities that changed would have had the same minority success rates as the cities that remained at large.

In the following section we first present evidence for our conclusion that very populous at-large cities differ from small cities with respect to the relation between election type and the level of black officeholding. Then, in the succeeding section, we examine evidence for a selection bias in cross-sectional research, taking advantage of the longitudinal aspects of our data base for southern cities.

The Significance of Differences in City Size Thresholds

Most careful studies of the effect of election structures have been limited to cities 25,000 or larger or 50,000 or larger. The latter threshold was used by Welch. There are only twenty-three such southern cities 10 percent or more black in her 1988

data base that still used at-large elections and were majority white.[66] Thirteen of those twenty-three cities are also in our data base.[67] For those thirteen we find an equity ratio of 0.70 for cities that were 10–49.9 percent black, closer to her figure of 0.83 than to the equity scores of 0.53 and 0.56 we report for at-large cities in table 10.3A for cities in the 10–29.9 and 30–49.9 percent black population categories, respectively. There are simply few very large southern cities that still elect at large, and almost all of these have elected appreciable proportions of black officials. However, at-large elections in majority-white cities are far less favorable to minority candidates in cities below 50,000. In the remainder of this section we look at city size effects on black representation in our data set. The eight state projects used different city size thresholds, with the result that states with low thresholds or none—North Carolina is a case in point—add a disproportionate number of cases to the category of smaller cities. Barring the use of a weighting procedure, we are therefore unable to control for the possible effects of state-specific influences. To remedy this problem, we decided to impose a size threshold of 10,000 on our eight-state data base and to analyze all cities in the resulting sample. Tables 10.6A–C and 10.7A–B report the extent of changes in black officeholding for all cities of at least 10,000 in 1980 that were at least 10 percent black in a fashion that parallels tables 10.2A–C and 10.3A–B, respectively.[68]

Since all the cities are at least 10,000 in size, and cases from North Carolina no longer dominate the sample, we can also report in tables 10.6A–C and 10.7A–B an average across states that uses cities as the units, in addition to one that averages across states as was done in tables 10.2A–C and 10.3A–B.[69]

The results largely corroborate our earlier ones with respect to the higher levels of black representation in the cities that changed election type as compared with those that remained at large. However, it is clear that in some states city size had a significant independent impact on black officeholding. More generally, we find a higher average level of black representation in the at-large cities 10,000 and above in population than in the full set of cities in our larger data set. For the cities that were 10,000 and up we get results more like those of Welch in her 1990 study of cities above 50,000, especially for cities that were 30–49.9 percent black. For example, using cities as our units for calculating means, we find in table 10.7A an equity score of 0.57 in the at-large cities that were 10–29.9 percent black and a score of 0.78 in the at-large cities that were 30–49.9 percent black.

In Mississippi and North Carolina, the two states where choice of the size threshold had the greatest impact on the number of cities included in the data set, the equity score at the end of the period was substantially higher for cities above 10,000 than for the entire set of cities in the two states' data base. In at-large cities of 10,000 or more, the scores were 0.58 and 0.51, respectively, in cities that were 10–29.9 percent black (table 10.7A), as compared to scores of 0.41 and 0.14 for the larger data set that includes the smaller cities (table 10.3A). Continuing the same mode of comparison, at-large cities that were 30–49.9 percent black in these two states produced equity scores of "not applicable" and 0.82, respectively, as compared to equity values of only 0.26 and 0.14 for the larger data set for the two states.

In Louisiana and Virginia, however, the pattern of greater equity scores in the larger cities as compared to the smaller cities was not present. For at-large cities of at least 10,000 that were 10–29.9 percent black, the scores in 1989 were 0.00, and 0.64, respectively, as compared to values of 0.60 and 0.56 for the larger data set. For the more populous at-large cities that were 30–49.9 percent black, the scores were 1.13, and 0.76, respectively, as compared to 0.52 and 0.83 for the larger data set. In Alabama the same three at-large majority-white cities compose the entire category in tables 10.3A–B and table 10.7A–B, and thus no evaluation of the effect of city size is possible for that state.[70]

All in all, the most striking aspect of these comparisons is that while the influence of city size varies somewhat within states, black representation was abysmally low in the hundreds of very small majority-white jurisdictions in North Carolina and in Mississippi—the former a state in the Outer South long enjoying a reputation for racial moderation, the latter a Deep South state whose name has been synonymous with racial reaction. Another important finding is that majority-white cities above 10,000 were far more likely to have eliminated the at-large plan than were the smaller communities. Only 36 percent of the cities above 10,000 still maintained at-large elections in the late 1980s, far lower than the 79 percent of cities in the full data set (which includes the small cities and towns) that maintained at-large elections.[71] Clearly, in some states, voting rights litigation has hardly begun to penetrate barriers to black officeholding in the rural areas. This fact is ignored in research such as Welch's that is limited to larger cities.

The dearth of black representation in the smaller cities of the South is particularly noteworthy because these communities, especially the very small ones, may be those where conditions of life for blacks have changed the least since 1965. If so, the absence of black participation in governance may be especially critical. This possibility takes on additional importance when one realizes that the number of blacks still living in small communities is considerable. In North Carolina, for example, more than two-thirds of all blacks in 1980 lived in cities of less than 25,000.

Problems that May Result from Selection Bias

We now turn to the problem of selection bias. The question we wish to answer is whether the equity scores in at-large election plans in 1989 were typical of scores we would have observed if all the cities that were at large at an earlier period had remained at large. In a strict sense, no one can answer this question because it concerns a counterfactual situation. We cannot know certainly what the facts would have been had the situation been different and none of the cities changed election system.

Nonetheless, a longitudinal design does enable us to approach this question in a manner that a cross-sectional one does not. The results, we believe, are quite suggestive. Because we have two data points for each city, separated by about fifteen years, we can look back to the time of the early data and compare the

characteristics of 1989–90 at-large cities at that earlier time, with the characteristics of those at-large cities that later changed. Differences between these two sets of cities, all originally at large, could provide persuasive grounds for concluding that the remaining at-large cities were indeed atypical.

We define selection bias as a situation where the treatment (in this instance, "change in election system") is not causally independent of the dependent variable, that is, "black officeholding." For example, in the situation under analysis, selection bias could occur because a city's abolition of its at-large election system was linked to black success in gaining office under that system. This link is highly plausible. Given the application of the law under the Voting Rights Act and the Fourteenth Amendment since the mid-1970s, an at-large system generally is more likely to be challenged by a voting rights lawsuit or faced with a threat thereof, and litigation is more likely to be successful (or any threat of litigation is more likely to be credible) if minorities have not been successful in gaining office under it.[72] Therefore, cities that are still at large at the end of a period in this time span can be expected to be a nonrandom sample of the cities that were at large at the beginning of the period. In particular, cities that are still at-large at the end of the period may disproportionately be those cities where minorities had achieved some electoral success early on.

If this is true, then these at-large cities—the ones examined by a cross-sectional design at the end of the period—would be "selected" through a biased process. It is now obvious why the longitudinal approach is especially useful in tackling this issue. It enables us to examine all the cities that were at large at the beginning and to see whether the subset of them that were still at large at the end had higher initial black equity scores, on average, than the subset that later adopted mixed or district plans. If this turns out to be true, there is strong evidence that cities still retaining the at-large system were probably more accessible to black officeholders than is true of the full set of at-large cities at the beginning of the period.

The possibility of selection bias in a sample analyzed by the cross-sectional method was obvious to Welch, who herself posed this question: was the recent better showing of black candidates in predominantly white at-large cities due at least in part "to the possibility that those cities with the most egregious previous underrepresentation of blacks were the ones most likely to be challenged in court and thus most likely to have changed from at-large systems?"[73] Welch regarded this question as open.

Is there reason to believe something like this happened? We initially thought it was a good possibility because the cities that remained at large were, in most states, only a relatively small subset of the cities that began the period at large. According to table 10.1, in five of the eight states of our study a clear majority of the at-large cities changed election type over the period in question. In a sixth state, Louisiana, the proportion of cities that shifted election type was almost exactly one-half. Only in North Carolina and Virginia did the vast bulk of cities with at-large elections at the beginning of the period still elect at large at the end. Of course, had the other state chapters included cities and towns of very small size, as

did North Carolina, then we would have most probably found that most cities in the South still elected at large.

To increase comparability across states without unnecessary sacrifice of sample size, we again focus on the cities in our data set that are above 10,000. If we confine ourselves to these cities, however, then the extent of changes in election type since the beginning of the period is even greater than for the full set of cities, although North Carolina and Virginia remain exceptions to the generalization that a clear majority of the cities that used to elect at large no longer do so.[74]

We examine the mean black equity score of the 1989–90 at-large cities of at least 10,000 at the beginning of the period, for cities grouped according to what election system they eventually adopted, and controlling for the percentage black in the cities' population.

The evidence for selection bias is easiest to see by examining the entire set of majority-white cities in tables 10.7A and 10.7B. In those sixty-seven cities which changed to single-member districts, the black equity score initially averaged only 0.09. In contrast, the seventy-two cities that retained the at-large plan began with a score of 0.31. These differences are statistically as well as substantively significant and show clear evidence of potential selection bias. The fifty cities that changed to mixed plans had an intermediate mean score of 0.23. There is also evidence of selection bias in the majority-black cities. The six adopting single-member districts had an initial mean score of 0.03; the six adopting mixed plans, 0.18; and the five remaining unchanged, 0.46. The number of majority-black cities, however, was obviously small.[75]

We now turn to a state-specific analysis to better understand some of the complexities of selection bias. The findings are seen in table 10.7A and 10.7B. In Georgia (for both population categories of majority-white cities), in Texas and Virginia (for cities 10–29.9 percent black), and in South Carolina (for cities 30–49.9 percent black), there appears to be a potential selection bias effect in the majority-white cities; minority electoral success was higher initially in the majority-white cities that remained at large than in those changing election type.[76] Thus, for half the states, the representational equity of the at-large majority-white cities might well have been lower if more of the "worst case" at-large cities had retained at-large elections.[77]

Tables 10.7A–B shows no evidence of probable selection bias in four states: Alabama, Louisiana, Mississippi, and North Carolina. But it is possible that our particular longitudinal design is not sufficient to uncover all the evidence that might exist for such bias even in these states, and may possibly underestimate the magnitude of selection bias in the four other states as well. This is because we chose, for each state, only two data points approximately fifteen years apart rather than, say, several data points throughout the period.[78]

Not only were very few southern cities using an alternative to the at-large election system in the early 1970s,[79] but in many areas of the South few cities had even begun to elect blacks to office in this period. This was fortunate for our before-and-after design, inasmuch as it meant that there would be few cases where

the change in election type had preceded our starting date, but it was unfortunate for our analysis of selection bias. The hypothesis of selection bias is premised on the assumption that some at-large cities early on became less vulnerable to voting rights litigation by virtue of having elected a substantial percentage of blacks to office, in comparison with other at-large cities. But if virtually no blacks were being elected in the "before" period, no test of the selection bias hypothesis is possible.[80]

Consider Alabama, a state that, according to the table, gives no evidence of selection bias The authors of the Alabama chapter chose 1970 as their starting point. The three majority-white Alabama cities still electing at large—cities whose 1989 ratio equity score was 1.10—had no black representation in 1970. But black representation that year in the state's other majority-white at-large cities was also virtually nil, as table 10.7B shows Analogous patterns of complete or nearly complete black exclusion from office in the "before" period of our study existed in Louisiana and Mississippi (and for South Carolina cities that were 10–29.9 percent black). Thus with only data for the 1970 or 1974 starting points in these states, the possibility of selection bias would appear to be nonexistent. However, bias may still be present in these states, but missed because of the lack of data points intermediate between the early 1970s and the late 1980s. Additional data collected for the Alabama chapter underscore this point.[81]

Summary

Our analyses of the eight-state data set lead us to reaffirm the standard view that at-large elections have deleterious effects on black representation for cities with white majorities and a black population of at least 10 percent. As table 10.2 demonstrates, dramatic gains in black representation followed abolition of at-large elections—gains much greater than in cities that remained at large. (The negative impact of at-large elections is felt in county government too, as demonstrated in the three state chapters that examined the question.) In almost all states, table 10.3A shows, black representational equity was near 1.00 for majority-white cities using single-member districts: 1.14 for cities that were 10–29.9 percent black; 0.92 for cities that were 30–49.9 percent black; and a score only slightly above 0.50 for the majority-white cities that elected at large (0.53 for cities that were 10–29.9 percent black and 0.56 for cities that were 30–49.9 percent black).[82]

Also, as anticipated, when the black population percentage was held constant, levels of black officeholding in cities with a mixed plan were generally intermediate between those in at-large and single-member-district systems. Moreover, the data in tables 10.4 and 10.5 show a pattern of total exclusion of blacks in some states (and near exclusion in others) in the at-large component of mixed plans and in the majority-white districts in single-member district plans. Black officeholding in mixed plans was largely or almost entirely the result of black success in the districted component of the plan. Moreover, when we focus on districts in cities

that elected by district, black officeholding was practically nonexistent in council districts less than 40 percent black but—except for Mississippi—it was close to 100 percent of all officeholders in districts greater than 60 percent black.[83]

The data analysis in this chapter also allows us to account for the differences between the findings of Welch's important 1990 study and those reported for the state chapters in this volume. Welch noted sharply increased black officeholding in at-large systems by 1988.[84] Our state chapters found that with a handful of exceptions at most, black equity scores in at-large settings were still very low in 1989. We reject the interpretation some authors (but not Welch herself) have placed on her work, and we have presented evidence that the differences between Welch's results and those of the chapter authors are more apparent than real, partly because of the difference in city sizes in the two studies and partly because of the problem of selection bias that Welch's cross-sectional design could not detect.

One way to see the remarkable effect of the changes in election type described in this chapter is to focus on the number of cities that failed to elect even a single black representative. Let us confine ourselves to the cities above 10,000 in our eight-state data base. There were 206, all at large, at the start of the period, of which 141 (68 percent) had no black officeholder; by the end of the period, there were only 77 at-large cities, of which 22 (29 percent) had no black officeholder. Also at the end of the period, however, there was *no* city with a single-member district or mixed plan that failed to have at least one black officeholder. Thus, even if we assume that without a change in election type, the proportion of the 129 changed cities (206 − 77) that would have no black officeholders at the end of the period would have been 29 percent (an estimate we know from our above discussion of selection bias to be very generous), then at least 37 cities over 10,000 in the eight southern states ([.29 − 0] × 129) avoided black exclusion from politics as a result of a change in election type. Of course, this is a very conservative estimate of the consequences of cities' adopting districts, since using the current results in at-large cities as predictive of what would have happened had these cities not adopted districts understates the consequences of change in election rules. In making this estimate of the positive impact of cities' adopting district or mixed plans, we are focusing narrowly on their ability to break the barrier against the election of a single black officeholder in these cities of at least 10,000.

If we broaden our inquiry, however, to include all gains in black officeholding resulting from cities' abolishing at-large elections and if we make use of our full data set, these gains are greater still. Our question now is, how many black officeholders can we be reasonably sure owe their election to single-member district or mixed plans? These are *council members who would not have been elected had black representation in these cities remained at the same level as in the unchanged at-large cities*. We find the net effect of change in election type in 217 cities to have resulted in the election of approximately two hundred more black city council members in 1989–90, even after we control for gains that under very generous assumptions might have taken place even had these cities remained at large.[85] Moreover, because such a relatively small proportion of cities have

adopted districts in the South as a whole, there remain potential net gains of hundreds of new black council members in the many cities and towns that still remain at large, if they adopt district systems.

In summary, the longitudinal comparisons permitted by our data base and the variety of data we looked at have allowed us to gauge more accurately the extent to which shifts to single-member districts caused gains in black officeholding.[86] To recapitulate, when we combined the information in tables 10.4 and 10.5 with that shown in tables 10.2 and 10.3, it was apparent that minority underrepresentation was a persistent phenomenon in the South even as late as 1989. Moreover, when we reanalyzed the data to look for possible selection bias effects, we discovered a strong likelihood of them. Also, when we examined tables 10.6 and 10.7, we saw that even though black officeholding was relatively proportional in the handful of large southern cities that still elected at large, there were strong city size effects, such that representational equity in the at-large setting remained minuscule in small towns in some states. In these jurisdictions, especially in North Carolina and Mississippi, blacks continued to go unrepresented, and there were numerous towns that fell into this category. Had we examined at-large cities under 10,000 in Georgia, South Carolina, and Texas, we might very well have found similar underrepresentation there. These findings lead us to disagree strongly with those who dismiss the continuing importance of the Voting Rights Act as a safeguard for the right of blacks to fair representation.

TABLE 10.2A
Changes in Black Representation on Council during the Period of Investigation, Cities *10–29.9 Percent Black* in Eight Southern States

State (1980 Population Threshold)	Change in % Black on Council: From AL to SMD t_1	From AL to SMD t_2	From AL to Mixed t_1	From AL to Mixed t_2	AL Unchanged t_1	AL Unchanged t_2	Difference ($t_2 - t_1$) in Black Representation: SMD Plan	Mixed Plan	AL Plan	Changed Plans: Net Change in Black Representation: (SMD Change − AL Change)	(Mixed Change − AL Change)
Alabama	0	20	11	11	0	20	20	0	20	0	−20
(6,000)	(23)	(23)	(1)	(1)	(3)	(3)	(23)	(1)	(3)		
Georgia	0	25	—	—	9	10	25	—	1	24	—
(10,000)	(1)	(1)	(0)	(0)	(5)	(5)	(1)	(0)	(5)		
Louisiana	0	27	3	19	0	10	27	16	10	17	6
(2,500)	(3)	(3)	(7)	(7)	(16)	(16)	(3)	(7)	(16)		
Mississippi	0	20	0	11	0	9	20	11	9	11	2
(1,000)	(5)	(5)	(16)	(16)	(20)	(20)	(5)	(16)	(20)		
N. Carolina	—	—	8	18	1	3	—	10	2	—	8
(none)	(0)	(0)	(5)	(5)	(346)	(346)	(0)	(5)	(346)		
S. Carolina	0	25	0	25	0	3	25	25	3	22	22
(10,000)	(2)	(2)	(1)	(1)	(5)	(5)	(2)	(1)	(5)		
Texas	6	27	7	19	11	14	21	12	3	18	9
(10,000)	(9)	(9)	(11)	(11)	(16)	(16)	(9)	(11)	(16)		
Virginia	0	20	5	21	8	10	20	16	2	18	14
(none)	(1)	(1)	(2)	(2)	(11)	(11)	(1)	(2)	(11)		
STATE MEAN	1	23	5	18	4	10	23	13	6	16	6
(*N*)	(7)	(7)	(7)	(7)	(8)	(8)	(7)	(7)	(8)	(7)	(7)

TABLE 10.1
Data Base Characteristics, Cities with 10 Percent or More Black Population in 1980, Eight Southern States Covered by Section 5 of The Voting Rights Act

State	City Population Threshold	Number of At-Large Cities: (N)[a]	At Beginning of Period	At End of Period	Period of Analysis
Alabama	6,000	(48)	48	6	1970–89
Georgia[b]	10,000	(34)	15	6	1980–90
Louisiana	2,500	(90)	57	29	1974–89
Mississippi	1,000	(133)	130	59	1974–89
North Carolina[c]	None	(729)	724	702	1973–89
South Carolina	10,000	(21)	21	7	1974–89
Texas[d]	10,000	(46)	42	17	1974–89
Virginia[e]	None	(26)	23	17	1977–89
TOTAL			1,060	843	

[a] The *N*s shown in parentheses in the third column are the total number of cities in a state for which any data are available. The values in the fourth column indicate the number of cities with at-large plans at the beginning of the period for which data are reported in the longitudinal data bases.

[b] In Georgia in 1990, 7 of 34 cities for which data are reported used multimember districts (see tables 3.1 and 3.2). We have omitted the multimember-district cities from the longitudinal data used in this chapter.

[c] The North Carolina data include ten cities with less than 10 percent black population but with a combined black plus Native American population of greater than 10 percent. All are under 5,000 in population; most are under 500. Six are in Robeson County. Five are majority Native American. The city of Goldsboro is identified by data provided by the city as being majority-minority, and is so treated in Chapter 6. However, it is only 46.6 percent black, according to the U.S. census, and is not treated as majority-minority in chapter 10.

[d] In Texas, one multimember-district city is omitted from the data set. Also omitted is one for which 1974 data are unavailable and two others that did not have at-large systems in 1974. Only cities at least 10 percent black are analyzed in chapter 10, as distinct from chapter 8, where cities at least 10 percent black and Hispanic combined are analyzed.

[e] All independent cities (see chapter 9 for a definition of these cities).

TABLE 10.2B
Changes in Black Representation on Council during the Period of Investigation, Cities *30–49.9 Percent Black* in Eight Southern States

State (1980 Population Threshold)	*Change in % Black on Council*						*Difference ($t_2 - t_1$) in Black Representation*			*Changed Plans: Net Change in Black Representation*	
	From AL to SMD		*From AL to Mixed*		*AL Unchanged*						
	t_1	t_2	t_1	t_2	t_1	t_2	*SMD Plan*	*Mixed Plan*	*AL Plan*	*(SMD Change − AL Change)*	*(Mixed Change − AL Change)*
Alabama	0	38	0	30	—	—	38	30	—	—	—
(6,000)	(13)	(13)	(2)	(2)	(0)	(0)	(13)	(2)	(0)		
Georgia	13	30	7	32	20	17	17	25	−3	20	28
(10,000)	(3)	(3)	(3)	(3)	(1)	(1)	(3)	(3)	(1)		
Louisiana	2	39	0	24	0	20	37	24	20	17	4
(2,500)	(9)	(9)	(6)	(6)	(7)	(7)	(9)	(6)	(7)		
Mississippi	0	36	0	30	0	9	36	30	9	27	21
(1,000)	(14)	(14)	(13)	(13)	(15)	(15)	(14)	(13)	(15)		
N. Carolina	5	36	11	32	1	5	31	21	4	27	17
(none)	(6)	(6)	(7)	(7)	(216)	(216)	(6)	(7)	(216)		
S. Carolina	2	45	4	33	8	15	43	29	7	36	22
(10,000)	(7)	(7)	(4)	(4)	(2)	(2)	(7)	(4)	(2)		
Texas	0	37	21	42	0	50	37	21	50	−13	−29
(10,000)	(3)	(3)	(2)	(2)	(1)	(1)	(3)	(2)	(1)		
Virginia	—	—	10	33	15	29	—	23	14	—	9
(none)	(0)	(0)	(1)	(1)	(6)	(6)	(0)	(1)	(6)		
STATE MEAN	3	37	7	32	6	21	34	25	14	19	10
						[16][a]			[9][a]	[25][a]	[15][a]
(*N*)	(7)	(7)	(8)	(8)	(7)	(7)	(7)	(8)	(7)	(6)	(7)

[a] The numbers in brackets show what happens when the one unchanged at-large Texas city in the 30–49.9 percent black is excluded. This is the city, as explained in the text, that had a majority-white population in 1980 but that was majority black by 1990

TABLE 10.2C
Changes in Black Representation on Council during the Period of Investigation, Cities *50–100 Percent Black* in Eight Southern States

State (1980 Population Threshold)	*Change in % Black on Council*						*Difference ($t_2 - t_1$) in Black Representation*			*Changed Plans: Net Change in Black Representation*	
	From AL to SMD		*From AL to Mixed*		*AL Unchanged*						
	t_1	t_2	t_1	t_2	t_1	t_2	*SMD Plan*	*Mixed Plan*	*AL Plan*	*(SMD Change − AL Change)*	*(Mixed Change − AL Change)*
Alabama	0	80	0	51	46	74	80	51	28	52	23
(6,000)	(1)	(1)	(2)	(2)	(3)	(3)	(1)	(2)	(3)		
Georgia	—	—	23	35	—	—	—	12	—	—	—
(10,000)	(0)	(0)	(2)	(2)	(0)	(0)	(0)	(2)	(0)		
Louisiana	0	50	0	25	27	53	50	25	26	24	−1
(2,500)	(2)	(2)	(1)	(1)	(6)	(6)	(2)	(1)	(6)		
Mississippi	0	43	5	37	23	49	43	32	26	17	6
(1,000)	(11)	(11)	(12)	(12)	(24)	(24)	(11)	(12)	(24)		
N. Carolina	6	48	0	40	2	9	42	40	7	35	33
(none)	(3)	(3)	(1)	(1)	(140)	(140)	(3)	(1)	(140)		
S. Carolina	—	—	—	—	—	—	—	—	—	—	—
(10,000)	(0)	(0)	(0)	(0)	(0)	(0)	(0)	(0)	(0)		
Texas	—	—	—	—	—	—	—	—	—	—	—
(10,000)	(0)	(0)	(0)	(0)	(0)	(0)	(0)	(0)	(0)		
Virginia	11	56	20	50	—	—	45	30	—	—	—
(none)	(1)	(1)	(1)	(1)	(0)	(0)	(1)	(1)	(0)		
STATE MEAN	3	55	8	40	24	46	53	32	22	33	15
(*N*)	(5)	(5)	(6)	(6)	(4)	(4)	(5)	(6)	(4)	(4)	(4)

TABLE 10.3A
Black Representation on Council *at the End of the Period* of Investigation, Cities at Least 10 Percent Black in 1980 that Began the Period with an At-Large Plan, Eight Southern States (Ratio Equity Scores)

% Black in City Population by Type of Plan at End of Period	*Mean Ratio Equity Score for Cities*								
	Ala.	*Ga.*	*La.*	*Miss.*	*N.C.*	*S.C.*	*Tex.*	*Va.*	*State Mean*
10–29.9									
SMD	1.10	0.89	1.04	0.84	—	1.34	1.20	1.54	1.14
(*N*)	(23)	(1)	(3)	(5)	(0)	(2)	(9)	(1)	(7)
Mixed	0.69	—	0.83	0.58	0.82	0.85	1.11	1.05	0.85
(*N*)	(1)	(0)	(7)	(16)	(5)	(1)	(11)	(2)	(7)
At-large	1.10	0.47	0.60	0.41	0.14	0.21	0.75	0.56	0.53
(*N*)	(3)	(5)	(16)	(20)	(346)	(5)	(16)	(11)	(8)
30–49.9									
SMD	1.03	0.68	0.90	0.85	0.89	1.08	1.04	—	0.92
(*N*)	(13)	(3)	(9)	(14)	(6)	(7)	(3)	(0)	(7)
Mixed	0.78	0.83	0.65	0.74	0.96	0.82	1.07	0.95	0.85
(*N*)	(2)	(3)	(6)	(13)	(7)	(4)	(2)	(1)	(8)
At-large	—	0.41	0.52	0.26	0.14	0.42	1.37	0.83	0.56
(*N*)	(0)	(1)	(7)	(15)	(216)	(2)	(1)	(6)	(7)
50–100									
SMD	1.08	—	0.80	0.74	0.87	—	—	1.10	0.92
(*N*)	(1)	(0)	(2)	(11)	(3)	(0)	(0)	(1)	(5)
Mixed	0.98	0.66	0.49	0.59	0.52	—	—	0.91	0.69
(*N*)	(2)	(2)	(1)	(12)	(1)	(0)	(0)	(1)	(6)
At-large	1.09	—	0.80	0.70	0.14	—	—	—	0.68
(*N*)	(3)	(0)	(6)	(24)	(140)	(0)	(0)	(0)	(4)

TABLE 10.3B
Black Representation on Council *at the Beginning of the Period* of Investigation, Cities at Least 10 Percent Black in 1980 that Began the Period with an At-Large Plan, Eight Southern States (Ratio Equity Scores)

% Black in City Population by Type of Plan at End of Period	*Mean Ratio Equity Score for Cities*								
	Ala.	*Ga.*	*La.*	*Miss.*	*N.C.*	*S.C.*	*Tex.*	*Va.*	*State Mean*
10–29.9									
SMD	0.00	0.00	0.00	0.00	—	0.00	0.26	0.00	0.04
(*N*)	(23)	(1)	(3)	(5)	(0)	(2)	(9)	(1)	(7)
Mixed	0.11	—	0.11	0.00	0.38	0.00	0.36	0.25	0.17
(*N*)	(1)	(0)	(7)	(16)	(5)	(1)	(11)	(2)	(7)
At-large	0.00	0.39	0.00	0.00	0.04	0.00	0.57	0.44	0.18
(*N*)	(3)	(5)	(16)	(20)	(346)	(5)	(16)	(11)	(8)
30–49.9									
SMD	0.00	0.30	0.04	0.00	0.12	0.05	0.00	—	0.07
(*N*)	(13)	(3)	(9)	(14)	(6)	(7)	(3)	(0)	(7)
Mixed	0.00	0.17	0.00	0.00	0.33	0.10	0.55	0.25	0.17
(*N*)	(2)	(3)	(6)	(13)	(7)	(4)	(2)	(1)	(8)
At-large	—	0.49	0.00	0.00	0.03	0.22	0.00	0.43	0.17
(*N*)	(0)	(1)	(7)	(15)	(216)	(2)	(1)	(6)	(7)
50–100									
SMD	0.00	—	0.00	0.00	0.10	—	—	0.22	0.06
(*N*)	(1)	(0)	(2)	(11)	(3)	(0)	(0)	(1)	(5)
Mixed	0.00	0.42	0.00	0.07	0.00	—	—	0.36	0.14
(*N*)	(2)	(2)	(1)	(12)	(1)	(0)	(0)	(1)	(6)
At-large	0.46	—	0.33	0.32	0.03	—	—	—	0.28
(*N*)	(3)	(0)	(6)	(24)	(140)	(0)	(0)	(0)	(4)

TABLE 10.4
Black Council Representation in Mixed Plans at the End of the Period of Investigation by District and At-Large Components, Cities at Least 10 Percent Black, Eight Southern States

	Mean % Black Councilpersons in Each Type of Component																	
% Black in City	*Ala.*		*Ga.*		*La.*		*Miss.*		*N.C.*		*S.C.*		*Tex.*		*Va.*		*State Mean*	
Population, 1980	*Dist.*	*AL*	*Dist*	*AL*	*Dist.*	*AL*	*Dist.*	*AL*	*Dist.*	*AL*	*Dist*	*AL*	*Dist.*	*AL*	*Dist.*	*AL*	*Dist.*	*AL*
10–29.9	13	0	—	—	31	0	15	0	31	0	33	0	14	2	23	13	23	2
(*N*)	(1)	(1)	(0)	(0)	(13)	(13)	(18)	(18)	(5)	(5)	(1)	(1)	(11)	(11)	(3)	(3)	(7)	(7)
30–49.9	42	0	42	12	31	7	37	0	36	3	53	0	25	10	58	0	41	4
(*N*)	(2)	(2)	(9)	(9)	(13)	(13)	(13)	(13)	(8)	(8)	(4)	(4)	(2)	(2)	(2)	(2)	(8)	(8)
50–100	59	0	45	39	51	38	46	25	50	0	—	—	—	—	50	0	50	17
(*N*)	(2)	(2)	(3)	(3)	(4)	(4)	(12)	(12)	(1)	(1)	(0)	(0)	(0)	(0)	(1)	(1)	(6)	(6)

TABLE 10.5
Black Representation on Council Single-Member Districts at the End of the Period of Investigation, by Black Population in District, Single-Member-District and Mixed Cities at Least 10 Percent Black, Eight Southern States*

% Black Population in District	*Mean % Black Councilpersons in District*								
	Ala.	*Ga.*	*La.*	*Miss.*	*N.C.*	*S.C.*	*Tex.*	*Va.*	*State Mean*
0–9.9	0	0	0	0	0	4	0	NA	1
(*N*)	(94)	(9)	(37)	(44)	(8)	(23)	(24)		(7)
10–19.9	3	0	0	0	0	0	0	NA	0
(*N*)	(37)	(11)	(10)	(27)	(11)	(15)	(12)		(7)
20–29.9	0	0	8	0	0	0	0	NA	1
(*N*)	(8)	(3)	(12)	(13)	(10)	(4)	(2)		(7)
30–39.9	0	33	0	0	25	0	17	NA	11
(*N*)	(4)	(3)	(9)	(14)	(8)	(3)	(6)		(7)
40–49.9	50	—	40	0	0	—	—	NA	23
(*N*)	(4)	(0)	(5)	(12)	(2)	(0)	(0)		(4)
50–59.9	—	67	50	27	100	75	100	100	74
(*N*)	(0)	(6)	(4)	(11)	(8)	(4)	(2)	(3)	(7)
60–69.9	100	100	100	48	75	100	83	75	85
(*N*)	(20)	(2)	(7)	(21)	(4)	(15)	(6)	(4)	(8)
70–79.9	100	—	100	82	100	83	83	100	93
(*N*)	(16)	(0)	(8)	(11)	(6)	(12)	(6)	(5)	(7)
80–89.9	100	100	100	93	100	100	100	100	99
(*N*)	(11)	(5)	(8)	(15)	(6)	(1)	(4)	(2)	(8)
90–100	100	100	100	100	100	—	—	100	100
(*N*)	(7)	(3)	(14)	(27)	(5)	(0)	(0)	(6)	(6)

*The percentage black categories in this table are more numerous than in some of the state chapters. Also, Texas data in this table, as compared with Texas data in the state chapter, are for cities at least 10 percent black rather than black and Hispanic combined. North Carolina data are reported only for cities with a population of at least 10,000. The *N*s in this table may differ slightly from those in the state chapters because data are included here only for cities for which the data set is complete.

TABLE 10.6A
Changes in Black Representation on Council during the Period of Investigation, Cities of 10,000 or More Population in 1980, *10–29.9 Percent Black*, in Eight Southern States

	Change in % Black on Council						Difference ($t_2 - t_1$) in Black Representation			Changed Plans: Net Change in Black Representation	
	From AL to SMD		From AL to Mixed		AL Unchanged					(SMD Change − AL Change)	(Mixed Change − AL Change)
State	t_1	t_2	t_1	t_2	t_1	t_2	SMD Plan	Mixed Plan	AL Plan		
Alabama	0	21	11	11	0	20	21	0	20	1	−20
(N)	(13)	(13)	(1)	(1)	(3)	(3)	(13)	(1)	(3)		
Georgia	0	25	—	—	9	10	25	—	1	24	—
(N)	(1)	(1)	(0)	(0)	(5)	(5)	(1)	(0)	(5)		
Louisiana	0	17	4	18	0	0	17	14	0	17	14
(N)	(2)	(2)	(5)	(5)	(3)	(3)	(2)	(5)	(3)		
Mississippi	0	17	0	14	0	10	17	14	10	7	4
(N)	(2)	(2)	(3)	(3)	(2)	(2)	(2)	(3)	(2)		
N. Carolina	—	—	8	17	4	9	—	9	5	—	4
(N)	(0)	(0)	(3)	(3)	(14)	(14)	(0)	(3)	(14)		
S. Carolina	0	25	0	25	0	3	25	25	3	22	22
(N)	(2)	(2)	(1)	(1)	(5)	(5)	(2)	(1)	(5)		
Texas	6	27	7	19	11	14	21	12	3	18	9
(N)	(9)	(9)	(11)	(11)	(16)	(16)	(9)	(11)	(16)		
Virginia	—	—	5	21	10	13	—	16	3	—	13
(N)	(0)	(0)	(2)	(2)	(7)	(7)	(0)	(2)	(7)		
CITY MEAN	0	23	5	18	6	11	22	14	6	16	8
(N)	(29)	(29)	(26)	(26)	(55)	(55)	(29)	(26)	(55)		
STATE MEAN	1	22	5	18	4	10	21	13	6	15	7
(N)	(6)	(6)	(7)	(7)	(8)	(8)	(6)	(7)	(8)	(6)	(7)

TABLE 10.6B
Changes in Black Representation on Council during the Period of Investigation, Cities of 10,000 or More Population in 1980, *30–49.9 Percent Black*, in Eight Southern States

	Change in % Black on Council						Difference ($t_2 - t_1$) in Black Representation			Changed Plans: Net Change in Black Representation	
	From AL to SMD		From AL to Mixed		AL Unchanged					(SMD Change − AL Change)	(Mixed Change − AL Change)
State	t_1	t_2	t_1	t_2	t_1	t_2	SMD Plan	Mixed Plan	AL Plan		
Alabama	0	41	0	30	—	—	41	30	—	—	—
(N)	(7)	(7)	(2)	(2)	(0)	(0)	(7)	(2)	(0)		
Georgia	13	30	7	32	20	17	17	25	−3	20	28
(N)	(3)	(3)	(3)	(3)	(1)	(1)	(3)	(3)	(1)		
Louisiana	0	41	0	35	15	43	41	35	28	13	7
(N)	(4)	(4)	(4)	(4)	(1)	(1)	(4)	(4)	(1)		
Mississippi	0	39	0	43	—	—	39	43	—	—	—
(N)	(8)	(8)	(2)	(2)	(0)	(0)	(8)	(2)	(0)		
N. Carolina	18	47	18	33	11	32	29	15	21	8	−6
(N)	(6)	(6)	(7)	(7)	(7)	(7)	(6)	(7)	(7)		
S. Carolina	2	45	4	33	8	15	43	29	7	36	22
(N)	(7)	(7)	(4)	(4)	(2)	(2)	(7)	(4)	(2)		
Texas	0	37	21	42	0	50	37	21	50	−13	−29
(N)	(3)	(3)	(2)	(2)	(1)	(1)	(3)	(2)	(1)		
Virginia	—	—	—	—	15	27	—	—	12	—	—
(N)	(0)	(0)	(0)	(0)	(5)	(5)	(0)	(0)	(5)		
CITY MEAN	4	41	9	35	12	29	35	26	17	18	9
(N)	(38)	(38)	(24)	(24)	(17)	(17)	(38)	(24)	(17)	(79)	(79)
STATE MEAN	5	40	7	35	12	31	35	28	19	13	4
(N)	(7)	(7)	(7)	(7)	(6)	(6)	(7)	(7)	(6)	(5)	(5)

TABLE 10.6C
Changes in Black Representation on Council during the Period of Investigation, Cities of 10,000 or More Population in 1980, *50–100 Percent Black*, in Eight Southern States

	Change in % Black on Council						*Difference ($t_2 - t_1$) in Black Representation*			*Changed Plans: Net Change in Black Representation*	
	From AL to SMD		*From AL to Mixed*		*AL Unchanged*						
State	t_1	t_2	t_1	t_2	t_1	t_2	*SMD Plan*	*Mixed Plan*	*AL Plan*	*(SMD Change − AL Change)*	*(Mixed Change − AL Change)*
Alabama	0	80	0	51	46	74	80	51	28	52	23
(*N*)	(1)	(1)	(2)	(2)	(3)	(3)	(1)	(2)	(3)		
Georgia	—	—	23	35	—	—	—	12	—	—	—
(*N*)	(0)	(0)	(2)	(2)	(0)	(0)	(0)	(2)	(0)		
Louisiana	0	60	—	—	—	—	60	—	—	—	—
(*N*)	(1)	(1)	(0)	(0)	(0)	(0)	(1)	(0)	(0)		
Mississippi	0	48	7	50	0	17	48	43	17	31	26
(*N*)	(3)	(3)	(2)	(2)	(1)	(1)	(3)	(2)	(1)		
N. Carolina	—	—	—	—	20	60	—	—	40	—	—
(*N*)	(0)	(0)	(0)	(0)	(1)	(1)	(0)	(0)	(1)		
S. Carolina	—	—	—	—	—	—	—	—	—	—	—
(*N*)	(0)	(0)	(0)	(0)	(0)	(0)	(0)	(0)	(0)		
Texas	—	—	—	—	—	—	—	—	—	—	—
(*N*)	(0)	(0)	(0)	(0)	(0)	(0)	(0)	(0)	(0)		
Virginia	11	56	—	—	—	—	45	—	—	—	—
(*N*)	(1)	(1)	(0)	(0)	(0)	(0)	(1)	(0)	(0)		
CITY MEAN	2	57	10	45	32	60	55	35	28	27	7
(*N*)	(6)	(6)	(6)	(6)	(5)	(5)	(6)	(6)	(5)	(17)	(17)
STATE MEAN	3	61	10	45	22	50	58	35	28	42	25
(*N*)	(4)	(4)	(3)	(3)	(3)	(3)	(4)	(3)	(3)	(2)	(2)

TABLE 10.7A
Black Representation on Council *at the End of the Period* of Investigation, Cities of 10,000 or More Population in 1980 at Least 10 Percent Black in 1980 that Began Period with an At-Large Plan, Eight Southern States (Ratio Equity Scores)

% Black in City Population by Type of Plan at End of Period	*Mean Ratio Equity Score for Cities*									
	Ala.	*Ga.*	*La.*	*Miss.*	*N.C.*	*S.C.*	*Tex.*	*Va.*	*City Mean*	*State Mean*
10–29.9										
SMD	1.06	0.89	0.65	0.80	—	1.34	1.20	—	1.07	0.99
(*N*)	(13)	(1)	(2)	(2)	(0)	(2)	(9)	(0)	(29)	(6)
Mixed	0.69	—	0.87	0.78	0.77	0.85	1.11	1.00	0.95	0.87
(*N*)	(1)	(0)	(5)	(3)	(3)	(1)	(11)	(2)	(26)	(7)
At-large	1.10	0.47	0.00	0.58	0.51	0.21	0.75	0.64	0.57	0.53
(*N*)	(3)	(5)	(3)	(2)	(14)	(5)	(16)	(7)	(55)	(8)
30–49.9										
SMD	1.16	0.68	0.94	0.95	1.11	1.08	1.04	—	1.03	0.99
(*N*)	(7)	(3)	(4)	(8)	(6)	(7)	(3)	(0)	(38)	(7)
Mixed	0.78	0.83	0.91	1.08	0.95	0.82	1.07	—	0.92	0.92
(*N*)	(2)	(3)	(4)	(2)	(7)	(4)	(2)	(0)	(24)	(7)
At-large	—	0.41	1.13	—	0.82	0.42	1.37	0.76	0.78	0.82
(*N*)	(0)	(1)	(1)	(0)	(7)	(2)	(1)	(5)	(17)	(6)
50–100										
SMD	1.08	—	0.86	0.86	—	—	—	1.10	0.93	0.97
(*N*)	(1)	(0)	(1)	(3)	(0)	(0)	(0)	(1)	(6)	(4)
Mixed	0.98	0.66	—	0.76	—	—	—	—	0.80	0.80
(*N*)	(2)	(2)	(0)	(2)	(0)	(0)	(0)	(0)	(6)	(3)
At-large	1.09	—	—	0.28	1.14	—	—	—	0.94	0.84
(*N*)	(3)	(0)	(0)	(1)	(1)	(0)	(0)	(0)	(5)	(3)

CHAPTER ELEVEN

The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations

LISA HANDLEY AND BERNARD GROFMAN

THE VOTING RIGHTS ACT of 1965 has succeeded in eliminating most of the barriers blacks in the South previously faced in attempting to register and vote. But the act sought to do more than this. It was also designed to bring minority groups and their concerns into the halls of government. Progress in this direction has been much slower; years after the act had produced impressive gains in registration, blacks still held only a small fraction of the elected offices in the South. However, as table 11.1 illustrates, blacks have been winning office in increasing numbers since 1970, a phenomenon that has been particularly dramatic in the South. By 1985, the percentage of blacks serving at every level of government with the exception of Congress was higher in the South than elsewhere. The primary reason for the disproportionate increase in southern black officeholding, this essay will show, is the Voting Rights Act.

Our evidence demonstrates, moreover, that the currently popular argument that the Voting Rights Act has served its purpose and is no longer as necessary as it once was is misguided.[1] Proponents of this argument herald the election of prominent black politicians such as Virginia governor Douglas Wilder as examples of a new southern progressivism. But Wilder's 1989 election is the exception rather than the rule, our data show, and even that gubernatorial contest was not devoid of racial bloc voting.[2] In fact, there is little evidence for a widespread increase in the willingness of white voters to cast their ballots for black candidates.[3]

This investigation examines the possible reasons for the growth in the number of black elected officials from the passage of the act in 1965, when virtually no blacks held political office in the South, until 1985, when the election results of the previous round of redistricting were in. It focuses primarily on state legislatures in the South, but congressional level data are examined briefly at the close of the study in order to determine if the conclusions hold at the congressional level as well. We arrive at three basic conclusions. First, the increase in the number of blacks elected to office in the South is a product of the increase in the number of majority-black districts and not of blacks winning in majority-white districts. Second, even today black populations well above 50 percent appear necessary if blacks are to have a realistic opportunity to elect representatives of their choice in

TABLE 10.7B

Black Representation on Council *at the Beginning of the Period* of Investigation, Cities of 10,000 or More Population in 1980 at Least 10 Percent Black in 1980 that Began Period with an At-Large Plan, Eight Southern States (Ratio Equity Scores)

% Black in City Population by Type of Plan at End of Period	*Mean Ratio Equity Score for Cities*									
	Ala.	*Ga.*	*La.*	*Miss.*	*N.C.*	*S.C.*	*Tex.*	*Va.*	*City Mean*	*State Mean*
10–29.9										
SMD	0.00	0.00	0.00	0.00	—	0.00	0.26	—	0.08	0.04
(*N*)	(13)	(1)	(2)	(2)	(0)	(2)	(9)	(0)	(29)	(6)
Mixed	0.69	—	0.00	0.00	0.30	0.00	0.36	0.22	0.23	0.22
(*N*)	(1)	(0)	(5)	(3)	(3)	(1)	(11)	(2)	(26)	(7)
At-large	0.00	0.39	0.00	0.00	0.25	0.00	0.57	0.42	0.31	0.20
(*N*)	(3)	(5)	(3)	(2)	(14)	(5)	(16)	(7)	(55)	(8)
30–49.9										
SMD	0.00	0.30	0.00	0.00	0.43	0.05	0.00	—	0.10	0.11
(*N*)	(7)	(3)	(4)	(8)	(6)	(7)	(3)	(0)	(38)	(7)
Mixed	0.00	0.17	0.00	0.00	0.51	0.10	0.55	—	0.23	0.19
(*N*)	(2)	(3)	(4)	(2)	(7)	(4)	(2)	(0)	(24)	(7)
At-large	—	0.49	0.00	—	0.29	0.22	0.00	0.43	0.30	0.24
(*N*)	(0)	(1)	(1)	(0)	(7)	(2)	(1)	(5)	(17)	(6)
50–100										
SMD	0.00	—	0.00	0.00	—	—	—	0.22	0.03	0.06
(*N*)	(1)	(0)	(1)	(3)	(0)	(0)	(0)	(1)	(6)	(4)
Mixed	0.00	0.42	—	0.11	—	—	—	—	0.18	0.18
(*N*)	(2)	(2)	(0)	(2)	(0)	(0)	(0)	(0)	(6)	(3)
At-large	0.64	—	—	0.00	0.38	—	—	—	0.46	0.34
(*N*)	(3)	(0)	(0)	(1)	(1)	(0)	(0)	(0)	(5)	(3)

the South. Third, the increase in the number of black districts in the South is primarily the result not of redistricting changes based on population shifts as reflected in the decennial census but, rather, of those required by the Voting Rights Act of 1965 and its 1982 amendments. Quite simply, had there been no federal intervention in the redistricting process in the South, it is unlikely that most southern states would have ceased their practice of diluting the black vote. The Justice Department forced many southern states to replace their multimember state legislative districts with single-member seats, especially in areas with black population concentrations, and also denied preclearance to single-member redistricting plans that appeared to fragment black voters unnecessarily. Federal intervention of this nature, as well as voting rights suits brought by private litigants, was primarily responsible for the significant increase in southern black officeholding, at least at the state legislative and congressional levels.

Are Whites Electing Blacks to Office in the South?

Table 11.1 shows that the number of southern black legislators increased sharply after 1965. In that year only 3 blacks were state legislators in the eleven states of the Old Confederacy; by 1985 that number had increased to 176—almost 10 percent of the legislative seats. Of course, because blacks comprise almost 20 percent of the southern population, they were still quite underrepresented proportionally.

To what can this substantial rise be attributed? A major cause was the increase in black voting made possible by the act. But black participation rates have leveled off since the early 1970s; thus the more recent increases must have been due to other factors. Some writers attribute it to a growing willingness among whites to vote for black candidates. If this were true, then we should see more blacks elected from majority-white jurisdictions. But as table 11.2 demonstrates, this is simply not the case. Majority-white legislative districts were no more likely to elect black legislators in the 1980s than in the previous decade. In the 1970s, approximately 1 percent of all state legislative districts that were less than 50 percent black elected black legislators. That did not change in the 1980s. Thus the need remained for districts with substantial black population percentages if blacks were to have a realistic opportunity to elect their candidates of choice.

What did change, however, was the number and percentage of majority-black districts that elected black legislators. As table 11.2 indicates, only 59 percent of the majority-black state house districts in the 1970s elected a black to office, but in the 1980s this increased to 77 percent. The rise was even greater in state senate districts: from 25 to 62 percent. Yet there was no increase in the percentage of blacks elected in majority-white districts. In fact, the proportion actually dropped in the lower houses. Thus the increase in black legislators observed in table 11.1 was due almost entirely to the increase in the number of blacks elected from majority-black districts and to the increase in the number of such districts. In the

1970s there were 126 majority-black state legislative districts in the seven southern states we analyzed; in those same states in the 1980s there were 182 such districts, an increase of over 44 percent.[4] Almost 84 percent of the southern black legislators in the 1970s represented majority-black districts; this figure rose to 90 percent in the 1980s.

How much of the increase in the number of black southern legislators is the result of black-majority districts voting more African Americans into office, and how much is it the result of the increase in the number of black-majority districts? Grofman and Jackson have independently developed a formula to answer this question. Called the *decompositional effects formula*, it assigns causal weights to a compositional effect (the number of majority-black districts); a behavioral effect (the ability of a majority-black district to elect a black); and an interaction effect (the interaction between composition and behavioral effects).[5] Using this formula, we determined that of the 5.1 percentage point gain in black representation between the 1970s and 1980s in the seven states analyzed, 55 percent was due to composition, 26 percent to behavior,[6] and 19 percent to the interaction of behavior and composition.[7] In other words, most of the black increase resulted from an increase in the number of majority-black districts. Moreover, black candidates actually fared worse in the 1980s in the majority-white districts than they had earlier.

The Color-Blind versus the Racial Polarization Model of Voting

Confronted with these facts, those with an optimistic view of southern race relations may say that the reason most black legislators get elected from black districts is that most blacks live in such districts. There are consequently not many blacks in other districts, which is why so few blacks get elected in them. This is the same reason, they might go on to say, that so few people of Scandinavian descent get elected to southern legislatures. It is not because of anti-Scandinavian voting, but because there simply are not very many Scandinavians there.

We call this *the color-blind hypothesis*, because it attributes the failure of blacks to get elected in white districts to the geography of residential dispersion rather than to whites' tendency to vote against blacks. (This hypothesis, as stated, obviously ignores the question of why blacks and whites tend to live in separate enclaves. But for the sake of argument, let us assume the answer has nothing to do with race.) The hypothesis could be tested, however, only if a significant number of blacks, albeit a minority, lived in majority-white districts. In that case, evidence for this hypothesis would be found in a correlation between the percentage of blacks in those districts and the percentage of black representatives elected from them. In a sample of majority-white districts whose mean black population was 10 percent, for example, one would expect about 10 percent of the elected representatives to be black as well; where the mean black population was 30 percent, one would expect about 30 percent of the representatives to be black, and so forth.

In contrast, *the racial polarization hypothesis* asserts the opposite. According to

this view, the size of the black population in majority-white districts will have little effect on the ability of black candidates to win in them, at least until some tipping point near 50 percent is reached. Evidence for this hypothesis would be a very low correlation between the proportion of black voters in the majority-white districts and the percentage of black representatives elected from them. At the extreme, no blacks would be elected from majority-white districts, and vice versa.

In point of fact, there was in the 1980s a sizable proportion of blacks in the South residing outside majority-black districts, allowing for a test of these contrary hypotheses. A significant majority of blacks lived outside of majority-black house and senate districts in every southern state. (The exceptions were Alabama and Mississippi, where only 50 percent resided outside majority-black house districts.)[8] In five states, over 80 percent of blacks lived outside majority-black senate districts; in three states, over 70 percent of blacks lived outside majority-black house districts.

Given these facts, we have examined the voting behavior of both majority-black and majority-white districts and compared the proportion of blacks one would expect these districts to elect in the 1980s, assuming the color-blind hypothesis were true, with the actual proportion of black legislators elected from them. The results of this test are seen in tables 11.3 and 11.4. They strongly support the racial polarization model at the expense of the color-blind one. In the majority of southern states, not a single majority-white district elected a black legislator. The most progressive state was North Carolina, where 4 percent of the 111 majority-white districts elected a black during the decade of the 1980s.

Racial polarization was also high in the majority-black districts, although not quite so high as in the white ones (see table 11.5). In districts 65 percent or more black, however, polarization was almost complete: nearly 100 percent of these districts elected blacks to office. The fact that black-majority districts were not quite as polarized as white ones probably stemmed from the relatively low black turnout in the black districts; when the actual electorate (as distinct from the total population) became majority black, the black voters were able and willing to elect a black candidate.

Table 11.6 indicates the numerical increase in these heavily black districts in the 1980s. Table 11.5 also shows the growth in the ability of such districts—those 60 percent black and over—to elect blacks to office. These two trends alone combined to boost the number of black legislators significantly in the 1980s. Contrary to the color-blind hypothesis, majority-white districts figured in this growth of black legislators hardly at all.

However, in looking at the black proportion needed to elect black legislative candidates, it is important to be sensitive to state and local variations.[9] In particular, Mississippi was anomalous in that the proportion of majority-black districts electing black candidates was much lower than in any other southern state (see table 11.4). This may in part have been due to lower rates of black participation in this state.[10] In contrast, virtually all majority-black districts in Alabama elected blacks to office.

The increase in the number of black districts between the 1970s and 1980s is presented in table 11.6. There was a 57 percent increase in the number of districts that were greater than 60 percent black. By contrast, the increase in the number of districts between 50 and 60 percent black was 26 percent, indicating an awareness by those drawing the districts of the need for heavy black majorities if black candidates were to have a fair chance of being elected.

In summary, although there was clearly an increase in the number of blacks elected to state legislative office, there is no evidence to indicate that this rise was the consequence of increasing white support for black candidates. Blacks were no more likely to be elected from majority-white jurisdictions in the 1980s than they were in the previous decade. Rather, states drew more majority-black districts, which had higher black concentrations than in the 1970s, as well as a higher likelihood of electing blacks.

This fact cannot be too strongly emphasized. There are basically three types of factors that might affect minority success. First, if black registration and turnout increased relative to whites, greater black success would have occurred in majority-black districts.[11] But this possibility can largely be ruled out because the racial differences in turnout rates remained relatively constant during this period.[12] Even more important, as has been shown using the Grofman-Jackson method described above, most of the increase in southern black representation over the past decade was due simply to an increase in the number of majority-black districts.

A second possible explanation for increased minority success is a growth in black population and/or a change in the black population concentration; that is, if the black population has shifted so as to allow for the creation of additional black-majority districts, then an increase in the number of blacks holding office might be anticipated. However, growth can be ruled out because the percentage of blacks in the South actually declined slightly over the past decade This is true for the entire region and for nine of the eleven states; only in Georgia and North Carolina did the black ratio rise slightly. As for changes in black population concentrations, there is little evidence to suggest much change during the period in question. In fact, the majority-black counties in the Mississippi Delta area of the Deep South have been losing black population.[13]

A third factor that might have produced substantial gains in black representation in an area with racially polarized voting is an increase in the number of black-majority districts. This, finally, is the best answer, as table 11.6 shows. How did this come about?

Why Were More Black Districts Drawn?

Action by the Justice Department, as well as by private litigants (particularly in the 1980s, when civil rights and minority groups made use of the newly amended provisions of section 2 of the Voting Rights Act), accounts for most of the growth

in black legislative representation in the South. This action usually took one of two forms: the state was required to change its election system from multimember to single-member districts, at least in the areas of the state with large concentrations of blacks; or, if the state already employed single-member districts, the state was required to redraw its lines so as not to fragment black voters.

The Justice Department has expressed a decided preference for the use of single-member districts, refusing to preclear state legislative plans with multimember districts, especially in heavily black areas. For example, in the 1970s, section 5 preclearance denials reduced or eliminated multimember districts in the legislative chambers of Georgia, Louisiana, Mississippi, and South Carolina.[14] Then in 1981 and 1982, a series of Justice Department objections also eliminated multimember legislative districts in the covered area of North Carolina.

Voting rights litigation also played a role in forcing states to adopt single-member districts. For example, in Texas in the early 1970s, multimember districts were eliminated as a result of a lawsuit brought by private litigants under the Fourteenth Amendment.[15] In North Carolina, multimember districts in a number of areas not covered by section 5 were eliminated as a result of a section 2 lawsuit brought by the NAACP Legal Defense and Educational Fund.[16]

Table 11.7 lists the type of election system used in each of the eleven southern states in 1965, 1970, 1975, 1980, and 1985. It shows that almost all of the states employed multimember districts in 1965; by 1985 no state had a pure multimember election system, although Arkansas still employed some multimember house districts. Many of the multimember districts in Arkansas were subsequently eliminated as the result of a section 2 suit, however.[17]

States already using only single-member districts have also been subjected to Justice Department intervention. For example, the Attorney General objected to several legislative plans in Alabama, Georgia, and Mississippi because of the fragmentation of black voting concentrations by district lines.

Recent critics of the act have claimed that, in many instances, department interference with the autonomy of state legislatures in drawing redistricting plans is unwarranted;[18] however, without such federal intervention, there is little evidence to suggest that white-dominated southern legislatures would have drawn majority-black districts. On the contrary, these legislatures have fought, often bitterly, to avoid such changes. For example, in the 1970s Mississippi used a variety of legal maneuvers that enabled them to avoid the creation of majority-black districts until 1979.

The Shift to Single-Member Districts

How has the adoption of single-member districts affected black legislative representation? Table 11.8 compares the percentage of blacks elected under multimember and single-member-district systems in three periods. It parallels and updates

analyses done by Jewell and by Grofman and his colleagues.[19] Blacks were obviously advantaged in single-member-district systems, and this advantage grew over time—a pattern that held both in the lower and upper houses.

This finding is further supported by a simple bivariate correlation between the dummy variable "use of single-member districts" and the variable "number of black legislators." We performed this analysis using forty-four data points—observations for each of the eleven southern states at four different times: 1970, 1975, 1980 and 1985 (see table 11.7 for the raw data). For the lower chamber, $r = .80$ and for the upper chamber, $r = .52$. There is obviously a strong relationship between the use of single-member districts and the election of blacks to state legislative office.

Of course, it might be argued that this relationship is misleading because there may be other reasons why states with multimember districts have a lower percentage of blacks serving in their legislatures: for instance, states with multimember district systems may have fewer blacks than states with single-member systems. We tested this hypothesis with before-and-after analyses in the states that changed election systems, comparing shifts in black representation in those jurisdictions that adopted new systems with shifts in those that did not.

The change in black representation in both chambers in all eleven states was identified for each of the three periods: 1970–75, 1975–80, and 1980–85, providing a total of thirty-three observation points for each legislative chamber (see table 11.7 for the raw data). A dummy variable indicated whether there had been a shift to single-member districts within the specified time period for each of the data points. Regressing change in black representation on the dummy variable ("shift to single-member districts") revealed the extent to which changes in black representation occurred in the period in which states switched to single-member districts. Data from states that did not change their system were included in the analysis as a control group. If black representation were to have increased as much in the unchanged systems as in the changed systems, then the increase would not be the result of system change.

The analysis for the lower chambers of the eleven states produced a bivariate correlation of .74 between a shift to single-member districts and change in black representation. A shift to single-member districts was associated with a mean gain of 6.3 black representatives in the state. In state senates, the corresponding correlation was .37, and the change to single-member districts was associated with a mean gain of 1.1 black senators in the state (see table 11.9, part [a]).[20]

As each of these analyses indicates, the switch to single-member districts was an important reason for the increase in black representation in southern legislatures.[21] And with very few exceptions, states did not make the switch voluntarily; Justice Department refusals to preclear state legislative plans that employed multimember districts and voting rights litigation challenging multimember districts as dilutive were the primary causes of the elimination of multimember districts. Tennessee and Florida—neither of which is subject to section 5—were the only states that

clearly shifted election systems voluntarily; every other southern state was required, either by courts or by the Justice Department, to adopt single-member districts in the election of at least one of their legislative chambers.

Section 5 Coverage

Initially, six southern states were entirely covered by the preclearance provisions of the Voting Rights Act: Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. North Carolina was only partially covered. Coverage was extended to the entire state of Texas in 1975. To ascertain the importance of section 5 on black officeholding, we regressed a dummy variable for section 5 coverage ("1" for all states covered in whole or in part) on the number of black legislators in the eleven southern states. The bivariate correlation was .43 for the lower chamber and .21 for the upper chamber. We conclude that the automatic trigger clearly made a difference in black representation (see table 11.9, part [b]). This difference, however, was not as important as that resulting from the substitution of single-member for multimember districts, as evidenced by a multivariate analysis that included the dummy variables "use of single-member districts" and "section 5 coverage." The multiple correlation coefficient was .82 for state houses, and both variables were statistically significant, although section 5 coverage was significant only at the .05 level. Use of single-member districts led to an average increase of 9.4 black representatives; section 5 coverage led to an average gain of 2.8 black representatives. The relationship was not as strong for state senates; the multiple correlation coefficient was .53 and only the dummy variable "use of single-member districts" was significant (see table 11.9, part [c]).

A time variable was also included in the analysis because time alone, we surmised, might have accounted for the increase in blacks elected in the South.[22] We thought it more likely, however, that the increase resulted from eventual black victories in new majority-black districts that did not initially elect a black to office.[23] The simple bivariate correlation between a time interval variable and the number of black legislators in state houses was .38 (see table 11.9, part [d]). When all three variables—time, use of single-member districts, and section 5 coverage—were included in a single multiple regression, only the latter two variables were significant, and the multiple correlation rose to .83. The use of single-member districts led to a mean increase of 8.8 black representatives; coverage led to a mean gain of 2.8 black representatives.

The bivariate correlation between the time variable and the number of black senators, however, was much higher than that between time and the number of black representatives: $r = .56$. Including all three variables within a single multiple regression produced a multiple r of .67, and the variables "use of single-member districts" and time were statistically significant, while section 5 coverage was not. The use of single-member districts accounted for an average increase of 1.2 black senators; and time, an average gain of 0.8 (see table 11.9, part [e]).

We now summarize this part of our analysis. First, the number of black legislators increased as states shifted to single-member districts. Second, the number of black legislators was higher in states covered in whole or in part by section 5, even controlling for the use of single-member districts. Third, there was a slight long-term gain in black representation due to time alone—especially in state senates—even controlling for the use of single-member districts and for whether jurisdictions were covered by section 5.

Black Success at the Congressional District Level

Our examination of black success at the congressional level is brief, primarily because there were so few blacks elected from southern districts and so few majority-black districts. The growth in the number and percentage of southern blacks in Congress was more erratic and less dramatic than in legislatures, as table 11.1 illustrates. In 1985, there were only two black representatives serving southern jurisdictions: Harold Ford from Tennessee and Mickey Leland from Texas. As a result of the 1986 and 1988 elections, there were four: Ford; Craig Washington, Leland's successor; John Lewis from Georgia; and Mike Espy from Mississippi. Only 3 percent of all southern U.S. representatives in 1990 were black, despite the fact that this region was almost 20 percent black in population. On the other hand, prior to 1973 there had been no black representatives from the South.

Black Success in Majority-White Congressional Districts

Three of the four black representatives serving in 1990 came from majority-black congressional districts. Only the Texas Eighteenth was not one; it was, however, a "majority-minority" district. Blacks were a plurality, and together with Hispanics made up 72 percent of the population. We therefore conclude that blacks recently have been far more likely to gain seats in majority-black districts than in majority-white ones.[24] This was not the case in the 1970s, however. There were then no majority-black districts in the South (although the Texas Eighteenth was already majority-minority), but three black representatives were elected: Andrew Young, Harold Ford, and Barbara Jordan. Therefore, as table 11.10 indicates, there has been a decrease in the percentage of majority-white jurisdictions electing blacks to office.

A test of the color-blind hypothesis indicates that the congressional data fit the racial polarization model almost perfectly, just as did the state legislative data. Table 11.11 presents the predicted percentage of black representatives elected from majority-white and majority-black districts, given the mean percentage of blacks in the population for each of the two groups, for those four southern states that actually had majority-black congressional districts: Georgia, Louisiana, Mississippi and Tennessee. In each of these states at least one of the majority-white congressional districts would have been represented by a black if voting was purely

color-blind. What table 11.11 makes quite evident is that there was not a single majority-white congressional district in any of these states that elected a black; conversely, in three of the four states, every majority-black district elected a black.

The size of the black population required to elect a black candidate appears to be only slightly less than the 60 percent required for a black state legislator. But as table 11.12 demonstrates, even in Mississippi a black population of 58 percent was sufficient to elect a black to Congress.[25] Harold Ford's district, the Tennessee Ninth, was only 57 percent black. However, the Louisiana Second, at 59 percent black, had not elected a black as of 1988.[26]

The Reason Majority-Black Congressional Districts Were Drawn

Three of the four majority-black districts created in the 1980s were the result of voting rights litigation: the Georgia Fifth,[27] the Mississippi Second,[28] and the Louisiana Second.[29] This is a clear indication of the importance of the Voting Rights Act for producing black officeholders in the South.

One might ask, if blacks can only be elected from such districts, why not draw more? The answer rests in part with electoral geography: it is much more difficult to draw majority-black congressional districts than state legislative ones.[30] The black population is simply not sufficiently concentrated for these much larger districts. There are also proportionally fewer state senate districts with majority-black populations than there are state house districts: they are larger than house districts.

In summary, the congressional data confirm our earlier conclusions about black legislative success in the South. The simple fact is that virtually all districts in which whites are a majority elect white candidates. This was just as true in the 1980s as in the 1970s. For blacks to win, it is therefore still necessary in the South to draw districts in which blacks are a majority or a supermajority of the population. Redistricting plans that have provided for an increase in the number of majority-black districts have invariably been the result either of a court order following voting rights litigation or a Justice Department preclearance denial. Therefore, the continuing importance of the Voting Rights Act for minority representation in the South simply cannot be denied.

Table 11.1
Percentage of Black Elected Officials in the South and Non-South, 1970–1985[a]

Year	% Black Population	U.S. Congress	State Legislature: Senate	State Legislature: House	County Councils	City Councils
			South			
1985	19.6	1.7 (2)	7.2 (33)	10.8 (143)	5.9 (425)	5.6 (1,330)
1980	19.6	1.8 (2)	3.1 (14)	8.3 (110)	6.8 (310)	4.4 (1,043)
1975	20.4	2.8 (3)	2.4 (11)	6.2 (83)	4.2 (192)	2.6 (605)
1970	20.4	0.0 (0)	1.3 (6)	1.9 (26)	0.6 (24)	1.2 (263)
			Non-South			
1985	8.5	5.3 (17)	3.2 (49)	3.8 (159)	1.0 (109)	1.1 (850)
1980	8.5	4.0 (13)	2.9 (44)	3.3 (137)	0.8 (84)	1.0 (756)
1975	7.7	4.0 (13)	2.7 (42)	3.3 (140)	0.7 (75)	0.8 (621)
1970	7.7	2.7 (9)	1.6 (25)	2.6 (111)	0.3 (40)	0.4 (289)

Note: Numbers in parentheses are *Ns*.
[a]The percentages for the South are for the eleven states of the Confederacy. The remaining thirty-nine states compose the Non-South.

Table 11.2
Southern Majority-White and Majority-Black Districts Electing Black Legislators[a]

Racial Composition of Districts	1970s % (N)	1980s % (N)
	Lower House	
Majority white	2 (637)	1 (1,144)
Majority black	59 (102)	77 (181)
	Upper House	
Majority white	1 (294)	1 (390)
Majority black	25 (24)	62 (52)

[a]Percentages for the 1970s are based on Bullock 1983, table 3. The base for the 1970 calculations include Alabama, Georgia, Louisiana, Mississippi, North Carolina (senate only), South Carolina, and Virginia. The figures for the 1980s are based on data for all eleven southern states provided by the Southern Regional Council, Atlanta.

TABLE 11.3
Majority-White and Majority-Black Districts Electing Black State Representatives in 1988: Actual Percentages and Percentages Predicted by the Color-Blind Model[a]

	Majority-White Districts			*Majority-Black Districts*		
	Actual	*Predicted*	(N)	*Actual*	*Predicted*	(N)
Alabama	0	16	(86)	100	71	(19)
Arkansas	0	11	(89)	55	59	(11)
Florida	3	11	(113)	100	60	(7)
Georgia	1	18	(149)	74	71	(31)
Louisiana	0	21	(87)	83	70	(18)
Mississippi	0	24	(89)	67	66	(33)
North Carolina	4	19	(111)	100	62	(9)
South Carolina	0	22	(97)	59	60	(27)
Tennessee	1	10	(91)	100	79	(8)
Texas	3	9	(141)	100	64	(9)
Virginia	0	15	(91)	78	63	(9)

[a]The actual percentages of majority-white and majority-black districts electing blacks to the upper houses were calculated from data provided by the Southern Regional Council and reflect the number of black representatives as of 1988.

TABLE 11.4
Majority-White and Majority-Black Districts Electing Black State Senators in 1988: Actual Percentages and Percentages Predicted by the Color-Blind Model[a]

	Majority-White Districts			*Majority-Black Districts*		
	Actual	*Predicted*	(N)	*Actual*	*Predicted*	(N)
Alabama	0	18	(29)	83	65	(6)
Arkansas	0	14	(33)	50	56	(2)
Florida	3	13	(39)	100	65	(1)
Georgia	0	19	(47)	78	66	(9)
Louisiana	0	25	(34)	100	63	(5)
Mississippi	0	27	(39)	15	62	(13)
North Carolina	3	22	(34)	100	61	(1)
South Carolina	0	23	(36)	50	56	(10)
Tennessee	0	10	(30)	100	73	(3)
Texas	3	11	(30)	100	53	(1)
Virginia	3	18	(39)	100	69	(1)

[a]The actual percentages of majority-white and majority-black districts electing blacks to the upper houses were calculated from data provided by the Southern Regional Council and reflect the number of black senators as of 1988.

TABLE 11.5
Southern Majority-Black Districts Electing a Black Legislator[a]

% Black	*1970s*		*1980s*	
	%	(N)	%	(N)
	Lower House			
50–54	11	(18)	30	(30)
55–59	42	(19)	57	(21)
60–64	36	(14)	76	(42)
65 or greater	88	(51)	98	(88)
	Upper House			
50–54	0	(6)	27	(14)
55–59	0	(7)	55	(11)
60–64	0	(3)	64	(11)
65 or greater	75	(8)	94	(16)

[a]The 1970s percentages are based on data reported in Bullock 1983. Included in calculations are Alabama, Georgia, Louisiana, Mississippi, North Carolina (senate only), South Carolina, and Virginia. The 1980s percentages are based on data provided by the Southern Regional Council and include all eleven states.

TABLE 11.6
Number of Southern Majority-Black Legislative Districts[a]

% Black	*1970s*	*1980s*
	Lower House	
50–54	18	25
55–59	19	15
60–64	14	28
65 or greater	51	69
TOTAL	102	137
	Upper House	
50–54	6	12
55–59	7	11
60–64	3	7
65 or greater	8	15
TOTAL	24	45

[a]Data are based on the seven states for which there are comparable data for the 1970s and 1980s: Alabama, Georgia, Louisiana, Mississippi, North Carolina (senate only), South Carolina, and Virginia. The 1970s numbers are based on Bullock 1983, and the 1980s numbers are based on Southern Regional Council figures.

TABLE 11.7
Type of Election System and Number of Black State Representatives and State Senators in Southern States[a]

	1965		1970		1975		1980		1985	
	SYS	#	*SYS*	#	*SYS*	#	*SYS*	#	*SYS*	#
					State Representatives					
Alabama	MMD	0	MMD	0	*SMD*	2	SMD	2	SMD	5
Arkansas	MMD	0	MMD	0	MMD	1	MMD	1	MMD	1
Florida	MMD	0	MMD	0	MMD	0	MMD	0	*SMD*	2
Georgia	MMD	2	MMD	2	*SMD*	2	SMD	2	SMD	6
Louisiana	MMD	0	MMD	0	*SMD*	1	SMD	2	SMD	4
Mississippi	MMD	0	MMD	0	MMD	0	*SMD*	2	SMD	2
N. Carolina	MMD	0	MMD	0	MMD	2	MMD	1	*SMD*[b]	3
S. Carolina	MMD	0	MMD	0	MMD	0	MMD	0	*SMD*	4
Tennessee	MMD	0	*SMD*	2	SMD	2	SMD	3	SMD	3
Texas	SMD	0	SMD	1	SMD	0	SMD	0	SMD	1
Virginia	MMD	0	MMD	1	*SMD*[c]	1	SMD[c]	1	SMD	2
					State Senators					
Alabama	MMD	0	MMD	0	*SMD*	13	SMD	13	SMD	19
Arkansas	MMD	0	MMD	0	MMD[c]	3	MMD[c]	4	MMD[c]	4
Florida	MMD	0	MMD	1	MMD	3	MMD	4	*SMD*	10
Georgia	MMD	0	MMD	12	*SMD*[b]	19	SMD[b]	21	SMD[b]	21
Louisiana	MMD	0	MMD	1	*SMD*	8	SMD	10	SMD	14
Mississippi	MMD	0	MMD	1	MMD	1	*SMD*[d]	15	SMD[e]	18
N. Carolina	MMD	0	MMD	1	MMD	4	MMD	4	*SMD*[b]	13
S. Carolina	MMD	0	MMD	0	*SMD*	13	SMD	14	SMD	16
Tennessee	MMD	0	MMD	6	*SMD*	9	SMD	9	SMD	10
Texas	MMD	0	MMD	2	*SMD*[b]	9	SMD	13	SMD	13
Virginia	MMD	0	MMD	2	MMD	1	MMD	4	*SMD*	5

[a] Type of election system (SYS) is designated as follows: "MMD" is a multimember system; "SMD" is a single-member system. A state has been designated as having a multimember system if it has a combination of multimember and single-member districts or if the entire state is composed of multimember districts. An italicized election system type means there has been a change in election system since the last time period reported. The symbol # refers to the number of black legislators serving

[b] Predominantly single-member districts in areas of black population, some multimember districts elsewhere in the state.

[c] Arkansas has one black-majority multimember district and one majority-black single-member district.

[d] Single-member-district system but with black fragmentation.

[e] Reduced black fragmentation in single-member-district system.

TABLE 11.8
Percentage of Blacks in Southern State Legislatures with Both Single-Member and Multimember Districts, 1975, 1980, and 1985

	Elected from Single-Member Districts	*Elected from Multimember Districts*
	Lower House	
1975	9.3	2.1
1980	10.7	3.4
1985	11.3	4.0
	Upper House	
1975	3.4	1.3
1980	4.2	1.2
1985	7.6	2.9

TABLE 11.9
Factors Predicting the Number of Black Representatives in Southern State Legislatures, 1970–1985

	Lower Chamber			*Upper Chamber*		
Variables	R	b	S.E.	R	b	S.E.
(a) Shift to SMDs	.74**	6.3**	1.0	.37**	1.7*	.5
(b) Sec. 5 coverage	.43**	5.4**	2.1	.21	0.7	.6
(c) Use of SMDs	—	9.4**	1.4	—	1.6**	.5
Sec. 5 coverage	—	2.8*	1.4	—	0.2	.5
Multiple *R*	.82**	—	—	.53**	—	—
(d) Time	.38*	2.7*	1.2	.56**	1.0**	.3
(e) Use of SMDs	—	8.8**	1.4	—	1.2*	.5
Sec. 5 coverage	—	2.8*	1.4	—	0.2	.5
Time	—	1.0	0.8	—	0.8**	.3
Multiple *R*	.83**	—	—	.67**	—	—

Note: $N = 33$ for all regression runs.
*$p < .05$
**$p < .01$

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TABLE 11.10
Southern Majority-White and Majority-Black Congressional Districts That Elected Black Representatives

	1970s		1980s	
	%	(N)	%	(N)
Majority-white districts	2	(108)	0[a]	(112)
Majority-black districts	—	(0)	75	(4)

[a]There was not a single majority-white district in the South that elected a black representative in the 1980s. The Texas Eighteenth, although not a majority-black district, was not majority white either; it was 41 percent black and 31 percent Hispanic.

TABLE 11.11
Majority-White and Majority-Black Districts Electing Black U.S. Representatives: Actual Percentages and Percentages Predicted by the Color-Blind Model[a]

	Majority-White Districts			Majority-Black Districts		
	Actual	Predicted	(N)	Actual	Predicted	(N)
Georgia	0	23	(9)	100	65	(1)
Louisiana	0	26	(7)	0	52	(1)
Mississippi	0	30	(4)	100	54	(1)
Tennessee	0	11	(8)	100	57	(1)

[a]The four states included in this chart are the only four states in which majority-black congressional districts have been drawn. The actual percentages were calculated from data provided by the Southern Regional Council and reflect the number of black representatives as of 1988.

TABLE 11.12
Majority-Black Congressional Districts in the South and the Election of Black Representatives in the 1980s

Congressional District	Percentage Black	Black Representative Elected		
		1984	1986	1988
Georgia 5th	65	No	Yes	Yes
Louisiana 2d	59	No	No	No
Mississippi 2d	58	No	Yes	Yes
Tennessee 9th	57	Yes	Yes	Yes
Texas 18th	41[a]	Yes	Yes	Yes

[a]Although the Eighteenth District in Texas was not a majority-black district, it was a majority-minority district, with Hispanics comprising 31 percent of the population.

CHAPTER TWELVE

The Impact of the Voting Rights Act on Black and White Voter Registration in the South

JAMES E. ALT

MOST OF THE ESSAYS in this volume look at the impact of changes in electoral systems on black officeholding in the South, and relate recent gains to the effects of sections 2 or 5 of the Voting Rights Act or to the effects of litigation brought under the Fourteenth and Fifteenth amendments. In contrast, this chapter focuses on institutional barriers to black registration and voting and on the effects, both short term and long term, of the federal registrars sent to various areas of the South in the early years of the act.

The initial concern of the act's framers was to destroy legal barriers to black registration and voting. Most observers agree that this purpose was accomplished within a remarkably short period. But there is little agreement on exactly how this was achieved. In particular, the question remains as to the relative impact on the gain in black registration in 1965 and thereafter of the act's elimination of literacy tests, the presence of federal registrars in southern counties, the 1964 abolition of the poll tax in federal elections, and the later abolition of lengthy residence requirements. The aim of this chapter is to answer this question and to provide an accurate picture of the nature of the changes in southern registration by race from 1960 to 1988.[1]

My analysis is both similar to and different from earlier work on the nature and causes of changes in black registration. The most important similarity is that, following Key, I argue that the southern legal framework was in large part designed to secure the election of white candidates and to keep blacks in a subordinate position. Second, like various other scholars, including Key himself, I look at the effects of institutional mechanisms like literacy tests and poll taxes as distinct from the individual characteristics of potential voters that may affect registration rates. Third, again following Key, I stress the importance of context, showing that particular mechanisms for disfranchisement work differently depending on the relative proportions of the black and white voting-age populations.

On the other hand, there are four main differences between the models developed in this chapter and most scholarship on registration and turnout. First, I rely primarily on a comprehensive data base at the county level. This permits controlling for the effects of various factors, including the relative sizes of the black and white voting-age populations.[2] Second, unlike previous researchers, I do not look

at black registration in isolation from white registration. Rather, I develop a ratio measure that allows the analysis to focus not merely on what proportion of blacks are registered but on *relative* numbers of black and white registrants. Use of this ratio measure as the dependent variable overcomes a major methodological flaw of virtually all previous research, which has focused on black registration rates alone. Such a narrow focus ignores the fact that what has often been most important about elections in the South, from the perspective of both whites and blacks, is whether more whites than blacks will be registered and able to vote and thus able to control who gets elected. Third, I construct a multivariate model with interaction effects. This allows for the possibility that barriers such as literacy tests varied dramatically in their effects on relative black and white registration levels in counties with different black population proportions; the model allows us to quantify and thus more precisely estimate the barriers' effects. Fourth, I model not only the effects particular institutions had on the black/white registration ratio in the pre-act South but also the incentives that whites had to make use of particular types of disfranchising devices in counties with different levels of black voting-age population. That is, while the basic analysis treats disfranchising devices as independent (explanatory) variables, at another point I treat certain devices as dependent variables whose presence or absence is to be explained in terms of factors such as the black proportion in the jurisdiction.

To understand how blacks were prevented from realizing the full potential of their numbers involves modeling a complex interaction between disfranchising devices, black and white efforts at mobilizing and demobilizing voters, and socioeconomic variables whose aggregate-level effects have so far been unclear. But I also want to understand fully the role played by the Voting Rights Act in helping blacks regain the franchise. To do this—by estimating, for example, the degree to which the act's elimination of literacy tests per se permitted growth in black registration—one must supplement the analysis of the effects of disfranchising devices with an analysis of the impact of federal registrars on black registration. Only in this way can we sort out the effects of changes in the law from the effects of enforcement practices.

This chapter is divided into four parts. The first reviews the basic data on registration laws and black participation in the South before passage of the act. In the second part I provide a brief literature review of earlier research on southern black registration. The third section identifies my own hypotheses about the interactive effects of disfranchisement devices and black population levels and about the effects of various socioeconomic variables, and it provides a test of those hypotheses. The final section discusses black registration after passage in 1965 and considers the immediate and long-run impacts on black registration of federal registrars who were sent into some recalcitrant jurisdictions under the act's provisions.

Before proceding, a brief summary of the major findings may help steer the reader through what may appear to be a difficult mass of details and model specifications. While I confirm many of the basic insights of earlier work, especially

those of Key, my various methodological innovations give rise to an analysis that sometimes provides quite different (and, I believe, more plausible) interpretations than those of other scholars, some of whom have used the same data sets as I have.

First, in the nation as a whole, disfranchising devices were used almost exclusively in states where there were significant black (or, outside the South, immigrant) populations.

Second, in the pre-act South, I find that the effects of disfranchising devices and what Matthews and Prothro refer to as white "race organizations"[3]—organizations aimed at keeping blacks in their place, especially as these interacted with black population proportion—far outweighed socioeconomic factors in explaining relative levels of black registration.

Third, the effects of a literacy test interacted with black population concentrations so that its greatest relative disfranchising effect occurred in counties with the highest black population proportions. Only in counties with very few blacks did literacy tests disadvantage whites relative to blacks.

Fourth, while the poll tax also kept many whites off the rolls, its effects interacted with black population concentrations so that its lowest relative disfranchising effects on blacks occurred in the counties with greatest black population; in fact, in terms of proportions ultimately registered, the poll tax disadvantaged whites more than blacks in counties with a black voting-age population proportion above 40 percent.

Fifth, the effects of the presence of white race organizations also interacted with black population concentrations (and the presence of black organizations); like literacy tests, white organizations were more prevalent and had their greatest relative disfranchising effects in the counties with highest black voting-age population proportions.

Sixth, residence requirements disfranchised whites more than blacks.

Seventh, following passage of the act in the late 1960s, a far higher proportion of black-majority counties visited by federal registrars achieved black-majority electorates than was true of the black-majority counties not visited by them. In fact, although in 1967 and 1968 roughly three-quarters of the majority-black counties in Alabama, Georgia, Louisiana, and Mississippi did not have majority-black electorates, every county in these states which did achieve a majority-black electorate in that period either had had a federal registrar or was geographically adjacent to one or more counties visited by a registrar.[4]

Eighth, the overall relative impact of federal registrars appeared to wear off over time, in that registration rates in counties not visited by registrars became comparable to the rates in those that were. Nonetheless, black-majority counties visited by federal registrars achieved black registration majorities roughly a decade earlier than did black-majority counties elsewhere in the South.

Ninth, the residual effects of abolished disfranchisement devices also appeared to wear off over time. Thus the act destroyed the basis for the pre-1965 pattern of disfranchisement and created the foundation for a new political system where

black registration rates by the end of the 1980s were nearly equal to those of whites and where the black-white registration differential was no longer greatest in the most heavily black counties.

Tenth, and finally, in the post-1965 period following the abolition of the disfranchisement mechanisms, white "mobilization," measured by a rise in white registration rates, was strongest in counties with high black proportions, suggesting a continuing fear among whites of the possibility of black electoral dominance. Blacks, suddenly able to register, reacted to this white response with a countermobilization, that is, with higher than normal registration as well. Their countermobilization in these heavily black counties, however, did not lead to yet another ratcheting up of white registration in the period from 1972 to 1988. Further, the gradual closing of the racial registration gap over the years has dampened this pattern of reaction and counterreaction.

Registration Laws in the South Before the Voting Rights Act

Fifty years ago, no southern state had a black voter registration rate above 7 percent, and the southwide average was 3 percent. As the data in table 12.1 show, by the late 1940s the black voting-age registration rate had risen to the teens or higher outside Alabama, Louisiana, and Mississippi. The proportion rose at different rates in different states through the 1950s, reaching a southwide average of nearly 30 percent by the end of the decade. Indeed, even before the Voting Rights Act, black registration rates in Florida and Tennessee were approximately 60 percent, about as high as they were ever to be, while in some other states the rates exceeded 40 percent, remaining dramatically lower only in Alabama and Mississippi. Table 12.1 also shows the rapid rise of black voter registration by 1968, and the smaller temporal and state variations since then. By the late 1980s, the average rate for the entire South was above 60 percent, and all eleven states were within 10 percentage points of the average. A central purpose of this chapter is to explain these variations systematically, both before and after passage of the act.

An Overview of Legal Restrictions on Voting

The Magnolia formula adopted in Mississippi in 1890 epitomized the post–Civil War disfranchising laws. Widely copied in the rest of the South, it combined literacy or understanding requirements, residence requirements, and poll taxes to deny the franchise not only to blacks in general but to migrant workers, those with less education, and the poor.[5] Kousser describes how the laws evolved and how biased application of the rules resulted in the disfranchisement of over 90 percent of previously registered blacks by the early 1900s, while in the Deep South states at least two-thirds of adult whites remained on the rolls.[6] Rusk and Stucker show how the laws reduced turnout in the period between 1890 and World War I.[7]

Literacy requirements, residence requirements, and poll taxes, moreover, were not the only impediments to registration and voting in the legal codes of southern states at various times, nor was the use of these impediments restricted to the South. For example, early twentieth-century litigation over voter registration laws centered on grandfather clauses and the white primary. The former involved various formulas by which other requirements might be waived for those who were registered—or whose ancestors had been registered—at some previous date, typically when there were few black registrants. One version of the grandfather clause was voided by the Supreme Court in *Guinn and Beal v. United States* (1915)[8] in Oklahoma, a nonsouthern state. All attempts to use these clauses ended after the Court's *Lane v. Wilson* decision in 1939.[9] The white primary excluded blacks from voting in party primary elections on the grounds that political parties were private, voluntary associations whose officers were not government officials, and thus were not subject to the constitutional prohibition against racial discrimination in voting.[10] The white primary's abolition gave blacks access to elections that were decisive in one-party areas of the South, causing much of the increase in black registration in Texas, Georgia, and South Carolina before 1947. Between 1944 and 1964, therefore, the primary legal restrictions on black registration were the literacy test, residence requirements, and the poll tax, although restricted registration periods were also a factor.

Literacy Requirements

Literacy requirements were not directed solely against blacks in the South, although their primary use seems to have been aimed at one or another "undesirable" political or ethnic group. Some early literacy tests were adopted to reduce the growing power of urban political organizations that appealed to immigrant voters.[11] For example, Yankees in Connecticut in 1855 and Massachusetts in 1857 adopted laws aimed at disfranchising recently arrived Irish immigrants. Most of the eleven nonsouthern states with literacy requirements in 1960—Arizona, California, Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New York, Oregon, Washington, and Wyoming—had significant immigrant or minority populations, reflecting the test's original purpose of diminishing the voting strength of marginal groups.

As table 12.2 shows, seven southern states, beginning with Mississippi in 1890, adopted forms of literacy or understanding requirements. Speakers in the Mississippi debate emphasized that the requirement was meant to safeguard by legal means white control of the electoral process, which had been previously secured by fraud and violence.[12] The relation between the state's black population proportion in the late-nineteenth century and the imposition of the literacy requirement is obvious from table 12.2. A majority of counties in at least two states were majority black, in which racial bloc voting would automatically have meant at least partial black control of the state legislature.[13]

In the seven states adopting a literacy requirement, the average black illiteracy rate in 1890 was nearly 75 percent, while the corresponding average among whites

was below 20 percent.[14] Thus the race-related impact of a literacy requirement is clear. Moreover, all seven states subsequently attempted to weaken its impact on illiterate whites at least temporarily through property ownership and grandfather-, morals-, or understanding-clause exemptions. Key describes the discretion these measures afforded local registrars, and their consequent discriminatory application.[15] Nevertheless, courts upheld the principle of literacy requirements (with varying requirements of standardization in application) until the Voting Rights Act's automatic trigger in section 4 abolished all literacy requirements in political units where less than 50 percent of eligible voters were registered on 1 November 1964 or less than 50 percent had voted in the 1964 presidential election.[16]

Poll Taxes

Each of the eleven southern states had a poll tax at some time, although those adopted after 1900 in Florida, Louisiana, Georgia, and North Carolina had disappeared even before Key's fieldwork in the late 1940s. Two other states, South Carolina and Tennessee, which had taxed nonelderly men only, abandoned the poll tax between the time of Key's research and that of Matthews and Prothro a decade later.[17] The annual tax of between one and two dollars in the remaining five states—Alabama, Arkansas, Mississippi, Texas, and Virginia—varied in its administration.[18] The tax was abolished as a qualification for national elections by the Twenty-fourth Amendment, ratified in 1964. The Voting Rights Act the following year directed the Attorney General to challenge the tax as a voting prerequisite in state and local elections. He did so, and consequently the Supreme Court in *Harper v. Virginia State Board of Elections* (1966)[19] proscribed its use in all elections.[20]

Other Restrictions

Registration requirements were always remarkably tight in the South. Poll tax payments had been due as long as nine months before elections, and the registration books closed four to five months before elections in Georgia and Mississippi. In Texas, the registration period lasted only four months, beginning in the fall of the year prior to elections and ending a full nine months before them.[21] Even in 1970, of the eleven southern states only Tennessee and Texas had any provision for absentee registration, although twenty-seven of the thirty-nine nonsouthern states had such provisions. State preregistration residence requirements of up to a year (upheld by the Supreme Court as late as 1965) were ubiquitous; in 1960 South Carolina, Louisiana, and Mississippi required two years' residence before registration. These states required one year's residence *in the county* before registration, and all others except Tennessee and North Carolina required six months. Restricted locations, few eligible officials, short daily registration periods, and limited dates for registration also reduced southern voting both before and after the act.[22]

Social Science Research on Registration Rates in the South

There is no question that prior to the act, legal barriers to registration had an impact on low registration rates in the South as compared to the non-South, as well as on the low registration rates in some southern locales as compared to others. Hence, no one in the early 1960s doubted that abolition of these legal barriers would increase black registration and voting. The question political scientists began to address in the years immediately preceding the act was the *relative* impact of these legal restrictions vis-à-vis other variables—socioeconomic and demographic—known to impinge on political participation generally.

The view that the removal of legal barriers was important in effecting gains in black registration permeates early reports of the Civil Rights Commission, which describe rapid increases in black voter registration after passage of the act.[23] Some scholars appeared sure (but offered little systematic evidence) that legal barriers, especially literacy requirements and poll taxes, depressed black registration in the southern states before 1965.[24] Key, in addition, estimated that poll taxes reduced white voting by 5–10 percent and had no effect on the disfranchisment of blacks.[25] However, Key's ability to estimate effects was constrained by the fact that few blacks were registered in any southern state in the late 1940s, when he was conducting his research.

Perhaps the single most important study of pre-act southern registration is that of Matthews and Prothro, who analyzed the effects of individual adults' race, gender, education, income, and occupation, factors that they incorporated into a twenty-one-variable model. Although believing that legal impediments had significant effects on black registration, Matthews and Prothro concluded that "low voting rates of Negroes in the South are, to perhaps a large extent, a result of . . . social and economic factors *more than [they are] a consequence of direct political discrimination by the white community*."[26] Of these factors the most important, they thought, was a jurisdiction's black percentage: "Generally, the higher the percentage of Negroes in an area, the greater the pressure to keep them from voting," at least in heavily black areas.[27] By contrast, they saw legal and extralegal barriers to registration, as well as other political factors like party systems and racial organization, as less important.[28] However, these authors devoted a good deal of attention to the development of black and white racial organizations in the South.[29] They found that about 30 percent of counties had a black race organization and about 20 percent had white race organizations. Other things equal, they concluded that black registration rates declined by about 10 percentage points where white race organizations existed unopposed and increased by about 10 points where both a white and a black race organization (other than the NAACP) were present.[30]

Recent research has challenged their view that legal factors played only a limited role in accounting for low black registration. Stanley has created an impressively large and complex data set by pooling all the Michigan National Elec-

tion Study surveys from 1952 to 1984. He finds that residence requirements lowered white turnout by 3 to 4 percentage points southwide and black turnout by 16 points. Stanley also finds that the poll tax and literacy requirements had no effect on white turnout and lowered black turnout by an estimated 4 and 10 percentage points, respectively.[31]

From at least the time of Key's *Southern Politics*, research on the South has emphasized the mediating role of the black population proportion. However, scholars divide over whether to model the influence of the black percentage on registration as a "black mobilization" process—in which a greater black percentage should produce higher black registration rates—or a "white fear" process, whereby the opposite would be true. In the pre-act South, in other words, did blacks in heavily black counties manage to achieve higher registration through the sheer force of their numbers or, as several authors have suggested, did the very possibility of a large pool of black registrants in these counties provoke whites, who controlled the legal process, to "batten down the hatches" with extraordinarily repressive mechanisms that would hardly have been necessary in counties with low black percentages?[32]

In a frequently cited study of determinants of black registration that examines these alternatives, Salamon and van Evera contrast several explanations, settling on a combination of three variables they believe operated at the local level.[33] The first involved paternalistic relations resulting from the dependence of wage earners on the good will of employers, as in the case of household servants or agricultural laborers. This political dependence led to political submission, they surmise. The second was a high black population, which the authors believe produced unusual white hostility. The third was outside organizational help for blacks, producing black political mobilization. The first two factors, then, according to the authors, depressed black registration, while the third elevated it.

While suggestive, this study is flawed because it fails to measure the effects of a major variable, legal barriers to registration. The authors also do not estimate white registration levels in addition to black ones. For reasons to be discussed shortly, I believe it is immensely important to model and explain relative levels of black and white registration simultaneously. Moreover, a crucial link is missing from this study since the authors do not demonstrate that white hostility, as measured by the presence of race organizations, resulted directly from a high black population percentage. And because their data are limited to twenty-nine black-belt Mississippi counties, the findings cannot be generalized to other areas of the state or the South.

Modeling Race and Registration in the South before the Act

In trying to understand the influence of different variables on black registration in the South in the twenty years or so preceding passage of the Voting Rights Act, it is useful to make some basic simplifying assumptions. The first is that race was a

crucial dynamic in southern politics, overshadowing all others. Insofar as the erection of political barriers to registration is concerned, racial considerations do appear to have been paramount. Second, particularly in the black belt but to a lesser degree in the rest of the South as well, the two racial groups were locked in a zero-sum game, or at least they often perceived the situation as such. One manifestation of this perception would be the tendency for whites to vote for white candidates and for blacks, if they could vote and a black candidate were to run, to vote for black candidates.

From these two assumptions it is easy to proceed to a third, namely, that the dominant political strategy of whites was to ensure the election of white candidates. *From these assumptions it follows that the system of legal impediments to registration which had developed in the region existed to preserve white numerical superiority on election day.* That is, it was designed to ensure that enough whites were registered, regardless of the size of the local black population, so that when voting took place, black candidates would not win, nor could blacks even expect to be the decisive voters in the election of white candidates.

While this proposition may seem obvious, it is remarkable that no scholar of southern politics has ever clearly asserted it, much less made it the foundation for modeling the effects of various impediments to registration.[34] A full understanding of black registration as a measure of potential black political strength is impossible without comparing it to white registration, in a way that takes account of the relative numbers of each race in the eligible population and the effort by each race's members to register.

Our analysis also assumes that the blacks who were actively involved in challenging the southern legal framework, and whites who were intent on maintaining it, were rational in the most direct of ways, in that they measured and compared the costs and benefits of a course of action before undertaking it.

Conditions for Use of Disfranchisement Mechanisms

Generally speaking, then, the severest legal restrictions on black registration would be most likely to be imposed where potential black voters were most numerous.[35] Also, white leaders who in the pre-act South were almost invariably in a position to implement their most favored strategies for maintaining white voting superiority would have considered the advantages and disadvantages of the various combinations of disfranchising options available to them.[36] For example, the poll tax had the advantage of disfranchising blacks but at the cost of disfranchising whites as well. How should the costs and benefits of imposing the tax be weighed in a particular jurisdiction?

Other things being equal, whites would be less likely to pay the tax and would thus "free ride"—let fellow whites bear the burden of maintaining white advantage by going to the polls to outvote blacks—under two conditions: when the white proportion was greatest and the need for white votes the least; or when lower-cost antiblack devices such as the literacy requirement existed.

These general expectations are confirmed both by the quantitative analysis that follows and by direct observation of other changes. For example, as noted above, it was in the states with the largest black proportion that whites went to the greatest effort to implement devices that deny blacks the vote. Also, as shown in table 12.2, the poll tax was eliminated in a number of southern states before passage of the Voting Rights Act, when the literacy test persisted in all of them with a substantial black percentage. Finally, the rapid abandonment of severe residence requirements resonates with the finding in this essay that, other things being equal, such requirements bore more heavily on white than on black registration.

Factors That May Affect the Formation of Race Organizations

Let us assume that blacks would have mobilized resources to fight for black suffrage and whites would have sought to promote white suffrage and to counter black suffrage attempts in the locales where each had the most to gain. We can further assume that these locales were those where the chance of influencing electoral outcomes was most substantial. Then, if we take the presence of black and white "race organizations" as a proxy for each race's local mobilization efforts, we should expect black organizations to have formed where there was more to gain—that is, where there were more blacks in the population—and we should expect the same to have been true for white race organizations, since it was in areas of high black population proportion that the potential electoral threat of blacks to white dominance was greatest.[37]

However, the incentives for race organizations to form should also have been affected by the nature of the structural barriers to black enfranchisement. For example, because the literacy requirement could be applied as an instrument of local discrimination, black organizations should have been more likely where literacy tests were used. Indeed, a natural focus of local black organization was discriminatory application of the literacy requirement. By contrast, a literacy requirement and white race organization were *substitutes*, other things equal, and thus the imposition of a literacy test should have diminished the need for white race organizations. Opposite effects should be observed in the case of the poll tax and residence requirements, because these might have affected white registration as much as or more than black registration.[38]

My analysis reveals that white race organizations, as predicted, were indeed more likely to form where there were poll tax and severe residence requirements (which reduced white registration), but less likely to form where there were literacy tests. By contrast, black organizations formed where there were more blacks to organize and where there were literacy tests,[39] but their presence was made less likely by the presence of a poll tax requirement. Most important of all, racial organizations of one race were more common when racial organizations of the other race were also present, suggesting a pattern of mobilization and countermobilization in the pre-act South.[40]

Hypotheses about Factors Affecting Comparative Levels of Black and White Registration

Based on the arguments developed above, I propose a model in which literacy tests, the poll tax, and white race organizations affected black registration differentially depending upon how numerous blacks were in the local jurisdiction.[41] In particular, I hypothesize that literacy tests were more effective in depressing relative black registration in local jurisdictions where the black proportion was higher.[42] Black race organizations should have had their greatest effects in increasing relative black registration in the same sort of locale, where there would have been most to gain. In contrast, I hypothesize that poll taxes and residency requirements had the least effect in depressing black registration share in locales where the black proportion was higher; that is, they should have had their greatest effect in reducing the relative level of white registration where there were the most whites.[43]

To be sure, socioeconomic determinants of differences in registration rates also existed, and their effects must be measured so that they can be part of a fully specified model. For both races, mobilization and electoral participation should have been made easier by certain factors. For example, greater socioeconomic resources like education and income should have increased registration.[44] Conversely, in agricultural areas economic dependency, such as tenant farming arrangements, may have inhibited black registration as well as the formation of black racial organizations.[45] Religion may also have been relevant. In the early 1950s the Catholic church declared racial segregation immoral. Consequently, the residual registration disadvantage to blacks might have been less in heavily Catholic areas. By contrast, it should have been higher where black Holiness sects were numerous, assuming they focused their members' attention on heavenly rather than worldly goals. It is easy to imagine that other factors may have impinged on relative registration rates. For example, since black population growth could have been more threatening whatever the black proportion in an area, population change may well have been an important variable.

The specification and estimation of our final model is decribed in the next two sections. Only those variables found to be statistically significant are included in it. Some variables found important by previous research—for example, early closing dates for registration periods, the extent of racial violence in a jurisdiction as measured by Matthews and Prothro, and the factional structure of party competition—produced at most small and statistically insignificant estimates in a model with the extensive controls reported below, and are thus omitted from the discussion.

White Numerical Advantage

I focus on the ratio of registered whites to registered blacks as the dependent variable since, as noted previously, it is the ratio of white to black registration,

rather than the registration rates of blacks alone, that determines the ability of whites to maintain political control. At low black concentrations this ratio would have very large values even if all blacks were registered, and the ratio is affected dramatically by even small changes in the denominator; so to smooth the data it is better to use the logarithm of this ratio.[46] I refer to this logged ratio value as the logged *white numerical advantage*. It is zero when the registered electorates of the races are equal in number, negative when blacks are more numerous in the registered electorate, and positive when whites are more numerous.

If the ability of whites to affect white numerical advantage were unrelated to racial population levels, then the white/black ratio would fall as the relative size of the black population grows. I construct an *equal effort* curve to reflect this. It is the value of the ratio that would result at all levels of black population concentration if, at each level, blacks and whites registered at equal rates. For instance, where white concentration is about 88 percent (and black concentration is thus about 12), if both races displayed equal effort (that is, had the same registration rates), white advantage would be proportional to 88/12, or a little over 7.3. Finally, as noted above, we take the natural logarithm of 7.3 (which is about 2), so at 12 percent black the logged "equal effort curve" has a value of 2. This same curve takes the value of 1 where black concentration is just below 30 percent. Again, at 50/50 its value is 0. Figure 12.1 shows this equal effort curve (composed of + symbols) and also contains, for the 1958–60 period, the distribution of observed values for logged white numerical advantage.[47] Each square represents a county. Values above the equal effort curve show white advantage greater than what would result from "equal effort."

The average value for the 858 counties over which the white advantage ratio can be calculated for this period was 2.34.[48] Because we used logarithms to the base e, in the average county registered whites outnumbered registered blacks by a factor of $e^{2.34}$ or about 7:1.[49] White numerical advantage shown in figure 12.1 was almost always above the equal effort curve, though the amount of dispersion varied. Most of the few cases where black registration rates exceeded white ones (that is, those cases below the equal effort curve) were in the eastern part of Texas, a state that had a poll tax and no literacy requirement; but only a handful of these counties produced black electoral majorities. Moreover, in spite of black registration gains in the years immediately preceding the act, if figure 12.1 were reproduced to show the less complete data available for 1964, the proportion of points above the line would actually be even greater because of new white registration in the period.

Factors That Affect White Numerical Advantage

In this section, using data at the county level, I will test the above hypotheses about factors that have an impact on white numerical advantage. A discussion of the characteristics of my data base is in the appendix to this chapter. Table 12.3 contains the estimation results of the regression model that best fits the data for

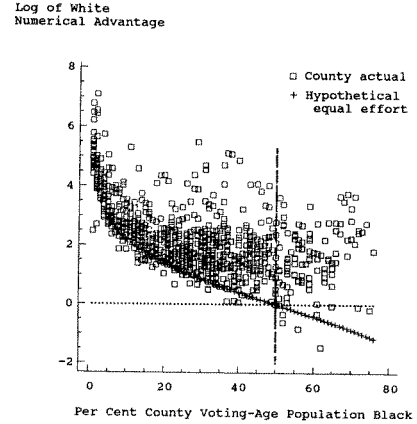

Figure 12.1. Logged White Numerical Advantage and Black Population Concentration, Counties in Eleven Southern States, 1958–1960

1958, explaining logged white numerical advantage with a number of political and socioeconomic variables and including only those interactions between other independent variables and black population concentration that were statistically significant.[50] A negative value for a coefficient means that white advantage is reduced; a positive value means that white advantage is increased. In general, the greater the size of the coefficient, the greater the magnitude of the effect.[51]

Many of the important effects shown in the table involve the interaction between legal barriers or race organizations and the proportion of blacks in the population. To illustrate how to read the table's findings, I review the results for the literacy requirement. This requirement had a composite effect. In counties that were effectively 0 percent black, its effect was to reduce logged white numerical advantage by −0.217 (as shown by the coefficient for the literacy requirement in table 12.3).[52] However, the greater the black population in a county, the more the literacy test tended to advantage whites. For every percentage point increase in black voting-age population, the literacy test increased the logged white advantage ratio by 0.016 (as shown by the coefficient for LR × county VAP % black). Thus,

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for example, if a county were 20 percent black, the effect of the literacy test was to increase logged white advantage by .103 (that is, $-0.217 + 20 \times 0.016$). Note that to figure out the effect on absolute (unlogged) white advantage, one would exponentiate .103 (as $e^{.103}$), which is equal to 1.11, so we can interpret this coefficient as implying an increase over zero white advantage (which has an exponentiated coefficient of 1.00) of roughly 11 percent.

The point where literacy tests began to increase rather than decrease white advantage can be calculated to occur when counties were 13.56 percent black, since $13.56 \times 0.016 = .217$. In other words, in counties above about 14 percent black, the effect of the literacy test was to increase white advantage, and this effect was greatest in the counties with the greatest black population. Hence, the literacy test had a negative effect on white advantage at very low black concentrations, but a positive effect in counties that were sufficently black. Indeed, in counties with very high black concentrations, a literacy requirement alone could have made white advantage more than twice what it would otherwise have been.[53]

In like manner we can infer from the coefficients in table 12.3 that a poll tax increased white advantage until a county's black percentage rose to about 40 percent, but reduced it thereafter.[54] An interactive effect similar to that for literacy tests is found for the presence of white race organizations. For counties over a quarter black, the presence of white race organizations increased white advantage, with the effect on white advantage increasing at higher levels of black voting-age population.[55] The impact of black race organizations was not found to vary with black population level. Rather, the simple effect of black race organizations was to decrease the logged value of white advantage by -0.265, that is, to decrease white advantage by about 23 percent ($e^{-.265} = .767$).[56] Conversely, residence requirements uniformly reduced white advantage, and a twelve-month county residence requirement cut white advantage nearly in half ($e^{-.05 \times 12} = .55$), other things equal. White advantage also was sharply higher in *states* with greater black population shares.[57]

How did socioeconomic variables affect relative registration rates? White advantage was higher where Holiness sects were more numerous in the black population, presumably because these religious organizations were less likely than other organizations to promote secular political involvement, including registration. White advantage was also higher in agricultural areas, where conditions of black dependence were more likely to be found; in areas where the white education level was higher, a situation that probably promoted white mobilization; in areas where population was increasing, perhaps because most inmigrants were white; and in locales where black county population had increased, possibly creating a perceived threat among whites. As expected, white advantage was lower in Catholic and urban areas, and where blacks had higher education on average. Overall, however, the effects of observed variations in socioeconomic context were less pronounced than the effects of the political and legal factors, though they still produced considerable dispersion.

The model in table 12.3 fits all the states.[58] On available data for over 80 percent of the southern counties at the time, no state had an average residual (the discrepancy between observed and predicted white advantage) from the estimates in table 12.3 that was, in terms of statistical significance, different from zero.[59] Thus the model, employing variables that measure legal institutions, levels of organization, and socioeconomic characteristics (including black state and local population concentration), captures in the pre-act period the relevant differences between the Deep and Outer South and among the individual states.

Comparisons with Earlier Research Findings

The principal difference between my work and earlier research is that I show how the effect on white numerical advantage of poll taxes, literacy tests, and white race organizations depended on a locale's black population level, and I provide precise estimates of the nature of those interactions. I confirm the hypotheses that, in the pre-act period, literacy tests had their greatest disadvantaging effects on blacks in areas with high black populations, while poll taxes exerted the opposite effect. But I also show how a variety of other factors—legal, political, and socioeconomic—restricted blacks' ability to register where they stood a chance of challenging white dominance.

Without examining the relative magnitude of the effects of devices such as literacy tests and poll taxes on black/white registration ratios in the pre-act period, we simply could not fully understand what happened in different areas of the South when such devices were removed—as literacy tests were in 1965 and poll taxes were between 1964 and 1966. The findings show that the combined impact of the elimination of literacy tests and poll taxes significantly reduced white advantage generally.

But perhaps even more important, the findings shed light on the differential impact, in various areas of the South, of the abolition of the literacy test and the poll tax. If both were present, their interactions with black population concentration exactly offset each other ($.016 - .016 = 0$), and so at all levels of black population concentration, white advantage would be given by $e^{(-.217 + .631)}$, which equals 1.51; thus the combined effect of these two devices in counties with both was to increase white advantage by a factor of roughly 1.5, or about 50 percent.[60] The fact that literacy tests rather than poll taxes were found in areas with the largest concentration of blacks means that the elimination of these devices helped blacks even more than the 1.5 figure indicates. On the other hand, the effect of their joint abolition, in those counties where they existed side by side, was more than offset by the contemporaneous elimination of lengthy residence requirements, which allowed white registration to increase in areas where black numbers were greatest.

Registration Patterns in the Post-Act South

I now turn to another feature of the black registration struggle, the dispatch of federal registrars under section 6 of the Voting Rights Act to areas of the South

where black participation was lowest, including many counties with black population majorities. I also sketch the basic registration patterns in the post-1965 South. The available data suggest that the southern white registration rate rose from about 65 percent in 1964 to 76 percent by 1967.[61] Reported by the Civil Rights Commission in 1967, the latter rate (in the states covered by the act) represented about a 19-point advantage over the black rate, a difference that still existed over a decade later.[62] Moreover, available data suggest a net increase in the number of southern registered whites from 1964 to 1984 of some 15 million persons, compared to a net increase of 3 million among blacks. The doubling of the black registration rate from 29 to 60 percent in the 1960s only added as many new black registrants (1.7 million) as the much smaller proportionate increases from 61 to 69 percent (1.8 million) added among the much larger eligible white population.[63] A focus on raw numbers, however, would lose sight of dramatic changes in the nature of white advantage.

Figure 12.2 presents average white numerical advantage relative to the equal effort curve in each of the years for which southern data exist at the county level.[64] Each year is represented on this curve as follows. Take 1958, as we did for figure 12.1, and calculate for each county its vertical distance from the equal effort curve, positive if above, negative if below. Then calculate the average of these distances, which turns out to be about 1.4 units: the "average" county is 1.4 units above the line in 1958. Since the vertical axis is in logarithms, exponentiate this number to turn the distance into a numerical multiple. In this case, $e^{1.4} = 3.9$, so in 1958, an average county had a white advantage nearly four times as great as equal effort would have produced, and this value appears in figure 12.2.

The points on the curve in figure 12.2 represent the cumulative effect of everything affecting white numerical advantage, apart from the advantage whites derived solely from their larger population. A value of 1 on the vertical axis of the figure would indicate that blacks were registered in exact proportion to their percentage of the voting-age population. This would happen when, in the underlying data for a given year, the "average" county lay on the equal effort curve.

It is thus obvious from figure 12.2 that while white advantage was declining slightly in the decade before the act, registered whites in the average southern county were still overrepresented by a ratio of almost four to one in 1964. From 1964 through 1967 by far the greatest change in the entire three decades occurred, cutting the white disproportionate advantage by more than half. One can only speculate, given the very modest downward trend between 1958 and 1964, what the disproportionate white advantage would have been in 1968—let alone 1988—had the voting rights bill been defeated. Blacks have continued to advance, though at a much slower pace, since 1972. White advantage was cut again by about a third since the late 1960s, and by 1988 whites and blacks in the South registered in near equal proportions relative to their voting-age populations.[65] If present changes continue, white advantage will disappear: that is, the average county will fall on the equal effort curve sometime in the 1990s.[66]

No one who looks at figure 12.2 can fail to appreciate how striking were the

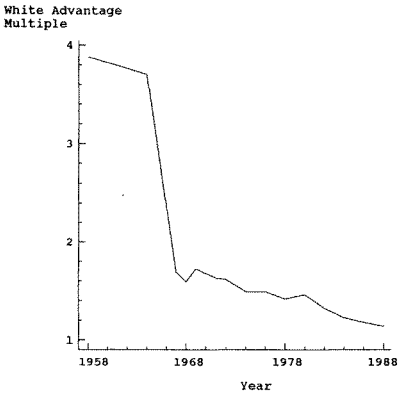

Figure 12.2. White Numerical Advantage as a Multiple of "Equal Effort" in Southern States, 1958–1988

changes in the racial patterns of southern registration in the short period immediately following passage of the act. This fact is hidden by the smoother, flatter trends observed when one considers black voter registration rates (table 12.1) in isolation from their complex interaction with white registration rates, racial organizations, restrictive laws, and demographic conditions. Before the act, an average southern political unit had a white ratio in its electorate that vastly exaggerated the white ratio in its voting-age population. After the act, the disparity diminished dramatically in a few short years.

Federal Examiners and Black Majorities

The elimination of literacy tests by section 4 was an important element in that transformation, but another feature of the act also had an impact on relative black registration. Under section 6, the Attorney General could send federal examiners directly to various counties to facilitate registration of blacks. I use county-level voter registration data after 1965 to trace the effect of the presence of federal examiners.

A fundamental question is whether blacks in black-majority counties actually were able to form majorities of the registered electorate as a consequence of the act. This is an important issue because, as we have seen, the central thrust of white strategy in the pre-act period was to prevent such majorities from forming. Thus, the act created the prospect in majority-black counties of a black numerical advantage at the polls. It seems reasonable that the desire among whites to maintain their advantage would continue, and perhaps even strengthen, as this prospect appeared more likely.

Table 12.4, which combines the data collected by Matthews and Prothro with that available in appendix 7 of the 1968 Civil Rights Commission report and in other sources, shows that in the seven states covered by section 4 in this period, there were 89 such majority-black counties at the time. None had had majority-black electorates before 1965 but 35—nearly 40 percent—had majority-black electorates in 1967 or 1968.[67] Rates of successful majority creation were highest in three Deep South states: 8 of the 10 possible in Alabama, 13 of 26 in Mississippi, and 4 of 9 in Louisiana. In comparison, only 10 of 44 majority-black counties in the other 4 covered states had majority-black electorates.[68]

The presence of federal examiners mattered a great deal for black registration, at least in the transitional period up to 1968. While only 28 percent (16 of 57) black-majority counties without examiners achieved black-majority electorates, 60 percent (19 of 32) of black-majority counties with federal examiners did so during this time. In fact, in Alabama, Georgia, Louisiana, and Mississippi, every county in which a majority-black electorate was registered in 1967 or 1968 either had had a federal examiner or was geographically adjacent to one or more counties that did.

Expanding the scope of the inquiry to include all counties for which interim data on registration are available relative to the base year of 1964, we find that the apparent independent effect of federal examiners having been sent in 1966 was a gain in the black registration rate of 23 percentage points by 1967 or 18 points by 1968. The results for 1967 are shown in table 12.6, while the results for 1968 are omitted because of space considerations. In a larger set of counties in 1968, the average black registration rate was 9 percentage points higher where federal examiners had been sent, relative to its corresponding percentage in 1958–60.[69] These 9 percentage points were added by examiners to what would, in their absence, have been an average predicted black registration rate of 45 percent, so examiners clearly had substantial—double-digit—effects in the short run.

The role of federal examiners in securing *durable* black majority electorates is less clear.[70] On this point there is too little data for firm conclusions. In the three states for which county-level data in 1967 and 1971 are available—Louisiana and the Carolinas—8 of 9 majority-black counties in 1967 no longer had black electoral majorities four years later.[71] In Mississippi, by contrast, 10 of the 11 majority-black electorates in 1967 were still majority black four years later. Examiners had been in 8 of those 10, and they revisited 6 counties in 1969 and/or 1971.[72] Econometric analyses of all southern counties for which we have sufficient

data show that as early as 1972 the independent impact of federal registrars had entirely dissipated.[73]

Yet in one important respect the presence of registrars in the early years did have a measurable impact over the long term. As we saw above, in Mississippi and Alabama more than half the majority-black counties had achieved majority-black electorates as a result of the presence of federal examiners as early as 1967 or 1968. No other southern state witnessed this achievement until the late 1970s at the earliest, when South Carolina joined the ranks of the other two states. It was not achieved in other southern states until the mid-1980s. Thus, the use of federal registrars in the transitional years clearly mattered in the majority-black counties to which they were sent. One can only speculate whether a more aggressive policy of deploying registrars might have changed the political landscape of the South. As it was, for all practical purposes the deployment ended by 1970.

Explaining the Contemporary Southern Political System

What has caused the dramatic decrease in registration differences between whites and blacks? Figure 12.2, buttressed by my earlier econometric findings, reveals big differences between 1964 and 1967, which are surely the result of the Voting Rights Act and its related legal and institutional changes. But what about the period since then? The figure also shows a substantial decline in white advantage more recently, from white overrepresentation (relative to "equal effort") of about 60 percent in 1972 to only 10 percent in 1988. Changes of that magnitude demand explanation too, even in view of the much larger changes immediately beforehand.

On the whole, scholars argue that interracial competition of the sort motivating the pre-act politics of registration has become less important.[74] For although some examples of racially motivated mobilization of new registrants exist,[75] nowhere are they part of a systematic pattern. With the legal impediments of the pre-act South swept away—so the usual account of registration in the post-act South goes—blacks and whites both registered in increasing numbers, a phenomenon described by Black, Stekler, and others.[76] Because the number of new white registrants was far greater, blacks remained a small minority of the registered electorate in many areas. Blacks, of course, participated at greater rates than they did before passage of the act, but at rates lower those of whites, other things equal.[77]

This account is correct as far as it goes, but it does not explain the continuing decline in white advantage. That can be explained in part by the fact that while whites have registered in greater numbers, they have registered at lower rates than before in many parts of the South, as we shall see in a moment. However, even this does not address the question of whether the old interracial fight to control the makeup of local electorates that characterized the pre-act South has continued into the present. For that, we again have to consider what is happening to white and black registration rates in the same places and at the same times.

Since 1972 voter registration figures by race have been officially reported on a continuing basis by South Carolina and, with gaps, by North Carolina, Georgia, and Louisiana. These counts of registrants can be transformed into registration rates by dividing them by contemporaneous estimates of white and black voting-age populations.[78] The results, shown in table 12.5, suggest that the decline in white advantage since 1972 could be due to several factors: increases in black registration rates in some states (especially North Carolina and to some extent Georgia), decreases in white registration rates in others (most notably Louisiana), and decreases in registration rates of both races (though a greater decrease among whites) in South Carolina.

Racial Mobilization and Countermobilization

Fortunately, the data are available at the county level in these four states, so we can look even more closely at factors that affected black and white registration in the post-1965 period.[79] One set of factors—what might be called an interaction of opposing forces—has been referred to as the *mobilization-countermobilization hypothesis*. For our purposes, mobilization occurs when one race's registration rates increase in anticipation of an increase in another race's rates, after allowing for the effects of other relevant factors. Countermobilization occurs when the second race's registration rates increase when those of the first race do so, after allowing for the effects of other factors. Simultaneous estimation of white and black registration rates allows for the possibility of measuring mobilization and countermobilization while avoiding bias in estimates attributable to these variables having reciprocal effects. Table 12.6 reports structural models of black and white county-level registration rates in 1967, 1972, 1980, and 1988, based on the four states listed in table 12.5, the only ones for which recent data are available.

The simultaneous structural estimates in the table show that white registration rates in the post-1965 period were directly related to black population concentration, while black registration rates responded to white registration rates, other things equal. That is, white registration rates were now higher where blacks were a larger part of the population (since the act removed the main factors inhibiting black registration in such locales), and blacks reacted, and continue to react, to this white response. These relationships appear in the data for 1972, 1980, and 1988, after controlling for the continuing effects of several demographic factors—including income, urbanism, and population growth—as well as allowing for differences among the states not captured by these other variables.

So the story told by the data is as follows. Where blacks were more concentrated, greater proportions of whites registered, once the legal barriers to black participation fell. Where this happened, other things equal, higher proportions of blacks—now able to register—responded by doing so. But rising black registration rates, as distinct from heavy black population concentrations, did not similarly affect white registration rates, at least before 1988. Therefore, because white registration rates were apparently positively related to black population concentration (other things equal), and black registration rates to white rates, unless we can find other factors to explain why this was so, it is hard to avoid the interpretation that registration politics in these years was characterized by white mobilization and black countermobilization. These results qualify the repeatedly observed finding for the post-1965 South that black registration rates were positively related to black population concentration.[80] In fact, white registration rates were higher where black concentration was higher, but black concentration appears to have had no significant independent effect on black registration rates. That is, black concentration had no apparent effect on black registration rates other than indirectly through its effect on white registration rates, when the rates of both races were estimated simultaneously.

The exact magnitudes of the estimates vary, but the qualitative outlines of the processes just described are robust in spite of considerable experimentation with the specifications and estimating techniques reported in table 12.6. However, the gradual erosion of racial differences in registration levels has somewhat diluted the reactions that its estimation results describe. For instance, the effect of black concentration on white registration rates declined between 1972 and 1988, while the impact of white registration rates on black rates came closer to a one-for-one correspondence. Were such trends to continue, future data would simply reveal areas of higher and lower registration rates of both races, unaffected by racial population concentrations, after allowing for the effects of other socioeconomic variables. This changing structural relationship between black and white registration rates is consistent with the disappearance of the relationship between white numerical advantage and black population proportion.[81]

Other Factors Affecting Relative Registration Rates

Table 12.6 also shows that relative white registration rates were consistently lower in urban areas of the South, possibly reflecting greater relative white population mobility there than in rural areas. Black registration rates were initially higher in areas that were more heavily Catholic, and, more recently, in areas where average incomes were higher. In 1988 black rates were also higher where more of the population was employed in agriculture, reversing a negative correlation that others had reported as surviving into the 1970s, but mirroring the lower white rates in urban areas.[82] Hence, even the effects of agricultural labor dependence, so prominent earlier, had disappeared by 1971. Limited effects of state context also existed. In particular, relative to predicted values, white registration rates were always higher in Louisiana and North Carolina relative to the mean for the four states.[83] Most important, given the absence of the legal impediments of earlier years, table 12.6 shows that these laws had no lasting holdover effects in the aggregate. As suggested previously, the absence of a significant effect after 1967 for the dummy variable reflecting use of federal registrars in a county suggests that the relative impact of federal examiners' presence on black registration rates wore off over time.

Another finding concerns the ebb and flow of registration rates. There was a good deal of volatility in registration rates immediately after the act, as one might expect in the wake of tumultuous changes. Since 1972, however, registration rates for both races were extremely stable within counties over time.[84] Admittedly, there was a regular cycle in registration rates, consisting of a surge in presidential election years and a dropoff in the midterm years—a cycle with greater amplitude for whites than blacks.[85] Once we allow for this cycle, we find the often discussed "Jackson surge" in black registration rates in 1984, the year the Reverend Jesse Jackson mounted the first serious candidacy by a black man for the presidency. My estimate is that the surge was on the order of 5–6 points and had no lasting effects.

The Winds of Change

In this chapter I have analyzed systematic estimates of white and black registration rates before and after the Voting Rights Act became law. I have estimated parameters for a variety of effects on both white and black registration rates in models that fit data for the entire eleven-state South. In the period before 1965, legal restrictions and racial organizations—mediated by black population concentration and some socioeconomic conditions—interacted to produce a system with greatly disproportionate white numerical advantage in southern registered electorates. This system was largely overthrown by 1967, with dramatic changes in relative rates of white and black registration that can principally be attributed to legal and institutional shifts, perhaps most notably the elimination of literacy tests. In addition, federal examiners authorized by the act played a substantial but short-lived role in raising black registration levels and securing local black majorities.

Consequently, it may safely be said that the Voting Rights Act transformed the basis of the southern electoral system, inasmuch as it was the vehicle for destroying the institutional barriers to black registration. Between 1972 and 1988, a pattern of racial mobilization and countermobilization, now possibly in decline, produced a reasonably stable system characterized by a ubiquitous but eroding white numerical registration advantage. The decline in this advantage raised the very real possibility of convergence in white and black registration rates as a percentage of eligible white and black voters, respectively, sometime in the 1990s. If and when that happens, the transformation of the southern registration system that the act began will be complete.

Appendix: Data Sources on Southern Counties

Pre-1960 county registration data for 1,083 of the 1,136 counties in the eleven-state South were taken from the Matthews and Prothro data set, originally provided to me on hollerith cards by James W. Prothro.[86] Registration requirement information about the pre-1965 period was taken from Smith.[87] Interim data on voter registration for 1964 and 1967 were taken from a report by the U.S. Commission on Civil Rights.[88] Subsequent registration data for 1968–71 were provided by the Voter Education Project of the Southern Regional Council and merged with the other data by Philip Wood at the University of Essex, England.[89] Each of the three data sources employed estimates in some cases, and no guarantee of accuracy can be given. Population data for 1970 and 1980 were collected by the U.S. census. Voter registration data for 1972–88 were provided by Election Data Services (EDS) of Washington, D.C. Supplementary data for Georgia in 1980, matching EDS data in other years, were provided by Michael Binford of Georgia State University.

Matthews and Prothro's data set on registration is mainly for 1958, although apparently for Tennessee, at least, 1960 figures were used. No white registration data were available for Mississippi in either year, but 1964 data for some counties (twenty in all) were published by the U.S. Commission on Civil Rights,[90] and were added to the earlier data by Philip Wood. Matthews and Prothro unfortunately did not record numbers of registered whites and blacks. However, as long as there are registration rate and voting-age population data for both races, the ratio of registered whites to blacks can be calculated.

For the 1960s and 1970s, changes occurring between decennial census years are assumed to occur at a constant rate, in order to allow interpolation of voting-age population figures for noncensus years. For the 1980s, population changes occurring between 1970 and 1980 are extrapolated forward year by year. These results will be confirmed or disconfirmed when final 1990 census data become available. The extrapolation probably produces greater measurement error than the interpolation.

TABLE 12.1
Estimated Percentage of Voting-Age Blacks Registered, Eleven Southern States, 1947–1986

State	*1947*	*1956*	*1964*	*1968*	*1976*	*1986*
Alabama	1.2	11.0	23.0	56.7	58.4	68.9
Arkansas	17.3	36.0	49.3	67.5	94.0	57.9
Florida	15.4	32.0	63.8	62.1	61.1	58.2
Georgia	18.8	27.0	44.0	56.1	74.8	52.8
Louisiana	2.6	31.0	32.0	59.3	63.0	60.6
Mississippi	0.9	5.0	6.7	59.4	60.7	70.8
N. Carolina	15.2	24.0	46.8	55.3	54.8	58.4
S. Carolina	13.0	27.0	38.7	50.8	56.5	52.5
Tennessee	25.8	29.0	69.4	72.8	66.4	65.3
Texas	18.5	37.0	57.7	83.1	65.0	68.0
Virginia	13.2	19.0	45.7	58.4	54.7	56.2
TOTAL SOUTH	12.0	24.9	43.1	62.0	63.1	60.8

Source: Data are from Stanley (1987, 97), who lists the original sources, supplemented for 1986 from *Statistical Abstract of the United States* 1990, table 441. These estimated registration rates are based on probably out-of-date values for the growing black voting-age population, and therefore systematically overestimate black registration by several percentage points, the more so the further a sample year is after the last decennial census. Stanley notes this problem for 1968 only. See table 12.5 below for adjusted estimates where alternative data are available.

TABLE 12.2
State-Level Characteristics, Eleven Southern States

		Legal Restrictions in 1960		
State	*Average Black % in State Population, 1880–1900*	*Literacy Requirement? (Date established)*	*Poll Tax?*	*Residence Required in County? (Months)*
South Carolina	60	Yes (1895)	No[a]	Yes (12)
Mississippi	58	Yes (1890)	Yes	Yes (12)
Louisiana	49	Yes (1898)	No[b]	Yes (12)
Georgia	47	Yes (1908)	No[b]	Yes (6)
Alabama	46	Yes (1901)	Yes	Yes (6)
Florida	45	No	No[b]	Yes (6)
Virginia	38	Yes (1902)	Yes	Yes (6)
North Carolina	35	Yes (1900)	No[b]	Yes (1)
Arkansas	27	No	Yes	Yes (6)
Tennessee	25	No	No[a]	Yes (3)
Texas	22	No	Yes	Yes (6)

[a]Some exemptions; abolished after 1948.
[b]Abolished before 1948.

TABLE 12.3
Explanation of Logged White Numerical Advantage,[a] Counties in Eleven Southern States, 1958–1960

Independent Variable	*Estimated Coefficient*	*Standard Error*
Literacy requirement (LR)	−0.217	0.167
LR × county voting-age population (VAP) % black	0.016	0.005
Poll tax (PT)	0.631	0.128
PT × county VAP % black	−0.016	0.003
Black race organization	−0.265	0.062
White race organization (WRO)	−0.530	0.152
WRO × county % VAP black	0.024	0.004
Residence requirement in county (months)	−0.050	0.013
County VAP % black	−0.061	0.005
State population % black	0.052	0.008
% Catholic in county	−0.007	0.002
% Holiness sect members in county	0.018	0.010
% county labor force employed in agriculture	0.012	0.002
White-black difference in median school years completed	0.097	0.027
% change in county population, 1950–60	0.029	0.012
% county population urban	−0.001	0.001
% change in black population proportion, 1900–1950	0.006	0.003
Constant	2.189	0.221
R-squared	0.567	—
Standard error of the regression	—	0.800

Sources: Described in the appendix to this chapter.
[a]Dependent variable is the natural logarithm of the estimated ratio of white and black registered voters in the county. Estimation is by ordinary least squares. Number of observations is 833.

TABLE 12.4
Black Majorities in Voting-Age Population and Electorate, Counties in Seven Southern States, 1967–1968

Did County Have:			
A Majority-Black Voting-Age Population?	*A Federal Examiner in 1966?*	*Number of Such Counties*	*Number Achieving a Majority-Black Electorate*
No	No	469	0
No	Yes	27	0
Yes	No	57	16
Yes	Yes	32	19

Sources: Data are calculated from sources listed in the appendix to this chapter. Data include black majorities in registered electorates in either 1967 or 1968 in the states covered by section 4 of the Voting Rights Act.

TABLE 12.5
Estimated Registration Rates by Race, State, and Year, Four Southern States, 1972–1988

State	*1972*	*1980*	*1984*	*1988*
	Black Voter Registration			
Georgia	—	45.8	52.6	52.2
Louisiana	55.3	54.6	59.9	59 1
North Carolina	46.9	46.7	61.1	59 7
South Carolina	49.4	48.7	53.9	46 4
	White Voter Registration			
Georgia	—	69.1	70.4	70 5
Louisiana	83.9	78.0	77.1	70 5
North Carolina	73.2	72.0	75.5	73 8
South Carolina	63.7	60.8	60.9	53 5

Sources: Data are calculated from sources listed in the appendix to this chapter.

TABLE 12.6
Simultaneous Estimates[a] of Registration Rates after Passage of the Voting Rights Act, Counties in Four Southern States

Independent Variable	*Estimated Coefficient in Year* 1967	1972	1980	1988
(a) Dependent Variable: Black Voter Registration Rate				
Constant	16.430*	−12.700	−5.010	−21.850*
Lagged black registration rate	0.572*	—	—	—
Federal examiner 1966	22.450*	—	—	—
Population % black	−0.050	—	—	—
White registration rate	0.213*	0.617*	0.699*	0.950*
Population % Catholic	—	0.110*	0.093*	0.135*
County median income	—	0.001*	0.000	0.001*
Population % urban	—	—	−0.085*	—
Labor force % in agriculture	—	—	—	0.429*
Louisiana	—	—	—	7.120*
Standard error	15.8	10.2	11.8	12.3
(b) Dependent Variable: White Voter Registration Rate				
Constant	44.490*	58.310*	57.860*	41.080*
Lagged white registration rate	0.572*	—	—	—
Population % black	0.065	0.342*	0.135*	0.128*
Black registration rate	0.053*	0.247	0.251	0.390*
Population % urban	−0.096*	−0.179*	−0.153*	−0.103*
County population % increase, 1960–70	0.040	−0.088	−0.058*	—
Louisiana	5.150*	16.840*	13.490*	8.650*
North Carolina	−6.160*	5.030*	6.170*	9.450*
Georgia	—	—	4.130*	6.370*
Standard error	9.7	10.0	9.1	8.3
Observations	361	202	337	349
System R-squared	.541	.567	.434	.407

Sources: Data are from sources listed in the appendix to this chapter.

[a]Estimation is by three-stage least squares. Each year is estimated separately. An asterisk (*) indicates coefficient more than twice its standard error. A dash indicates statistically insignificant effects, as does the omission of any variable included in table 12.3.

CHAPTER THIRTEEN

The Voting Rights Act and the Second Reconstruction

CHANDLER DAVIDSON AND BERNARD GROFMAN

THE VOTING RIGHTS ACT is deeply rooted in American history. It was the last major piece of legislation passed during the southern civil rights movement. That movement, in turn, was but a phase of the battle for black citizenship rights growing out of the Civil War and Reconstruction. And, of course, the war itself was fought over the slavery question and was a milestone in the African-American quest for racial equality. A broad historical perspective is therefore essential to an understanding of the act's significance.

THE FIRST AND SECOND RECONSTRUCTIONS

It is our thesis that the Voting Rights Act must be seen as a mechanism to insure that the Second Reconstruction of the 1960s did not meet the same fate as that of the First Reconstruction of the 1860s and 1870s.[1] In that era, the basic rights of citizenship ostensibly guaranteed African Americans by the Fourteenth and Fifteenth amendments enacted following the war were stripped away with astonishing speed, largely as a result of a ferocious white southern backlash. Table 9 in the state chapters of this volume chronicles in detail the ingenious devices adopted in the southern states from the 1860s forward to prevent blacks from registering and voting. The southern "redeemers" could not have succeeded, however, without the indifference of most northern politicians to the plight of the newly freed slaves, and without the complicity of the federal courts. In the absence of broad support for the Negroes' cause, the forces of reaction effectively gutted the Civil War amendments of their intended powers to secure black people's newly gained rights.

Almost a century later, as the civil rights movement gathered momentum, it was clear to historically informed observers that the white South would not surrender easily as blacks tried once more to obtain rights they had acquired during Reconstruction. Writing in the spring of 1965 before passage of the Voting Rights Act that August, Woodward observed that "the South since 1954 has been more deeply alienated and thoroughly defiant than it has been at any time since 1877."[2] Continued white resistance in the 1960s to school desegregation, the widespread violence against blacks who attempted to desegregate public accommodations, the ominous election of racist demagogues calling for an end to federal pressure for change, and the failure of the Civil Rights acts of 1957, 1960, and 1964 to end systematic

exclusion of blacks from the voter rolls in the Deep South convinced civil rights leaders, Congress, and President Lyndon B. Johnson that only extraordinary measures would guarantee black southerners the rights they had long been denied.

Voting rights was a case in point. During and after the First Reconstruction, southern white officials were quick to employ devices that denied newly enfranchised blacks their political rights without blatantly violating the Fifteenth Amendment but that violated it nonetheless. Then, a half century after disfranchisement, when the Supreme Court in 1944 declared white primaries unconstitutional, many southern officials, anticipating a concerted push for black suffrage, once again took steps to prevent it. Simultaneously, as chapters in this book reveal, they began amending electoral laws to prevent black officeholding in the event that substantial numbers of blacks entered the electorate. So strong was white resistance that efforts to minimize the influence of black votes continued and sometimes intensified after passage of the act in 1965.[3]

The failure of the white South to submit voluntarily to the growing demand in the nation at large for abolishing its Jim Crow system was the backdrop for the debate over the Voting Rights Act in the spring and summer of 1965. The framers of the act, which was designed to enforce the Fifteenth Amendment, were well aware of that amendment's failure to effectively protect black voting rights almost from the time it was ratified in 1870. The Justice Department under President Johnson, as well as congressional leaders—pushed hard by civil rights forces—were determined that the Second Reconstruction should not fall victim once more to the same reactionary impulse that had emasculated the First Reconstruction.

The provisions of the act with the most immediate impact were those which temporarily abolished the literacy test in most areas of the southern states still using it and authorized the executive branch to send federal examiners to register black voters in those same jurisdictions—ones that had shown the greatest resistance to granting African Americans their constitutional rights. Also of major importance were the preclearance provisions of section 5, requiring covered jurisdictions to submit proposed changes in voting practices to the Justice Department. Before the department would approve changes in electoral practices, it had to be convinced that the changes had neither the effect nor the purpose, in the language of the act, of "denying or abridging the right to vote on account of race or color."

Two features of section 5 are particularly noteworthy and explain the intense resistance of many white southerners. First, the only appeal of the department's preclearance denial was to the Federal District Court for the District of Columbia, a court then presided over by cosmopolitan and progressive judges.[4] This meant that southern district judges could no longer hamstring private plaintiffs or Justice Department lawyers, as they had done under the Civil Rights Act of 1957 and its successors. Second, because no change in voting practices could legally be implemented without preclearance, southern jurisdictions whose election schemes had been struck down by a federal judge could not immediately implement a different form of voting discrimination and apply it while it was being litigated, as they had been able to do before passage of the act.

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In sum, the new Voting Rights Act would shortly bring the force of the federal government to bear directly on what have been called first-generation problems—white southerners' efforts to prevent blacks from registering and voting—and it would provide a powerful tool that could be used to abolish second-generation devices such as vote dilution, a barrier to black officeholding. The act did this primarily by giving the executive branch extraordinary monitoring and enforcement powers in that region of the country where adamant opposition to black voting rights was still widespread.

Once the battle was lost to defeat the act or, barring that, to scuttle key provisions, various southern officials challenged the act's constitutionality, refused to submit changes in election practices for preclearance, tried to retain the poll tax in states where it was still used, and sought to have the act's provisions construed narrowly so as, for example, to permit devices like at-large elections to replace single-member districts without the need for Justice Department approval.

Most of their stratagems failed. South Carolina's challenge to the act's constitutionality was rejected by the Supreme Court in 1966.[5] That same year, in cases growing out of Justice Department challenges to the poll tax in state and local elections—challenges section 10 instructed the Attorney General to file—the Court ruled that the tax was unconstitutional.[6] Then, in a case that was to prove critical for the subsequent evolution of voting rights law, the Court in 1969 rejected Mississippi's claim that the state's massive changes from district to at-large elections did not need to be precleared under the act.[7] Reviewing the act's legislative history, the Court held that such changes fell under the act's definition of voting practice and as such might abridge protected voting rights.

The Impact of Sections 4, 6, and 7

In very general terms, the act's overall enfranchising effect has been known for some time. By abolishing the literacy test in covered jurisdictions, section 4 of the new law accomplished what none of the earlier laws or judicial decisions during the post–World War II period had achieved: a dramatic growth in black registration in the Deep South, and a significant though smaller growth in the Outer South, where blacks had already begun to register in appreciable numbers. As Alt demonstrates in table 12.1, which presents registration trends by race in each southern state, a striking shift occurred shortly after the act was passed.

Alt's chapter should prove to be a definitive study of southern black and white registration in the decades immediately before and after passage of the act. It integrates sociological and demographic factors, data on white and black political organizations, information on institutional practices having a racially exclusionary impact, and events and actions tied to passage of the act—all within the framework of a statistically sophisticated longitudinal research design.

Alt gives precise estimates of the effects formal barriers such as the literacy test had in depressing black registration. Applying econometric techniques to insights

Key had achieved some forty years earlier, he presents a unified model of southern political participation in the decade before 1965, focusing on counties' black population percentage as the major variable, both in isolation from and interaction with other factors. He shows how barriers to voting were most pernicious in locales with the heaviest black concentration—areas in which Key had predicted whites would perceive the greatest threat of black voting because it could result in black electoral control.

Alt's analysis reveals how the act's passage led to a complete breakdown of the old patterns of minority exclusion in which black registration was lowest relative to that of whites in the areas of the South with the greatest black population concentrations. Alt also analyzes the critical role played by federal registrars authorized under sections 6 and 7. Of particular interest is his finding that the registrars' intervention quickly succeeded in achieving increased black registration rates in the majority-black counties where they were sent. A comparable registration level took another ten years to achieve in heavily black counties elsewhere in the South.

The Impact of Section 5

The act's preclearance provisions have had a tremendous impact on southern legislatures during reapportionment because the Department of Justice has not only rejected plans for multimember districts that would submerge substantial black voting strength but plans for single-member districts that would either fragment or pack minority population concentrations. Table 10 in the state chapters demonstrates the extent of growth in black legislators.

Handley and Grofman in chapter 11 show the almost perfect correlation between majority-black districts and black officeholding in state legislative and congressional districts. This correlation also exists in cities and counties with districted plans, as shown in table 7 of the state chapters and in table 10.5. Handley and Grofman further demonstrate that the creation of these majority-black legislative districts is largely the result of Justice Department preclearance denial or southern legislators' expectation of it. In the eight states on which we focus in this volume, the number of black state legislators and U.S. representatives increased from 2 in 1964 to 160 in 1990. Had it not been for section 5, this increase would have been very much smaller, our findings strongly suggest.

Even so, black officeholding in the South by the end of the 1980s was still sharply lower than it would have been were race not a factor in elections. Table 10 in the state chapters demonstrates this clearly. Black elected officials in Texas, for example, made up only 1.2 percent of the state's officeholders in 1989, although the average black population over the past thirty years was 12.3. In Mississippi, with the largest black population proportion of any state in the union—a 37.4 percent thirty-year average—blacks in 1989 made up only 12.2 percent of the officeholders. Georgia was among the states with the highest proportion of blacks

in its house of representatives and senate—17 and 14.3 percent, respectively—at the end of the 1980s. And yet the black population in Georgia between 1960 and 1990 averaged 27 percent.

At the local as distinct from the state level the principal impact of section 5 arguably has been more limited. By the time the Voting Rights Act was passed, a clear majority of southern localities already employed at-large elections. Thus section 5—limited to enforcing the retrogression standard in cases where jurisdictions planned to change election type—could not serve as the primary mechanism to attack the discriminatory effects of at-large elections in the South.[8] Instead, challenges initially were mounted in terms of the constitutional standard for equal protection and, after 1982, the revised standard of section 2. During the period before 1982, the act functioned largely at the local level to deter majority-white jurisdictions from imposing changes in election practices, other than the already existing at-large elections, that would dilute minority voting strength.

The Impact of the Constitutional Equal Protection Standard

After holding in *Fortson v. Dorsey* (1965)[9] that multimember district plans might under certain circumstances restrict constitutionally protected rights, the Supreme Court in *White v. Regester* (1973)[10] upheld a lower court's decision striking down multimember legislative districts in Texas that were found to dilute black and Mexican-American voting strength. Building on *White*, minority plaintiffs later in that decade filed constitutional challenges to local at-large elections and often prevailed, although the number of municipal jurisdictions affected was not that large.[11] Even so, *Stewart v. Waller* (1975)[12] caused over thirty Mississippi cities to revert to single-member districts.[13]

In *City of Mobile v. Bolden* (1980)[14] the Supreme Court held that plaintiffs must show a discriminatory purpose in creating or maintaining a challenged election practice in Fourteenth Amendment minority vote-dilution cases, effectively rejecting the results standard that lower courts had fashioned from the language of *White*. Because the evidentiary standard laid down in *Bolden* was seen as virtually impossible to satisfy without "smoking gun" evidence of intentional discrimination, constitutional challenges to at-large elections virtually came to a halt after the *Bolden* decision.[15] When the act was renewed in 1982, section 2 in an amended form became a vehicle to restore a results-based test to the arsenal of voting rights plaintiffs. In *Thornburg v. Gingles* (1986)[16] the Supreme Court upheld congressional authority to impose such a test by statute and provided a simplified standard that has come to be known as the *three-pronged test*.

As chapter 1 makes clear, it would be a mistake to describe the demise of local at-large systems resulting from Fourteenth Amendment litigation such as *White* and its progeny as having no connection with the Voting Rights Act. The essential idea of minority vote dilution implicit in *White* was introduced in the Court's earlier *Allen* decision, which interpreted the act's section 5 preclearance provision

as covering changes from district to at-large elections. Had there been no act and consequently no *Allen* decision, it is highly questionable whether the concept of minority vote dilution that underlay the constitutional challenges to at-large systems throughout the South in the 1970s would have been accepted. It therefore makes sense, we believe, to think of these Fourteenth Amendment cases, which had a significant impact on minority officeholding, as progeny of the Voting Rights Act.

The Impact of Section 2

In addition to sketching the history of the struggle to achieve minority voting rights, a central concern of the state chapters is to measure the impact of changes in local election practices on minority representation and to determine the role of voting rights litigation in causing changes. These changes have been profound. Hundreds of southern cities, counties, and other kinds of jurisdictions shifted from at-large elections in the 1980s. In Alabama, where perhaps the most extensive changes have occurred, there has been a virtual elimination of at-large cities of 6,000 or more with black populations above 10 percent. Throughout the eight-state South covered by section 5, most majority-white cities of 10,000 or larger have changed from at-large to district or mixed plans since the early 1970s. In Texas, numerous jurisdictions with significant Mexican-American populations also have switched from at-large systems. What has been the result of the changes, and how has the Voting Rights Act, particularly section 2, figured in this development?

The Effects of Change in Local Election Systems

The individual state chapters as well as chapter 10 show that at the local level, replacement of at-large elections led to remarkable gains in black officeholding that far outstripped gains in the jurisdictions that remained at large. For example, over a period of roughly fifteen years equity scores for black representation in cities that changed from at-large to district systems went from 0.04 to 1.14 in cities that were 10–29.9 percent black, and from 0.07 to 0.92 in cities that were 30–49.9 percent black. By contrast, in the cities that retained the at-large system throughout the period, comparable scores went from 0.18 to 0.53 and from 0.17 to 0.56, respectively.

The focus of our research at the local level was on cities, but the authors of the chapters on Georgia, North Carolina, and South Carolina also examined the impact of the abolition of at-large plans on county officeholding in those counties with a population of 10 percent or more black. The findings for counties in the three states were quite similar to those for cities: sharp increases in black officeholding in single-member-district plans, and relatively small increases in the plans that retained the at-large system. Moreover, as with the cities, many of the

changes in county election structures can be attributed directly to the Voting Rights Act or to Fourteenth Amendment litigation. Evidence reported elsewhere indicates that the same pattern of increased black (and, in many locales, Hispanic) officeholding following the adoption of district systems is true for other types of southern governmental units, such as school boards.[17]

In Texas, Hispanic representation also showed noteworthy gains in districted cities. Between 1974 and 1989, in cities that switched to districts the Hispanic equity score increased slightly in cities that were 10–29.9 percent black plus Hispanic from 0.18 to 0.35, while in cities that were 30–49.9 percent black plus Hispanic, the score jumped dramatically from 0.15 to 0.95. The change in comparable at-large cities that did not switch was from 0.37 to 0.21 and from 0.24 to 0.50, respectively. Moreover, evidence indicates that some of the gains in minority officeholding that occurred in unchanged at-large jurisdictions resulted from a conscious effort by local elites to prevent successful voting rights litigation.

Why do minorities fare better in district cities than in at-large ones? The answer, almost certainly, is that racially polarized voting is still widespread, and when whites, or Anglos in the Southwest, are in the majority, minority candidates have difficulty winning. On the other hand, as suggested by Handley and Grofman's findings on southern state legislative districts and by the state chapters' corroborating findings on city council and county commissioner districts, when minorities are in the majority, their candidates are far more likely to win. Without the close federal supervision of boundary drawing in districted cities as a result of the act, it is quite probable that far fewer majority-black districts (and majority-Hispanic districts in Texas) would have been drawn in them.[18]

Moreover, as we argue in chapter 10, drawing in part from data presented in tables 2.5 and 2.5A, it is quite likely that a selection bias causes recent cross-sectional data on black municipal representation to overstate the ability of black candidates to win in typical at-large settings. In a number of states and on average across all eight states, jurisdictions that retained at-large plans at the end of the 1980s originally had higher black representation than those adopting districts. In other words, the "worst case" cities, in terms of black officeholding, were most likely to become districted during the period under investigation, and the "best case" cities were most likely to retain at-large systems.

The Role of Voting Rights Litigation in Provoking Change in Local Election Systems

Contrary to some recent claims, the evidence we have presented provides no reason to believe that the act's prohibition of minority vote dilution was unnecessary or that it has outlived its usefulness.[19] The data presented by Handley and Grofman demonstrate the importance of the section 5 preclearance provision in enabling black candidates to win legislative races. The data in the state chapters enable us to grasp the critical importance of amended section 2 for the success of minority candidates at the local level. The state chapters also underscore the role of

the Justice Department, the federal courts, civil rights organizations, and private litigators in guaranteeing enforcement of the act's provisions.[20]

As we have seen, the impact on black representation of replacing at-large with district and mixed systems in the eight southern states was extraordinary. Why did this widespread shift in local election structures take place? By and large the answer is quite simple: the changes stemmed from the Voting Rights Act, especially section 2.

After the amendment of section 2, numerous suits attacking local at-large elections were filed.[21] The number of section 2 cases between 1982 and 1989 dwarfed the number of constitutional challenges brought during the 1970s in the pre-*Bolden* period. Indeed, from 1982 through 1989 (1990 in Georgia) we found over 150 section 2 challenges to municipal elections in the eight states of our study.[22] Nearly 65 percent of all changes from at-large elections in our full eight-state municipal data set can be attributed to litigation or to settlements resulting from litigation,[23] and an additional 6 percent, roughly speaking, to actions related to section 5.[24] Moreover, about 10 percent of the changes in election type not tied to actual litigation are attributed by the city sources consulted by our state authors to threat of litigation.[25] Thus over 80 percent of all changes in election type in our eight-state data set can be attributed to voting rights activity, and this is almost certainly a conservative figure, since some of the unexplained changes and even some of the changes reported to us by city clerks and other city officials as voluntary would not have taken place except for the climate of enhanced concern for voting rights and officials' fear of litigation.

Once the *Gingles* standard was announced, our data show that well over 90 percent of the section 2 challenges to municipal at-large elections in the eight states were successful, either as a result of a trial or of a settlement that implemented a single-member-district or mixed plan.[26] The vast bulk of section 2 actions were brought by minority plaintiffs, often acting through civil rights or civil liberties organizations. Within the eight states covered by our study, section 2 litigation brought solely by the Department of Justice played only a minor role in effecting changes in local election systems.[27] One of the most remarkable results of amended section 2, therefore, is its encouragement of the private bar to take a major role in enforcing public voting rights law. This fact cannot be emphasized too strongly.

In summary, this volume has chronicled the evolution of the Voting Rights Act to the end of the 1980s, focusing primarily on black political participation in the South. The contributors have tried to understand the impact of the act by systematically analyzing, in chapters 2–9, the eight state-specific data sets described in the Editors' Introduction; in chapter 10, the pooled data for the states covered by section 5; and in chapters 11 and 12, data for the eleven-state South as a whole. While many questions remain unanswered, we have nonetheless resolved several issues about the act's accomplishments—in particular, certain controversies about how gains in minority voter registration and officeholding came about.[28]

Our empirical approach throughout this volume stems from the premise that a

balanced assessment of the Voting Rights Act over a quarter century requires at the very least an investigation of the basic facts about black-white voter registration rates and black-white officeholding. We asked the authors to limit themselves to research using hard and convincing data that would answer first- and second-generation issues with respect to electoral participation and the effects of election systems on minority electoral success. By the same token, we asked them to resist speculation on third- and fourth-generation questions—how well minority officials have become incorporated into the political decision-making processes of the bodies to which they were elected, and what the social and economic policy consequences of increased minority representation have been. Neither of the latter types of questions could be readily answered with the resources at our disposal.[29] We nonetheless hope that our research has laid the groundwork for systematic investigations of such questions.

Looking Ahead to the Twenty-first Century

The decade of the 1990s will witness new litigation under section 2, particularly in Texas and California, where concentrated populations of Mexican Americans (and, to a lesser extent, Asian Americans) will challenge barriers to full participation. Litigation on behalf of Native Americans will almost certainly increase, as well. We anticipate new suits in the South challenging district boundaries in already districted units, and we expect to see additional litigation in the North as well. But we also expect to see it in the small-town South. This point bears elaborating.

When we began this research, we thought it would demonstrate the success of the Voting Rights Act in changing minority representation in the South. In particular, we anticipated that many southern jurisdictions with a substantial black population and a history of very limited black officeholding would have adopted district or mixed plans as a result of litigation, leading to large gains in minority representation. This is exactly what we found.

However, on closer analysis, we now recognize that in several southern states this success story applies primarily to the larger towns and cities. There are hundreds of smaller towns where the effects of the Voting Rights Act as a means to prevent minority vote dilution have not yet been felt. It will almost certainly be many years before these jurisdictions are as well represented by minority officeholders as are the more populous ones. While these cities may be small in total population, they are the areas of the South least affected by the civil rights revolution of the 1960s and most in need of minority officeholders to protect the interests of black citizens. Thus, while the research reported here shows that the Voting Rights Act has wrought a "quiet revolution" in southern politics and is perhaps the single most successful civil rights bill ever passed, the need for it is far from over. We believe it will be extensively used in coming years to break the barriers to black officeholding in these towns.

With this litigation as well as with that in the Southwest and the North will come new issues and controversies. How can the law accommodate the sometimes conflicting interests of different minority groups—blacks and Hispanics, for example—in the same jurisdiction? How far must political cartographers go in drawing districts for protected minority groups when these clash with other criteria for districting, such as the desire to honor the geographic integrity of various governmental units? How can courts rationally decide among competing districting plans when the computer revolution in political map drawing makes possible hundreds of unique plans, all of which have virtues and shortcomings? Should minority leaders with close ties to the Democrats aim for maximizing minority seats even at the expense of Democratic party strength in a legislature? Are single-member-district plans, as distinct, say, from limited voting or proportional representation schemes, necessarily the best remedy for at-large vote dilution? How much weight, if any, should a court give to claims by defendants in voting suits that minority candidates' party affiliation, as distinct from their ethnicity pure and simple, is the cause of their defeat at the polls? Does the Voting Rights Act require legislatures, where possible, to draw districts in which minority voters can exert maximum influence short of being able to elect candidates of their choice?

These are issues we cannot address here.[30] We mention them only to emphasize that controversies over minority voting rights are a long-standing feature of American politics; they did not begin in 1965, or even in 1865, nor will they soon disappear. They are conflicts woven into the tapestry of our nation of many peoples of diverse origins and interests. Fortunately, the Voting Rights Act is a dynamic statute. To the extent that it resolves these conflicts fairly and rationally—and, in doing so, leads to a more unified, democratic, and participatory society—it will have achieved its purpose.

NOTES

Editors' Introduction

1. For a more detailed review of the provisions of the act and its subsequent amendments and the relevant legal history, see Grofman, Handley, and Niemi 1992.

2. The phrase is taken from the title of McDonald 1989. We refer to the voting changes as a "quiet revolution" because, while the results of the act are widespread and significant, the use of voting rights litigation to counter the resistance of white officials to minority political empowerment has largely escaped public attention—at least until the 1990s round of redistricting—in marked contrast to a white backlash to legal developments connected with the Civil Rights Act of 1964, for example. On the latter, see Grofman 1993a.

3. At various times other states have also been covered. The number of states now covered in whole or in part by the special provisons of the act is sixteen; the maximum number of states or parts thereof that have ever been covered is twenty-two.

4. At-large systems were often used in combination with runoff requirements or numbered place systems, a combination believed to have especially pernicious effects on the prospects for minority representation in circumstances where whites voted as a bloc against black candidates.

5. Wolfinger and Field 1966, 316, 325 (quotation in text). "A one-party system removes temptations to appeal to Negro voters, as does the city manager plan," they write. "With only one party, the partisan ballot is not meaningful. At-large elections minimize Negro voting strength" (325).

6. In the chapters on Georgia, North Carolina, and South Carolina, data on county elections are also examined.

7. We recognize that litigation involving Hispanic voting rights is already of great importance and that the voting rights of Asians are ripe for future litigation. As part of the National Science Foundation project, whose findings are reported in this volume, we also commissioned studies on the voting rights of American Indians (Wolfley and Henderson 1991), Hispanic voting rights issues in California (Avila and Grofman 1990), and voting rights litigation in New York (McDonald 1991). That work has been reported elsewhere. In order to provide a clearly defined research focus for this volume, we have dealt exclusively with voting rights in the South, where slavery and the Jim Crow system have left terrible and enduring scars. Thus with the partial exception of coverage of Hispanics in the Texas chapter and a few comments about Native American issues in North Carolina, our concern in this volume is with southern black voting rights in those states where voting rights litigation and section 5 enforcement have had the greatest impact. Even in the other two states covered entirely by section 5—Alaska and Arizona—and in the two partially covered states with large numbers of blacks and Hispanics, respectively—New York and California—there has so far been relatively little voting rights activity resulting from the act. Nonetheless, as Mundt (1988) points out, the Voting Rights Act has been "moving North," and we anticipate additional research to analyze its effects outside the South following the 1990s round of redistricting.

8. Leslie Winner, an attorney in North Carolina, contributed greatly to the development of the litigation data base used in the North Carolina chapter. The lead author of the Georgia chapter, Laughlin McDonald, a voting rights attorney in Georgia with litigation experience

in South Carolina as well, critically read the South Carolina chapter and made many useful suggestions. Armand Derfner, an attorney in South Carolina, also contributed significantly to the South Carolina chapter. We are grateful to these three attorneys who, though not authors of the North Carolina and South Carolina chapters, respectively, contributed much to them.

9. Those seeking to protect black voting rights included black community leaders, the Department of Justice, and a dedicated group of private civil rights attorneys, many of whom were connected with the National Association for the Advancement of Colored People, the Legal Defense Fund, the American Civil Liberties Union, the Lawyers' Committee for Civil Rights Under Law, and the Legal Services Corporation. Later, when Hispanics and Asians were placed under the act's special protections, organizations such as the Mexican American Legal Defense and Educational Fund, Texas Rural Legal Aid, the Southwest Voter Registration Education Project, the Asian-American Legal Defense Fund, and the Puerto Rican Legal Defense and Educational Fund played important roles. For a discussion of the "voting rights bar," see Caldeira 1992, 230.

10. See for example Karnig and Welch 1979; Engstrom and McDonald 1981; and Grofman 1980–81.

11. Bullock 1989; O'Rourke 1992; Swain 1989, 1992, and 1993.

12. While there has been theoretical work on the issue of the percentage of minority voters in a district necessary for them to elect their preferred candidates (see especially Brace, Grofman, Handley, and Niemi 1988), the empirical data are very limited (Grofman 1982a and b; Brace, Grofman, Handley, and Niemi 1988; Hedges and Carlucci 1987), and there has never been a comprehensive study of this issue for all city councils in a single state.

13. A partial exception to this is a study by Mundt and Heilig (1982), which tries to determine the causes—classified as either litigation or local referendums—of abandoning at-large elections in southern cities.

We have also been struck by the disagreements in the literature on the effectiveness of the Justice Department's role in implementing the act (especially under Republican presidents), but we will not be discussing that topic here. On the department's role, see Ball, Krane, and Lauth 1982; Days 1992; Days and Guinier 1984; Grofman 1992b; Parker 1989 and 1991, and Turner 1992.

14. For examples, see A. Derfner 1984; Edds 1987; Foster 1985; and Lawson 1976 and 1985.

15. See especially Parker 1990; Stern 1985; and the symposium issue of *Publius* containing essays by Colby 1986; Cotrell and Polinard 1986; Thompson 1986; and Wright 1986

16. The absence of information on the reason for changes in election type characterizes virtually all of the studies on the impact of at-large elections, including Davidson and Korbel 1981; Engstrom and McDonald 1981, 1982, and 1986; Heilig and Mundt 1983, Karnig 1979; Karnig and Welch 1980 and 1982; Welch 1990; and Zax 1990.

17. Symptomatic of these shortcomings is the work of Thernstrom (1987), whose critique of the act makes almost no use of systematically collected empirical data.

18. Ball, Krane, and Lauth (1982), for example, were more concerned with internal decision making at the Justice Department than with the external long-run consequences of decisions reached.

19. While our research goals were relatively simple, no one else had attempted to achieve them. We believe this is partly because they required an expensive and time-consuming effort to gather and cross-check data. Our research teams first met at a planning conference at Rice University in October 1989. After a thorough discussion of methods and

organizational prerequisites, the conferees dispersed and began their research. A conference was held at Rice University in May 1990, where initial findings were announced to the public. Invited scholars and lawyers criticized the findings, and numerous problems were worked out in subsequent drafts submitted to the editors in 1991. All data chapters were submitted for further criticism in the summer of that year to scholars—primarily historians—not connected with the project. Afterward the data from the state chapters were pooled and analyzed by the editors, with results reported in chap. 10.

20. See Davidson and Korbel 1981, 985–92, for a brief summary of the findings on the Progressive Era reform movement so far as election structures' effects on minority participation are concerned.

21. Grofman and Handley 1989a and 1989b.

22. For example see Lane 1959, 270.

23. See chap. 1.

24. Davidson and Korbel 1981.

25. Grofman 1982b.

26. For example, MacManus (1978) found little evidence that district elections helped minority candidates. Her findings were problematic for two reasons. The data base was virtually identical to one developed at almost the same time by Robinson and Dye (1978), who published opposite conclusions in the same issue of the same journal in which MacManus's article appeared. And, as other scholars soon pointed out, MacManus's methodology in analyzing her data base contained serious flaws. See, for example, Davidson 1979; Engstrom and McDonald 1981, 345, 347; Karnig and Welch 1982, 112–13; Welch 1990, 1052.

27. Conway 1991, 185.

28. Vedlitz and Johnson (1982) is a notable exception. When segregation is taken into account, the difference in black representation between at-large and districted systems is much larger than when not taken into account. Other things being equal, a district remedy for vote dilution will not be effective in cities where the minority population is not segregated. Further, because Hispanics in American cities are typically less residentially segregated than blacks are, district remedies for Hispanics are more difficult to fashion (Zax 1990, 342).

29. Davidson and Korbel 1981, 1001.

30. Among the major cross-sectional studies based on data from the 1970s or early 1980s are Engstrom and McDonald 1981; Karnig and Welch 1982; Robinson and Dye 1978; Vedlitz and Johnson 1982; and Zax 1990.

31. See, for example, Taebel 1978.

32. Thernstrom 1987, 240–44.

33. Welch 1990. In contrast to her findings that suggested a change from the patterns reported in earlier research, however, Welch also found that when she compared minority representation in at-large seats and single-member-district seats in mixed cities—the modal election type in her sample—almost no minorities were elected from at-large seats while many were elected from the district ones. We consider this topic in chap. 10, using data from the state chapters.

34. Welch 1990, 1051.

35. Welch (ibid., 1052) also voices this criticism.

36. Grofman 1982b. Grofman's criticism would apply as well to Polinard, Wrinkle, and Longoria 1991, a more recent longitudinal study of this issue.

37. Heilig and Mundt 1983, 394. While the authors refer to a sample of 209 southern

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cities, their published data (table 1, p. 396) are based on numbers that sum to 189. See also Heilig and Mundt 1984, 62–63.

38. Heilig and Mundt 1983, 395.

39. Engstrom and McDonald 1986, 214.

40. See chap. 10 for an extended discussion of the issues surrounding alternative experimental designs.

41. It was necessary to choose different points as the "before" years in some chapters for reasons of data availability. Generally the early point was 1974, but it was 1970 for Alabama, 1973 for North Carolina, 1977 for Virginia, and 1980 for Georgia. The "after" year was 1989 for all states except Georgia, for which it was 1990. However, extensive litigation in Alabama in the late 1980s meant that when the Alabama project used a 1989 cutoff, only five cities in the Alabama data set were still electing at large, and two of these were majority-black cities. Thus the Alabama chapter also discusses data for 1986, when the sample of majority-white at-large cities was larger.

42. The city size threshold was 1,000 in Mississippi; 2,500 in Louisiana; 6,000 in Alabama; and 10,000 in Georgia, Texas, and South Carolina. In North Carolina all incorporated cities were examined, and in Virginia, all cities that were "independent." In the Virginia data base cities as small as 4,480 were included. However, in North Carolina, the only cities to shift from at large were above 10,000 in population. The population data—both city totals and minority percentages—are derived from the 1980 U.S. census.

43. In Texas, the threshold was a combined *black and Hispanic* population of at least 10 percent. However, unpublished tables also report data for Texas cities with a *black* population of at least 10 percent and a small Hispanic population, as well as for Texas cities with a *Hispanic* population of at least 10 percent and a small black population, to control for the presence, in both cases, of the other ethnic minority. In North Carolina it was a combined black and American Indian population of at least 10 percent.

44. Few changes from at-large to district or mixed systems took place in the South before the early 1970s. Indeed, a very high proportion of all changes in election systems have taken place since the 1982 amendments to section 2 of the Voting Rights Act.

45. In general, more esoteric variations in election type are dealt with in footnotes; however, the Georgia chapter has a separate category in its tables for systems that are entirely multimember but not at large, since this is a more common variant there than elsewhere. Also, the North Carolina chapter contains a discussion in the text of the minority success rates in at-large elections with a district residence or nomination requirement as compared to rates in at-large systems without such requirements.

46. This applies to the base-level information on cities and minority officeholders. We were able to achieve high coverage in large part thanks to repeated follow-up telephone calls. However, data at the individual district level for those cities with single-member district or mixed plans are far less complete because this information was simply unavailable.

47. Zax 1990, a cross-sectional study of 1981 data, has two of the largest samples we know of that are used to examine this issue. They comprise 602 cities and 420 cities for his analysis of black and Hispanic officeholding, respectively. The two samples overlap substantially, however.

48. The total sample contains a disproportionately large number of cities from North Carolina, the vast bulk of which continue to elect at large.

49. Included in this data base are not only those cases which directly challenged at-large elections but the small number of cases which indirectly led to such a challenge. An example would be a suit attacking a jurisdiction's failure to seek preclearance for election changes under section 5, resulting, after a favorable ruling, in a suit challenging at-large elections. Given the large number of law cases—many officially unreported—in this eight-state data base, it should come as no surprise that not all of the information on every case was available. What is surprising, in our view, is that the state chapter authors were able to get as complete a record as they did. Nearly two hundred suits challenging municipal election practices filed over almost twenty-five years constitute this data base; we have complete information for the great majority of them.

50. Equity of representation is simply a measure of proportionality of officeholding (comparing the percentage of minority officeholders to the percentage of the minority population in a given jurisdiction), which is used by the authors in this volume to demonstrate the extent of minority candidates' success under different election schemes. We emphasize that the use of this measure is not meant to imply that either constitutional or statutory voting rights law requires proportional representation of minority population or citizens.

51. For discussion of the properties of each measure (and of alternative approaches) see Grofman 1983.

52. We note at this point that the method of calculating the mean equity scores in tables 4 and 5 of state chapters 2–9 differs from the method in the synoptic chapter 10. The state chapter authors averaged, for all cities within a category, the equity ratio calculated for each city. In chapter 10, we took the ratio of the average black representation of all cities within a category to the average black population of those cities. But these two figures—the average of the ratios and the ratio of the averages—are not the same, although they are usually quite similar. Because state chapters use the average of the ratios, it is impossible to obtain the values in tables 4 and 5 of the state chapters by dividing the average values of black representation and black population in table 2. For this, the raw figures from our data base are required.

53. The raw data, so to speak, on which table 8 is based, are drawn from table Z, described above, which is not published but is archived and is also available from the editors.

54. For an elaboration of our views on this point, see Grofman and Davidson 1992.

55. The outstanding example of this approach is Button 1989, an exhaustive study of black participation in six Florida communities from the 1950s into the 1980s that is testimony to the magnitude of the effort required to address third- and fourth-generation issues in even a small sample of small cities.

56. For similar reasons, we discouraged our authors from focusing on recent political events in their states or speculating about the future of race relations. We did not want readers to be distracted from the findings in this volume by questions that cannot presently be resolved with the available data.

57. It is fortunate that the right to elect candidates of choice is not predicated on the assumption that these candidates, once elected, will be more effective than others, inasmuch as forces entirely beyond their control—white racism in the electorate or on city council, for example, or hard economic times—may diminish their ability to deliver.

58. Karst 1989, 94.

59. McDonald 1981, 3–4. For an account of the remarkable Tom McCain's rise to office in Edgefield County, see Edds 1987, 28–50.

60. The circumstances under which black officeholders can achieve goals that benefit the particular interests of the black community is an especially important issue. It is undoubt-

edly true, for example, that black officeholding sometimes produces few measurable benefits because of white resistance to legitimate black goals. See Guinier 1991b. Also, as previously noted, scarce economic resources in a locale may severely limit the possibility of substantial minority gains.

61. However, we commissioned one study (Fraga 1991) as a pilot study with an eye to developing an appropriate research design for exploring third- and fourth-generation issues.

62. This information can serve as a rich resource for scholars interested in a variety of issues, from very general questions about the role of law as an agent of social change to more specific concerns such as measuring the importance for black representation of various election features in addition to the three basic election types we have focused on—features such as council size, residence requirements (about which only the North Carolina chapter in the current volume reports findings), staggered elections, runoffs, and the like. (The most thorough analysis to date of the impact of some of these special election features in combination with at-large elections is Engstrom and McDonald 1993).

Chapter One
The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities

1. *Smith v. Allwright*, 321 U.S. 649.

2. While not a history of minority voting rights per se, Dixon (1968) continues to command the attention of students of voting rights as they relate to democratic representation. A. Derfner's influential article (1973) provides a basic framework for understanding the evolution of modern voting rights law and the racial problems in the South giving rise to this evolution. McDonald (1989) presents a useful update of the story told by Derfner. Issacharoff (1992) provides a particularly insightful analysis of the evolution of the legal concept of vote dilution from the 1960s to the present. The definitive history of black disfranchisement is told by Kousser (1974), while the leading histories of the twentieth-century movement for black suffrage are by Lawson (1976 and 1985).

3. The Fifteenth Amendment in full reads as follows:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

4. Kousser 1984b, 32–33.

5. This conceptualization of vote dilution has recently been challenged by Guinier 1991a, 1494. While she believes that a definition such as the one I have given underlies federal courts' recent vote dilution decisions, she argues for a more expansive definition—one in which not simply a group's ability to elect its candidates of choice is diminished, but also its ability to secure its interests through legislative policy.

6. McDonald 1982, 46–50; and McDonald 1983, 71–73. See also McDonald 1986, 575.

7. In 1962 a member of the Alabama State Democratic Executive Committee informed his white colleagues as follows: "We have got a situation in Alabama that we are becoming more painfully aware of every passing day, that we have a concerted desire and a campaign to register Negroes en masse. . . . It has occurred to a great many people, including the legislature of Alabama, that to protect the white people of Alabama, that there should be numbered place laws." *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1357 (1986).

8. See n. 4 above. See also chap. 3 below on the use of some of these devices in Georgia in the 1870s.

9. That these considerations are just as crucial in small southern jurisdictions as in large metropolitan centers is brought home forcefully in Edds's (1987) depiction of the ongoing black struggle for elective office in many southern jurisdictions, large and small.

10. See n. 4 above. On nineteenth-century vote dilution in South Carolina, Texas, and Virginia, see chaps. 7, 8, and 9 below.

11. Rosenberg 1991, 81. Accounts of contemporary dilutionary practices in particular are contained in U.S. Commission on Civil Rights 1968 (chaps. 4–5) and 1975; A. Derfner 1973, 557–58; and Washington Research Project 1972, chaps. 2, 4. See also Parker 1990, 51–55, for an account of what was perhaps the most massive and systematic attempt by a state—Mississippi—to change election laws in the 1960s for dilutionary purposes. Ladd (1966, 103) notes the widespread adoption of at-large elections in the face of a growing black vote. See also Hamilton 1967, 321–25.

12. For other examples of dilutive election practices adopted after World War II see the various state chapters below.

13. Chap. 2 below. See also Norrell 1985, chap. 6, for an account of the efforts of Alabama state senator Samuel Engelhardt, Jr.—the father of the famous Tuskegee gerrymander—in the years following World War II to prod the legislature to pass dilutionary laws.

14. 364 U.S. 339.

15. 364 U.S. 339, 346.

16. 307 U.S. 268, 275.

17. 364 U.S. 339, 342.

18. Chap. 2 below.

19. 257 F. Supp 901 (M.D. Ala. 1966).

20. Moon 1949, 188, Ladd 1966, 102–3.

21. Chap. 6 below

22. Chap. 6 below.

23. Chap. 7 below.

24. Chap. 3 below.

25. Chap. 3 below.

26. Chap. 4 below.

27. Young 1965, 21–22.

28. Davidson 1972, 55–67; Davidson 1990, 54–55.

29. Chap. 5 below.

30. Chap. 9 below.

31. Not all or even most of the at-large systems in the South, of course, were created in recent decades. Many such systems are holdovers from the Progressive Era, although they were often created during that era or earlier to dilute the votes of blacks, working-class whites, and political minorities. See n. 67 below.

32. For accounts of post-1960s efforts at dilution at both the local and legislative levels, see the state chapters in this volume.

33. 369 U.S 186

34. 377 U.S 533

35. For a detailed account of the political and legal aspects of *Reynolds*, see Blacksher and Menefee 1982.

36. 379 U.S. 433.

37. 379 U.S. 433, 439.
38. The first at-large minority vote dilution suit was filed in 1966. See chap. 2 below.
39. 412 U.S. 755 (1973).
40. 412 U.S. 755, 769, 766.
41. Blacksher and Menefee 1982, 22–23.
42. 485 F.2d 1297 (5th Cir. 1973).
43. 485 F.2d 1297, 1305.
44. 485 F.2d 1297, 1305.
45. The federal courts' gradual development, with help from plaintiffs' lawyers and experts, of the concept of minority vote dilution in the 1970s provided guidance to Justice Department lawyers faced with enforcement of the Voting Rights Act, particularly section 5. To this extent, constitutional law was influencing the Justice Department's thinking about what constituted illegal vote dilution. Below, I suggest that the Voting Rights Act, as interpreted by the Supreme Court in a 1969 ruling, had a profound impact on the Court's thinking about vote dilution as a constitutional issue in the 1970s. It is in light of this mutual influence that I have characterized constitutional voting rights law and the Voting Rights Act as having a synergistic relation.
46. 446 U.S. 55 (1980).
47. McDonald 1992, 70; Larry Menefee, plaintiffs' lawyer, interviewed by the author, 4 February 1992.
48. Garrow 1978, 6–7.
49. Congressional Quarterly Service 1968, 115.
50. The Civil Rights Commission, commenting on the failure of the Civil Rights Acts of 1957 and 1960 in this regard, "cited the efforts in 100 counties in eight states where, despite the filing of thirty-six voting rights suits by the Department of Justice, registration increased a measly 3.3 percent between 1956 and 1963, from approximately 5 percent to 8.3 percent" (Rosenberg 1991, 62).
51. See Garrow 1986, chap. 7, for a vivid account of the Selma campaign. See also Matusow 1984, 180–88.
52. Section 203, which mandates language assistance in certain language-minority jurisdictions, was added to the statute in 1975, later extended to 1992, and then again extended to 2007.

The act as originally passed is Public Law 89–110, 89th Congress, S. 1564, August 6, 1965. Subsequent amendments are as follows: Public Law 91–285, 91st Congress, H.R. 4249, June 22, 1970; Public Law 94–73, 94th Congress, H.R. 6219, August 6, 1975; and Public Law 97–205, 97th Congress, H.R. 3112, August 5, 1982.

53. Section 2 as amended and section 5 are discussed below.
54. In addition to the inclusion of certain language minorities under the protection of section 4(f)(4) (and hence section 5), the 1975 amendments—extended in 1992 to 2007—provide protections also to language minorities under a somewhat different trigger formula in section 203(c). This does not bring the jurisdictions covered by it under section 5, but, like section 4(f)(4), it requires the provision of bilingual election materials to the language minorities.
55. Today, states in which all elections are covered by section 5 are Alabama, Alaska, Arizona, Louisiana, Georgia, Mississippi, South Carolina, Texas, and Virginia. States whose elections are covered only in certain counties are California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota.

56. Congress substantially amended the act during periodic extensions of its special provisions. In 1970, for example, it suspended for five years the use of literacy tests as election requirements in all fifty states, and in 1975 it abolished them permanently. The "bailout" provisions, by which jurisdictions could remove themselves from coverage of sections 4 and 5, were changed over the years, most extensively in 1982. In addition to expanding section 5 coverage in 1975 to include other states through the language minority provisions, the act gave private parties the right, which the Justice Department already had, to sue in order to impose on jurisdictions preclearance and federal examiner remedies. It also enabled private attorneys who prevailed in voting suits to receive expenses and reasonable fees for their efforts. (See chap. 2 in this volume. See also M. F. Derfner 1977, 447 n. 36.) Finally, as explained below, one of the most significant amendments was made in 1982, changing section 2, a permanent feature of the act applying nationwide.
57. 383 U.S. 301.
58. 393 U.S. 544 (1969).
59. Parker 1990, 51–55 (quotation on 54).
60. 393 U.S. 544, 565–66.
61. U.S. Department of Justice, 1990.
62. I owe this insight, conveyed in a personal communication, to Samuel Issacharoff.
63. 478 U.S. 30 (1986).
64. 425 U.S. 130 (1976).
65. For an analysis of section 5 and its enforcement, see Days 1992.
66. Blacksher and Menefee 1982, 26.
67. Hays 1964, 162–63; Holli 1974, 137; B. Rice 1977, 29; Weinstein 1962, 173.
68. For two sharply contrasting accounts of the events leading to the amendment, see A. Derfner 1984 and Thernstrom 1987, chaps. 5–6.
69. 42 U.S.C. 1973
70. 458 U.S. 613 (1982)
71. Blacksher and Menefee 1982, 39, 50–64.
72. 478 U.S. 30, 50, 51.
73. The largeness and compactness tests, as Karlan has explained (1989, 199–213), mean that if a minority group in a jurisdiction is not large or compact enough to constitute a majority of voters in at least one single-member district, it is not entitled to relief. The degree of both compactness and size, however, appears to be a function of the number of council seats under the challenged plan. Thus, for example, a four-member city council might escape a successful dilution challenge while a six-member council with the same demographic makeup and history of white bloc voting might not.
74. Chap. 8 below.
75. The act has been employed to combat other forms of voting discrimination as well, such as the refusal to hire black poll workers, and the practice of abolishing offices or decreasing their number in order to minimize minority officeholding.

Chapter Two
Alabama

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1. Garrow 1986, 397–400; Fager 1985.

2. Garrow 1978, 81–82; Garrow 1986, 400–409.

3. See *United States v. Alabama*, 192 F. Supp. 677 (M.D. Ala. 1961), *aff'd* 304 F.2d 583 (5th Cir. 1962), *aff'd* 371 U.S. 37 (1962) [Macon County]; *United States v. Alabama*, 7 Race Rel. L. Rep. 1146 (M.D. Ala. 1962) [Bullock County]; *United States v. Penton*, 212 F. Supp. 193 (M.D. Ala. 1962) [Montgomery County]; *United States v. Atkins*, 323 F.2d 733 (5th Cir. 1963) [Dallas County]; and *United States v. Logue*, 344 F.2d 290 (5th Cir. 1965) [Wilcox County].

4. Pub. L. 88–352, 78 Stat. 241 [42 U.S.C 1971(a) (2,3), (f), (h)]. Even so, a constitutional amendment ratified by the voters in 1965 would have required applicants to demonstrate their ability to read and write English: Alabama Department of Archives and History 1967, 687–88, 707–9.

5. *United States v. Hines*, 9 Race Rel. L. Rep. 1332 (N.D. Ala. 1964) [Sumter County], *United States v. Cartwright*, 230 F. Supp. 873 (M.D. Ala. 1964) [Elmore County]; and *United States v. Parker*, 236 F. Supp. 511 (M.D. 1964) [Montgomery County].

6. Pub. L. 89-110, 79 Stat 437 [42 U.S.C. 1971, 1973].

7. Scher and Button 1984 In Alabama the U.S. Attorney General appointed federal examiners in twelve of the counties with the worst registration rates: Autauga, Dallas, Elmore, Greene, Hale, Jefferson, Lowndes, Marengo, Montgomery, Perry, Sumter, and Wilcox. U.S. Commission on Civil Rights 1968, 224–27.

8. In *Reynolds v. Katzenbach*, 248 F. Supp. 593 (S.D. Ala. 1965), a three-judge panel headed by Elbert Tuttle, chief judge of the Fifth Circuit Court of Appeals, enjoined registrars in Dallas, Hale, Lowndes, Marengo, Perry, and Wilcox counties from complying with state court orders. State circuit judges in these counties had placed the registrars in an impossible situation by ordering them not to place federally registered voters on the rolls. In *United States v. Bruce*, 353 F.2d 474 (5th Cir. 1965), the court reversed a lower court ruling that had allowed landowners in Wilcox County to keep voter registration activists off their plantations.

9. In *United States v. Alabama*, 252 F. Supp. 95 (M.D. Ala. 1966), the court found that the purpose and effect of the poll tax requirement was to disfranchise black voters.

10. U.S. Commission on Civil Rights 1968, 224–27.

11. Stanley 1987, 50–52, 54–55; Bass and DeVries 1976, 65; Peirce 1974, 255–56.

12. Black and Black 1987, 138–40; Stanley 1987, 5–7, 50–52; U.S. Commission on Civil Rights 1968, 222–23.

13. U.S. Commission on Civil Rights 1968, 214, 222–23. As in the past, Macon County, 84 percent black in 1960, led the way: one black was elected to the five-person Tuskegee city council for the first time in 1964; one of five county commissioners was black, as well as one member of the school board, and two justices of the peace: Norrell 1985, 164–67. In *Sims v. Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965), a three-judge panel ordered a new districting plan into effect that linked Macon, Bullock, and Barbour counties in a house district. The two black candidates failed to win election in 1966, however, due to

overwhelming white voter turnout. Not until 1970 were the first two representatives elected to the state house, one of whom was Fred Gray, the lawyer who had brought many of the early Alabama voting rights cases. Norrell 1985, 190–91, 200, 234; Joint Center for Political Studies 1971, 1–6.

14. Lane 1959, 270; Banfield and Wilson 1963, 87–96, 307–9; Matthews and Prothro 1966, 4–5, 143–44, 208, 220–21; Ladd 1966, 29–30, 102–3, 307. For early recognition of the legal implications of racial vote dilution, see Jewell 1964 and 1968; and Dixon 1968, 459–62.

15. *Ala. Acts* (1965), no. 10 (2 June 1965), 31.

16. *Clayton Record*, 25 March 1965, 1.

17. Key 1949, 636, 648; Matthews and Prothro 1966, 224–29; Watters and Cleghorn 1967, 79–81. A contemporary example comes from Choctaw County, Alabama, where proponents of at-large elections said that "they advocate the change because of the increasing number of Negro voters that have been qualified in recent weeks," according to the local paper. "They maintain that by electing the commissioners on an at-large basis the threat of an effective Negro bloc vote will be eliminated." *Choctaw Advocate*, 18 November 1965, 1.

18. In 1978, however, the Department of Justice filed a lawsuit challenging the 1965 change: *United States v. Barbour County Commission*, C.A. No. 78–348-N (M.D. Ala.). The county quickly agreed to return to a system of single-member district elections and settled the case.

19. 257 F. Supp. 901 (M.D. Ala. 1966), *aff'd*, 386 F.2d 979 (5th Cir. 1967). In the fall of 1965, it is true, a three-judge court in the state legislative reapportionment case found that in drawing the 1965 house districting plan, "the legislature intentionally aggregated predominantly Negro counties [Bullock and Macon] with predominantly white counties [Elmore and Tallapoosa] for the sole purpose of preventing the election of Negroes to House membership." *Sims v. Baggett*, 247 F. Supp. 96, 109 (M.D. Ala. 1965). At first blush, this might appear to be the first racial vote-dilution case. *Sims*, then on remand from the Supreme Court (*Reynolds v. Sims*, 377 U.S. 533 (1964)), was essentially, however, a one-person, one-vote case.

20. 257 F. Supp. 901 (M.D. Ala. 1966). For a detailed account of the litigation see McCrary 1988, 9–14.

21. 257 F. Supp. 903; McCrary 1988, 9–10.

22. 257 F. Supp. 903. The defendants stipulated to the accuracy of all the facts in the case (McCrary 1988, 10).

23. 257 F. Supp. 904–5.

24. McCrary 1988, 11.

25. Yarbrough 1981, 62–72. According to Clayton, the purpose of the at-large election resolution was to comply with the one-person, one-vote principle set forth by the Supreme Court. The court dismissed this claim as "nothing more than a sham," noting that the defendants retained the malapportioned districts as residency requirements for candidates, rather than choosing "to adjust the population disparities between the beats [districts] themselves" while preserving the traditional single-member districts. 257 F. Supp. 905.

26. 257 F. Supp. 904, quoting the legislative reapportionment decision in which he concurred, *Sims v. Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965).

27. 257 F. Supp. 905. Judge Johnson declined to order new elections, however.

28. *Smith v. Paris*, 386 F.2d 979 (5th Cir. 1967).

29. *Eufaula Tribune*, 20 February 1968; *Clayton Record*, 22 February 1968. At the same

meeting the committee endorsed segregationist George Wallace as a favorite son in the 1968 presidential campaign, although he was running as an independent against the Democratic ticket.

30. *Eufaula Tribune*, 2 May 1968. "Federal intervention" was commonly understood as a reference to federal enforcement of civil rights laws in the South.

31. Quoted in McCrary 1988, 11.

32. Ibid. In an earlier case, however, private plaintiffs raised a section 5 claim in successfully challenging an Alabama statute extending the terms of the Bullock County commission by two years. *Sellers v. Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966). Clearly involving a "practice or procedure with respect to voting," and thus covered by the preclearance requirement, *Sellers* was nevertheless not a vote-dilution case. The three-judge court saw the change as involving the right to vote, and found it unconstitutional as racially discriminatory in effect: "Act No. 536 freezes into office for an additional two years persons who were elected when Negroes were being illegally deprived of the right to vote. Under such circumstances, to freeze elective officials into office is, in effect, to freeze Negroes out of the electorate. That is forbidden by the Fifteenth Amendment." 253 F. Supp. 917.

33. *United States v. Democratic Executive Committee of Barbour County, Alabama*, 288 F. Supp. 943, 945, 946 (M.D. Ala. 1968). Judge Johnson ignored the Justice Department's section 5 claim.

34. *Eufaula Tribune*, 28 November 1968.

35. McMillan 1955, 110–13, 124–33, 151–56, 169–74.

36. Wiggins 1977. Scalawags sought to minimize the nomination of black candidates because the Democrats cried "Negro domination" every time a black was elected to office. Many also shared the general white prejudice against having blacks in decision-making roles. More dependent on black votes than were scalawags, carpetbaggers were necessarily more willing than native white Republicans to nominate blacks to state and local office.

37. Blacks won seats from black-majority wards in Montgomery, but most of the Republican council members were native whites. Rabinowitz 1978, 265, 273–74. No blacks ever won election to the city council in Mobile, although the governor or state legislature appointed several in 1868 and 1869. The city's delegation to the 1867 constitutional convention included several black delegates and white radical Republicans, but conservative whites dominated the city's Republican party thereafter. In 1870 the Democrats regained control of the city government. McCrary 1984, 50–52.

38. *Alabama State Journal*, 4 December 1869. The next year the legislature eliminated the ward election system for electing Mobile aldermen. McCrary 1984, 52.

39. Trelease 1971, 81–88, 246–73, 302–10.

40. Wiggins 1980, 60–66; Rable 1984, 114–18.

41. McMillan 1955, 175. White opposition in north Alabama to tax increases under the Republicans also contributed to the Democratic victory. See Thornton 1982.

42. Kousser 1984b, 31–36; McMillan 1955, 217.

43. *Ala. Acts* (1874–75), no. 18 (3 March 1875), sec. 39, p. 85.

44. *Montgomery Advertiser and Mail*, 3 March 1875.

45. *Montgomery Advertiser and Mail*, 5 March 1875. As late as the 1970s this provision was used to prosecute two black civil rights activists in Pickens County, Alabama: see *State of Alabama v. Julia P. Wilder*, No. CC-78–108 (29–31 May 1979), and *State of Alabama v. Maggie S. Bozeman*, No. CC-78–109 (1–2 November 1979), *aff'd* 401 So. 2d 167 (Supreme Court of Alabama 1981). Using the evidence of racial purpose in the law's adoption, however, black attorney Lani Guinier of the NAACP Legal Defense and Educational Fund

was able to have the convictions of the two women overturned and their voting rights restored.

46. Rabinowitz 1978, 273–75; Kousser 1984b, 35.

47. McCrary 1984, 58. The adoption of at-large elections for the county school board in 1876 was found to be racially motivated, and thus unconstitutional, in *Brown and United States v. Board of School Commissioners of Mobile County*, 542 F. Supp. 1078 (S.D. Ala. 1982), *aff'd* 706 F.2d 1103 (11th Cir. 1983), *aff'd* 464 U.S. 1005 (1983).

48. McCrary and Hebert 1989, 119.

49. McMillan 1955, 222.

50. *Selma Southern Argus*, 13 November, 11 December 1874; McMillan 1955, 218.

51. McMillan 1955, 218–25; Kousser 1974, 130–32. See, for example, the following comment from the *Selma Times*, 6 December 1895: "The Times is one of those papers that does not believe it is any harm to rob or appropriate the vote of an illiterate Negro."

52. McMillan 1955, 223–24; Kousser 1974, 132–36. The racially discriminatory purpose and effect of the Sayre Law was first noted in the findings of a vote-dilution lawsuit in *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1062 (S.D. Ala. 1982), where the court relied on the testimony of Professor J. Morgan Kousser. The last remnants of the Sayre Law were eliminated from Alabama's electoral procedures by *Harris v. Siegelman*, 695 F. Supp. 517 (M.D. Ala. 1988).

53. *Birmingham Age-Herald*, 25 December 1892, quoted in Kousser 1974, 134.

54. Kousser 1974, 137–38.

55. Woodward 1974, 69–74; McMillan 1955, 230–31.

56. Anyone who failed the literacy test could still qualify if he possessed at least three hundred dollars worth of property or forty acres of land. For a brief period anyone whose ancestor fought in the Civil War could also register under a "grandfather" clause. McMillan 1955, 280–81, 305–6.

57. Most of the crimes were drawn from a list suggested by John F. Burns, a black-belt planter whose years as a justice of the peace had taught him, he claimed, that blacks were prone to larceny, bigamy, seduction, incest, rape, burglary, vagrancy, wife beating, and forgery. McMillan 1955, 275. Many decades later, this "petty-crimes" provision was struck down by a unanimous Supreme Court decision (written by Justice William Rehnquist), *Hunter v. Underwood*, 471 U.S. 222 (1985).

58. McMillan 1955, 352–53; Kousser 1974, 241–42.

59. Woodward 1974, 84. Pursuant to the state's white primary law, the State Democratic Executive Committee (SDEC) limited the right to vote in the party primary to white males: Minutes, 10 July 1902, bk. 5, p. 67, SDEC Papers, Alabama Department of Archives and History.

60. *Giles v. Harris*, 189 U.S. 475 (1903); Kousser 1984b, 41. In 1909 Frederick Bromberg, who was twice president of the state bar association and publisher of a daily newspaper in Mobile, advocated throughout Alabama an amendment to the state constitution prohibiting blacks from holding office, which he thought would not violate the Fifteenth Amendment. He predicted, however, that the U.S. Supreme Court would soon "overturn the present methods of applying the registration laws." Of the 1901 disfranchising clauses he remarked: "We have always, as you know, falsely pretended that our main purpose was to exclude the ignorant voter, when, in fact, we were trying to exclude, not the ignorant vote, but the negro vote." McCrary 1984, 54–56.

61. McCrary and Hebert 1989, 110, 119.

62. *Ala. Acts*, (1907) no. 797 (15 August 1907).

63. From 1872 through 1906 the city's Democrats had used a ward system for primary elections, from which blacks were largely excluded. The general election, in which black Republicans voted, had always been conducted on an at-large basis. McCrary 1984, 53–54.

64. Ibid., 54–56. In *Bolden v. City of Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982), Judge Virgil Pitman found, based in part on this historical evidence of racial purpose, that the adoption of at-large elections in 1911 was racially motivated, and thus unconstitutional.

65. 321 U.S. 649 (1944).

66. *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949), *aff'd* 336 U.S. 933 (1949), Lawson 1976, 89–96. Another lawsuit challenging discriminatory practices by registrars in Macon County, *Mitchell v. Wright*, C.A. No. 102 (M.D. Ala. 1945), was terminated after three years of delays, when the registrars announced that their records now revealed the plaintiff had, in fact, registered successfully, Norrell 1985, 60–68, 222–23.

67. Lawson 1976, 96–97, 376; Norrell 1985, 82–83. The amendment placed the state supreme court in the position of abetting voter discrimination by designing a four-page questionnaire requiring applicants to write their names correctly in ten separate places, explain their employment background in three places, and answer two questions about length of residence. See U.S. Commission on Civil Rights 1959, 17–20. A series of lawsuits brought by the Department of Justice in the early 1960s challenged the discriminatory implementation of this and other state laws by local voter registrars. See Garrow 1978, 15–17, 26–27, 243, 249; and see nn. 3 and 5 above.

68. Norrell 1985, 79–80. Engelhardt was scion of an old planter family that owned thousands of acres of rich land, a cotton gin business, and a country store; he saw his class interests as well as racial pride threatened by black political power. "The niggers were just about to take us over," Engelhardt recalled, adding that "because of all our [land]holdings," he was concerned about the tax assessor blacks might elect.

69. Norrell 1985, 91–92, 101.

70. 167 F. Supp. 405 (M.D. Ala. 1958), *aff'd* 270 F.2d 594 (5th Cir. 1959), *rev'd and remanded* 364 U.S. 339 (1960).

71. 167 F. Supp. 405, Yarbrough 1981, 73–74.

72. 364 U.S. 342. "For Frankfurter," notes one legal scholar, the legislation's "obvious racial purpose and effect distinguished the constitutional claims raised in *Gomillion* from those at issue in malapportionment cases." Yarbrough 1981, 75. See also C. Hamilton 1973, 193. In debating the adoption of the Voting Rights Act in 1965, the house relied on the factual circumstances in *Gomillion* as an example of the discriminatory election practices the statute was designed to regulate. Karlan and McCrary 1988, 756.

73. *Ala. Acts* (1951), 1043, no. 606 (4 September 1951), applied to all municipal elections in the state. For an explanation of single-shot voting, see U.S. Commission on Civil Rights 1975, 207.

74. *Mobile Register*, 29 August 1951, 4; *Selma Times-Journal*, 29 August 1951, 2. The quoted legislator was Senator J. Miller Bonner, Engelhardt's father-in-law. Norrell 1985, 82.

75. *Ala. Acts* (1961), 670, no. 221 (29 August 1961). The new statute explicitly repealed Engelhardt's 1951 act.

76. Butler (1982, 864–67) discusses the full-slate and numbered-place requirements. An early court decision striking down these provisions in the North Carolina code, *Dunston v. Scott*, 336 F. Supp. 206 (E.D.N.C. 1972). Young 1965 is a pioneering [illegible] place voting.

77. McCrary and Hebert 1989, 120–21. Based largely on historical evidence [illegible]

the 1951 anti-single-shot law and the 1961 numbered-place statute, which exemplified a state policy of using at-large elections to dilute black voting strength, Judge Myron Thompson enjoined further use of at-large elections for nine county commissions in Alabama. *Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986).

78. See, for example, *United States v. Executive Committee of Democratic Party of Dallas County, Alabama*, 254 F. Supp. 537 (S.D. Ala. 1966). The first eleven section 5 objections to changes in election practices in Alabama dealt with such matters as candidate qualification deadlines, requirements for signing poll lists, and absentee registration requirements.

79. *Allen v. State Board of Elections*, 393 U.S. 544 (1969). Alternatively, the jurisdiction can seek preclearance by a three-judge court in the District of Columbia. Under section 5 the burden shifts to the jurisdiction to demonstrate that neither the purpose nor the effect of the change is racially discriminatory.

80. Days and Guinier 1984.

81. Editorial, *Birmingham News*, 29 May 1969.

82. See the objection letters regarding Alabaster, 7 July 1975 and 27 December 1977; Bay Minette, 6 October 1986; and Alexander City, 1 Dec. 1986. All objections by the Attorney General are described in U.S. Department of Justice, Civil Rights Division, "Complete Listing of Objections Pursuant to Section 5 of the Voting Rights Act of 1965," which is routinely updated. Photocopies of objection letters and microfiche copies of the public—though not internal—files for all section 5 submissions can be obtained from the Voting Section of the Civil Rights Division merely by identifying the date of action.

83. The Department of Justice objected to the adoption of staggered terms on 12 December 1975, and precleared the new mixed plan on 9 May 1977. Newspaper coverage makes clear that the racial effects of at-large elections were well understood, and that the Department of Justice was aware of the black community's efforts to secure single-member districts. See *Columbus Ledger*, 11 September 1975, 1B; 19 September 1975, 1B; 21 September 1975, 1A; 24 September 1975, 4A; 12 October 1975, 1B; 14 October 1975, 1A.

84. Joint Center for Political Studies 1979, 7.

85. *Dillard v. Crenshaw County*, C.A. No. 85-T-1332-N (M.D. Ala. 1986), Plaintiffs' Exhibit No. 187.

86. The counties, with the date of the objection letters in parenthesis, are as follows: Autauga (20 March 1972); Pike (12 August 1974); Chambers (8 March 1976); Hale (23 April 1976, 29 December 1976); Barbour (28 July 1978); Clarke (26 February 1979); Conecuh (14 September 1981); Butler (19 July 1982); Tallapoosa (10 May 1983); Monroe (17 February 1984); Houston (15 October 1985). The objections for Autauga and Chambers included the county school boards as well. The Attorney General also objected to the at-large election of school board members in Pickens County (5 March 1976).

87. *Sims v. Amos*, 336 F. Supp. 924, 935–36 (M.D. Ala. 1972), *aff'd* 409 U.S. 942 (1972). The racial vote-dilution claim was first raised by Morris Dees and Joseph Levin, white lawyers who founded the Southern Poverty Law Center, and their black cocounsels Peter Hall and Orzell Billingsley, Jr., in *Nixon v. Brewer*, 49 F.R.D. 122 (M.D. Ala. 1970). *Nixon* was consolidated with *Sims*, a one-person, one-vote case originating in the landmark reapportionment case *Reynolds v. Sims*, 377 U.S. 533 (1964). The court's decision in *Sims v. Amos* emphasized the one-person, one-vote claim (*i.e., quantitative, rather than racial, vote dilution*). David Vann, a white lawyer in Birmingham, and Charles Morgan, Jr., then head of the southern regional office of the ACLU, were attorneys of record throughout the litigation.

88. *Alabama Journal*, 4 January 1972, 1, 4; *Birmingham News*, 4 January 1972, 1A, 4A; *Mobile Register*, 5 January 1972, 3B; *Montgomery Advertiser*, 5 January 1972, 1A, *Selma Times-Journal*, 5 January 1972, 1A, 2A.

89. U.S. Commission on Civil Rights 1975, 241.

90. *Selma Times-Journal*, 25 January 1972, 1A, 2A. See also 28 January 1972, 1A, 2A; and 7 February 1972, 1A, 2A. A local black attorney threatened to file a vote-dilution lawsuit if the council retained at-large elections. See Chestnut and Cass 1990, 259–61. One council member who lived in a black-majority district proposed to increase the number of at-large seats to four, so that the white minority in his district could have an opportunity to elect a ward representative of its choice. The municipal election code provided no such option, however; the legislature would have to enact a new statute, and this would have meant postponing city elections. In *Talton v. City of Selma*, C.A. No. 80–0271-H (S.D. Ala. 1980), whites challenged the existing districts as malapportioned; the court ordered a properly apportioned interim plan with ten single-member districts, which resulted in the election of five blacks and five whites (with a council president and the mayor elected at large). In 1988, however, legislation sponsored by black state senator Hank Sanders, with the agreement of the white-majority city council, established a new mixed plan with eight single-member districts and a council president. The Department of Justice precleared the new plan on 27 June 1988.

91. This change is described in a letter from the city's attorney, Knox McMillan, to David Norman, 6 July 1972, Public File, Auburn (Lee County), Alabama, Submission V4620, Department of Justice, Civil Rights Division, Voting Section. The Attorney General precleared the change on 21 July 1972.

92. Heilig and Mundt 1984, 114. In the referendum "heavy votes in favor were recorded in the highest-income white precincts, with more moderate support in black precincts. Low-income white precincts showed the heaviest opposition." Ibid., 41–42.

93. *Montgomery Advertiser*, 6 July 1973, 1A; see additionally 3 July 1973, 11A. In contrast to the mayor and the senate delegation, house members favored electing council members at large, although with a district *residency* requirement. Ibid., 6 May 1973, 12A. See additionally, 26 May 1973, 11A; 5 June 1973, 1A, 2A; 10 June 1973, 8A; 13 June 1973, 1B; 5 July 1973, 13A; 13 July 1973, 2A; 17 July 1973, 1A; 2 August 1973, 17A; 31 August 1973, 1A. Voters supported the change in a referendum, and four of the nine council members elected in 1975 were black. *Alabama Journal*, 17 September 1975. In 1983, a more conservative city council approved a redistricting plan that purposely reduced minority voting strength; the plan was successfully challenged in *Buskey v. Oliver*, 565 F. Supp. 1473 (M.D. Ala. 1983). Black attorney Solomon Seay represented the plaintiff class, and black council member Donald V. Watkins, also an attorney, represented himself.

94. 412 U.S. 755 (1973).

95. 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

96. James U. Blacksher and Larry Menefee in Mobile and Edward Still of Birmingham were cooperating attorneys of the NAACP Legal Defense and Educational Fund (LDF). Still also handled cases in conjunction with the Southern Regional Office of the ACLU. Pamela S. Horowitz, Howard Mandell, Stephen J. Ellman, and Ira A. Burnim, northern-born whites employed by the Southern Poverty Law Center, handled a few vote-dilution cases, although their principal focus was on other areas of civil rights law. Barry Goldstein and Pamela Karlan, northern-born white staff attorneys of LDF, also litigated Alabama cases. Black attorneys involved in voting rights litigation after 1973 include Lani Guinier of LDF, J. L. Chestnut, Hank Sanders, and Rose Sanders of Selma; Solomon Seay, Donald V. Watkins, and Terry Davis of Montgomery; Demetrius Newton of Birmingham; and Joe Lampley of Huntsville. On the importance of funding provided by public-interest organizations such as LDF and the ACLU, see Caldeira 1992.

97. J. Gerald Hebert handled the largest volume of Alabama dilution cases, but Paul Hancock, Sheila Delaney, S. Michael Scadron, John Tanner, Ellen Weber, Robert Berman, Poli Marmolejos, and Christopher Lehman also litigated Alabama cases. Tanner is a native Alabamian; Marmolejos is the only black lawyer in the group.

98. 340 F. Supp. 691, 694 (M.D. Ala. 1972). "If, pursuant to this action, plaintiffs have benefitted their class and effectuated a strong congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith," said the court. Indeed, the award of attorneys' fees "becomes a part of the effective remedy a court should fashion to encourage public-minded suits, and to carry out congressional policy."

99. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

100. Pub. L. No. 94–73, 89 Stat. 402 [42 U.S.C., 19731(e)]; U.S. Commission on Civil Rights 1981, 11, 45. Congress also enacted a general statute covering all civil rights issues, Pub. L. 94–559, which reinforces the principle that "private attorneys general" benefit the public good and thus should be appropriately compensated for their efforts. M. F. Derfner 1977.

101. Lawson 1985, 106–10, 117, 200–201; Bass and DeVries 1976, 76–78; Peirce 1974, 300–301; Strong 1972, 469–70. The National Democratic Party of Alabama (NDPA), nominally led by Dr. John Cashin of Huntsville, was successful in electing a majority of officeholders in Green County, 83 percent black, and had some strength in a few other black-belt counties. Its separatist outlook made sense in such areas, where cooperation with the local party was an impossibility. After 1972, however, the strength of the NDPA declined dramatically as the ADC demonstrated the advantages of its position as a black caucus within the Democratic party.

102. The ADC files have, in fact, been a principal source of data for this study. In 1986 dissident members of the ADC, many of whom were angry at the organization's endorsement of Walter Mondale rather than Jesse Jackson during the 1984 Democratic presidential primary, formed the New South Coalition. No longer a caucus within the Democratic party, it was technically bipartisan and biracial. See Chestnut and Cass 1990, 401–2. Other than the Huntsville and Madison county cases, however, the New South Coalition was not very active in voting rights litigation.

103. See the objection letters for the Pickens County Democratic Executive Committee (18 February 1976), and for the Pickens County Board of Education (5 March 1976).

104. *Corder v. Kirksey*, 585 F.2d 708 (5th Cir. 1978).

105. *Nevett v. Sides*, 533 F.2d 1361 (5th Cir. 1976).

106. 571 F.2d 209 (5th Cir. 1978).

107. *Yelverton v. Driggers*, 370 F. Supp. 612 (M.D. Ala. 1974). Howard Mandell represented the Dothan plaintiffs. The city continued to use at-large elections as late as 1989.

108. *Hendrix v. Joseph*, 559 F.2d 1265 (5th Cir. 1977). Judge Johnson's unpublished opinion did not delineate the *Zimmer* factors to the satisfaction of the appeals court, which remanded the case for more ample findings of fact. Johnson's subsequent decision, *Hendrix v. McKinney*, 460 F. Supp. 626 (M.D. Ala. 1978), was upheld. Pamela Horowitz was the principal attorney for the Montgomery County plaintiffs.

109. For perceptive discussions of voting rights case law in the 1970s, see Blacksher and Menefee 1982; Butler 1982; O'Rourke 1982; Parker 1983.

110. 423 F. Supp. 384 (S.D. Ala. 1976). In a companion case black plaintiffs persuaded

the court to strike the use of at-large elections for the county school board: *Brown v. Moore*, 428 F. Supp. 1123 (S.D. Ala. 1976). The attorneys in both cases were Blacksher, Menefee, and Still.

111. Senator Bill Roberts, quoted in McCrary 1985, 469.

112. *Mobile Register*, 28 July 1976, 1A, 4A.

113. 423 F. Supp. 387, 389–92, 397, 400.

114. 423 F. Supp. 388. Judge Pittman relied on regression analysis performed by both plaintiffs' and defendants' experts McCrary 1990, 511, 523.

115. 423 F. Supp. 402–4.

116. *City of Mobile v. Bolden*, 571 F.2d 238, 245 (5th Cir. 1978).

117. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

118. *Bolden v. City of Mobile*, 542 F Supp. 1050 (S.D. Ala. 1982). See above, text accompanying nn. 63–64, and McCrary 1984 At this point the United States, represented by J. Gerald Hebert and Ellen Weber, intervened in the case, and in *Brown and United States v. Board of School Commissioners of Mobile County*, 542 F. Supp. 1078 (S.D. Ala. 1982), *aff'd* 706 F.2d 1103 (11th Cir. 1983), *aff'd* 464 U.S. 1005 (1983).

119. A. Derfner 1984, 145–63.

120. *United States v. Board of Commissioners of Sheffield, Alabama*, 430 F. Supp. 786 (N.D. Ala., 1976), *rev'd*, 435 U.S. 110 (1978), established that: (1) when preclearing a referendum concerning a voting change, the department retained the authority to review any subsequent change in election practices, once approved by the voters; and (2) cities were covered jurisdictions, even if they did not register voters. Because the change was from an at-large city commission to an at-large mayor-council system, this legal victory had no direct impact on minority representation in Sheffield.

121. *Hale County, Alabama v. United States*, 496 F. Supp. 1206 (D.D.C. 1980). Earlier the department had to go to court to enforce its section 5 objection, *United States v. County Comm., Hale County, Alabama*, 425 F. Supp. 433 (S.D. Ala. 1976).

122. Sometimes litigation was necessary to compel submission of changes for Justice Department preclearance: *United States v. Barbour County Commission*, C.A No 78–348-N (M.D. Ala. 1978); *United States v. Pike County, Ala. Commission*, C.A. No. 79–245-N (M.D. Ala.); *United States v. Clarke County Commission*, C.A. No. 80–547-P (S.D. Ala. 1980). In each instance the county agreed to adopt single-member districts.

123. *Clark and United States v. Marengo County Commission*, 469 F. Supp. 1150 (S.D. Ala. 1979); *United States v. Dallas County Commission*, 548 F. Supp. 875 (S.D. Ala. 1982).

124. *Clark and United States v. Marengo County Commission*, 469 F. Supp. 1150 (S.D. Ala. 1979), *rev'd* 731 F.2d 1546 (11th Cir. 1984), *appeal dismissed and cert. denied*, 469 U.S. 976 (1984), *on remand*, 643 F. Supp. 232 (S.D. Ala. 1986), *aff'd sub nom. Clark and United States v. Marengo County*, 811 F.2d 609 (11th Cir. 1987) (liability) and 811 F.2d 610 (11th Cir. 1987) (remedy); *United States v. Dallas County Commission*, 548 F. Supp. 875 (S.D. Ala. 1982), *rev'd*, 739 F.2d 1529 (11th Cir. 1984), *on remand*, 636 F. Supp. 704 (S.D. Ala. 1986), 661 F. Supp. 955 (S D Ala. 1987) (remedy), *rev'd*, 850 F.2d 1433 (11th Cir. 1988). See McCrary 1985, 484–88, McCrary 1990, 512–14, 523–24.

125. See *Burton v. Hobbie*, 543 F Supp. 235 (M.D. Ala. 1982), *aff'd*, 459 U.S. 962 (1982). Attorneys for the plaintiffs were Blacksher, Menefee, Still, and black Montgomery lawyer Solomon Seay.

126. *Sims v. Amos* 336 F. Supp. 924 (M.D. Ala. 1972), *aff'd*, 409 U.S. 942 (1972). A three-judge panel in Burton ordered the second plan into effect as an interim remedy, but

called for new elections under a fair redistricting scheme in one year, *Burton v. Hobbie*, 543 F. Supp. 235, 239, 248 (M.D. Ala. 1982).

127. *Burton v. Hobbie*, 561 F. Supp. 1029, 1035–36 (M.D. Ala. 1983).

128. In *Harris v. Graddick*, 593 F. Supp. 128 (M.D. Ala. 1984), also called *Harris I*, Judge Myron Thompson issued a preliminary injunction requiring the appointment of more black persons as poll officials. Blacksher, Menefee, and black Montgomery attorney Terry Davis represented the plaintiffs; Still was by this time representing one of the defendants, the State Democratic Executive Committee.

129. See, for example, the following deposition testimony cited in *Harris v. Graddick*, 601 F. Supp. 70, 72–73 (M.D. Ala. 1984), also called *Harris II*: "Where you got 75 percent of the voters are white and you are going to throw them in a black chief inspector," complained the probate judge of Jefferson County, one of the officials responsible for appointing poll workers throughout the county, "that don't make sense. And I can't get re-elected with that kind of program. I will just tell you like it is." The plaintiffs' attorney then asked: "They would vote against you when you ran for office next time?" The forthright probate judge responded, "You damned right," adding by way of explanation that "people that are primarily working at the polls are the most biased, prejudiced, politically affiliated people in the world and they are the ones that go out and make three or four thousand phone calls in every election."

130. *Harris v. Graddick*, 615 F. Supp. 239 (M.D. Ala. 1985), also called *Harris III*. The final opinion in the case contains findings of historical intent as well as current effects. *Harris v. Siegelman*, 695 F. Supp. 517 (M.D. Ala. 1988), also called *Harris IV*.

131. *Underwood v. Hunter*, 730 F.2d 614 (11th Cir. 1984), *aff'd* 471 U.S. 222 (1985). As evidence of disparate impact the plaintiffs showed that in Jefferson and Montgomery counties, where the two plaintiffs resided, blacks were at least 1.7 times as likely as whites to suffer disfranchisement under the petty crimes provision. The testimony of both expert historians, J. Morgan Kousser for the plaintiffs and J. Mills Thornton for the defendants, documented the racial purpose behind the adoption of the petty crimes provision.

132. 640 F. Supp. 1347 (M.D. Ala. 1986). Blacksher, Menefee, and Still represented the plaintiffs initially; in subsequent phases Pamela Karlan of the NAACP Legal Defense and Educational Fund played a significant role.

133. *Dillard v. Crenshaw County* (1986), 640 F. Supp. 1361, 1373. The testimony of the historian is summarized, ibid., 1356–59. ADC Field Director Jerome Gray also testified about the repeated failures of black candidates running at large in the nine counties.

134. Still 1991.

135. Auburn City Attorney Knox McMillan to David Norman, 6 July 1972, plus attachments (see n. 91 above); Strong 1972, 468–69.

136. Thernstrom 1987; Bullock 1989.

137. Academic research documenting the discriminatory impact of at-large elections includes Jones 1976; Karnig 1976; Robinson and Dye 1978; Latimer 1979; Karnig and Welch 1980; Davidson and Korbel 1981; Engstrom and McDonald 1981 and 1987; Mundt and Heilig 1982.

138. Cox and Turner 1981 was the starting point for our analysis of both the methods of electing municipal governing bodies and the degree of black representation in each city. A survey by the Alabama Democratic Conference of selected Alabama municipalities for 1984 provides a valuable supplement to the information on these issues. Many of the changes from at-large to district elections are documented in consent decrees growing out of voting rights litigation; such consent decrees are obtained from the clerks of federal district

courts in Alabama. For other changes, we draw on the public files of section 5 submissions for Alabama cities in the Civil Rights Division of the Department of Justice. For data on black officeholding we rely on the rosters of black public officials published by the Joint Center for Political Studies from 1971 through 1990. Racial composition data come from the 1980 Census of Population, supplemented in some instances by special surveys undertaken by local jurisdictions and reported to the Department of Justice in section 5 submissions.

139. Such an equity ratio is the most common measure of the dependent variable in ascertaining the relationship between methods of election and minority representation; in using this ratio we do not imply that section 2 of the Voting Rights Act entitles minority groups to proportional representation.

140. Alabama "Class 8" cities (those under 6,000 population) are covered by different code provisions, and are excluded from the analysis presented here. Many of them also shifted from at-large to district elections in response to litigation between 1984 and 1989. Our preliminary findings are that these smaller cities followed the same pattern as those with populations above 6,000: blacks were rarely elected at large in white-majority jurisdictions, but almost invariably won in black-majority single-member districts.

141. In this chapter we present our findings for city governing bodies; in an earlier paper we reported similar results for county commissions. See McCrary, Gray, Still, and Perry 1989.

142. Each city had relatively few blacks: Dothan was 26 percent black in 1980, Ozark was 23 percent, and Jacksonville was only 12 percent. For more than a decade each had reelected the same individual; no white person ever ran against the black incumbents. As early as 1980, Dothan, Ozark, and Jacksonville were among the ten majority-white cities in our total sample of forty-eight cities that had elected a black council member. The remaining thirty-five majority-white cities using at-large elections at that time had no black members. The mean equity ratio for all forty-five at-large cities in 1980 was a mere 0.26; for Dothan, Ozark, and Jacksonville the average was 1.16. Thus even in 1980 black representation in these three cities was atypical. In Dothan, moreover, litigation had played an indirect role in securing minority representation. Black plaintiffs challenged the city's at-large system in *Yelverton v. Driggers*, 370 F. Supp. 612 (M.D. Ala. 1974). After the initiation of the lawsuit, the city elected its first black commissioner to represent a residency district that was more than 90 percent black. Because a black had been elected, federal judge Frank Johnson allowed the city to continue using at-large elections, but he retained jurisdiction over the case.

143. The four municipalities with mixed plans also approached proportionality.

144. See the objection letters for annexations in Alabaster, 7 July 1975, 27 December 1977; Bay Minette, 6 October 1986; and Alex City, 1 December 1986. Subsequently all these cities switched to single-member districts, and their annexations were precleared. An objection to staggered terms in Phenix City, 12 December 1975, led to the adoption of a mixed plan including three single-member districts and two at-large seats.

145. As we saw earlier, Montgomery voluntarily adopted a ward plan, and Auburn and Selma mixed plans, in the 1970s. Six white-majority cities (and one black-majority municipality) switched more or less voluntarily to single-member districts, and one white-majority city to a mixed plan in the 1980s. Andalusia, Attalla, Greenville, Jasper, Northport, and Sylacauga were the white-majority cities changing voluntarily to districts (although discussion of possible lawsuits by minority plaintiffs or by the Department of Justice stimulated

voluntarism in most). Black-majority Prichard also voluntarily adopted a ward plan. White-majority Anniston adopted a mixed plan.

146. Even in cases that appear to be purely voluntary, awareness of the Voting Rights Act served at least an educational function. In its ordinance establishing a single-member district plan in 1988, for example, the small north Alabama city of Attalla, only 6,544 in population and 17 percent black, specified that it was "sensitive to the Sec. 5 Preclearance Requirements of the Voting Rights Act," and even cited the specific provisions of the Code of Federal Regulations that sets forth these requirements. Attalla City Council, Ordinance No. 612(88). Both Etowah County, in which Attalla is located, and the neighboring city of Gadsden had previously agreed to go to district elections in order to settle lawsuits by private black plaintiffs.

Chapter Three
Georgia

1. U.S. Commission on Civil Rights 1968, 232–39.
2. Ibid., 216–17, 232–39.
3. Act of March 2, 1867, 14 Stat. 428; Act of March 23, 1867, 15 Stat. 2; Act of July 19, 1867, 15 Stat. 14.
4. Bartley 1983, 59.
5. *Journal of the House*, 9 September 1868, 294–95; *Journal of the Senate*, 12 September 1868, 277–80; Bartley 1983, 62.
6. 92 U.S. 542 (1875).
7. 92 U.S. 214 (1875).
8. Ga. Laws 1871, 74, repealing Ga. Laws 1870, 431–32.
9. Ga. Laws 1872, 64, 279; Foner 1988, 423. Many counties abolished their grand jury appointed boards of education by local referendums, until by 1985 only thirty-four grand jury appointed boards remained. The constitutionality of the 1872 statute was challenged in a class action suit in federal court in 1988. *Vereen v. Ben Hill County*, 743 F. Supp. 864 (M.D. Ga. 1990). After the complaint was filed the general assembly abolished the grand jury selection system in Ben Hill County, the class representative, and provided for the election of a new board of education from single-member districts. Ga. Laws 1990, 4435. The next year the legislature passed a constitutional amendment, Ga. Laws 1991, 2032, requiring all county boards of education to be elected. The amendment was approved by the voters at the 3 November 1992 general election, rendering the legal challenge moot and consigning the grand jury appointment system to history.
10. Ga. Laws 1873, 25; Wardlaw 1932, 25.
11. Drago 1982, 155.
12. Wardlaw 1932, 46.
13. Kousser 1974, 209.
14. Wardlaw 1932, 45.
15. Kousser 1974, 210.
16. Stone 1908, 355.
17. Ga. Laws 1945, 129.
18. "Poll Tax Repeal Voted in House," *Atlanta Constitution*, 1 February 1945.
19. Ga. Laws 1890, 210.
20. Holland 1949, 50, 54; Kousser 1974, 217.

21. Ga. Laws 1894, 115.
22. Wardlaw 1932, 52.
23. Woodward [1938] 1973, 189.
24. Ga. Laws 1908, 27.
25. *Journal of the House*, 24 June 1908, 11.
26. Ga. Laws 1908, 27.
27. 383 U.S. 301, 310–11.
28. Ga. Laws 1913, 115.
29. Wardlaw 1932, 67–68.
30. "The Georgia Disfranchisement," *Nation*, 8 August 1908, 113–14.
31. Wardlaw 1932, 69.
32. 62 F. Supp. 639 (M.D. Ga. 1945), *aff'd*, 154 F.2d 450 (5th Cir. 1946).
33. 321 U.S. 649 (1944).
34. Bernd and Holland 1959, 487–94.
35. McDonald 1983, 14.
36. "Devise Revenue or Scrap Program, Says Executive," *Atlanta Constitution*, 21 March 1947.
37. Southern Regional Council 1984.
38. Frick 1967, 44–45.
39. Southern Regional Council 1984.
40. Ga. Laws 1949, 1204.
41. Ga. Laws 1950, 126.
42. 71 Stat. 634.
43. Ga. Laws 1957, 348.
44. Ga. Laws 1958, 269.
45. Bernd and Holland 1959, 487.
46. Ga. Laws 1964, Ex. Sess., 58.
47. Interview with Robert Flanagan, 30 April 1990.
48. *United States v. Raines*, 189 F. Supp. 121, 125 (M.D. Ga. 1960).
49. *United States v. Raines*, 172 F. Supp. 552 (M.D. Ga. 1959), *rev'd*, 362 U.S 17 (1960).
50. Lawson 1976, 270–72.
51. McDonald 1982, 77.
52. Ga. Laws 1917, 193.
53. Key 1949, 106.
54. Ibid., 119; Bernd 1960, 16.
55. *Busbee v. Smith*, 549 F. Supp. 494, 499 (D.D.C. 1982).
56. *Gray v. Sanders*, 372 U.S. 368, 381 (1963).
57. *Journal of the House*, 25 January 1963, 301.
58. Ga. Laws 1964, Ex. Sess., 174.
59. "Majority Vote Ordered," *Savannah Evening Press*, 1 April 1964; "State Democratic Committee Increases Fees for Candidates," *Macon News*, 1 April 1964.
60. "Election Methods Face Change," *Valdosta Daily Times*, 21 February 1963.
61. "Majority Vote Requirement in Elections Passes House," *Valdosta Daily Times*, 20 February 1963.
62. "Runoff Bill Revived by Senate Unit," *Atlanta Constitution*, 1 March 1963.
63. *Rogers v. Lodge*, 458 U.S. 613, 627 (1982).
64. Ga. Laws 1968, 977.

65. Voter Education Project 1976; U.S. Department of Justice 1990; McDonald 1983, 71–73, 79–80. Cities switching to majority vote included: Alapaha, Alma, Americus, Ashburn, Athens, Augusta, Bainbridge, Blackshear, Brunswick, Buford, Camilla, Cochran, Conyers, Covington, Crawfordville, Douglasville, Forsyth, Fort Valley, Gainesville, Gordon, Hartwell, Hawkinsville, Hinesville, Hogansville (including the city board of education), Homerville, Jackson, Jesup, Jonesboro, Kingsland, Lakeland, Louisville, Lumber City, Madison, Manchester, McRae, Monroe, Moultrie, Nashville, Newnan, Norcross, Ocilla, Palmetto, Perry, Quitman, Rome, Saint Marys, Sandersville, Sylvester, Thomasville (board of education), Thomson, Wadley, Waynesboro, and Wrens.
66. Civ. No. 1:90-CV-1001 (N.D. Ga.).
67. Civ. No. 1:90-CV-1749 (N.D. Ga.).
68. *Bond v. Fortson*, 334 F. Supp. 1192 (N.D. Ga. 1971), *aff'd*, 404 U.S. 930 (1971).
69. *United States v. Georgia*, No. C76–1531A (N.D. Ga. 1977), *aff'd*, 436 U.S. 941 (1978).
70. *Brooks v. Harris*, Civ. No. 1:90-CV-1001-RCF (N.D. Ga.). Transcript of Proceedings, 13 July 1990, 74–75.
71. Butler 1985, 448–50.
72. *Toombs v. Fortson*, 205 F. Supp. 248, 257 (N.D. Ga. 1962).
73. Ga. Laws 1962, Ex. Sess., 30; "House Acts to Assure County-Wide Elections," *Valdosta Daily Times*, 8 October 1962.
74. Ga. Laws 1962, Ex. Sess., 51; "Redistricting Certain to Win in House, Experts Forecast," *Atlanta Constitution*, 3 October 1962; *Atlanta Constitution*, 5 October 1962; "Countywide Vote Okayed in House," *Atlanta Constitution*, 9 October 1962.
75. *Finch v. Gray*, No. A96441 (Fulton Cty. Sup. Ct. 1962).
76. "Legislature to Adjourn Today After Decision on Urban Senate Races," *Atlanta Constitution*, 8 October 1962; "Fulton Senate Voting Can Be Held by Districts Only, Judge Pye Rules," *Atlanta Constitution*, 16 October 1962.
77. "Who's In That Runoff? Courts Ready to Decide," *Atlanta Constitution*, 18 October 1962; "Count by Districts Changes Results of 3 Fulton Races, One in DeKalb," *Atlanta Constitution*, 19 October 1962.
78. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).
79. Ga. Laws 1969, 285, repealing Ga. Laws 1964, Ex. Sess., 43.
80. 42 U. S. C. §§1973aa and 1973c.
81. U.S. Commission on Civil Rights 1968, 238.
82. U.S. Commission on Civil Rights 1981, 103.
83. Watters and Cleghorn 1967, 143.
84. O.C.G.A. §§21–2-218 and 21–3-123.
85. Interview with Ed Brown, director of VEP, 25 April 1990.
86. *NAACP DeKalb County Chapter v. Georgia*, 494 F. Supp. 668 (N.D. Ga. 1980).
87. *Fourth Street Baptist Church of Columbus, Georgia v. Board of Registrars*, 253 Ga. 368 (320 SE2d 543) (1984).
88. No. C84–1181A (N.D. Ga. February 19, 1987).
89. Interview with Brown, 25 April 1990.
90. No. C86–1946A (N.D. Ga. September 12, 1986)
91. No. 3–84-CV-79 (N.D. Ga. June 3, 1985)
92. Rosenstone and Wolfinger 1978, 22.
93. 42 U.S.C. §1973.
94. Davidson and Korbel 1981; Engstrom and McDonald 1981.

95. "At-Large Elections Abolished in Baldwin," *Atlanta Constitution*, 8 April 1984.
96. "More Blacks Win Offices in District Voting," *Atlanta Constitution*, 26 August 1984.
97. U.S. Department of Commerce 1990, app. A, A4–A173.
98. See *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987)[Carroll County]; *Hall v. Holder*, 955 F.2d 1563 (11th Cir. 1992)[Bleckley County]; *Clark v. Telfair County, Georgia, Commission*, Civ. No. 287–25 (S.D. Ga. Oct. 26, 1988)[Telfair County]; *Nealy v. Webster County, Georgia*, Civ. No. 88–203 (M.D. Ga. March 16, 1990)[Webster County]; *Howard v. Commissioner of Wheeler County, Georgia*, Civ. No. 390–057 (S.D. Ga. July 10, 1992) [Wheeler County].
99. The missing data in the 129 Georgia counties precludes an equivalent table for counties.
100. *McCain v. Lybrand*, 465 U.S. 236, 245 (1984).
101. Lawsuits requiring section 5 preclearance were: Calhoun, *Jones v. Cowart*, Civ. No. 79–79 (M.D. Ga. June 11, 1980); Clay, *Davenport v. Isler*, Civ. No. 80–42 (M.D. Ga. June 23, 1980); Dooly, *McKenzie v. Giles*, Civ. No. 79–43 (M.D. Ga. Feb. 22, 1980); Early, *Brown v. Scarborough*, Civ. No. 80–27 (M.D. Ga. 1980); Henry, *Head v Henry County Board of Commissioners*, Civ. No. 79–2063A (N.D. Ga. June 10, 1980); Miller, *Thompson v. Mock*, Civ. No. 80–13 (M.D. Ga. Feb. 23, 1981); Morgan, *Butler v. Underwood*, Civ. No. 76–53 (M.D. Ga. June 11, 1980); Twiggs, *Bond v. White*, 377 F. Supp. 514 (M.D. Ga. 1974); and Wilkes, *Avery v. Wilkes County Board of Commissioners*, Civ. No. 176–38 (S.D. Ga. 1976), and *Wilkes County, Georgia v. United States*, 450 F. Supp. 1171 (D.D.C. 1978), denying section 5 preclearance. A successful constitutional challenge was filed against McDuffie County, *Bowdry v. Hawes*, Civ. No. 176–128 (S.D. Ga. 1978). An interview with Christopher Coates, 6 April 1990, indicated threats of litigation had been made in Bacon, Crisp, Meriwether, Walton, and Newton counties. House Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, *Extension of the Voting Rights Act*, 97th Cong., 1st sess., 1981, ser. 24, pt. 1, p. 605. documented a threat in Newton County. See also U.S. Department of Justice 1990.
102. Ga. Laws 1933, 656.
103. *Williams v. Timmons*, Civ. No. 80–26 (M.D. Ga. 28 June 1980).
104. 458 U.S. 613 (1982).
105. 395 F. Supp. 35 (N.D. Ga. 1975).
106. 437 F. Supp. 137 (M.D. Ga. 1977).
107. 412 U.S. 755 (1973).
108. 446 U.S. 55 (1980).
109. McDonald 1989, 1264.
110. *Thornburg v. Gingles*, 478 U.S. 30, 43–60 (1986).
111. 458 U.S. 613, 618, quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976).
112. *Lodge v. Rogers*, Civ. No. 176–55 (S.D. Ga. March 23, 1983).
113. "Threat of Lawsuits Looms," *Atlanta Constitution*, 26 August 1984.
114. 478 U.S. 30 (1986).
115. "More Blacks Win Offices in District Voting," *Atlanta Constitution*, 26 August 1984.
116. *Thornburg v. Gingles*, 478 U.S. 30, 53 (1986).
117. 478 U.S. 30, 73.
118. *Hall v. Holder*, 955 F.2d 1563, 1573 (11th Cir. 1992).
119. *Lodge v. Buxton*, 639 F.2d 1358, 1378 (5th Cir. 1981).

120. *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1559 (11th Cir. 1987).
121. *Cross v. Baxter*, 604 F.2d 875, 880 n. 8 (5th Cir. 1979).
122. *Paige v. Gray*, 437 F. Supp. 137, 158 (M.D. Ga. 1977).
123. *Pitts v. Busbee*, 395 F. Supp. 35, 40 (M.D. Ga. 1975).
124. *Bailey v. Vining*, 514 F. Supp. 452, 461 (M.D. Ga. 1981).
125. *Wilkes County, Georgia v. United States*, 450 F. Supp. 1171, 1174 (D.D.C. 1978).
126. *Brooks v. Georgia State Board of Elections*, No. CV 288–146 (S.D. Ga. December 1, 1989), *aff'd mem.* 111 S. Ct. 288 (1990).
127. American Civil Liberties Union Foundation, 1989.
128. *Busbee v. Smith*, Civ. No. 82–0665 (D.D.C. 1982), Young deposition, 9; Plaintiffs' Exhibit 25.
129. Binford 1990.
130. Dubois 1979.
131. Interview with Tyrone Brooks, 5 March 1990.
132. 241 F. Supp. 65, 67 (M.D. Ga. 1965).
133. 277 F. Supp. 821 (M.D. Ga. 1967).
134. *Bond v. Floyd*, 385 U.S. 116, 120 (1966).
135. Bond 1990.
136. Ibid.
137. *Bond v. Floyd*, 385 U.S. 116, 125.
138. *Georgia v. United States*, 411 U.S. 526, 529–30 (1973).
139. *Georgia v. United States*, 411 U.S. 526 (1973).
140. "Blacks Fighting to Gain Six Seats," *Atlanta Constitution*, 3 July 1988.
141. 376 U.S. 1 (1964)
142. Ga. Laws 1964, 468; *Toombs v. Fortson*, 241 F. Supp. 65, 67 (N.D. Ga. 1965).
143. *Pitts v. Busbee*, 395 F. Supp. 35, 40 (N.D. Ga. 1975).
144. *Busbee v. Smith*, 549 F. Supp. 494, 500 (D.D.C. 1982).
145. *Bacote v. Carter*, 343 F. Supp. 330, 331 (N.D. Ga. 1972).
146. Drago 1982, 60.
147. *Busbee v. Smith*, 549 F. Supp. 494, 510 (D.D.C. 1982).
148. 425 U.S. 130, 141 (1976).
149. *Busbee v. Smith*, 459 U. S. 1166 (1983).
150. *Busbee v. Smith*, 549 F. Supp. 494, 507 (D.D.C. 1982).
151. 549 F. Supp. 494, 501.
152. 549 F. Supp. 494, 500.
153. 549 F. Supp. 494, 520.
154. Joint Center for Political and Economic Studies 1990, 10, 129.
155. U.S. Department of Commerce 1989. These figures may understate the black-white gap in voter turnout. See Lichtman and Issacharoff 1991.

Chapter Four
Louisiana

1. Prestage and Williams 1982, 316.
2. The race of registered voters is recorded on voter registration cards in Louisiana. These percentages reflect the official state registration figures at the beginning of 1990 and the voting-age population figures reported in the 1990 Census of Population.
3. Joint Center for Political and Economic Studies 1991, 10, 13, 195–216.

4. 380 U.S. 145 (1965).
5. La. Const. 1921, art. 7, section 1(d), as amended in 1960.
6. Kunkel 1959, 2, 7.
7. *United States v. Louisiana*, 225 F. Supp. 353, 364 (E.D. La. 1963).
8. Kunkel 1959, 11–12.
9. Prestage and Williams 1982, 293–96.
10. Wright 1987, 13.
11. Kousser 1974, 162–63.
12. Quoted in Kunkel 1959, 17.
13. *United States v. Louisiana*, 225 F. Supp. 353, 373 n. 49 (1963).
14. 225 F. Supp. 353, 374.
15. Ibid.
16. 225 F. Supp. 353, 375.
17. 238 U.S. 347 (1915).
18. From 1868 to 1940 Louisiana's constitutions also contained provisions for a poll tax. This tax does not appear to have been employed as a disfranchising device, however (see Kunkel 1959, 21; and Wright 1987, 20).
19. Kunkel 1959, 20.
20. *United States v. Louisiana*, 225 F. Supp. 353, 377 (1963).
21. 225 F. Supp. 353, 377.
22. These figures are taken from U.S. Commission on Civil Rights 1968, 240–43.
23. See Fenton and Vines 1957; and Prestage and Williams 1982, 101–3.
24. See Matthews and Prothro 1966, 115–20; and chap. 12, this volume.
25. Prestage and Williams 1982, 302; see also Fenton and Vines 1957, 709–10.
26. Wright 1987, 23; see also Fenton and Vines 1957, 705–9.
27. See generally chap. 12. Blacks attempting to register in Louisiana were also subject at times to violence or threats of violence from whites and to economic sanctions (see Prestage and Williams 1982, 317; and Wright 1986, 105).
28. See Conaway 1973; Jeansonne 1977.
29. *United States v. Louisiana*, 225 F. Supp. 353, 381 (1963).
30. *Louisiana v. United States*, 380 U.S. 145, 153 (1965).
31. La. Const. 1921, art. 7, secs. 1(c), 1(d).
32. *United States v. Louisiana*, 225 F. Supp. 353, 381 (1963).
33. See Wright 1986, 100; and Lawson 1976, 136, 211.
34. *United States v. Louisiana*, 225 F. Supp. 353, 378 (1963).
35. *United States v. Wilder*, 222 F. Supp. 749, 750 (1963). See also *United States v. McElveen*, 180 F. Supp. 10 (1960); and *United States v. Association of Citizens Councils of Louisiana*, 196 F. Supp. 908 (1961).
36. *United States v. Wilder*, 222 F. Supp. 749, 752 (1963).
37. *Louisiana v. United States*, 380 U.S. 145, 153 (1965).
38. 380 U.S. 145, 150.
39. See chap. 1 in this volume.
40. U.S. Commission on Civil Rights 1968, 243.
41. Wright 1986, 102; see more generally chap. 12, this volume.
42. U.S. Commission on Civil Rights 1968, 243. The number of voting-age blacks in 1967 has been estimated by interpolating between the 1960 and 1970 census figures.
43. Prestage and Williams 1982, 289.
44. The issue resurfaced in 1986, however, when the Republican party attempted to purge voters in precincts in which Ronald Reagan had received less than 20 percent of the presidential vote in 1984. This criterion of course primarily targeted black precincts in the state. See Sabato 1988a, 83–84.

45. The expression is taken from Mr. Justice Marshall's dissenting opinion in *City of Mobile v. Bolden*, 446 U.S. 55, 104 (1980).
46. See Engstrom 1985a, 14.
47. See the *Roster of Black Elected Officials*, published by the Joint Center for Political Studies, Washington, D.C., for these selected years.
48. Wright 1986, 103.
49. Ibid.
50. Ibid., 106.
51. See generally Engstrom and McDonald 1981 and 1986; Engstrom and Wildgen 1977; Grofman, Migalski, and Noviello 1986; and Lyons and Jewell 1988.
52. See Engstrom 1988.
53. A few objections were subsequently withdrawn after the receipt of additional information.
54. See Grofman, Migalski, and Noviello 1986.
55. See Halpin and Engstrom 1973, 52–57, 64–65.
56. *Bussie v. Governor of Louisiana*, 333 F. Supp. 452 (E.D. La. 1971).
57. 333 F. Supp 452
58. See Weber 1981, 138.
59. The redistricting plan for the senate adopted by the district court was revised, over the objections of black plaintiffs, by the Fifth Circuit Court of Appeals. See *Bussie v. McKeithen*, 457 F.2d 796 (5th Cir. 1971).
60. This requirement, applicable to both chambers of the state legislature, was contained in a new state constitution adopted in 1974. La. Const., art. 3, sec. 1(A).
61. Joint Center for Political and Economic Studies 1991, 13.
62. See generally Engstrom and McDonald 1981 and 1986.
63. See Halpin 1978.
64. This was a telephone survey in which the respondents were either municipal clerks or employees in the clerk's office. The voting-age population of Farmerville was not reported by race in the census, so that municipality has been excluded from the analysis. The authors wish to thank John Cosgrove and Kenneth Prados for assisting with the collection of these data.
65. On the use of these measures, see, e.g., MacManus 1978 and Karnig 1976; but see also Engstrom and McDonald 1981 and 1986.
66. The data on black council members in 1974 are taken from the Joint Center for Political Studies 1975.
67. See Brouthers and Larson 1988.
68. Engstrom and McDonald 1986; Welch 1990. This chapter on Louisiana, unlike the other state chapters, focuses its tabular analysis on those tables (4.1A–4.8A) in which cities are classified by percentage of the voting-age population rather than by total population. However, for comparison with the other state chapters, we also include several equivalent tables (4.1–4.5) that categorize cities by total population. There would be no significant differences in these conclusions about the impact of at-large elections in Louisiana if we were to rely on the black percentages of the total populations in these municipalities rather than on the percentages of the voting-age populations.
69. The data on the racial composition of the respective districts are taken from the

available section 5 preclearance requests submitted to the Department of Justice by twenty-three municipalities.

70. 425 U.S. 130.
71. Engstrom 1978, 160; and Engstrom and Wildgen 1977.
72. *Beer v. United States*, 374 F Supp 363 (D.D.C. 1974).
73. *Beer v. United States*, 425 U.S 130, 138–39 (1976).
74. 425 U.S. 130, 141.
75. Ibid.
76. Binion 1979, 171.
77. Engstrom 1978, 162.
78. McDonald 1991, 6–7.
79. 446 U.S. 55 (1980).
80. Ibid.
81. 403 U.S. 124 (1971).
82. 412 U.S. 755 (1973).
83. 412 U.S. 755, 766.
84. 485 F.2d 1297 (5th Cir. 1973).
85. 485 F.2d 1297, 1306–7.
86. Parker 1983, 735–37.
87. See, however, *Rogers v. Lodge*, 458 U.S. 613 (1982).
88. Engstrom 1988, 102–5.
89. Parker 1983, 716
90. Engstrom 1986.
91. See generally Engstrom 1986, 115–18.
92. 574 F. Supp. 325 (E.D. La. 1983).
93. Engstrom 1986, 118–19.
94. *Major v. Treen*, 574 F. Supp. 325, 351–55 (E.D. La. 1983).
95. 574 F. Supp. 325, 352.
96. Engstrom 1986, 120.
97. 106 U.S. 30.
98. 834 F.2d 496 (5th Cir. 1987).
99. *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987) The district court's decision is reported at 636 F. Supp. 1113 (E.D. La. 1986).
100. 834 F.2d 496, 503–4.
101. 834 F.2d 496, 503. The all at-large system was replaced by a mixed arrangement with four single-member districts, one of which had a black majority, and one at-large seat. In the subsequent election, a black was elected to the Gretna city council from the majority-black district.
102. See Engstrom 1985b.
103. 106 U.S. 30 (1986).
104. See also *Smith v. Clinton*, 687 F. Supp. 1310 (E.D. Ark. 1988), *summarily aff'd*, *Clinton v. Smith* 488 U.S. 988 (1988)
105. 691 F. Supp. 991 (E.D. La. 1988), *aff'd* 926 F.2d 487 (5th Cir. 1991). See also *Westwego Citizens for Better Government v City of Westwego* 872 F.2d 1201 (5th Cir. 1989) and 946 F.2d 1109 (5th Cir. 1991).
106. 725 F. Supp. 285 (M.D. La. 1988).
107. Engstrom 1989.
108. *Clark v. Edwards*, 725 F. Supp. 285 (1988).

109. These estimates are based on a weighted double regression analysis in which the votes cast on the proposed amendment in precincts across the state were regressed onto the percentage of voters signing in to vote who were black in every precinct. On this methodology, see generally Grofman, Migalski, and Noviello 1985, 202–9; Loewen and Grofman 1989; Engstrom and McDonald 1988, 181; and Engstrom 1989.
110. *Clark v. Roemer* 777 F. Supp. 471 (M.D. La. 1991).
111. Civ. No. 86-4057A (E.D. La. Sept. 13, 1989).
112. The October 1989 statewide ballot also contained a proposed constitutional amendment that would have provided a New Orleans–based single-member district for the state supreme court. This proposed amendment, like that for the district courts and the courts of appeals, was rejected in a racially divided vote. An estimated 66.4 percent of the blacks voting on this amendment voted in favor of it, compared to only 18.9 percent of the whites (see note 108).
113. *Chisom v. Roemer*, Civ. No. 86-4057A (E.D. La. Sept. 13, 1989), sl. op. 34–35.
114. *Chisom v. Edwards*, Civ. No. 86–4075 Sec. A (E.D. La. 1992) (consent judgment).
115. *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (1990).
116. *Chisom v. Roemer*, — U.S. — (1991), sl. op., 17. The Supreme Court also held in 1991, in an appeal from the *Clark v. Roemer* case, that changes in judicial election systems require preclearance under section 5 of the Voting Rights Act — U.S. — (1991).

Chapter Five
Mississippi

The authors are grateful for the research assistance of Martha Roark and Marianne Merritt in the preparation of this chapter.

1. *Greenville Times*, 24 November 1906.
2. *Stewart v. Waller*, 404 F. Supp. 206, 213 (N.D. Miss. 1975) (three-judge court).
3. E.g., Parker 1990.
4. *Redemption* was a term used by white Southerners after Reconstruction to apply to the abolition of black political participation.
5. Morrison 1987, 33.
6. Lynch [1913] 1970, 44.
7. McMillen 1989, 37.
8. Wharton 1965, 138–56; McMillen 1989, 38–41.
9. Colby 1986, 125.
10. U.S. Commission on Civil Rights 1965, 7.
11. Colby 1986, 125–26.
12. Morrison 1987, 45–47.
13. Ibid., 3.
14. 393 U.S. 544, 565, 569 (1969).
15. Colby 1986, 129–30.
16. Colby 1987, 42–44.
17. 301 F. Supp. 1448 (S.D. Miss. 1969) (three-judge court), *rev'd*, 400 U. S. 379 (1971).
18. *Perkins v. Matthews*, 400 U.S. 379 (1971).

19. 404 F. Supp. 206 (N.D. Miss. 1975) (three-judge court).
20. 412 U.S. 755 (1973).
21. 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).
22. 446 U.S. 55 (1980).
23. E.g., Parker 1983, 738–46.
24. 506 F. Supp. 491 (S.D. Miss. 1981), *aff'd*, 663 F.2d 659 (5th Cir. 1981).
25. 534 F. Supp. 1351 (N.D. Miss. 1980), *vac'd and remanded*, 711 F.2d 667 (5th Cir 1983), *on remand*, 599 F. Supp. 397 (N.D. Miss. 1984).
26. Parker and Phillips 1981, 40–41.
27. Parker 1983, 747–64
28. 478 U.S. 30 (1986)
29. Civil No. H77-0062(C) (S.D. Miss. March 2, 1984).
30. The figures in this paragraph do not square with those in table 5.8 for two reasons First, the figures in the text refer to all section 2 cases in all cities, while the table contains data only on cities of 1,000 or more. Second, the table contains data on cities that changed not only as a result of section 2 litigation but Fourteenth Amendment litigation.
31. Davidson and Korbel 1981, 994–95; Engstrom and McDonald 1981 and 1982; Jones 1976; Karnig 1976 and 1979; Karnig and Welch 1980 and 1982; Latimer 1979; Robinson and Dye 1978; Taebel 1978; Vedlitz and Johnson 1982.
32. Davidson and Korbel 1981; Heilig and Mundt 1983.
33. See Editors' Introduction and chap. 10 in this volume.
34. U.S. Commission on Civil Rights 1975. Facets of Mississippi's resistance to voting rights are described in virtually every chapter of this report.
35. Parker 1990, 188; Amaker 1988, 139–56; and Parker 1989.
36. Parker 1990, 34–35.
37. Amaker 1988, 149; Parker 1989, 14.
38. 446 U.S. 156 (1980).

Chapter Six
North Carolina

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1. Key 1949, 210.
2. For more on this, see Kousser 1980.
3. Chafe 1980, 13, 53–60, 220–22.
4. U.S. Commission on Civil Rights 1975, 43. While 46.8 percent of the black voting-age population was registered in 1964, this compared to 96.8 percent for whites. Both figures were inflated by the state's failure to purge voting lists of voters who were deceased or had moved. See *Gingles v. Edmisten*, 590 F. Supp. 161 (E.D.N.C. 1984), Exhibit 38 and Stipulation 58, n. 2.
5. Suitts 1981, 78.
6. 590 F. Supp. 161 (E.D.N.C. 1984).
7. North Carolina Advisory Committee 1962, 16.

8. Kousser 1974, 15.
9. Edmonds 1951, 97–117; Anderson 1981.
10. Swain 1993.
11. Edmonds 1951, 124–36.
12. Logan 1964, 26.
13. Edmonds 1951, 124–36.
14. Logan 1964, 57.
15. Mabry 1940, 63.
16. Kousser 1974, 187.
17. Edmonds 1951, 204.
18. North Carolina, Secretary of State 1980, 890.
19. Kousser 1974, 236.
20. *Allison v. Sharp*, 209 N.C. 477 (1936), quoted in North Carolina Advisory Committee 1962, 16.
21. *Lassiter v. Northhampton County Board of Elections*, 360 U.S. 45 (1959).
22. *Bazemore v. Bertie County Board of Elections*, 254 N.C. 398 (1961).
23. North Carolina Advisory Committee 1962, 24.
24. Key 1949, 256; Crowell 1984, 1.
25. North Carolina Advisory Committee 1962, 24.
26. Ibid., 24.
27. *Winston-Salem Journal*, 19 March 1947, 1; 22 September 1948, 1.
28. U.S. Commission on Civil Rights 1981, 47–48; Suitts 1981, 67.
29. *Dunston v. Scott*, 336 F. Supp. 206 (1972). See Suitts 1981, 67–70.
30. U.S. Commission on Civil Rights 1975, 13–14.
31. *Gaston County v. United States*, 395 U.S. 285 (1969).
32. U.S. Commission on Civil Rights 1975, 31–34; 1981, 101–4.
33. See *Gingles* trial transcript, 429; testimony by board of elections chairman Robert Spearman; and defendant's exhibits.
34. Thompson 1986, 143–45. These comparisons should be interpreted with caution because the state began purging registration rolls in 1972. Reports of white registration rates of over 80 percent are almost certainly inflated.
35. Crowell 1984, 6. See also table 6.10.
36. Thompson 1986, 144.
37. Thernstrom 1987, 20.
38. U.S. Commission on Civil Rights 1975, 26.
39. Parker 1990.
40. 393 U.S. 544 (1969).
41. 393 U.S. 544, 565.
42. Suitts 1981, 71–73.
43. Unpublished Justice Department tabulations.
44. Suitts 1981, 72–73.
45. Keech 1981.
46. Swain 1993.
47. See Joint Center for Political and Economic Studies 1990.
48. For an analysis of this contest, see Eamon 1987.
49. If the appointment occurs in the sixty days preceding the election, it runs to the succeeding election.
50. Drennan 1990, 20. See also Drennan 1989.

51. 618 F. Supp. 410 (E.D.N.C. 1985).
52. No. 86-1048-CIV-5 (E.D.N.C., filed 2 October 1986).
53. Chapter 509 of the North Carolina Session Laws of 1987.
54. Drennan (1990, 33) observes that the law "all but guarantees that the judges in at least eight districts will be black."
55. Drennan 1990, 16–21.
56. These were Judges Ernest B. Fullwood in District Five and Quentin T. Sumner in District Seven-A.
57. Nearly two dozen district court judges out of 127 were black (Drennan 1990, 21 n. 28).
58. 590 F. Supp. 345 (E.D.N.C. 1984). On appeal, this case was upheld in part by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986).
59. 590 F. Supp. 345, 367 n. 27.
60. M. Jordan 1989.
61. Christenson 1990.
62. Information on methods of election for county commissions and city councils was obtained from annual issues of *Forms of Government in North Carolina Counties* and *Forms of Government in North Carolina Cities*, publications of the Institute of Government at the University of North Carolina. Tabulations of minority officeholding at all levels were drawn from the annual issues of *Black Elected Officials: A National Roster*, a publication of the Joint Center for Political Studies. Population figures for 1980 were compiled from census material put out by the North Carolina State Board of Elections. Although cities that were less than 10 percent black were excluded, no population size cutoff was used for the city tables. All municipalities with a governing body were analyzed, including 260 with a population of fewer than 500. Data on population and officeholding on the district level were gathered by telephone survey.
63. *Johnson v. Halifax County*, 594 F. Supp. 161 (E.D.N.C. 1984).
64. In these lawsuits challenging the method of electing the Cumberland County Board of Commissioners and the Siler City city council, the defendants had already abolished at-large elections before the districting; the plaintiffs challenged the new districting system.
65. Leslie Winner supervised research on litigation and contributed to our report on this topic.
66. *McGhee v. Granville County, North Carolina*, 860 F.2d 110 (4th Cir. 1988).
67. Crowell 1988, 1989b.

Chapter Seven
South Carolina

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1. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). South Carolina filed the original complaint. At the court's invitation, Alabama, Georgia, Louisiana, Mississippi, and Virginia filed briefs as amici curiae supporting South Carolina's claim that certain provisions of the Voting Rights Act were unconstitutional. Numerous other states filed briefs supporting the constitutionality of the act.
2. 383 U.S. 301, 308–9, 310–11 n. 9, 329–30 (1966).
3. Newby 1973, 15.
4. Burton 1991, 166; McDonald 1986, 558.
5. Williamson 1965, 72–79; Foner 1988, 200; Burton 1991, 166–67.
6. McDonald 1986, 560.
7. Foner 1988, 352–54, 357, 538; Holt 1977, esp. 97; Williamson 1965, esp. 363–417; Burton 1989, 27–38.
8. Edgar 1974, 141, 407, 409, 420–22; Reynolds and Faunt 1964, 62.
9. Although President Ulysses S. Grant was reluctant to use federal law enforcement on the scale necessary to counteract a statewide campaign of paramilitary violence, his outrage at this incident prompted Grant to send troops to Aiken, Laurens, Barnwell, and Edgefield counties. Rable 1984, 165–72.
10. Cooper 1968, 89.
11. Foner 1988, 342–43, 427–28, 431; Gergel 1977, 7–8; Kaczorowski 1985, 57–61; Hall 1984, 936–41; Burton 1985, 228, 290.
12. Burton 1978, 42–44; Foner 1988, 570–75; Gergel 1977, 8.
13. Gergel 1977, 11–14, quotation on 13. Hampton referred specifically here to the 1878 election, which repeated the tactics of 1876 and added new chicanery.
14. Current law allowed congressional regulation of elections to national office. Democratic reliance on violence, intimidation, and fraud to carry state and local elections would not bear federal scrutiny.
15. Tindall 1952, 31, 39.
16. Ibid., 69; Kousser 1974, 49–50, 85–87, 89, 91–92.
17. Tindall 1952, 54; Kousser 1974, 32, and 1991, 598–602; McDonald 1986, 568. Kousser shows that the proportion of the five other districts, and probably of the sixth as well, was also majority black. Dilutive and disfranchising methods allowed Democrats to control the outcome of the other districts (1991, 598–602).
18. Brown 1975, 85–86. Simkins 1944, 531–34; Brown 1975, 89; Banks 1970, 26, 29–30, 60–73. One of Tillman's native Edgefield County political lieutenants was J. Strom Thurmond's father.
19. Simkins 1944, 407.
20. Simkins 1937, 167–68.
21. In *Mills v. Green*, 67 F. 818 (D.S.C. 1895), a federal district court ruled that this registration law was racially discriminatory and thus unconstitutional. The appeals court reversed, however; see 69 F. 852 (4th Cir. 1895).

22. Simkins 1944, 289–91; Kousser 1974, 147; Burton 1991, 169–70.

23. Tindall 1952, 82; Kousser 1974, 150–51; McDonald 1986, 571; Burton 1991, 161, 170.

24. In 1878 Gary had proposed that African Americans be excluded from the political process by barring them from the Democratic party primary (*Charleston News and Courier*, 4 June 1878). In 1876 three counties—Anderson, Pickens, and Oconee—adopted a primary system. Eight more counties followed in 1878, nine in 1880, and four in 1882. In 1886 the Democratic party held the first primary for congressional offices.

25. Tindall 1952, 89; Ogden 1958, 42, 123, 188.

26. Tindall 1952, 88.

27. Kousser 1974, 92.

28. Key 1949, 504–5.

29. Burton 1991, 170–71.

30. Simkins 1921b, 177.

31. Burton 1991, 171.

32. Myrdal 1944, 488n. Newby (1973, 291) puts registration at three thousand (0.8 percent of voting-age African Americans in South Carolina).

33. *Smith v. Allwright*, 321 U.S. 649 (1944).

34. Key 1949, 627.

35. Democratic Party of South Carolina 1946, 2. For a discussion of the white primary in South Carolina see Farmer 1965.

36. Yarbrough 1987, 65–66; *Elmore v. Rice*, 72 F. Supp. 516, 527 (E.D.S.C. 1947), *aff'd sub nom. Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S 875 (1948).

37. Key 1949, 628–32.

38. *Brown v. Baskin*, 78 F. Supp. 933 (E.D.S.C. 1948), 80 F. Supp. 1017 (E.D.S.C. 1948), *aff'd*, 174 F.2d 391 (4th Cir. 1949).

39. *S.C. Acts* (1950), No. 858. In addition to restoring previously eliminated provisions of the state's election code, the statute includes numerous revisions. Debate over the bill was infused with racial comments. "The white primary is gone," lamented a legislator from Chesterfield County, and "we have a problem of biracial voting in our state." *Charleston News and Courier*, 9 February 1950, 11A. The newspaper also commented that the regulation of primary elections had been removed in 1944 "to avoid having the white primary outlawed in the courts." 14 April 1950, 1A.

40. *Charleston News and Courier*, 24 February, 1B; 15 March, 1A; 14 April, 1A, 1950.

41. Under the full-slate requirement, section 7(13), "if a voter marks more or less names than there are persons to be elected or nominated to an office . . . his ballot shall not be counted for such office." Section 10 provided that "no candidate shall be declared nominated in a first primary election unless he received a majority of the votes cast for the office for which he was a candidate," and section 11 required a runoff primary in the event that candidates failed to secure the requisite majority. Both the full-slate and runoff requirements date from the days of the white primary: see South Carolina Code (1942), Sec. 2365–67. The first adoption of both devices seems to have been in *S.C. Acts* (1915), No. 118, Sec. 1.

42. *Charleston News and Courier*, 12 February 1950, 4B.

43. Ogden 1958, 188–89.

44. Burton 1991, 177; Newby 1973, 274–313; Sproat 1986, 164, 166–69; Synnott 1989, 54–57.

45. Sproat 1986.

46. Tindall 1967, 165.

47. Sullivan 1991, 87, 88; Garson 1974, 117.

48. Myrdal 1944, 488n; Sullivan 1991, 92; *Charleston News and Courier*, 22 July 1948, 1.

49. Lawson 1976, 53–54; Jack Bass to Vernon Burton, 31 October 1992; Bass 1989, 332.

50. A. Morris 1984, 149–55, 238–39.

51. Carawan and Carawan 1989, vii–xvii, 10, 151–55, 168; Morris 1984, 149–55; Woods 1990; Burton 1991, 163–64, 173–75; Sproat 1986, 170, 172; Branch 1988, 263–64, 381–82, 575–78.

52. Burton 1991, 177; Newby 1973, 274–313; Sproat 1986, 164, 166–69. See *Briggs v. Elliot*, 98 F. Supp. 529 (1951), 103 F. Supp. 920 (1952), 347 U.S. 497 (1954), 132 F. Supp. 776 (1955).

53. A. Morris 1984, 128–34; 201.

54. Meier and Rudwick 1973, 80, 83–84, 87–90, 117, 175–76, 217; A. Morris 1984, 128–34, 201.

55. Garrow 1978, 11. This estimate is consistent with the state's official tabulation in 1958 (the last for a decade), showing that less than 15 percent of the total black voting-age population was registered, as compared with 31 percent of the total white voting-age population. Fowler 1966, 44.

56. Garrow 1978, 11, 19.

57. Fowler 1966, 43–47; Matthews and Prothro 1963.

58. Sproat 1986, 173. These areas supported the independent presidential candidacy of Virginia's Senator Harry F. Byrd in 1956. Byrd's leadership in his state's "massive resistance" was the key factor that won him 29 percent of the votes cast in South Carolina, far behind Democratic standard bearer Adlai Stevenson's plurality of 45 percent, but high for an independent candidate. See Bartley 1969, 166–67; McMillen 1971, 77, 313; Fowler 1966, 1, 6–8, 37–41, 48. In 1960, African Americans provided John F. Kennedy with his nine-thousand-vote margin of victory in South Carolina, the first time in the twentieth century that African Americans made a difference in the outcome of a statewide election. (Newby 1973, 291; *Columbia State*, 1 December 1965, 1D; *New York Times*, 16 June 1966.)

59. Synnott 1989, 57.

60. Kluger 1977, 329, 525; Burton 1991, 163–64; Newby 1973, 274–313; Woods 1990; Sproat 1986, 166–70.

61. Bartley 1969, 217–19, 226, 230.

62. Meier and Rudwick 1973, 90, 104, 106, 116–18, 176.

63. *Columbia State*, 14 December 1965, B14. A more comprehensive explanation for Thurmond's switch is found in Bass and DeVries 1976, 24–25, 250, 253–55.

64. Fowler 1966, 12–13.

65. Whitaker and Davis 1967, 19–20.

66. U.S. Commission on Civil Rights 1968, 222–23; *Columbia Record*, 16 March 1965, 1B.

67. U.S. Commission on Civil Rights 1968, 219. Other sources suggest that there were a few African-American elected officials in black-majority districts. Davis 1976, 58–62; Felder 1987, introduction.

68. *Camden Chronicle*, 19 February 1965, 1.

69. *Columbia State*, 3 August 1965, 1B, and 13 August 1965, 12A; U.S. Commission on Civil Rights 1968, 213.

70. At the time of passage of the Voting Rights Act, the South Carolina Voter Education Project was under the direction of Richard Miles, a white youth from Columbia. In 1967 African-American James Felder became director and John Roy Harper II, then a black law student, served as an assistant.

71. *Columbia State*, 13 August 1965, 12A; *Columbia Record*, 6 August 1965.

72. Burton 1989, xxi. Kousser (1980) shows that in North Carolina African Americans' taxes supported the education of whites.

73. Burton 1991, 175–77.

74. Cooper 1968, 90–91; Ashmore 1954, 153; Burton 1991, 175–77; Burton 1987, xxi–xxiv.

75. Meier and Rudwick 1973, 176, 217, 260–61; Sproat 1986, 170–80.

76. The Justice Department did not file a lawsuit against South Carolina until 1972.

77. McLeod 1965, 603–4, 613–14; Dorn 1965, 632–33, 637–40.

78. The state's brief is summarized and quoted extensively in the *Columbia State*, 16 January 1966, 1A, 8A. Its arguments are also systematically addressed in *South Carolina v Katzenbach*, 383 U.S. 301 (1966).

79. *Columbia State*, 14 December 1965, 14B; 26 December 1965, 3D.

80. U.S. Commission on Civil Rights 1968, 61–64, 72–73, 86–87, 95–96, 117–18, 167–68.

81. *Columbia State*, 26 December 1965, 3D, and 18 October 1987, 9B; *Columbia Record*, 16 March 1965, 1B; Ruoff 1986.

82. *S.C. Code of Laws* (1976), Section 7-5-10 (source for how the boards are appointed)

83. Ruoff 1986.

84. *S.C. Acts* (1986), No. 535 (Sec. 7-5-155, *S.C. Code* [1976]). Voting rights attorney Laughlin McDonald characterizes South Carolina's registration system today as "the best in the entire South," which he attributes to the conscientious public service of elections administrator James Ellisor. Interview, 24 September 1992.

Reregistration of voters has not been a requirement of law since the late 1970s, but it still remains a barrier. Although a voter in South Carolina registers for life, failure to vote in two consecutive elections places a registered voter on an inactive list, commonly known as the "purge list." People on the inactive list found it very difficult to vote before South Carolina computerized registration lists. The list of inactive voters is now placed at the back of the list, and people who have been "purged" can still vote if the poll workers look at the purge list. With encouragement from the NAACP and the League of Women Voters, poll workers are learning to do so. *Columbia State*, 18 October 1987, 9B; Ruoff 1986.

85. *Columbia State*, 13 August 1965, 12A; 22 August 1965, 3D.

86. U.S. Commission on Civil Rights 1968, 252–53. By 1980, however, their registration rate had risen to 56 percent of the black voting-age population, and they comprised 26 percent of total registered voters; they made up over half of registered voters in only five counties (U.S. Commission on Civil Rights 1981, 43; South Carolina Election Commission 1979). The five counties were Allendale (56 percent); Clarendon (51 percent); Jasper (53 percent); Lee (51 percent); and Williamsburg (53 percent).

87. Jewell 1964, 183–85; McCrary and Hebert 1989, 102–3.

88 U.S. Department of Commerce, Bureau of the Census 1965, 1974.

89 *Columbia State and Record*, 5 December 1965, D3.

90. *Charleston News and Courier*, 12 April 1967, 1A, 2A; 13 April 1967, 1A, 2A. In the city, where the African-American percentage of the population was heavier than in the county as a whole, the Democratic leadership was more reconciled than the county council leaders to the new black voters. Charleston mayor J. Palmer Gaillard, in fact, won African-American support for his ticket in the spring primary by nominating black leader St. Julian Devine for a council seat in black-majority Ward 10. *Ibid.*, 2 June 1967, 2A; 12 June 1967, 8A; 13 June 1967, 1A, 2A. Devine, who had no white opponent, won by a landslide over another black candidate. *Ibid.*, 14 June 1967, 1A, 2A.

91. Quint 1958, 44–45, 47–48. Republicans in the county, as throughout South Carolina, were often openly hostile to the Voting Rights Act. For example, one of the Republicans in the legislative delegation, Senator John E. Bourne of North Charleston, was then pushing for passage of a Republican bill that would have required all voters to reregister before the 1968 primary or general elections. According to press accounts, the Republicans were making "a stubborn fight to trim Negro strength in 1968 elections." In opposing a Democratic motion to postpone implementation of reregistration until after the fall elections, Bourne himself said: "If we pass this amendment, it seems to me we will be slapping the federal registrars on the back and saying, 'We were glad to have you. You did a good job.'" *Charleston News and Courier*, 2 June 1967, 1A, 13A.

92. *S.C. Acts* (1969), No. 94. Thus despite the reference in U.S. Department of Commerce, Bureau of the Census 1974, the Charleston Council was elected at large, rather than by districts, in 1973. Similarly, Thernstrom states that "by 1968 the county of Charleston had elected its first black commissioner, at-large" (1987, 167). In 1968 the county council was still elected by districts, and no black candidate even sought a council seat. *Charleston News and Courier*, 10 June 1968; 4B; 12 June 1968, 1A, 6A.

93. Underwood 1989, 68. According to Andrews (1933, 33), among the reasons for the adoptions of legislative county government "was the race problem, which cast all else into deep shadow."

94. McDonald 1986, 570; Underwood 1989, 67–69, 265–66; Andrews 1933, 33; Kousser 1982, 11–12; Burton 1991, 170.

95. *Columbia State and Record*, 5 December 1965, D3, D20; Graham 1984 As the federal court put it in *O'Shields v. McNair*, 254 F. Supp. 708, 719 (D.S.C 1966) "With the exception of a few counties, the legislative authority in county affairs is still vested in the General Assembly." In practice, the court noted, decision making was exercised by the county's legislative delegation. "When a particular county delegation reaches a conclusion on a county legislative matter, 'local' bills are introduced in the General Assembly which are routinely passed in both houses without scrutiny by other members of the General Assembly."

96. Key 1949, 151; Graham 1984.

97. Andrews 1933; Underwood 1989, 92–96.

98. Key 1949, 152; *Columbia State and Record*, 5 December 1965, D3, D20.

99. Order of 3 December 1965, cited in *O'Shields v. McNair*, 254 F. Supp. 708, 709, 711 (D.S.C.).

100. *Reynolds v. Sims*, 377 U.S. 533 (1964).

101. *Columbia State and Record*, 16 June 1966, 3D.

102. *Columbia State*, 12 December 1965, 5D.

103. Myrdal 1944, 446–48; Woodward 1974, 85–86, 164–65.

104. L. Marion Gressette, who chaired the notorious "Segregation Committee," also chaired the senate's Reapportionment Committee.

105. Defendants in a Barbour County, Alabama, case defended their shift to at-large elections as necessary to comply with the one-person, one-vote principle. Judge Frank Johnson rejected this claim as "nothing more than a sham" because they could easily "adjust the population disparities" by redistricting. *Smith v. Paris*, 257 F. Supp. 901, 905 (M D. Ala. 1966).

106. 254 F. Supp. 708, 716 (D.S.C. 1966). Under this order, the senate would implement the interim plan for two years; the legislature would have to redistrict the senate again in 1967, and submit the permanent plan for the court's approval. The court ruled against the plaintiffs in a companion case, *Mungo v. McNair*, allowing the existing apportionment of the house of representatives to stand. 254 F. Supp. 708, 720.

107. *S.C. Acts* (1967), No. 540. Each of the multimember districts was divided into a series of numbered seats, and residency requirements assured that at least thirty counties would have their own senator. South Carolina immediately submitted the plan for preclearance under section 5 of the Voting Rights Act, but there is no record that the Department of Justice took any action on the matter. The federal court in *O'Shields* approved the plan on 9 January 1968.

108. U.S. Commission on Civil Rights 1975, 219; South Carolina Election Commission 1984, 19–24. On 25 October 1983 in a special election to fill the unexpired term of a senator and only after litigation to move to district elections, I. DeQuincey Newman, a grand old man of the South Carolina civil rights movement, won election to a numbered seat in a multimember district composed of Richland, Fairfield, and Chester counties.

109. McCrary 1982.

110. Stoudemire and Ascolillo 1969; Paschal 1977; Underwood 1989, 103, 180, 272, Maggiotto 1984.

111. 393 U.S. 544 (1969).

112. By 1971 the establishment of a separate Voting Section within the Civil Rights Division and the development of detailed guidelines for the evaluation of election changes made section 5 a major instrument for protection of minority voting rights. Lawson 1985, 307–28

113 Blacks and whites challenged the senate, but only blacks challenged the house. One of the three challenges to the apportionment of the senate was *McCollum v. West*, C.A. No. 71-1211 (D.S.C.) brought on behalf of black plaintiffs who argued that the use of at-large elections in multimember districts, together with numbered posts, had a racially discriminatory effect. In *Stevenson v. West*, C.A. No. 72-45 (D.S.C.) African-American plaintiffs challenged the districting plan for the house on the grounds that its use of multimember districts and the state's full-slate requirement diluted black voting strength.

114. Objection letter, 6 March 1972. Officially an objection is interposed by the Attorney General; in practice the actual letter is signed on his behalf by the assistant attorney general for civil rights, who makes the decision based on recommendations from the Voting Section of the Civil Rights Division. These letters are available from the chief of the Voting Section and are cited hereafter as above.

115. The decision to defer to the court and preclear the senate plan was challenged by African-American plaintiffs in two different lawsuits, which were ultimately resolved in the state's favor in *Morris v. Gressette*, 432 U.S. 491 (1977), which summarizes the litigation's complex history. Following the 1980 census the existing senate districts were severely malapportioned, yet not until November 1983 did the general assembly adopt a redistricting plan. In addition to the usual submission to the Department of Justice, South Carolina filed a declaratory judgment action in the District of Columbia: *State of South Carolina v. United States and the NAACP*, 585 F. Supp. 418 (D.D.C. 1984). On 8 March 1984 the Attorney General objected to the the senate plan, and the trial schedule in the state's lawsuit threatened to postpone new elections until 1985. At that point South Carolina Republicans and the NAACP brought a lawsuit before a three-judge panel in South Carolina and persuaded the court to order implementation of a new senate districting plan so that elections could be held in 1984. *Graham and NAACP v. South Carolina*, C.A. No. 3:84-1430-15 (D.S.C., July 31, 1984). No multimember districts were used in the court's plan, and five African-American senators were elected to the forty-six member body. McDonald 1986, 578–79; Felder 1987, 11, 26, 42, 45; Webb 1990, 47. The Joint Center for Political Studies claimed only four blacks were elected to the senate, Joint Center for Political Studies 1986, 347.

116. *Stevenson v. West*, C.A. No. 72–45, slip op. at 11 (D.S.C. April 7, 1972). A full-slate law prevents voters from using "single-shot voting," that is, marking only one name in a multiseat election. Black voters often used single-shot voting to increase the chances of electing an African-American candidate, while whites distributed their votes among several white candidates. Butler 1982, 864–67. In 1970 three African Americans were elected to the house, marking the first time since 1902 that any black person held state office. Newby 1973, 291.

117. *S.C. Acts* (1972), No. 1204. In addition to a full-slate law and a numbered-place rule, another device that prevents single-shot voting is the requirement that candidates reside in a particular geographic area but run in a countywide election. For this reason the Department of Justice has objected to the adoption of residency requirements on five occasions: Darlington city council, 17 August 1973; Walterboro city council, 24 May 1974; Bamberg county council, 3 September 1974; Sumter County school district, 1 October 1976; Chester County council, 28 October 1977.

118. Butler 1982, 864–67.

119. Objection letter, 30 June 1972. The Attorney General also objected to three local efforts to adopt numbered places. See the objections to numbered-place laws for the Aiken County council, 25 August 1972, and, in Lancaster County, both the school board, 30 July 1974, and the county council, 1 October 1974.

120. *Stevenson v. West*, 413 U.S. 902 (1973).

121. Objection letter, 14 February 1974.

122. U.S. Commission on Civil Rights 1975, 214–17; Davis 1976, 61–62.

123. *Columbia State*, 11 June 1975, 1A, 6A.

124. We base this description on newspaper coverage of the legislative debates from April through June 1975. See esp. *Columbia State*, 5 June 1975, 1A, 6A, and 13 June 1975, 1A, 6A; *Charleston News and Courier*, 12 June 1975, 1B, 2B, and 13 June 1975, 1B, 2B.

125. *S.C. Acts* (1975), No. 283. The various options under the compromise agreement are spelled out in sections 14–3701 (a) and (b), and section 14–3706.

126. Paschal 1977, 2. Of the twenty-five counties that held referendums, the following twenty used district elections as of 1977: Aiken, Allendale, Anderson, Bamberg, Berkeley, Calhoun, Chesterfield, Dillon, Greenville, Lee, Lexington, Marion, Marlboro, Newberry, Oconee, Orangeburg, Pickens, Union, Williamsburg, and York. Counties already using district elections that did not hold referendums were Cherokee, Dorchester, and Florence. Paschal incorrectly identifies Dorchester as electing its council at large and Edgefield as having district elections. Beaufort had a mixed plan, with three elected at large and six from districts.

127. Bass and DeVries 1976, 259. Perry was at one time acting general counsel for the national NAACP.

128. Caldeira (1992) discusses the critical role of public-interest legal organizations such as the ACLU in voting rights cases. Private attorneys in a civil rights practice rarely have the funds to pay the expense of taking depositions, as well as of retaining scholars to do research and testify as expert witnesses, even when willing to wait years before receiving attorneys' fees.

129. In one early case, *McCain v. Lybrand*, C. A. No. 74–281 (D.S.C.), plaintiffs' attorneys filed an unsuccessful motion requesting Judge Donald S. Russell to disqualify himself from serving on a three-judge panel. Among the grounds cited were the fact that Russell, while serving as U.S. senator from South Carolina, had participated in the debates concerning, and voted against adoption of, the Voting Rights Act of 1965.

130. *Lloyd v. Alexander*, C.A. No. 74-291 (D.S.C. 1976). Chapman chaired the state Republican party before his appointment to the bench.

131. *Washington v. Finlay*, C.A. No. 77-1791 (D.S.C. 24 March 1980).

132. *Washington v. Finlay*, 664 F.2d 913, 918 (4th Cir. 1981). The plaintiff's expert witness, Professor Earl Black of the University of South Carolina, testified that Columbia elections typically experienced "widespread racial polarization," adding that "to this point in time, black candidates in the city council races have not been able to find the 30 percent or 33 percent of the white voters that they need to win." McDonald 1982, 89–90.

133. 664 F.2d 913, 917–18, 921–22. The case was tried between December 1979 and March 1980, and was decided before the Supreme Court established the "intent standard" in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The appeals court refused to remand the case so that the plaintiffs could present evidence that at-large elections were adopted in 1910 for a racially discriminatory purpose. Although African Americans had been disfranchised fifteen years earlier, the plaintiffs found interesting evidence that might have been developed further had the courts permitted a new trial. The sponsor of the shift to at-large elections in Columbia was John J. McMahan, one of the chief exponents of disfranchisement as a "good government" measure at the 1895 convention. The 1910 statute, furthermore, applied the literacy test and poll tax—which state law applied only to the general election—to the city's primary election for the first time. McDonald 1982, 86–87.

134. *Columbia State*, 16 December 1981, 1A, 5A. On behalf of the NAACP, local Columbia attorney John Roy Harper II and NAACP attorney Willie Abrams have challenged the at-large seats in Columbia. No African American has ever been elected to the at-large seats. The case was tried 13 July 1993. *NAACP, Inc. v. City of Columbia, S.C.*, C.A. No. 89–1938.

135. In six counties—Chester, Colleton, Dorchester, Edgefield, Horry, and Sumter—Justice Department objections were accompanied by litigation. The one voluntary change was by Greenwood County which the NAACP reported it assisted. South Carolina Conferences of Branches 1990, 13.

136. Objections were interposed to the use of at-large elections for county councils in the following: Dorchester, 22 April 1974; Bamberg, 20 September 1974; York, 12 November 1974; Horry, 12 November 1976; Sumter, 3 December 1976; Chester, 28 October 1977; Edgefield, 8 February 1979 and 11 June 1984; and Colleton, 6 February 1978 and 19 December 1979. Efforts to enact at-large plans for the following county school boards also triggered objections: Calhoun, 7 August 1974; Sumter County School District No 2, 1 October 1976; Bamberg, 31 August 1977; Allendale, 25 November 1977.

137. The objection on 14 June 1977 to the adoption of at-large elections for the Charleston County Council was ruled untimely in *Woods v. Hamilton*, 473 F. Supp 641 (D.S.C. 1979).

138. In the annexed areas under consideration resided 3,456 whites and only 98 African Americans. Objection letter, 20 September 1974.

139. Ibid.

140. As a result, the Attorney General withdrew the objection to these annexations on 13 May 1975.

141. An objection of 21 October 1985 to annexations in the city of Sumter was withdrawn on 17 October 1986, when the city agreed to switch to district elections. The Department of Justice also objected to annexation of a white area in the city of Spartanburg. The initial objection was dated 16 July 1985. After the city agreed to adopt district elections, the objection was withdrawn on 6 October 1987. See discussions of the cities of Sumter and Spartanburg below. The NAACP led a drive for districts in Rock Hill. Maggiotto 1984, 102. The Department of Justice interposed an objection to annexations in Rock Hill on 28 June 1988, which was withdrawn on 18 October 1989, after the city adopted districts.

The Department of Justice also objected to majority vote requirements for the following municipal councils: Darlington, 17 August 1973; Seneca, 13 September 1976; Cameron, 15 November 1976; Bishopville, 26 November 1976; Calhoun Falls, 13 December 1976; Pageland, 22 March 1977; Hollywood, 3 June 1977; Mullins, 30 June 1978; Marion, 5 July 1978; Nichols, 19 September 1978; Lancaster, 19 September 1978; and Rock Hill, 12 December 1978.

142. *DeLee v. Branton*, C.A. No. 73-902 (D.S.C. 1973).

143. Objection letter, 22 April 1974.

144. McDonald 1982, 61.

145. *Columbia State*, 18 October 1987, 9B. The authority cited by the paper was Laughlin McDonald.

146. The county governing body sought a county council with expanded powers, elected at large. McCrary and Hebert 1989, 113. Under the existing system, the governor appointed seven commissioners in Sumter County, on the recommendation of the local legislative delegation; the state senator was by custom the most influential member. This arrangement had been in effect since 1922. See generally Andrews 1933, 34–38.

147. Order of 21 June 1978 cited in *Blanding v. DuBose*, 509 F. Supp. 1334, 1335 (D.S.C. 1981).

148. According to a subsequent ruling in the case, "whites are estimated to have voted for at-large elections by a four to one margin; blacks are estimated to have voted nine to one against at-large elections." *County Council of Sumter County, South Carolina v. United States and Blanding*, 596 F. Supp. 35, 38 (D.D C. 1984).

149. The county's letter, dated 1 June 1979, suggested that its request might also be considered a new submission of the 1976 change to at-large elections. In two subsequent letters, on 1 August and 27 September 1979, the Department of Justice treated the letter as a request for reconsideration and refused to withdraw its previous objection.

150. *Blanding v. DuBose*, 509 F. Supp. 1334 (D.S.C. 1981).

151. *Blanding v. DuBose*, 454 U.S. 393 (1982). The black plaintiffs intervened subsequently in a lawsuit brought by the county seeking alternative preclearance of the at-large system. *County Council of Sumter County, South Carolina v. United States and Blanding*, 596 F. Supp. 35 (D.D.C. 1984).

152. *County Council of Sumter County, South Carolina v. United States and Blanding*, 596 F. Supp. 35 (D.D.C. 1984), see esp. 37. The account in Thernstrom 1987, 155–56, ignores this finding, among others, and misconstrues the burden of proof under section 5; as a consequence, she misinterprets the court's ruling in the case.

153. Sumter County white voters had supported racial conservatism in presidential campaigns, from Harry Byrd's "protest" candidacy in 1956 to the 1964 Goldwater ticket. Fowler 1966, 7, 21. Richardson's racial views were reflected in a 1955 radio address, for example, where he urged support for the Citizens Council and its struggle for "the preservation of our Southern way of life by legal and peaceful means." McCrary and Hebert 1989, 115.

154. According to the *Columbia State*, 30 April 1967, 3D, quoted in McCrary and Hebert 1989, 114n, many legislators opposed the inclusion of Williamsburg County in the district due to "fear of the county's predominantly Negro population at election time."

155. McCrary and Hebert 1989, 113–15. See the findings in *County Council of Sumter County, South Carolina v. United States and Blanding*, 596 F. Supp. 35, 37–38 (D.D.C. 1984). Edgefield County also shifted from an appointed governing body to a council elected at large. Prior to 1966 Edgefield was governed by three commissioners, a supervisor elected at large and two commissioners appointed by the governor at the recommendation of the local legislative delegation. *McCain v. Lybrand*, C.A. No. 74-281 (D.S.C., April 17, 1980), slip op. 8–9. Threatened, like Sumter, with the elimination of its resident senator, the legislative delegation established a county council of three members elected at large but qualifying for one of three residency districts. This council took over the powers of taxation, budget supervision, and local appointment previously exercised by the county's senator and representatives. *S.C. Acts* (1966), No. 1104. Act. No. 521 of 1971 increased the commissioners and their residency districts to five.

156. *McCain v. Lybrand*, 465 U.S. 236 (1984).

157. *McCain v. Lybrand*, C.A. No. 74-281 (D.S.C., slip op., April 17, 1980). The court initially delayed issuing its opinion pending implementation of the Home Rule Act, pursuant to that 1975 statute, however, the county merely readopted its at-large system

158. 412 U.S. 755 (1973).

159. *McCain v. Lybrand*, slip op. 17–18.

160. Edds 1987, 44; *Columbia State* 18 October 1987, 1B, 5B.

161. 446 U.S. 55 (1980). On 11 August 1980 Judge Chapman vacated his previous order in *McCain*.

162. Edds 1987, 40–44. The record introduced in 1975 included evidence of continuing discriminatory behavior by county officials. The county operated its juries and its chain gang on a racially segregated basis until challenged in federal lawsuits in 1971. The county school board resisted desegregation until 1970 (when white parents established a segregated private academy) and refused to rename the athletic teams at previously white Strom Thurmond High School (whose "Rebels" played "Dixie" at their football games under the banner of the Confederate flag). McCrary and Hebert 1989, 117n.

163. Laughlin McDonald to Vernon Burton, 28 July 1981 (in possession of Burton).

164. *McCain v. Lybrand*, C.A. No. 74-281 (D.S.C., 10 May 1982). The three judges were Chapman, Donald Russell, and Clement Haynsworth.

165. *McCain v. Lybrand*, 465 U.S. 236 (1984).

166. *Columbia State*, 18 October 1987, 1B, 5B; McDonald 1986, 580; Edds 1987, 37, 46–48; Maggiotto 1984, 88–90.

167. The defendants hired Duke Law School professor Donald Horowitz, whom President Reagan had appointed chairman of the North Carolina Advisory Committee to the U.S. Commission on Civil Rights.

168. McCrary and Hebert 1989, 117–18.

169. Objection letter, 21 October 1985, withdrawn 17 October 1986; NAACP 1990, 26.

170. *Columbia Record*, 21 September 1987, 1C.

171. *Columbia State*, 18 October 1987, 9B.

172. This information was drawn from our surveys. Richland County blacks got one more seat in 1990 when the other five districts were phased in. Thus African Americans won five of the eleven single-member districts.

173. *Columbia Record*, 21 September 1987, 1C, 4C; South Carolina Conference of Branches NAACP 1990, 1, 13, 27; Dennis Courtland Hayes to Vernon Burton, 7 July 1992 (in possession of Burton); interview with Adell Adams, July 1993.

174. South Carolina Conference of Branches NAACP 1990, 26. The case was scheduled before native Edgefieldian Judge Joseph F. Anderson, Jr., who informed both defendants and plaintiffs about the long fight, appeals, and expense of the Edgefield court cases.

175. Questionnaire completed by the Spartanburg Registration and Election Board. The respondent also noted that the "NAACP has protested this method to the Justice dept. They want the chairman to be elected by the commission."

176. *Columbia Record*, 3 December 1965, 14A.

177. *Jackson v. Edgefield County, South Carolina, School District*, 650 F. Supp. 1176 (D.S.C. 1986); *Beasley v. Laurens County, South Carolina*, C.A. No. 6-1817-3 (D.S.C.), slip op., November 17, 1987. *Glover v. Laurens, South Carolina*, C.A. No. 6:87-1663-17 (D.S.C.), slip op., March 18, 1988, *Reaves v. City Council of Mullins, South Carolina* C.A. No. 4:85-1533-2 (D.S.C.), slip op., August 5, 1988.

178. *Lewis v. Saluda County, South Carolina*, C.A. No. 83-1514-3 (D.S.C.), slip. op., July 11, 1985; *Thomas v. Mayor and Town Council of Edgefield, South Carolina*, C.A. No. 9:86-2901-16 (D.S.C.), slip op., May 27, 1987; *Owens v. City Council of Orangeburg*, C.A. No. 5:86-1564-6 (D.S.C.), slip op., June 3, 1987; *Jackson v. Johnston, South Carolina*, C.A. No. 9:87-955-3 (D.S.C.), slip op., September 30, 1987; *Broome v. Winnsboro, South Carolina*, C.A. No. 0-88-1160-16 (D.S.C.), slip op., July 20. 1988

179. The unreported opinion of a three-judge panel in South Carolina, May 1, 1992, is reprinted as appendix 1 of the plaintiffs' Jurisdictional Statement, *Statewide Reapportionment Advisory Committee v. Theodore*, No. 92–155 (U.S. Supreme Court, October Term, 1992). After trial, the panel held that none of the plans proposed by the parties fully satisfied constitutional and statutory requirements, and drew its own legislative and congressional redistricting plans.

180. Indeed, the plaintiffs in *Statewide Reapportionment Advisory Committee v. Theodore*, C.A. No. 3:91-3310-1 (D.S.C.), offered a compilation of these objection letters as Exhibit 120.

181. Loewen 1990. Loewen studied both primary and general elections and found that race was in no sense merely a proxy for party identification.

182. *Columbia State*, 18 October 1987, 9B.

183. Ibid.

184. Karnig 1976; Latimer 1979; Karnig and Welch 1980; Engstrom and McDonald 1981 and 1985; Welch 1990.

185. Blough 1983, 167.

186. We base our conclusions on evidence from several relational data bases constructed between 1988 and 1992. Conducting both written and telephone surveys of every county and city council, we also examined all extant directories of local government associations. We checked Justice Department records for all counties, cities, and school boards, and these records often provided important corroborating evidence. The U.S. Bureau of the Census published a survey of methods of electing county governing bodies in both 1965 and 1973.

Election returns from the published reports of the South Carolina Election Commission enabled us to determine whether an election was conducted at large or by single-member district. The South Carolina Election Commission informed us which precincts were contained in each district. Finally, to confirm the racial compositions of districts, the South Carolina State Budget and Control Board, Division of Research and Statistical Services, provided the population statistics for each voting precinct for 1980 and 1990. In some counties and cities, this agency had drawn district plans and was able to provide racial compositions of the districts. The *National Roster of Black Elected Officials*, published by the Joint Center for Political Studies, provided data on black officeholding.

187. In at-large counties between 10 and 29.9 percent black, the equity ratio increased from 0 to 0.37; in at-large counties between 30 and 49.9 percent African American, there was no increase at all. Some white voters in recent years have tolerated tokenism in elections. They have been willing to accept one African American elected to a county council. Where blacks are not more than 30 percent of the population, tokenism appears most evident. Edds (1987, 191) discusses tokenism and quotes South Carolina NAACP activist Adell Adams: "With at-large districts, we have black councilmen off and on, but that's exactly what it is, off and on. . . . It's a very iffy situation. If there are seven seats, they'll give the blacks one. 'That's yours, but don't ask me for more.'"

188. At the time of the study, the NAACP had begun numerous challenges to multimember districts in South Carolina cities. On one day in 1989, for example, the NAACP filed suit against five city councils (Bennettsville, Gaffney, Kingstree, Saluda, and Union). South Carolina NAACP 1990, 27. Most of these cases had either not been adjudicated or implemented at the time of our survey.

189. We were unable to obtain district population data for Aiken and Anderson, cities that had mixed plans.

190. Burton 1978, 44.

191. For the twelve years that H. O. "Butch" Carter had served Edgefield County, the council "had never seen fit to give him a contract." Edds 1987, 36.

192. Ibid., 44. The ousted white administrator sued the county but soon settled for severance pay and found a job in another county.

193. *Columbia State*, 18 October 1987, 5B.

Chapter Eight
Texas

We would like to acknowledge the generous help of the following people: Sharon Breard Reese, Rita Loucks, Elizabeth Lock, Cathy Monholland, and Kerri Gantz at Rice University; Marivel Dávila and Rodolfo Ruiz at the Southwest Voter Education Project; José Garza of the Mexican American Legal Defense and Education Fund; George Korbel of Texas Rural Legal Aid; Alwyn Barr of Texas Tech University; and Emilio Zamora of the University of Houston.

1. The special provisions of the act, contained primarily in sections 4–9, apply only to certain states and their subdivisions rather than to the entire nation and, unless renewed by Congress, will expire in 2007. The most important of these provisions for Texas is section 5, which since 1975 has required all the state's political jurisdictions to submit proposed voting law changes to the Justice Department or the U.S. District Court for the District of Columbia for preclearance.

2. We shall generally use the terms *black* and *African American* to designate nonwhite persons of African heritage. In Texas almost all persons listed by the Bureau of the Census as nonwhite are black; there are few Asian Americans or Native Americans. The persons of Spanish heritage in Texas are called by a variety of names, each with a slightly different connotation: *Mexicans*, *Hispanics*, *Spanish-surnamed people*, *Chicanos*, *Tejanos*, *Latinos*, and *Mexican Americans*. In the name of consistency, we shall primarily use the terms *Mexican American* or *Tejano*, although in some contexts this usage might suggest that we are talking solely about United States citizens, which is not necessarily so. Nine out of ten people of Spanish heritage in Texas are of Mexican origin; many of the rest are refugees from Central America who have entered the state in recent years. Writing in 1949, the demographer Lyle Saunders made a point about "the Spanish-speaking group" in Texas that is still true. "The . . . group is not an easy one to delimit or define. The group is not homogeneous, as is popularly supposed, but is made up of persons with a wide range of physical and cultural characteristics." Saunders 1976, 7.

3. As blacks and Mexican Americans tend to be undercounted, these figures are slightly low. The term *Mexican American* in the above sentence refers to the census category "Hispanic origin," which includes some non-Mexican Hispanics. Further, there is a slight overlap between blacks and people of Hispanic origin in Texas: in 1990 45,272 blacks were of Hispanic origin, so that the total black and Hispanic population was slightly less (37.2 percent) than the sum of blacks and Hispanics (37.5). Of the 63 percent of the state's population who were neither black nor Hispanic, 96.4 percent were Anglos. Of the remainder, 2.8 percent were Asians or Pacific Islanders.

4. Kousser 1974, 196–209.

5. Barr 1982, 39–40.

6. Ibid., 42.

7. Ibid., 46.

8. Ibid., 46–47.

9. Brewer 1935, 14–15; Moneyhon 1980, 236–47.

10. Crouch 1978, 352.

11. Barr 1982, 44, 47–48. In the first edition of this work, published in 1973, Barr (1982, 47–48) stated that nine blacks were elected to the house and two to the senate in the Twelfth Legislature. Scholarship has since turned up three more black house members. Barr 1986, 342.

12. Barr 1982, 48–49.

13. Ibid., 52; Brewer 1935, 126.

14. Brewer 1935, 69; Barr 1982, 70–71.

15. Rice 1971, 26.

16. Ibid., chap. 7.

17. Hine 1979, 27–28.

18. Pitre 1985, 130–51; Smallwood 1981, 160.

19. Key 1949, 534.

20. Ibid. For a treatment of the poll tax in Texas, see Ogden 1958 and *United States v. State of Texas*, 252 F. Supp. 234 (1966).

21. Barr 1982, 80.

22. Pitre 1985, 199, 201. The fourteen blacks in the Twelfth Legislature of 1870—Texas's sole legislature in which Republicans had a working majority—are profiled by Barr (1986). Pitre (1985, 199–213) both lists and describes black legislators in the nineteenth century.

23. Rice 1971, 86, 93–111.

24. T. Jordan 1986, 401, 420.
25. Ibid., 392, 420.
26. Simmons 1952, 272n; see also Key 1949, 272–73.
27. Montejano 1987, 38–39.
28. De Leon (1982, 23–49) describes other exceptions during the latter half of the nineteenth century.
29. Montejano 1987, 40.
30. See Anders 1982 for an account of the challenge to these machines in the Progressive Era.
31. Montejano 1987, 144.
32. Anders 1981, 138 n. 35.
33. Key 1949, 273–75.
34. Barr 1971, 201.
35. García 1989, 27.
36. Kibbe 1946, 227. "Though disfranchisement measures have not been directed specifically at Mexican-Americans," wrote Key 1949, 273, "their effective enfranchisement has often been brought about by individuals primarily interested in utilizing their votes." That Mexican Americans were allowed and even encouraged to vote because their vote could be manipulated is beyond dispute. But contrary to Key on this point, they were in some cases disfranchised by measures specifically directed at them.
37. De Leon 1982, 41. The 1903 Terrell Election Law establishing direct primaries and encouraging parties to limit access to them led the Democratic State Executive Committee the next year to suggest that county committees require primary voters to declare: "I am a white person and a Democrat." But, as Barr notes, "with the Rio Grande Valley vote in mind, 'white' was defined to include Mexicans." Barr 1971, 201. Thus the same Democratic party that excluded blacks generally allowed Mexican Americans to vote, on the assumption that the bosses could control them.
38. Shelton [1946] 1974, 11. The Wharton County organization appears to have been formed primarily to exclude blacks. See Barr 1971, 198.
39. Barr 1971, 205–6.
40. Montejano 1987, 143; García 1989, 27.
41. Barr 1982, 133–35; Lewinson [1932] 1965, 113; Key 1949, 621.
42. 273 U.S. 536.
43. 273 U.S. 536, 541.
44. *Nixon v. Condon*, 286 U.S. 73.
45. Key 1949, 622.
46. 286 U.S. 73.
47. 295 U.S. 45.
48. 295 U.S. 45, 52.
49. Gillette 1978, 393–416.
50. 313 U.S. 299.
51. 313 U.S. 299, 300.
52. 321 U.S. 649.
53. Davidson 1972, 84; Weeks 1948, 506; Strong 1948, 512.
54. 345 U.S. 461.
55. *Terry v. Adams*, 345 U.S. 461, 464 (1953).
56. Simmons 1952, 277–78. The classic study of the effects of the poll tax in the South is Ogden 1958; Ogden was a student of V. O. Key. On the effects of abolition of the tax in Texas, see Nimmo and McCleskey 1969.

57. Schroth 1965, 1632.
58. 252 F. Supp. 234 (W.D. Tex.) *affirmed*, 384 U.S. 155.
59. 321 F. Supp. 1100 (S.D. Tex), *aff'd sub nom. Beare v. Briscoe* 498 F.2d 244 (5th Cir. 1974).
60. 321 F. Supp. 1100, 1103.
61. 535 F.2d 1259 (D.C. Cir.).
62. S-75-103-CA (E.D. Tex). See also *Flowers v. Wiley*, 675 F.2d 704 (5th Cir. 1982).
63. 405 U.S. 134.
64. Ibid., 143–44.
65. 482 F.2d 1230 (5th Cir.).
66. *Wilson v. Symm*, 341 F. Supp. 8 (S.D. Tex. 1972), and *Ballas v. Symm*, 494 F.2d 1167 (5th Cir. 1974).
67. 99 Sup. Ct. 1006 (1979) *affirming* 445 F. Supp. 1245 (S.D. Tex. 1978).
68. *Sams v. Waller County*, No. 75-H-965 (S.D. Tex.—Houston Div. 1979).
69. Montejano 1987, 282; Davidson 1990, 43.
70. García 1989, 17; see also Christian 1989, 589–95.
71. On the Telles election, see García 1989, 113–41.
72. After his 1957 filibuster against a spate of segregationist bills before the legislature, Gonzalez was given the NAACP's Man of the Year Award.
73. Castro (1974) captures the spirit of militancy sweeping across Texas as the chicano movement came to a climax.
74. Brischetto 1988a, 75; U.S. Department of Commerce, Bureau of the Census 1989, 39.
75. Montejano 1987, 296.
76. 320 F. Supp. 131 (W.D. Tex.).
77. 42 U.S.C. §1973 b(f)(1).
78. On the provisions of the 1975 extension of the Voting Rights Act affecting language minorities, see Hunter 1976 and Brischetto 1982.
79. Barr 1982, 133. A very small number of blacks had been elected prior to this time, but in nonpartisan elections at the local level.
80. Grebler, Moore, and Guzman 1970, 561.
81. Simmons 1952, 276–77.
82. Ibid., 280–81. Davidson and Fraga (1988) describe the operation of these slating groups generally.
83. The numbered-place system can advantage whites in a situation where there is racially polarized voting and whites are in the majority. It does this by preventing minorities from electing their favored candidate through single-shot voting. The place system requires candidates to declare for a specific "place" on the ballot. Thus, to use a hypothetical example, suppose there are four citywide seats to be filled, and each voter has four votes to cast. Instead of operating like a pure at-large system, in which all the candidates for city council run against each other and the four highest vote-getters win, the place system requires the candidates to split up into four separate contests (one for each "place") and run against a subset of their competitors.

In the absence of place voting, an ethnic minority group can decide before the election to vote for one candidate only—to "single-shoot." Minority voters then mark their ballot for that candidate and withhold their other three votes, depriving competing candidates of votes. The place system, on the other hand, allows the voter one vote in each of the four contests. Thus the voter does not help the minority group's favored candidate by withholding votes, because those votes would not have gone to the favored candidate's competitors in

the same contest. The courts have held that the place system is the equivalent of an anti-single-shot provision, and can in some circumstances dilute the votes of minority voters. See Young 1965 for an explanation and historical account of place voting in Texas elections.

84. Montejano 1987, 277.
85. McKay 1965, 432.
86. 252 F. Supp. 404 (S.D. Tex.).
87. 377 U.S. 533.
88. Davidson 1972, 71–72.
89. See *Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972). The trial court concluded with respect to Dallas County that the white-dominated slating group, DCRG, "without the assistance of black community leaders, decides how many Negroes, if any, it would slate in the Democratic Primary." The court found that in DCRG's slating procedure, "the black community has been effectively excluded from participation in the Democratic primary selection process" (343 F. Supp. 726).
90. 343 F. Supp. 704 (W.D. Tex.).
91. 412 U.S. 755 *affirming*, *Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972). For an account of the reasoning in *White*, see chap. 1 above.
92. 403 U.S. 124, 143.
93. 386 U.S. 120.
94. 378 F. Supp. 640 (W.D. Tex.), *vacated and remanded*, 422 U.S. 935 (1975).
95. 390 U.S. 474.
96. 584 F.2d 66 (5th Cir.).
97. See *Robinson v. City of Jefferson*, No. M-81-107 (E.D. Tex.-Marshall Div. 1983)
98. No. TY-73-CA-209 (E.D. Tex.-Tyler Div.).
99. 505 F.2d 674 (5th Cir.).
100. 505 F.2d 674, 679.
101. 648 F. Supp. 537 (1986).
102. Days 1992, 61–63; Thomas and Murray 1986.
103. U.S. Department of Justice 1990, T1–T11.
104. Davidson and Korbel 1981, 1001.
105. For a cross-sectional study that controls for residential segregation of blacks, see Vedlitz and Johnson 1982. It shows that the difference between at-large and district plans is greatest in cities with high racial segregation. These cities are probably most likely to be sued in vote dilution suits because minority concentration allows a district remedy to at-large dilution.
106. Polinard, Wrinkle, and Longoria (1991), in the second published before-and-after study of Mexican-American representation we are aware of, also report a sharp average increase in that group's city council representation in Texas after jurisdictions abandoned at-large elections sometime between the mid-1970s and the late 1980s.
107. 446 U.S. 55.
108. A. Derfner 1984, 146–47.
109. 840 F.2d 1240 (5th Cir.).
110. No. B-88-053 (S.D. Tex., Brownsville Div.).
111. No. MO-88-CA-154 (W.D. Tex., Midland-Odessa Div.).
112. 111 S.Ct. 2376.
113. Korbel 1989.
114. We decided to examine the cities in which the *combined population* of blacks and Hispanics was at least 10 percent, because it significantly increased the size of our overall

sample. Had we not done so, the subsample size in several of our cells would have been too small to support generalizations with any degree of confidence. The cost of this procedure is that the data on this "bi-ethnic minority" are not precisely comparable to the data in other chapters which, except in North Carolina, are for blacks alone.

115. Davidson and Korbel 1981.
116. Grofman 1982b, 5. Grofman's criticism of the research design of the Davidson-Korbel study was technically correct, as all longitudinal studies of this sort should include a control group along with the experimental group. However, the before-and-after data on minority representation presented by Davidson and Korbel were for the last election before the change from at-large election rules and the first election after the change in each jurisdiction in the sample. The time period between these elections was seldom more than two years, and often less. It is unlikely that "maturation effects" such as measurable changes in white voters' attitudes to minority candidates—effects that would have been observed in a control group of jurisdictions that did not undergo structural changes—could have developed in so short a time. In the study now being reported, however, the changes in minority representation are those between 1974 and 1989, a period of time long enough to make the appearance of maturation effects plausible. Thus the incorporation of a control group in the present research design is even more important than it would have been in the earlier study.
117. All Texas cities of 10,000 or more population in 1980 with 10 percent or more minority (black plus Hispanic) population were contacted through a telephone survey conducted by the Southwest Voter Research Institute during the summer of 1989. City election administrators were asked a series of twenty questions, including a request for a detailed description of election type in 1974 and 1989; for the racial, ethnic, and gender makeup of city council in 1974 and 1989; and for identification of each councilperson according to whether he or she was a district or at-large representative. Respondents were also asked if their city's election plan had been sued for diluting minority votes. In cities with districted systems, respondents were asked to provide 1980 census data on the total, black, and Hispanic populations in each district. (A follow-up survey to legal departments in all fifty-two cities that changed from at-large to districted systems between 1974 and 1989 was carried out by Sharon Breard Reese under the supervision of Chandler Davidson at Rice University in the spring of 1991, to get the city attorney's account of the reasons for the city's changing systems. Fifty cities responded, and data on the other two were obtained from lawyers who tried cases against them.)

Questionnaires were mailed to those who did not respond, and callbacks were made until the researcher obtained as much information as could be obtained from the city clerk or election administrator. A 100 percent completion rate was achieved on some but not all of the questions.

To check for accuracy and fill in some of the missing data, information on the population composition of districts was obtained from section 5 submissions to the Department of Justice. Additional checks for accuracy of election system data and type of litigation filed against cities were made against data from a 1988 survey by the Southwest Voter Research Institute of attorneys involved in voting rights lawsuits.

City population data were obtained from the 1980 census.

118. Brischetto 1988b, 1; Joint Center for Political and Economic Studies 1991, 14; National Association of Latino Elected and Appointed Officials 1990, 72–87.
119. Only one city with the above-mentioned demographic characteristics—10,000 or more total population, and 10 percent or more black and Hispanic combined—is excluded

from this table and all others. The city of Seguin elected two councilpersons each from four multimember districts. Rather than create another category in all our tables for this city, we dropped it from the analysis.

Almost all of our tables reporting minority representation on councils are based on cities meeting a threshold of 10 percent black and Hispanic population combined, and the data presented contain information on black and Hispanic officials combined. However, tables in the other state chapters, as well as those in chap. 10 that use pooled data on black representation from the states, use a threshold of 10 percent black. (The exception is the North Carolina chapter, whose threshold is 10 percent black and Native American, but the state's Native American population is so small as to be negligible.) To present comparable data, therefore, the Texas chapter ideally would have presented two additional tables for each table showing black and Hispanic data combined: one showing black data in cities 10 percent or more black and another showing Hispanic data in cities 10 percent or more Hispanic. This would not only have been cumbersome, but several of the cells in such tables would have been empty or the percentage figure would have been based on an *N* of 1 or 2. Nonetheless, when we pooled Texas data with those of other states for analysis in chap. 10, we used only those cities that were at least 10 percent black, rather than black and Hispanic combined.

120. The assumption of a before-and-after comparison of a city is that the only change in independent variables affecting minority representation is the change in election structures; thus, observed changes in minority representation must be due to changes in those structures. This assumption is most compelling when the time between "before" and "after" is short. In our research design, however, fifteen years elapsed, which is enough time for some factors thought to impinge on minority representation to change. It seems reasonable to suppose, however, that the changes in relevant independent variables *within* the same cities *over fifteen years* are smaller than the changes in such variables *among* the cities *in the same year* (the latter changes being the ones measured in cross-sectional analysis).

121. Grofman 1982a, 19–21.

122. At this point in our analysis, given the importance of table 8.5, we asked whether our decision to study cities many of which contained large proportions of both blacks and Hispanics led to findings significantly different from those we would have found if we had decided to study "single-minority" cities only. In other words, what if we had limited our study of the effects of election structure on black officeholding to cities 10 percent or more black but no more than 10 percent Hispanic, or, alternatively, if we had examined Hispanic officeholding in cities 10 percent or more Hispanic but no more than 10 percent black—thus disaggregating, so to speak, the two minority groups that are combined in the other tables in this chapter? For an answer, we analyzed such "single-minority" cities separately for blacks and Hispanics, and found that the impact of at-large elections was generally the same as table 8.5 shows. In other words, at-large as compared to district elections generally disadvantaged blacks in cities with few Hispanics, and they disadvantaged Hispanics in cities with few blacks. These tables are not published, but are available from the authors

123. There might, however, be other variables besides election structure changes that account for the relative increases in minority officeholding in changed cities. One possibility is that the increases are the artifact of our measure of the cities' minority population. The measure of this percentage in table 8.2 is taken from the 1980 decennial census. Of reliable population estimates available, this is the single most accurate one for the fifteen-year period. However, the minority populations increased in many of the cities; if a relatively larger minority population increase occurred in the experimental group, this could

account for part or all of the increase in officeholding in that group, thus exaggerating the causal impact of election structures. To test this hypothesis, we substituted 1990 minority population proportions for 1980 ones in table 8.5 to see whether minority population increases were systematically greater in experimental cities. There was only a minuscule mean difference in population changes between the two types of cities.

124. Welch 1990.

125. No. CA3-88-1152-R (N.D. Tex.—Dallas Div.)

126. Brace, Grofman, Handley, and Niemi (1988) and Grofman and Handley (1990) discuss data relevant to this claim drawn from a variety of sources.

127. Hwang and Murdock 1982, 744.

128. See Rice 1977 on the adoption of commission government in Texas.

129. For an account of this phenomenon in Fort Worth, see Cotrell 1980, chap. 12.

130. See, for example, *New York Times*, 27 April 1992, A17.

131. U.S. Department of Justice 1990, M1–M10, T1–T11.

132. The remaining lawsuits were brought and won under the Fourteenth Amendment. As Davidson points out in chap. 1 above, the Supreme Court's conceptualization of minority vote dilution in *White v. Regester* (1973) was influenced by its 1969 decision in *Allen v. State Board of Elections* (393 U.S. 544), interpreting section 5 of the Voting Rights Act to prohibit minority vote dilution. Thus the act indirectly influenced the development of constitutional law that allowed plaintiffs to challenge minority vote dilution in cases where the act could not be directly invoked. Therefore, the act—either directly or indirectly—influenced all the litigation attacking minority vote dilution in the 1970s.

Chapter Nine
Virginia

1. Stanley 1987, 97.
2. Key 1949, 20.
3. Howard 1974, 15.
4. Maddex 1970, 66–73.
5. Ibid., 82.
6. Morton [1918] 1973, 77–78.
7. Ibid., 44, 77; Maddex 1970, 55.
8. Pulley 1968, 8–9.
9. Maddex 1970, 198; Buni 1967, 2.
10. Maddex 1970, 198.
11. Buni 1967, 2, 8–9; Morton [1918] 1973, 77–78, 84–85.
12. Kousser 1974, 173–75.
13. Morton [1918] 1973, 5 and map opposite 147.
14. Buni 1967, 24, 28.
15. Sabato 1977, 14–16.
16. Ibid., 26.
17. Ibid., 48–49; Buni 1967, 61–62.
18. Sabato 1977, 50–52; Buni 1967, 118–20.
19. Key 1949, 624.
20. Ibid., 669.
21. Buni 1967, 157, 166.
22. Gates 1964, 24.

23. Wilkinson 1968, 259; Eisenberg 1965, 31.
24. 383 U.S. 663 (1966).
25. Eisenberg 1972, 58.
26. Wilkinson 1968, 259–61.
27. Eisenberg 1965, 30.
28. Wilkinson 1968, 282–83; Eisenberg 1969, 27.
29. Eisenberg 1972, 67–68.
30. Sabato 1975, 64–72. See also Black and Black 1987, 138–39.
31. Sabato 1988b, 23–24.
32. Black and Black 1987, 139.
33. Sabato 1987, 71.
34. Morris 1992, 189–204; Edds 1990, 239; Sabato 1987, 84.
35. Sabato 1990, 4.
36. Edds 1990, 258.
37. Wilkinson 1968, 362.
38. Black 1978, 446–47.
39. *Commonwealth of Virginia v. United States*, 386 F. Supp. 1319, 1324 (1975), O'Rourke 1983, 776–77, 770 n. 29.
40. U.S. Commission on Civil Rights 1968, 222–23.
41. *Commonwealth of Virginia v. United States*, 386 F. Supp. 1319, 1325.
42. The 1964 reapportionment was a result of the invalidation of the 1962 reapportionment on one-person, one-vote grounds. *Mann v. Davis*, 213 F. Supp. 577 (E.D. Va. 1962), *affirmed* 377 U.S. 678 (1964).
43. *Mann v. Davis*, 245 F. Supp. 241 (1965).
44. *Richmond Times-Dispatch*, 8 November 1967, A-1, A-5.
45. Baker 1989, 80.
46. Austin 1976, 285–94; *Howell v. Mahan*, 330 F. Supp. 1138 (E.D. Va. 1971).
47. *Mahan v. Howell*, 410 U.S. 315 (1973).
48. *Whitcomb v. Chavis*, 403 U.S. 124 (1971).
49. *Washington Post*, 18 August 1981, A-21.
50. Parker 1982, 11–22; Schuiteman and Selph 1983, 47–51.
51. Schuiteman and Selph 1983, 48 n. 5.
52. Moeser and Dennis 1982, 60–70.
53. Rankin 1974, 3–4; Moeser and Dennis 1982, 80–87.
54. *Perkins v. Matthews*, 400 U.S. 379 (1971).
55. Moeser and Dennis 1982, 3–4.
56. Ibid., 166–69.
57. 422 U.S. 358 (1975).
58. *Collins v. City of Norfolk*, 883 F.2d 1232, 1141–42 (4th Cir. 1989).
59. The cities of Poquoson, Virginia Beach, and Waynesboro have districts as residence requirements for candidates only.
60. *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990).
61. *Smith v. Board of Supervisors of Brunswick County, Virginia*, (E.D. Va. 1992) *rev'd.*, 984 F.2d 1393, 1402 (4th Cir. 1993).
62. The lone exception is Hillsville, a small town of 2,100 residents. See below later in this chapter on the distinction between Virginia cities and towns.
63. *Irby v. Virginia State Board of Elections*, 889 F.2d 1352 (4th Cir. 1989), *affirming*, *Irby v. Fitz-Hugh*, 692 F. Supp. 610 and 693 F. Supp. 424 (E.D. Va. 1988).

64. Morris and Sabato 1991, 263.
65. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).
66. *Richmond Times-Dispatch*, 2 March 1988, B-6.
67. Muse 1961, 47–53; Kluger 1977, 471–76.
68. U.S. Department of Commerce, Bureau of the Census 1988, A-215.
69. A chart listing black representation on city councils in 1977 is in O'Rourke 1979. Petersburg, Suffolk, and Lynchburg are not included because the changes in their electoral systems were made prior to 1977 (see table 9.8). Telephone interviews and newspaper accounts were utilized to determine black representation in 1989.
70. The recall was prompted by allegations that Mayor Holley secretly sent hate mail to other black council members.
71. (Norfolk) *Virginian Pilot*, 2 May 1990, D-1, D-4; (Portsmouth) *Currents*, 3 May 1990, 1.
72. Morris 1990, 1–2.

Chapter Ten
The Effect of Municipal Election Structure on Black Representation in Eight Southern States

We are indebted to J. Gerald Hebert of the U.S. Department of Justice and James E. Alt for helpful suggestions on an earlier draft of this chapter. Errors remaining are solely the responsibility of the authors.

1. At the state legislative level, multimember districts have also been challenged. See the state chapters and the overview in chap. 11.
2. See the discussion in Editors' Introduction and below.
3. In three states—Georgia, North Carolina, and South Carolina—data on counties as well as municipalities were collected. We compare below the findings on minority representation at the county level with those for southern cities.
4. For Georgia, data are from 1980 to 1990. See table 10.1 for the beginning and end points for each of the state analyses and a general inventory of the basic characteristics of our data set on a state-by-state basis.
5. As previously noted, our discussion in this chapter will focus exclusively on black representation and will concentrate on data from city council elections. The data bases in Texas included Mexican Americans and in North Carolina, Native Americans. For results concerning these two minority groups, see chaps. 6 and 8.
6. For Georgia, cities with multimember districts are excluded from the analyses presented in this chapter. There were four such cities in the longitudinal data base in chap. 3. Thus $N = 15$ for at-large Georgia cities in table 10.2, four lower than the corresponding N of 19 in table 10.1. For analysis of black representation in Georgia multimember cities, see chap. 3. In South Carolina, the single-member-district category for counties includes one county (Colleton) that had two equal-size multimember districts, one of which had a substantial black population; the mixed category includes Beauford County, which had a multimember district as well as three single-member districts and three at-large seats. See notes to table 7.1A.
7. "Roughly speaking," because the before-and-after comparisons in our design pertain to the same cities about fifteen years apart—a time frame in which some variables besides election structure have surely changed. However, another feature of our research design, a control group, is intended to ameliorate this problem.

8. Davidson and Korbel 1981; and Polinard, Wrinkle, and Longoria 1991. Heil Mundt 1983 contained a control group but exhibited other problems. For a discus those studies, see Editors' Introduction.

9. The editors gave state chapter authors detailed basic guidelines, but they also gave flexibility in order to accommodate variations across states in demographic charact of cities, litigation patterns, data availability, and data-gathering resources.

The data across states are largely comparable but there are some state-to-state var in measurement. One concerns the time frame. The choice of a general startung point end point was dictated by various considerations. On the one hand, we hoped to much change as possible in covered municipal election structures in the period after was passed in the fall of 1965. Thus our end point, we decided, should be the research actually got underway. But a starting point as early as 1965, we feared, mean that a considerable amount of our "before" data would be irretrievable because record keeping by local officials and lack of accurate electoral data on race at the min level. On the other hand, if the starting point were too recent, many of the chan election plan whose effects over time on black officeholding we hoped to measure already have occurred. A reasonable compromise was a starting point in the early Yet because of peculiarities of the individual states as well as varying resources avai the research teams, the beginning and end points, respectively, were not identical state.

Moreover, as a result of extensive litigation in Alabama in the late 1980s, the use 1989 ending point for that state, which the authors had originally decided on, m only six cities in the Alabama data set still elected their council at large, and three were majority-black cities. Consequently, some data in the Alabama chapter reported for the 1980 period, when the number of majority-white cities electing at la much greater. We discuss below some of the special features of the Alabama data consider the problems of causal inference about election system effects.

10. In the Louisiana chapter, a 10 percent black *voting-age* population threshold used in some tables to supplement the data reported in terms of population. Here we data for the Louisiana cities that are at least 10 percent black in *total* population. Becau this difference in choice of threshold for city inclusion, there are some (generally minor) differences between the data reported in this chapter and that in the tables Louisiana chapter that use voting-age population.

11. We report the data in chap. 10 only for those Texas cities which were at least percent black. Thus the data base for this chapter will be smaller than that used for the in chap. 8, which include cities that were at least 10 percent black plus Hispanic.

Thanks to another important feature of the data that were collected, the Texas chapter is able to assess the effect of black population in a district on Hispanic officeholding conversely, the effect of Hispanic population in a district on black officeholding. feature of the Texas data is discussed in chap. 8.

12. The addition of the Native American component in North Carolina only expands the set of cities that meet the threshold conditions. Those cities are included data when we summarize the findings of the tables in the North Carolina chapter 10.1–10.5) since that is how the data in that chapter are reported. However, Native American figures have been dropped from the data set when we report only on cities of 10,000 (tables 10.6 and 10.7). Those tables include only cities 10 percent or more bl North Carolina there were three cities above 10,000 in total population (Ashboro, and Carey) that were less than 10 percent black but more than 10 percent combined

and Native American. Ashboro was 9.7 percent black; the other two had black populations of roughly 3 percent. Because of these and other minor differences in classifying North Carolina cities according to minority population depending upon whether black population or black plus Native American population is used, some care must be taken in comparing the results for North Carolina in tables 10.1 through 10.5 with those in tables 10.6 and 10.7.

13 Data are reported for 724 of them. There are far more at-large cities from North Carolina than from the remaining seven states combined.

14 We report data on black representation in terms of cities' total population percentage rather than their percentage of voting-age population primarily to increase comparability to earlier research. Because all tables in this book (except for some of the Louisiana ones) use total population rather than voting-age population, a few cities in our data base that are majority-minority in population are not majority-minority in voting-age population. This is most likely to be true for cities that have barely more than a 50 percent minority population. Also, some cities in each state might shift location among our two other black population categories, depending on whether total population or voting-age population was used as a base In the Lousiana chapter, for example, compare tables 4.1 and 4.1A. The former reports data for cities classified by black population as a percentage of total population; the latter, as a percentage of voting-age population.

Note also that all population data in the tables—the basis for the denominators in our measures of representational equity—are derived from the 1980 census, although data on the number of elected officials—which provide the numerators—are for either the early 1970s or the late 1980s. Our reliance on the single reference point of 1980 for population figures but on two reference points for our officeholding figures was dictated by the fact that our studies were completed before the 1990 census figures were available, and thus city population estimates could not be made by interpolating between 1970, 1980, and 1990. Therefore, equity measures for the late 1980s may need some minor adjustments in light of 1990 population data; however, such adjustments probably would not significantly alter the comparative findings reported in this volume because there is no reason to believe that black population changes between 1980 and 1990 are correlated with adoption of different electoral plans. (A test of this "no correlation" hypothesis using the Texas city population data in the two census years found it to be true.) However, for individual states, in cells with only one or two cases, there may be effects created by differential population changes over the past decades. For example, as discussed below, one of the Texas cities that elected at large throughout the period shifted from majority-white to majority-black between 1980 and 1990 Since it is the only city in its population category and exhibits substantial black officeholding, the Texas data considerably overstate black electoral success in majority-white at-large jurisdictions by our treating this city as if it were majority-white in 1989, when in fact it was not.

15 Because many North Carolina cities retained an at-large election plan, weighting by cities rather than by states would give results that heavily overrepresented the North Carolina data for that category. To avoid this problem, when we provide a similar eight-state comparison only for cities of at least 10,000 (table 10.6) we calculate (a) the mean using cities as the unit of analysis as well as (b) the mean with states as the units used in table 10.2. For the data set consisting of cities of at least 10,000, no single state provides an excessively large share of the data points.

16 While more categories might have been used, the ones we have chosen have the important property of excluding cities with a minuscule black population. In such cities, change in election type ought not to matter in comparisons between district and at-large

plans, since minority population concentrations large enough to form the majority in a single-member district do not exist. Our choice of three categories also allows us to distinguish between cities that were majority black in population and those that were not, since we anticipated that this would be an important threshold.

17. Here we round to two significant digits.

18. In a subsequent analysis (table 10.3) we reanalyze the data in table 10.2 in another way, to generate the ratio of black representation relative to black population in a given time period in cities of various election types. Immediately above we looked at the *growth* in black representation relative to black population.

19. We use values for the at-large unchanged cities as our control because in almost no state were there enough unchanged cities of other types to provide a reliable baseline to estimate changes in minority representation taking place independently of change in election type.

20. Another example of a possible maturation effect is a significant general change over time in the type of black candidate running—for instance, an increase in the number of conservative black candidates with a greater appeal to white voters.

21. The seeming dramatic *gain* in black representation in Texas at-large cities 30–49.9 percent black also is based on a single city in that cell—a city that, in fact, had become majority black by 1990 and thus is almost certainly misclassified as majority white in 1989. We should also point out that a very different picture, one of small gains in minority representation in Texas at-large jurisdictions, is derived from the full Texas data set based on cities at least 10 percent black and Hispanic combined (see chap. 8).

22. As noted earlier, the reported mean is based on averaging across each state's cell values in the table, otherwise the North Carolina data set, which has far and away the largest *N* for the at-large unchanged category (because it includes a large number of very small cities) would swamp all other data points.

23. Trivial differences between the means reported for the last five columns in tables 10.2A–C and the simple differences between means that might be calculated based on the raw data reported in the first six columns of that table are due to differences in the number of states for which means are being calculated (means for the last five columns are reported only for those states for which complete data is available) and rounding effects. A similar caveat applies to calculations of means in all subsequent tables.

24. The two exceptions are the three Alabama cities that were 10–29.9 percent black and the one Texas city that was 30–49.9 percent black.

25. In 1980 this city (Forest Hill, Texas) was only 36 percent black; by 1990 it was 61 percent.

26. See chap. 12 for evidence for this fact.

27. However, there are some state-by-state variations in this pattern, especially with respect to mixed cities. See table 10.2C.

28. Recall that the means calculated are based on states as units.

29. On a state-by-state basis the pattern is somewhat more complicated, although in only one state (if we exclude the Texas city that was not really majority white in 1989) did a shift to single-member districts have a greater effect on black gains in cities 10–29.9 percent black than in cities 30–49.9 percent black.

30. See chap. 12.

31. For example, of the nine Louisiana majority-black cities, only four were majority-black in voting-age population (see tables 4.2 and 4.2A).

32. Again we report data for cities in each of three categories of election type and for each of our three categories of minority population proportion.

33. We again report values for individual states as well as an overall average that simply is the average of the eight state values.

34. Across a set of cities a mean equity score has been calculated by averaging the equity ratio in each of the cities. Alternatively, we might take the ratio of the average black representation in those cities to the average black population in those cities. The average of the ratios is not necessarily the same as the ratio of the averages, but in general the two figures will usually be close. For consistency across tables, we calculated the ratio of the averages. Otherwise one could not obtain the values in table 4 in each of the state chapters by dividing the average values of black representation and black population given in table 2 in each. Rather, access to the raw data would be needed.

35. See Grofman 1983 for a discussion of the ratio measure and a review of its use in other studies.

36. Later we will show that these latter two high at-large equity values also can partly be explained in terms of differences between the kind of cities that shifted election plan and of cities that did not.

37. Recall that tables 10.2A–C are intended to highlight *change* in representation in the cities that changed election type, including a measure of net change that is relative to the unchanged at-large cities, while tables 10.3A and 10.3B show proportionality of representation relative to population at a given point (table 10.3B "before" and Table 10.3A "after"). Of course, we can also look at black equity changes over time by comparing the data in the corresponding cells of tables 10.3A and 10.3B. See the discussion of selection bias below.

38. Virginia, Texas, and Georgia are also among the four states for which there is some evidence for selection bias in majority-white cities. In Virginia and Georgia, for cities that were 10–29.9 percent black and 30–49.9 percent black, the equity score was highest in cities that remained at large; and the same is true for Texas cities that were 10–29.9 percent black. In South Carolina, a very slight potential selection bias effect is found in cities 30–49.9 percent black.

39. Most of the mixed plans for which we have data are majority white. See table 10.4.

40. In all states except Texas and Virginia (see table 10.3A), minority representation in the majority-white cities was clearly diluted by the at-large component of the mixed plans, since these are the only two states where the equity score for mixed cities was near 1.00 in majority-white cities. In these two states, the district seats in mixed plans actually overrepresented blacks sufficiently so that even the addition of an at-large component where blacks were dramatically underrepresented did not drive the equity score below 0.95. We also note that in those states there were usually many more districted seats than at-large seats in the mixed cities.

41. Many of the majority-black cities with mixed plans in the various states had only slight black population majorities and were not cities in which blacks constituted a majority of the electorate.

42. It is perhaps not coincidental that some states had no districts that were 40–49.9 percent black, since this is a category that might be seen by the Justice Department as "cracking" black voting strength if there were the potential to create a majority-black district.

43. Recall that our data are in terms of black population proportions, not registration or turnout shares.

44. Data on the 60–64.9 percent and 65–69.9 percent black population categories in Mississippi are not shown in table 10.5 but are reported in table 5.6 in the Mississippi chapter. In Mississippi, districts that were above 70 percent black had a 94 percent probability of electing black city council members.

45. Indeed, in general it appears to us that there is a mirror pattern of racial polarization in majority-white and majority-black units when we take into account the different registration and turnout levels of whites and blacks and imagine what the data would look like if districts were classified by black share of the actual electorate rather than black population share.

46. It might be argued that the imposition of a mixed system allows whites who might otherwise be tempted to vote for blacks to vote their preference for the white candidates who run at large, safe in the knowledge that at least some blacks will be elected at the district level. Thus we might expect even more polarized voting in mixed cities than in pure at-large cities. And the data do indeed suggest greater polarization. By a similar logic, in pure district cities white voters' knowledge that there are majority-black districts may lead some who might otherwise be disposed to vote for blacks to believe that they now have no obligation to vote for black candidates in any district. And once again we find evidence compatible with this view: there appears to be less polarized voting in at-large cities than in majority-white districts in pure district cities. But there are other plausible explanations as well. More blacks may be elected at large in pure at-large cities than in either the at-large components of mixed plans or in individual majority-white districts in single-member district plans simply because, in citywide races, it is more likely that numerous white candidates will contest for office, allowing a black candidate to be a plurality winner, or because white politicians are eager to have some black officeholders in order to preclude a successful voting rights challenge. There may be other reasons as well. An evaluation of the merits of the competing explanations for the observed differences in black success among these three types of majority-white settings must be left to subsequent research.

47. Why should North Carolina's record be so poor in this regard? One answer might be that the state of its race relations has been overrated. Another more likely explanation is that voting rights litigation came late to North Carolina and has not yet penetrated the state's rural areas, whereas Mississippi, whose record in voting rights for blacks has been egregious, became the target much earlier of vigorous and well-funded legal attacks. It is also important to recognize that most of the North Carolina cities in the data set are relatively small and rural—a result of the absence of a size threshold. Later in the chapter we address black representation in cities of different size.

48. For example, in Georgia the equity ratio for at-large majority-white counties was roughly half that of the at-large majority-white cities, averaging around 0.16.

49. Compare tables 3.5A, 6.5A, and 7.5A with tables 3.5, 6.5, and 7.5, respectively.

50. Thernstrom 1987.

51. Welch 1990.

52. Ibid, 1059, table 2, and 1066, table 4.

53. Welch (1990, 1059, table 2, and 1066, table 4) reports data both for cities that met a 5 percent black population threshold and those that met a 10 percent black population threshold; similarly, she reports data both for cities at least 5 percent Hispanic and for cities at least 10 percent Hispanic. To ensure direct comparability with our own results (and because we would not expect significant differences in minority representation by election type in cities with only a minuscule minority population), we focus on the result that Welch reports for majority-white cities that were *at least 10 percent black*, since this is the threshold used in our state chapters. (Her results do not appear to differ significantly according to which minority population threshold is used, however.) There were 170 majority-white cities at least 10 percent black in her data base, of which 68 were in the South. Of these 68 cities, 23 elected at large, 14 by districts, and 31 by mixed plans.

54. The figure we report is for at-large cities that were 10–49.9 percent black, the same range restriction as used by our chapter authors. We have data on eight of the eleven states in Welch's "South" category.

55. Welch 1990, 1059, table 2.

56. Ibid., 1058. See also Engstrom and McDonald 1981; Karnig and Welch 1982; Robinson and Dye 1978.

57. Welch 1990, 1058–59; Karnig and Welch 1982.

58. Welch 1990, 1059, table 2, and 1061.

59. See, for example, Bullock 1989; O'Rourke 1992.

60. We emphasize that the discussion below addresses only the empirical aspects of the controversy. As discussed in the Editors' Introduction, we have sought to eschew discussion of the complicated normative issues involved in deciding what the conditions are under which race-conscious districting is permissible or required. For our views on some normative aspects of the debate over enforcement of the Voting Rights Act, see Grofman and Davidson 1992.

61. Welch 1990, 1059, table 2.

62. Our findings also contradict Bullock and MacManus (1991*a*), who claim that election type is not nearly as important a factor in black officeholding as the independent effect of black population proportion. As various students of this issue have noted, blacks are unlikely to be elected in jurisdictions with few blacks, regardless of what type of election system is employed. Moreover, whatever the election type, the proportion of black elected officials will be strongly related to the black proportion in the population, regardless of whether voting is racially polarized. However, the correct policy question to ask—the one we have sought to answer—is whether, for a *given* proportion of minority population, election type makes a difference in rates of minority representation. Our findings show that the predicted effect of at-large election systems held true for all levels of black population in majority-white cities with more than a minuscule black population.

63. Moreover, if we exclude the Texas city in the 30–49.9 percent black category misclassified as majority-white by 1980 population data, the equity score in the 30–49.9 percent black at-large category drops to 0.43.

64. The exception is Georgia, whose at-large cities 30–49.9 percent black had councils that were 20 percent black in 1980 but only 17 percent black in 1990.

65. See our discussion below of the effects of city size.

66. Welch 1990, 1059, table 2.

67. Recall that the data set in Welch 1990 is for 1988, while ours is for 1989 (1990 in Georgia); further, she includes three southern states—Arkansas, Tennessee, and Florida—for which we do not have data.

68. If we restrict the sample to cities above 10,000, the *N*s of our longitudinal data base change for the five states where data are initially reported for cities with population less than 10,000: in Alabama, the *N* is reduced from 48 to 32; in Louisiana, from 57 to 20; in Mississippi, from 130 to 23; in North Carolina, from 724 to 38; and in Virginia, from 23 to 15. For the North Carolina data we report in tables 10.6A–C and 10.7A–B, we also remind the reader that cities with combined black and Native American population greater than 10 percent that had black population smaller than 10 percent have been excluded. In Georgia

four multimember-district cities are excluded from tables 10.6A–C and 10.7A–B as well as from most other previous tables. In Georgia ($N = 15$, after we eliminate the four cities that used multimember districts), in South Carolina ($N = 21$), and in Texas ($N = 42$), the *N*s remain the same as in tables 10.2A–C and 10.3A–B, since these three states are ones where data were already reported only for cities of at least 10,000. Thus for these states, there are no differences in the data reported in tables 10.6A–C and 10.7A–B and that reported in tables 10.2A–C and 10.3A–B. For Texas, however, we would also remind the reader that the *N* in many of the tables in the Texas chapter is larger than that in tables 10.6A–C and 10.7A–B because tables in the Texas chapter include cities whose *combined* black and Hispanic population was above 10 percent.

69. The former averaging procedure is more directly comparable to the data reported in other studies of the effects of election type on minority representation. We have reported both types of averages in tables 10.6A–C and 10.7A–B to permit readier comparison with the data reported in tables 10.2A–C and 10.3A–B.

70. However, in Alabama, voting rights efforts penetrated throughout the state at all levels of government, reaching down even into the smaller towns (Peyton McCrary, personal communication, March 1993; also see chap. 2), and we would thus not expect city size differences to have that great an independent impact on levels of black representation.

71. Roughly 30 percent of the majority-white cities in our data set above 50,000 population retained at-large elections.

72. Compare, for example, Grofman, Handley, and Niemi 1992, chap. 2.

73. Welch 1990, 1073.

74. If we further confine ourselves to cities that were over 50,000 in total population, 31 percent of such cities in the eight states of our study eliminated at-large elections. This is higher than the 21 percent figure for the entire eight-state data set. (For majority-white cities the comparable percentages are 30 and 21 percent.) The larger cities were much more likely to have been challenged in voting rights litigation or to have changed election type in anticipation of such a challenge.

75. If we turn to the larger data set reported in table 10.3, we also see evidence for potential selection bias effects in majority-black cities in Alabama, Louisiana, and Mississippi. In these states, the majority-black cities that remained at-large began the period with higher black electoral success than those which changed election type. As previously noted, a number of these majority-black cities almost certainly lacked a black electoral majority.

76. These are the same four states for which a possible selection bias effect was previously identified in table 10.3.

77. By *worst case* we mean cities at the earlier point that had the worst track record of minority representation relative to population size and hence were more likely to be challenged; conversely, the *best case* cities had the best track record and were least vulnerable to challenge.

78. It will be remembered that our decision to choose, when possible, the early 1970s as the starting point for our data collection was dictated by various considerations. One was that we wanted ideally to include as many cities as possible in the post-act period from 1965 on that had changed election system. But our hunch that data would not be accessible so far back led us to choose 1974 instead. Our worry about this latter date was that a number of cities would have already changed their system by then, preventing our obtaining data for the "before change" point.

79. Indeed, our data show that in most areas of the South, the great majority of changes in election type occurred after the 1982 amendments to section 2.

80. Similarly, when we confine ourelves to majority-white cities above 50,000 in population (of which there are forty-six in our eight-state data set), there is little evidence of selection bias, in terms of cities that remained at large having initially had a higher level of minority representation than the cities changing election type—at least if we use the initial period as the basis for our determination.

81. See chap. 3. Alabama's research team collected data on minority representation and election type in all its cities for 1980 as well as for 1970, and for 1986 as well as for 1989. Using 1980 as an alternative starting point, we can test for selection bias in Alabama to see whether the most striking unexplained anomaly in our data in table 10.3A—the 1.10 equity value for the three majority-white Alabama cities in the 10–29.9 percent black category that still elected at large in 1989—can at least partly be attributed to selection bias efforts.

A comparison of 1980 and 1989 data demonstrates the probability of a very significant selection bias for Alabama cities 10–29.9 percent black, one that is not apparent when data for 1970 and 1989 only are compared. Even as late as 1980 there were still thirty-five at-large majority-white cities in Alabama of 6,000 or above with a black population of at least 10 percent, as compared to forty-two in 1970 and three in 1989. While the three cities retaining at-large plans in 1989 do not appear atypical in their *1970* equity score, that is not true when *1980* becomes the starting baseline. (In 1974, these three cities, like all majority-white cities in Alabama, had no black city council representatives. See the discussion in chap. 2.) In the three cities in question, by 1980 blacks were already *overrepresented*, with a mean equity score of 1.16, far higher than the 0.26 for the thirty-five majority-white at-large cities that year. Thus the three cities remaining at large in 1989 were a small and quite unrepresentative subset of those with at large plans in 1980. This is strong evidence for the existence of a selection bias in Alabama for cities in the 10–29.9 percent black population category.

The Alabama analysis is further illustration of the potential problems of using cross-sectional analysis to draw causal inferences in settings where a strong selection bias is quite possibly at work. The three anomalous cities had a mean equity score of 1.10 in 1989. In other words, blacks at that point were more than proportionally represented in these at-large jurisdictions. A cross-sectional analysis using 1989 Alabama data might well suggest that because the at-large systems provided fair representation, the shifts from at-large to district elections in other Alabama cities had been unnecessary. But that inference would almost certainly be wrong. As early as 1980, these three cities were ones where black success had been much higher than in the at-large cities that subsequently switched. Had an additional intermediate data year been available for comparison in some of the other states, as it was for Alabama, it is possible that evidence of additional selection bias efforts might have been revealed.

82. Recall also that the equity ratio in this category would become 0.43 if the Texas city that was majority white in 1980 but majority black in 1990 were excluded from the data set.

83. Recall that in Mississippi it was close to 100 percent in districts that were at least 70 percent black.

84. Welch 1990.

85. The last two columns in tables 10.2A–C indicate the longitudinal gains in black officeholding in single-member-district and mixed plans relative to those occurring in the unchanged jurisdictions. Taking average council size to be roughly six, we can calculate how many black officeholders were elected in the changed cities relative to what would have been expected had these cities elected black officeholders at the same rate as did the

unchanged cities. Performing such calculations for the 117 cities that shifted from at-large to single-member-district plans (44 of which were 10–29.9 percent black; 55, 30–49.9 percent black; and 18, majority black), we find a net gain of 157 black representatives. For the 100 cities shifting from an at-large to a mixed plan (43 of which were 10–29.9 percent black; 38, 30–49.9 percent black; and 19, majority-black), we find a net gain of 48 black officeholders. The hypothetical net gain resulting from change to pure districts is considerably greater than the gain from change to mixed systems even though the number of cities in each category is not that different. This is because black representation is greater, on average, in pure district plans than in mixed ones. If we examine the longitudinal gains in the changed cities by substracting the number of black representatives at the beginning of the study from that at the end, we find well over 300 new black council members.

86. The Alabama data are particularly instructive. There we might have overlooked the potential for selection bias completely if, employing only a cross-sectional design to investigate black officeholding, we had looked only at the three at-large cities that still elected at large in 1989.

Chapter Eleven
The Impact of the Voting Rights Act on Minority Representation

1. See, for an example of this argument, O'Rourke 1992.

2. According to exit polls, Wilder did not receive a majority of the white votes in his bid for office in 1989. An exit poll conducted by CBS/*New York Times* reported that only 39 percent of the whites voting in the Virginia gubernatorial contest voted for Wilder. If whites alone had voted, the white Republican, Marshall Coleman, would have been elected governor of Virginia (*Time*, 20 November 1989, 54).

3. The one longitudinal study that exists on the subject of racial bloc voting—a case study of South Carolina—shows essentially no change in the degree of racially polarized voting (Loewen 1990).

4. These numbers are based on the seven southern states for which there are comparable data in the 1970s and 1980s: Alabama, Georgia, Louisiana, Mississippi, North Carolina (senate only), South Carolina, and Virginia.

5. Let P_1 be the proportion of all districts that are majority nonblack and P_2 be the proportion of all districts that are majority black. Further, let B_1 be the proportion of non-majority-black districts that elect a black legislator and B_2 be the proportion of majority-black districts that elect a black legislator. The Grofman-Jackson decomposition-effects formula is: $X_t - X_0 = (\Sigma\Delta P_i \times B_i) + (\Sigma\Delta B_i \times P_i) + (\Sigma\Delta P_i \times \Delta B_i)$

6. The behavioral effect is positive because majority-black districts were much more likely to elect blacks to office in the 1980s than in the 1970s, outweighing the negative effect of majority-white districts being *less* likely to elect blacks in the 1980s than in the 1970s.

7. The interaction effect is positive because the number of white-majority seats decreased but, since those seats were less likely to elect black candidates than previously, we have a positive contribution of the interaction term. Similarly, the number of majority-black seats increased but so, too, did the probability that those seats would elect a black, giving rise to another positive interaction effect.

8. The percentages of the black population in 1980 that did *not* reside in majority-black house or senate districts for each of the states are as follows:

	Senate	*House*
Alabama	57	50
Arkansas	81	60
Florida	88	75
Georgia	61	54
Louisiana	73	59
Mississippi	56	50
North Carolina	95	79
South Carolina	60	57
Tennessee	58	55
Texas	86	68
Virginia	91	70

9. See Brace, Grofman, Handley, and Niemi 1988.

10. On lower black participation rates in Mississippi, see Lichtman and Issacharoff 1991.

11. However, a lower proportion of blacks were of voting age than was true for whites; hence the proportion of black voters within a district was unlikely to equal the proportion of white voters within a district with equal total population proportions, even if blacks were registering and voting at the same rate as whites (see Brace, Grofman, Handley, and Niemi 1988).

12. According to census surveys (U.S. Department of Commerce, Bureau of the Census 1989, table A), the percentages of adult blacks and whites who voted in presidential elections in the South from 1972 through 1988 are as follows:

	1972	*1976*	*1980*	*1984*	*1988*
White	57.0	57.1	57.4	58.1	56.4
Black	47.8	45.7	48.2	53.2	48.0

13. Black and Black 1987, chap. 1.

14. Although the Justice Department objected to plans for both chambers in South Carolina, the state successfully challenged the senate plan objection in court and only the house was required to shift to single-member districts.

15. *White v. Regester*, 412 U.S. 755 (1973).

16. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

17. *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989).

18. See, for example, Thernstrom 1987, 190–91.

19. Jewell 1980 and 1982; Grofman, Migalski, and Noviello 1986.

20. Since not all legislatures are of equal size, these regressions were replicated with changes in black representation expressed as a percentage of all legislators in a chamber rather than in terms of the actual number of legislators, but the conclusions are essentially identical and thus the results have been presented in terms of raw numbers for ease of exposition. More important, these analyses were also replicated with a control for the size of the black population in the state, but since this control did not have a significant effect on the findings, these results have been omitted.

21. A look at the raw data in table 11.7 will also confirm that a shift to single-member districts resulted in an increase in the number of black legislators elected. For example, the

elimination of multimember districts between 1970 and 1975 led to a gain of 13 black representatives in the Alabama house, a gain of 7 black representatives in both Georgia and Louisiana, a gain of 13 black legislators in South Carolina, and a gain of 7 black representatives in the Texas house. Similar gains were made in senates following a change from multimember districts to single-member districts, although the gains were smaller. (Because senate districts are larger than state house districts, it is usually more difficult to create majority-black seats in the senate than in the house. That fact, combined with the fact that there are fewer seats in a senate to be filled, means that the effects of electoral system change on black representation are much less pronounced for senates than for houses.)

22. A "census redistricting year" dummy variable was also incorporated in the analysis to test for the simple effect of redistricting (assigning a 1 for the period 1970–75 and 1980–85, and a value of 0 otherwise). Regressing this "redistricting year" dummy variable against change in black representation produced weak correlations of .17 in the house and .31 in the senate that were not statistically significant in either case.

23. It is actually the number of majority-black single-member districts that was the proximate cause of the gain in black representation; the increases in black representation brought about by changes to single-member districts were mediated by the change in the number of majority-black seats that were drawn following the elimination or reduction in the number of multimember districts. Exactly as we would expect, there was a very strong correlation ($r = .82$) between the number of black-majority seats and the number of black state representatives. This correlation was even further strengthened when we entered an additional variable for the number of black-majority districts with a 60 percent or greater black population ($r = .84$). In the state senates, the correlations were lower but the relationships were still statistically significant. The correlation between the number of black senators and the number of majority-black districts was .47. The correlation between the number of black senators and the number of districts over 60 percent black was .52.

24. However, not all majority-black congressional districts elected blacks to office; the Louisiana Second (59 percent black) did not elect one until 1990.

25. Yet, it took several attempts before a black candidate managed to win the Mississippi Second. Robert Clark ran in both 1982 and 1984; in 1982 the district was only 54 percent black (and was less than majority black in voting-age population). A federal court ordered the district redrawn in 1984 (*Jordan v. Winter*, 541 F. Supp. 1135 [N.D. 1982], *vac'd and remanded sub nom. Brooks v. Winter*, 461 U.S. 921 [1983], *on remand* 604 F. Supp. 807 [N.D. Miss. 1984]) and a 58 percent black district was created. Mike Espy finally won the seat in 1986.

26. In 1990, a black, William Jefferson, was elected to the Louisiana Second when Boggs retired.

27. *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982).

28. *Jordan v. Winter*, 541 F. Supp. 1135 (N.D. 1982), *vac'd and remanded sub nom. Brooks v. Winter*, 461 U.S. 921 (1983), *on remand* 604 F. Supp. 807 (N.D. Miss. 1984)

29. *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983).

30. Grofman and Handley 1989a.

Chapter Twelve
The Impact of the Voting Rights Act on Black and White Voter Registration in the South

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1. There are numerous aspects of southern white political behavior that are important for understanding race relations and the maintenance of white dominance which I do not discuss because they are not central to my focus on disfranchisement devices and minority registration. For example, fears of the "black threat" played a pivotal role in state administration, where counties could be abolished or have their powers modified; also, the southern judiciary sometimes condoned violence and discrimination.

2. The exact nature of the data base is discussed in the appendix to this chapter.

3. Matthews and Prothro 1963.

4. The only counties to achieve majority-black electorates were counties with majority-black voting-age populations.

5. The Supreme Court upheld it on the grounds that it did not explicitly discriminate between the races and that bias in its application had not been demonstrated; the Court later upheld it even where the application appeared biased. See Key 1949, 538.

6. Kousser 1974, 49, 241.

7. Rusk and Stucker 1978.

8. 238 U.S. 347.

9. 307 U.S. 268.

10. Lawson 1976, chap. 2, provides an excellent history of the legal and political conflict surrounding this restriction, from the initial enactment of a statewide Texas white primary in 1923 to its demise in 1944.

11. Reitman and Davidson 1972, 16.

12. As quoted by Colby 1986, 124–25.

13. Unit voting schemes like Georgia's, which gave extra weight to the rural areas that tended to have black majorities, increased the incentive for whites to disfranchise blacks. Key (1949, 5) remarks on the important role played by whites in majority-black areas in the politics of disfranchisement.

14. Reitman and Davidson 1972, 18.

15. Key 1949, chap. 26.

16. The Supreme Court had struck down Alabama's Boswell Amendment as too arbitrary but left other literacy tests intact. The 1964 Civil Rights Act had required administration of literacy tests in writing, to restrict arbitrariness in application and possibly to facilitate litigation. Constitutional cases sustaining the Voting Rights Act's abolition of literacy requirements and the use of federal examiners are reviewed in Reitman and Davidson 1972, 145–46.

17. Matthews and Prothro 1963, 1966.

18. The tax was cumulative in Virginia, though other states had dropped this provision. Veterans and the disabled were frequently exempted. See Smith 1960.

19. 383 U.S. 663.

20. Lawson 1976, chap. 3, provides details of the long battles against the poll tax by various civil rights organizations. For an early before-and-after analysis of the impact of the poll tax on voting, see Ogden 1958, chap. 5.

21. As late as the 1950s, neither Texas nor Arkansas had a system of enumerating registered voters other than compilation of poll tax receipts.

22. In the pre-act South my research reveals significant independent effects on registration only for literacy requirements, poll taxes, and residence requirements. Rosenstone and Wolfinger (1978) describe effects of factors other than these three. Some of the factors they discuss, such as early closing dates and the lack of local registration sites, explain differ-

ences between the South and the rest of the country rather than differences within the South. Lengthy residence requirements were eliminated by the Supreme Court in *Dunn v. Blumstein* (1972), 405 U.S. 330

23. While Black and Black (1987, 126) describe black registration and voting over the last two decades—following passage of the act—as the "limited leverage of a franchised minority," they have little to say in a systematic manner about the causes of variation in racial registration rates from place to place.

24. See Wright 1987, 21; and Thernstrom 1987, 15–16.

25. Key 1949, 576, 605, 617–18.

26. Matthews and Prothro (1963, 24, emphasis added). Unfortunately, Matthews and Prothro do not report their findings in a way that makes it easy to estimate separate effects or to see how the impact of legal barriers was affected by contextual factors like black population proportion.

27. Matthews and Prothro (1963) did not directly report how much of an effect racial composition had independently of its many socioeconomic correlates. Including all their twenty or so extra demographic variables in a model only predicts black registration about one-fifth better than does black concentration alone.

28. Matthews and Prothro (1966, 324) also asserted, "Legal changes in the political system—such as those stemming from the Voting Rights Act of 1965—can increase Negro political activity. But any changes are likely to be small unless or until these changes in the legal climate lead to . . . greater interest, partisanship, information about parties, and general political information." Earlier works stressing different socioeconomic factors include Fenton and Vines 1957; Price 1955.

29. Matthews and Prothro 1966, 164. I use their data on race organizations below

30. They did not discuss the effects of racial groups on white registration.

31. Stanley 1987, table 7 and p. 93. He also finds that economic dependence (as measured by the concentration of tenant farming) strongly reduced black participation, but his data do not permit him to test the effects of race organizations or to determine whether, for instance, white registration was higher where more blacks were registered, other things equal.

32. Of course, either process could be operative, depending on the proportion of blacks in a jurisdiction or on differing political cultures in various southern locales.

33. Salamon and van Evera 1973.

34. Key clearly comes closest: consider his observation in the 1940s that "almost everywhere the figures suggest that when other conditions are the same the presence of a substantial Negro population brings with it a higher level of white voting" (1949, 516). Blalock, writing after Key, infers that whites, as the dominant group, must mobilize disproportionately as their numerical advantage declines, and thus advocates devising a "measure of discrimination involv[ing] a ratio of white to Negro voter registrations" (1967, 163). Blalock's call for researchers to focus on the combined registration rates of both races was an important step forward, in spite of his lack of empirical data to investigate the dynamics of biracial registration.

35. Naturally, maintaining numerical supremacy after passage of the act would have retained its appeal to whites, but the older institutional strategies were no longer available. In the period before the act, of course, if blacks could have been depended on to support particular white candidates, their registration would not have had to be prevented.

36. The general perspective of my analysis is one in which choices that are efficient in terms of costs and benefits are sought, subject to information and feasibility constraints

37. As with any other type of organization, it is costly in human and other resources to form and maintain racial political organizations. Matthews and Prothro (1966) do not look at the question of where race organizations of either race should be expected to form.

38. Indeed, as the analysis leading to table 12.3 demonstrates, the effect of a poll tax was to reduce white advantage, particularly at high black population levels. Overall, residence requirements also reduced white advantage.

39. However, ceteris paribus, the existence of severe literacy tests appears to have diminished the likelihood of black race organizations.

40. Also, white race organizations tended to form where white average incomes and education levels were higher and where the population was growing. Black race organizations were more likely to be formed in urban areas, less likely in agricultural areas, and more likely where the black population was more educated. Analyses on which these findings are based are omitted because of space constraints.

41. I also believe that, with the possible exception of residency requirements, states adopted these mechanisms because, on balance, they believed that they restricted the size of the black electorate.

42. Matthews and Prothro (1966, 155) show that in three North Carolina counties where white registrars did not enforce the literacy requirement, the black registration rate appeared to be dramatically high, but they fail to point out that in one of these counties blacks comprised only 1 percent of the county population, and in the other two less than 10 percent.

43. Morgan Kousser (personal communication, 1991) suggests the alternative interpretation that in areas where black concentration was high, whites collected the poll tax from blacks to raise county revenue and keep other tax rates lower. Also see Kousser 1980, 178.

44. Similarly, resources like education and income should have facilitated the development of race-based organizations.

45. Southern congressional Democrats were instrumental in preventing the extension of Social Security legislation to agricultural workers in the 1930s precisely because this would have interfered with the structure of dependence. See Alston 1985. More generally, of course, southern representatives fought to prevent federal legal intervention in local electoral and social practices (Key 1949, 9).

46. Technically, taking logarithms reduces the effect of heteroskedasticity, or larger random error variance, where the black population is very small.

47. Values shown are for the most complete data set for the period. See the appendix to this chapter for a description of the data.

48. Omitted from figure 12.1 are twenty-two counties with some voting-age blacks but a black registration rate of zero. These cases of total exclusion arose at a variety of black population densities and were mostly in Mississippi. The counties had other political and socioeconomic characteristics that, when combined with the parameter estimates for black registration rates in counties in the rest of the South with black populations of more than single figures, imply expected values for black registration of about 3 to 5 percent—which was about average for Mississippi at that time.

49. Exponentiation, or taking the constant e to a power, reverses the effects of taking natural logarithms.

50. The inclusion of an interaction between, say, poll tax and black population concentration means that the effect of a poll tax on white numerical advantage depended on the level of black population density or, conversely, that the effect of black density depended on whether or not there was a poll tax.

51. To assess the importance of interaction effects in counties with various levels of black population proportion, one must multiply the coefficients by the appropriate black population percentage. Such a multiplication could increase the coefficient by a factor of up to 100 in the case of all-black counties.

52. I say "effectively" because where there are absolutely no blacks in a county, white advantage is strictly undefined.

53. For example, in a county with a black voting-age population of 60 percent, we would obtain $e^{(-.217 + 60 \times .016)}$, which equals 2.10.

54. Where there was only a poll tax but no literacy requirement, as in Texas and Arkansas, blacks might have been expected to register at higher rates than whites, especially in black-majority counties. In fact, however, very few such counties had only a poll tax, and thus other factors, such as race organizations, need to be taken into account.

55. Other analysis that I do not report shows, as expected, that white race organizations achieved their effect by depressing levels of black registration.

56. If we look at the combined effect of white race organizations and black race organizations, we find white advantage in counties that are over half black.

57. The average difference made by state black population concentration was to increase white advantage by about 4:1, other things equal. Of course, as is almost inevitable because of the definition of the white advantage variable, it declined with *county*-level black VAP share (even "equal effort" would depress the data in figure 12.2 downward from left to right).

58. I have also done extensive econometric analyses that space constraints do not permit me to report, including models with black and white registration rates, respectively, as their dependent variables. These models sometimes give more detail about the interactive effects of restrictive laws on white advantage. For instance, in these models, poll taxes affected both white and black registration rates. They reduced black registration by 14 percentage points on average, but, where there were few blacks, it reduced white registration by up to 27 points. Residence requirements reduced black registration by about 8 points where a strict one-year residence requirement existed, but had a much larger effect on whites, reducing their registration rates by up to 30 percentage points in areas of high black population concentrations. The existence of a literacy requirement reduced white registration rates by a constant amount, nearly 12 points, at all levels of black population. But while a literacy requirement reduced black registration on average by only 5 to 6 points, it affected black registration rates more as black population percentage increased, so that in 50-percent-black counties its estimated effects on black and white registration were equal. Moreover, at high black concentrations the existence of a white race organization had a bigger negative effect on black registration than the positive effect induced by the presence of a black race organization. Finally, for each 10 point increase in a state's black population concentration, there was, on average, a 10 point gain in the percentage of whites who were registered. All these effects appear in a simpler form in the results reported in table 12.3. Of course, models that estimate black and white registration levels separately fail to take into account interactions like the effects of local black registration levels on white registration decisions, which is automatically accounted for by our white advantage variable that measures *relative* levels of black and white registration.

59. Some suggestive findings about geographically clustered areas with high residuals are omitted because of space considerations.

60. All other joint effects can be calculated analogously.

61. In Texas, partial pre-act poll tax records indicate that white registration levels of about 45 percent rose to nearly 54 percent by 1967. These low rates may include many Mexican Americans counted as whites. Other states where white registration was low, partly as a result of the poll tax, included Arkansas (whose white rate rose from 65 percent before the act to 72 percent afterward) and Virginia (61 percent before, 63 percent after). In contrast, white registration rates of 90 percent and more were reached in Alabama, Louisiana, and Mississippi by 1967, reflecting increases of nearly 20 percentage points on average.

62. For example, the aggregate data in Stanley (1987, 97 and 154) show that in 1980, 58 percent of blacks were registered, and whites comprised 80 percent of the eligible population but 84 percent of the actual electorate. From these numbers we can calculate a white registration rate of 76 percent, virtually identical to the 77 percent obtained in his survey estimates. Stanley's own data make it perfectly clear that black survey responses overestimated black registration rates by something like 10 points (echoing other findings on blacks' tendency to overreport turnout to a greater degree than whites). The exact source of this discrepancy is not known. Of course, the aggregate data used in my essay have problems, too. In particular, the high observed rates for white registration in some states derive from policies that discourage registrars from deleting names of those who have moved or died.

63. However, we also need to be sensitive to the fact that, in the post-1965 period, there were changes in the racial mix in the South caused by net inmigration by whites and outmigration by blacks. Stanley 1987, 6; Black and Black 1987, 12–22.

64. Intermediate values in the figure are based on certain adjustments that were needed to keep changes in voting-age population synchronized with changes in registration.

65. White registration rates were on average higher than those of blacks by perhaps 10–12 percentage points in 1988. This was a smaller difference than was observed a few years earlier. Until 1988, this racial difference existed almost everywhere: there were very few counties where blacks registered at higher rates than whites. The narrowing racial difference was due to a steady decline in white registration from its mid-to-late 1960s peak, while black registration remained stable or rose after 1972.

66. This conclusion is buttressed by econometric analyses predicting black and white registration levels (see below).

67. Majorities are recorded here whether they occurred in 1967 and/or 1968, since some uncertainty exists about the exact dating of estimates for those two years. There are some other data limitations. See the appendix to this chapter.

68. The act's trigger formula enabling the Attorney General to send federal registrars was based on 1964 registration rates, not on the size of the black voting-age population. In fact, the presence of federal examiners never led to a black majority of registrants in a white-majority county.

69. In all cases these estimates of the effects of examiners are independent of the effects of population concentration and the abolition of the legal restrictions discussed earlier. The effect of examiners always looks larger across a shorter time period, partly because over the longer period some of those registered by federal examiners dropped off the rolls, and partly because over longer periods other influences on registration in general came into play, reducing the apparent effect of registrars. The last estimate is consistent with independent figures in Stekler 1983.

70. Note that the number of majority-black counties in the South was declining because of black migration to urban areas, but I have taken this into account (see below).

71. In Georgia, Louisiana, North Carolina, and South Carolina, there were 12 majority-black electorates in 51 majority-black counties in 1968. Not until 1980 were there as many

as 13 (when there were only 45 majority-black counties), although the number rose to 23 of 39 in 1984, to 27 of 39 in 1986, and to 28 of 37 in 1988, assuming the statistical adjustments described in the appendix are correct. Although data are sketchy for certain periods, the biennial data available for South Carolina reveal steady upward movement in majority-black electorates: from 2 of 14 possible in 1971 to 4 of 14 in 1974; then to 6 of 13 in 1976 (the black population was declining), to 7 of 12 in 1980, to 9 of 12 in 1982, and finally to 10 of 12 in 1984. Georgia had 5 majority-black county electorates in 19 majority-black counties in 1980, and 7 of 16 in 1984; and Louisiana had 1 of 7 until 1974, and then none until 1984.

72. The relationship is not simple. There are two counties in Mississippi with durable black majorities of registrants that never had examiners, while examiners went to East Feliciana Parish in Louisiana three times and never secured a black-majority electorate. Unfortunately there are no data to test for the role of black organizations as distinct from the presence of examiners, and there are no interim data at all for Alabama and Georgia, but it is likely that continuing federal enforcement had some effect in securing black-majority electorates.

73. See table 12.6. To some extent, examiners stimulated black registration temporarily to unsustainably high levels. They also pushed rates in their counties up quickly, and blacks elsewhere subsequently caught up. Between 1967 and 1971, black registration rates dropped on average by about a point in the counties visited by examiners in 1966. Outside these counties, the rates rose by about 4 percentage points in the same period.

74. Stanley 1987, 37. Stanley argues that little of the white post-1965 gains in registration could be attributed to white mobilization to counter rising black registration. However, some of what he calls "nonracial" factors affecting pre-1965 registration, like residence requirements, surely were closely connected to racial attitudes. Since residence requirements reduced white registration and advantage (table 12.3), one can conjecture that the relaxation of residence requirements between 1960 and 1970 was motivated at least partly by white officials' desire to increase white registration.

75. Black and Black 1987, 139.

76. E. Black 1976; Stekler 1983.

77. Tate (1988), Stanley (1987, 35–36), and Davison (1986) all show that black turnout in recent times is typically a few percentage points lower than white turnout, except in 1984, when black registration and turnout were stimulated by the Jesse Jackson campaign. Stanley emphasizes the importance of change in registration requirements, increased media usage by blacks, and the effects of newly competing parties in explaining the lessening differences in black and white turnout rates before and after 1968. We draw on this turnout research since factors that raise turnout often also raise registration.

78. The voting-age data by race are available only from the decennial census. Data in intercensus years are estimated by interpolation. Thus, for the period since 1972, the figures for registered voters in these states derive from official counts, but those for voting-age populations derive from estimates, since the voting-age populations of both races change considerably within decades. Indeed, even though the black population in the South is growing more slowly than the white population—accounting for the decline in black concentration and the number of majority-black counties—it is nevertheless growing. Failure to allow for this biases upward any estimates of black registration rates.

79. A justification for using aggregate registration data by race, despite problems with the data, is that minority self-reporting of registration (or turnout) is often exaggerated even more than is true for whites. See for example Tate 1988, and note 62 above.

80. For example, Black and Black 1987, 137; Daniel 1969; Carlson 1980, and Stern 1987.

81. I prepared graphs identical to figure 12.1 in the previous section for subsequent periods. The figures are omitted but are available upon request from the author. The pattern for 1964 is very similar to that for 1958–60, shown in figure 12.1. In contrast, by 1967, after the act's passage, the vertical scatter above the "equal effort" line was much smaller, so the range of observed white advantage had declined sharply. Moreover, by 1971 there were no systematic differences in white advantage at different levels of black concentration, that is, the vertical scatter was about the same at all levels of black concentration. Therefore, by 1971, whatever the sources of white advantage in the post-act South may have been, they had no obvious relation to a county's black population density. One thing had not changed, however: Blacks registered at greater rates than whites hardly anywhere. There were virtually no counties below the equal rates curve. Nonetheless, as described above, there were now cases (in heavily black counties) where blacks formed a majority of the registered county electorate.

82. Also, where population was increasing, white registration rates were initially higher, ceteris paribus, then elsewhere. Subsequently, white population increases were associated with lower white registration rates, while by 1988 they were unrelated to this variable.

83. A few other state-to-state differences appeared. Analysis of them is omitted because of space constraints.

84. The regression standard errors for black rates shown in table 12.6 declined over the years (and would have been considerably larger in 1967 without the inclusion of past registration rates), reinforcing the conclusion that black registration became more predictable as time passed. In fact, when data on Georgia in 1972 are excluded, the registration rates of each race were equally predictable. See table 12.6.

85. This analysis, omitted because of space constraints, is consistent with Davison's study, which shows that turnout variation over time—especially that between presidential and off years—is often greater than interracial differences in turnout. See Davison 1986, especially figs. 1 and 2.

86. See Matthews and Prothro (1963, 25–26) for a description of the data set.

87. Smith 1960, 12–21.

88. U.S. Commission on Civil Rights 1968, app. 7.

89. Some of these data are reprinted in U.S. Commission on Civil Rights 1971.

90. U.S. Commission on Civil Rights 1968, 244.

Chapter Thirteen
The Voting Rights Act and the Second Reconstruction

1. Woodward (1965) coined the term *Second Reconstruction* to point to the parallels but also to some differences, up to the time he wrote, between the movement for civil rights in the 1960s and that following the Civil War. Also see Kousser (1992)

2. Woodward 1965, 128.

3. See chaps. 2–9 in this volume, as well as chap. 1, for detailed descriptions of this response by white officials. See also chap. 12 on southern white reaction to the act after 1965.

4. Strictly speaking, the Attorney General's objections are not subject to judicial review. If a jurisdiction so wishes, however, it may file a case de novo in the U.S. District Court for

the District of Columbia, challenging the Justice Department's finding, and this is colloquially referred to as an "appeal."

5. *South Carolina v. Katzenbach*, 383 U.S. 301.

6. *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

7. *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

8. Section 5 was relevant, however, for municipalities seeking to annex or consolidate with predominantly white populations. Here the Department of Justice would sometimes object to the annexation unless changes were made in electoral practices within the enlarged jurisdiction. (See, for example, Days 1992, 61–63.) At the municipal level through 1989, or 1990 in Georgia, our authors identify over ten cases involving at-large elections in the eight states where section 5 came into play.

9. 379 U.S. 433.

10. 412 U.S. 755.

11. For example, there were apparently no successful constitutional challenges to municipal at-large elections in North Carolina and only a few in states such as Alabama, Georgia, and South Carolina. Once the 1982 amendments to the Voting Rights Act were in place, challenges to at-large elections were invariably decided under section 2, even in cases where there were also constitutional issues raised. See chap. 1 and discussion below.

12. 404 F. Supp. 206 (N.D. Miss. 1975).

13. However, there was an intent issue in this multijurisdictional case that made the basis of its resolution unique. See the discussion in chap. 5.

14. 446 U.S. 55 (1980).

15. However, the Supreme Court's decision in *Bolden* remanded the case for further evidentiary proceedings about intent to discriminate. Evidence unearthed by Peyton McCrary, a historian and an expert witness for the plaintiffs, showed that the plan was adopted with a discriminatory intent. See chap. 2.

16. 478 U.S. 30.

17. See, for example, Arrington and Watts 1991; Meier and England 1984; Robinson and England 1981; and Stewart, England, and Meier 1989.

18. A comparison of the results of district remedies in Texas imposed during the 1970s showed that when the boundary drawing was monitored by the Justice Department or developed by minority plaintiffs, the increase in minority officeholding was much greater than when the author of the boundaries was unknown or was hostile to minority electoral interests. See Davidson and Korbel 1981, table 3.

The issue of majority-minority districts whose majority is made up of two minority groups as a remedy for minority vote dilution has been before the courts in several cases, including cities as different as Pasadena, California; Boston, Massachussetts; and Baytown, Texas. Combined minority districts raise important strategic questions about the desirability of fostering multiethnic coalition politics as well as empirical questions about the potential for black-Hispanic electoral alliances. Without trying to resolve either issue, we note that even in the absence of an explicit black-Hispanic electoral alliance, the Texas data suggest that even a slightly greater tolerance by one group of minority voters for candidates of another minority group under some conditions may allow districts to be created in which no single minority group has a voting majority but in which there is sufficient combined minority voting strength to elect a candidate from the larger of the two minority groupings See table 8.7 for an illustration of this point.

19. The act's provisions allow election practices to be overturned only when racial polarization leading to the systematic electoral defeat of minority candidates of choice is

present (Grofman and Davidson 1992, 301–5). Contrary to what is sometimes claimed (see, for example, Thernstrom 1987, 243), there is very little evidence to suggest that white bloc voting has substantially diminished in the South, especially in party primaries. (For an analysis of racially polarized voting in South Carolina involving numerous elections, see Loewen 1990.) Of course, sometimes black candidates will be able to win a Democratic primary contest in an area with a substantial black population because of overwhelming support from black voters and then go on to win the general election with some degree of support from white Democratic voters.

20. As we noted earlier, the overwhelming majority of the successful challenges to local at-large systems were brought under section 2 by minority plaintiffs.

21. In *Rogers v. Lodge*, 458 U.S. 613 (1982), decided shortly after passage of the amended act, the Supreme Court softened its test for intentional vote dilution under the Fourteenth Amendment by permitting courts to make use of circumstantial evidence of intent. Nonetheless, virtually all voting rights challenges by private litigants since 1982 have been decided under section 2

22. There were also section 2 challenges to other types of elections, e.g., county commissioner and school board, as well as a significant number of lawsuits outside the eight states of our study.

23. See table 8 in each of the state chapters.

24. In every state other than Louisiana, half or more of the changes in election type could be attributed clearly to litigation.

25. These figures are approximate because information is missing on why some of the cities changed and because the classifications of changes as voluntary or due to referendums unconnected to litigation may not always be reliable, especially since the sources being interviewed sometimes lacked firsthand knowledge of the period when the change occurred. Also, while in virtually all instances our chapter authors were able to identify the specific litigation and its resolution even when there was no published opinion, for changes not tied to litigation or section 5 related activity, the various chapters differ somewhat in their classification scheme.

26. Some section 2 challenges were also brought alleging racial gerrymandering in single-member districts in the South—local, state, or congressional—but prior to 1990 there were very few. See Grofman and Handley 1992.

27. Even in the handful of section 2 lawsuits the Reagan-Bush era Justice Department brought in the 1980s, the department's role in most of them was that of plaintiff intervenor in a suit first filed by minority litigants. Nonetheless, the participation of the department in lawsuits as a plaintiff intervenor could be critical to the success of the case, especially in situations where the jurisdiction was a large one whose resources were much greater than those available to minority plaintiffs.

28. See the discussion above and the summary of state-by-state findings in chap. 10.

29. For an elaboration on the reasons for this decision, see Editors' Introduction.

30. See, however, Grofman and Handley 1992; Grofman 1993b.

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Edited by
Bernard Grofman
University of California, Irvine

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I wish to dedicate this volume to two men of great wisdom and integrity:

Michael A. Hess (1952-1995), former Chief Counsel for the Republican National Committee. A key player in the redistricting battles of the 1980s and 1990s, Mike was always able to see beyond party interests to the pursuit of justice. I had the pleasure of working with him on a number of voting rights cases and I was proud to count him as a friend.

Donald Stokes (1927-1997), noted scholar of American voting behavior and Dean of the Woodrow Wilson School at Princeton from 1974 to 1992. Don's approach to bipartisan districting, as outlined in his posthumously published essay in this volume, provides an important model of how to achieve fair and reasonable districting outcomes.

They will be missed.

Acknowledgments

FOR ALMOST TWO DECADES I HAVE BEEN ACTIVELY INVOLVED in voting rights issues as a scholar and as a redistricting consultant to entities such as the Voting Rights Section of the U.S. Department of Justice, the New York City Districting Commission, the National Conference of State Legislatures, the NAACP Legal Defense Fund, the ACLU, MALDEF, AALDEF, and state and national committees of both political parties. I have served as an expert witness in over twenty cases. Over the years I have learned about the complexities of representation—theoretical, legal, and practical—from more people than I could possibly list, so I can only begin this volume with a blanket acknowledgment to the many many people—lawyers, expert witnesses, computer consultants—whom I've had the pleasure to work with (or against) and to learn so much from.

This volume was made possible by a grant from the Ford Foundation (#446740-47007) on "The Impact of Redistricting on the Representation of Racial and Ethnic Minorities." The Ford Foundation grant enabled me to reduce my teaching load over a three-year period so as to devote time to thinking about and writing about voting rights issues. I am specially indebted to Michael Lipsky of the Ford Foundation for his help and encouragement in this project. I would also like to acknowledge my debt to the scholars who were part of the Ford Foundation advisory committee for this project—Chandler Davidson, Luis Fraga, Lisa Handley, Paula McClain, and Guillermo Owen—for many helpful conversations over the years on issues related to race and redistricting and for their specific suggestions about this project. Of course, the views reflected in this volume are those of its authors and do not represent the views of the Ford Foundation.

Earlier and much shorter versions of four of the essays in this book (those by Gartner; Hagens; Handley, Grofman and Arden; and Stokes) appeared in a special minisymposium I organized on "Race and Redistricting" for the 1997 annual edition of the *National Political Science Review,* edited by Georgia Persons and published by the University of Michigan Press In that annual, the plan to subsequently publish longer versions of these four essays in this volume is noted. Portions of my editorial comments on that minisymposium have also been

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incorporated into the introduction to this volume. I am indebted to Georgia Persons for permission to incorporate these materials.

Small portions of Grofman and Handley (1995a), in the *Mississippi Law Journal*, are incorporated (in updated form) into the two Grofman and Handley essays in this volume. I am indebted to Barbara Phillips Sullivan at the University of Mississippi Law School for encouraging the submission of that article to the *Mississippi Law Journal*, and for many earlier helpful discussions about voting rights issues, and to Will Montjoy of the *Mississippi Law Journal* for helpful editorial feedback.

The Schousen, Canon, and Sellers chapter on supply side effects appeared in an earlier version as Canon, Schousen, and Sellers in the *Journal of Politics* in August 1996. An earlier version of the chapter by these authors on North Carolina appeared as "A Formula for Uncertainty: Creating a Black Majority District in North Carolina" in Thomas A. Kazee, ed., *Who Runs for Congress? Ambition, Context, and Candidate Emergence.* Washington, DC: Congressional Quarterly, Inc., 1994, pp. 23-44, and is reprinted by permission of the publisher.

This volume was originally scheduled to appear in 1993. In 1993, and again in 1994, 1995, and 1996, I delayed its publication to allow changes to be made in the text because the new developments in voting rights case law beginning with *Shaw v. Reno* rendered portions of it obsolete. Even as I update these acknowledgments in June of 1998, important new districting cases are still about to be decided. For example, on March 28, 1998, a new lawsuit challenging South Carolina's Congressional redistricting was filed. Nonetheless, if this volume were ever to appear, it seemed to me that at some point I needed simply to say "Stop." Coming more than midway through the decade of the '90s and exactly ten years after the landmark *Thornburg v. Gingles* decision in 1986, I believe that 1996 makes a reasonable stopping point for discussion of the continuing evolution of voting rights case law and for the districting changes of the 1990s. Most of the chapters in the volume were completed by January 1997,although some updating of various chapters was done in early 1998. I am grateful to the authors of this volume and to Burt Lasky of Agathon Press for their understanding and forbearance about the long delay in publication.

As has been true now for more than a decade, I have benefited on this project from the invaluable secretarial assistance of Dorothy Green and Cheryl Larsson, without whose help this book would never have been finished. In addition, m present secretary, Clover Behrend, and her assistant Anna Datta played a key role in shepherding this process through to completion.

Preface

UNTIL QUITE RECENTLY, THE ROLE OF THE VOTING RIGHTS ACT was not a matter for much public attention, voting rights questions generated a higher degree of bipartisan consensus than other civil rights issues, and the most important legal issues related to race and redistricting seemed largely settled in the light of *Thornburg v. Gingles* (1986). All that changed dramatically in the mid-1990s. Whether we assign the principal reason for this change as outrage at the shape of some of the 1990s[1] districts that were carefully crafted to make the election of minority candidates near certain, or racist backlash to the dramatic minority gains in descriptive representation that occurred in 1992 and earlier, or simply the inevitable spillover into the voting rights arena of the ongoing discontent of the new conservative majority on the Supreme Court with earlier Courts' uses of the Civil War Amendments as a justification for various kinds of affirmative action, there can be no doubt that the previously arcane issue of districting is now on both the legal and political agenda in a way that it has not been since the years immediately following *Baker v. Carr.* The aim of this volume is to contribute to both the public and scholarly debate about voting rights and race and redistricting by focusing on the "on the ground" realities rather than on discussion of constitutional jurisprudence in the abstract.[2]

As noted in Grofman and Handley (1995), in buttressing their normative or jurisprudential arguments, critics of the current voting rights regime make various factual assertions such as the following:

[1]See, e.g., discussion in Grofman and Handley, 1995; Grofman, 1997.

[2]While the chapters in this volume can each be read on their own, the volume does not purport to contain a full discussion of every aspect of race and redistricting. Especially with respect to legal issues, it should be read in conjunction with Grofman, Handley, and Niemi (1992) and Grofman and Davidson (1992). A variety of perspectives on the major Voting Rights Act cases of the 1990s can be found in works such as Pildes and Niemi, 1993; Aleinikoff and Issacharoff, 1993; Grofman, 1993; Karlan, 1995; Kousser, 1995; Grofman and Handley, 1995; McDonald, 1995; McKaskle, 1995; McClain and Stewart, 1995, Issacharoff, 1996; and the various essays of Peacock, 1997 (including Grofman, 1997). Davidson and Grofman (1994) considers issues of city and county districting in a way that complements the present volume's focus on congressional and legislative districting.

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1. in its dealing with state and local officials the Voting Rights Section of the Department of Justice displays a harsh and arrogant stance that has forced the creation of black and Hispanic districts that grossly violate appropriate standards for geographic-based representation districting;
2. action under the VRA is not needed to provide descriptive minority representation because of increased white willingness to support suitable black candidates[3]; and
3. the VRA is actually counterproductive to the interests of minorities in a variety of ways: e.g., in raising the saliency of racial politics; in diminishing incentives for cross-racial coalitions; and in making it less likely that Democrats will be elected, with the further concomitant consequences of reducing the median/mean liberalism of elected representatives and making eventual Republican legislative control more likely/more solid.[4]

My own view is that none of these three empirical claims is accurate, although each contains just enough of a kernel of truth to make it plausible.[5] The essays in this volume (especially those of Posner; Handley, Arden and Grofman; and the first of the two essays by Grofman and Handley) bear directly on each of these assertions and help reveal the empirical errors and half-truths in each.[6] Moreover, the state-specific chapters in this volume allow the reader to gain a much more realistic and nuanced view of the overall determinants of congressional and legislative districting so as to better evaluate the newly "constitutionalized" (and thus made central) question of whether race has been the "preponderant" factor in any given state districting plan.

[3]Relatedly, it has been argued that the lack of success of many black/Hispanic candidates can be attributed more to partisan consideration than to racial animus (for discussion of this point, see Grofman and Handley, 1995).

[4]Other empirical claims made by those skeptical of the need for majority-minority districts are that it is unwarranted to assume that members of a given minority group share common political interests simply because of their group membership, and that white representatives with black constituencies represent their black constituents as well as or better than many black representative of black constituencies do.

[5]For further discussion see, e.g., Grofman, 1993; Handley and Grofman, 1994; Grofman and Davidson, 1994.

[6]See also Grofman and Handley, 1995.

INTRODUCTION: Race and Redistricting in the 1990s

Bernard Grofman

THE ESSAYS IN THIS VOLUME provide a portrait of how the 1990s round of redistricting treated the racial and linguistic minorities that had been given the special protections of the Voting Rights Act of 1965—African-Americans, Native Americans, Asian-Americans, and those of Spanish heritage, although most of the emphasis is on the first of these groups. While some chapters in this volume do review legal issues, unlike most other very recent work on race and redistricting (e.g., Grofman, Handley and Niemi, 1992; Aleinikoff and Issacharoff, 1993; Karlan, 1995; McDonald, 1995; McKaskle, 1995; Issacharoff, 1996; and the various essays in McClain and Stewart, 1995, and Peacock, 1997) the primary focus of this volume is not on the constitutional jurisprudence of voting rights. Instead, our focus is on the practical politics of redistricting and its consequences for racial representation.[1]

Almost all of the authors in this volume have been directly involved in the 1990s redistricting process either as a legislator (Robert Holmes), a member of the Voting Rights Section of the U.S. Department of Justice (Mark Posner), a Director of a Districting Commission (Tuckerman Babcock, Alan Gartner, Donald Stokes) or, most commonly, as an expert witness or lawyer in voting rights cases. They are thus able to bring to bear special insights as well as insider knowledge. Most of the chapters offer detailed discussion of the actual redistricting process in a single state,[2] including details of the legislative process, while others provide an overview of the consequences of 1990s districting for black and Hispanic representation[3] in congress and/or state

[1] Because the central focus of this volume is on racial aspects of districting, other important districting topics (e.g. one person, one vote issues, or issues related to partisan gerrymandering) will not be the subject of much attention. For more general discussions of districting see e.g., Grofman, 1992b, c; Cain, 1984; Butler and Cain, 1992.

[2] Or, in the case of the Gartner chapter, a single city—New York.

[3] The Alaska chapter deals with the representation of Native Americans.

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legislatures, or consider how districting choices affect the decisions of potential minority candidates.

The book is divided into four parts: The first section deals with theoretical and empirical issues about the link between districting and descriptive representation of racial and linguistic minorities;[4] the second with legal and enforcement issues; the third contains state-specific chapters on seven of the states covered in whole or in part by Section 5 of the VRA (states which each have substantial minority populations); the last section discusses two different forms of non-partisan commissions and the lessons we may draw from them about how to improve districting.

Section I, on theoretical and empirical issues, contains three essays.

The first of these is by Lisa Handley, Bernard Grofman and Wayne Arden. It provides a detailed empirical summary of the changes in the descriptive representation of blacks and Hispanics in state legislatures that immediately followed the 1990s round of redistricting. It traces the growth in black representation at both the congressional and state legislative level in the states with the most substantial black population concentrations and shows the almost perfect causal link between that growth and the creation of black majority districts in 1992, and then provides a similar analysis for Hispanics. The Handley-Grofman-Arden joint essay also looks at the link between minority population and the likelihood of Democratic success.[5] For the South, its bottom line is a simple one: with at best rare exceptions, African-American legislators are not elected except from districts with substantial black populations. Moreover, in the South, although there is state-specific variation, high likelihood of Democratic success is strongly associated with a significant black population.

The second essay in Section I, by Schousen, Canon and Sellers, seeks to understand the characteristics of the new black House members as a function of the racial demography of the district and the nature of black-white competition. First, they consider the "collective action" problem facing potential black candidates, namely the potential that, if "too many" black candidates run, a white candidate may be the plurality winner. They suggest this problem can be largely obviated by the existence of a majority runoff requirement that acts to discourage white challengers in the Democratic primary in districts where the majority of voters in that primary are very likely to be black. They also note that both a sense of "fair play" and pressures from the minority community not to aggravate racial tensions also act to inhibit white challengers from running in newly created black majority districts. Then, they look at the likelihood that a black candidate with biracial appeal will be selected.

[4] By descriptive representation we mean the election to office of persons of a given race or ethnicity. We may distinguish the question of descriptive representation from the question of whether or not the actions of any given legislator or set of legislators are broadly representative of the communities that elected them.

[5] Related work on this point is Grofman, Griffin and Glazer (1992).

The third essay in this section, by Bernard Grofman and Lisa Handley, addresses the claim that has been made by political commentators of both the right and the left and by academic researchers (e.g., Lublin 1995a) that the creation of new majority-minority districts assured that the Republicans won solid control of the House in 1994. It also addresses the claim that the aggregate effect of racial redistricting has been to make the House less likely to adopt legislation favored by African-Americans. Grofman and Handley enter a strong (albeit partial) dissent to the view that the Voting Rights Act has had, on balance, negative consequences for black interests. However, they also note that, just as the full consequences of the 1990s redistricting lines on the fate of the Democratic party in the South were not yet visible in 1992, they were not fully realized in 1994 or 1996 either; and they argue that the future does not look good for the remaining Southern Democrats in House districts with less than 30% black population, or for the Democratic party in the South, in general.

The essays in Section II deal with legal and enforcement issues in voting rights. There is little or no dissent to the proposition that the substantial number of new black (and Hispanic) congressional districts created in the 1990s round of districting was tied to the Voting Rights Act of 1965.[6] Almost all new majority minority districts came into existence largely if not entirely in direct or anticipated response to Department of Justice preclearance powers under Section 5 of the Voting Rights Act, or as a result of actual or threatened litigation under Section 2 of the Act (as amended in 1982), or as a result of court action that took Voting Rights Act concerns into account.[7] In like manner, virtually all of the changes that have occurred in districting plans since the first round of 1990s redistricting have been triggered by court scrutiny of plans under the new constitutional test laid out in *Shaw v. Reno* as it has been further elucidated in cases like *Miller v. Johnson*. It is impossible to understand the redistricting choices of the 1990s

[6] Together with the Civil Rights Act of 1964 and the Immigration Reform Bill of 1965, the Voting Rights Act of 1965 is one of the cornerstones of contemporary race relations in the United States. The Act was intended to guarantee the full exercise of the franchise to blacks and later applied to other minorities. The provisions of the 1965 Act and of subsequent amendments have been upheld by the U.S. Supreme Court against constitutional challenge; moreover, its coverage has been interpreted by the Court as extending to virtually all aspects of election organization, from locations of voting booths to redistricting plans and choice of electoral systems. Thus, the Act has come to apply to far more than simple denial of the franchise.

[7] Research on the impact of voting rights concerns on 1970s and 1980s redistricting showed equally clear results: virtually all minority gains in representation in the South and southwest at the state legislative and congressional levels came about in majority-minority districts, and these districts were created largely if not entirely in response to concerns tied to Voting Rights Act enforcement or threat thereof or litigation directly under the fourteenth amendment (Grofman and Handley, 1989, 1992a; Handley and Grofman, 1994). Similar, but not quite as strong, results apply to local districting in the South (see various state chapters in Davidson and Grofman, 1994 and summary of findings in Grofman and Davidson, 1994). General discussions of voting rights case law as it applies to districting issues is found in Grofman, 1992a; Grofman, Handley, and Niemi, 1992; and various chapters in Grofman and Davidson, 1992. Grofman (1993a, 1997) and Grofman and Handley (1995a) discuss voting rights cases of the 1990s.'

without taking into account voting rights litigation and enforcement of the Voting Rights Act by the U.S. Department of Justice. As I have written elsewhere (Grofman, 1993a), in 1990s districting, the Voting Rights Act was "a brooding omnipresence."

The first essay in this section, by Bernard Grofman and Lisa Handley, offers a synoptic overview of the changes in voting rights case law in the 1990s. It focuses on the dramatic changes in districting case law that occurred when the Supreme Court, in *Shaw v. Reno*, found that districts that were drawn with race as the exclusive or overwhelmingly preponderant concern could be found to be unconstitutional. It also discusses another less known case, *LULAC. v. Clements* (1992), coming out of the Fifth Circuit *en banc*. Grofman and Handley argue that *LULAC* offers a definition of racially polarized voting that would make it very difficult for plaintiffs ever to prove polarization. Since racial polarization is the linchpin of any voting rights districting case, *LULAC* potentially has very important implications, and they note that the opinion is already being cited outside the Fifth Circuit. However, leaving aside *Shaw* and its progeny and *LULAC*, the Grofman and Handley chapter also emphasizes the remarkable continuities in voting rights case law from the 1980s to the 1990s. The chapter ends with a relatively optimistic assessment of the prospects for maintaining high levels of descriptive minority representation throughout this decade and into the next.

The second and final essay in this section, by Mark Posner, a member of the Voting Rights Section of the U.S. Department of Justice, provides a very detailed description of the role of the Department in Voting Rights Act enforcement of the Section 5 preclearance provisions that, in the 1990s round of districting, applied to 16 states in whole or in part. Posner's essay is, in his words, "not designed as a rebuttal to the Supreme Court's mistaken appraisal of the Department's enforcement of Section 5," i.e., of the claim accepted by a majority of the Court's members in cases such as *Miller v. Johnson* that the Justice Department had been pursuing a policy of maximizing the number of black safe seats to the exclusion of all other considerations. Nonetheless, by setting forth the principles and analytic methods that guided the Department in its 1990s districting reviews of over 3,000 redistricting plans, and that led to nearly 200 Section 5 objections being filed by the Department, Posner shows that judgements about the Department's policies based on only a handful of cases can be very misleading. His essay also reports a variety of statistics and other summary information about the role of the Department of Justice in 1990s redistricting, including a complete list of all objections through mid-1995, which should prove invaluable for anyone who wishes to understand what actually happened.

The essays in Section III each deal with individual case studies of redistricting, but each is also concerned with broader theoretical points. Each author was given the following charge by the editor: Each chapter was to discuss what happened in the 1990s districting in their state, with a focus on (1) alternative plans and their anticipated consequences; (2) the key state players and the positions they took; (3) the role of the Department of Justice; (4) the litigation history; and (5) the actual consequences for minority representation. Most of the authors have dealt with almost all, if not all, of these questions in their chapters. In addition, chapter authors were encouraged to consider certain special topics, such as the role of computers, or conflicts between blacks and other minorities, or the partisan implications of voting rights-related districting, if these were of particular relevance in their state.

We have placed the chapters alphabetically by state. Each of the seven states discussed in this section is one covered in whole or in part by the Justice Department preclearance provisions of Section 5 of the VRA. All but Alaska and California are southern states. While these are certainly not the only states whose redistricting efforts were substantially affected by voting rights concerns, they provide a representative illustration of the redistricting process in states covered by Section 5.

The first state chapter is by Tuckerman Babcock, who served as staff director of the Alaska Reapportionment Board. Since there are no major African-American, Hispanic or Asian-American populations in the state, Babcock's focus is on the impact of legislative districting on Alaska's Native American population (16.5 percent of the total population of the state). He also comments on the unique legal environment that affects Alaskan legislative districting, namely the fact that the legislature has no role in districting, but instead, there is a five member board which serves in an advisory role to the governor; and the fact that the Alaskan State Supreme Court is constitutionally mandated to review the actions of the Reapportionment Board. He observes that every Alaska reapportionment has been declared unconstitutional by the State Supreme Court, and argues strongly that that court has failed to develop consistent standards for judging redistricting over the past decades. Babcock also comments on what he refers to as the Section 5 "micromanagement" by the Department of Justice of the state's districting in the1990s, notably the insistence by DOJ that the population in a district which already had an Alaskan Native as incumbent be adjusted upward from 51 to 59 percent Native American.

The second state chapter, by the historian Morgan Kousser, is unique in that it provides an extensive comparison of districting in California over three different reapportionment decades. Kousser provides evidence suggesting that the effects of California districting plans on long-lasting partisan advantage has been exaggerated. Another of Kousser's most important observations is that "the concerns of ethnic groups cannot be separated from partisan politics." In California, as elsewhere, African-Americans and Latinos of Mexican descent are strongly associated with the Democratic party. He points out that, by the 1990s, minority officeholders elected from heavily minority districts created in earlier rounds of

districting were in positions of power within the Democratic party. According to Kousser, 1990s plans proposed by Democrats were generally more attentive to minority election chances that those proposed by Republicans or by the Masters appointed by the State Supreme Court, who ended up reapportioning the state due to the failure of the Democratically controlled legislature and the Republican governor to agree on plans. Kousser also provides some intriguing insights into the role that the previous history of redistricting in the state played in shaping expectations for the 1990s (e.g., about what would happen if there were deadlock between the governor and the legislature) which critically shaped the behavior of key actors in the redistricting game.

The third chapter in this section is by Robert Holmes, a Georgia legislator who was intimately involved in redistricting in that state. Holmes shows that black legislators were greatly involved in shaping the districting plans that were adopted, especially as those plans impacted on African-American voters. Their ability to do so was aided by the fact that a three-term black legislator was Chair of the Senate Reapportionment Committee, and another black legislator was a senior member of both the committee in charge of redistricting the State House and the committee in charge of congressional districting. With respect to congressional districting, Holmes observes that while black legislators in the state were initially split as to districting strategy, by the end of the 1992 legislative session they had largely reached consensus to only support a congressional plan that contained three districts with black majorities, and they had agreed on criteria for black representation in the state chambers as well. However, the congressional plan passed by the legislature had only two black majority districts; proposals for plans with three black majority districts were voted down. Under Section 5, DOJ denied preclearance to the original plan, and a plan with three black-majority districts was passed, only to be invalidated in *Miller v. Johnson*. After *Miller v. Johnson* invalidated the congressional plan, white Democrats joined with Republicans in the state Senate[8] to pass a congressional plan with but a single black majority Congressional district, but that plan did not pass the House, leaving it up to a federal court to draw the state's congressional districts. The court-drawn plan, too, had but a single black majority district. Nonetheless, with the advantage of incumbency, all three black congressional incumbents were reelected in 1996 despite the fact that two of them had the black populations in their districts reduced considerably below a majority.[9]

[8]Holmes has a number of other observations about the nature of cooperation, or lack thereof, between black and Republican legislators. Initially part of coalition with black legislators to create black districts (whose creation Georgia Republicans saw as advantageous for their own partisan ends), the coalition first broke down amid accusations that the plans pushed by Democrats were partisan gerrymanders.

[9]See the epilogue to the Holmes chapter for details. The epilogue also discusses 1996 results in the state legislature, where there was actually an increase in the number of African-American legislators despite the fact that there were new districting plans in use that had been thought to be less advantages for minority representation.

The fourth chapter in this section is by Richard Engstrom and Jason Kirksey. Louisiana was the second state to have a plan struck down under the *Shaw* standard. Professor Engstrom was involved as an expert witness at various phases of the complicated Louisiana litigation, which involved a multiplicity of plans and several court cases. Indeed, for congressional elections in Louisiana, a different plan was in place in each of the three elections of the 1990s from 1992 to 1996. The first two plans had two black majority districts, one in New Orleans and one elsewhere. In 1992 both elected black House members; in 1994 both black incumbents were reelected even though the boundary lines of the second black majority district had been substantially revamped. However, because litigation had prohibited the 1994 plan being used again and deemed the plan unconstitutional under the *Shaw* test, the plan put in place in 1996 had only a single black majority House district. Only one black member of congress was elected in 1996, with the black incumbent of the other majority-black district choosing not to run after the black voting age population in the district had been lowered by roughly 30 percentage points from that in the 1992 plan. One of the important points made by Engstrom and Kirksey deals with the notion of black "influence districts." The federal court had claimed that districts with around 25% or so black population provided black influence; the evidence provided by Engstrom and Kirksey shows otherwise.[10]

The fifth chapter in Section III is by Patrick Sellers, David Canon and Matthew Schousen. While the authors emphasize the legal as well as political conte xt in which North Carolina districting took place, they also point out how the personal ambitions of some legislators shaped the line-drawing process. They observe that, early in the decade, "Republicans and some black leaders argued that the state should have two and perhaps even three black-majority districts," since 22 percent of the state's population is black (".22 times 12 equals 2.64 districts"). Nonetheless, the legislature opted in favor of a plan with only a single black congressional district. Interestingly, the black legislators most likely to run were a second black district to be created did not publicly protest the plan. However, a preclearance denial by the Department of Justice soon followed. Responding both to DOJ and to incumbency protection concerns, the legislature drew the subsequently infamous "I-85" district as a second majority black district. It ran for nearly 200 miles and was only the width of the interstate in some parts of the state.[11] North Carolina's congressional plan, with its peculiarly shaped districts and racially motivated irregularities in lines, served as the triggering force behind the Supreme Court's reshaping of the constitutional standards for voting rights in

[10]Engstrom and Kirksey (this volume) also note that "the influence district notion was applied in a racially selective manner....The majority African-American districts, District 2 and 4, are both over 40 percent white in voting age population,...yet neither of these districts was identified as a white influence district."

[11]In *Pope v. Blue* (1992) I testified against North Carolina's congressional plan, labelling it a patchwork crazy-quilt that violated standards of contiguity.

the 1993 landmark case of *Shaw v. Reno*.[12] Sellers, Canon and Schousen observe that "the current state of law and its interpretation by the Supreme Court leaves state legislatures in the uncomfortable position of being sued by black voters if they do not take race into account when redrawing district lines, and being sued by white voters if they are too aggressive in creating majority-minority districts."[13]

The sixth chapter in this section, on legislative and congressional districting South Carolina, is by Orville Vernon Burton, an historian who has served as an expert witness in a number of South Carolina cases. The South Carolina case makes an interesting contrast to what had gone on in neighboring states. Because of divided partisan control in the state, deadlock resulted in 1992 and a federal court drew the plans used in the 1992 elections.[14] Burton emphasizes the calculated role of Republican strategy in the state to avoid political compromise and expect to do better in the courts. According to Burton, this was consistent with a "national Republican strategy of using the federal courts for redistricting...." For 1994 the ball was back in the legislature's court, after a complicated sequence of events leading to the district court's giving deference to the legislature in seeking to devise plans that complied with the Voting Rights Act and with *Shaw*. An alliance of black Democrats and Republicans in the state House pushed a plan with a substantial increase in the number of majority-black districts. This plans was put into place in 1994 and led to further gains in black representation: in the state House, six white Democrats were replaced by black Democrats in 1994, bringing black representation up to 19% of that body. However, control of the state House also shifted to the Republicans. In Burton's view this change cannot be blamed on districting: Republicans had been making gains in the state and the shift occurred because eight elected Democrats switched parties (joining two Democrats who had already switched between 1992 and 1994).[15] Nonetheless, the "lesson" taken from the loss of the House to Republicans led Democratic state senators (both white and black) to opt for only marginal gains in black descriptive representation in the state Senate when plans for that body were redrawn in 1995.

[12]Neither the link between some of the most bizarre features of the plan and partisan concerns (e.g., the "u-turn" at the interstate necessary to protect the incumbent in the 6th district by keeping that district from being bisected by the 12th district), nor state claims that they were seeking to remedy past discrimination and comply with the Voting Rights Act, prevented the plan from being rejected by the Supreme Court as unconstitutional under the *Shaw* test when the case came back before it (after a remand to the district court) as *Shaw v. Hunt*.

[13]The Sellers, Canon and Schousen chapter was completed prior to a March 1998 district court decision invalidating the redrawn North Carolina congressional plan.

[14]As Burton notes, "as late as May 1994, the South Carolina legislature still had not passed a plan." Burton observes that, after *Shaw*, when other states were being challenged for having congressional districts that were "'unfair' to white voters," South Carolina was "still attempting to prove its proposed plans were not unfair to African-Americans."

[15]See, however, the discussion of the *indirect* effects of redistricting discussed in the first of the two Grofman and Handley chapters in this volume (what they refer to under the rubric of the "triple whammy").

However, the last chapter of the 1990s South Carolina redistricting story has yet to be written.[16]

The seventh and last of the state analysis chapters in Section III is on legislative redistricting in Virginia. Its author, Winnett Hagens, has been a key participant in the Norfolk State University Voting Rights Project that has provided mapping and other technical assistance to numerous minority organizations seeking to influence local and state redistricting decisions. The Hagens essay emphasizes the insider role of black legislators and the importance of minority access to computer resources and the capability to easily generate alternative plans and to evaluate plans that were proposed by others, as well as the complex interplay between racial and partisan considerations on the part of legislators and litigators. It also discusses the most recent chapter in Virginia's redistricting history, the rejection by a federal court of the boundaries for the state's lone majority-black congressional district as being in violation of the *Shaw* standard.[17]

The two essays in Section IV are also case studies of redistricting, but we have placed them in a separate section because each exemplifies a different alternative to legislative-based redistricting.

Alan Gartner served as Executive Director of the New York City Districting Commission that drew the 1990 lines for the enlarged 51 member City Council provided for in the new City Charter.[18] Gartner's essay lays out the basic elements of the redistricting process for the New York City Council.[19] He notes that the selection process for the New York City Districting Commission essentially guaranteed that spokespersons for various minority communities would have representation on the Commission. He argues, i.a., that the complex representational process that guided the City Districting Commission's activities, which had a substantial public access component, provides a good model for redistricting decision-making in multi-ethnic polities.[20] He also argues that it gave rise to lines that fairly reflected the diverse communities within New York City, despite the fact that not all minority organizations were happy with the results of the Commission's plan and DOJ required very minor changes in the lines before the plan could be precleared.

Donald Stokes served as the court-appointed non-partisan Chair of the New Jersey Apportionment Commission that drew the state's legislative and congressional districts, a post he also held in the 1980s round of district-

[16]The Burton chapter was completed in September 1996, prior to a federal court ruling on the constitutionality of South Carolina's State House and State Senate plans, and prior to the 1996 elections. Some information about subsequent events was added in early 1998.

[17]*Moon v. Meadows* (1992).

[18]I served as a voting rights consultant to the New York City Districting Commission. (However, I was not involved in the final set of changes to the plan.)

[19]Subsequently he became a court-appointed expert in the drawing of congressional lines for the State of New York.

[20]In a larger monograph from which portions of his essay for this volume is drawn, Gartner (1992) also discusses at length the influence minority organizations had on the city council districting process in New York and on the interplay between partisan and racial considerations.

ing.[21] His essay reviews that experience and its lessons for plans that seek to preserve communities of interest. In it he argues strongly in favor of the desirability of a districting commission model similar to that in New Jersey, that would remove redistricting from the control of the legislature and provide a linchpin role for an advocate of the overall public interest. To a greater extent than Gartner he is concerned with balancing the need for descriptive representation of minorities with concern for the non-fragmentation of geographically defined communities.

In the vast majority of states, redistricting is in the hands of the legislature. Good government types in the midwest and west have sought to inspire a grass-roots revolt against permitting legislatures to draw the districts from which their own members would run. Their attack on legislative control of redistricting is based on the Lockean theory that no person should be a judge in his own case, and on the practical grounds that legislatures (and governors) were botching the job and engaging in partisan and incumbent gerrymandering. Also, in California and elsewhere, in the early 1990s, Republicans put forward initiatives to take redistricting out of the hands of state legislatures, on the general theory that most state legislatures were then under Democratic control and Republicans couldn't do any worse. While the term limits movement has changed the landscape of American legislative politics, change in redistricting practices has failed to spark public interest. The number of jurisdictions that have ended (or even severely restricted) legislative control of the redistricting process has changed only minusculely since 1980.[22]

Nonetheless, alternative models of how redistricting might be done, such as the New Jersey model of a bipartisan commission with a non-partisan chair who can effectively force the parties to offer plans intended to satisfy specified criteria (Stokes, 1993; this volume)[23] or the New York City model of a racially and ethnically diverse districting commission with a first-rate technical staff and administration oriented to promoting compromise among competing interests and responding to a City Charter that lays out criteria for districting (Gartner, 1992; this volume), may well serve as inspiration for reformers as we look toward how redistricting should be done in the 21st century.[24]

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[21] The commission was then not yet responsible for congressional redistricting.

[22] However, just as in the 1990s round of redistricting, to a greater extent than ever before, failure of governors and legislatures to agree to districting plans thrust redistricting decision-making into the hands of federal or state courts, so I would expect to see this pattern repeated in the next reapportionment round.

[23] Stokes (1993, this volume) argued that the New Jersey experience demonstrates that a mixed process of redistricting, with balanced party membership of the Apportionment Commission and a public member committed to explicit standards of public interest, can produce boundaries that are fair between the parties, responsive to the shifting tides of electoral support, and provide appropriate tradeoffs among values such as preserving geographic communities, satisfying equal population requirements, and serving the need for effective minority representation.

[24] My own view, however, is that the constraints set by Voting Rights Act Section 5 enforcement and Section 2 standards have a far greater impact on how redistricting will affect minorities than the question of who does redistricting. I hope to empirically investigate this issue in future work.

PART I

Theoretical and Empirical Issues

ELECTING MINORITY-PREFERRED CANDIDATES TO LEGISLATIVE OFFICE: The Relationship Between Minority Percentages in Districts and the Election of Minority-Preferred Candidates[1]

Lisa Handley, Bernard Grofman, and Wayne Arden

THE ELECTIONS FOLLOWING THE 1990S ROUND of redistricting led to dramatic changes in the composition of state legislatures and the U.S. Congress. More minorities assumed legislative office following these elections than at any other time in our nation's history. Despite continuing debate over the benefits of creating majority minority districts, it is clear that the majority minority districts created in the 1990s redistricting were responsible for the significant increase in the number of African-Americans and Hispanics elected to legislative office.

Minority concentrations short of a majority also affect the election of legislators. There is a very distinct relationship between the percentage minority in a district and the party affiliation of the legislator elected: the higher the percentage minority, the greater the probability of electing a Democrat to office. If the district is a majority minority district, there is a high probability that a African-American or Hispanic Democrat will be elected. If the district is less than majority minority, but has a significant concentration of minorities, it is likely that a white Democrat will be elected to legislative office. This suggests that white Democrats are the minority-preferred candidates in districts in which minorities have influence, but are unable to elect a minority candidate.

[1] An earlier version of this paper was prepared for presentation at the Hendricks Symposium on Legislative Districting in the 1990's, University of Nebraska, Lincoln, Nebraska, April 8-9, 1994

This chapter reviews how the 1990s round of redistricting impacted the election of minority-preferred candidates, both minority and white Democrats, in Congress and state legislatures. The chapter is divided into two sections: the first section focuses specifically on majority minority districts and the election of minority candidates to office, the second section examines the relationship between minority concentrations in districts and the election of Democrats to legislative office.

MINORITY DISTRICTS AND THE ELECTION OF MINORITY CANDIDATES

To determine the impact of the 1990s round of redistricting on the creation of majority minority districts and the election of minority candidates, we have prepared two sets of tables. Both sets of tables summarize minority representation prior to the 1990s round of redistricting and following the next set of elections (1991 or 1992, depending on the legislative office and the state). One set of tables examines African-American representation in states with a black population in excess of 10 percent. The second set of tables examines Hispanic representation in states with a Hispanic population greater than 10 percent.

African-American Representation and the Creation of Majority African-American Districts

As expected, the 1990s redistricting process led to significant gains in the number of African-American legislators and majority black districts. Table 1 indicates that African-Americans were underrepresented relative to population proportions following the 1990 elections. This underrepresentation continued to be more pronounced in the South than in other parts of the country (see Grofman and Handley, 1991, for a summary of African-American representation in southern state legislatures prior to 1990). For example, in 1990 African-Americans comprised only 14 percent of the Louisiana state house despite a black population state-wide of almost 31 percent, and less than 4 percent of the Mississippi senate despite a state-wide black population of slightly less than 36 percent. The majority of southern states had no African-American representation in Congress.

Table 2 provides the results of the first post-1990 redistricting elections. The elections led to major gains in African-American representation in the South: the number of African-Americans serving in Congress rose from 5 to 17, and the number of African-American state legislators increased in every southern state - with the largest gains in Louisiana and Mississippi. In fact, the increase in African-American representation in the South far surpassed the increase elsewhere in the country. For the first time since Reconstruction, African-Americans are better represented (i.e., closer to proportional representation) in southern state legislatures than in state legislatures elsewhere in the country. Two non-southern states examined, Illinois and Michigan, actually experienced a decrease in the number of African-American state legislators.

TABLE 1. Percent African-American Elected Legislators in the South and Non-South in 1990[1]

	Percent Black Population	*State House*	*(N)*	*State Senate*	*(N)*	*U.S. Congress*	*(N)*
South							
Alabama	25.3	18.1	(105)	14.3	(35)	0.0	(7)
Arkansas	15.9	9.0	(100)	8.6	(35)	0.0	(4)
Florida	13.6	10.0	(120)	5.0	(40)	0.0	(19)
Georgia	27.0	14.4	(180)	14.3	(56)	10.0	(10)
Louisiana	30.8	14.3	(105)	10.3	(39)	12.5	(8)
Mississippi	35.6	16.4	(122)	3.8	(52)	20.0	(5)
N. Carolina	22.0	11.7	(120)	10.0	(50)	0.0	(11)
S. Carolina	29.8	12.1	(124)	13.0	(46)	0.0	(6)
Tennessee	16.0	10.1	(99)	9.1	(33)	11.1	(9)
Texas	11.9	8.7	(150)	6.5	(31)	3.7	(27)
Virginia	18.8	7.0	(100)	7.5	(40)	0.0	(10)
Total	19.2	12.1	(1325)	9.4	(457)	4.3	(116)
Non-South							
Delaware	16.9	4.9	(41)	4.8	(21)	0.0	(1)
Illinois	14.8	11.9	(118)	11.9	(59)	13.6	(22)
Maryland	24.9	17.0	(141)	14.9	(47)	12.5	(8)
Michigan	13.9	10.9	(110)	7.9	(38)	11.1	(18)
Missouri	10.7	8.0	(163)	8.8	(34)	22.2	(9)
New Jersey	13.4	7.5	(80)	5.0	(40)	7.1	(14)
New York	15.9	11.3	(150)	8.2	(61)	11.8	(34)
Ohio	10.6	11.1	(99)	6.1	(33)	4.8	(21)
Total	14.6	11.0	(902)	9.0	(333)	11.0	(127)

[1]The states lised above are states with black populations of 10 percent or greater (according to the 1990 U.S. Census). The percent African-American elected legislators reflects officeholders following the 1989/1990 elections (as reported in *Black Elected Officials: A National Roster 1991*, Joint Center for Political and Economic Studies Press, 1992).

TABLE 2. Percent African-American Elected Legislators in the South and Non-South in 1992[1]

	Percent Black Population	*State House*	*(N)*	*State Senate*	*(N)*	*U.S. Congress*	*(N)*
South							
Arkansas	15.9	10.0	(100)	8.6	(35)	0.0	(4)
Florida	13.6	11.7	(120)	10.0	(40)	13.0	(23)
Georgia	27.0	17.2	(180)	16.1	(56)	27.3	(11)
Louisiana	30.8	22.9	(105)	20.5	(39)	28.6	(7)
Mississippi	35.6	26.2	(122)	19.2	(52)	20.0	(5)
N. Carolina	22.0	15.0	(120)	12.0	(50)	16.7	(12)
S. Carolina	29.8	14.5	(124)	15.2	(46)	16.7	(6)
Tennessee	16.0	12.1	(99)	9.1	(33)	11.1	(9)
Texas	11.9	9.3	(150)	6.5	(31)	6.7	(30)
Virginia	18.8	7.0	(100)	12.5	(40)	9.1	(11)
Total	18.8	14.8	(1220)	13.5	(422)	13.6	(125)
Non-South							
Delaware	16.9	4.9	(41)	4.8	(21)	0.0	(1)
Illinois	14.8	10.2	(118)	13.6	(59)	15.0	(20)
Michigan	13.9	10.0	(110)			12.5	(16)
Missouri	10.7	8.0	(163)	8.8	(34)	22.2	(9)
New Jersey	13.4	12.5	(80)	5.0	(40)	7.7	(13)
New York	15.9	13.3	(150)	8.2	(61)	12.9	(31)
Ohio	10.6	12.1	(99)	9.1	(33)	5.3	(19)
Total	13.8	10.5	(761)	8.9	(248)	12.8	(117)

[1]The states listed above are states with black populations of 10 percent or greater, excluding Alabama and Maryland (which do not have any 1992 state legislative elections), and the Michigan state senate (which did not have any 1992 elections). The percent African-American elected legislators reflects officeholders following the 1991/1992 elections.

The primary reason for the surge in African-American representation was the increase in the number of majority black districts drawn. A comparison of Tables 3 and 4 indicates an increase in the number of majority black districts in almost every state, although the growth was greater overall in the South. In only two states—neither of which are southern—did the number of majority black districts actually decrease: Michigan drew three fewer majority black state house

districts and Ohio drew one less majority black state senate district. Of the two states, however, only Michigan suffered a corresponding decrease in the number of African-American state legislators.

TABLE 3. Percent Majority African-American Districts in 1990[1]

	Percent Black Population	*State House*	*(N)*	*State Senate*	*(N)*	*U.S. Congress*	*(N)*
South							
Alabama	25.3	19.0	(105)	17.1	(35)	0.0	(7)
Florida	13.6	7.5	(120)	2.5	(40)	0.0	(19)
Georgia	27.0	18.9	(180)	19.6	(56)	10.0	(10)
Louisiana	30.8	18.1	(105)	15.4	(39)	12.5	(8)
Mississippi	35.6	26.2	(122)	26.9	(52)	20.0	(5)
N. Carolina	22.0	7.5	(120)	6.0	(50)	0.0	(11)
S. Carolina	29.8	21.0	(124)	21.7	(46)	0.0	(6)
Tennessee	16.0	11.1	(99)	9.1	(33)	11.1	(9)
Texas	11.9	6.0	(150)	3.2	(31)	0.0	(27)
Virginia	18.8	9.0	(100)	5.0	(40)	0.0	(10)
Total	19.3	14.5	(1225)	13.5	(422)	3.4	(116)
Non-South							
Delaware	16.9	4.9	(41)	4.8	(21)	0.0	(1)
Illinois	14.8	11.9	(118)	10.2	(59)	13.6	(22)
Maryland	24.9	17.0	(141)	17.0	(47)	12.5	(8)
Michigan	13.9	14.5	(110)	10.5	(38)	11.1	(18)
Missouri	10.7	8.6	(163)	11.8	(34)	11.1	(9)
New York	15.9	8.6	(150)	6.6	(61)	5.9	(34)
Ohio	10.6	4.0	(99)	6.1	(33)	4.8	(21)
Total	14.7	10.5	(822)	10.2	(239)	8.7	(127)

[1]The states listed are states with black populations of 10 percent or greater. No state legislative data was available for Arkansas or New Jersey therefore these two states have been excluded. The percentages reported in this table reflect the districting plans in place for the 1989/1990 elections. Single member districts are counted once, multimember districts (both those that are majority black and those that are not) have a value equal to the number of delegates elected.

TABLE 4. Percent Majority African-American Districts in 1992[1]

	Percent Black Population	*State House*	*(N)*	*State Senate*	*(N)*	*U.S. Congress*	*(N)*
South							
Arkansas	15.9	13.0	(100)	8.6	(35)	0.0	(4)
Florida	13.6	10.8	(120)	7.5	(40)	13.0	(23)
Georgia	27.0	23.3	(180)	23.2	(56)	27.3	(11)
Louisiana	30.8	24.8	(105)	23.1	(39)	28.6	(7)
Mississippi	35.6	31.1	(122)	23.1	(52)	20.0	(5)
N. Carolina	22.0	13.3	(120)	8.0	(50)	16.7	(12)
S. Carolina	29.8	22.6	(124)	23.9	(46)	16.7	(6)
Tennessee	16.0	11.1	(99)	9.1	(33)	11.1	(9)
Texas	11.9	7.3	(150)	3.2	(31)	6.6	(30)
Virginia	18.8	12.0	(100)	12.5	(40)	9.1	(11)
Total	18.8	17.2	(1220)	15.2	(422)	13.6	(125)
Non-South							
Delaware	16.9	4.9	(41)	4.8	(21)	0.0	(1)
Illinois	14.8	15.3	(118)	13.6	(59)	15.0	(20)
Maryland	24.9	19.9	(141)	19.1	(47)	25.0	(8)
Michigan	13.9	11.8	(110)	13.2	(38)	12.5	(16)
Missouri	10.7	8.6	(163)	11.8	(34)	11.1	(9)
New Jersey	13.4	7.5	(80)	7.5	(40)	7.7	(13)
New York	15.9	10.0	(150)	11.5	(61)	9.7	(31)
Ohio	10.6	6.1	(99)	3.0	(33)	5.3	(19)
Total	14.6	11.3	(902)	11.4	(333)	11.1	(117)

[1]The states listed are states with black populations of 10 percent or greater. Alabama has not yet redistricted its state legislature and therefore has been excluded. The percentages reported in this table reflect the districting plan in place for the 1991/1992 elections. Single member districts are counted once; multimember districts (both those that are majority black and those that are not) have a value equal to the number of delegates elected.

Not only did states draw more majority black districts, but jurisdictions were apparently also more successful in the 1990s than in the 1980s in drawing "effective" minority districts (i.e., districts in which minority voters have a realistic opportunity to elect candidates of their choice).[2] The percentage of majority black districts that elected African-Americans to office increased, as evidenced by comparing Table 5 (A) and (B) to Table 6 (A) and (B).[3] The proportion of

[2]The one notable exception is the Illinois state house. Although the number of majority black districts in the Illinois state house increased, a number of these districts failed to elect African-American candidates to office, which led to a retrogression in African-American representation.

majority black districts that elected African-Americans to office in 1992 was slightly greater than .8 (.81 in the state house and .82 in the state senate).[4] This proportion may well increase over the course of the decade as majority black districts that failed to elect African-Americans in 1992 proceed to do so in subsequent elections.

TABLE 5(A). Percentage of Majority African-American and Non-Majority African-American Districts that Elected African-American State House Members in the South and Non-South in 1990

	Percent Majority Black Districts Electing African-American Legislators	*(N)*	*Percent Non-Majority Black Districts Electing African-American Legislators*	*(N)*
South				
Alabama	95.0	(20)	0.0	(85)
Florida	100.0	(9)	2.7	(111)
Georgia	73.5	(34)	.7	(146)
Louisiana	78.9	(19)	0.0	(86)
Mississippi	59.4	(32)	0.0	(90)
N. Carolina	100.0	(9)	4.5	(111)
S. Carolina	61.5	(26)	0.0	(98)
Tennessee	81.8	(11)	1.1	(88)
Texas	100.0	(9)	2.8	(141)
Virginia	77.8	(9)	0.0	(91)
Total	77.0	(178)	1.3	(1047)
Non-South				
Delaware	100.0	(2)	0.0	(39)
Illinois	92.9	(14)	1.0	(104)
Maryland	87.5	(24)	3.4	(117)
Michigan	68.8	(16)	1.1	(94)
Missouri	78.6	(14)	1.3	(149)
New York	92.3	(13)	3.6	(137)
Ohio	100.0	(4)	7.4	(95)
Total	85.1	(87)	2.7	(735)

[3]Tables 7 (C) and 8 (C) indicate that every majority black congressional district created elected an African-American to office—and this was true in 1990 as well as 1992.

[4]The proportion of majority black districts that elect African-Americans to office depends in part on the percentage black of the district. For example, in 1992 when all districts over 50 percent black are considered, 80 percent of the districts elected African-Americans, but when only districts that are over 60 percent black are considered, 84 percent elected African-Americans. Similarly, when only districts over 65 percent black are included in the analysis, the proportion of districts that elected African-Americans increases to 86 percent. Black success may also depend on the percent of Hispanics in the district—a factor that needs to be controlled for (see Grofman and Handley, 1989b).

TABLE 5(B). Percentage of Majority African-American and Non-Majority African-American Districts that Elected African-American State Senate Members in the South and Non-South in 1990

	Percent Majority Black Districts Electing African-American Legislators	*(N)*	*Percent Non-Majority Black Districts Electing African-American Legislators*	*(N)*
South				
Alabama	83.3	(6)	0.0	(29)
Florida	100.0	(1)	2.6	(39)
Georgia	72.7	(11)	0.0	(45)
Louisiana	66.7	(6)	0.0	(33)
Mississippi	14.3	(14)	0.0	(38)
N. Carolina	100.0	(3)	4.3	(47)
S. Carolina	50.0	(10)	0.0	(36)
Tennessee	100.0	(3)	0.0	(33)
Texas	100.0	(1)	3.3	(30)
Virginia	100.0	(2)	2.6	(38)
Total	59.6	(57)	1.4	(368)
Non-South				
Delaware	100.0	(1)	0.0	(20)
Illinois	100.0	(6)	0.0	(53)
Maryland	87.5	(8)	0.0	(39)
Michigan	75.0	(4)	0.0	(34)
Missouri	75.0	(4)	0.0	(30)
New York	50.0	(4)	5.3	(57)
Ohio	0.0	(2)	6.9	(29)
Total	75.9	(29)	2.3	(262)

TABLE 5(C) . Percentage of Majority African-American and Non-Majority African-American Districts that Elected African-American Congressional Representatives in the South and Non-South in 1990

	Percent Majority Black Districts Electing African-American Legislators	*(N)*	*Percent Non-Majority Black Districts Electing African-American Legislators*	*(N)*
South				
Alabama	–	(0)	0.0	(7)
Arkansas	–	(0)	0.0	(4)
Florida	–	(0)	0.0	(19)
Georgia	100.0	(1)	0.0	(9)
Louisiana	100.0	(1)	0.0	(7)
Mississippi	100.0	(1)	0.0	(4)
N. Carolina	–	(0)	0.0	(11)
S. Carolina	–	(0)	0.0	(6)
Tennessee	100.0	(1)	0.0	(8)
Texas	–	(0)	3.7	(27)
Virginia	–	(0)	0.0	(10)
Total	100.0	(4)	.9	(112)

TABLE 5(C) *(continued)*. Percentage of Majority African-American and Non-Majority African-American Districts that Elected African-American Congressional Representatives in the South and Non-South in 1990

Non-South				
Delaware	–	(0)	0.0	(1)
Illinois	100.0	(3)	0.0	(19)
Maryland	100.0	(1)	0.0	(7)
Michigan	100.0	(2)	0.0	(16)
Missouri	100.0	(1)	12.5	(8)
New Jersey	100.0	(1)	0.0	(13)
New York	100.0	(2)	6.3	(32)
Ohio	100.0	(1)	0.0	(20)
Total	100.0	(11)	2.6	(116)

TABLE 6(A). Percentage of Majority African-American and Non-Majority African-American Districts that Elected African-American State House Members in the South and Non-South in 1992

	Percent Majority Black Districts Electing African-American Legislators	(N)	*Percent Non-Majority Black Districts Electing African-American Legislators*	*(N)*
South				
Arkansas	76.9	(13)	0.0	(87)
Florida	92.3	(13)	1.9	(107)
Georgia	71.4	(42)	.7	(138)
Louisiana	92.3	(26)	0.0	(79)
Mississippi	84.2	(38)	0.0	(84)
N. Carolina	93.8	(16)	2.9	(104)
S. Carolina	64.3	(28)	0.0	(96)
Tennessee	100.0	(11)	1.1	(88)
Texas	100.0	(11)	2.2	(139)
Virginia	58.3	(12)	0.0	(88)
Total	81.0	(210)	1.0	(1010)
Non-South				
Delaware	100.0	(2)	0.0	(39)
Illinois	66.7	(18)	0.0	(100)
Michigan	76.9	(13)	1.0	(97)
Missouri	78.6	(14)	1.3	(149)
New Jersey	66.7	(6)	8.1	(74)
New York	93.3	(15)	4.4	(135)
Ohio	100.0	(6)	6.5	(93)
Total	79.7	(74)	3.1	(687)

TABLE 6(B). Percentage of Majority African-American and Non-Majority African-American Districts that Elected African-American State Senate Members in the South and Non-South in 1992

	Percent Majority Black Districts Electing African-American Legislators	(N)	*Percent Non-Majority Black Districts Electing African-American Legislators*	*(N)*
South				
Arkansas	100.0	(3)	0.0	(32)
Florida	100.0	(3)	2.7	(37)
Georgia	69.2	(13)	0.0	(43)
Louisiana	88.9	(9)	0.0	(30)
Mississippi	83.3	(12)	0.0	(40)
N. Carolina	100.0	(4)	4.3	(46)
S. Carolina	63.6	(11)	0.0	(35)
Tennessee	100.0	(3)	0.0	(30)
Texas	100.0	(1)	3.3	(30)
Virginia	100.0	(5)	0.0	(35)
Total	82.3	(64)	1.1	(358)
Non-South				
Delaware	100.0	(1)	0.0	(20)
Illinois	87.5	(8)	2.0	(51)
Missouri	75.0	(4)	0.0	(30)
New Jersey	66.7	(3)	0.0	(37)
New York	71.4	(7)	0.0	(54)
Ohio	100.0	(1)	6.3	(32)
Total	79.2	(24)	1.3	(224)

TABLE 6(C) . Percentage of Majority African-American and Non-Majority African-American Districts that Elected African-American Congressional Representatives in the South and Non-South in 1992

	Percent Majority Black Districts Electing African-American Legislators	(N)	*Percent Non-Majority Black Districts Electing African-American Legislators*	*(N)*
South				
Alabama	100.0	(1)	0.0	(6)
Arkansas	--	(0)	0.0	(4)
Florida	100.0	(3)	0.0	(20)
Georgia	100.0	(3)	0.0	(8)
Louisiana	100.0	(2)	0.0	(5)
Mississippi	100.0	(1)	0.0	(4)
N. Carolina	100.0	(2)	0.0	(10)
S. Carolina	100.0	(1)	0.0	(5)
Tennessee	100.0	(1)	0.0	(8)
Texas	100.0	(2)	0.0	(28)
Virginia	100.0	(1)	0.0	(10)
Total	100.0	(17)	0.0	(109)

TABLE 6(C) *(continued)*. Percentage of Majority African-American and Non-Majority African-American Districts that Elected African-American Congressional Representatives in the South and Non-South in 1992

Non-South				
Delaware	-	(0)	0.0	(1)
Illinois	100.0	(3)	0.0	(17)
Maryland	100.0	(2)	0.0	(6)
Michigan	100.0	(2)	0.0	(14)
Missouri	100.0	(1)	12.5	(8)
New Jersey	100.0	(1)	0.0	(12)
New York	100.0	(3)	3.6	(28)
Ohio	100.0	(1)	0.0	(18)
Total	100.0	(13)	1.9	(104)

Tables 5 and 6 serve to illustrate another point: the vast majority of African-American legislators are elected from majority black districts. In 1990, 86 percent of the African-Americans serving in state legislatures represented majority African-American districts. In 1992, the percentage increased slightly to 89 percent. The percentage increase for Congress was more dramatic in the states studied: in 1990, 79 percent of the African-Americans in office were elected from majority black districts; in 1992, 94 percent of the African-American congressional representatives served majority black districts. Thus the gain in African-American representation cannot be attributed to an increase in the number of African-Americans being elected from non-majority black districts, at least in states with significant black populations. African-American representation increased only because the number and effectiveness of majority black districts increased.

Hispanic Representation and the Creation of Majority Hispanic Districts

The 1990s redistricting process also led to significant gains in the number of Hispanic legislators, although the increases were not as dramatic as for African-Americans. (African-American gains, especially in the South, surpassed Hispanic gains in Congress and state senates and were comparable in state houses.) African-Americans are currently better represented, proportionally, than Hispanics - although Hispanics were better represented than African-Americans in the South prior to 1992.

Table 7 indicates that Hispanics were dramatically underrepresented relative to population proportions in 1990. For example, Hispanics comprised over 25 percent of the population in California, but held only 5 percent of the state house seats and less than 8 percent of the state senate seats. In 1992, the percentage of California state house seats occupied by Hispanics increased to 10 percent but the percentage of state senate seats held by Hispanics remained the same (see Table 8). Hispanic representation actually decreased at the state legislative level in two states: Arizona and Colorado. Two states also decreased the number of majority

Hispanic districts, Colorado and Florida—although Florida maintained 3 Hispanic state senators from 1990 to 1992, despite its decrease in the number of majority Hispanic state senate seats.

TABLE 7. Percent Hispanic Elected Legislators in 1990[1]

	Percent Hispanic Population	*State House*	*(N)*	*State Senate*	*(N)*	*U.S. Congress*	*(N)*
Arizona	18.8	10.0	(60)	16.7	(30)	0.0	(5)
California	25.8	5.0	(80)	7.5	(40)	6.7	(45)
Colorado	12.9	10.8	(65)	8.6	(35)	0.0	(6)
Florida	12.2	6.7	(120)	7.5	(40)	5.3	(19)
Nevada	10.4	0.0	(42)	4.8	(21)	0.0	(2)
New Mexico	38.2	35.7	(70)	35.7	(42)	33.3	(3)
New York	12.3	2.7	(150)	3.3	(61)	2.9	(34)
Texas	25.5	13.3	(150)	16.1	(31)	14.8	(27)
Total	20.2	10.0	(737)	12.3	(300)	7.1	(141)

[1]The states listed above are states with Hispanic populations of 10 percent or greater (according to the 1990 U.S. Census). The percent Hispanic elected legislators reflects officeholders following the 1990 elections (as reported in *1991 National Roster of Hispanic Elected Officials*, National Association of Latino Elected and Appointed Officials, 1992).

TABLE 8. Percent Hispanic Elected Legislators in 1992[1]

	Percent Hispanic Population	*State House*	*(N)*	*State Senate*	*(N)*	*U.S. Congress*	*(N)*
Arizona	18.8	10.0	(60)	10.0	(30)	16.7	(6)
California	25.8	10.0	(80)	7.5	(40)	7.7	(52)
Colorado	12.9	9.2	(65)	5.7	(35)	0.0	(6)
Florida	12.2	8.3	(120)	7.5	(40)	8.7	(23)
Nevada	10.4	0.0	(42)	4.8	(21)	0.0	(2)
New Mexico	38.2	37.1	(70)	35.7	(42)	33.3	(3)
New York	12.3	4.7	(150)	6.6	(61)	6.5	(31)
Texas	25.5	18.0	(150)	19.4	(31)	16.7	(30)
Total	20.2	12.2	(737)	12.3	(300)	9.8	(153)

[1]The states listed above are states with Hispanic populations of 10 percent or greater according to the 1990 U.S. Census. The percent Hispanic elected legislators reflects officeholders following the 1992 elections.

The largest percentage increase between 1990 and 1992 in both African-American and Hispanic representation occurred at the congressional level rather than the state legislative level. This is somewhat surprising because it is easier to create minority districts at smaller levels of geography than larger levels such as congressional districts (Grofman and Handley, 1989b). One reason for the more dramatic gains at the congressional level may be the national attention focused on electing more minorities to federal office.

TABLE 9. Percent Majority Hispanic Districts in 1990[1]

	Percent Hispanic Population	*State House*	*(N)*	*State Senate*	*(N)*	*U.S. Congress*	*(N)*
California	25.8	12.5	(80)	7.5	(40)	8.9	(45)
Colorado	12.9	3.1	(65)	0.0	(35)	0.0	(6)
Florida	12.2	5.8	(120)	10.0	(40)	5.3	(19)
Nevada	10.4	0.0	(42)	0.0	(16)	0.0	(2)
New York	12.3	6.7	(150)	4.9	(61)	2.9	(34)
Texas	25.5	17.3	(150)	19.4	(31)	18.5	(27)
Total	19.9	9.1	(607)	7.2	(223)	8.3	(133)

[1]The states listed are states with Hispanic populations of 10 percent or greater. No data was available for Arizona or New Mexico therefore these two states have been excluded. The percentages reported in this table reflect the districting plan in place for the 1990 elections. Single member districts are counted once, multimember districts (both those that are majority Hispanic and those that are not) have a value equal to the number of delegates elected.

TABLE 10. Percent Majority Hispanic Districts in 1992[1]

	Percent Hispanic Population	*State House*	*(N)*	*State Senate*	*(N)*	*U.S. Congress*	*(N)*
Arizona	18.8	13.3	(30)	13.3	(30)	16.7	(6)
California	25.8	12.5	(80)	10.0	(40)	13.5	(52)
Colorado	12.9	0.0	(65)	0.0	(35)	0.0	(6)
Florida	12.2	7.5	(120)	7.5	(40)	8.7	(23)
Nevada	10.4	0.0	(42)	0.0	(16)	0.0	(2)
New Mexico	38.2	32.9	(70)	35.7	(42)	0.0	(3)
New York	12.3	7.3	(150)	6.6	(61)	6.5	(31)
Texas	25.5	20.0	(150)	22.6	(31)	23.3	(30)
Total	20.2	12.3	(707)	12.5	(295)	12.4	(153)

[1]The states listed are states with Hispanic populations of 10 percent or greater. The percentages reported in this table reflect the districting plan in place for the 1992 elections. Single member districts are counted once; multimember districts (both those that are majority Hispanic and those that are not) have a value equal to the number of delegates elected.

Why were Hispanic gains less substantial between 1990 and 1992 than African-American gains? Although Hispanic legislators appear no less likely to be elected to office from majority white seats than African-American legislators (compare Table 6 with Table 12), it appears that (1) a smaller percentage of Hispanic seats were created than African-American seats, relative to population proportions (compare Table 4 with Table 10) and (2) African-American seats were more likely to elect candidates of choice to office than Hispanic districts (compare Table 6 with Table 12). Undoubtedly, one of the primary reasons that fewer Hispanic districts were created is that it is easier to draw majority African-American seats than majority Hispanic seats: African-Americans tend to be more residentially segregated than Hispanics. Hispanic districts are less successful at electing Hispanics to office in large part because there is a greater proportion of

non-voters among the Hispanic population. This is largely a product of the lower citizenship rates among the Hispanic population.

TABLE 11(A). Percentage of Majority Hispanic and Non-Majority Hispanic Districts That Elected Hispanic State House Members in 1990

	Percent Majority Hispanic Districts Electing Hispanic Legislators	*(N)*	*Percent Non-Majority Hispanic Districts Electing Hispanic Legislators*	*(N)*
California	30.0	(10)	1.4	(70)
Colorado	100.0	(2)	7.9	(63)
Florida	100.0	(7)	.9	(113)
Nevada	-	(0)	0.0	(42)
New York	30.0	(10)	.7	(140)
Texas	73.1	(26)	.8	(124)
Total	61.8	(55)	1.6	(552)

TABLE 11(B). Percentage of Majority Hispanic and Non-Majority Hispanic Districts That Elected Hispanic Senate Members in 1990

	Percent Majority Hispanic Districts Electing Hispanic Legislators	*(N)*	*Percent Non-Majority Hispanic Districts Electing Hispanic Legislators*	*(N)*
California	66.7	(3)	2.7	(37)
Colorado	–	(0)	8.6	(35)
Florida	75.0	(4)	0.0	(36)
Nevada	–	(0)	4.8	(21)
New York	66.7	(3)	0.0	(58)
Texas	66.7	(6)	4.0	(25)
Total	68.8	(16)	2.8	(212)

TABLE 11(C). Percentage of Majority Hispanic and Non-Majority Hispanic Districts That Elected Hispanic Congressional Representatives in 1990

	Percent Majority Hispanic Districts Electing Hispanic Legislators	*(N)*	*Percent Non-Majority Hispanic Districts Electing Hispanic Legislators*	*(N)*
Arizona	–	(0)	0.0	(5)
California	75.0	(4)	0.0	(41)
Colorado	–	(0)	0.0	(6)
Florida	100.0	(1)	0.0	(18)
Nevada	–	(0)	0.0	(2)
New Mexico	–	(0)	33.3	(3)
New York	100.0	(1)	0.0	(33)
Texas	80.0	(5)	0.0	(22)
Total	81.8	(11)	.8	(130)

TABLE 12(A). Percentage of Majority Hispanic and Non-Majority Hispanic Districts That Elected Hispanic State House Members in 1992

	Percent Majority Hispanic Districts Electing Hispanic Legislators	*(N)*	*Percent Non-Majority Hispanic Districts Electing Hispanic Legislators*	*(N)*
Arizona	62.5	(8)	1.9	(52)
California	60.0	(10)	2.9	(70)
Colorado	–	(0)	9.2	(65)
Florida	100.0	(9)	.8	(131)
Nevada	–	(0)	0.0	(42)
New Mexico	78.3	(23)	17.0	(47)
New York	63.6	(11)	0.0	(139)
Texas	86.7	(30)	.9	(120)
Total	78.0	(91)	2.9	(666)

TABLE 12(B). Percentage of Majority Hispanic and Non-Majority Hispanic Districts That Elected Hispanic State Senate Members in 1992

	Percent Majority Hispanic Districts Electing Hispanic Legislators	*(N)*	*Percent Non-Majority Hispanic Districts Electing Hispanic Legislators*	*(N)*
Arizona	50.0	(4)	3.8	(26)
California	25.0	(4)	5.6	(36)
Colorado	–	(0)	5.7	(35)
Florida	100.0	(3)	0.0	(37)
Nevada	–	(0)	4.8	(21)
New Mexico	86.7	(15)	7.4	(27)
New York	100.0	(4)	0.0	(57)
Texas	71.4	(7)	4.5	(24)
Total	75.7	(37)	3.4	(263)

TABLE 12(C). Percentage of Majority Hispanic and Non-Majority Hispanic Districts That Elected Hispanic Congressional Representatives in 1992

	Percent Majority Hispanic Districts Electing Hispanic Legislators	*(N)*	*Percent Non-Majority Hispanic Districts Electing Hispanic Legislators*	*(N)*
Arizona	100.0	(1)	0.0	(5)
California	57.1	(7)	0.0	(45)
Colorado	–	(0)	0.0	(6)
Florida	100.0	(2)	0.0	(21)
Nevada	–	(0)	0.0	(2)
New Mexico	–	(0)	33.3	(3)
New York	100.0	(2)	0.0	(29)
Texas	71.4	(7)	0.0	(23)
Total	73.7	(19)	.7	(134)

MINORITY PERCENTAGES IN LEGISLATIVE DISTRICTS AND THE ELECTION OF DEMOCRATS

In addition to measuring the impact of redistricting on African-American and Hispanic representation, we attempted to determine whether there is a relationship between the minority population percentages in a district more generally and the election of a minority-preferred candidate. We assumed that, given the large percentage of African-Americans and non-Cuban Hispanics that are Democrats, Democrats would be the candidate of choice—and this assumption appears to be correct given the strong relationship between minority concentrations across districts and the election of Democrats to legislative office.

TABLE 13. Percent Democrats in State Houses by Percent African-American in District 1990[1]

	Percent African-American in District											
South	*0-9.9*	*(N)*	*10-19.9*	*(N)*	*20-29.9*	*(N)*	*30-39.9*	*(N)*	*40-49.9*	*(N)*	*50+*	*(N)*
Alabama	59.4	(32)	75.0	(28)	91.7	(12)	85.7	(7)	100.0	(6)	100.0	(20)
Florida	41.0	(61)	71.0	(31)	90.9	(11)	100.0	(7)	100.0	(1)	100.0	(9)
Georgia	52.2	(46)	70.6	(34)	89.7	(29)	100.0	(24)	100.0	(13)	100.0	(34)
Louisiana	43.8	(16)	81.0	(21)	81.0	(21)	100.0	(19)	83.3	(6)	100.0	(19)
Mississippi	46.2	(13)	80.0	(20)	81.8	(22)	86.4	(22)	90.9	(11)	97.1	(34)
N. Carolina	37.9	(29)	52.9	(34)	83.3	(24)	95.0	(20)	100.0	(4)	100.0	(9)
S. Carolina	30.8	(13)	32.4	(34)	71.4	(21)	90.0	(20)	90.0	(10)	95.8	(24)
Tennessee	42.1	(57)	76.5	(17)	60.0	(5)	66.7	(6)	66.7	(3)	100.0	(11)
Texas	55.6	(81)	56.1	(41)	81.8	(11)	100.0	(4)	100.0	(2)	100.0	(9)
Virginia	38.9	(36)	51.7	(29)	69.2	(13)	88.9	(9)	100.0	(4)	100.0	(9)
Total	46.4	(384)	62.3	(289)	81.7	(169)	92.8	(138)	93.3	(60)	98.9	(178)
Non - South												
Illinois	43.6	(78)	93.8	(16)	83.3	(6)	100.0	(2)	100.0	(6)	100.0	(14)
Maryland	65.2	(46)	79.4	(34)	89.5	(19)	100.0	(9)	100.0	(9)	100.0	(24)
Michigan	40.8	(76)	80.0	(10)	66.7	(6)	100.0	(2)	—		100.0	(16)
Missouri	50.4	(121)	73.3	(15)	85.7	(7)	100.0	(1)	100.0	(4)	100.0	(14)
New York	46.5	(101)	95.2	(21)	100.0	(4)	100.0	(6)	100.0	(5)	100.0	(13)
Ohio	50.7	(71)	75.0	(12)	100.0	(3)	100.0	(5)	100.0	(4)	100.0	(4)
Total	48.5	(493)	83.3	(108)	86.7	(45)	100.0	(25)	100.0	(28)	100.0	(85)

[1] Information for Arkansas, Delaware and New Jersey unavailable

African-American Population Concentrations and the Election of Democrats to Office

As is evident from Tables 13-18, a very clear pattern exists between the percentage African-American in a district and the election of a Democrat. Regardless of region or type of district examined, **the higher the percentage African-American in the district, the greater the percentage of Democrats elected to office**. This pattern holds true in both 1990 and 1992, for both the South and the non-South, and for all three types of legislative districts examined—state house, state senate and congressional districts.

TABLE 14. Percent Democrats in State Senates by Percent African-American in District 1990[1]

	Percent African-American in District											
South	*0-9.9*	*(N)*	*10-19.9*	*(N)*	*20-29.9*	*(N)*	*30-39.9*	*(N)*	*40-49.9*	*(N)*	*50+*	*(N)*
Alabama	42.9	(7)	80.0	(10)	87.5	(8)	100.0	(2)	100.0	(2)	100.0	(6)
Florida	31.3	(16)	66.7	(18)	100.0	(4)	—		100.0	(1)	100.0	(1)
Georgia	54.5	(11)	66.7	(12)	80.0	(10)	100.0	(9)	100.0	(3)	100.0	(11)
Louisiana	0.0	(2)	77.8	(9)	100.0	(10)	100.0	(10)	50.0	(2)	83.3	(6)
Mississippi	100.0	(3)	55.6	(9)	77.8	(9)	92.3	(13)	100.0	(5)	92.3	(13)
N. Carolina	45.5	(11)	41.7	(12)	93.3	(15)	100.0	(8)	100.0	(1)	100.0	(3)
S. Carolina	60.0	(5)	50.0	(8)	76.9	(13)	75.0	(8)	100.0	(1)	100.0	(10)
Tennessee	47.4	(19)	57.1	(7)	100.0	(2)	—		100.0	(2)	100.0	(3)
Texas	64.3	(14)	70.0	(10)	100.0	(4)	—		100.0	(1)	100.0	(1)
Virginia	75.0	(12)	71.4	(14)	60.0	(5)	75.0	(4)	100.0	(3)	100.0	(2)
Total	52.0	(100)	64.2	(109)	86.3	(80)	92.6	(54)	95.2	(21)	96.4	(56)
Non - South												
Illinois	27.8	(36)	81.8	(11)	100.0	(2)	100.0	(4)	—		100.0	(6)
Maryland	56.3	(16)	90.9	(11)	83.3	(6)	100.0	(3)	100.0	(3)	100.0	(8)
Michigan	36.0	(25)	42.9	(7)	—		100.0	(1)	100.0	(1)	100.0	(4)
Missouri	57.7	(26)	100.0	(3)	100.0	(1)	—		—		100.0	(4)
New York	18.9	(37)	58.3	(12)	100.0	(3)	100.0	(3)	100.0	(2)	100.0	(4)
Ohio	22.7	(22)	33.3	(6)	100.0	(2)	100.0	(1)	100.0	(2)	100.0	(1)
Total	34.0	(162)	68.0	(50)	92.9	(14)	100.0	(12)	100.0	(8)	100.0	(27)

[1] Information for Arkansas, Delaware and New Jersey unavailable

TABLE 15. Percent Democrats in Congress by Percent African-American in District 1990

	Percent African-American In District											
South	*0-9.9*	*(N)*	*10-19.9*	*(N)*	*20-29.9*	*(N)*	*30-39.9*	*(N)*	*40-49.9*	*(N)*	*50+*	*(N)*
Alabama	100.0	(1)	100.0	(1)	50.0	(2)	66.7	(3)	—		—	
Arkansas	0.0	(1)	100.0	(2)	100.0	(1)	—		—		—	
Florida	42.9	(7)	37.5	(8)	66.7	(3)	100.0	(1)	—		—	
Georgia	100.0	(2)	0.0	(1)	100.0	(2)	100.0	(4)	—		100.0	(1)
Louisiana	—		0.0	(1)	66.7	(3)	33.3	(3)	—		100.0	(1)
Mississippi	—		100.0	(1)	100.0	(1)	100.0	(1)	100.0	(1)	100.0	(1)
N. Carolina	0.0	(1)	75.0	(4)	50.0	(4)	100.0	(1)	100.0	(1)	—	
S. Carolina	—		100.0	(1)	100.0	(1)	50.0	(4)	—		—	
Tennessee	50.0	(4)	50.0	(2)	100.0	(2)	—		—		100.0	(1)
Texas	57.1	(14)	85.7	(7)	80.0	(5)	100.0	(1)	—		—	
Virginia	50.0	(2)	66.7	(3)	66.7	(3)	50.0	(2)	—		—	
Total	53.1	(32)	64.5	(31)	74.1	(27)	70.0	(20)	100.0	(2)	100.0	(4)
Non - South												
Delaware	—		100.0	(1)	—		—		—		—	
Illinois	53.3	(15)	100.0	(4)	—		—		—		100.0	(3)
Maryland	50.0	(2)	0.0	(2)	100.0	(2)	—		100.0	(1)	100.0	(1)
Michigan	41.7	(12)	100.0	(3)	100.0	(1)	—		—		100.0	(2)
Missouri	57.1	(7)	—		100.0	(1)	—		—		100.0	(1)
New Jersey	33.3	(6)	71.4	(7)	—		—		—		100.0	(1)
New York	45.5	(22)	83.3	(6)	100.0	(1)	100.0	(2)	100.0	(1)	100.0	(2)
Ohio	41.7	(12)	62.5	(8)	—		—		—		100.0	(1)
Total	46.1	(76)	74.2	(31)	100.0	(5)	100.0	(2)	100.0	(2)	100.0	(11)

Overall, the probability of electing a Democrat to the state legislature and Congress decreased between 1990 and 1992.[5] Although the decline was not great (no more than 5 percent for any set of districts), it is found at all three levels; 64% to 60% in Congress; 66% to 61% in state senates; and 67% to 63% for state houses. This decline occurred in both the South and the non-South considered separately as well. In absolute terms, among states with comparable data, Democrats lost 31 house and 26 senate seats in the South and 10 house and 9 senate seats in the non-South. In Congress, Democrats lost 10 seats in the non-South and no seats in the South in 1992.[6]

[5]No state legislative elections were held in Alabama, Maryland and the Michigan state senate in 1991 or 1992, therefore only 16 states have been compared at the state legislative level. All 19 states have been compared at the congressional and state house level.

TABLE 16. Percent Democrats in State Houses by Percent African-American in District 1992[1]

	Percent African-American In District											
South	*0-9.9*	*(N)*	*10-19.9*	*(N)*	*20-29.9*	*(N)*	*30-39.9*	*(N)*	*40-49.9*	*(N)*	*50+*	*(N)*
Arkansas	83.6	(55)	100.0	(18)	100.0	(10)	75.0	(4)	—		92.3	(13)
Florida	40.0	(75)	84.6	(26)	100.0	(3)	100.0	(3)	—		100.0	(13)
Georgia	35.7	(56)	68.9	(45)	92.6	(27)	100.0	(9)	100.0	(1)	100.0	(42)
Louisiana	55.6	(18)	77.8	(27)	90.5	(21)	100.0	(12)	0.0	(1)	100.0	(26)
Mississippi	41.7	(12)	60.0	(35)	72.7	(22)	83.3	(12)	100.0	(3)	100.0	(38)
N. Carolina	38.5	(39)	46.7	(30)	95.5	(22)	87.5	(8)	100.0	(5)	100.0	(16)
S. Carolina	4.3	(23)	25.9	(27)	78.3	(23)	87.5	(16)	71.4	(7)	100.0	(28)
Tennessee	48.3	(60)	84.6	(13)	71.4	(7)	83.3	(6)	100.0	(2)	100.0	(11)
Texas	50.0	(96)	71.9	(32)	100.0	(4)	100.0	(3)	100.0	(1)	100.0	(11)
Virginia	40.5	(42)	55.6	(27)	76.9	(13)	66.7	(6)	—		100.0	(12)
Total	48.3	(476)	65.4	(280)	86.2	(152)	88.6	(79)	85.0	(20)	99.5	(210)
Non - South												
Delaware	43.8	(16)	37.5	(14)	33.3	(6)	0.0	(1)	100.0	(2)	100.0	(2)
Illinois	43.5	(85)	77.8	(9)	83.3	(6)	—		—		100.0	(18)
Michigan	34.2	(79)	87.5	(8)	71.4	(7)	100.0	(2)	100.0	(1)	100.0	(13)
Missouri	52.7	(129)	92.9	(14)	75.0	(4)	100.0	(1)	100.0	(1)	100.0	(14)
New Jersey	8.0	(50)	20.0	(10)	66.7	(12)	100.0	(2)	—		100.0	(6)
New York	51.5	(101)	100.0	(17)	100.0	(9)	100.0	(4)	100.0	(4)	100.0	(15)
Ohio	44.2	(77)	71.4	(7)	0.0	(1)	100.0	(2)	100.0	(4)	100.0	(6)
Total	42.6	(537)	70.9	(79)	73.3	(45)	91.7	(12)	100.0	(12)	100.0	(74)

[1]Alabama and Maryland did not have state house elections in 1991 or 1992.

Much of the decrease in the number of Democrats elected to office is attributable to the increase in the number of districts with less than 10 percent black populations and the lower probability of Democrats being elected from these districts. This is the only category in which the percentage of Democrats elected clearly decreased between 1990 and 1992; furthermore, this category experienced the largest increase in the number of districts—there were far more dis-

[6]It should be noted that as a result of reapportionment the South gained 9 congressional seats and the non-South lost 10 congressional seats.

tricts with less than 10 percent black in 1992 than there were in 1990. For example, in the non-South the number of districts with black populations below 10 increased by 24 in state houses, 14 in state senates and 2 in Congress; in the South the increase in the number of districts with less than 10 black was 69 in state houses, 37 in state senates and 19 in Congress. Moreover, following the 1992 elections, the only category in which Democrats controlled a minority of the seats were those districts below 10 percent. This is true regardless of region or level of office. In every other black percentage range, Democrats held a majority of the seats. The percentages of Democrats elected in each percentage category (0 to 10, 10 to 20, 20 to 30, 30 to 40, 40 to 50 and over 50 black), as well as the number of districts falling into each category can be found in Tables 13 and 16 for state houses, Tables 14 and 17 for state senates and Tables 15 and 18 for Congress.

TABLE 17. Percent Democrats in State Senates by Percent African-American in District 1992[1]

	Percent African - American In District										
South	*0-9.9*	*(N)*	*10-19.9*	*(N)*	*20-29.9*	*(N)*	*30-39.9*	*(N)*	*40-49.9*	*(N)*	*50+*	*(N)*
Arkansas	78.9	(19)	85.7	(7)	100.0	(4)	100.0	(2)	—		100.0	(3)
Florida	26.9	(26)	85.7	(7)	100.0	(1)	100.0	(2)	100.0	(1)	100.0	(3)
Georgia	35.7	(14)	68.8	(16)	85.7	(7)	100.0	(5)	100.0	(1)	100.0	(13)
Louisiana	25.0	(4)	72.7	(11)	100.0	(8)	100.0	(6)	100.0	(1)	100.0	(9)
Mississippi	100.0	(2)	35.7	(14)	81.8	(11)	90.0	(10)	66.7	(3)	100.0	(12)
N. Carolina	40.0	(15)	83.3	(6)	94.7	(19)	100.0	(4)	100.0	(2)	100.0	(4)
S. Carolina	33.3	(6)	41.7	(12)	37.5	(8)	100.0	(8)	100.0	(1)	100.0	(11)
Tennessee	52.4	(21)	0.0	(4)	100.0	(2)	100.0	(3)	—		100.0	(3)
Texas	55.6	(18)	50.0	(10)	100.0	(1)	—		100.0	(1)	100.0	(1)
Virginia	25.0	(24)	50.0	(14)	50.0	(6)	100.0	(1)	—		100.0	(5)
Total	43.6	(149)	57.4	(101)	82.1	(67)	97.6	(41)	90.0	(10)	100.0	(64)
Non - South												
Delaware	50.0	(8)	87.5	(8)	66.7	(3)	—		100.0	(1)	100.0	(1)
Illinois	32.6	(43)	25.0	(4)	100.0	(2)	100.0	(2)	—		100.0	(8)
Missouri	44.0	(25)	100.0	(3)	—		—		—		100.0	(4)
New Jersey	12.0	(25)	40.0	(5)	66.7	(6)	100.0	(1)	—		100.0	(3)
New York	26.2	(42)	33.3	(6)	100.0	(4)	100.0	(2)	—		100.0	(7)
Ohio	20.0	(25)	100.0	(3)	100.0	(1)	100.0	(2)	100.0	(1)	100.0	(1)
Total	28.6	(168)	62.1	(29)	81.2	(16)	100.0	(7)	100.0	(2)	100.0	(24)

[1] Alabama, Maryland and Michigan did not have state senate elections in 1991 or 1992

On the other hand, most districts over 30 percent black continue to elect Democrats to office. In fact, in the non-South, every state house, state senate and congressional district over 30 percent black elects a Democrat to office (this is true for both 1990 and 1992) except for one.[7] The pattern is not quite as stark in the South. (Actually, in the South, not even every district over 50 percent black elects a Democrat to office, at least at the state legislative level).

TABLE 18. Percent Democrats in Congress by Percent African-American in District 1992

	Percent African - American In District											
South	*0-9.9*	*(N)*	*10-19.9*	*(N)*	*20-29.9*	*(N)*	*30-39.9*	*(N)*	*40-49.9*	*(N)*	*50+*	*(N)*
Alabama	50.0	(2)	100.0	(1)	33.3	(3)	—		—		100.0	(1)
Arkansas	0.0	(1)	100.0	(2)	0.0	(1)	—		—		—	
Florida	25.0	(16)	66.7	(3)	100.0	(1)	—		—		100.0	(3)
Georgia	50.0	(2)	50.0	(4)	50.0	(2)	—		—		100.0	(3)
Louisiana	—		33.3	(3)	50.0	(2)	—		—		100.0	(2)
Mississippi	—		100.0	(1)	100.0	(1)	100.0	(1)	100.0	(1)	100.0	(1)
N. Carolina	0.0	(4)	100.0	(2)	100.0	(4)	—		—		100.0	(2)
S. Carolina	—		0.0	(1)	33.3	(3)	100.0	(1)	—		100.0	(1)
Tennessee	50.0	(4)	66.7	(3)	100.0	(1)	—		—		100.0	(1)
Texas	52.6	(19)	100.0	(7)	100.0	(2)	—		—		100.0	(2)
Virginia	66.7	(3)	40.0	(5)	100.0	(1)	100.0	(1)	—		100.0	(1)
Total	39.2	(51)	68.8	(32)	66.7	(21)	100.0	(3)	100.0	(1)	100.0	(17)
Non - South												
Delaware	—		0.0	(1)	—		—		—		—	
Illinois	46.7	(15)	100.0	(2)	—		—		—		100.0	(3)
Maryland	0.0	(3)	66.7	(3)	—		—		—		100.0	(2)
Michigan	50.0	(12)	100.0	(2)	—		—		—		100.0	(2)
Missouri	57.1	(7)	—		100.0	(1)	—		—		100.0	(1)
New Jersey	16.7	(6)	83.3	(6)	—		—		—		100.0	(1)
New York	50.0	(22)	33.3	(3)	—		100.0	(3)	—		100.0	(3)
Ohio	38.5	(13)	100.0	(3)	0.0	(1)	100.0	(1)	—		100.0	(1)
Total	43.6	(78)	75.0	(20)	50.0	(2)	100.0	(4)	—		100.0	(13)

Not surprisingly, the categories of districts that experienced the largest decrease in number were those districts with black populations between 30 and 50 percent. For example, in the South there were 18 fewer congressional districts, 90 fewer state house districts and 22 fewer senate seats with black populations between 30 and 50 percent. In the non-South, the decrease in districts with black populations between 30 and 50 percent was 16 in state houses, 5 in state senates and no change in congressional districts. This decrease in districts between 30

[7] The exception is a 31% black state house district in Delaware that elects a Republican to office.

and 50 percent black is not unexpected given the increase in the number of districts over 50 percent black—the logical place to begin drawing additional majority black districts is in areas of the state with substantial black populations and no currently existing majority black district. Since Democrats control an overwhelming percentage of districts between 30 and 50 percent black, some of the Democratic losses in 1992 must be attributed to the elimination of these strong minority influence districts.

A review of the relationship between black population concentrations and the election of Democrats to office in the individual states across the region reveals some differences across states. South Carolina and New Jersey are the least likely to elect Democrats at low black percentages, Arkansas appears to be the most likely. In 1992, all congressional and legislative districts in Florida, Texas and New York with black populations greater than 20 percent elected Democrats to office. On the other hand, black percentages of 50 percent or more were required before every district in Louisiana, Mississippi and South Carolina elected a Democrat.[8] Overall, the patterns in the South and non-South, especially with regard to Congress, are becoming increasingly similar. This is due in large part to the decreasing likelihood of Democrats being elected from the South, particularly from districts less than 10 percent black.

Hispanic Population Concentrations and the Election of Democrats to Office

Although the pattern is not as marked, the same relationship noted for African-American population concentrations and the election of Democrats exists for Hispanics: the higher the percentage of Hispanics in districts, the greater the percentage of Democrats elected to office.[9] This is true of all three levels of legislative districts but, as will be discussed below, there are some significant differences in the three levels of offices studied.

In states with Hispanic populations greater than 10 percent, the probability of electing a Democrat to the state house and Congress actually increased between 1990 and 1992, while the probability of electing Democrats to the state senate decreased slightly. The percentage of seats held by Democrats increased from 58 in 1990 to 61 in 1992 in the seven state houses considered (Table 19); but the percentage of the seats held by Democrats in the state senates decreased from 54 to 50 (Table 20). In actual numbers, Democrats gained 24 house and 4 congressional seats (these states gained 8 seats as a result of reapportionment) and lost 9 state senate seats.

The Hispanic population percentage which elects a majority of Democrats to

[8]In 1990, no category of districts we analyzed in these three states elected only Democrats.

[9]We analyzed seven of the eight states with Hispanic populations greater than 10 percent. The states reviewed were Arizona, California, Colorado, Nevada, New Mexico, New York and Texas. Florida, although it has an Hispanic population greater than 10 percent, was excluded because of the large number of Cuban voters who exhibit little similarity with non-Cuban Hispanics (and tend to vote for Republicans rather than Democrats).

office is dependent on the level of office. For example, in 1992 Democrats held 62 of the state house districts with Hispanic populations between 10 and 20 percent (see Table 19), however, Democrats did not control a majority of state senate seats until the Hispanic population concentration reached 30 to 40 percent—at which point Democrats were elected to 78 percent of the seats (see Table 20). Furthermore, there is no category of state house districts or congressional districts that elect only Democrats; but all state senate districts over 40 Hispanic elect Democrats to office (see Table 21).

Since the populations of New York and Texas are both over 10 percent black and 10 percent Hispanic, a more detailed review of these two states provides a good indication of the role played by these two groups in electing Democrats to office. In New York, there appears to be little measurable difference between the two minority groups; in the New York Assembly, Democrats control all of districts over 10 percent black and all of the districts over 10 percent Hispanic (see Tables 16 and 19). The likelihood of electing a Democrat to the state senate or to Congress in New York is also comparable regardless of whether a district contains a significant African-American or Hispanic population.

TABLE 19: Percent Democrats in State Houses by Percent Hispanic in District
1992

	Percent Hispanic in District											
1992	*0-9.9*	*(N)*	*10-19.9*	*(N)*	*20-29.9*	*(N)*	*30-39.9*	*(N)*	*40-49.9*	*(N)*	*50+*	*(N)*
Arizona	9.1	(22)	36.4	(22)	100.0	(2)	83.3	(6)	—		100.0	(8)
California	33.3	(9)	61.8	(34)	35.7	(14)	60.0	(5)	87.5	(8)	100.0	(10)
Colorado	35.0	(40)	71.4	(14)	60.0	(5)	0.0	(1)	80.0	(5)	—	
Nevada	60.0	(25)	81.3	(16)	—		100.0	(1)	—		—	
New Mexico	100.0	(2)	38.5	(13)	52.8	(17)	85.7	(7)	100.0	(8)	100.0	(23)
New York	50.5	(99)	100.0	(23)	100.0	(13)	100.0	(3)	100.0	(1)	100.0	(11)
Texas	45.8	(48)	51.1	(45)	66.7	(15)	71.4	(7)	100.0	(5)	93.3	(30)
Total	44.1	(245)	61.7	(167)	63.6	(66)	76.7	(30)	92.6	(27)	97.6	(82)

1990[1]

	Percent Hispanic in District											
1990	0-9.9	(N)	10-19.9	(N)	20-29.9	(N)	30-39.9	(N)	40-49.9	(N)	50+	(N)
California	36.4	(11)	51.9	(27)	35.3	(17)	91.7	(12)	100.0	(2)	100.0	(10)
Colorado	30.8	(39)	50.0	(10)	55.6	(9)	100.0	(1)	50.0	(4)	100.0	(2)
Nevada	36.0	(25)	71.4	(14)	100.0	(2)	100.0	(1)	—		—	
New York	45.5	(99)	95.7	(23)	100.0	(14)	100.0	(1)	100.0	(3)	100.0	(10)
Texas	73.5	(34)	42.5	(40)	66.7	(21)	72.7	(11)	83.3	(6)	88.4	(26)
Total	45.7	(208)	59.6	(114)	65.1	(63)	84.6	(26)	80.0	(15)	93.8	(48)

[1]Information for Arizona and New Mexico not available

TABLE 20: Percent Democrats in State Senates by Percent Hispanic in District
1992

	Percent Hispanic in District											
1992	*0-9.9*	*(N)*	*10-19.9*	*(N)*	*20-29.9*	*(N)*	*30-39.9*	*(N)*	*40-49.9*	*(N)*	*50+*	*(N)*
Arizona	18.2	(11)	27.3	(11)	100.0	(1)	66.7	(3)	----		100.0	(4)
California	50.0	(2)	46.7	(15)	50.0	(12)	100.0	(2)	100.0	(3)	100.0	(3)
Colorado	23.8	(21)	75.0	(8)	50.0	(2)	100.0	(2)	100.0	(2)	----	
Nevada	33.3	(12)	66.7	(9)	----		----		----		----	
New Mexico	100.0	(1)	28.6	(7)	22.2	(9)	57.1	(7)	100.0	(3)	100.0	(15)
New York	21.6	(37)	64.3	(14)	66.7	(3)	100.0	(2)	100.0	(1)	100.0	(4)
Texas	33.3	(9)	30.0	(10)	100.0	(3)	100.0	(2)	----		100.0	(7)
Total	25.8	(93)	48.6	(74)	50.0	(30)	77.8	(18)	100.0	(9)	100.0	(33)

1990[1]

	Percent Hispanic In District											
1990	*0-9.9*	*(N)*	*10-19.9*	*(N)*	*20-29.9*	*(N)*	*30-39.9*	*(N)*	*40-49.9*	*(N)*	*50+*	*(N)*
California	100.0	(2)	53.3	(15)	62.5	(8)	85.7	(7)	66.7	(3)	100.0	(3)
Colorado	10.5	(19)	28.6	(7)	83.3	(6)	----		100.0	(3)	----	
Nevada	40.0	(15)	83.3	(6)	----		----		----		----	
New York	23.7	(38)	54.5	(11)	85.7	(7)	----		100.0	(2)	100.0	(3)
Texas	71.4	(7)	50.0	(8)	85.7	(7)	100.0	(1)	100.0	(1)	83.3	(6)
Total	29.6	(81)	53.2	(47)	78.6	(28)	87.5	(8)	89.9	(9)	91.7	(12)

[1]Information for Arizona and New Mexico is unavailable

In Texas, on the other hand, there appears to be a difference in the ability of the two minority groups to affect the election of a Democrat. As discussed previously, every district in Texas with a black population over 20 percent elects a Democrat to office (see Tables 16, 17 and 18). This is not the case in districts with Hispanic populations greater than 20 percent; in fact, no category elects only Democrats except for state senate districts over 20 percent Hispanic. The differences between Hispanic and African-American population concentrations appear to be narrowing, at least at the state legislative level, when the 1990 and 1992 tables are compared.

Some possible explanations for the differences between the African-American and the Hispanic population percentages necessary to elect Democrats to office include: (1) the large number of non-citizens in the Hispanic community who are ineligible to vote; and, (2) the lower proportion of Hispanic voters compared with African-American voters who are Democrats. For example, in New York—where a large proportion of the Hispanics are Puerto Rican and thus eligible to vote—the difference between African-Americans and Hispanics in their ability to elect Democrats to office is minimal.

Table 21. Percent Democrats in Congress by Percent Hispanic in District

1992

	Percent Hispanic In District											
1992	*0-9.9*	*(N)*	*10-19.9*	*(N)*	*20-29.9*	*(N)*	*30-39.9*	*(N)*	*40-49.9*	*(N)*	*50+*	*(N)*
Arizona	0.0	(1)	50.0	(4)	----		----		----		100.0	(1)
California	33.3	(3)	70.0	(20)	16.7	(12)	71.4	(7)	75.0	(4)	100.0	(6)
Colorado	33.3	(3)	0.0	(2)	100.0	(1)	----		----		----	
Nevada	0.0	(1)	100.0	(1)	----		----		----		----	
New Mexico	----		----		----		50.0	(2)	0.0	(1)	----	
New York	35.0	(20)	100.0	(6)	100.0	(2)	----		100.0	(1)	100.0	(2)
Texas	50.0	(8)	66.7	(12)	100.0	(3)	----		----		85.7	(7)
Total	36.1	(36)	68.9	(45)	44.4	(18)	66.7	(9)	66.7	(6)	93.8	(16)

1990

	Percent Hispanic In District											
1990	0-9.9	(N)	10-19.9	(N)	20-29.9	(N)	30-39.9	(N)	40-49.9	(N)	50+	(N)
Arizona	0.0	(1)	0.0	(3)	----		----		100.0	(1)	----	
California	33.3	(6)	58.8	(17)	33.3	(6)	77.8	(9)	66.7	(3)	100.0	(4)
Colorado	0.0	(2)	66.7	(3)	100.0	(1)	----		----		----	
Nevada	0.0	(1)	100.0	(1)	----		----		----		----	
New Mexico	----		----		----		33.3	(3)	----		----	
New York	36.8	(19)	87.5	(8)	100.0	(4)	----		100.0	(2)	100.0	(1)
Texas	57.1	(7)	80.0	(5)	62.5	(8)	0.0	(1)	100.0	(1)	100.0	(5)
Total	36.1	(36)	64.9	(37)	63.2	(19)	61.5	(13)	85.7	(7)	100.0	(10)

CONCLUSION

The 1990s redistricting process led to significant growth in the number of African-American and Hispanic elected officials. These gains were due to the increase in the number of majority minority districts created; they were not the result of additional minority representatives being elected from majority white districts. In fact, in 1992 fewer African-Americans represented majority white districts than in 1990. Thus, we have found no evidence to indicate that majority minority districts are no longer necessary to ensure African-Americans and Hispanics fair representation in our legislative bodies.

Our research also indicates a strong relationship between the minority composition of a district and the likelihood of electing a Democrat to office. The majority of districts over 10 percent black or Hispanic elect Democrats. For example, in 1992 Democrats controlled an overwhelming majority of districts containing black populations in excess of 10 percent, but a minority of districts

with black populations less than 10 percent. Democratic losses in the first post-redistricting elections appear to be the result of an increase in the number of overwhelmingly white districts and the lower probability of Democrats being elected from these districts.

REPRESENTATION AND AMBITION IN THE NEW AFRICAN-AMERICAN CONGRESSIONAL DISTRICTS: The Supply-Side Effects

Matthew M. Schousen, David T. Canon, and Patrick J. Sellers

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THE GOAL OF EMPOWERING MINORITIES through redistricting has been attacked from all sides (Guinier, 1991a: 1134-53; Thernstrom, 1987: 237-38). Though our study will not resolve this normative debate, it offers a new perspective from which to assess the viability of this approach to black empowerment: the supply-side of redistricting.[1] The traditional demand-side perspective on minority redistricting includes studies of vote dilution (Davidson, 1984; Schockley, 1991), racial bloc voting (Chapter 4 of this volume; Grofman, 1991; Loewen, 1990; McCrary, 1990; Schockley, 1991), run-off elections (Bullock and Smith, 1990; Ballard, 1991), political geography and demographics (Grofman and Handley, 1989a, 1989b; Niemi, Grofman, Carlucci, and Hofeller, 1990; Niemi and Brace, 1993), racial transitions and incumbency advantage (Vanderleeuw, 1991), and the partisan implications of black-majority districts (Brace, Grofman, and Handley, 1987).

In contrast, our supply-side perspective examines how individual politicians respond to the changing electoral context imposed by new district lines and how, in turn, their decisions shape the electoral choices and outcomes in a given district. Rather than simply assuming that goals for minority representation are translated into a specific configuration of district lines with predictable conse-

[1] The "supply-side" perspective of politics has provided new explanations for divided government (Jacobson, 1990; Ehrenhalt, 1991), partisan realignments (Hurley, 1991; Canon and Sousa, 1992), and the impact of economic variables on election outcomes (Jacobson and Kernell, 1983). But, there is no systematic analysis of the relationship between redistricting and candidate behavior. The only study of the supply-side of redistricting and minority representation is an analysis of black mayoral elections that concludes black incumbents deter future black challengers (Watson, 1984).

quences, the supply-side perspective cautions that all outcomes are dependent on the calculations of potential candidates. We argue that individual politicians acting in their own self-interest create a collective action problem for a majority in the black community that may tip the balance of power to a minority of black voters and white moderates in the district, or in extreme cases undermine the central goal of electing black representatives. Ironically, the collective action problem is most likely in newly created black-majority districts because of the absence of institutions that could channel the ambition of competing black candidates.

We examine this collective action problem with a unique data set that includes the race of every candidate in House districts that were at least 30% black in 1972, 1982, and 1992.[2] The first section of the chapter assesses the goals of racial redistricting and explores the impact of the collective action problem on prospects for attaining those goals. Next we examine the pervasiveness of the collective action problem and describe how it has helped produce a shift from "traditional" black leadership—leaders who had their roots in the civil rights movement and in the African-American community they would represent—to more centrist, "new style" leaders who work more closely with whites in mainstream politics.

THE COLLECTIVE GOAL AND THE COLLECTIVE ACTION PROBLEM

A central political goal of the civil rights movement in the last twenty years has been to elect more black politicians. Most individuals in the black community have agreed on this collective goal for symbolic and policy reasons: black leaders serve as role models for the community, stimulate political participation, provide the political system with greater legitimacy, and enhance the likelihood of substantive representation (Clay, 1993; Guinier, 1991a: 1091). The election of African-Americans is a collective good in the classic sense: it is non-exclusive (once it is provided to a given district or state no voter can be prevented from "consuming" the symbolic good) and indivisible (one person's enjoying the representation does not detract from another's consuming the good).

The collective nature of this goal was emphasized by former Rep. Mervyn Dymally (D-CA), "(T)he black power movement is based on a concept of community. Black self-interest focuses not on the ambition of a particular individual, but on the entire black community" (1971, 50). Ironically, personal

[2] We only examine black districts, though many of the same problems are evident in the new Hispanic-majority districts. The central theoretical reason for excluding the new Hispanic districts is that bloc voting is not as pervasive in the Hispanic community as in the black community, and thus one of the assumptions of our theory is not met. The 30% cutoff was chosen because below that level, blacks have very little chance of being elected. The only exception in the current House is Gary Franks (R-CT). Franks shows that black conservatives may have increasing opportunities in the Republican Party, but in most districts the Democratic Party is the only realistic outlet for black candidates. We therefore limit our study to Democratic primaries.

ambition may undermine the provision of the public good (i.e., prevent the black community in a congressional district from electing a black to Congress). When new black-majority districts were created in 1992, dozens of black politicians had a realistic chance of being elected for the first time in history. This pent-up supply of black politicians, the absence of political institutions capable of channeling ambition, and racial bloc voting create a potential collective action problem for the black community analogous to Hardin's "tragedy of the commons" (Hardin, 1968; Olson, 1965). For example, if one white candidate and four black candidates run in a district that is 51% black, the white candidate will probably win. In such cases, the collective good for the African-American community can only be provided if the individual ambitions of various politicians can be controlled. Many politicians voluntarily sacrificed their political interests for the collective good, but altruistic behavior cannot be relied upon to solve this collective action problem. Institutional arrangements are generally required, but the most obvious solutions—selective recruitment and endorsements by groups or parties—are rarely successful in an era of candidate-centered campaigns.

The collective action problem is most likely in districts where blacks have a slim majority. In urban districts such as in Detroit (15th district), Baltimore (7th), and New York City (11th), the coordination problem is not evident because the districts are more than 70% black. A white candidate probably would not win under any circumstances (for example, if a white won a divided primary, the black community could unite behind a single independent candidate in the general election and probably prevail). But as the percentage of black voters falls closer to 50%, the likelihood of a white candidate winning the primary increases.[3]

Personal ambition is not the only cause of a collective action problem; policy considerations may also encourage more than one black candidate to run. For example, if a moderate black is running against a moderate white in a new black-majority district, a liberal black may be unwilling to sacrifice his or her policy views, simply to gain more symbolic representation in Congress. These concerns may lead the liberal black to enter the race, despite the possibility that his or her candidacy might split the black vote and help elect the white candidate. In this way, concerns about the nature of the public good to be provided (the type of black elected to Congress and the substantive representation he or she provides) may undermine the provision of that good (the election of a black to Congress).[4]

Policy differences among black candidates typically do not lead to the election of a white. Instead, the collective action problem is likely to affect substan-

[3] Obviously there is a coordination problem for white candidates as well, but their ability to affect the outcome of the election is limited. If the black community solves the coordination problem in a black-majority district, a white candidate will probably not win, even if he or she is the only white running. White Democrats have won elections in black-majority districts (Peter Rodino, D-NJ, and Lindy Boggs, D-LA, were the two most recent), but currently there are no white representatives in black-majority districts.

tive representation: in primaries with several black candidates, a black moderate may win the election with the plurality support of a small number of blacks and most of the white Democrats in the district. Many whites are not comfortable with an activist civil rights, redistributive agenda, and are especially threatened by black separatist rhetoric (Edsall and Edsall, 1991, especially chap. 3). These swing voters support moderate blacks over liberal blacks, which creates an opportunity for strategic behavior by black moderates who may pursue the centrist voters. Later in this chapter we explore in greater detail these differences in the substantive representation provided by these "new style" black politicians who actively cultivate biracial coalitions, and "traditional" black politicians who rely on the votes of their black constituents.

These substantive disagreements within the African-American community raise fundamental questions about defining "representatives of their choice." The political science and legal literature on the topic, the Supreme Court, and Congress assume that if given the opportunity (through black-majority districts) blacks will elect leaders who represent their interests.[5] But even disregarding the small but growing black political right (Walter Williams, Thomas Sowell, Clarence Thomas, Shelby Steele, The Lincoln Institute, etc.), *black interests are not monolithic*. If there are several black candidates, each representing a different part of the ideological spectrum and pursuing different political coalitions, it may not be possible to define a single representative of choice.

The remainder of this chapter investigates the implications of these issues. How often does the collective action problem affect the African-American community's efforts to elect a black to Congress, either by allowing a white to defeat a divided black field or by permitting swing white voters to determine the type of substantive representation that the black community receives?

[4] This fits our theoretical formulation of the collective good as the election of a black to Congress. With many collective action problems, individuals derive identical levels of benefits from the provision of the public good. For example, all ships passing a lighthouse at night receive a similar benefit from the light. This assumption does not necessarily hold in black-influence or black-majority districts, because different voters may value the contrasting policy platforms of competing candidates differently. Liberal voters may derive substantial benefits from the policy positions of a leftist candidate, while moderate voters may receive less utility from those positions. Conversely, centrist voters will receive greater benefits from the policy stands of a moderate candidate than will liberal voters. Thus, while all members of the black community may prefer that a collective good be provided (e.g., a black elected to Congress), the community may find it difficult to agree on the type of black candidate to be elected.

[5] Justice White's concurring opinion in *Thornburg v. Gingles* (1986) considers a scenario with black Democratic and Republican nominees. But, we have not encountered a discussion of the vote dilution standard in the context of a Democratic primary with black candidates who represent different factions within the black constituency. Until recently, the courts have assumed monolithic black interests. A recent series of Supreme Court decisions (*Shaw v. Reno* 1993, *Miller v. Johnson* 1995, and *Shaw v. Hunt* 1996) signal that the Court is questioning the validity of the assumption of monolithic black interests. Sandra Day O'Connor, writing for the majority in *Shaw v. Reno*, said that the North Carolina redistricting plan "reinforces the perception that members of the same racial group regardless of their age, education, economic status, or the community in which they live think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes" (125 L Ed 2d 511, 113 S Ct, 529).

TESTING THE SUPPLY-SIDE MODEL

To address these questions, we collected data on the race of the candidates and other variables in all House districts with at least 30% black population in 1972, 1982, and 1992. Collecting the data on race was much more difficult than we had anticipated. But after 239 phone interviews, we ascertained the race of the candidates in all 144 districts (see Appendix A for a discussion of our data collection techniques and interviews).

Descriptive data on the level of candidate activity in black districts will reveal if there is any basis for a collective action problem. If new districts release a pent-up supply of black candidates, there should be a significant increase in the number of black candidates in 1992 when compared with 1972 and 1982. As is shown in Table 1, black candidate activity increased substantially in 1992 in districts that were at least 30% black, while there were fewer white challengers in these districts. More than twice as many black candidates ran in black districts in 1992 (80) than in 1972 and 1982 combined (37). Fifty-four of the black candidates in 1992 ran in the 14 new black-influence or black-majority districts. At the same time, the number of whites running fell from 111 in 1972 and 1982 to 45 in 1992. The pattern of increased activity in new districts holds in 1972 and 1982 as well, but there were only 5 new districts in 1972 and 3 new districts in 1982 that were created to enhance black representation, compared with 15 in 1992. Therefore, the mean levels of the number and quality of candidates are much lower for 1972 and 1982 than in 1992. The averages per district are shown in Table 1.

TABLE 1. Candidate Activity in Democratic Primaries in Districts That Are at Least 30% Black

	All candidates			*Candidates receiving at least 5% of the primary vote*		
	1972	*1982*	*1992*	*1972*	*1982*	*1992*
Black challengers						
Mean number	.40	.36	1.7***	.36	.34	1.43***
Mean quality of pool	.96	.81	4.55***	.92	.79	4.17***
White challengers						
Mean number	1.30	1.13	.96	1.10	1.00	.55**
Mean quality of pool	2.56	2.49	1.74	2.36	2.36	1.30*
Number of districts	50	47	47	50	47	47

*Differences between 1972 and 1992 are significant at the .05 level
**Differences between 1972 and 1992 are significant at the .025 level
***Differences between 1972 and 1992 are significant at the .01 level

Note: This table includes only challengers, not incumbents. The differences would be greater for blacks if incumbents were included. The quality of the pool is derived from a four-level measure of quality that is summed across all candidates. Candidates who have held significant elective office receive a four, minor elective and other public office is a three, ambitious amateurs are a two, and regular amateurs are a one. See Canon (1990, 87-92, 165-67) for a more extended discussion of this variable.

An important consequence of this trend is that black voters now have a greater opportunity to elect a "representative of their choice" (even though it may be a second choice, as we discuss more fully below). Supply-side considerations (the absence of black candidates) denied black voters the opportunity to vote for a serious candidate (defined as one who receives at least 30% of the vote) in 64% of the black districts in 1972 and 55% in 1982. This percentage decreased dramatically in 1992 to 25.5%.

This trend marks an especially significant departure from previous patterns in southern politics. Malcolm Jewell notes that candidate activity in southern state legislative primaries in the 1960s was the lowest in the "black belt" (counties with at least 40% black population). He says that these counties were "run by a small clique of politicians hostile to innovation who have maintained a closed political circle, partly to minimize competition and open controversy that might possibly encourage Negro registration and voting" (1967, 34). In 1992, these same areas stimulated a much higher rate of candidate activity than is typical in comparable congressional races. In all incumbent primaries between 1972 and 1988 (n=3,915), 63.9% of incumbents were unopposed. The average quality of the candidate pool (as defined in Table 1) was only .64; in open-seat races it was 6.75 (n=722). In black districts in 1992, the candidate pool quality averaged 1.93 for incumbent primaries (n=30, only 40% were unopposed) and 14.59 in open-seat races (n=17).[6] Clearly black districts in 1992 were a hotbed for activity, rather than a weak spot in participatory democracy.

IMPACT ON SYMBOLIC REPRESENTATION

Nearly four black candidates, on average, ran in every new black district in 1992. Given these levels of candidate activity, blacks should have faced a collective action problem in these districts. Counter to our expectations, however, opportunistic whites did not take advantage of the split black vote in most of these districts. Like much of American society, congressional campaigns remain largely segregated. Of the 144 races in black districts in 1972, 1982, and 1992, only 40 (27.8%) had at least one black candidate and one white candidate. In most of these races, one of the candidates did not run a serious campaign. Only 11 districts (7.6%) had a candidate of each race who received at least 30% of the vote in the Democratic primary.

As a result, there was only one district where a black candidate lost because of a collective action problem (the Ohio 1st in 1992). In four others, the black nominee would have lost had it not been for the runoff election (Florida 23rd, Georgia 2nd, North Carolina 1st, and the special election to fill Mike Espy's seat in the Mississippi 2nd).[7] Four of the five were new black-

[6] Data collected from *Congressional Quarterly Weekly Report* by two of the authors for a study of congressional primary elections from 1972-1988.

influence or black-majority districts (the exception was the Mississippi 2nd, which was created in 1982).

The rather surprising absence of a collective action problem requires an explanation. A central reason is a sense of fairness among potential white candidates and the perception that it is "the blacks' turn." Two white Democratic state legislators whom we interviewed cited the creation of the black-majority district as their main reason for not running in the North Carolina 1st. One said, "The first district was created to elect a minority candidate and I think that is a good thing. I would not want to stand in the way of that. I would never consider running in the 1st, not now or in the future." The other also cited "not wanting to step on toes" in the new district, but also was realistic in recognizing she would not be able to win because she is white (personal interviews, 5/28/92). The aggregate data presented in Table 1 also support this conclusion (recall that the mean number of non-frivolous white challengers in black districts fell by almost 50% between 1982 and 1992).

Sometimes the decision of whites not to run in black districts was not entirely voluntary. Pressure from the black community contributed to incumbent Robin Tallon's decision not to run for reelection in the newly created black-majority 6th district in South Carolina. Despite having to face a constituency with 60% new voters, Tallon originally announced his plans to run for reelection, saying that his campaign would "promote racial harmony" (Duncan, 1992: 2536). Tallon had always received strong support from the 40% of the black voters in the old 6th District in each of his elections since 1982. However, Phil Duncan reported that his "decision to run met with considerable criticism from the black community; some of the black aspirants for the 6th faulted him for trying to block minority political empowerment." Tallon had a change of heart just minutes before the filing period closed on June 25th. He decided not to run, saying that his campaign would "further divide the races (and) cause racial disharmony and unrest" (Duncan, 1992: 2536). Districts with runoff elections also may deter whites from running in black majority districts, just as blacks were deterred by runoffs when the districts were black majority. For example, according to a state party official, Claude Harris, the incumbent in the Alabama 7th, would have run in the new black majority district had it not been for the runoff; instead he retired (personal interview, April 5, 1993).

[7] However, one cannot make firm conclusions about the impact of the runoff provision on the behavior of candidates and voters. If several black candidates split the black vote and one white candidate wins the initial round of a two-stage primary, one cannot assume that the same white would have emerged the winner in a plurality-vote system. The same black candidates might have solved their collective action problem and united behind a single candidate if the runoff primary had not helped ensure the eventual election of an African-American. Similarly, black voters may be more strategic in their behavior in a plurality election, supporting a candidate who might be their second choice (but black) to avoid electing a white candidate. A parallel argument for the motivations of white candidates and voters in white majority districts is made by Gregory G. Ballard (1991, 1153). See also, V.O. Key (1956, 410, 420-23).

IMPACT ON SUBSTANTIVE REPRESENTATION

Although our data indicate that the segregation of campaigns and runoff provisions generally further the goal of electing more blacks, the collective action problem may greatly alter the substantive representation received by the black community in congressional districts, tipping the balance of power in the district, in some cases, to white voters. Ideological and policy disagreements within the black community help produce this outcome by encouraging different types of black candidates to run for Congress. As we note above, moderate white voters, especially in the south, will be more likely to support "new style" black candidates who cultivate biracial coalitions than "traditional" blacks who appeal primarily to their African-American constituents.

"Traditional" black candidates, with backgrounds in the civil rights movement and black churches, typically come from the liberal wing of the Democratic party. These candidates tend to think of themselves and the black community as political outsiders who must form political organizations separate from the larger white community in order to battle for a greater share of the political pie. Many of these black politicians have little or no prior experience in party and elective politics, and more importantly, value their outsider status (Dymally, 1971; Holden, 1973). This outlook was especially prominent in the early stages of the "black electoral success" period. According to one black politician who was elected mayor of a Southern city in 1969, "Black elected officials in the South can not become hung up on party politics and be thus bound up by party loyalty....In the South the black man can be rendered useless if he allows himself to be put in the pocket of the party boss or if he allows himself to come up through the party structure" (Howard Lee, quoted in Dymally, 1971: 76). Adam Clayton Powell more explicitly described the value of remaining independent from the white establishment: "Black organizations must be black-led. The extent to which black organizations are led by whites, to that precise extent are they diluted of their black potential for ultimate control and direction....Black people must support and push black candidates for political office first..." (quoted in Dymally, 1971: 65-166). More recently, Bennie Thompson, who was elected to replace Mike Espy in Mississippi, emphasized this separatist position. Espy was noted for his moderation on racial issues and his appeals to white voters. Thompson criticized this moderation, saying that blacks voters "don't like how the district has gone back to the plantation owners." Thompson vowed to return more power to blacks and consistently rejected biracial politics during the campaign, saying, "You've got to be one or the other. Ain't no fence. The fence is torn down now" (*Congressional Quarterly* 3/6/93, 537).

Not all black politicians or members of the black community support "traditional" black positions. In the late 1980s and early 1990s more and more black politicians began advocating a moderate approach that emphasizes compromise and accommodation with the white community rather than confrontation and separation (Perry, 1990). These "new style" black politicians tend to follow more

mainstream lines of career development and are more closely tied to the party establishment. Sanford Bishop, for example, served in the Georgia state legislature for 16 years before defeating white incumbent Charles Hatcher (D-GA) in a 1992 primary. The black challenger campaigned on his political experience, arguing that he "represents a new generation of leadership" (Duncan, 1992: 2536). In Louisiana's 4th district, state senator Cleo Fields campaigned hard for the support of white voters. According to *Congressional Quarterly*, "Fields has always played down racial issues and done as much as possible to raise the comfort level of his white constituents. At one point in the campaign, he distanced himself from Jones (his runoff opponent, a black state senator), who attacked a white newspaper editor as 'some racist cracker'" (*Congressional Quarterly*, 1993: 90).

Aggregate-level evidence suggests that the electoral climate facing black candidates has gradually changed to favor "new style" blacks over "traditional" ones. In the 38 congressional districts that elected blacks in 1992, the percentage of black voters fell five points from the level of the previous decade (61.8% in 1982 to 56.5% in 1992; the percentage of white voters climbed from 31.7% to 36.3% in these same districts). As Strickland and Whicker argue, blacks who are political insiders and project a conservative image are more likely to appeal to white voters. They say, "Only by demonstrating expertise can black candidates in black-white contests overcome individual racism where individuals assume that blacks are inferior and less able to govern" (1992, 208-209). Table 2 suggests that the "new style" black politicians are increasingly taking advantage of the changed electoral environments by appealing to white voters. From 1972 to 1980, 38.5% of the blacks elected to the U.S. House had no previous elective experience, and only 15.4% had more than ten years of previous experience. The pattern changes significantly in 1992. Of the 16 new black members elected, only one (6.2%) had no prior experience. Eleven (68.8%) had more than ten years of political experience, which makes them far more experienced than the average new white member of Congress.

TABLE 2. Prior Political Experience of Black Members of the U.S. House, 1972-1992

Prior experience in public office	*Year elected to Congress*		
	1972-1980	*1982-1990*	*1992*
No experience	38.5%	23.5%	6.2%
More than zero years, but less than ten years of experience	46.1%	47.1%	25%
Ten or more years of experience	15.4%	29.4%	68.8%
Number of members	13	17	16

The dramatic success of "new style" black congressional candidates can be attributed in part to the dynamics of the collective action problem and substantive representation described above. Democratic primaries in newly created black-

influence and black-majority districts often pit one or more liberal "traditional" black candidates against one or more moderate "new style" black candidates. If the black community splits its support between traditional and new style candidates, whites can play a pivotal role in deciding which candidate will represent the district. In districts with both a new style black and traditional black candidate, the presence of a white candidate can influence the outcome of the Democratic primary in one of two ways. In states without runoff elections, a divided black vote can translate into a victory for the white candidate. In states with runoffs, the new style black candidate has to compete with the white candidate for moderate voters, thus creating a greater likelihood that the traditional black candidate will win. If no white candidate enters the race, we argue that moderate white voters will support the new style black candidate and greatly increase his or her chances of winning the election. However, if the blacks solve their collective action problem and unite behind a single candidate, a traditional black will win.

Because data on the coalitional and ideological politics of black candidates in Democratic primaries is both scarce and difficult to collect, we test our hypotheses only for the 1992 election. We examined the 17 congressional districts in which a newly elected black candidate emerged from the Democratic primaries and the new black influence district (the Ohio 1st) in which a black did not win.[8] Sixteen of the 18 cases support our theory. In seven districts a white candidate competed with at least one liberal black and one moderate black candidate. Either a liberal black won as the moderate vote was split (CA37, FL3, FL23, GA11, NC1, MS2), or a white won because of the divided black vote (OH1). In seven other districts no white candidate emerged, and one of the black moderate candidates defeated one or more black liberal (AL7, IL1, IL2, LA4, MD4, NC12 and SC6). In two districts (FL17 and TX30), a dominant black candidate ran with no white opposition. In these cases, there is no collective action problem and a liberal black who is strongly supported by the African-American community wins. Two cases were not were not consistent with our theory. In the Georgia 2nd, Sanford Bishop defeated a white incumbent Charles Hatcher, and in the Virginia 3rd, Robert Scott won a low turnout (15%), issueless primary over two black moderates. In the Georgia case our theory predicted that a traditional black should have won, but Bishop clearly ran as a new style black, touting his legislative experience and attacking Hatcher for his 819 overdrafts. In Virginia, ideology and racial politics simply did not emerge in this contest between three similar black candidates. The most conservative of the three candidates, Jacqueline G. Epps, should have won, according to the expectations of our theory (with white support in a divided black field). But, Scott used his superior name-recognition and fund-raising ability to win this low-key race.

[8] We included the special election to fill Mike Espy's seat in this analysis. To ascertain the ideological positions of the various candidates we conducted 30 personal interviews and consulted newspaper articles, *Congressional Quarterly Weekly Report*, and various editions of the *Almanac of American Politics*.

This limited test of our supply-side theory suggests that the presence or absence of a white candidate can strongly influence the type of candidate who wins the Democratic primary in black-influence or black-majority districts.[9] Ironically, in newly created districts of this type, the black community is often unable to agree on the type of candidate that best represents its interests, and thus white voters play the decisive role in determining how the district is represented. While this may be good or bad, depending on one's normative perspective, the debate thus far has ignored this issue. We expect that these supply-side effects will have a significant impact on the type of representation that the new black districts receive. Candidates elected from biracial coalitions are likely to exhibit more moderate behavior and pursue different policy agendas than "traditional" African-Americans elected from a unified black electorate. These substantive effects are an important topic for future research.[10]

Appendix A—Data Collection and Interviews.

The first set of interviews conducted for this study was part of an in-depth case study of the candidate emergence process in the North Carolina 1st in 1992 (Canon, Schousen, and Sellers, 1994). We conducted 37 interviews with 34 people, including newspaper reporters, Democratic Party chairs of the most populous counties in the district, members of the General Assembly, a member of the U.S. Congress, and all of the identified potential candidates. The interviews ranged in length from twenty minutes to more than two hours, with an average length of about one hour. All but five of the interviews were face-to-face (citing time constraints, three candidates and two informants would only agree to phone interviews).

In the second stage of the project, we collected data on the race of all candidates in 1972, 1982, and 1992 in districts that were at least 30% black. This proved much more difficult that we thought it would be. We were a bit surprised to discover that no institution systematically records the race of House candidates. We called the Joint Center for Political Studies, the Black Congressional Caucus, the Urban League, the NAACP, Vote America, the Democratic National Committee, and the Democratic Congressional Campaign Committee. The Joint Center was the most helpful; one of the researchers working on the *Roster of Black Elected Officials* told us that they considered expanding their research to include candidates who lose, but they did not have sufficient funding. After pursuing those dead-ends, we naively assumed that we would be able to identify the race of House candidates from the public record. Many futile hours at the micro-

[9] The same pattern of coalitional politics should be evident even in the post-*Shaw v. Hunt* era in which creating black-majority districts will become increasingly difficult, as long as the bloc of African-American voters is sufficiency large.

[10] One of the authors (David Canon) is currently working on a book, *Race, Representation, and Redistricting, in the United States Congress*, that will examine the impact of supply-side effects on behavior in Congress. The book will also address the normative issues that are not tackled here.

film machines and pouring through *Congressional Quarterly Weekly Report* disabused of us that notion. There were two problems with the public record: first, minor candidates (those receiving less than 10% of the vote) often were mentioned only in passing, and second, the race of leading candidates was not noted in some cases. Next, we called party officials (starting with the state party headquarters in each relevant state), newspaper reporters, campaign workers, offices of incumbents who were still in office (this approach was especially useful for 1992), and the candidates themselves to fill in the substantial gaps. After 239 phone interviews, ranging in length from a minute or two ("Nope, don't know anything about that campaign. Try Mr. X. He would know"), to more than a half an hour, we were able to identify the race of all the candidates.

ESTIMATING THE IMPACT OF VOTING-RIGHTS-RELATED DISTRICTING ON DEMOCRATIC STRENGTH IN THE U.S. HOUSE OF REPRESENTATIVES

Bernard Grofman and Lisa Handley

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WHILE THIS ASSERTION HAS BEEN DENIED BY CIVIL RIGHTS GROUPS such as the NAACP Legal Defense and Educational Fund (NAACP LDF, 1994), there appears to be a widespread agreement across party and ideological lines that the creation of a large number of new majority black districts in the South (and, perhaps to a lesser extent, the creation of new majority black and majority Hispanic districts elsewhere in the country) contributed in no small part to the change in party control of the House that occurred between 1990 and 1994. For example, according to George Will (1995), "(r)acial gerrymandering is one reason that Newt Gingrich is speaker." More recently, the Voting Rights Act has been blamed for the continuing Republican control of the House in 1996 despite the reelection of a Democratic president. Thus, the argument is made that gains in descriptive minority representation have come only at the cost of probable defeat of minority-supported initiatives in the House.[1]

In addition, the claim has been made (e.g., by Lublin, 1997) that there is, in general, a trade-off between descriptive representation of minorities and the ability of minorities to gain policy outcomes to their liking which holds even if Democrats were to have remained (or to become again) the majority party in the House (or in any given Southern state legislature).

Here we focus on African-African representation in the House in 1992 and

[1]Lublin (1995b) observes that "the aggregate effect of racial redistricting has been to make the House less likely to adopt legislation favored by African Americans."

1994. By comparing the results of the congressional elections in 1992 and 1994 under the 1990s lines with earlier outcomes, we provide new empirical evidence on the extent to which 1990s redistricting leading to the creation of new black majority congressional seats (1) negatively impacted Democratic seat share, and/or (2) negatively impacted mean and median congressional liberalism. While our results suggest that the *direct* impact of racial redistricting on Democratic congressional losses in the South has been somewhat exaggerated, we offer a theory of what we call the "triple whammy" that leads us to an extremely negative view of the long run prospects for the Democratic party in the South. In our view of what has been happening in the South, race and realignment go hand in hand.

DATA ANALYSIS

Impact of Districting/Distribution of Black Population on Democratic Seat Share

We believe it important to distinguish between three easy-to-confuse questions. The first is "Did the Democrats suffer greater losses between 1990 and 1994 in the areas of the country where (new) black seats were drawn than elsewhere?" The second is "If the districting lines in 1990 had been used (in the South) in 1994 , would Democrats have done better; and, the flip side, if the districting lines in 1994 had been used (in the South) in 1990, would the Democrats have done worse?" The third is "Would the optimal arrangement of black voting strength across congressional districts have permitted the Democrats (in the South) to hold on to some of the seats they lost?" The answers to these different questions need not point in the same direction vis-a-vis the partisan consequences of districting. Which question you answer largely determines whether you conclude that the Voting Rights Act proved very costly to House Democrats in the 1990s.

For the 1994 versus 1990 comparison, our answer to the first question is no,[2] our answer to the second question is yes, but not to any great extent; and our answer to the third question is yes for sure, but not nearly as many seats as you might think, although more than one would conclude in looking only at the answers to the previous two questions.

Let us look first at the question, "Did the Democrats suffer greater losses between 1990 and 1994 in the areas of the country where (new) black seats were drawn than elsewhere?" Taking this question as the relevant question to be answered, the civil rights attorney Laughlin McDonald (1995) asserts that the impact of the VRA on the Democratic party has been much exaggerated. He points out that in the nine states that drew new predominantly minority districts after the 1990 census, Democrats lost 19% of their 1992 seats in the 1994 election; in the 41 other states, they lost 21%.[3] Moreover, even if the Democrats had

[2] However, we would have to answer yes to the first question for a 1996 versus 1994 comparison.

[3] Moreover, in House elections, a swing ratio near 2 has characterized the past several decades (Brady and Grofman, 1991). Given the striking decline in Democratic mean congressional vote share from 1992 to 1994, a seat loss of 52 seats is not that out of line.

retained every one of their 1992 House seats in the nine states that drew new black majority seats—completely bucking the national trend—the Republicans would *still* have gained control of the House in 1994.

Of course, looking at only a single year can be misleading. In *1992* most of the limited number of Democratic losses did occur in the nine states with new majority minority seats; thus looking only at 1994 results understates the impact of 1990s districting on Republican gains. But even taking these Democratic 1992 losses into account does not change the basic result that Republican congressional gains between 1990 and 1994 occurred virtually everywhere. Between 1994 and 1996, however, the Republicans gained a handful of Southern seats in the House (some by virtue of incumbents changing their party affiliation) at the same time as they were losing seats elsewhere in the nation. But, on average, at least for elections to the House, Republicans also gained more votes compared with 1994 in the South than elsewhere.

The answer to the second question posed above, "If the districting lines in 1990 had been used in 1994 (and in 1992), would Democrats have done better; and, the flip side, if the districting lines in 1994 had been used in 1990, would the Democrats have done worse?" is a subject of some dispute in the literature. For example, Lublin (1995a, b), who looks at seats decided by relatively small margins which lost substantial black population between 1990 and 1992 and which shifted to the Republicans by 1994, notes that many of these seats could have been kept in Democratic hands if the black population in the district had been kept at its previous levels. Lublin (1995a, emphasis ours) concludes that "the creation of new majority-minority districts assured that the Republicans won *solid* control of the House in 1994." However, we should not read too much into this claim. Even using Lublin's method of calculation, it seems to us unlikely that drawing new black majority seats during the 1990s round of districting cost the Democrats more than 10 of the 62 seats they dropped between 1990 and 1994.

More importantly, if we look at the question of the link between Republican gains and districting using a methodology that is sensitive to the overall consequences of changes in the distribution of black strength for the probability of Democratic success rather than just singling out just those districts where the loss of black population might have affected close contests, we get an estimate of the impact of racial districting that is considerably lower than that obtained by Lublin. In net terms, taking into account countervailing factors such as the certainty of Democratic success in the new heavily black seats, we find that as few as 2-5 of the 24 Southern congressional seats lost by the Democrats between 1990 and 1994 might be seen as the direct result of the racial aspects of 1990s redistricting. The rest of the Democratic losses are attributable to a quite simple fact—Republican congressional candidates across the board got a lot more votes in the South in 1994 than they did in 1992 and fewer votes in 1992 than in 1990 as well. Indeed, Republicans showed greater vote gains in 1994 in the deep South than in the rest of the country.[4]

Before we can explain the basis for our empirical results about this second question, we need to lay some methodological groundwork.

Let us imagine a population (e.g., an electorate) decomposed into a set of mutually exclusive and exhaustive categories, C_1 through C_n. These may be based on characteristics such as attitudes or demographic attributes. Let Y be the variable whose change in value we seek to account for, i.e., let Y be the dependent variable (e.g., turnout). Let p_{it} be the proportion of the total population that group i comprises at time t. Let y_{it} be the (perhaps estimated) value of the dependent variable in the ith group at time t. We wish to explain the change in Y over time, i.e., to account for

$$\Delta Y = Y_0 - Y_t$$

as a function of changes in composition (i.e., differences between p_{it} and p_{i0}, in each of the categories), and changes in behavior (i.e., differences between y_{it} and y_{i0}, in each of the categories).[5]

Now let

$$(1)\quad \Delta Y_i = y_{i0} - y_{it}$$

$$(2)\quad \Delta P_i = p_{i0} - p_{it}$$

Abramson and Aldrich (1982) use the formula in Eq. (3) below as a measure of the impact on behavior (in their case turnout) of changes in the variables (e.g., partisanship) they study.[6]

$$(3)\quad \frac{\sum_{i=1} y_{it}\Delta p_i}{\Delta Y}$$

The numerator of Eq. (3) is the difference between the value of the independent variable that would have been found had the proportion of the population in each category remained unchanged from time 0 to time t while the behavior of each of the population groups was that found at time t, and the value of the independent variable that actually obtained at time t,[7] i.e., it can be thought of as a measure of the compositional change.[8]

[4] It is also important to note that, thanks to reapportionment and sun-belt population gains relative to the rest of the country, there were more 9 seats in 1994 (or 1992) in the South than in 1990. Thus, 1990s Republican gains in vote share had a greater impact on Republican seat gain in the South relative to 1990 than in areas of the country with constant or declining congressional delegation size.

[5] For example, using the notation of Cassel and Luskin (1981: 1327-28), $p_{it} = s_{ijkt}$ where, in their notation, i indicates the proportion of the electorate in the ith category of partisanship, j the jth category of efficacy, and k the kth category of some third variable, while t is, as here, a subscript for time. This example demonstrates how the C_i categories can be based on one or more polychotomous variables.

[6] Their notation is somewhat different from ours.

[7] The expression shown in Eq. (3) is what Cassel and Luskin (1988) denote as A_i.

Cassel and Luskin (1988) strongly critique Eq. (3) as a measure of the contribution of compositional change (to total turnout decline) by noting that the value of the expression in Eq. (3) can readily exceed one.[9] We can also readily provide examples in which its value is negative. Cassel and Luskin take such findings to mean that the expression cannot possibly measure the proportion of the change in behavior (turnout) that can be accounted for by any given factor. In like manner it can be shown that the equation analogous to Eq. (3) for attributing the magnitude of *behavioral* change, shown as Eq. (4) below, is also flawed in that it can take on values below zero or above one.

$$(4)\quad \frac{\sum_{i=1} p_{it}\Delta Y_i}{\Delta Y}$$

To understand what is going on we make use of the following algebraic identity:

$$(5)\quad Y_0 - Y_t = \sum_{i=1}^{n} y_{it}\Delta P_i \qquad \text{(a) composition effect}$$

$$+ \sum_{i=1}^{n} p_{it}\Delta Y_i \qquad \text{(b) behavioral effect}$$

$$+ \sum_{i=1}^{n} \Delta P_i \Delta Y_i \qquad \text{(c) interaction effect}$$

Like Abramson and Aldrich we treat Expression (5a), which has a ΔP_i term in it, as a measure of compositional change for a fixed value of the y_i, namely y_{it}. In like manner we treat Expression (5b), which has a ΔY_i term in it, as a measure of behavioral change for a fixed value of the p_i, namely p_{it}.[10] However, *we have added an interaction term to complete the algebraic identity.*

[8] A similar formula is used by Boyd (1981) and Cavanagh (1982), each of whom looks at the effects on turnout of growth in the proportion of the eligible electorate falling into the oldest and the youngest age cohorts, and at the turnout consequences of permitting eighteen-year-olds to vote. Both authors estimate effects by computing a hypothetical turnout in 1976 on the assumption that age-specific turnout rates had stayed constant over the period and that the only thing that changed was the proportion of eligibles who fell into each age grouping. Each then takes the difference between hypothetical turnout and actual turnout (normalized by the total decline in turnout) to be the measure of age-related compositional changes, i.e., they calculate an expression identical to that of Expression (3) except that except that y_{i0} is used instead of y_{it}. In our terminology here the C_i are age segments of the population and Y again is turnout.

[9] Categories based on efficacy, partisanship, etc. See earlier footnote .

[10] We may readily develop an analogue to Expression (5) where we look at the value of our fixed parameters at time zero rather than at time t. See below.

This decomposition model has been used in published work by only a few political scientists (Grofman and Handley, 1991; Krehbiel and Wright, 1993). John Jackson, at the University of Michigan, like one of the present authors, independently derived the above methodology, but then discovered it to be already known in the sociology literature (John Jackson, personal communication, October 1989). Eq. (5) provides a useful methodology to estimate the relative magnitude of changes in districting lines (composition) and changes in voting (behavior) on Democratic congressional success from 1990 to 1994 (and/or from 1990 to 1992).

For the states with above 10% black population, we show in Table 1 the percent Democratic in the House in 1994 by percent African-American in the district. The format for this table parallels that in Tables 15 and 18 (page 30 and page 33) in the Handley, Grofman and Arden chapter in this volume. Those earlier tables show data for 1990 and 1992, respectively.

We shall make use of the data in these tables and the formulas of Eq. (5) to calculate the impact of redistricting related changes in the distribution of black population across districts on Democratic seat share in the House for the South. It is in the South where we expect large effects to be present. If they are not found there, they will be found elsewhere in the nation. When we calculate the three formulas shown in Eq. (5) for the data in Table 1 in this chapter and Table 15 in the Handley, Grofman, and Arden chapter for the eleven Southern states for which data is provided, what we are doing is as if we were rerunning the 1994 House elections in the South with 1990s district lines and rerunning the 1990 House elections in the South with 1994 levels of Republican success in the various racial categories.[11] Similarly, when we calculate the three formulas shown in Eq. (5) for the data in Tables 18 and 15 in the Handley, Grofman, and Arden chapter, what we are doing is as if we were rerunning the 1992 election with 1990s district lines and rerunning the 1990 election with 1992 levels of Republican success in the various racial categories

Performing these calculations for the 1990 to 1994 comparison, we find that a 17% decline from 1990 to 1994 in the percentage of House seats held by Democrats in the (eleven state) South is apportioned into 17 points of behavioral change (i.e., increased Republican vote share) and only 4 points of compositional (i.e., redistricting-related) change, with -4 points of interaction effect. If we allocate the interaction equally to the compositional and behavioral components, then only 2 percentage points, equaling a little over 2 seats (2/17 x .17 x 125) would be attributed to the impact of race-related districting in the South. If, more plausibly, we allocate the interaction effect in proportion to the magnitude of the behavioral and compositional effects, we would still only attribute 4 Southern seats (4/21 x .17 x 125) to the race-related effects of 1990s districting. Even if we allocate the interaction effect entirely to the compositional component, we would still only attribute 5 seats (4/17 x .17 x 125) to the race-related effects of 1990s

[11]Because we do our calculation in percentage terms, there is an additional factor that needs to be taken into account, namely the additional nine seats added to Southern congressional delegations after the 1990 census.

TABLE 1. Percent Democrats in Congress by Percent African-American in District 1994

	Percent African-American In District											
South	*0-9.9*	*(N)*	*10-19.9*	*(N)*	*20-29.9*	*(N)*	*30-39.9*	*(N)*	*40-49.9*	*(N)*	*50+*	*(N)*
Alabama	50.0	(2)	100.0	(1)	33.3	(3)	—		—		100.0	(1)
Arkansas	0.0	(1)	100.0	(2)	0.0	(1)	—		—		—	—
Florida	18.8	(16)	33.3	(3)	100.0	(1)	—		—		100.0	(3)
Georgia	50.0	(2)	0.0	(4)	0.0	(2)	—		—		100.0	(3)
Louisiana	—		33.3	(3)	50.0	(2)	—		—		100.0	(2)
Mississippi	—		100.0	(1)	0.0	(1)	100.0	(1)	100.0	(1)	100.0	(1)
N. Carolina	0.0	(4)	50.0	(2)	25.0	(4)	—		—		100.0	(2)
S. Carolina	—		0.0	(1)	0.0	(3)	100.0	(1)	—		100.0	(1)
Tennessee	25.0	(4)	33.3	(3)	100.0	(1)	—		—		100.0	(1)
Texas	52.6	(19)	100.0	(7)	50.0	(2)	—		—		100.0	(2)
Virginia	33.3	(3)	40.0	(5)	100.0	(1)	100.0	(1)	—		100.0	(1)
Total	33.3	(51)	53.1	(32)	33.3	(19)	100.0	(3)	100.0	(1)	100.0	(17)
Non - South												
Delaware	—		0.0	(1)	—		—		—		—	
Illinois	33.3	(15)	100.0	(2)	—		—		—		100.0	(3)
Maryland	0.0	(3)	66.7	(3)	—		—		—		100.0	(2)
Michigan	41.7	(12)	100.0	(2)	—		—		—		100.0	(2)
Missouri	57.1	(7)	—		100.0	(1)	—		—		100.0	(1)
New Jersey	16.7	(6)	50.0	(6)	—		—		—		100.0	(1)
New York	45.5	(22)	33.3	(3)	—		100.0	(3)	—		100.0	(3)
Ohio	15.4	(13)	100.0	(3)	0.0	(1)	0.0	(1)	—		100.0	(1)
Pennsylvania	44.4	(18)	100.0	(1)	—		—		—		100.0	(2)
Total	36.5	(96)	66.7	(21)	50.0	(2)	75.0	(4)	—		100.0	(15)

districting. Thus, the *direct* effect on Democratic seats of changes in the distribution of black population across Southern districts[12] is at least a two-seat loss in the House for the Democrats and at most a five-seat loss for the Democrats.[13]

[12]Of course there are also some non-South states with substantial black populations, but the partisan effects of black population shifts across House districts in these states is of a much smaller magnitude than for the South.

[13]Using a variety of statistical methods, Petrocik and Desposato (1995) reach nuanced and relatively conservative conclusions about the impact of race-related districting on Democratic success that are not that different from those of the present authors. They note (p. 16, emphasis in original) that "had the political mood been less hostile (especially in 1994) it's doubtful that Democratic losses would been so large. They also emphasize that Democrats in the South did a rather good job of redrawing lines given the two severe constraints they faced: (1) the need to draw additional black majority seats lest plans be denied preclearance; (2) a reduction in both the number of and the loyalty of Democratic party identifiers in the South (see esp Figure 2). In particular, they argue that many of the black voters used to form the new black majority seats were pulled from districts that were already Republican, thus minimizing the costs to Democrats; and that the burden of running in a district with radically redrawn district lines was placed on Republican incumbents to the greatest extent possible. Nonetheless, since there were more Democratic seats to begin with, more 1990 Democratic incumbents were impacted by changes in their old district lines than were Republican incumbents. They also point that, especially in 1994, there was both a decline in black turnout relative to white turnout in the South and a major decline in the willingness of white voters to support Democratic congressional candidates. Their bottom line is that "New voters, the loss of loyal black voters, and the anti-Democratic mood were all necessary for the losses."

However, this estimate of redistricting effects is almost certainly an understatement because it skips over what happened in 1992. One reason the Republicans got more votes in 1994 than in 1990 is that 1990s line drawing impacted white Democratic incumbents. There were somewhat fewer white (Southern) Democratic incumbents in 1994 than there otherwise might have been as a result of the 1992 elections, [14] and some Democratic incumbents were induced to withdraw from politics prior to the 1992 election.[15] Thus, some of the impact of the 1990s line drawing on Democratic seat loss will be missed if we simply do a 1994 versus 1990 comparison.[16] Taking these earlier effects into account would increase the importance of the VRA as a factor in Southern Democratic congressional decline, and would give estimates of the magnitude of the racial districting effect that come somewhat closer to the magnitude of the effect estimated by Lublin. But, even taking into account both direct effects in 1994 and the continuing effects of the 1992 election and pre-election choices made by Democratic office-holders, we would still conclude that the consequences of drawing new black majority seats cannot be blamed for the shift in control of the House in 1994.

Now let us turn to the third of our questions about redistricting impact: "Would the optimal arrangement of black voting strength across congressional districts have permitted the Democrats to hold on to some of the seats they lost?"

In 1994, in the South, districts with between 20 and 30 percent black population show evidence of a possible backlash effect in that these districts are actually less likely to elect Democrats than districts with only 10-20 percent black populations. Thus, based on 1994 election results, in the South, it would appear that Democrats would have been well-advised to avoid creating districts with between 20 and 30 percent black population. By turning two districts with 20-30 percent black population into one district with 30-40 percent black population and one district with 0-10 percent black population, they would have raised the expected number of Democratic successes in 1994 in the two seats from .67 to 1.33.

[14] Using an eight state definition of the South, and using a methodology that draws on ideas in Gleaming and King (1994), Hill (1995) estimates that redistricting cost the Democrats four seats in the South in 1992.

[15] Performing analogous calculations to those above for the 1990 to 1992 comparison, we find that a 5% decline in the percentage of seats in the (eleven state) South from 1990 to 1992 held by Democrats is apportioned into 5 points of behavioral change (i.e., increased Republican vote share) and 6 points of compositional (i.e., redistricting-related) change, with -6 points of interaction effect. If we allocate the interaction equally to the compositional and behavioral components, then only 3 percentage points, equaling a little under 4 seats (3/5 x .05 x 125) would be attributed to the impact of race-related districting. This result does not really change much if we allocate the interaction effect in proportion to the magnitude of the behavioral and compositional effects. Even if we allocate the interaction effect to the compositional component to the greatest extent possible, we would still only attribute 6 seats (5/5 x .05 x 125) to the race-related effects of 1990s districting in 1992.

[16] Also, some half-dozen white Democratic House members shifted their allegiance to the Republican party in the 1990s. As we discuss later, we see some of these changes as responsive to a new climate in the South in which the Democratic party is increasingly seen as the party of blacks, both in terms of voters and, increasingly, in terms of office-holders as well.

Based on calculations like these, we can show that, in theory, *ceteris paribus*, had the Democrats made near optimal use of black voters to shore up Democratic seats in the South against the Republican tide, as many as 10-11 seats might have been saved. However, this maximum estimate of 10-11 seats is unrealistic, because, given the geography, it would have been impossible without excessively tortuous lines to convert a large proportion of the 20 to 30 percent black population districts into the districts with between 30 and 40 percent black population that were optimal for Democratic election chances in the South. Moreover, even if compactness could have been achieved given the constraints of geography, gerrymandering that would have been optimal from the perspective of maximizing Democratic congressional seat share in the South (i.e., districts with 30 to 40 percent black population) would seem to be incompatible with the creation of districts from which African-Americans would have had a realistic chance of being elected to Congress from that region, since the latter (except where there are already black incumbents in place) appear to require black populations closer to 50 percent (see e.g., Grofman and Handley, 1995a; Handley, Grofman, and Arden, this volume, and references cited therein; cf. Cavanagh, 1995; Cameron, Epstein, and O'Halloran, 1995).

In the non-South, in 1994, in contrast, districts with 10-20 percent black population seemed desirable to maximize Democratic chances. These findings parallel those in Grofman, Griffin and Glazer (1992). Higher black populations are needed to maximize Democratic success in the South than in the non-South, and spreading black population so as to avoid creating majority black districts is desirable in both South and non-South from the standpoint of maximizing the aggregate election chances of (white) Democrats. However, there is one very important difference between the conclusions reached from examining the data in Table 1 and that reached in the earlier analyses of Grofman, Griffin and Glazer (1992). In the 1990s, in the South, as Democratic support has continued to fall among white Southerners, an even higher black population share is now optimal from the standpoint of maximizing Democratic chances in the House than was true in previous decades. In the 1980s, in the South, what had been optimal for Democratic chances was to maximize the number of districts with between 20 and 30 percent black population. Now, such districts are no longer safe.

Of course, we must be cautious in trying to use the Grofman, Griffin, Glazer (1992) methodology to second-guess (Democratic) districting strategies; the methodology only provides an estimate of the partisanly optimal allocation rule, and it neglects complications such as geographic constraints and incumbency advantages.[17] Moreover, our belief about what is the best districting strategy with respect to black population placement from a partisan point of view may change with new election results, as is evident from our earlier point about the difference between the Grofman, Griffin and Glazer (1992) findings for the South in the

[17] Very similar notes of caution are sounded in Hill (1995: 400).

1980s and our own findings for that region in 1994.[18] Another important point to note is that, as can be seen by reviewing the data in Table 1, it is harder for Democrats to make districting mistakes in the non-South than in the South with respect to how best to locate black population for purposes of partisan advantage.

Impact of Districting/Black Population Distribution on Mean and Median Congressional Liberalism

Lublin (1995a, b) argues that Republican gains made possible by the creation of (additional) black seats, especially those in the South, has the net effect of reducing congressional liberalism, and thus reducing the likelihood that bills supported by black legislators will pass. Also, he notes that the creation of such districts made it more likely that Republicans would win/keep control of Congress. We have already commented on the extent to which Republican gains that can be linked to the VRA can be said to have caused a change in partisan control of the House. Here we wish to evaluate the claim that the net effect of creating black seats is a loss for congressional liberalism. We believe this claim is wrong. Only insofar as the spillover effects of the new seats vis-a-vis Democratic loss operate to shift partisan control of the House will creating new black seats reduce the liberalism of House policy outcomes.

Even if we posit that every new black congressional seat in the South led to a net loss of one white Democrat,[19] calculations using the methodology in Grofman, Griffin, and Glazer (1992), updated by using 1994 ADA scores, shows that creating black seats is pretty much a wash as far as mean liberalism. the average black southern congress member has an ADA score of 85; the average white southern Democrat has an ADA score of only 46 or so, with only minimal variation as a function of how black the seat is in population (except for a couple of seats in the 40-50% black population range where there is evidence of backlash insofar as these district representatives are actually less liberal than those from

[18] Indeed, in our view, the definitive word on how best to understand what population percentage is now needed to give black House candidates in the South a realistic opportunity to be elected has yet been written. In the 1960s and early 1970s, the lack of black registration was the principal barrier to black electoral success. In the late 1970s and through the mid-1980s the principal reason that blacks could not be elected from non-majority black seats was that blacks could not win the Democratic primary given polarized voting patterns and the advantages possessed by white incumbents. Now, the principal barrier to black electoral success in a district that is, say, 35-40% black, is no longer the Democratic primary; rather it is the general election. Because so many whites in the South have become Republicans, for any given (substantial) black population proportion, black success in the Democratic primaries is easier to achieve than it ever has been. On the other hand, being the nominee of the Democratic party is no longer anything like the royal road to inevitable success that it once was, especially if you are black. Growing Republican strength in the South has reversed the relative importance of primaries and generals as barriers to black representation. Republican gains have made it easier for blacks to get elected (in primaries) while Republican gains have also made it harder for blacks to get elected (in general elections). The exact nature of the trade-off between these two countervailing effects is subtle. Modeling the effects of this two-stage electoral game on both partisan and minority representation is a task on which the present authors are currently engaged.

[19] It is highly implausible that we can expect a net loss of more than one Democratic seat for each new black majority seat created—at least in terms of the direct effects of districting.

districts with fewer blacks). In 1994, the average southern Republican has an ADA score around 6, independent of how black in population the district is, with mean decile scores ranging between 4 and 8. thus if we replace two white southern Democrats with a Republican and a black Democrat, we go from a combined ADA of 92 to a combined ADA of 93. Yes, white Republicans are a lot more conservative than white Democrats, but black southern Democrats are equally more liberal than white Democrats elected from non-majority black seats!

Lublin (1995b) argues that the correct way to look at roll-call voting impact is in terms of medians rather than means. In the scenario above the median member of Congress remains the same if we replace two moderates with one extreme conservative and one extreme liberal.[20] However, even though the impact on race-related districting on the overall House median is a wash, since we would argue that the location of the median party voter in the majority party is also important for policy outcomes in the House, if Democrats control congress, policy liberalism is almost certainly aided by the election of black Democrats who shift the Democratic median to the left; on the other hand, if Republicans control congress, policy liberalism is harmed by the election of very conservative Southern Republicans who shift the Republican median even farther to the right. Thus, given the 1994 and 1996 election results, gains in descriptive minority representation have required a price to be paid in terms of negative consequences for policy liberalism in House votes.[21]

DISCUSSION

We have shown that

(1) Through 1994, Democrats did not suffer greater levels of decline in those states where black majority districts had been drawn than in those states where they had not been.

(2) Given the substantial increase in support for Republican congressional candidates from 1990 to 1994, the Republican seat gains in Congress were generally consistent with previous patterns of seats-votes relationships over the past two decades.

(3) Almost all of the Democratic congressional loss in the South from 1990 to 1994 can be attributed to one simple fact: namely, Republican candidates made substantial vote gains in virtually all districts.

(4) Given the national scope of the Republican 1994 tidal wave, even had no

[20] Lublin's counterexamples rest on an attempt to determine median voters by simulating outcomes of certain important (and close) roll calls under alternative districting schemes, with hypothetical votes recreated using Poole-Rosenthal "Nominate" scores (Poole and Rosenthal, 1987). The problem with this method is that it relies on a string of complicated projections. Because the predictive equations are far from perfect, results based on a precise location for the median voter are highly suspect.

[21] Of course, even this analysis is still perhaps too simplistic. The rise to power of the extreme conservative wing of the Republican party in the House may have led Newt Gingrich to overreach, provoking a voter backlash to conservative initiatives.

new black majority seats been drawn in the 1990s districting round, the Republicans would still have gained control of the House.

(5) Had there been no need to create additional black seats and had African-American voters in the South been treated as "sandbags" and optimally deployed to protect Democratic beachheads from the Republican tide, even skillful partisan gerrymandering could not have reduced the level of Democratic congressional loss between 1990 and 1994 by more than at most 10-11 seats in the South.

(6) For all practical purposes, unless there is a black incumbent already in place, Southern districts that are not majority black do not elect African-Americans (at least ones who are candidates of choice of the African-American community) to the House. Thus, gerrymandering that appears to have been optimal from the perspective of maximizing Democratic congressional seat share in the South (i.e, districts with a 30-40% black population) appears incompatible with the creation of districts from which African-Americans have in the past had a realistic chance of being elected to Congress from the South.

(7) The consequences for Democratic success of a failure to "optimally" allocate black population across districts are (considerably) greater in the South than in the non-South.

(8) The implications of Democratic districting for congressional liberalism appears a wash, were Democrats to have kept control of the House. Even if every new black majority seat in the South led, on balance, to the replacement of a white Democrat with a Republican, the mean liberalism of the combination of one new Republican and one new black Democrat would be virtually indistinguishable from the mean liberalism of the two white Southern Democrats who had been replaced.

MORE SPECULATIVE CONCLUSIONS

We propose the following general conceptual framework for thinking about the impact of race-conscious districting in the South—what we call the theory of the "triple whammy." This theory has three components: (1) *ceteris paribus*, reducing black population proportion in a district reduces the likelihood that the district will be won by a Democrat, and, on balance, creating black majority seats is not an "optimal" allocation of black votes from the standpoint of maximizing the number of Democrats to be elected, especially in the South. (2) The "blackening" of the Democratic party in the South has a kind of chain reaction effect, making it ever less likely that Democrats will regain white support as the center of gravity within the Democratic party in the South shifts toward black interests (cf Edsall and Edsall, 1991). (3) We can expect a kind of top-down realignment based on "progressive ambition," as the incumbency advantage shifts to the Republicans, in which the potential for Republican success at the congressional level makes it more likely that strong Republican candidates will seek state legislative office as a springboard to the higher and more desirable office,[22] and the increased Republican state legislative strength in the South will provide an increased pool of strong Republican congressional candidates which will make it more likely that Republicans will be able to hold on to their recent gains in congressional seats in the South. Eventually Republican gains will even percolate down to lower levels of office in most Southern states.[23]

When Lyndon Johnson pushed for the passage of the Voting Rights Act of 1965, he did so with the belief that it might doom the Democratic party's future chances in the South, although he also recognized that without it, the Democratic party in the South was probably doomed anyway (Grofman and Davidson, 1994). Over the past 30 years, the greatest loss of Democratic strength at the presidential level has taken place in the South, with the decline greatest in the areas of the South with the greatest black population, despite the fact that these voters (some not enfranchised until the late 1960s) vote solidly Democratic (Grofman and Handley, 1995).

If we look at the relationship between Democratic vote shares and black percentage in congressional districts in the South, we find that, while it used to be true that Democrats had a better than 50% chance of winning even the districts where there was minimal black voting strength (Grofman, Griffin and Glazer, 1992), by 1994, it was only in districts with more than 30% black population that Southern Democrats could be sure of winning more than half the seats (see Table 1 [page 57]; Tables 15 and 18 in Handley, Grofman and Arden [page 30 and page 33, this volume]).

As black population becomes ever more key to Democratic success in the South, and as Republicans win more and more of the heavily white seats, the character of the Democratic constituency and of Democratic elected officials begins to change accordingly. Increasingly, in the South, the Republicans will become even more the white party and the Democrats the party of blacks. Consider two groups, B and W, and their support levels for the Democratic party, P_{BD} and P_{WD}. The strength of each group within the Democratic party is given by

[22] Similarly, we would argue that one reason for recent Republican House gains in the South is the fact that Republicans have been doing better in recruiting House candidates due in part to the fact that Republicans now have a realistic chance to be elected to the U.S. Senate in most Southern states, and being a Republican member of the House is a good place from which to seek a Senate seat.

[23] This model of "top-down" realignment (Brunell and Grofman, 1998, forthcoming) begins at the presidential level. It is in voting for president that the cracks in the "Solid South" first appeared, next in U.S. Senate elections, then in gubernatorial elections, then in House elections, and only very recently in elections for lower office. However, this realignment has been what Brunell and Grofman (1998, forthcoming) call a "glacial realignment," whose pace has been hindered by the rise of "candidate-centered politics" (Wattenberg, 1991) and, in the South, by the long shadow cast by the Civil War. But, like an avalanche, this realignment picked up speed in 1994 and began sweeping congressional Democrats out of its path. In 1996 despite a Democratic presidential victory and net losses overall, the Republicans made gains in the House in the South. The solid South was an historical anomaly; once the Democratic party began to change its stance on civil rights after WWII, and especially after Lyndon Johnson's "great betrayal" in supporting passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, no one would ever be able to put Humpty-Dumpty together again (cf. Huckfeldt and Kohfeld, 1989; Carmines and Stimson, 1989).

$BP_{BD}/(BP_{BD} + WP_{WD})$. As P_{WD} goes down, then this ratio goes up. Thus, the greater the decline in white support for the Democrats, the greater the proportion of that party's support that comes from black voters and the more visible blacks will be in the Democratic coalition.[24]

The same kind of argument applies at the office-holder level. A majority of Democratic party leaders in some Southern states are now black. In Georgia, thanks to the 1994 election debacle and one party switch by a Democratic incumbent, there were *no* white Democratic members of the 1994 Georgia congressional delegation.

Prior to the 1996 election one of the present authors made a bet with a congressional specialist that few of the House seats in the South that changed partisan affiliation in 1992 and 1994 would return to Democratic control and that the Republicans would make a net gain of House seats in the South regardless of what happened to them elsewhere in the country or for president. That prediction was an accurate one. Moreover, the full consequences of the 1990s districting have yet to be felt. In particular, we can anticipate further limited net congressional Democratic losses in the South over the remainder of the decade, as those few seats in which George Bush got more votes than Clinton in 1992 that are still in the hands of Democrats shift into Republican hands.[25] Indeed, in Congress, in the deep South, only in districts with at least a 30% black population are Democrats likely to be safe.

In our (admittedly pessimistic) view, the Democratic party in the deep South (with the probable notable exceptions of Mississippi and Louisiana) will eventually become a minority party at all levels of government. As it does so, it will necessarily become more and more a party of blacks, with an increasing proportion of African-Americans among its diminishing number of elected officials. The Republican party will be the party supported by most whites—as has long been true in the deep South in terms of presidential voting, and has already become true at the congressional level.

Shaw v. Reno will not rescue the Democratic party in the South by permitting them to return to earlier ways of using black voters as "sandbags." First of all, contrary to some interpretations of its significance, Shaw does not overthrow the *Thornburg v. Gingles* guidelines (see discussion in Grofman, 1997; Grofman and Handley, 1995a; Grofman and Handley, chap. 5 this volume). Second, and probably even more importantly, even though a number of Southern states already have been forced to redraw congressional lines in the light of *Shaw v. Reno*-type challenges and others will be forced to do so, as we can see from the results of the

[24]Analogously, recent Democratic presidential nominees have received well over 20% of their total votes from African-Americans, making blacks a highly visible component of the national Democratic coalition—as reflected in the racial composition of delegates to recent Democratic National Conventions in which blacks have made up between 20% and 25% of the delegates.

[25]The growing Republican strength in the South also means that the regional peculiarities that fostered split-ticket voting for congress and president will be decreasing (Grofman, McDonald, Koetzle, and Brunell, 1996).

1996 House elections, Democrats still failed to make net gains in the South despite doing so elsewhere in the country. Because white support for the Democratic party in the South is already so weakened and the top-down realignment in the South has already progressed quite far, it will take more than a handful of changes in congressional (or legislative) district lines to return the Democratic party to dominance in Dixie[26]

[26]Of course, the South will never be as solidly Republican as it had been solidly Democratic for the obvious reason the blacks will anchor the Democratic party in the South and some whites will join them—especially when economic hard times (or fear thereof) remind Bubba that, while the "new" Republicans love their country they also love their country clubs, and that, even if Republicans are right that "welfare" is just another code word for "giving money to blacks," it can be even more important to decode "free men and free markets" as "low-wage jobs without health care, pension rights, or concern for worker safety."

PART TWO

Legal and Enforcement Issues

VOTING RIGHTS IN THE 1990S: An Overview[1]

Bernard Grofman and Lisa Handley

IN THIS ESSAY WE WILL PROVIDE A BRIEF OVERVIEW OF CHANGES in voting rights case law in the 1990s. Because we have written extensively about voting rights in the past, our approach here will be a synoptic one, and we refer the reader to our earlier work for further details.[2] Our principal focus will be on issues related to race and redistricting. Thus, we will not cover, except in passing, legal issues related to one person, one vote or to partisan gerrymandering.

We may divide the modern voting rights era into five periods:

(1) In the period from 1962-1965, after *Baker v. Carr* but prior to the passage of the Voting Rights Act of 1965, one person, one vote issues are central (see Grofman, 1992b, c).

(2) From 1965-1970, the focus is on removing barriers to black registration and voting in the South (Alt, 1994).

(3) Beginning in the 1970s, and especially for legislative and congressional districting, the Section 5 powers of the U.S. Department of Justice are at the heart of voting rights jurisprudence (Grofman, Handley, and Niemi, 1992). Because the Department of Justice is concerned that multimember districts may operate to submerge black voting, by the mid-1980s, because of Justice Department preclearance denials (or threat of denial) the number of multimember districts used for legislative elections in the South is drastically reduced (Niemi, Hill, and Grofman, 1985).

[1] We are indebted to Dorothy Green and Chau Tran for library assistance. This research was partly supported by a grant from the Ford Foundation, #446740-47007, "The Impact of Redistricting on the Representation of Racial and Ethnic Minorities," to the first-named author. The views expressed in this paper are solely those of the authors and do not reflect those of the Ford Foundation.

[2] See especially Grofman, 1985, 1992a; and Grofman, Handley, and Niemi, 1992 for voting rights case law prior to the 1990s; and Grofman and Handley, 1995a; and Grofman, 1997 for more recent developments. Portions of this essay were taken from Grofman and Handley, 1995a.

(4) In 1982, Section 2 of the Voting Rights Act is amended to assure that a finding of discriminatory purpose will not be needed before a districting plan can be held to violate the Voting Rights Act. Although this change was intended to restore a legal status quo ante (See Grofman, Handley, and Niemi, 1992), the new language of Section 2, especially as interpreted by the Supreme Court in 1986 in the landmark case of *Thornburg v. Gingles*, leads to a wave of successful challenges to local use of at-large elections throughout the South (see Davidson and Grofman, 1994). The Section 2 standard is also held to be applicable to single member district plans (Grofman and Handley, 1992).

For congressional and legislative districtings in the 1990s, a combination of Section 5 actions by the Department of Justice, and (to a much lesser extent) the threat of litigation under Section 2 of the Act, yielded major gains in minority representation. In states covered by Section 5, as a result of strong enforcement pressures from the Department and greater technical sophistication about map-drawing possibilities, the initial 1990s districtings gave rise to a huge increase in the number of black majority seats in Congress—far higher than in any previous decade. Also there were large, if not quite as startling, gains in the number of majority-minority seats in state legislatures in the South and Southwest (Handley, Grofman and Arden, this volume), especially in heavily black states like Georgia and Mississippi.[3] A very high proportion of the majority black districts that have been created have elected minority candidates of choice (Handley, Grofman, and Arden, this volume). There were gains in Hispanic representation as well, also coming largely from the newly drawn majority-minority seats (Handley, Grofman, and Arden, this volume).

(5) With its 1993 decision in *Shaw v. Reno*, the voting rights tide turns (somewhat unexpectedly) in a much more conservative direction. In districting, the Supreme Court majority in *Shaw* and subsequent cases finds an overemphasis on the racial characteristics of districts to the exclusion of other representational concerns to violate constitutionally protected rights. Unfortunately, however, the exact nature of the rights that are being violated is, to put it mildly, less than clear (see discussion in e.g., Karlan, 1993, McDonald, 1995; cf. Pildes and Niemi, 1993). The Court arguably leaves at least equally obscure the crucial operational question of how to determine when race is such a "preponderant" factor that a given plan must be struck down as unconstitutional, although peculiarities in district lines based on purely racial considerations are taken to be prima facie evidence for possible unconstitutionality (see Grofman, 1993a, Grofman and Handley, 1995a; Grofman, 1997).[4]

[3] Deep south states have a long history of contesting any attempt to provide black representational gains through redistricting (see e.g., Parker, 1990).

[4] For other perspectives on *Shaw v. Reno*, see e.g., Pildes and Niemi, 1993; Aleinikoff and Issacharoff, 1993; Karlan, 1995; Kousser, 1995b; McDonald, 1995; McKaskle, 1995; Issacharoff, 1996; and the various essays in McClain and Stewart, 1995; and Peacock, 1997.

1990S REDISTRICTING PRIOR TO *SHAW V. RENO*

Critical to the dramatic gains in minority representation that took place in the early 1990s have been a number of key factors, most of which are directly related to the Voting Rights Act,[5] including: (a) an insider rather than outsider position for minorities with respect to legislative and congressional districting in the 1990s in many states that reflects previous gains in minority representation (see e.g., Holmes, this volume; Hagens, this volume); (b) the computer revolution that made it possible for minority legislators and minority advocacy groups to generate a plethora of plans to be produced at the click of a mouse, and allowed for fine-tuning of variants;[6] (c) vigorous enforcement of Section 5 of the Act by the Voting Rights Section of the Department of Justice; [7] (d) until quite recently, remarkable continuity in voting rights case law, with the three-pronged test in *Thornburg v. Gingles* (1986) defining the parameters of minority vote dilution for jurisdictions not covered by Section 5; [8] and (e) a Republican strategy that resisted bipartisan agreements on districting plans and sought to use litigation under the provisions of the Act to force major changes in district lines, with the expectation that such changes would inevitably benefit the Republican minority by concentrating Democrats in heavily minority districts and, in the process, displacing a number of white Democratic incumbents.[9]

THE 1990S LEGAL BACKLASH TO VOTING RIGHTS ACT ENFORCEMENT

Shaw v. Reno and Its Progeny

The Voting Rights Act has long been seen as one of the most successful pieces of legislation of the post-WW II period, whose consequences include a dramatic growth in black registration and black voter turnout, especially in the period immediately after its passage (Alt, 1994), and even more dramatic long-run gains in the number of black (and to a lesser extent, Hispanic) elected officials.[10] Recently, however, it has come under increasing attack as having outlived its usefulness and having been perverted to purposes not intended by its framers.[11] The strange shape of some majority-minority districts helped trigger a scholarly and public backlash against the Voting Rights Act in the 1990s[12] and, arguably, is the direct antecedent to the Supreme Court's opinion in *Shaw v. Reno*.[13]

[5] Grofman (1993a) notes that the Voting Rights Act is often most influential where its impact is least visible. By anticipating how courts and DOJ will interpret the Act, legislators frequently make changes they would not otherwise have made to reduce the likelihood of a plan being overturned. Consequently, even if a plan is overturned in court or denied preclearance, the difference between what was rejected and what eventually becomes law may not seem that large. Yet, without the influence of the Voting Rights Act, the proposed redistricting plan almost certainly would have looked quite different. Grofman (1993a: 1263) characterized the Act as a "brooding omnipresence" in redistricting decision making in the 90's.

[6] For example, Hagens (this volume) shows how the ready computer access of minority legislators and groups seeking to foster minority interests affected the redistricting bargaining process in Virginia.

While we can understand popular disgust at some of the lines drawn ostensibly in the name of fostering minority voting rights: (a) many of the more bizarre features of the legislative and congressional plans of the 1990s reflect partisan or incumbent protection calculations (just as in previous decades) and thus should not be blamed entirely on the Voting Rights Act; and (b) compactness is a criterion of limited importance.[14] Nonetheless, the shape of districts such as North Carolina's 12th CD suggested to the media, the public, and most importantly, to many members of the Supreme Court, that, in the 1990s, race had (except for population equality)[15] become the only real criterion governing redistricting, and that "maximizing" had replaced "equal opportunity" as the standard.[16]

In *Shaw v. Reno*, the Court created a new constitutional cause of challenge to a districting plan, namely that a plan had an impermissible racial motive—to segregate the races—allowing a plan to be struck down even if did not have impermissible consequences in terms of diluting the voting strength of any group. In *Shaw*, a five member majority on the Supreme Court viewed a North Carolina congressional district (the 12th North Carolina CD) that had been consciously drawn with a black majority as potentially violative of the Equal Protection Clause of the 14th Amendment because the nature of the startlingly irregularities in its shape suggested to them that the district could have no legitimate purpose other than to assure racial representation. A second Supreme Court decision, *Shaw v. Hunt*, struck down the plan, reversing the three-judge panel that had upheld its constitutionality (see Sellers, Canon, and Schousen, page 269 this volume). Because of the delay caused by the several rounds of litigation, a new congressional plan for North Carolina will not be put into place until the 1998 election.[17]

After *Shaw*, with the *Miller v. Johnson* decision, which overturned a Georgia

[7] One of the puzzles of voting rights enforcement is why the Department of Justice under Republican presidents such as Bush pursued a generally tough enforcement policy in the area of voting rights while regressing or retrenching in all other civil rights domains. One standard answer is that it is all a Republican plot. In this view, in the 1990s round of districting Republican officials under Bush ordered DOJ try to create as many highly concentrated minority districts as they could in order to pack Democrats. But, this is far too simplistic: there are a number of instances where DOJ actions under the Bush Administration (as in the Los Angeles County Board of Supervisors case) directly harmed Republican interests. As one of us has argued elsewhere (Grofman, 1993a), the civil service professionals at the Voting Rights section of DOJ seek to enforce the Act in a completely non-partisan fashion and they are highly competent (albeit overworked). While there is some interference from political appointees at DOJ, all in all, this interference is minimal.

Nonetheless, Republican belief that strict voting rights enforcement would in the long-run benefit Republican interests has acted to shield the Voting Rights Section from the conservative backlash that has crippled civil rights enforcement in other areas--permitting DOJ staff in the Voting Rights Section to, by and large, just do their job and enforce the Act as they see it, especially with respect to Section 5. When Clinton came into office, after his retreat on the Lani Guinier appointment there was an initial period when there was no Assistant Attorney General (AAG) for Civil Rights—conducive to a maintenance of previous enforcement policies—and when Deval Patrick was appointed AAG, he, too, was committed to vigorous enforcement of the Act. All in all, there has been remarkable continuity in DOJ voting rights policies from Bush to Clinton, with the present AAG vigorously defending the preclearance denials made by his Republican predecessor. See further discussion of these points in Grofman (1993a).

congressional district that was nowhere near as ill-compact as the North Carolina 12th, but whose creation could be laid almost entirely to insistence by the Department of Justice that Georgia go from one majority black congressional district in the 1980s redistricting round to three such districts in the 1990s (see Holmes, this volume), it is clear that the Supreme Court majority is anxious to put curbs on DOJ's use of its preclearance authority,[18] and it is also clear that ill-compactness is not a necessary condition for a district to be struck down as violative of *Shaw*.[19]

The *Shaw v. Reno* decision can be attacked on a variety of grounds. In particular, it creates a new constitutional standard that is hard to interpret and it places a burden of presumptive constitutional illegitimacy on tortuously shaped black majority districts that it does not place on similarly ugly white majority districts.[20] On the face of it, *Shaw*, *Miller*, and related subsequent decisions[21] might appear incompatible with the requirements of the Voting Rights Act for race-conscious districting to remedy vote dilution, and thus they appear to threaten the dramatic black (and Hispanic) gains in representation that have been brought about over the past several decades through the creation of majority-minority districts. Moreover, *Shaw* and subsequent decisions have already led to the voting rights bar being put on the defensive, defending *Shaw*-type claims, with few new voting rights challenges being brought; and to a greater unwillingness of those defendant jurisdictions faced with Section 2 lawsuits to agree to draw majority-minority districts as part of an out-of-court settlement, since they can take refuge in the claim that the remedial district(s) violates *Shaw*.[22] Nonetheless, we are not as concerned about the dangers of *Shaw* and its progeny as are some other voting rights specialists.

[8] Prior to *Shaw*, despite several opportunities to revisit the *Thornburg v. Gingles* decision and make it harder to prove a violation of Section 2 of the Act, the Court had reiterated that *Thornburg* defines the Section 2 test for minority vote dilution. Indeed, cases decided early in the 1990s applied the *Thornburg* test to judicial elections for the first time (albeit this was an interpretation that federal courts would subsequently backtrack from: see Karlan, 1997 forthcoming). While the decision in *Presley v. Etowah County* (1992) suggested that the Supreme court was not really prepared to advance voting rights case law to go beyond the issues covered in *Thornburg*, it did not really represent a retrenchment (see discussion of this case in Grofman and Handley, 1995). Similarly, the failure of federal courts to require a statistical adjustment for census minority undercount could also not be taken to be a retrenchment of previous voting rights standards. In general, the standards for operationalizing one person, one vote remained unchanged in the 1990s. Also, (with the partial exception of *Republican Party of North Carolina v. Hunt*) the potential for a districting plan to be held unconstitutional as a partisan gerrymander (Grofman, 1990) went unrealized in the 1990s (see discussion in Grofman and Handley, 1995a). Arguably, the closest thing to a genuine change in voting rights case law prior to *Shaw* was that the Supreme Court signaled to federal courts that they should defer more to state court jurisdiction in the initial phases of redistricting litigation than some federal courts had shown themselves wont to (Karlan, 1993). This was a minor course correction, with no direct implications for substantive doctrine.

[9] See further elaboration of this argument in Grofman (1993a).

[10] There has been a long history of bipartisan support for strong voting rights enforcement. Also, voting rights law was seen as fundamentally distinct in many ways from other areas of 14th Amendment jurisprudence, permitting even conservative justices to assent to color-conscious choices so as to safeguard fundamental rights (see further discussion of these points in Grofman, 1993a: 1243-1247; Grofman and Handley, 1995a).

While the 5-4 lineups in *Shaw* and *Miller v. Johnson*, and the intemperate tone of some of the opinions in these (and other) cases, suggest that the Court is strongly polarized around voting rights issues and that there are Justices on the Court who wish an almost total reversal of the current interpretation and implementation of the VRA, [23] there is every reason to expect that extreme anti-VRA views will remain in a minority on the Supreme Court, at least for the near future. Justice O'Connor, whose orientation is relatively case-specific and fact-specific, holds the pivotal vote (Grofman, 1997).

Moreover, if we look at the Supreme Court's 1995 *per curiam* affirmance of the California districting plans created under the auspices of the California Supreme Court in *DeWitt v. Wilson*, we see that majority-minority districts can be sustained, as long as it can also be shown that factors other than racial balance were important in the districting decision-making as to the number of and configuration of these majority-minority districts. Also, as yet (February 1998), *Thornburg* is far from dead, especially since there are ways to make *Thornburg* and *Shaw* compatible (Grofman, 1997).

Finally, as one of us has written elsewhere (Grofman, 1997), the most important implications of *Shaw* hold only at the level of congressional districting: "(G)iven the degree of residential segregation in the U.S., drawing relatively compact and clearly contiguous black districts at the local level (or even for most

[11]In the 1980s we had already seen the beginnings of a backlash to the Act, especially among Republicans. In 1982 Republicans like Senator Orrin Hatch opposed the Act's extension, and initially so did Ronald Reagan. Opponents of the Act claimed that Section 5 had become an unreasonable intrusion of the federal government into state affairs and that the new language of Section 2 of the Act was tantamount to a quota system. Similarly, Abigail Thernstrom (1985, 1987), in work which received considerable scholarly attention, and others (e.g., Schuck, 1987), argued that the Act had been distorted beyond the intent of its framers and was being enforced by the Department of Justice in an inappropriately rigid and aggressive manner. Nonetheless, this point of view had little or no impact on Voting Rights Act enforcement in the 1990s round of districting.

[12]In addition, (white) Democrats have been concerned with the supposed partisan implications of drawing heavily minority districts that tend to soak up Democrats (see the previous chapter by Grofman and Handley, this volume).

[13]The current negative reaction to the VRA also cannot be understood without taking into account constitutional and normative arguments about ideas about equality and competing individualistic and group-oriented conceptions of rights. For critics of the Act, such as George Will or Abigail Thernstrom, the VRA has come to embody an idea of tribalistic representation that is incompatible with a commitment to a color-blind society, and thus incompatible with the "proper" interpretation of the fourteenth amendment's "equal protection" clause. As Will (1995) puts it: "The creation of 'majority-minority' districts expresses the ideology of 'identity politics': you are whatever your racial or ethnic group is. But that ideology, promulgated by political entrepreneurs with a stake in the racial and ethnic spoils system, is false regarding the facts of human differences, and bad as an aspiration and an exhortation." For discussion of the normative debate about voting rights in this essay see, e.g., Davidson and Grofman, 1994 (esp. Grofman and Davidson, 1992b); Grofman, 1993a.

[14]See further discussion of the compactness issue in Grofman (1993a). Also see Niemi, Grofman, Carlucci and Hofeller (1990) and Pildes and Niemi (1993).

[15]We might also note in passing that, in our view, an overemphasis on strict population equality has often been carried to the point of absurdity and led to disregard for preserving political subunit boundaries or creating districts that mapped onto (re)cognizable communities of interest. See e.g., Stokes (1993: 22), Grofman (1992c: 786-788).

state legislatures) is not that difficult." Moreover, even at the congressional level, the results of elections in 1996 suggest that, with the strong advantage given by incumbency,[24] black candidates can continue to win in reconfigured districts (such as those in Georgia and Texas) when those districts remain very heavily black in population, even if not majority black (see e.g. the discussion of the 1996 congressional results in Georgia in the concluding epilogue in Holmes, this volume).

LULAC v. Clements and the Definition of Racially Polarized Voting

Important as *Shaw* is as a brake on further gains in descriptive minority representation, and certain as *Shaw*-related litigation is to lead to the defeat of some minority officeholders when districts become reconfigured,[25] in our view, the greatest potential for a major setback in minority representation lies not in *Shaw* and its progeny, but in the potential consequences of another much less visible case, *LULAC v. Clements*.[26] In *LULAC*, a majority of the 5th circuit, in an *en banc* ruling, reinterpreted the definition of racial bloc voting in a fashion that we see as incompatible with the descriptive approach to the presence or absence of racial bloc voting taken in Thornburg. The *LULAC* court moved away from the straightforward question of whether or not minority candidates of choice regularly lose because of white bloc voting into a consideration of whether or not other factors, such as straight party-line voting, could explain the racial differences in voting patterns. The *LULAC* line

[16]Elsewhere, one of us has argued that this is a mischaracterization of 1990s case law and DOJ enforcement practices (Grofman, 1993a). See esp. Posner (this volume) and the discussion in *Moon v. Harris* (1997) of the DOJ stance in Virginia. The three judge court in *Moon* observes (1997 WL 57432, 8) that "the record reflects no indication that the Department of Justice advocated a 'maximization' policy for Congressional districts in Virginia. Indeed, the acting head of the Voting Rights Section of the Department of Justice spoke in Richmond prior to the redistricting process and stated that the Department did not read the VRA to require that, if a majority black district could be created, it must be."

[17] At the time of writing (February 1998), it is not clear whether this plan will be a legislative one or one drawn by the courts.

[18] For example, the three judge court in *Diaz v. Silver* (1997), the New York congressional voting case, asserts that "The Supreme Court had found that DOJ had unlawfully interpreted the VRA to require the maximization of majority-minority districts." (slip op. at p. 61; cf. the totally different, and we believe far more accurate, interpretation of the DOJ position with respect to maximization set forth in 1997 by the three judge court in *Moon v. Harris* quoted in an earlier footnote).

[19] For example, the three judge court in *Diaz v. Silver* (1997) asserts that "the fact that a district is compact does not immunize it from scrutiny. Compactness or its absence would not itself excuse racially motivated districting" (slip op. at p. 78).

[20] *Shaw* is jurisprudentially excessive because it creates a new constitutional violation when it could have addressed the perceived problem in a more efficient and focused manner merely by correcting legislative misinterpretations of Section 2 (and Section 5). The Supreme Court failed to appreciate the political/legal dynamic that led to the creation of majority-minority districts. Thus, it crafted an overbroad remedy, when it could, in our view, have achieved the same end with far less travail by choosing a different case to send a message to legislatures (and to lower courts and the Department of Justice) about how better to interpret the geographical compactness element of *Thornburg*'s three-pronged test for Section 2 vote dilution and/or the Section 5 preclearance denial standard.

[21] See, e.g., Engstrom and Kirksey, this volume, for discussion of the various *Hays* decisions, the *Shaw*-related litigation in Louisiana.

of argument has now been taken up by other circuits,[27] and is likely to be a major source of contention in future voting rights cases, despite the fact that, arguably, it flies in the face of Justice Brennan's position in *Thornburg* that only the fact of racial polarization, not evidence as to the reasons for the existence of that polarization, is needed to demonstrate a dilutive impact.[28]

According to Judge Higginbotham, who wrote the *LULAC* majority opinion, in partisan elections, racially polarized voting occurs only "where Democrats lose because they are black, not where blacks lose because they are Democrats." Thus, *LULAC* stands for the proposition that, even if minority voters support the minority candidate in overwhelming numbers and non-minority voters oppose the minority candidate in overwhelming numbers, if it can be demonstrated that minority voters supported the minority candidate not only because s/he was black/Hispanic but because he was a Democrat, while non-minority voters opposed that candidate not only because s/he was minority but because that candidate was a Democrat (and thus not a Republican), then voting is not racially polarized.

If we accept this definition of polarized voting, in general elections where candidates run on party labels, polarized voting will be roughly as scarce as hen's teeth, since blacks (and Mexican-Americans) vote overwhelmingly Democratic, while a majority of whites in most areas of the South now support Republican.[29] Thus *LULAC* represents the possibility of a total turnaround in voting rights case law, since proving polarization in voting patterns is the linchpin of minority voting rights claims with respect to districting.

However, even if we grant Judge Higginbotham's premise that the simple descriptive fact of polarized voting is not enough to show that voting is polarized in a legally relevant way (which conflicts with Justice Brennan's views in

[22] Moreover, in the redistricting taking place next century, it seems likely that jurisdictions covered under Section 5 of the Act will be much more likely to challenge the Department of Justice's Section 5 preclearance denials in D.C. court by arguing that no constitutional remedy is possible because any remedy plan would require ill-shaped districts.

[23] For example, *Hall v. Holder* (1994), is important not for its decision, a relatively narrow holding that legislative size was not litigable under the VRA because there were no clear standards as to how large a legislature should be, but because the concurring opinion by Justice Thomas (joined by Justice Scalia) is a complete repudiation of the past several decades of voting rights jurisprudence. Their opinion claims that earlier court decisions were wrong in accepting the fact that the VRA applied to issues of vote dilution, and it also makes a strong normative argument against the creation of what they call racial "safe boroughs."

[24] Various students of congressional elections have found the advantages of incumbency (e.g., name recognition, better access to campaign funding) to be worth from 6 to 10 percentage points of vote share in a general election over what a candidate of the same party running when the seat is open could be expected to achieve.

[25] See, for example, Engstrom and Kirksey (this volume) for a discussion of what happened when Louisiana congressional lines were redrawn after a successful *Shaw*-type challenge.

[26] *LULAC v. Clements*, 999 F. 2d 831(5th Cir. 1993), cert denied 114 S. Ct. 878 (1994). *LULAC* also breaks new ground in upholding the applicability of Section 2 of the Voting Rights Act to judges. We will not discuss that aspect of the case here, since subsequent cases have led to a backsliding from the practical import of that aspect of the opinion (see Karlan, 1997 forthcoming).

[27] See esp. *Lewis v. Alamance County*, 99 F 3rd 600 (4th Cir. November 4, 1996).

Thornburg), for the Higginbotham argument to make sense we must be able to treat party and race as independent factors and to statistically separate out their effects. The latter is very difficult to do, and if we try to do so using cross-sectional data, we would be mistaking the true causal link between race, partisanship and voting behavior. It can readily be shown that the affiliations of white voters in the South and black voters in the South have fluctuated directly with the nature of the racial policies espoused by the Democratic and Republican parties.[30] Moreover, the political affiliations of white voters in the South can be directly related to the racial context in which they find themselves, with whites in the most heavily black areas having deserted the Democratic party almost entirely (Grofman and Handley, 1995b; Huckfeldt and Kohfeld, 1989; cf. Carmines and Stimson, 1989).[31]

DISCUSSION

While decisions such as *Shaw* would probably have turned out the same even if the Justices in the majority had been persuaded to change their minds about certain important and mistaken factual claims about the supposed present-day irrelevance of race in American politics and American society,[32] it seems plausible to believe that normative/constitutional judgments are shaped at least in part by views about consequences, and thus by views about social facts.[33] In this light, we would like

[28] The definition of polarized voting used by the Supreme Court in *Beer v. U.S.* and elaborated in *Thornburg*, is simply that whites and blacks vote for different candidates, and, in particular, that whites regularly oppose black candidates who have the support of the black community. If the standard definition of racially polarized voting is used, then, at least in the South, the evidence for racially polarized voting is considerable, although there are not many examples of blacks losing in white majority seats because black candidates are discouraged from ever seeking election in such constituencies. *LULAC* sneaks an intent requirement back into Section 2 jurisprudence because it moves from the test for racially polarized voting based simply on the presence or absence of differences in the support levels of black and white (or Hispanic and non-Hispanic) voters vis a vis the minority candidate(s) of choice that is specified in *Thornburg* to a test that requires consideration of the factors that determine how voters voted, and thus to a test of whether or not the intent lying behind the decision of white/Anglo voters to not support the minority candidate could be regarded as racial in motivation. We regard the 5th circuit reinterpretation of the definition of racially polarized voting as incompatible with the test for bloc voting used in *Thornburg*.

[29] In our view, however, it is also critical to understand what happens in party primaries, where polarized voting patterns may also be found. If voting is polarized in the primaries of one or both parties, whether or not it is also polarized in the general may be irrelevant to a determination that minority voting strength has been diluted through the presence of polarized voting.

[30] The first cracks in the Democratic solid South, white desertions by the droves, came in 1948 in response to Truman's desegregation stance, and the pattern was repeated in 1964, in response to Lyndon Johnson's civil rights policies. Blacks finally deserted the party of Lincoln, to vote for Lyndon Johnson and succeeding Democratic presidential nominees in proportions above 90 percent, only after passage of the Civil Rights Act of 1964. Today, the two major parties stand for very different positions with respect to civil rights, and, as we tend to forget, which party is on which side has flip-flopped over the past 30 years.

[31] A considerably more detailed discussion of the problems with the *LULAC* decision, one from which much of the material above has been drawn, is found in Grofman and Handley (1995a). Also, see Grofman (1985; 1991a; 1991b; 1993b; 1993c; 1995) for a general discussion of how to measure racially polarized voting and other related issues.

to believe that the Supreme Court majority in cases such as *Shaw* would not have been quite so fervent in their denunciation of the evils of black majority seats and in their likening of such seats to racial apartheid if they had been better grounded in empirical reality about the continuing existence of barriers to minority electoral success from non majority-minority districts,[34] or the fact that (because of racial discrimination) blacks do perceive important political interests in common with one another simply because they are black,[35] or recognized the limited truth to the claim that a focus on descriptive representation, on balance, harms minority interests by helping conservative Republicans to get elected.[36]

Justice O'Connor's opinion in Shaw seeks a moral high ground by attacking districts for whites and districts for blacks (or other minorities) as tantamount to *Shaw* apartheid. However, if (at least in the absence of minority incumbents) voting is heavily polarized along racial lines (in primaries and/or general elections), and minority candidates usually lose, then drawing districts with no attention to their demography may mean that only (non-Hispanic) whites can be expected to win election. We must be careful that a zeal to end overreliance on racial considerations in the districting process not retard the integration of the halls of our legislatures. While most of us would prefer to live in a color-blind society, we live in a "'second-best' world where color conscious problems require color-conscious remedies" (Grofman and Davidson, 1992b), even if that merely means being attentive to the continuing massive residential segregation of minority groups (Massey and Denton, 1993).[37]

[32]In his dissenting opinion in Miller, Justice Stevens (joined by Justice Ginsburg) approvingly quotes various social scientists about the continuing significance of racial and ethnic divisions in American life. Unfortunately, most of the works quoted by Justices Stevens and Ginsburg are twenty or more years old. However, more current works making the same point are easily found (see below).

[33]Like a number of other social scientists (see esp. Kousser, 1995b: 18-19), we are bothered by the remarkably casual way in which Supreme Court Justices throw out empirical assertions that lack factual grounding as if they were simply so obvious as to not need supporting justification. For example, Shaw is misguided in its views that the majority-minority districts that have been created can be directly analogized to "racial apartheid." Usually these districts are the most racially balanced districts in a state.

[34]See Handley, Grofman, and Arden (this volume).

[35]If we look at the similarities between white and black attitudes on a large variety of issues, from foreign policy to abortion, it is possible to argue that blacks and whites are really not that different in attitudes, but such an analysis is quite misleading about things that matter most. When it comes to attitudes and beliefs linked to race, the empirical evidence is overwhelming that the gap between whites and blacks remains huge. As Kousser (1995b) summarizes the evidence: "(W)hites and blacks see entirely different worlds. In the white view, there is little remaining prejudice or public or private discrimination, and there is consequently little need for government programs to do something about it. In the black view, prejudice and discrimination are pervasive, and government at all levels should act to remedy this serious plight" (Kousser, 1995b: 35). Related arguments and evidence is found in other recent sources such as Welch, 1991; Tate, 1993; and Dawson, 1994. Dawson (1994), for example argues that, for blacks, race is more important than class (or other factors) in defining self-identity (or having it defined for one by others).

[36] For evaluation of this claim see the previous chapter by Grofman and Handley (this volume) and references therein.

[37] The Voting Rights Act may be far from perfect, but the need for it remains. As Maurice Chevalier responded when asked how he liked being old: "Consider the alternative."

Despite *Shaw v. Reno* and its progeny, we prefer to end this essay on a reasonably hopeful note. As we argued above, we see *Shaw* as limited in its probable impact.[38] We would prefer to emphasize how far we have come since the passage of the Voting Rights Act.[39] In large part because of the Voting Rights Act, the 1990s round of redistricting, like that in previous decades, led to substantial growth in the number of minority officials in Congress and in state legislatures.[40] Even though more majority-minority districts will fall to *Shaw*-type challenges,[41] not all (or even most) districts will be (successfully) challenged, and the incumbents in many redrawn districts will continue to be reelected even though minority population in the district will be reduced somewhat below a majority.

[38]Also, even though we are both highly skeptical about taking compactness too seriously, especially as compared to other factors such as preserving communities of interest, we do believe that contiguity of district boundaries is, in general, desirable, and one of the present authors testified against the North Carolina 12th congressional district on the grounds that the plan in which was embedded was a patchwork crazy quilt lacking rational state purpose (Grofman, 1992a). In his testimony, however, Grofman indicated that the North Carolina plan was very nearly *sui generis* in its bizarreness (also see Grofman, 1993a: 1260-1263.

[39]Indeed, even in the worst case scenario, to the extent that we do go backwards in minority electoral success, it will be toward the status quo circa 1980, not that circa 1890.

[40]Also, some additional districts in which minorities have a realistic opportunity to elect candidates of choice will be created by new Section 2 challenges to at-large systems at the local level.

[41]For example, congressional districts in Virginia and New York were struck down by three-judge federal courts as unconstitutional under *Shaw*, and even the substantially redrawn North Carolina congressional districts were struck down in March 1998.

POST-1990 REDISTRICTINGS AND THE PRECLEARANCE REQUIREMENT OF SECTION 5 OF THE VOTING RIGHTS ACT

MARK A. POSNER

THIS ESSAY CHRONICLES, ANALYZES, AND EXPLAINS an important and controversial period in the application of Section 5 of the Voting Rights Act to state and local redistricting plans—the period from April 1991, shortly after the 1990 Census was released, until mid-1995, when the Supreme Court issued its watershed decision in *Miller v. Johnson*, rewriting the law of redistricting, sharply criticizing the manner in which the Department of Justice conducted its review of post-1990 redistricting plans and, at least to some degree, restarting a post-1990 redistricting cycle that otherwise had generally reached its conclusion.

In 1965, Congress took up an historic challenge, to end the "blight of racial discrimination in voting...[which had] infected the electoral process in parts of our county for nearly a century,"[1] by enacting the Voting Rights Act of 1965.[2] Central to the Act's remedial scheme is Section 5,[3] which places a federal "preclearance" barrier against the adoption of any new voting practice or procedure (by covered states and localities) whose purpose or effect is to discriminate against minority voters. For 30 years thereafter, Congress, the federal courts, and the Department of Justice worked hand-in-hand to make the promise of Section 5 a very potent reality.

The drawing of districts from which officials are elected, whether through a redistricting or the adoption of a districting plan to implement a new district method of election, is one of the most important voting changes that a jurisdiction may adopt, and the review of redistrictings and districtings has been an integral part of Section 5 enforcement efforts from the beginning. For those jurisdictions subject to Section 5, the knowledge that their redistricting or districting plan would be closely scrutinized by a federal preclearance official (the Attorney General or the District Court for the District of Columbia) has exerted a strong influence on their districting choices. Where those choices have been tainted by a discriminatory purpose or effect, Section 5 preclearance has been

[1] *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).
[2] Pub. L. No. 89-110, 79 Stat. 437 (1965).
[3] 42 U.S.C. § 1973c (1988).

denied, requiring the adoption of new, nondiscriminatory plans. From Congress to state legislatures to local governing bodies, the application of Section 5 to redistricting and districting plans has played a major role in minority voters making dramatic strides toward achieving an equal opportunity to elect candidates of their choice to office.

The role of Section 5 in redistrictings has expanded, from the 1970s to the 1980s to the 1990s, as court decisions and legislation have (directly or indirectly) subjected an increasing number of redistricting and districting plans to Section 5 review. Initially, it was the Supreme Court's Fourteenth Amendment "one-person, one-vote" decisions which gathered force with the passage of time leading more jurisdictions to determine that redistricting was a constitutional necessity.[4] In 1975, Congress amended the Section 5 coverage test resulting in the State of Texas becoming covered,[5] which nearly doubled the number of voting changes submitted for Section 5 review.[6] Also in the 1970s, the federal courts developed a constitutional "vote dilution" claim for challenging at-large election systems.[7] In 1982, Congress incorporated that law into Section 2 of the Voting Rights Act[8] which was followed by court decisions that generally adopted a liberal interpretation of the revised statute.[9] The 1982 amendment resulted in hundreds of counties, cities, and school districts covered by Section 5 changing to district election systems, either voluntarily, under threat of a lawsuit, or in the context of federal court litigation.

On June 29, 1995, the Supreme Court decided *Miller v. Johnson*,[10] its second

[4] The Supreme Court initially held that "one-person, one-vote" applies to congressional districting plans. *Wesberry v. Sanders*, 376 U.S. 1 (1964). This was followed by decisions applying the requirement to state legislative plans, *Reynolds v. Sims*, 377 U.S. 533 (1964), and to local government apportionment. *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970); *Avery v. Midland County*, 390 U.S. 474 (1968).
[5] Pub. L. No. 94-73, 89 Stat. 400 (1975).
[6] Since Texas has become covered under Section 5, the state and its subjurisdictions have accounted for approximately 40 percent of the changes submitted for administrative Section 5 review, and about 30 percent of all submitted redistricting and districting plans.

All statistics cited in this essay are taken from statistics and data compilations maintained by the Voting Section of the United States Department of Justice's Civil Rights Division.
[7] The leading decisions were *White v. Regester*, 412 U.S. 755 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom., East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).
[8] Pub. L. No. 97-205, 96 Stat. 131 (1982). The 1982 amendment effectively reversed the Supreme Court's decision in *Mobile v. Bolden*, 446 U.S. 55 (1980), where the Court held that plaintiffs would need to satisfy a stiff test of discriminatory purpose in order to prevail in a challenge to an at-large method of election. The 1982 amendment instead adopted a "results" test, patterned on the pre-*Mobile* constitutional vote dilution standard.
[9] See, *e.g.*, *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Garza and United States v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991); *Collins v. City of Norfolk*, 883 F.2d 1232 (4th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990); *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989); *United States v. Dallas County Commission*, 850 F.2d 1430 (11th Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989) (county commission); *United States v. Dallas County Commission*, 850 F.2d 1433 (11th Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989) (county school board); *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 492 U.S. 905 (1989), *McMillan v. Escambia County*, 748 F.2d 1037 (5th Cir. 1984), *Ketchum v. Byrne*, 740 F.2d 1398, (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985); *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984); *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989) and 756 F. Supp. 1195 (E.D. Ark. 1990) (three-judge court), *aff'd mem.*, 498 U.S. 1019 (1991).

ruling on the new constitutional claim of racial gerrymandering. The Court (by a five to four vote) held that Georgia's congressional redistricting plan, which had been adopted in response to the Attorney General's objections to two earlier plans, was impermissibly based on race, and sharply criticized the manner in which the Department of Justice exercised its Section 5 preclearance authority in reviewing redistricting plans. Specifically, the Court concluded that, at least in the review of the Georgia plans and perhaps in other reviews as well, the Department had implemented a policy of maximizing the number of majority-minority districts by denying preclearance to plans that could have included additional majority-minority districts but did not. The Court admonished that this policy raised "serious constitutional concerns."[11] The Court noted, but did not accept, the Department's denial that any such policy existed. More recently, in *Shaw v. Hunt*[12] the Court (again split five to four) held that the Department had applied the same maximization policy in denying preclearance to North Carolina's post-1990 congressional plan.

While this essay is not designed as a rebuttal to the Supreme Court's mistaken appraisal of the Department's enforcement of Section 5, by setting forth the principles and analytic methods that guided the Department in its 1990s redistricting reviews it demonstrates that no "maximization" policy existed. The Court's belief reflects a review of only three Section 5 objections. Moreover, the *Miller* determination (on which *Shaw* then largely piggybacked) was based on a narrowly circumscribed district court record. The United States, as defendant-intervenor in the case, did not seek to defend its Section 5 review process or demonstrate that the objections were properly grounded on the Section 5 legal standard because, in its view, it was sufficient that the objections were proper on their face and there was no collusion between the Department and the State of Georgia regarding the state's decision to remedy the objections by adopting a new plan.[13] This essay, on the other hand, relies on the entire width and breath of the Department's experience in reviewing post-1990 redistrictings, which involved the receipt of nearly 3,000 redistricting plans and nearly 200 objections.

The essay is divided into three sections. First, it sets the stage for the post-1990 Section 5 reviews by summarizing the basic requirements of Section 5 as applied to redistricting and districting plans, also noting the important developments in districting technology and census data that were inaugurated with the

[10]515 U.S. 900 (1995).

[11]*Id.* at 926. The Court made this finding in ruling that the Section 5 objections did not provide a compelling state interest justifying the adoption of what it concluded was a racially gerrymandered plan. Thus, the plan failed the constitutional test of strict scrutiny.

[12]517 U.S. 899 (1996).

[13]As noted *infra*, only the District Court for the District of Columbia (and not local district courts such as the court in *Miller*) may, under the Voting Rights Act, consider (in a *de novo* review) the propriety of the Attorney General's Section 5 objections. Sections 5 and 14(b) of the Voting Rights Act, 42 U.S.C. §§ 1973c, 1973*l*(b). In the Supreme Court in *Miller*, the Department argued that "[g]iven the Attorney General's important role in the Section 5 statutory scheme, a State should be able to act on the assumption that the Attorney General has correctly objected to its plan, unless the objection is clearly insupportable." Br. for the United States at 30.

1990 Census. The second section reports a variety of statistics and other summary information to provide an overview of the Section 5 determinations made by the Attorney General, as well as by the District Court for the District of Columbia, regarding the post-1990 redistricting and districting plans. The third section describes the analytic framework employed by the Department of Justice in making these determinations and examines the manner in which the Department addressed a number of specific districting issues.[14]

I. LEGAL AND TECHNOLOGICAL BACKDROP FOR POST-1990 SECTION 5 REVIEWS

A. Overview of Section 5 Requirements

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1988), requires that covered jurisdictions obtain federal approval (preclearance) whenever they "enact or seek to administer" a change in a voting practice or procedure,[15] including redistricting plans.[16] Preclearance is to be obtained before the voting change is implemented,[17] and may be obtained through one of two alternative methods—either by making an administrative request to the Attorney General or by seeking a declaratory judgment against the United States before a three-judge panel of the United States District Court for the District of Columbia. A judicial preclearance action is considered *de novo*, and may be filed without first making an administrative submission or after preclearance is denied by the Attorney General.[18] The administrative preclearance process was designed by Congress to provide an expeditious means by which jurisdictions may obtain preclearance,[19] and almost all jurisdictions utilize the administrative preclearance procedure with relatively few filing declaratory judgment actions in the history of Section 5.[20]

To obtain preclearance (whether from the Attorney General or the district court), the jurisdiction has the burden of demonstrating that its voting change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minor-

[14]In the remainder of this essay, the term "redistricting" generally will be used to refer to both redistricting and districting plans.

[15]Section 5 applies whenever a covered jurisdiction "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect" on the jurisdiction's coverage date, which (depending on the jurisdiction) is November 1 of 1964, 1968, or 1972.

[16]*Georgia v. United States*, 411 U.S. 526 (1973); Procedures for the Administration of Section 5 (hereafter "Section 5 Procedures"), 28 C.F.R. § 51.13(e).

[17]*E.g., Clark v. Roemer*, 500 U.S. 646 (1991); *United States v. Board of Supervisors of Warren County*, 429 U.S. 642 (1977); *Connor v. Waller*, 421 U.S. 656 (1975) (per curiam. § Section 5 Procedures, 28 C.F.R. § 51.10.

[18]Preclearance determinations by the Attorney General are not subject to judicial review. *Morris v. Gressette*, 432 U.S. 491 (1977); *Harris v. Bell*, 562 F.2d 772 (D.C. Cir. 1977); Section 5 Procedures, 28 C.F.R. § 51.49.

[19]*Morris v. Gressette*, *supra*. *See also McCain v. Lybrand*, 465 U.S. 236 (1984).

[20]From the enactment of Section 5 in 1965 through July 1, 1995, the Attorney General received approximately 270,000 changes for Section 5 review. Only 55 declaratory judgment actions were filed in this period (which sought preclearance for somewhat more than 55 voting changes).

ity group]."[21] The Act defines "membership in a language minority group" to include "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage."[22] During the time period in question, the Attorney General's Procedures for the Administration of Section 5 also specified that a change could not be precleared if it presented a "clear violation" of the "results" test of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1988),[23] which prohibits the use of voting practices or procedures that deny minority voters an equal opportunity to elect candidates of their choice. In 1997, the Supreme Court held that preclearance may not be denied based on a Section 2 violation.[24] While this ruling is significant, Section 2 played only a very minor role in the Attorney General's Section 5 redistricting determinations following the 1990 Census; only one redistricting objection relied exclusively on Section 2.[25] Accordingly, the Supreme Court's ruling has minimal relevance here.

Section 5 applies to nine states in their entirety—the States of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia—and to substantial portions of two other states—New York (the Bronx, Brooklyn, and Manhattan) and North Carolina (40 of the state's 100 counties).[26] In addition, relatively small portions of California, Florida, Michigan, New Hampshire, and South Dakota are covered.[27] Where 80 entire state is covered, all statewide redistricting plans and all local plans are subject to preclearance. In the case of a partially covered state, statewide plans must be precleared to the extent they impact on the political subdivisions that are covered, and all local plans in the covered subdivisions must be precleared.

A requirement of federal preclearance also may arise as a result of voting rights litigation. Under Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c) (1988), a federal district court may remedy a Fourteenth or Fifteenth Amendment violation in part by ordering that the defendant jurisdiction be subject to the same preclearance requirements as in Section 5, for a specified period of time and for specified types of voting changes. Preclearance is obtained from the Attorney General or from that local district court.[28] Several significant post-1990 redistrictings were subject to preclearance pursuant to Section 3(c), including the New Mexico house and senate plans and the redistricting for the Los Angeles County board of supervisors.[29]

Preclearance is required irrespective of the method by which a covered jurisdiction adopts a redistricting plan. Thus, a plan must be precleared whether it is adopted

[21] 42 U.S.C. § 1973c (1988). Section 5 places the burden of proof on covered jurisdictions in judicial preclearance actions, *South Carolina v. Katzenbach*, *supra*, and the Attorney General's Section 5 Procedures similarly require that jurisdictions bear the burden of proof in administrative preclearance proceedings. 28 C.F.R. § 51.52. In *Georgia v. United States*, *supra*, the Supreme Court rejected a challenge to the Attorney General's interpretation of the Act in this regard.

[22] Section 14(c)(3), 42 U.S.C. § 1973l(c)(3).

[23] Section 5 Procedures, 28 C.F.R. § 51.55(b)(2).

[24] *Reno v. Bossier Parish School Board*, 117 S. Ct. 1491 (1997).

[25] This objection was to the redistricting plan for the Texas Senate (interposed on March 9, 1992). For a description of the circumstances relevant to that objection, see note 52 *infra*.

by a legislative body, a state court, or a redistricting commission.[30] In addition, if a jurisdiction proposes or agrees to a plan to resolve a federal voting rights lawsuit (such that the plan reflects the policy choices of the jurisdiction), preclearance is required even though the plan also must be approved by the district court.[31] On the other hand, a plan prepared by the federal court itself is not subject to preclearance.[32]

[26] The coverage formula, set forth in Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b) (1988), specifies a two-part test for Section 5 coverage: 1) on November 1 of 1964, 1968, or 1972, the state or political subdivision "maintained...any test or device" related to voting (as determined by the Attorney General); and 2) less than 50 percent of the jurisdiction's voting age residents were registered to vote on November 1 of 1964, 1968, or 1972, or less than 50 percent of the voting age residents voted in the presidential election of 1964, 1968, or 1972 (as determined by the Director of the Census). For purposes of determining coverage using the 1964 and 1968 dates, Section 4 defines "test or device" to include certain requirements imposed as a prerequisite to voting or registering to vote, such as literacy tests and moral fitness tests. With respect to the 1972 coverage date Section 4(f)(3) provides that "test or device" also includes the use of English-only elections in jurisdictions where more than five percent of the voting age citizens "are members of a single language minority" (defined in Section 14(c)(3), 42 U.S.C. § 1973l(c)(3), as including "persons who are American Indian, Asian American, Alaskan Native or of Spanish heritage").

For each coverage date, coverage first was determined on a state-by-state basis and then, for those states not covered in their entirety, the coverage formula was applied to each "political subdivision" in those states ("political subdivision" is defined in Section 14(c)(2), 42 U.S.C. § 1973l(c)(2), as "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting").

Section 4(b) also specifies that coverage determinations by the Attorney General and the Director of the Census are not reviewable in court, which was upheld by the Supreme Court in *Briscoe v. Bell*, 432 U.S. 404 (1977). Section 4(a) sets forth a procedure by which a jurisdiction that meets the coverage test may "bail out" from coverage. For a discussion of the bailout procedure, see Paul F. Hancock and Lora L. Tredway, "The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination," 17 Urb. Law. 379 (1985).

The Supreme Court upheld the constitutionality of the coverage procedure in *South Carolina v. Katzenbach*, *supra*, and subsequently reaffirmed the constitutionality of Section 5 in *City of Rome v. United States*, 446 U.S. 156 (1980).

Jurisdictions subject to Section 5 also are subject to certain other special provisions of the Act dealing with federal registration examiners and election observers. Sections 6-9 of the Voting Rights Act, 42 U.S.C. §§ 1973d-g.

[27] In these states, the following areas are covered by Section 5: four counties in California (Kings, Merced, Monterey, and Yuba); five counties in Florida (Collier, Hardee, Hendry, Hillsborough (where the City of Tampa is located), and Monroe); two townships in Michigan (Clyde and Buena Vista); ten towns in New Hampshire (Rindge Town, Millsfield Township, Pinkhams Grant, Stewartstown Town, Stratford Town, Benton Town, Antrim Town, Boscawen Town, Newington Town, and Unity Town); and two counties in South Dakota (Shannon and Todd). The complete listing of all Section 5 covered jurisdictions, including their applicable coverage dates, is set forth in the appendix to the Section 5 Procedures. 28 C.F.R. Pt. 51.

[28] The Section 5 Procedures specify that Section 3(c) submissions to the Attorney General are processed in the same manner as Section 5 submissions. 28 C.F.R. § 51.8.

[29] *Sanchez v. Anaya*, No. 82-0067M (D.N.M. Dec. 17, 1984) (coverage for state legislative redistrictings in New Mexico following the 1990 Census); *Garza and United States v. County of Los Angeles*, Nos. CV 88-5143 EN (Ex) and CV 88-5435 KN (Ex) (C.D. Cal. Apr. 26, 1991) (coverage for any change affecting the method of electing the county board of supervisors through 2002).

In addition, during the time period in question, four individual counties in New Mexico were required to obtain preclearance for all voting changes including redistrictings. *United States v. McKinley County*, No. 86-0029-C (D.N.M. Jan. 13, 1986) (until January 1996); *United States v. Socorro County*, No. 93-1244 JP (D.N.M. Apr. 11, 1994) (until December 2003); *United States v. Cibola County*, No. 93-1134 LH/LFG (D.N.M. Apr. 21, 1994) (until March 2004); *United States v. Sandoval County*, No. 88-1457-SC (D.N.M. Sept. 9, 1994) (at a minimum, until ten years following entry of the order). The State of Arkansas and its political subdivisions were covered under Section 3(c) but only with respect to changes relating to the use of a majority vote requirement in general elections. *Jeffers v. Clinton*, 740 F. Supp. 585, 626-27 (E.D. Ark. 1990), *app. dis.*, 498 U.S. 1129 (1991) (coverage until further order of the court).

When a jurisdiction files an administrative preclearance request, Section 5 specifies that the Attorney General has 60 days in which to interpose an objection (i.e., deny preclearance), and that if no action is taken within the 60-day review period, the submitted change is precleared by operation of law. The administrative preclearance process is governed by the Attorney General's Procedures for the Administration of Section 5,[33] which define the specific steps a jurisdiction must take to seek administrative preclearance and the procedures followed by the Attorney General in responding; the process is relatively informal compared to federal court litigation.[34] The Section 5 Procedures include a provision allowing the Attorney General to send a written request for additional information to the submitting jurisdiction and the operative 60-day period then begins anew when the jurisdiction provides a complete response to that request.[35] The Procedures also provide that a jurisdiction may request that the Attorney General reconsider and withdraw an objection.[36]

Where preclearance is denied, the jurisdiction continues to be prohibited

[30]For example, following the 1990 Census all three statewide plans for California (for Congress and the two houses of the state legislature) were adopted by the state supreme court, and then precleared by the Attorney General on February 19 and 28, 1992. The plans adopted for the 1992 elections for the Alaska legislature also were ordered by the state courts, and were precleared on July 8, 1992. In New York City, the responsibility for drawing the city council redistricting plan is assigned to a redistricting commission. The Attorney General interposed an objection on July 19, 1991 to the initial plan adopted by the commission and precleared a remedial plan on July 26, 1991.

[31]*McDaniel v. Sanchez*, 452 U.S. 130 (1981); Section 5 Procedures, 28 C.F.R. § 51.18. Such plans include those embodied in a consent decree and plans offered to the court as a remedy by the defendant jurisdiction but opposed by the plaintiff.

[32]*Connor v. Johnson*, 402 U.S. 690 (1971) (per curiam); *Texas v. United States*, 785 F. Supp. 201 (D.D.C. 1992); Section 5 Procedures, 28 C.F.R. § 51.18. The United States has taken the position that a plan prepared by a litigant other than the defendant jurisdiction, which does not reflect the jurisdiction's policy choices and which is ordered into effect by a federal district court, also is not subject to Section 5. Br. for the United States as Amicus Curiae at 11-15, *Slagle v. Terrazas*, 506 U.S. 801 (1992), *aff'ing mem.*, 789 F. Supp. 828 (W.D. Tex. 1991) (No. 91-1540). *See also* 28 C.F.R. § 51.18.

If a court-ordered plan that was not subject to preclearance is subsequently adopted by the Section 5 jurisdiction, the plan may then be subject to Section 5 preclearance for use in future elections. *Statewide Reapportionment Advisory Committee v. Campbell*, No. 3:91-3310-1 (D.S.C. Aug. 22, 1994); 28 C.F.R. § 51.18.

[33]28 C.F.R. Pt. 51.

[34]The administrative preclearance process is begun by a jurisdiction sending a written request to the Attorney General that identifies the changes for which preclearance is sought. The Section 5 Procedures specify the information that should be included with the request, the manner in which the Attorney General processes requests, the permissible responses by the Attorney General, and the general substantive standards applied by the Attorney General.

Unlike federal court litigation, there are no parties in an administrative preclearance proceeding, the process is not adversarial, there is no testimony taken, and the Attorney General does not have subpoena power. The Attorney General considers any and all information provided by the submitting jurisdiction (which, for a redistricting, typically may include a letter describing and explaining the new plan, the enacting legislation or ordinance, demographic information and district maps, transcripts or minutes of meetings, newspaper articles, and election returns). The Attorney General also considers any written comments submitted by interested persons, and gathers additional information through telephone interviews. It is rare for an on-site investigation to be conducted because of the overwhelming number of submissions that must be reviewed, the Attorney General's limited staff, and the limited time allowed for conducting Section 5 reviews.

[35]Section 5 Procedures, 28 C.F.R. § 51.37. *Georgia v. United States*, 411 U.S. 526 (1973) (upholding the Attorney General's regulation regarding the right to toll the 60-day period by requesting additional information). The 60-day period also is restarted when the submitting jurisdiction provides material supplemental information to the Attorney General. 28 C.F.R. § 51.39.

[36]Section 5 Procedures, 28 C.F.R. §§ 51.45, 51.47, 51.48. The Section 5 Procedures also permit the Attorney General to initiate a reconsideration review. 28 C.F.R. § 51.46.

under Section 5 from implementing the voting change. Although Section 5 generally contemplates that the affected jurisdiction may continue to implement the existing practice or procedure, a new plan usually must be adopted following a redistricting objection since the existing plan typically does not comply with the Fourteenth Amendment's "one-person, one-vote" requirement. With respect to first-time districting plans (i.e., plans adopted in connection with a change to district elections from an at-large election method or an appointive system), the jurisdiction also may find it necessary to adopt a new plan rather than return to the old election or selection system.[37] If a jurisdiction does not voluntarily adopt a new redistricting or districting plan after preclearance is denied, that decision may be challenged through litigation (e.g., claiming a "one-person, one-vote" violation or a Section 2 violation).[38]

The Attorney General's decisionmaking authority under Section 5 has been delegated to the Assistant Attorney General for Civil Rights.[39] The Assistant Attorney General makes all decisions with respect to objections, requests for reconsideration of objections, and other significant or controversial matters (e.g., all statewide redistrictings following the 1990 Census). The Assistant Attorney General has authorized the Chief of the Division's Voting Section generally to act on the Attorney General's behalf in all other matters.[40] The staff of the Voting Section is responsible for the receipt, investigation, and analysis of all submitted voting changes.

Each Section 5 decision by the Attorney General is formalized in a letter sent to the submitting jurisdiction. Objection and reconsideration letters provide a description of the concerns that prompted the decision to object or to withdraw or not withdraw the reconsidered objection. Preclearance letters generally consist of a standard letter that does not address the basis for the preclearance decision.

B. Technological Changes

The 1990 Census sparked a technological revolution in the drawing and review of redistricting plans. For the first time, the Census Bureau placed the country's census geography (with its associated population data) on computer. This made it possible for any entity or individual possessing the computer-readable census data and "geographic information system" ("GIS") software to quickly and simply use the census data to draw redistricting plans or review plans drawn by others. The use of census data to draw or review plans was not something new in the 1990s. But the GIS software provided a new and powerful lens through

[37]For example, a Section 2 suit may be pending against the jurisdiction, and either the court has determined that the at-large system violates Section 2 or the jurisdiction does not wish to litigate that issue. Or state law may preclude a return to the prior system.

[38]The United States may file suit under Section 2, but lacks authority to file suit based on a constitutional violation.

[39]Section 5 Procedures, 28 C.F.R. § 51.3.

[40]Section 5 Procedures, 28 C.F.R. § 51.3. Should the Chief of the Voting Section disagree with a recommendation by Section staff to interpose an objection, the submission is forwarded to the Assistant Attorney General for decision.

which the precise location and size of minority population concentrations could be determined.

Section 5 jurisdictions, as well as private voting rights groups, widely utilized GIS in creating plans. The Voting Section of the Civil Rights Division similarly utilized GIS in reviewing submitted plans, and GIS played a profound and crucial role in allowing the Attorney General to closely scrutinize in a timely manner the very large number of plans submitted for preclearance following the 1990 Census. Previously, the Department often had asked jurisdictions submitting redistricting plans to identify the location of minority population concentrations and, in some submissions, had its own staff go through the painstaking process of transferring census data from a computer printout to a census map on which the new and existing district lines were overlaid.

In addition, the Census Bureau for the first time in the 1990 Census provided demographic information for the entire country by small geographic units, known as census blocks, rather than using census blocks and, in some rural areas, larger enumeration districts. This allowed jurisdictions greater flexibility in drafting district lines and a heightened ability to identify the location of minority population concentrations.

II. PRECLEARANCE DETERMINATIONS REGARDING POST-1990 REDISTRICTING PLANS

A. Overview

The 1990s saw a record level of Section 5 redistricting activity. From April 1991 through the first half of 1995, the Attorney General received nearly 3,000 redistricting plans for Section 5 review (2,822).[41] This was almost twice the number of plans submitted in a comparable period following the 1980 Census, and about seven times the number submitted following the 1970 Census.[42] In response, the Attorney General precleared 93 percent (2,348) of the post-1990 plans for which a merits determination was made (i.e., plans precleared or objected-to) and interposed objections to seven percent (183 plans).[43] No merits determination was made on a portion of the submitted plans (slightly over ten percent of the total plans submitted), either because a merits determination was inappropriate or because the plans still were pending review as of July 1, 1995.[44]

The rate of objection in the 1990s was almost identical to the 1980s rate, when the Attorney General interposed objections to eight percent of the plans for which a merits determination was made. While the necessary statistical information is not available to compute this percentage for the 1970s, the objection rate was substantially higher in that period—the Attorney General objected to approximately 14 percent of all plans submitted then (including plans for which a merits determination was not made).[45]

[41]The 1990s submissions included a small number of pre-1990 plans which jurisdictions had failed to submit for preclearance at the time they were adopted.

[42]For calendar years 1981 through 1984, approximately 1,500 redistrictings plans were submitted to the Attorney General for Section 5 review, and from 1971 through 1974 approximately 400 plans were submitted.

[43]During this period, there was one instance in which the Attorney General interposed an objection to a redistricting plan and then later withdrew the objection (to a county redistricting plan in Mississippi). The Section 5 determination for this plan is included in the preclearance total and not in the figure for the number of plans to which objections were interposed.

In absolute terms, the 183 post-1990 redistricting objections represent a record number. They constitute about 40 percent of all redistricting objections interposed since the Voting Rights Act was adopted in 1965, about one and two-thirds times the number of objections interposed from April 1981 through June 1985, and over three times the number of objections interposed from April 1971 through June 1975.[46]

The large increase in the absolute number of objections following the 1990 Census is only in part attributable to the increase in the number of plans submitted. While a large portion of the increase in submitted plans was due to the adoption of district election systems following the 1982 amendment to Section 2, only a modest number (14 percent) of the objected-to plans were from jurisdictions that either were adopting their first redistricting plan following the post-1982 adoption of a district method of election or were adopting a districting plan for the first time (as part of a change from an at-large election system or an appointed board). Even if these first-time redistrictings and districtings are discounted, the absolute number of plans to which objections were interposed still increased substantially from the 1980s to the 1990s.[47]

Another notable aspect of the post-1990 objections was the significant increase in the number of objections involving discrimination against Hispanic Americans. Objections were interposed on this basis to statewide plans in Ari-

[44]No merits determination could be made for 286 plans, either because the plan was voluntarily withdrawn from Section 5 review before a determination was made, Section 5 Procedures, 28 C.F.R. § 51.25, or because the plan was not ripe for review or had become moot (*e.g.*, certain plans were adopted with a sunset provision that was triggered before a Section 5 determination could be made). 28 C.F.R. §§ 51.22, 51.35.

Another 46 plans submitted during this time period were pending review as of July 1, 1995, *i.e.*, were under active review but the 60-day review period had not yet expired (36 plans), or the Attorney General had made a written request for additional information and the jurisdiction had not yet responded (10 plans).

The number reported for the total number of submitted plans is slightly less than the sum of the plans precleared, objected to, under consideration as of July 1, 1995, or for which the Attorney made no determination. This is because there were a small number of plans already pending review as of April 1991, *i.e.*, the beginning of the reporting period used in this article.

[45]From April 1981 through June 1985, objections were interposed to approximately 108 redistricting plans (there also were five plans where objections were interposed and then later withdrawn). From April 1971 through June 1975, there were approximately 58 redistricting objections (with an additional two that were subsequently withdrawn).

[46]As of June 30, 1995, the Attorney General had interposed objections to approximately 460 redistricting plans since the adoption of Section 5.

Another way to describe the scope of the post-1990 redistricting objection activity is that if the Section 5 preclearance mechanism did not exist, the Department would have had to successfully prosecute approximately 118 lawsuits under Section 2 of the Act between April 1991 and June 1995 in order to have achieved the same result (118 represents the number of individual states and local jurisdictions where objections were interposed to statewide and local redistricting plans).

[47]Discounting the post-1990 objections to these first-time redistrictings and districtings, the post-1990 total still is about one and a half times greater than the number of redistricting objections in the comparable 1980s period.

zona, New Mexico, New York, and Texas, and to local plans for three counties and a community college district in Arizona, two counties in California, the New York City Council, and, in Texas, 11 counties, two cities (Dallas and Houston), four school districts, a water district, and plans for justices of the peace and constables in five counties. In contrast, during the same time period in the 1980s, objections based on discrimination against Hispanic voters were interposed to statewide plans in New York and Texas, and to local plans only for the New York City Council and one county in Texas.

Following the 1990 Census (through the middle of 1995), jurisdictions filed only eight declaratory judgment actions seeking preclearance from the District of Columbia Court for a post-1990 redistricting plan The district court granted preclearance in one case over the opposition of the United States (for a Louisiana school board plan), however, that decision recently was vacated and remanded by the Supreme Court; in two other cases the district court granted preclearance with the United States' concurrence (for the Texas Senate plan and a plan for a Mississippi county governing body). The other suits were dismissed without a ruling on the merits (see Appendix I-A, page 111). In fact, since the passage of the Act, there have been only nine decisions on the merits regarding redistricting plans in declaratory judgment actions (see Appendix I-B, page 112).

B. Statewide Redistricting Plans

From April 1991 through June 1995, the Attorney General interposed Section 5 objections to 30 statewide redistricting plans for congressional delegations, state legislatures and a state board of education. Preclearance was granted to 53 statewide plans (including initial plans and plans adopted to remedy objections).[48]

The plans to which objections were interposed are as follows:

State	*Plans*
Alabama	Congressional
Alaska	House and Senate
Arizona	House (2 plans) and Senate (2 plans)
Florida	Senate
Georgia	Congressional (2 plans), House (3 plans), and Senate (2 plans)
Louisiana	House, Senate, and Board of Elementary and Secondary Education
Mississippi	House and Senate (2 plans)
New Mexico	Senate[49]
New York	Assembly
No. Carolina	Congressional, House, and Senate
So. Carolina	House
Texas	House and Senate
Virginia	House

[48]There were another 14 redistrictings precleared that made limited changes to statewide plans that previously had been precleared, and two limited redistrictings were precleared where the prior statewide plan was court-ordered.

[49]As of July 1995, the objection to the New Mexico Senate plan was the only objection interposed under Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973b(c) (1988), since the adoption of the Act.

Generally, all other statewide plans in the covered states were precleared, except as noted below.[50]

Following the statewide objections, the affected states uniformly complied with Section 5. No state sought to implement a plan to which the Attorney General objected, and after the objections were interposed the states generally adopted new plans which were precleared and then implemented. In a few instances, the objected-to plan was replaced for the 1992 elections by a plan ordered into effect by a federal district court based on exigent circumstances, i.e., there was insufficient time for the state to develop a remedial plan and hold elections as scheduled. This occurred with respect to the Alabama congressional plan, the Arizona legislative plans, and the Texas House plan. Arizona and Texas subsequently adopted and obtained preclearance for remedial plans, while Alabama is continuing to implement the court-drawn plan for congressional elections.[51]

[50]Following the 1980 Census, the Attorney General interposed objections to 27 statewide plans, as follows:

State	*Plans*
Alabama	House (2 plans) and Senate (2 plans)
Arizona	House and Senate
Georgia	Congressional, House, and Senate
Louisiana	House
Mississippi	Congressional
New York	Congressional, Assembly, and Senate
No. Carolina	Congressional, House (3 plans), and Senate (2 plans)
So. Carolina	House
Texas	Congressional, House, and Senate
Virginia	House (2 plans) and Senate

[51]In Alabama, the legislature initially failed to adopt a congressional redistricting plan and suit was filed in the local federal district court to obtain a new plan. After trial and four days before judgment was entered, the state legislature adopted a plan. The three-judge district court then entered an order on March 9, 1992 adopting its own plan for the 1992 elections, with the proviso that if the legislature's plan was precleared within 18 days of the order that plan would be used instead. *Wesch v. Hunt*, 785 F. Supp. 1491 (S.D. Ala.), *aff'd mem. sub nom.*, *Camp v. Wesch*, 504 U.S. 902 (1992). The Attorney General interposed an objection to the legislative plan on March 27, 1992. The district court declined to reopen its judgment and reconsider its plan in light of the objection, and this decision was summarily affirmed by the Supreme Court. *Figures v. Hunt*, 506 U.S. 809 (1993).

The Attorney General interposed an objection to the redistricting plans for the Arizona House and Senate on June 10, 1992. Immediately thereafter, the legislature adopted a new plan. On June 19, 1992, a local three-judge district court ordered the interim use of that plan for the 1992 elections. *Arizonans for Fair Representation v. Symington*, No. CIV 92-256-PHX-SMM (D. Ariz.). About a month later, the state submitted this plan to the Attorney General for preclearance, and on August 12, 1992 the Attorney General interposed an objection. The court then declined to reconsider its decision in light of the objection, which was summarily affirmed by the Supreme Court. *Arizona Hispanic Community Forum v. Symington*, 506 U.S. 969 (1992).

The Attorney General interposed an objection to the plan for the Texas House of Representatives on November 12, 1992. On December 24, 1992, the local district court ordered into effect a plan that altered the legislative plan with respect to those districts whose configuration was the basis for the Attorney General's objection. *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. 1991).

In addition, the following events transpired with respect to the redistricting plans for the Mississippi House and Senate. After the Attorney General interposed objections to both plans in 1991, a three-judge district court ordered that the existing, precleared 1982 plans be used on an interim basis for the regular 1991 elections. *Watkins v. Mabus*, 771 F. Supp. 789 (S.D. Miss.), *aff'd mem. in part and vacated as moot in part*, 502 U.S. 954 (1991). The state legislature adopted new plans in 1992 which the Attorney General precleared (the Attorney General interposed an objection to the initial 1992 Senate plan and then precleared the second 1992 Senate plan). The district court then ordered special House and Senate elections in 1992 pursuant to the precleared plans to elect persons to complete the remainder of the regular four-year terms. *Watkins v. Fordice*, 791 F. Supp. 646 (S.D. Miss. 1992).

In addition, there were a few instances where, as an initial matter (i.e., not following an objection), states were unable to adopt the requisite statewide plans and, as a result, federal district courts stepped in and imposed court-ordered plans for the 1992 elections. This occurred with respect to the Arizona congressional plan, all three South Carolina plans (for Congress, the state House, and the state Senate), the Texas Senate plan, as well as the Florida and Michigan congressional plans (where Section 5 coverage is limited).[52] South Carolina, Texas, and Florida subsequently adopted and obtained preclearance for new plans.

C. Local Redistricting Plans

From April 1991 through June 1995, the Attorney General interposed Section 5 objections to 153 redistricting plans (for 122 different elected bodies) for counties, cities, and school districts, as well as plans used to elect certain other local officials.[53] These included objections to the plans for the three largest cities covered in whole or in part by Section 5, New York City and Dallas and Houston, Texas. Preclearance was granted to 2,279 local plans.

The local plan objections may be summarized as follows:[54]

State	*Total*	*Local Jurisdictions*
Alabama	7	Two cities and one school district (including objections to two plans for each city and to three plans for the school district)
Arizona	5	Three county governing bodies and one college district (including objections to two plans for the college district)
California	2	Two county governing bodies

[52] *Arizonans for Fair Representation v. Symington*, No. 92-256-PHX-SMM (D. Ariz. May 5, 1992), *aff'd mem. sub nom., Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 507 U.S. 981 (1993) (Arizona); *Burton v. Sheheen*, 793 F. Supp. 1329 (D.S.C. 1992), *vacated and remanded sub nom., Statewide Reapportionment Advisory Committee v. Theodore*, 508 U.S. 968 (1993) (South Carolina) (vacated in light of position taken by the United States in its brief as amicus curiae, urging remand for the district court to determine whether its plans complied with Section 2 of the Act); *De Grandy v. Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992) (Florida); *Good v. Austin*, 800 F. Supp. 557 (E.D. & W.D. Mich. 1992) (Michigan).

Texas' efforts to adopt a post-1990 plan for its state Senate may be chronicled as follows. The legislature enacted a plan in 1991 and submitted it to the Attorney General for Section 5 preclearance. However, before the Section 5 determination was made, the plan was withdrawn from review (as permitted by 28 C.F.R. § 51.25) and a new plan was submitted that was the product of a settlement in a state court redistricting suit. That plan was precleared but subsequently was invalidated by the Texas Supreme Court. *Terrazas v. Ramirez*, 829 S.W.2d 712 (1991).

A federal district court then ordered its plan into effect. *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. 1991), *aff'd mem. sub nom., Richards v. Terrazas*, 504 U.S. 939 (1992) and *Slagle v. Terrazas*, 506 U.S. 801 (1992). At the time the district court initially acted, the Texas legislature had not adopted a substitute plan. Shortly thereafter, the legislature adopted a plan, however, the district court declined to put the legislature's plan into effect based primarily on its determination that doing so would delay the 1992 elections. An alternative basis for the district court's decision was a preliminary determination that the legislature's plan violated Section 2 of the Voting Rights Act. The Attorney General interposed an objection to the legislature's plan on March 9, 1992 based upon the federal court's ruling that the state's plan would violate Section 2; subsequently, with the Attorney General's concurrence, the District Court for the District of Columbia precleared the plan. *Texas v. United States*, 802 F. Supp. 481 (1992). After the 1992 elections were held, the district court held that the plan did not violate Section 2. 821 F. Supp. 1162 (1993). Accordingly, the legislature's plan was implemented in the 1994 elections.

[53] This does not include the one instance where an objection to a local redistricting plan later was withdrawn. For the same period in the 1980s, the Attorney General interposed objections to approximately 81 local plans, not including five plans to which objections were interposed and then later withdrawn.

Georgia	5	One county governing body, three cities, and one school district
Louisiana	50	Seventeen parish governing bodies, seven cities, fourteen school districts, and one plan for parish justices of the peace/constables (including objections to three plans for two parish governing bodies, two plans for three parish governing bodies, three plans for one school district, two plans for another school district, and two plans for one city)
Mississippi	43	Twenty-five county governing bodies, six cities, and two plans for justice court/constables (including objections to three plans for one county governing body and two plans for eight county governing bodies)
New York	1	New York City
So. Carolina	11	Four county governing bodies, four cities, and two school districts (including objections to two plans for one city)
Texas	28	Twelve county governing bodies, two cities, four school districts, one water district, and five plans for justices of the peace/constables (including objections to three plans for one county governing body, two plans for one city, and two plans for one school district)
Virginia	1	One county governing body.

Appendix II (page 114) lists the individual jurisdictions where objections were interposed.

The vast majority of local plans to which objections were interposed were for jurisdictions whose district methods of election pre-date the 1982 amendment of Section 2.[55] Thus, as noted previously, the large increase in the number of post-1990 objections may not simply be traced to the flood of new redistrictings that resulted from election method changes prompted by the 1982 amendment to Section 2. In addition, a large number of the post-1990 redistricting objections concerned elective bodies where no redistricting objection was interposed following the 1980 Census. However, there also were some "repeat offenders" (particularly in Mississippi), where post-1990 objections followed redistricting objections in the 1980s or in 1990.[56]

Nearly all local jurisdictions complied with Section 5 by not implementing plans to which objections were interposed. There were a few exceptions to this record of Section 5 compliance, notably involving jurisdictions in Arizona and Texas. In response to these violations, lawsuits were filed by the United States and private plaintiffs to enforce Section 5, and the district courts generally enjoined the violations (see Appendix I-C, page 112).

[54] In Louisiana and South Carolina, there were objections interposed where the same plan was to be used for the both the parish/county governing body and the local school district, and in Texas there were objections where the same plan was to be used for the county governing body and for the election of justices of the peace and constables. For statistical purposes, the Justice Department has counted each such objection as an objection to two plans since state law did not require that the entities involved use the same plan. In Mississippi, on the other hand, the governing boards of countywide school districts and county election commissioners are required to be elected using the board of supervisors redistricting plan. Accordingly, the Department has counted each objection to a supervisor plan as one objection.

[55] Of the 153 local plans to which objections were interposed, only 25 of the plans were for jurisdictions (20 jurisdictions) that adopted a district method of election following the 1982 amendment to Section 2.

Following the objections, some jurisdictions were able to adopt and obtain preclearance for a new plan prior to their next regularly scheduled election. Others delayed their elections until a precleared plan was obtained (notably, parish governing bodies in Louisiana) or held elections under their pre-1990, precleared plans (notably, county governing bodies in Mississippi). As of July 1995, about 84 percent of the jurisdictions where objections were interposed had obtained preclearance for new plans (and another five percent had new plans pending before the Attorney General or had objections interposed only recently, during the second quarter of 1995).

D. Deterrent Effect of Section 5

Statistics concerning the number of plans that were precleared or to which objections were interposed describe only one aspect of the impact of Section 5 on the plans adopted during the first half of this decade. It is clear that before any preclearance review was conducted, district boundaries often were configured to protect and enhance minority electoral opportunity in part because of the plan-drawers' knowledge that their districting choices would be scrutinized for discriminatory purpose and effect under Section 5.

There are a number of reasons why Section 5 had a strong deterrent effect. By the 1990s, state and local officials, and their demographers, had become intimately familiar with the substantive requirements of Section 5. In addition, the large body of objections interposed since the passage of the Voting Rights Act in 1965, and the near complete absence of any success in Section 5 preclearance actions in the District of Columbia Court, were tangible evidence that Section 5 posed a significant barrier to implementing a discriminatory plan. Moreover, Congress' adoption of the Section 2 "results" standard in 1982, and the subsequent explication of that standard by the Supreme Court in *Thornburg v. Gingles*[57] and by the lower courts in redistricting litigation,[58] sent a powerful message to Section 5 jurisdictions that the Voting Rights Act would not permit the adoption of dilutive plans. Finally, minority leaders and the organizations

[56]The jurisdictions where a post-1990 Census objection followed an objection in the 1980s or in 1990 may be summarized as follows:

State	*Local Jurisdictions*
Alabama	One city (two post-1990 objections)
Georgia	One city
Louisiana	Two parish governing bodies and one school district (two post-1990 objections to one of the parish governing bodies)
Mississippi	Eleven county governing bodies (including three post-1990 objections for one governing body and two post-1990 objections for five governing bodies)
New York	New York City
South Carolina	One county governing body
Texas	One school district

[57]478 U.S. 30 (1986).

[58]See, *e.g.*, *Garza and United States v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991) (Los Angeles County board of supervisors plan found to violate Section 2); *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989) and 756 F. Supp. 1195 (E.D. Ark. 1990) (three-judge court), *aff'd mem.*, 498 U.S. 1019 (1991) (Arkansas legislative plan found to violate Section 2). See also cases cited in note 9 *supra*.

that assist them were well prepared following the 1990 Census to advocate the adoption of plans that would provide minority voters an opportunity to elect candidates of their choice.

There also were specific efforts made by the Department of Justice in the early 1990s to promote compliance with Section 5. The Assistant Attorney General for Civil Rights and the leadership of the Voting Section made numerous speeches at conferences attended by state and local officials, government and private attorneys, and demographers and legislative support staff in which the Department explained the principles that would be applied in enforcing Section 5. The Department emphasized that it would closely scrutinize submitted plans to ensure that they satisfied the preclearance standards. However, the Department also emphasized that it did not require that plans maximize the number of majority-minority districts or that plans provide proportional representation.[59]

Toward the end of the post-1990 redistricting cycle, in June 1993 and then in June 1995, the Supreme Court issued its twin decisions in *Shaw v. Reno*[60] and *Miller v. Johnson*[61] holding that, in certain limited circumstances, the intentional creation of a majority-minority district will trigger strict scrutiny under the Fourteenth Amendment. In *Shaw*, the Court held that strict scrutiny is invoked when a plan "is so bizarre on its face that it is 'unexplainable on grounds other than race.'"[62] Then, in *Miller*, the Court expanded this test holding that strict scrutiny applies when "race was the predominant" redistricting criterion; the Court explained that this test would be met when the decisionmaker "subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations."[63] In *Miller*, the Court held that a new black-majority congressional district in Georgia was unconstitutionally racially gerrymandered, and in 1996 the Court issued two more decisions finding constitutional violations involving new black-majority and Hispanic-majority districts in North Carolina and Texas.[64] However, a majority of the Court rejected the view that any consideration of race in redistricting is prohibited,[65] and, on the same day it decided *Miller*, the Court summarily affirmed a district court's ruling that California's congressional and legislative redistricting plans—which include numerous majority-minority districts—were not premised on an unconstitutional use of race.[66]

[59]See, *e.g.*, "Remarks of [Assistant Attorney General] John R. Dunne," 14 Cardozo L. Rev. 1127 (1993).

[60]509 U.S. 630 (1993).

[61]515 U.S. 900 (1995).

[62]509 U.S. at 644.

[63]515 U.S. at 916. The Court explained that "[a] State is free to recognize communities that have a particular racial makeup [without triggering the strict scrutiny standard], provided its action is directed toward some common thread of relevant interests." *Id.* at 920. However, the Court upheld the district court's finding that the use of race in drawing the challenged Georgia district could not be sanctioned on this ground.

[64]*Bush v. Vera*, 517 U.S. 952 (1996) (Texas); *Shaw v. Hunt*, 517 U.S. 899 (1996) (N. Carolina).

[65]*Bush v. Vera*, 517 U.S. at __, 116 S. Ct. at 1951-1952.

Clearly, the Supreme Court's rulings will have a substantial influence on state and local decisionmakers in future redistrictings, particularly when the issue is whether to provide minority citizens with a greater electoral opportunity than existed under the current plan. In part, of course, this will reflect the concern for redistricting in a constitutional manner. However, the ambiguity of the constitutional standard enunciated in *Shaw* and *Miller* also may compromise the positive deterrent effect of Section 5, to the extent that jurisdictions (either in good faith or for illicit reasons) may place less value on recognizing communities defined both by race and "actual shared interests." Initially, the decisions' effect on future redistricting behavior will be evidenced most particularly in those jurisdictions where established post-1990 plans are ruled unconstitutional. The more widespread effect on Section 5 jurisdictions likely will not be felt until the redistrictings following the 2000 Census. Most Section 5 jurisdictions had completed their redistricting efforts before *Shaw* was decided in 1993.[67] Also, *Shaw* represented a more limited ruling than *Miller* since it pointed only to bizarrely shaped majority-minority districts as those which would be constitutionally suspect and, by June 1995 when *Miller* was handed down, nearly all Section 5 jurisdictions had completed redistricting.[68]

III. THE ATTORNEY GENERAL'S SUBSTANTIVE FRAMEWORK IN REVIEWING POST-1990 REDISTRICTING PLANS

In describing the analytic framework relied upon by the Attorney General in reviewing the post-1990 redistricting plans, it is useful at the outset to emphasize several general propositions.

First, the touchstone for each redistricting determination was the "purpose and effect" test of Section 5. In applying this test, the Attorney General followed the analytic framework established by the courts as well as the principles and standards of review set forth in the Attorney General's Procedures for the Administration of Section 5.[69] The Attorney General did not implement any policy of maximizing the number of majority-minority districts nor did the Attorney General seek to mandate proportional representation. Although the Supreme Court in *Miller* criticized the Department's application of the Section 5 test, the decision did not alter that test.

[66] *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Ca. 1994), *aff'd mem.*, 515 u.s. 1170 (1995). More recently the Court affirmed district court rulings approving a black-minority legislative district in Florida and a Hispanic-majority congressional district in Chicago. *Lawyer v. Department of Justice* 117 S. Ct. 2186 (1997)' *King v. State Board of Elections*, 979 F. Supp. 619 (N.D. Ill. 1997), *aff'd mem. sub. nom. King v. Illinois Board of Elections*, 118 S. Ct. 877 (1998).

[67] Approximately three-quarters of the redistricting plans submitted between April 1991 and July 1, 1995 were submitted before the Supreme Court's decision in *Shaw*.

[68] The redistricting and districting plans submitted for administrative Section 5 review during the year following *Miller* constitute only about five percent of all plans submitted beginning in April 1991.

[69] 28 C.F.R. Pt. 51, Subpt. F.

The determination whether a plan should be precleared or was objectionable rested on a case-specific analysis of the individual facts relevant to the particular jurisdiction. As stated by the Supreme Court in *Thornburg v. Gingles* (in discussing Section 2 of the Act), Voting Rights Act determinations depend "upon a searching practical evaluation of the past and present reality,...and on a functional view of the political process."[70] Thus, under Section 5, a practice that is legal and proper in one jurisdiction may be illegal and improper in another.[71]

The great majority of the redistricting objections were based on the purpose prong of the Section 5 test. Because discriminatory purpose rarely is disclosed by explicit statements by officials, the purpose analysis involved the application of the long-established analytic framework to determine whether discriminatory purpose should be inferred, keeping in mind that under Section 5 the jurisdiction bears the burden of demonstrating the absence of discrimination. In applying this approach to the review of post-1990 redistrictings, the Department of Justice took a broad view of the purpose test. However, that did not represent any *de facto* use of a policy of maximization or proportional representation.

Underlying the "purpose and effect" test the question in each redistricting review typically was whether the submitted plan discriminated by: a) not providing for one or more additional majority-minority districts; and/or b) affording too low of a minority percentage in a proposed majority-minority district to allow minority voters a realistic electoral opportunity. As set forth in the Section 5 Procedures, in map-drawing terms the issue was whether the proposed districts divided ("fragmented") or overconcentrated ("packed") minority population concentrations. In that regard, fragmentation was viewed as including the decision to separate minority concentrations that are located reasonably close to one another such that inclusion of the concentrations in one district would not violate traditional race-neutral districting principles.[72]

Finally, the consideration of any partisan political interests has no part to play in the administration of Section 5. With a few possible exceptions since the enactment of the Voting Rights Act in 1965, political interests have not governed

[70] 478 U.S. at 45 (internal quotation marks omitted), *quoting* S. Rep. No. 417, 97th Cong., 2d Sess. 30 & n.120 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208.

[71] The Attorney General's case-specific approach to applying the Voting Rights Act previously has been described in James P. Turner, "Case-Specific Implementation of the Voting Rights Act," in *Controversies in Minority Voting* (Bernard Grofman and Chandler Davidson, eds., 1992). Mr. Turner was a longtime Deputy Assistant Attorney General in the Civil Rights Division and served as Acting Assistant Attorney General on a number of occasions, including most recently from January 1993 until the confirmation of Deval Patrick as Assistant Attorney General in March 1994.

[72] Section 5 Procedures, 28 C.F.R. §§ 51.58, 51.59. As the Supreme Court pointed out in *Johnson v. De Grandy*, 512 U.S. 997 (1994), some fragmentation and packing of a minority group may be inevitable in a redistricting plan and fragmentation or packing must result in some cognizable minimization of voting strength in order to make out a Section 2 results violation. Similarly, under Section 5, fragmentation and packing are significant, but not decision determinative, factors in reaching the ultimate conclusion whether a plan passes muster.

the application of the Voting Rights Act in any national administration, and this high standard was met in the review of the post-1990 redistricting plans. As noted by other commentators, there were a number of high visibility Voting Rights Act determinations in recent years where the determination was not what was advocated by the local political leaders of the national administration's political party.[73]

A. Overview of Section 5 Preclearance Standard

1. Retrogressive Effect

As interpreted by the Supreme Court in its 1976 decision in *Beer v. United States*,[74] the effect prong of the Section 5 test requires that covered jurisdictions demonstrate that their voting changes will not "lead to a retrogression in the position of...minorities with respect to their effective exercise of the electoral franchise."[75] Retrogression is a legal determination based on a finding that minority electoral opportunity has been meaningfully reduced, and that the reduction was avoidable.

The benchmark for judging whether a change is retrogressive is the existing practice or procedure, so long as that practice or procedure is legally enforceable under Section 5 (i.e., was in place as of the date of Section 5 coverage, was precleared, or was court-ordered and thus not subject to preclearance).[76] As applied to redistrictings, the retrogression analysis generally involves a comparison of the electoral opportunity provided by the proposed plan to that provided by the existing plan. The existing plan is analyzed using the most recent census data since the retrogression standard safeguards the level of minority voting strength present at the time the submission is being reviewed.[77] While the existing plan typically

[73]Bernard Grofman, "Would Vince Lombardi Have Been Right If He Had Said: 'When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing'?," 14 Cardozo L. Rev. 1237, 1254-1256 (1993) (discussing: the Department of Justice's successful Section 2 litigation against the redistricting plan for the Los Angeles County Board of Supervisors (*Garza and United States v. County of Los Angeles, supra*); preclearance of the Virginia House plan in July 1991; and preclearance of the North Carolina congressional plan in February 1992); Frank R. Parker, "Voting Rights Enforcement in the Bush Administration: The Four-Year Record," in *New Opportunities: Civil Rights At a Crossroads* (Citizens' Commission on Civil Rights, 1993) (noting that every redistricting objection arose out of circumstances where minority leaders opposed the plan, and also noting the July 1991 preclearance of the Virginia House plan). While the examples cited by these commentators occurred during the Bush Administration, in the Clinton Administration, for example, an objection was interposed to the South Carolina House plan (in May 1994) which was drawn by Democratic legislators and opposed by the Republican governor.

There are two essential checks on any tendency of a political appointee in the Department of Justice to permit political interests to enter into the Section 5 calculation. First, Section 5 decisions are guided by a large body of precedent, which includes not only court decisions and the Section 5 Procedures but also the large number of prior Section 5 determinations. These past Section 5 decisions are not binding precedent in a technical sense, but indicate analytic approaches that the Department seeks uniformly to follow unless there is a sound legal or policy reason for making a departure. Secondly, as described previously, the Department's internal decisionmaking process is a "bottom-up" process. All Section 5 submission reviews are conducted by the career, nonpolitical staff of the Voting Section, and all matters reviewed by the Assistant Attorney General are presented for decision with the analyses and recommendations made by the career Section staff and leadership.

[74]425 U.S. 130 (1976).

[75]*Id.* at 141.

[76]Section 5 Procedures, 28 C.F.R. § 51.54(b); *Texas v. United States*, 785 F. Supp. 201 (D.D.C. 1992).

is malapportioned and thus is no longer capable of implementation, a jurisdiction typically has available a variety of alternative plans that satisfy the "one-person, one-vote" test, follow sound districting principles, and maintain or augment minority electoral opportunity. However, a meaningful reduction in minority opportunity that is constitutionally unavoidable because of the "one-person, one-vote" requirement would not violate the retrogression standard.[78]

Although application of the retrogression test to redistrictings may engender some difficult factual questions, Section 5 jurisdictions generally understood (by the 1990s) its essential meaning and few retrogression objections were interposed to post-1990 redistrictings.[79] Often those objections also involved purpose concerns.

An example of a retrogression objection was the objection interposed on September 28, 1993 to the House and Senate plans for the State of Alaska. As stated in the February 11, 1994 letter denying the state's request to withdraw the objection, the focus of concern was "the effect upon Alaskan Native voters of the boundary lines for House District 36 and Senate District R, which includes all of House District 36...[which] result[ed] in reductions in the Alaskan Native share of the voting age population in House District 36 (from 55.7 percent to 50.6 percent) and in Senate District R (from 33.5 percent to 30.5 percent)." In its request for reconsideration, the state argued that despite the presence of polarized voting, there was sufficient white crossover voting that the reductions would not adversely affect the ability of Alaskan Native voters to elect their preferred candidates. The Attorney General maintained the objection noting that the Department's analysis of the electoral data showed that the reductions "would make it more difficult for Alaskan Native voters to elect candidates of their choice, even though the defeat of the Alaskan Natives' preferred candidates might not be ensured by the proposed reductions."[80]

[77]*City of Rome v. United States*, 446 U.S. 156, 186 (1980); *Texas v. United States*, 866 F. Supp. 20 (D.D.C. 1994); *Texas v. United States*, 785 F. Supp. 201 (D.D.C. 1992); *Mississippi v. United States*, 490 F. Supp. 569, 582 (D.D.C. 1979), *aff'd mem.*, 444 U.S. 1050 (1980); Section 5 Procedures, 28 C.F.R. § 51.54(b)(2).

The Voting Rights Act does not require that Section 5 analyses be based on the population data published in the decennial censuses. As a matter of practice, the Department relies on the census data as being presumptively accurate, however, where that data are unavailable (*e.g.*, where district lines split census blocks) or are out of date or incorrect, the Department will rely on population surveys or estimates prepared by the Section 5 jurisdiction (or, alternatively, by other interested persons) if prepared in a manner that indicates they are accurate and reliable.

[78]Comments to Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 488 (1987). Section 5 also does not freeze in place those aspects of a redistricting plan that have been found to represent an unconstitutional racial gerrymander. *Abrams v. Johnson*, 117 S. Ct. 1925, 1939 (1997).

[79]Where the change under review is an initial districting plan (adopted in connection with a change to a district method of election), the new plan must be compared with the overall method of election or selection previously in effect (subject to the proviso that this method is lawful under Section 5). This typically involves a comparison between the submitted plan and an at-large election method or an appointive system, which typically does not suggest any retrogression.

[80]In addition, as set forth in both the initial objection letter and the reconsideration letter, there also were purpose concerns that underlay the objection.

2. Discriminatory Purpose

Almost all the Section 5 objections interposed by the Attorney General to redistricting plans during the first half of this decade were based on the purpose prong of the Section 5 test.

Both the Attorney General and the federal courts consistently have construed the Section 5 purpose test as being co-extensive with the constitutional prohibition on enacting redistricting plans (or other voting practices and procedures) that minimize minority electoral opportunity for a discriminatory reason, and that is the approach that was used by the Attorney General in reviewing post-1990 redistricting plans.[81] To show the absence of discriminatory purpose, a Section 5 jurisdiction must demonstrate that the choices underlying the redistricting plan were not tainted, even in part, by an invidious purpose. It is not sufficient to establish that there are some legitimate, nondiscriminatory reasons for the plan.[82] Moreover, the fact that a redistricting plan is ameliorative, or at least not retrogressive, does not (by itself) demonstrate that the plan also is free of a discriminatory purpose. A plan may improve minority electoral opportunity to some extent (or at least not worsen it) but still may minimize minority electoral opportunity for an invidious reason, and such plans may not be precleared.[83] But the Department has not considered that discriminatory intent is demonstrated by the mere fact that a plan does not include as many majority-minority districts as it might.

As the Supreme Court recently confirmed,[84] the analytic framework used in Section 5 in evaluating whether a voting change has a prohibited discriminatory purpose is the framework laid out by the Court in *Arlington Heights v. Metropolitan Housing Development Corp.*[85] for evaluating whether a challenged practice

[81] *City of Pleasant Grove v. United States*, 479 U.S. 462, 469- 472 (1987); *City of Port Arthur v. United States*, 459 U.S. 159, 168 (1982); *City of Richmond v. United States*, 422 U.S. 358, 378-379 (1975).

However, in *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997), the Supreme Court recently raised as a possibility (but did not hold) that the Section 5 purpose test is limited to the question whether a change was enacted with an intent to retrogress minority electoral opportunity. The Court did not decide the issue (or undertake any analysis of the question) because, regardless of what the ultimate question is under the Section 5 purpose test, the district court in *Bossier* apparently had used the wrong analytic framework in deciding that the school board's redistricting plan satisfied that test (and thus a remand was necessary). Justices Breyer and Stevens, in their separate opinions in *Bossier*, explained that both the language of Section 5 and the underlying congressional intent, as well as the Court's prior Section 5 decisions, require that the Section 5 purpose test be construed as being equivalent to the constitutional test of purpose to minimize minority electoral opportunity. On remand, however, the district court declined to decide this issue. *Bossier Parish School Board v. Reno*, No. 94-1495 (D.D.C. May 1, 1998).

[82] *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977). *Accord, Texas v. United States*, 866 F. Supp. 20 (D.D.C. 1994); *Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983).

[83] *City of Pleasant Grove v. United States, supra*; *City of Port Arthur v. United States, supra*; *City of Richmond v. United States, supra*; *Busbee v. Smith, supra*. The Supreme Court's decisions in *Miller*, 515 U.S. at 923-924, and *Shaw v. Hunt*, 517 U.S. at __, 116 S. Ct. at 1904, are not to the contrary. Although the Court criticized the Department of Justice's enforcement of Section 5, the Court agreed that, notwithstanding the fact that the plans to which the Attorney General objected increased the number of black-majority congressional districts in Georgia and North Carolina, the Department properly required the states to demonstrate the absence of discriminatory purpose.

[84] *Reno v. Bossier Parish School Board, supra*.

has an unconstitutional discriminatory purpose. The Attorney General's Procedures for the Administration of Section 5 further define the relevant analytic factors.[86]

As stated in *Arlington Heights*, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[87] The Court noted that "an important starting point"[88] for the purpose inquiry is an analysis of the impact of the official action at issue. Thus, the starting (but not the ending) point in reviewing redistricting plans is an analysis of the extent to which the submitted plan fairly reflects minority voting strength in the context of prevailing voting patterns.[89] The analysis then branches out to consideration of such matters as the reasons proffered by the jurisdiction for its selection of the particular district lines, the reasons proffered for rejecting available alternative configurations, the extent to which the proposed plan adheres to or deviates from the jurisdiction's stated districting criteria, and the process leading to the adoption of the plan (including the opportunity for, and response to, minority input).[90] In actual practice, these different points of inquiry tend to merge together and reflect back on one another, as in each submission the pieces of the factual puzzle are fit together to reach an overall judgment as to whether the submitted plan was tainted by an invidious purpose.

Overall, the Section 5 objections interposed by the Attorney General to the post-1990 redistrictings reflected the view that where a plan substantially minimized minority voting strength, and that minimization was not required by adherence to traditional race-neutral districting principles, the jurisdiction bore the burden of demonstrating through specific evidence that discriminatory purpose did not play a role in the selection of the district lines. The conscious choice of district lines that have the foreseeable effect of minimizing minority voting strength is significant evidence of discriminatory purpose.[91] However, the Supreme Court's rulings in *Miller* and *Shaw v. Hunt* suggest that, where a plan is ameliorative, that fact now may go a long way toward

[85] 429 U.S. 252 (1977).

[86] 28 C.F.R. §§ 51.57-51.59.

[87] 429 U.S. at 266.

[88] *Id.*

[89] In the Section 5 context, the Supreme Court has characterized a districting plan that provides a full and appropriate electoral opportunity to minority voters as one that "afford[s] them representation reasonably equivalent to their political strength in the... community" or, alternatively, one that "fairly reflects the strength of the [minority] community." *City of Richmond v. United States*, 422 U.S. at 370, 371. *See also Johnson v. De Grandy*, 512 U.S. 997, 1013-1014, 1020 (1994)(proportional representation, or lack thereof, is probative evidence as to whether a redistricting plan provides minority voters with the equal electoral opportunity required by Section 2 of the Act); 512 U.S. at 1025 (O'Connor, J., concurring; same). However, a plan may fairly reflect minority voting strength but nevertheless be the product of an invidious purpose. *City of Port Arthur v. United States*, 459 U.S. at 168. *See also Johnson v. De Grandy*, 512 U.S. at 1017-1021 (proportional representation is not an absolute defense to a Section 2 "results" claim).

[90] 429 U.S. at 267-268. See also Section 5 Procedures, 28 C.F.R. §§ 51.57, 51.59(e)-(g).

demonstrating the absence of a discriminatory purpose.

B. Specific Redistricting Issues

1. Voting Patterns

An integral part of every review of a redistricting plan under Section 5 is an analysis of voting patterns, particularly with respect to elections for the electoral body for which the districts were drawn.

The threshold question in this regard is whether voting is polarized between minority and white voters, and if so, whether the polarization is at a level that is electorally significant. As noted by the Supreme Court in *Thornburg v. Gingles*, "courts and commentators agree that racial bloc voting is a key element of a vote dilution claim."[92] Simply put, it is only where voting is polarized between minority and white voters that the choice of district lines may affect the opportunity of minority voters *qua* minority voters to elect candidates of their choice.[93] The two complementary aspects of this inquiry, as described in *Gingles*, are whether minority voters are politically cohesive and whether white voters cast their votes sufficiently as a bloc to defeat the minority's preferred candidate in an election district.[94]

Accordingly, consideration was given to the polarization question in every post-1990 redistricting submission, and where serious concerns arose as to the propriety of a submitted plan, the Department closely scrutinized the electoral circumstances to determine whether and to what extent voting was polarized.[95] As with all other aspects of the Section 5 review, the analysis in each submission was case-specific and jurisdiction-specific. Nonetheless, in carrying out the reviews of the post-1990 plans, the Department commonly (although not universally) found that voting was racially or ethnically polarized in the jurisdictions at issue, although the level of polarization varied.

The Attorney General also considered, on a case-specific basis, factors other than polarization that may influence the electoral significance of a particular minority population percentage in a particular redistricting plan. This typically included such factors as the extent to which the minority voting age population percentage is less than the minority population percentage; the

[91] As stated in the Senate Report for the 1982 Voting Rights Act amendments regarding proof of discriminatory purpose under Section 2, "the normal inferences to be drawn from the foreseeability of defendant's actions... 'is one type of quite relevant evidence of racially discriminatory purpose.'" S. Rep. No. 417, 97th Cong., 2d Sess. 27 n.108, *quoting Dayton Board of Education v. Brinkman*, 443 U.S. 526, 536 n.9 (1979), *reprinted in* 1982 U.S.C.C.A.N. 177, 205.

[92] 478 U.S. at 55.

[93] "Not only does voting along racial lines deprive minority voters of their preferred representatives..., it also allows those elected to ignore minority interests without fear of political consequences,... leaving the minority effectively unrepresented." *Thornburg v. Gingles*, 478 U.S. at 48 n.11 (internal quotation marks omitted).

[94] As further explained by the Court in *Gingles*, "[i]f the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure [or the selection of particular district lines] thwarts distinctive minority group interests." *Id.* at 51. The Court also noted "that in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Id.* at 49 n.15.

extent to which eligible minority persons are registered to vote at a lower rate than eligible whites; the extent to which minority registered voters turn out at a lower rate than whites; and whether there is any population present in the jurisdiction that is legally precluded from voting or that in practice does not vote in local elections (such as a noncitizen population or the residents of a military base). Since the analysis is case-specific, the Attorney General has not subscribed to and has not in any way enforced the so-called "65 percent rule."[96]

The Attorney General's analysis of these factors yielded a variety of results. There were instances where a post-1990 plan was precleared that included one or more majority-minority districts less than 65 percent minority in total population, although there were available alternative plans in which a 65 percent minority district was drawn. For example, on August 23, 1993, the Attorney General precleared a new method of election (four districts and two at large) and districting plan for the City of Warner Robins, Georgia. The plan included one black-majority district that was 61 percent black in total population; this district in turn was 55 percent black in voting age population and 53 percent black in voter registration. The city had rejected six-district and five-district plans in which the district would have been, respectively, 67 percent and 66 percent black in population. The analysis indicated that while voting was polarized, black voters would have a realistic opportunity to elect their preferred candidate in the proposed district.

On the other hand, there were some instances where an objection was interposed although the proposed district at issue was greater than 65 percent minority in total population. For example, on June 24, 1992, the Attorney General interposed an objection to the plan for the New York state Assembly. The proposed plan, in northern Manhattan, unnecessarily split a

[95] To assess whether voting is racially or ethnically polarized, the Section 5 analysis focuses on evidence from a variety of sources. This may involve, most importantly, an analysis of election returns for the subject electoral body, and also may include an examination of exogenous elections where appropriate. Where possible, the Department of Justice makes use of the well-established techniques of ecological regression analysis and extreme case precinct analysis, relying on the Voting Section statistician to perform the necessary calculations. Election returns also are studied to determine the existence of any patterns as to where, when, and by what margin minority candidates are elected or defeated.

In assessing whether polarized voting is present, the analysis typically examines only those elections in which a minority candidate offered for election, unless there is evidence that a particular white candidate was sponsored by the minority community. *Collins v. City of Norfolk*, 883 F.2d 1232 (4th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990); *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 492 U.S. 905 (1989). However, the Department recognizes that the Act protects the opportunity of minority voters to elect their preferred candidates irrespective of the candidates' race or ethnic origin and does not protect minority candidates *per se*.

[96] That "rule" posits that the voting age population, registration, and turnout factors each produces a five percentage point drop in the minority share of the district population such that a district must be at least 65 percent minority in total population in order for the minority group to constitute 50 percent of the voters present at the polls on election day. See, *e.g.*, *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985); *Mississippi v. United States*, 490 F. Supp. 569 (D.D.C. 1979), *aff'd mem.*, 444 U.S. 1050 (1980).

geographically compact Hispanic population between two Assembly districts (in the context of polarized voting), thus minimizing Hispanic voting strength. The proposed district was 73 percent Hispanic in total population, but a substantial portion of the Hispanic population in the district were not citizens.

Another recurrent question was whether different minority groups should be combined in assessing electoral potential when a jurisdiction has a significant number of residents of different groups The Attorney General's approach again was to employ a functional, case-specific analysis. Where the electoral analysis indicated that minority groups are politically cohesive with each other, that was factored into the Section 5 analysis. Where they are not cohesive, then the analysis proceeded to determine the impact of the submitted plan on each separate group. This approach rejects the view that the Act itself precludes combining minority groups as a matter of law.[97]

This functional approach, for example, led to different conclusions with respect to redistricting plans affecting two different areas of Texas. As set forth in a March 30, 1992 objection letter regarding a redistricting plan for the Lubbock Independent School District, the Attorney General relied in part on a finding that blacks and Hispanics in the school district formed electoral coalitions. On the other hand, in connection with the November 18, 1991 preclearance of the Texas congressional plan, the Attorney General rejected an allegation of discriminatory line-drawing in connection the state's decision not to draw a district in the Dallas-Fort Worth area that was majority-minority only if the black and Hispanic populations were combined. Even if the two minority populations were to coalesce, the alternative only would have been an influence district and significant questions were raised as to whether the minority communities combined in this district (blacks and Hispanics in both Dallas and Tarrant Counties) would form an electoral coalition in congressional elections.[98]

2. Treatment of Minority Population Concentrations by the Submitted Plan and Available Alternative Plans

Another key element of every post-1990 redistricting review was a close analysis of the interplay between the demography of the jurisdiction and the proposed district lines, and the extent to which alternative plans were available that complied with traditional districting principles but combined or separated minority population concentrations in a manner which, given the prevailing voting patterns, would have yielded districts with significantly different minority percentages.

[97] The courts of appeals that have addressed this issue under Section 2 of the Voting Rights Act are split. *Concerned Citizens v. Hardee County*, 906 F.2d 524 (11th Cir. 1990) (minority coalition claims are permissible under Section 2); *Campos v. City of Baytown*, 840 F.2d at 1244 (same). *Contra, Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc).

[98] In *Terrazas v. Slagle*, 821 F. Supp. 1162 (W.D. Tex. 1993), the district court rejected a Section 2 challenge to the state Senate redistricting plan which was predicated on the failure to draw a Dallas-Fort Worth black/Hispanic influence district in that plan. The court found for the state in part because plaintiffs failed to provide any evidence that blacks and Hispanics would form an electoral coalition.

As set forth in the Section 5 Procedures, the map analysis involves a review of whether the plan minimizes minority voting strength by fragmenting or packing minority population concentrations.[99] To the extent that a proposed plan does one or both of these things, the flip side of this inquiry is an examination of what alternative plans would yield if the potentially problematic features of the submitted plan were reduced or eliminated.

In analyzing what districting options were objectively available to the jurisdiction, the Attorney General factored in certain districting principles that either are constitutionally mandated or generally reflect the accepted manner in which districts should be drawn.

At the constitutional level, plans of course must adhere to the Fourteenth Amendment's "one-person, one-vote" principle.[100] In practice, however, this requirement often imposes only a very flexible limit on the districting options, especially with the advent of the GIS technology. In addition, *Shaw v. Reno*[101] and *Miller v. Johnson*[102] now impose a constitutional limit on the extent to which race may predominate in redistricting decisionmaking.

The Section 5 Procedures note other, non-constitutional considerations, including the legitimate governmental interests of the jurisdiction, and compactness and contiguity.[103] In that regard, the Attorney General did not consider as "available" any alternative plan that included districts so noncompact as to be extreme or bizarre.[104] Typically, post-1990 plans included contiguous districts that were roughly compact, and the post-1990 objections were premised on the existence of fragmentation or packing which, if cured, would yield a plan that would include contiguous districts of similar compactness.

However, the mere existence of an alternative plan that is constitutionally acceptable, with compact and contiguous districts, and with more majority-minority districts than the submitted plan, did not result in the Attorney General interposing a "purpose" Section 5 objection. For example, in 1994, the Attorney General precleared a redistricting plan for the boards of commissioners and education in Dougherty County, Georgia, although the plan was opposed by some minority leaders who favored an alternative plan that included an additional majority-minority district.

3. Rationale for the Adopted Plan

[99] 28 C.F.R. § 51.59(c) & (d).

[100] *See generally New York City Board of Estimate v. Morris*, 489 U.S. 688 (1989), and cases cited therein. However, the equal apportionment requirement does not apply to districts used to elect judicial officers. *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973) (one-person, one-vote inapplicable to judicial elections); *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C.), *aff'd mem.*, 409 U.S. 807 (1972) (same); *Chisom v. Roemer*, 501 U.S. 380 (1991) (approving holding in *Wells*).

[101] 509 U.S. 630 (1993).

[102] 515 U.S. 900 (1995).

[103] 28 C.F.R. § 51.59(e) & (f).

[104] This is the longstanding approach of the Department of Justice to the compactness issue. Drew S. Days, III and Lani Guinier, "Enforcement of Section 5 of the Voting Rights Act," in *Minority Vote Dilution* 171 (Chandler Davidson ed., 1984).

a. Neutral Justifications. The primary explanation that typically was advanced by a jurisdiction for its submitted redistricting plan was the need to adhere to the "one-person, one-vote" requirement. But since that requirement usually leaves open a variety of districting options, it was rare for that to explain the particular district lines selected or to justify the adoption of a dilutive plan.

After *Shaw* and *Miller*, jurisdictions also may justify the plan selected by contending that alternatives would have threatened an unconstitutional racial gerrymander. As with any other justification offered by a jurisdiction, the Attorney General would evaluate that claim to determine whether the concern was valid or was a pretext for intentionally minimizing minority voting strength. After *Shaw*, and during the period covered by this essay, there were only a few instances in which jurisdictions raised this issue.

There were a variety of other criteria, neutral on their face, that jurisdictions cited in their submissions of post-1990 plans. These included such things as respect for other political boundaries (e.g., municipal or township boundaries, precinct boundaries, and the boundaries of districts used to elect other bodies), "least change" (i.e., minimizing changes in the existing plan), and equalization of duties (typically, equalizing the road mileage that each county commissioner or supervisor is responsible for). The Section 5 Procedures require the Attorney General to scrutinize such justifications to determine whether they are "reasonable and legitimate."[105] For example, the justifications were reviewed to determine whether they were applied consistently (both between districts, and historically between plans), the extent to which the district lines selected in fact reflected the criteria, and the extent to which the criteria in fact were discussed or employed during the redistricting process.

b. Incumbency Protection. A major concern that underlay most (if not almost all) post-1990 plans was incumbency protection. Incumbency protection in and of itself is not precluded by the Voting Rights Act. However, where incumbency protection is tied to racial discrimination, the plan may be objectionable.

Incumbency protection may become intertwined with a purpose to minimize minority voting strength where voting is racially or ethnically polarized and white voters historically have been overrepresented in electing a jurisdiction's officials. In these circumstances, it may be necessary to minimize a district's minority population percentage in order to protect the re-election chances of an incumbent official who is the choice of white voters but not minority voters. Thus, in reviewing post-1990 plans, the Attorney General interposed objections where the interests of incumbents favored by white voters were protected at the expense of minority electoral opportunity. Such incumbency protection efforts typically were related to the unnecessary fragmentation of minority communities or the needless packing of minority residents into a minimal number of districts.[106]

An example of an objection where incumbency protection was an issue was the May 2, 1994 objection to the redistricting plan for the South Carolina House

[105] 28 C.F.R. § 51.57(a).

of Representatives. The plan was adopted after the Supreme Court vacated a court-ordered plan used in the 1992 House elections on the ground that the district court had failed to adequately apply Section 2.[107] The objection letter summarized the basis for the objection as follows:

> [O]ur analysis reveals that the redistricting process was designed to ensure incumbency protection, not compliance with the Voting Rights Act. Without analyzing the Voting Rights Act concerns that the Supreme Court directed should be considered before the 1992 redistricting plan could be used again, the House opted for a least-change approach that limited revisions only to those that each district's incumbent would accept. The state has not advanced state policy considerations served by the proposed plan other than incumbency protection and the ease of administering a plan essentially the same as the 1992 plan.
>
> The state, fully aware of alternative redistricting configurations that created additional black-majority districts, rejected them without considering them seriously. The proposed plan...fragments and packs black population concentrations to avoid drawing additional black-majority districts or enhancing the existing black majorities....Overall, the state has failed to justify its redistricting plan on legitimate, nonracial grounds.[108]

c. Jurisdiction's Knowledge of Alternative Plans. To conclude that a plan was tainted by discriminatory purpose, the Attorney General must determine that the jurisdiction was aware that an alternative configuration was available that would have provided for greater minority electoral opportunity. In considering this issue in the review of post-1990 redistrictings, the Attorney General again followed a functional, case-specific approach.

In some redistrictings, alternative plans that more fairly reflected minority voting strength were developed during the redistricting process by the minority community or by the jurisdiction itself. However, the Attorney General did not consider it necessary that this occur in order to conclude that a plan was the product of a discriminatory purpose. It sometimes was probative that minority citizens suggested a particular districting approach which the jurisdiction then decided not to incorporate in its plan. Or, in some circumstances, the well-known demographic characteristics of the jurisdiction (particularly the location and size of

[106] See, *e.g.*, *Garza and United States v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1992); *Ketchum v. Byrne*, 740 F.2d 1398, 1408-09 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). The Attorney General's position in this regard was articulated in numerous Section 5 objection letters, including, for example, the letters in which objections were interposed to post-1990 statewide plans.

Section 5 concerns also may arise where a plan manipulates the districts to which incumbents or potential minority challengers are assigned, *e.g.*, by drawing a noncompact district in order to maintain a white incumbent in his or her district or by purposefully excluding potential strong minority challengers. On the other hand, the Attorney General did not interpose any post-1990 objections requiring that district lines be manipulated to exclude white incumbents from their districts in order to promote minority electoral opportunity.

[107] *Burton v. Sheheen*, 793 F. Supp. 1329 (D.S.C. 1992), *vacated and remanded sub nom.*, *Statewide Reapportionment Advisory Committee v. Theodore*, 508 U.S. 968 (1993).

[108] The plan adopted by the state following the objection was precleared but then was struck down as being an unconstitutional racial gerrymander. *Able v. Wilkins*, 946 F. Supp. 1174 (D.S.C. 1996). A new remedial plan was precleared, and was upheld by the same court when the racial gerrymander claim was renewed. *Able v. Wilkins*, No. 3:96-0003 (Apr. 25, 1997).

minority concentrations) indicated readily available alternatives to the plan adopted by the jurisdiction. It also was relevant whether the jurisdiction provided an adequate opportunity for minority input during the districting process. In considering the jurisdiction's awareness of alternative plans, the Attorney General recognized that minority citizens may have lacked the expertise and resources to prepare a formal alternative plan.

4. Increase in Minority Population Percentages from 1980 to 1990

In a number of Section 5 jurisdictions, there was a substantial increase in the minority population percentage from 1980 to 1990, particularly in the West and Southwest involving Hispanic population. The Attorney General carefully monitored redistricting plans adopted by these jurisdictions to determine whether the new plans recognized the enhanced minority population share or sought to fragment or pack minority concentrations to counter growing minority electoral strength.

For example, on October 4, 1991, the Attorney General interposed an objection to the redistricting plan for the City of Houston, Texas. The city is governed by a 14-member council and a mayor, who also is a member of the council, with nine councilmembers elected from single-member districts and five councilmembers and the mayor elected at large. As discussed in the objection letter, from 1980 to 1990 the city's Hispanic population grew by 60 percent, increasing from 18 to 28 percent of the total city population, while the black population percentage remained essentially unchanged and the white percentage decreased from 52 to 41 percent. Although the city claimed that it sought to recognize the growing Hispanic population in drawing its new districts, the submitted plan—like the existing plan—provided only one district in which Hispanic voters would have the opportunity to elect a candidate of their choice and fragmented the remainder of the community into a number of adjoining districts. Alternative plans developed during the redistricting process demonstrated that, by avoiding such fragmentation, the plan would contain two districts in which Hispanics would constitute a majority of the voting age population. The objection letter concluded that the goal of recognizing the Hispanic growth appeared to have been subordinated by the city to a concern for drawing districts that would protect the re-election chances of white incumbent councilmembers.

5. Who Controls the Elective Body

Particularly difficult post-1990 determinations were presented where jurisdictions were majority-minority in population and the redistricting dispute was over whether the plan would favor white or minority voters with regard to the opportunity to elect a majority of the governing board. In these circumstances, alternative plans developed by various parties during the redistricting process often were drawn with full awareness as to which group would be benefited by the plan. These submissions required a particularly sensitive examination of the facts and difficult judgments to distinguish between a motivation to adopt a racially fair plan and an invidious purpose to minimize minority voting strength. On a number of occasions objections were interposed, not based on any abstract judgment as to which group should have the opportunity to control the elected body, but based on a factual determination that the jurisdiction had failed to demonstrate the absence of discriminatory purpose.

6. Influence Districts

A small number of objections involved discrimination regarding the drawing of so-called "influence" districts, i.e., districts that would not be majority-minority under any available districting scenario. Thus, these objections did not raise either of the basic districting questions that characterized the review of almost all post-1990 redistrictings—whether additional majority-minority districts may have been drawn or whether the minority percentage in a proposed majority-minority district may have been higher.

In general, the Section 5 "purpose and effect" test applies equally to a claim that minority voting strength was unnecessarily minimized by failing to draw a stronger "influence" district.[109] However, from a functional perspective, it typically is less likely that such a claim will arise or that it will lead to an objection. In the context of polarized voting, it often is of relatively little electoral significance for minority voters whether a somewhat stronger or somewhat weaker influence district is drawn since, in either case, minority voters generally will not enjoy a realistic opportunity to elect their preferred candidate. In addition, minority voting strength in an influence district may be reduced in order to accommodate requests from the minority community to draw an additional majority-minority district or augment the minority percentage in an existing majority-minority district. The absence of a significant electoral impact would make it less likely that any discriminatory purpose was present. With respect to retrogression, a nonmeaningful reduction in minority voting strength would not render a plan retrogressive.

An example of an "influence district" objection was the February 22, 1993 objection to the redistricting plan for the three-member board of supervisors of Graham County, Arizona. According to the 1990 Census, the county is 25 percent Hispanic, 15 percent Native American, and 2 percent black. By fragmenting the Hispanic population, the plan reduced the Hispanic proportion of one district from 39 to 33 percent, whereas in a plan free of such fragmentation that Hispanic proportion likely would have modestly increased. As set forth in the objection letter, the analysis indicated that in the context of local voting patterns, the fragmentation significantly minimized Hispanic voting strength and the county failed to provide any nonracial explanation for its districting choices.

7. Minority Participation

[109] The Supreme Court has not yet decided whether a failure to draw a stronger influence district may violate the Section 2 results standard. See, *e.g.*, *Johnson v. De Grandy*, 512 U.S. 997 (1994). A number of courts of appeals, however, have held that the results test does not apply to influence district claims and that a plaintiff must demonstrate that additional districts may be drawn in which minority residents would constitute a majority of the voting age population. *E.g.*, *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989); *McNeil v. Springfield Park District*, 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989). In addition, one court of appeals has further specified that minorities must constitute a majority of the alternative district's citizen voting age population. *Romero v. City of Pomona*, 883 F.2d 1418 (9th Cir. 1989).

The minority residents of Section 5 jurisdictions play a crucial role in ensuring that nondiscriminatory plans are adopted and in the Attorney General's enforcement of Section 5.

The Section 5 Procedures specifically recognize that an important factor in Section 5 determinations is "[t]he extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change."[110] If minority citizens are included in the decisionmaking process, it is more likely that a redistricting plan that fairly reflects their political and community interests will be adopted. On the other hand, if minorities are excluded from the decisionmaking process, that may be highly probative of an effort to minimize minority electoral opportunity.

In the 1990s, minority leaders and groups were much better prepared to offer specific alternative redistricting plans and suggestions to state and local officials, and often made use of the new GIS technology. Where this occurred and a plan was adopted that was opposed by the minority community, minority citizens then were in a much stronger position to argue discriminatory purpose to the Attorney General than if they had not raised specific concerns during the redistricting process. The Attorney General also relies on minority contacts in the Section 5 jurisdictions to provide their analysis of the local electoral dynamics and their perspective on the process that led to the adoption of the submitted plan.

Often where there was minority opposition to a post-1990 plan, minority leaders and groups were in general agreement about the plan's purpose and effect. In some instances, there was a diversity of viewpoints. That sometimes involved, for example, a situation where minority incumbent officials voted for the submitted plan while other minority leaders opposed it. This split could indicate the absence of a discriminatory purpose; however, the support offered by minority incumbents did not automatically validate a plan as the Attorney General on occasion found that their support was based only on their interest in protecting their own re-election chances or their belief that they were not in a position to express opposition to the plan.

In practice, there were few instances where an objection was interposed to a post-1990 plan in the absence of minority opposition, since absent any local controversy it is unlikely that the Attorney General would conclude that federal action barring the change is necessary or appropriate. On the other hand, plans were precleared despite minority opposition. In the end, the Attorney General in each submission considered all the information provided by the jurisdiction and interested citizens and made an independent judgment as to whether the plan should be precleared.

IV. CONCLUSION

The adoption of redistricting plans following the decennial census has become an important and integral part of the American political process. For minority voters,

[110] 28 C.F.R. § 51.57(c).

redistricting may offer a unique opportunity to remedy past discrimination through the adoption of new plans that fairly reflect minority voting strength. However, in part because redistricting decisions may be controlled by officials who do not owe their election to minority voters, the process also poses the danger that discrimination may taint the new plan.

The Voting Rights Act, and Section 5 in particular, have provided minority voters with a powerful institutional means by which to ensure that redistricting is accomplished in a nondiscriminatory manner, and the Attorney General vigorously enforced Section 5 following the 1990 Census to effectuate the congressional mandate. In order to carefully scrutinize each of the enormous number of redistrictings submitted following the 1990 Census, the Department of Justice committed personnel and resources to undertake a "state of the art" review process. The result has been that political opportunity in the 1990s is apportioned in a fair, nondiscriminatory manner to a degree not before seen in American political history. The extent to which, following the Supreme Court's lead, we now recede from this high water mark remains an open question.

APPENDIX I: SECTION 5 REDISTRICTING CASES AND DECISIONS

A. The eight cases in which jurisdictions sought judicial preclearance for a post-1990 redistricting plan are as follows, in chronological order of filing:

1. *Bolivar County, Mississippi v. United States*, No. 91-2186, filed August 26, 1991, seeking preclearance of a redistricting plan for the county board of supervisors to which the Attorney General had interposed an objection; on December 20, 1994, the court granted preclearance to a revised plan, with the concurrence of the United States.
2. *Texas v. United States*, No. 91-2383, filed September 20, 1991, seeking preclearance of congressional, state House and Senate, and state board of education redistricting plans; the Senate plan was precleared by the district court with the concurrence of the United States (802 F. Supp. 481 (D.D.C. 1992)); the congressional and board of education plans were precleared by the Attorney General pursuant to submissions made by the state prior to filing the declaratory judgment action; and the claim regarding the state House plan was not pursued after the Attorney General interposed an objection to the plan.
3. *Walker v. United States*, No. 92-0480, filed February 24, 1992, seeking preclearance of a redistricting plan for the commissioners court, justices of the peace, and constables in Gregg County, Texas; at the time suit was filed, the county had pending before the Attorney General a request for administrative preclearance of the same plan, and after suit was filed the Attorney General interposed an objection to the plan; the suit was voluntarily dismissed after the Attorney General precleared a subsequently adopted remedial plan.
4. *Ellis County, Texas v. United States*, No. 92-1110, filed May 11, 1992, seeking preclearance of a redistricting plan for the county commissioners court to which the Attorney General had interposed an objection; the complaint was dismissed as moot by the district court in an unreported opinion dated October 6, 1992; the county subsequently obtained administrative preclearance from the Attorney General for a remedial plan.

5. *Calhoun County, Texas v. United States*, No. 92-1890, filed August 18, 1992, seeking preclearance of redistricting plans for the county commissioners court, and for justices of the peace and constables, to which the Attorney General had interposed objections; the suit was voluntarily dismissed after the Attorney General granted administrative preclearance to remedial plans adopted by the county.
6. *Lee County, Mississippi v. United States*, No. 93-0708, filed April 6, 1993, seeking preclearance of a redistricting plan for the county board of supervisors to which the Attorney General had interposed an objection; the suit was voluntarily dismissed and a remedial plan subsequently was adopted and precleared.
7. *Castro County, Texas v. United States*, No. 93-1792, filed August 25, 1993, seeking preclearance of a redistricting plan for the county commissioners court to which the Attorney General had interposed an objection; the suit was dismissed and the county obtained administrative preclearance from the Attorney General for a remedial plan.
8. *Bossier Parish School Board v. Reno*, 907 F. Supp. 434 (D.D.C. 1995), *vacated and remanded*, 520 U.S. 471 (1997), *on remand*, No. 94-1495 (May 1, 1998), filed July 14, 1994, seeking preclearance of a redistricting plan to which the Attorney General had interposed an objection; on November 2, 1995, the court granted preclearance, on May 12, 1997 the Supreme Court vacated and remanded and on May 1, 1998, the district court again granted preclearance.

B. In addition to the decisions regarding the Bossier Parish, Louisiana School Board, the Bolivar County, Mississippi Board of Supervisors, and the Texas state Senate (set forth in part A of this Appendix), the other judicial section 5 preclearance decisions are (in chronological order of decision):

1. *Beer v. United States*, 374 F. Supp. 363 (D.D.C. 1974) (declaratory judgment denied for redistricting plan for New Orleans City Council), *vacated and remanded*, 425 U.S. 130 (1976), *on remand*, No. 1495-73 (July 29, 1976) (declaratory judgment granted).
2. *Donnell v. United States*, No. 78-0392 (D.D.C. July 31, 1979), *aff'd mem.*, 444 U.S. 1059 (1980) (declaratory judgment denied for redistricting plan for the Warren County, Mississippi Board of Supervisors).
3. *Mississippi v. United States*, 490 F. Supp. 569 (D.D.C. 1979), *aff'd mem.*, 444 U.S. 1050 (1980) (declaratory judgment granted for redistricting plans for the state House and Senate).
4. *City of Port Arthur v. United States*, 517 F. Supp. 987 (D.D.C. 1981) (declaratory judgment denied for districting plan for Port Arthur, Texas City Council), *aff'd on other grounds*, 459 U.S. 159 (1982).
5. *Senate of California v. United States*, No. 81-2767 (D.D.C. Apr. 26, 1982) (declaratory judgment granted without opposition to redistricting plan for the California state Senate).
6. *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C 1982), *aff'd mem.*, 459 U.S. 1116 (1983) (declaratory judgment denied for congressional redistricting plan for the State of Georgia).

C. The cases in which relief was granted in local district courts to prevent implementation of unprecleared post-1990 redistricting plans are:

1. *Casares v. Cochran County, Texas*, No. 5-92-CV-184-C (N.D. Tex. Oct. 9, 1992) (injunction against further implementation of commissioners court plan which was implemented in the March 10, 1992 primary and to which the Attorney General objected on April 6, 1992; settlement thereafter provided for special election implementing a subsequently adopted, precleared plan).
2. *Dallas County Board of Education v. Jones*, No. 92-0583-B-M (S.D. Ala. Sep. 28, 1992) (injunction against further implementation of redistricting plan for Alabama school district which had not been submitted for preclearance either to the Attorney General or the District of Columbia Court but which had been implemented in a June 2, 1992 primary; a court-ordered plan was then imposed).
3. *Daniel v. Bailey County, Texas*, No. 5-92-CV-0171-C (N.D. Tex. Oct. 28, 1992) (agreed order permitting conduct of 1992 election pursuant to a commissioners court plan to which the Attorney General objected on April 6, 1992, and approving settlement plan (subsequently precleared) for use in future elections; election district at issue in objection was not up for election until 1994).
4. *Gamez v. Deaf Smith County, Texas*, No. 2-92-CV-0115-J (N.D. Tex. July 16, 1992) (1992 special primary election ordered to implement precleared commissioners court plan after March 10, 1992 primary held pursuant to a plan to which the Attorney General objected on April 10, 1992).
5. *Gant v. Ellis County Commissioners' Court*, No. 3-92-CV-0395-D (N.D. Tex. Mar. 4, 1992) (injunction against implementation of commissioners court plan to which the Attorney General subsequently objected on March 30, 1992; a remedial plan subsequently was precleared).
6. *Hoskins v. Hannah*, No. G-92-12 (S.D. Tex. Jan. 24, 1992) (injunction against implementation of plan for justices of the peace and constables in Galveston County, Texas to which the Attorney General subsequently objected on March 17, 1992; settlement provided for a special 1992 primary election for constable pursuant to a plan also embodied in the settlement and subsequently precleared).
7. *LULAC v. Monahans-Wickett-Pyote Independent School District*, No. P-92-CA-007 (W.D. Tex. Apr. 16, 1992) (injunction against implementation of plan for Texas school district to which the Attorney General objected on March 30, 1992; a remedial plan subsequently was precleared).
8. *Mexican American Political Action Committee v. Calhoun County, Texas*, No. V-92-013 (S.D. Tex. Nov. 5, 1992) (order based on parties' stipulations shortening terms of office of county commissioner and constable elected in 1992 using plans to which the Attorney General objected on March 17, 1992, and providing a special election for these offices pursuant to subsequently adopted, precleared plans).
9. *Puerto Rican Legal Defense & Education Fund v. City of New York*, 769 F. Supp. 74 (E.D.N.Y. 1991) (temporary restraining order granted by single judge barring commencement of candidate petitioning process for qualification for the party primaries pursuant to city council redistricting plan then pending review with the Attorney General), *vacated and injunction denied*, No. CV 91 2026 (E.D.N.Y. June 18, 1991) (three-judge court), *further relief granted*, (E.D.N.Y. July 30, 1991) (three-judge court) (modifying candidate qualification procedures for party primaries pursuant to city council plan precleared July 26, 1991 following Attorney General's objection to initial plan on July 19, 1991).
10. *Reyna v. Castro County, Texas*, C.A. No. 2-92-CV-168-J (N.D. Tex. Oct. 14, 1992) (injunction against further implementation of commissioners court plan implemented in the March 10, 1992 primary and to which the Attorney General objected on March 30, 1992); *Castro County, Texas v. United States*, No. 93-1792 (D.D.C. Dec. 17, 1993) (injunction barring county from taking any action to seek to implement the commis-

sioners court plan to which the Attorney General objected on March 10, 1993 and with respect to which the county was seeking judicial preclearance in this case).

11. *United States v. Graham County*, No. CIV-93-598 (D. Ariz. Apr. 18, 1994) (settlement enjoining the county from implementing the redistricting plan to which the Attorney General objected on February 22, 1993, and requiring the county to engage in outreach efforts in the minority community with respect to the plan that subsequently was precleared by the Attorney General).
12. *United States v. Yuma County*, No. 92-2024 (D. Ariz. Oct. 30, 1992 & Mar. 12, 1993) (consent orders enjoining implementation of plans for the Yuma County, Arizona board of supervisors and the Arizona Western College District (Yuma County portion) to which the Attorney General interposed objections on September 28, 1992, and requiring that the county hold special elections under precleared plans).

The cases in which relief was denied or otherwise not granted are:

1. *Almager v. Gaines County, Texas*, No. 5-92-CV-66-W (N.D. Tex. June 1, 1993) (case dismissed pursuant to joint motion; Attorney General objected to initial post-1990 commissioners court plan on July 14, 1992 and subsequently precleared a remedial plan adopted by county with plaintiff's concurrence; election district at issue in objection was not up for election until 1994).
2. *Campos v. City of Houston*, 776 F. Supp. 304 (S.D. Tex. 1991) (City of Houston, Texas ordered to conduct its November 1991 election pursuant to a plan to which the Attorney General had objected on October 4, 1991, despite availability of redistricting plan precleared by the Attorney General on October 12, 1991), *stay pending appeal denied*, 502 U.S. 1301 (1991) (Scalia, Circuit Justice), *vacated and remanded*, 968 F.2d 446 (5th Cir. 1992), *cert. denied*, 508 U.S. 941 (1993); *United States v. City of Houston*, 800 F. Supp. 504 (S.D. Tex. 1992) (court declined to order special election to implement the plan precleared on October 12, 1991).
3. *Craig v. Gregg County, Texas*, No. 6-92-CV-128 (E.D. Tex. June 1, 1992) (court denied joint motion for special primary election for commissioners court and constables after March 10, 1992 primary held pursuant to redistricting plan to which the Attorney General objected on March 17, 1992; court previously had not granted plaintiff's request for an injunction against holding the primary using the unprecleared plan).
4. *Lopez v. Hale County, Texas*, 797 F. Supp. 547 (N.D. Tex. 1992), *aff'd mem.* 506 U.S. 1042 (1993) (court declined to enjoin implementation of commissioners court plan to which the Attorney General objected on April 10, 1992, based in part on the fact that the election district that was the subject of the objection was not up for election until 1994; a remedial plan subsequently was precleared).

APPENDIX II: POST-1990 OBJECTIONS TO LOCAL REDISTRICTING PLANS

Alabama
Dallas County Board of Education: 5/1/92; 7/21/92; 12/24/92
Greensboro (Hale County): 12/4/92; 1/3/94
Selma (Dallas County): 11/12/92; 3/15/93

Arizona

Arizona Western College District (Yuma County portion): 9/28/92 (2 plans)
Graham County (board of supervisors): 2/22/93
La Paz County (board of supervisors): 7/17/92
Yuma County (board of supervisors): 9/28/92

California
Merced County (board of supervisors): 4/3/92
Monterey County (board of supervisors): 2/26/93

Georgia
Griffin (Spalding County): 11/30/92
Macon (Bibb and Jones Counties): 12/20/94
Monroe (Walton County): 10/22/93
Randolph County (board of commissioners and school board): 6/28/93

Louisiana
Bienville Parish (police jury): 9/27/91
Bossier Parish (school board): 8/30/93
Catahoula Parish (police jury): 10/25/91
Concordia Parish (police jury): 12/23/91; 8/28/92
DeSoto Parish (police jury): 10/15/91
Desoto Parish (school board): 4/25/94
East Carroll Parish: 12/20/91 (police jury and school board); 8/21/92 (police jury only); 1/4/93 (police jury and school board); 8/19/94 (school board only)
Evangeline Parish (school board): 5/24/93
Franklin Parish (police jury): 11/25/91 (2 plans)
Iberville Parish (school board): 6/21/93; 11/24/93
Jackson Parish (police jury): 10/8/91
Jennings (Jefferson Davis): 3/8/93
Lafayette Parish (parish council): 10/18/93
Lafayette Parish (school board): 9/21/92
Madison Parish (police jury and school board): 4/10/92
Minden (Webster Parish): 10/17/94
Morehouse Parish: 9/27/91 (police jury); 5/26/92 (police jury); 9/14/92 (police jury); 3/26/93 (justice court)
Pointe Coupee Parish (police jury): 2/7/92; 9/10/92
Richland Parish (police jury): 1/2/92
St. Francisville (West Feliciana Parish): 5/18/93
St. Landry Parish (police jury and school board): 12/16/91
St. Martin Parish (police jury and school board): 10/25/91
St. Martinville (St. Martin Parish): 11/9/92
St. Mary Parish (school board): 8/30/93
Tallulah (Madison Parish): 8/30/93
Terrebonne Parish (council): 1/3/92
Vermillion Parish (school board): 12/30/92
Ville Platte (Evangeline Parish): 12/13/93; 4/3/95
Washington Parish (school board): 6/21/93
Webster Parish (police jury and school board): 12/24/91
West Carroll Parish (school board): 3/30/93
West Feliciana Parish (police jury): 10/25/91

Winnsboro (Franklin Parish): 11/22/94

Mississippi
Adams County (board of supervisors): 1/30/95
Amite County (board of supervisors): 8/23/91; 11/30/92
Attala County (board of supervisors): 1/13/92
Benton County (board of supervisors): 9/9/91
Bolivar County (board of supervisors): 7/15/91; 8/23/91
Canton (Madison County): 12/21/93
Carroll County (board of supervisors): 4/18/94
Charleston (Tallahatchie County): 6/4/93
Chickasaw County (board of supervisors): 3/26/93; 4/11/95
Clarke County (board of supervisors and justice court): 9/24/91
Forrest County (board of supervisors): 10/7/91
Gloster (Amite County): 3/30/93
Greenville (Washington County): 2/22/93
Harrison County (board of supervisors): 9/9/91
Hinds County (board of supervisors): 7/19/91
Jefferson Davis County (board of supervisors): 9/13/91
Lauderdale County (board of supervisors): 10/7/91
Lee County (board of supervisors): 8/23/91; 3/22/93
Leflore County (board of supervisors): 10/21/91
Marshall County (board of supervisors): 9/30/91; 10/13/92
Monroe County (board of supervisors): 4/26/91; 9/17/93; 3/20/95
Montgomery County (justice court): 9/16/91
Okolona (Chickasaw County): 10/29/93
Oktibbeha County (board of supervisors): 9/30/91
Pearl River County (board of supervisors): 11/25/91
Perry County (board of supervisors): 11/19/91
Quitman (Clarke County): 12/19/94
Sunflower County (board of supervisors): 10/25/91; 5/21/92
Tallahatchie County (board of supervisors): 4/27/92
Tate County (board of supervisors): 7/2/91; 10/11/91
Union County (board of supervisors): 8/2/91; 6/20/95
Walthall County (board of supervisors): 9/30/91

New York
New York City: 7/19/91

South Carolina
Bennettsville (Marlboro County): 2/6/95
Dorchester County (council): 8/28/92
Johnston (Edgefield County): 6/5/92; 7/6/93
Lee County (council and school district): 2/8/93
Marion County (council and school district): 1/5/93
Norway (Orangeburg County): 11/9/92
Orangeburg County (council): 7/21/92
Rock Hill (York County): 1/17/92

Texas

Bailey County (commissioners court and justices of the peace/constables): 4/6/92
Calhoun County (commissioners court and justices of the peace/constables): 3/17/92
Castro County (commissioners court): 3/30/92; 10/6/92; 5/10/93
Cochran County (commissioners court): 4/6/92
Dallas (Dallas County et al.): 5/6/91 (2 plans)
Deaf Smith County (commissioners court): 4/10/92
Del Valle Independent School District (Travis County): 12/24/91; 7/31/92
Ellis County (commissioners court): 3/30/92
Gaines County (commissioners court): 7/14/92
Galveston County (justices of the peace/constables): 3/17/92
Gonzales Underground Water Conservation District (Gonzales County): 10/31/94
Gregg County (commissioners court and justices of the peace/ constables): 3/17/92
Hale County (commissioners court): 4/10/92
Houston (Harris County et al.): 10/4/91
Lubbock Independent School District (Lubbock County): 3/30/92
Monahans-Wickett-Pyote Independent School District (Ward County): 3/30/92
McCulloch County (commissioners court): 6/4/93
Refugio Independent School District (Refugio County): 4/22/91
Terrell County (commissioners court): 4/6/92
Wharton County (commissioners court and justices of the peace/ constables): 8/30/93

Virginia
Powhatan County (board of supervisors): 11/12/91

PART III
Case Studies

PREDICTABLY UNPREDICTABLE: The Alaskan State Supreme Court and Reapportionment

Tuckerman Babcock

ALASKANS MAY NOT LIKE TO ADMIT IT, but we are not unique in every respect. Like every other state at least once every ten years the Alaskan state legislature must be reapportioned.

On the other hand, the Alaskan State Supreme Court, if not unique among all state courts, comes close. This court has crafted a legacy that is as predictable as it is unpredictable. Since the first reapportionment case decided by the State Supreme Court in 1965, there have been three decades of reapportionment.[1] Predictably, each decennial reapportionment is challenged, predictably the State Supreme Court finds the Governor's first plan unconstitutional, and predictably the State Supreme Court allows the second plan to go forward.

Each Opinion is written to explain the constitutional violation or violations compelling the Court to conclude that all, or part, of the first plan of each decade be dismissed as unconstitutional. What is unpredictable for those responsible for redistricting in Alaska[2] is embodied in the fact that the Court never applies the same rules twice. Each initial plan has been found unconstitutional, but each for different reasons. A constitutional issue that catches the Court's attention in one case is ignored in the next. An innovative solution in one cycle becomes a fundamental flaw in the next. With that tradition, the would-be Alaskan redistricter might as well ignore (1) whatever reasoning has been advanced by the State Supreme Court; (2) any district designed in the past that has been allowed to

[1] *Wade v. Nolan*, 414 P.2d (Alaska 1966), *Egan v. Hammond*, 502 P.2d (Alaska 1972), Masters Plan 1972, *Groh v. Egan*, 526 P.2d (Alaska 1974), *Carpenter v. Hammond*, 667 P.2d (Alaska 1983), *Kenai Peninsula Borough v. State* 743 P.2d (Alaska 1987) and *Southeast Conference v. Hickel*, CN 1JU-91-1608 Civil, SCN S-5165, December 29, 1995 opinion.

[2] State of Alaska, Constitution, Article VI

stand or have even proposed by the court; and, therefore, (3) strike for as much political advantage as possible without fear of unnecessarily endangering the plan. The implication for those inclined to egregious partisan gerrymandering is clear: follow the federal rules to secure approval by Justice, and go for all you can get stateside because the only rule the State Courts follow is that the first plan will be thrown out. In Alaska, a wise redistricter must accept that the first plan will fall. Then, if history is any guide, the second plan, however amended, will stand. Beside the predictable unpredictability of the State Court, what else confounds redistricting in Alaska?

Alaska is the Last Frontier. The last state where, at close to one person per square mile, Frederick Jackson Turner's thesis may still be put to the test. A minuscule one percent of the land is inhabited and just 3 percent is privately owned. Geographically, Alaska sprawls across an area more than twice the size of Texas; boasts more coastline than the contiguous 48 states combined; displays glaciers as large as some other states; and offers the highest mountain in North America, Mount McKinley. Alaska houses the smallest population (after the 1990 census one can quibble with Wyoming on this point); is crisscrossed by the fewest roads and has the most airports. Finally, an item of vital interest to reapportionment, although not an item of interest, I am sure, to the more than 1,000,000 tourists who visit each year, is that Alaska's geography and population of 550,000 require the most expansive and least populated legislative districts in the nation.

For 1991 those facts were complicated by a decade of skyrocketing population. At just over 33 percent, Alaska enjoyed the greatest percentage increase in the United States. Growth was wildly uneven around the state, causing an explosion in overall deviation of House districts from 14.9 percent in 1984 to 82.5 percent in 1990. House district deviations exceeded 75 percent within every geographic area of the state.

There is no concentration of Asian, Hispanic, or African-American population sufficient to form even 25 percent of any legislative district. However, Native Americans in Alaska make up 15.6 percent of the statewide population (a decline from 16.0 percent in 1980) and can provide a majority or substantial minority in several districts. Certain minorities in Alaska, just as in every other state in the Union, are protected from discriminatory districting by Section 2 of the Voting Rights Act. In addition, Alaska suffers the burden of mandatory preclearance under Section 5.[3] This requirement is particularly onerous because, perhaps

[3]This requirement for preclearance is not related to any historical example of actual discrimination or harm. Indeed, Alaska was allowed to opt out of the Voting Rights Act preclearance requirements during the 1970s. Alaska was covered again solely because a certain percentage of the population has a first language other than English. Despite the fact that no discrimination has ever been demonstrated, the U.S. Justice Department took from November 1991 to April 1992 to approve the first plan and actually entered an objection to the second plan in 1994. In a ludicrous example of micromanagement, U.S. Justice Department attorney Steve Rosenbaum, Chief of the Voting Rights Act Section, insisted that approximately 2,000 people be moved around involving six communities. The effect was to increase the voting age population in a single house district from 51 percent Alaska Native to 59 percent Alaska Native. The district already had an Alaska Native incumbent Representative.

unique among states, there is virtually no evidence of racially polarized voting.[4]

The State Constitution mandates a House of 40 and a Senate of 20. Article VI of the State Constitution provides for a five member advisory board appointed by the Governor (members are appointed without regard to political affiliation and cannot also serve on any other government panel, board, commission or be federal, state or local government employees). The five serve at the pleasure of the Governor and need not be confirmed by the Legislature. In fact, the State Constitution provides no participation in reapportionment for the legislature other than appropriation of funds to carry out the task. The State Constitution limits the Court to a review for constitutionality and gives them the authority to compel the Governor to reapportion. This specific limitation on the discretion of the judiciary to adopt plans of their own was ignored in 1972 (at the request of the Governor), was followed in 1983 when an unconstitutional plan was sent back to the Governor for amendment, and then was ignored in 1992 over the earnest objection of the Governor when the Court appointed three Masters and drew up their own plan in a couple of weeks.[5]

The U.S. Bureau of the Census PL94-171 data showed statewide population in April 1990 at 550,043. The Constitution states that after receiving the population figures from the census, this five member board is allowed just 90 days to recommend a final plan to the Governor. After receiving the Board's recommendation, the Governor is allowed 90 days to review the plan and make any change he chooses so long as he describes his change in writing.

Alaska elected a new Governor in November of 1990, Walter J. Hickel, an Alaska Independence Party member who also had been elected Governor in 1966 as a Republican. Governor Hickel took office on December 3, 1990 and in January 1991 replaced the five-member board that had been appointed by former Governor Steve Cowper, a Democrat.[6] The Board retained staff, hired consultants, and for legal advice relied on Virginia Ragle, an assistant attorney general. The Board also relied on the Voting Rights Act expertise of Charles J. Cooper of Potts, Pittman, Shaw and Trowbridge in Washington, D.C.

All of Alaska is covered under Section 5 of the 1965 Voting Rights Act, as amended in 1982, which requires all election law changes to secure preclearance from the U.S. Department of Justice. The Act applies to Alaska not because of any

[4]*Racially Polarized Voting in Alaska*, a study done for the Reapportionment Board, 1991, by Bernard Grofman.

[5]The first Alaskan redistricting in 1961 escaped unchallenged in state court. The redistricting dealt only with a few House districts because the Alaska Senate was based on geography, not population.

[6]Unlike the process in the huge majority of states, the Attorney General in Alaska is appointed by the Governor, is confirmed by the Legislature, and serves at the pleasure of the Governor. Governor Cowper's term expired on noon on December 3, 1990. Draft reapportionment plans were adopted by his reapportionment board on the morning of December 3, 1990. These draft plans were adopted in the absence of population figures from the U.S. Bureau of the Census and these preliminary plans were jettisoned by Governor Hickel's reapportionment board. All public testimony collected by the Cowper board regarding preferred alignments was adopted.

evidence of past racial animus but because turnout was below an arbitrary threshold in areas where English was not the primary language. The 1982 amendments had never been applied to an Alaskan redistricting. In fact, until presented with a revised plan in 1993, no objection had ever been lodged by the U.S. Department of Justice against any redistricting in Alaska.[7] Indeed, no federal court has ever ruled specifically on the constitutionality of any Alaskan redistricting.

Yet, every Alaskan reapportionment had been declared unconstitutional by the State Supreme Court. There were five previous cases going into this round. Despite rigorous analysis of prior court decisions, and great hopes on the part of the Governor and the Reapportionment Board, the 1991 reapportionment met the same fate as every preceding plan: at least some part of the plan was declared unconstitutional by the State Supreme Court (May 1992).

The 1991 Board took some two months to develop priorities for redistricting. Guidelines directed staff on the development of redistricting scenarios. Both the Board's attorney and contract attorneys advised that every effort must be made to protect individuals covered by the Voting Rights Act from avoidable retrogression in their ability to elect candidates of their choice.[8] The Board was urged not to pair incumbents who belonged to a protected race or language group with incumbents who did not belong to such a group. The Board was advised to devise so-called "influence" districts where people protected by the Voting Rights Act constituted at least 25 percent of the population. Despite honest misgivings about the prevalence or even existence of significant racially polarized voting patterns in Alaska, the Board followed that advice with gusto to help ensure approval by Justice and to preserve as many rural districts as possible. The Board, and their legal advisors, simply held out little hope of convincing the Justice Department that Alaska was not subject to the pernicious polarization and discrimination that gave rise to the Voting Rights Act in the first place.[9] The State had successfully bailed out before the 1975 amendments but did not try to bail out in time following the 1982 amendments.

The Board decided to shoot for keeping overall statewide population inequality among districts to under 2 percent (they later relaxed that standard to 10 percent) while at the same time designing districts avoiding retrogression and respecting individual ethnic and linguistic groups.

[7]In 1994 the U.S. Department of Justice objected to House District 36 because it dropped from 55.6 percent Alaska Native voting age population (VAP) to 50.2 percent. The Governor directed the Attorney General to amend the plan to please Justice attorneys. The Attorney General also negotiated a settlement with the lone challenger to the 1994 plan, the Matanuska-Susitna Borough. The settlement eliminated the 23 percent influence the Borough had in a fourth House district and concentrated Borough population in three overpopulated and underrepresented House districts. The Borough insisted on reducing their influence in the legislature in order to place residents only in districts dominated by Borough voters.

[8]How can there be retrogression in the ability of a protected group to elect candidates of their choice in the absence of racially polarized voting by the unprotected majority that might usually ensure the defeat of candidates supported by the protected group? Despite Professor Grofman's analysis, the conclusions of the State Supreme Court and the powerful legislative positions held by Alaska Natives (the only significant protected group in Alaska), Section 5 applies to Alaska and the Department of Justice must be appeased. This can lead to ridiculous micromanagement. At least one subset (Athabascan Indians) of the protected group (Alaska Natives) succeeded in persuading Justice to threaten an objection if a single town of 500 people was not moved from one district to another.

The Board held 12 public hearings and incorporated 32 public hearings held by the previous Board. They considered six scenarios for Southeast Alaska; twelve for Rural Alaska; eight for Fairbanks; ten for Anchorage and four for Southcentral Alaska. The Board reviewed in detail three final plans and adopted portions of two.

The final plan included a statewide deviation under 10 percent and an average deviation under 2 percent; the lowest overall and average deviations in state history.[10]

The plan provided for uniform single member districts where each district would elect a single representative and a single senator; the first time in state history that a uniform electoral apportionment was adopted.[11]

The plan maintained the number of Native American majority districts while increasing the percentages of Native Americans in every influence district. This was accomplished despite the drop from 16 percent to 15.6 percent in statewide Native American population. This was the first plan in state history where rural Alaska (where Alaskan Natives are generally in the majority) did not lose at least one seat in the Legislature.[12]

In order to accomplish those ends many Representatives and Senators, both Republican and Democrat, were paired in single-member districts and some towns and boroughs were divided between House or Senate districts. These divisions generated strong opposition from some citizens, towns, boroughs, the State Democratic Party, and five powerful Native American corporations.[13]

[9]In the last 20 years not a single unprotected group candidate defeated a protected group candidate as a result of racially polarized for the state legislature. The only instance of racially polarized voting discovered by Professor Grofman's analysis took place in a district with just 18 percent protected group VAP. In 1996, among other examples, an Alaska Native woman was reelected in a House District four percent Alaska Native VAP with 70 percent of the vote. She defeated a white male challenger in the primary. An Alaska Native man defeated two white men and a black man for his party's nomination and went on to defeat an incumbent white woman for the State Senate. The District had 5 percent Alaska Native VAP. An Alaska Native Representative challenged an incumbent Alaska Native State Senator in a District with 25 percent Alaska Native VAP and went on to defeat a white challenger by a wide margin for the open Senate seat.

[10]The Courts gave short shrift to population equality. In *Southeast Conference v. Hickel*, both the Superior Court and Supreme Court used the 16.45 percent deviation allowed in *Mahan v. Howell*, 410 U.S. 315 (1973) as though it was perfectly acceptable in order to satisfy other objectives. Judge Weeks wrote: "The courts have approved deviations of up to 10 percent as a matter of course and up to 16.4 percent with justifications like many that the board ignored." When the Court was through revising the plan, population deviation was 16.33 percent.

[11]Under the preceding reapportionment, the 40 House members had been elected from 14 single and 13 double-member districts while the 20 Senators were elected using five different types of district configurations.

[12] That plan revised under direction from the State Courts eliminated one of two Native majority Senate districts and reduced two influence districts, one to 36 percent from 41 percent and the other from 48 percent to 25 percent.

[13]The cases were consolidated under *Southeast Conference v. Hickel*.

Following the Governor's reapportionment proclamation, the Constitution, Article VI, Section 8, allows just 30 days for filing challenges in superior court. Suits were filed against portions of the plan by the Southeast Conference representing cities in Southeast Alaska protesting division of their communities, the Matanuska-Susitna Borough against unwelcome division of their political subdivision and by the Arctic Slope Regional Corporation and the Tanana Chiefs Conference opposed to pairing Inupiat Eskimo with Athabascan Indians instead of the traditional pairing of Yupik Eskimo with Athabascan Indians. The Yupik Eskimo community, represented by the Fish and Game Fund, filed suit to defend the Governor's plan. The Democratic Party filed suit on procedural grounds that eventually demonstrated mistakes in advertising but whose broad hints of gerrymandering were apparently ignored by the Supreme Court in their decision and were not officially part of either the Superior Court or Supreme Court decisions. Indeed, no party brought charges of partisan gerrymandering before the court although many did not hesitate to imply the worst to the press. In court, Arctic Slope and Tanana Chiefs claimed that local incumbents representing their regions were targeted because of their opposition to the Governor in the Legislature. Pending preclearance, the plan could not be put into effect and little progress was made in state court.

The Board finished their work on June 11, 1991. The Governor proclaimed a plan on September 5, 1991. The plan was submitted to the U.S. Justice Department for preclearance on November 8, 1991 and was reviewed by Justice for some five months before it was precleared on April 10, 1992. It was the first statewide plan in the United States to receive preclearance without objection from Justice following the 1990 census.

The same interests filing suit in state court carried their opposition to the Justice Department. However, the Governor had active allies for his reapportionment before Justice. Native American groups in Alaska were divided. Support for the Governor's plan came from five of the nine Alaska Native legislators and five of the twelve Native Regional Corporations established under the Alaska Native Land Claims Settlement Act of 1971. Opposition to the plan came from the remaining four Alaska Native legislators and from five of the twelve Native Regional Corporations. Two Native Corporations and the Alaska Federation of Natives took no public position.

Representatives of the Governor flew twice to Washington, D.C. to meet with Justice Department officials. More information was requested by Justice on December 31, 1991, and a response from the State was sent back to Washington on February 11, 1992. If the pointed questions of the December 31 Justice letter are any guide, they gave considerable weight to objections raised by the opponents of the Governor's plan.

Nevertheless, after additional information and lobbying by Alaska Natives in support of the Governor's plan, the Justice Department eventually entered no objection to the reapportionment. A Justice Department attorney, Robert Kengle,

seemed to be focused on Athabascan Indians and the effect the plan had on their status in a single legislative district. The State countered that (a) the Voting Rights Act did not apply separately to each group of Native Americans in Alaska, and, in any case, (b) the position of Athabascan Indians did not avoidably retrogress under the Governor's plan. They actually increased their statistical advantage. The Athabascan were simply paired with Inupiat Eskimo instead of Yupik Eskimo. While the State did not agree with Mr. Kengle that individual Native American groups had to be considered for purposes of the Voting Rights Act, the Board took individual groups into consideration for socio-economic reasons.

Oddly enough, it was the condition of the Yupik Eskimo and efforts by the Board and Governor to unify the Yupik that led to fierce opposition by Inupiat Eskimo and Athabascan Indian organizations. Traditionally, reapportionment relied on dividing Yupik Eskimo communities along the Western Alaskan coast to round out population for districts otherwise dominated by Inupiat Eskimo to the north and using Yupik Eskimo communities along the Yukon and Kuskokwim Rivers to shore up the underpopulated Interior Alaska where Athabascan Indians predominated.

The 1991 Board united the Yupik into two districts and combined the Inupiat and Athabascan into two. Yupik Eskimo dominated two districts, one district was dominated by Inupiat Eskimo, and one district combined the remaining Inupiat Eskimo population with rural Athabascans. The Athabascans and non-Natives living in the Athabascan region of the new district made up more than 55 percent of that new district population.

Once Justice approved the Governor's plan on April 10, 1992, State litigation resumed in earnest. The original complaints filed in September 1991 did not come to trial until April 16, 1992. After a 16-day trial, a Superior Court Judge from Southeast Alaska issued a harsh 106-page Opinion on May 11, 1992 that rejected nine House districts and invalidated the plan. The Judge, who had no experience with reapportionment, was nonetheless unequivocal in his denunciation of the attitude of members of the Board. He criticized the process the Board followed as inadequate and stated in his Opinion that the chair of the Board was evasive in testifying, sometimes "misleading to the point that only persistence in counsel's questioning brought out the truth."[14]

Alaska includes a military population of approximately 55,000 service personnel and their dependents. This represented 10 percent of the total population recorded by the Census for Alaska. The Superior Court also ruled that the Board failed to take a "hard look" at whether non-resident military could be identified and deducted from the population base for reapportionment.[15] According to earlier rulings by the State Supreme Court, the State Constitution permits the deduc-

[14]Superior Court Judge Larry Weeks wrote that the Board Chairman was contradicted by his deposition testimony at least ten times. Interestingly, the Chair of the Reapportionment Board was elected in 1992 to the State House and reelected in 1994 and 1996.

[15]*Southeast Conference v. Hickel.*

tion of non-resident military from the reapportionment base if nonresidents can be identified.

The Governor appealed. The State Supreme Court took ten days to uphold the Superior Court that certain districts violated the State Constitution and reversed Judge Weeks with respect to the population base, ruling instead that the Governor's inclusion of all military and dependents was reasonable.

The Supreme Court stated that the Board and Governor had needlessly sacrificed socio-economic integration and compactness in order to bolster Native American districts and to achieve "excessive" population equality.[16] The Court even managed to find a lack of contiguity. The 1992 Court held that the Board had an affirmative responsibility to apply the "as nearly as practicable" standards for contiguity, compactness, and relative socio-economic integration outlined in Article VI, Section 6 of the State Constitution and further decreed that political subdivisions inherently represented integrated socio-economic areas.[17] The Court insisted that these state constitutional mandates could be sacrificed only when mandated by the Voting Rights Act.

The State Supreme Court reached its conclusion in June, 1992. The Court's decision and remedy so late in the year required—for the first time in state history—canceling some local school board elections and postponement of the statewide primary for three weeks. In a 3-2 decision it also ordered the Superior Court to adopt an interim plan. Rather than remand reapportionment to the Governor, the Court ignored the plain language of the State Constitution which reads:

> Governor Hickel and Attorney General Charles E. Cole were outraged at the usurpation of constitutional authority granted to the Governor and publicly denounced the court, but with elections pending, they participated in the Court's adoption of an interim plan. Ultimately, the 1992 interim plan left some 75 percent of Alaskans in the districts the Governor originally placed them; the Court adopted a revised map prepared and submitted by the Governor.

Was the Court's plan any better? Most people in Southeast Alaska think so. Statewide, the Alaska Native community remained divided. No changes were made to urban Alaska. The Matanuska-Susitna Borough was still divided, although in seven instead of nine districts. The plan adopted by the Court meandered back and forth across highways in rural Alaska for several hundred miles and divided the tiny Lake and Peninsula Borough (population 1,668) in half, separating the people of that Borough into two house and two

[16]After the Court was through revising the Governor's plan overall population deviation leaped from 9.2 percent to 16.33 percent, as high as any in the United States.

[17]This innovative ruling left organized boroughs (counties) with preferential status while leaving those communities in rural areas of Alaska not organized into boroughs (some 60 percent of the area of Alaska), apparently requiring a greater burden of proof before their interest in being districted together equaled boroughs. The Constitution simply states that political subdivision boundaries may be considered.

senate districts. This latter result was not required by the Voting Rights Act nor did it adhere to the latest Opinion by the Supreme Court regarding the recently discovered preeminence of Boroughs as perfect representations of socio-economic integration.[18]

Was there any way to avoid this fate for the Governor's plan? Can the Governor and Board in 2001 look for clues in the rulings of the Alaska Supreme Court?

I think not. The 1991 Board attempted to avoid the fate of the 1971 and 1981 boards by following the court's own rules to no avail.[19] The 1992 court reversed or ignored their previous reasoning and conclusions.[20]

Three examples should serve to illustrate this point.

ADAK 1972 and 1992

In 1972 the State Supreme Court's own interim plan decided where to place the naval military base of Adak, which sits some 900 miles out at the western edge of the Aleutian chain. This Court-drawn House district skirted around the rest of the Aleutians (an island chain) for more than 1,100 miles until Adak was finally combined with the City of Kodiak, but not the rest of the Kodiak Borough. Zero evidence of socio-economic integration existed and none was referred to by the Court's Masters who devised the scheme. It is impossible to conceive a district less compact. It resembled a 1,100-mile hose with bulbs of population at both ends. It was contiguous only over more than 1,000 miles of water. It was adopted by the Court.

The 1991 reapportionment board took the isolated military base and aligned it over water (about 1,000 miles) with Southwest Alaska. The obvious Court precedent may have deterred the six plaintiffs who filed suit against portions of the Governor's plan from objecting to this, but it did not deter our imaginative State Supreme Court. Acting on its own motion, *sua sponte*, without so much as a reference to the model of its own 1972 plan,[21] the 1992 Court

[18]It was a result of revisions made by Judge Weeks to the plan adopted by his own Masters. He moved a town in the east where people had complained (Cordova) and exchanged them for a town in the north east (Tok) and dividing the Lake and Peninsula Borough. Once Tok was moved and the little Borough divided, people promptly complained. Judge Weeks ignored them. His tinkering serves as excellent evidence of the perplexity in reapportionment and the trials of attempting to accommodate public opinion. People complain largely when something they dislike happens to them. Until it happens they don't have anything to complain about. Where do you draw the line, both literally and figuratively, with public testimony?

[19]During the 1991-92 reapportionment process, the Board carefully reviewed the Court's own prior plans to attempt to discern what it was the Court might find acceptable. The Board applied all previous tests discovered by the Court in the past by which proposed new districts might by measured. Every district proposed by the Reapportionment Board and Governor Hickel had its counterpart in districts previously endorsed or designed by the Court.

[20]The final decision in *Southeast Conference v. Hickel* included yet another new proclamation from the eminent jurists of the State Supreme Court. Perhaps they were a little embarrassed by the similarities between districts designed or approved by them in the past and the new districts adopted by Governor Hickel but declared unconstitutional by the Court. How did they deal with this ticklish problem? The 1992 Court declared that all Court plans were interim in nature and need not necessarily be constitutional.

rejected the pairing of Adak Naval Base over water with the Lower Yukon River area some 800 miles distant, proclaiming such a district "plainly erroneous." This conclusion was reached despite the substantial improvement in the percentage of Native Americans in House and Senate districts and the endorsement of the plan by all three Alaska Native Regional Corporations whose population was affected.

One Iceworm Is Fine, Two Are a Crowd

The 1983 Supreme Court held that a new House district, stretching for some 800 miles, winding its way through islands and up inland waterways from Annette Island in the South, to Yakutat in the north, was socio-economically integrated except for the City of Cordova.[22] This district was described as the "Iceworm" district by the Court. In order to permit such a novel construction—previous districts had centered on communities moving from north to south. To justify the elongated and weaving Iceworm district the 1983 Court stated in their Opinion that they believed all of Southeast Alaska was socio-economically integrated.

The 1991 plan divided the region and some towns in Southeast to create two districts (instead of one) stretching the length of the region in order to unite almost all Native Americans living in Southeast Alaska in two house districts and one senate district. Such districts would ensure political integration of Southeast House districts and enhance Alaska Native voting influence.

However, the 1992 Court ruled that those districts were not socio-economically integrated as nearly as practicable and ruled them unconstitutional. What is incredible is that the 1983 court admitted that dividing the Southeastern region of Alaska into districts North and South would lead to greater socio-economic integration but elected to defer to the Governor and his Board who desired to maximize Alaska Native influence. This 1981 effort to maximize was not a result of a Justice Department objection, nor was it to avoid retrogression, and the Court admitted it was not required by the Voting Rights Act. Yet the 1983 court concluded a single Iceworm was fine as long as it was confined to Southeast Alaska. They ruled that a district not as socio-economically integrated as practicable was within the proper discretion of the Governor. The 1992 Court proclaimed the opposite. Now the constitution was reinterpreted to require adherence to borough boundaries and to maximize socio-economic integration! Yet, except for one member, the membership of the Court was identical.[23]

[21] In the written decision that followed six months later the Court decreed that since Court plans were interim in nature, they did not have to be constitutional. *Southeast Conference v. Hickel.*

[22] *Carpenter v. Hammond*

[23] The new member had been the Superior Court judge who ruled the whole 1981 plan constitutional and had been overruled by the State Supreme Court.

Borough Busters, That Was Then, This Is Now

In 1982, the Kenai Peninsula Borough population justified 1.5 Senate and 3 House districts. However, the 1984 revised plan divided the Kenai Peninsula Borough into four House districts and three Senate districts. The local government challenged the 1984 plan arguing that their right to equal representation was violated. The 1987 Court dismissed their claim utterly.

In 1992, the Matanuska-Susitna Borough population justified just under 1.5 Senate and three House districts. It was, and is, the fastest growing area in Alaska. The 1992 plan divided the Matanuska-Susitna Borough[24] (Mat-Su) into five House districts and four Senate districts. In the Governor's plan, Mat-Su residents were the majority in two House seats, held 44 and 48 percent of the population in two more, and made up 20 percent in a fifth. In the Senate, the people of the Mat-Su made up a solid 72 percent in one district, 40 percent in a second, 24 percent in a third and 10 percent in a fourth.

The 1987 Court, ruling on the revised 1984 plan, concluded that they should not draw a fine line with respect to whether areas are socio-economically integrated as nearly as practicable. The Court found that the Nikiski portion of the Kenai Peninsula Borough was socio-economically integrated with Anchorage despite the fact that the interaction of North Kenai with South Anchorage is compromised by being 100 miles apart by road, sharing no common services, looking to different daily newspapers and communities where only a very few residents commute.[25]

That was then, this is now. The 1992 Court concluded that Wasilla is not socio-economically integrated as nearly as practicable with Eagle River. This comic conclusion is made notwithstanding the fact that these communities are both members of the same telephone and electric cooperatives, are less than 25 miles apart, share only one daily paper; moreover, up to 40 percent of each community's workforce commutes together into Anchorage on a daily basis.

Every member of the Court who participated in the 1987 ruling participated in 1992. During the intervening five years the Court apparently discovered that Boroughs were actually ideal socio-economic integrated units and that to divide a borough any more than absolutely necessary was an obvious violation of the constitution.[26] The 1992 Court ruled that these 1992 Matanuska-Susitna districts violated the state constitutional provisions mandating socio-economically integrated districts.[27]

The 1992 Court trotted out the description the delegates to the state constitutional convention gave to their concept of socio-economic integration: [W]here

[24] The fastest growing Borough in Alaska during the 1980s and 1990s according to the U.S. Census and the Alaska Department of Labor.

[25] *Kenai Peninsula Borough v. State*

[26] How this Opinion squared with the needless division of the Lake and Peninsula Borough (population 1,668) designed by Judge Weeks and adopted by the Supreme Court remains a mystery. The Governor's final plan (March 1994) reunited the tiny Borough.

[27] Interestingly, the Court's own Masters and the final plan adopted by the Governor maintained a Wasilla-Eagle River House District.

people live together and work together and earn their living together, where people do that, they should be logically grouped that way. A socio-economic unit is described as: "an economic unit inhabited by people. In other words, the stress is placed on the canton idea, a group of people living within a geographic unit, following if possible, similar economic pursuits.[28]

The 1992 Court announced that all boroughs (counties, municipalities) inherently represented integrated socio-economic units, the antiquity or size of the borough notwithstanding. However, the Matansuka-Susitna Borough was compelled by the Legislature in 1965 to organize as a local government. The Borough is the size of West Virginia and was simply modeled after an existing state legislative district. As for being a perfect socio-economic ideal, in the last thirty years, the Borough has contracted once and sought expansion at least twice.[29]

Some Neighbors Are More Socio-economically Integrated Than Others

The 1992 Court went on to declare a new constitutional principle: that it was unconstitutional for any political subdivision of the state to be divided so that excess population went in more adjoining districts than necessary.

Obviously, this could not have been the understanding of the 1991 Board, because no plan had ever been designed with that in mind. Indeed, the Constitution merely states that the Reapportionment Board may consider political subdivisions while drawing districts but gives them no greater weight. On the contrary, the Board determined that equal population, enhancement of the numbers of people protected by the Voting Rights Act, and uniform legislative representation were the primary goals superior to adhering to political subdivision boundaries. Naively, the Board believed the plain constitutional language, prior rulings by the Court, and the Court's own examples when they took a direct hand in drawing districts were safe guides.

For example, the 1992 Court writes:

> It is axiomatic that a district composed wholly of land belonging to a single borough is adequately integrated....We recognize that it may be necessary to divide a borough so that its excess population is allocated to a district situated elsewhere. However, where possible, all of a municipality's excess population should go to one other district in order to maximize effective representation of the excess group. This result is compelled not only by the article VI, section 6 requirements, but also by the state equal protection clause which guarantees the right to proportional geographic representation.[30]

While this constitutional principle may be "axiomatic," the 1987 Court approved a plan dividing the Kenai Peninsula Borough in five House seats and three Senate seats.

[28] Minutes of the Alaska Constitutional Convention, 3 PACC 1873 (January 12, 1956).

[29] In 1996, the Alaska Local Boundary Commission recommended to the Legislature the approval of an application by northeastern residents seeking to break away from the Matanuska-Susitna Borough.

[30] Kenai 1352, 1369 and 1372-73 and Southeast Conference, p.29.

Once again, the 1992 Court ignored several of its own previous rulings and discovered heretofore unobserved state constitutional standards. Every decade, without prejudice toward whether the Governor was Democrat, Republican or Alaskan Independence, the Court has found the Governor's plan unconstitutional. In each case the Court has applied heretofore undiscovered rules to justify judicial interloping.

Reviewing Alaska history, we find that the State Supreme Court has substituted its own judgment for Governors Egan and Hickel, compelled Governor's Egan and Hammond to amend their plans, and reprimanded Governor Sheffield by declaring his plan unconstitutional.[31]

The Governor proclaimed a new reapportionment on March 25, 1994. No suits were filed protesting the plan during the 30-day period allowed by the state constitution. It is preposterous to suggest that no suit was filed because Governor Hickel managed to please everyone. Indeed, in 1995 a Yupik Eskimo group had dropped a case pending in federal court and citizens from Nenana to Glennallen were outraged that there were no suits in state court. Even in the election for Governor in 1994, no party or individual filed suit even on the hope that a new Governor might have an opportunity to craft a plan more to their liking. It is reasonable to surmise that the absence of a state challenge was less because the Democratic Party was delighted with the Governor's plan than because everyone recognized the futility of a second round victory in state court. What else can this be due to other than the predictability of our State Supreme Court?

My conclusion is that the State Supreme Court believes every Governor will use reapportionment to create districts that benefit their political agenda, whether party oriented or incumbent oriented. Consequently, the Court believes only by declaring a plan unconstitutional can they exercise restraint on the unbridled political maneuvering of the Governor.

The Governor has absolute authority to reapportion through a reapportionment board that serves at his pleasure. However, the first plan of any governor will be declared unconstitutional by the State Supreme Court. What empirical evidence exists is irrefutable. No effort to read past decisions will spare even the most apolitical Governor or Board from the censure of the Court. The perverse effect of this judicial strategy eliminates whatever meager incentive exists for a governor to practice restraint, work to compromise, or to any real degree rein in political manipulation during reapportionment, round one. Such is the legacy of Alaska's predictably unpredictable reapportionment process.

[31] The 1987 Court found a senate district unconstitutional, concluding that the design of one of the multi-member Senate districts intentionally discriminated against the people of Anchorage and violated their right to equal protection under the Alaska Constitution. In what stands out as a singularly bizarre action the 1987 Court proclaimed that their declaration that the district was unconstitutional was remedy enough. Kenai 1373.

REAPPORTIONMENT WARS: Party, Race, and Redistricting In California, 1971-1992[1]

Morgan Kousser

I. INTRODUCTION: THE TEN YEARS' WAR

THE 1980S WAS THE DECADE OF REAPPORTIONMENT IN CALIFORNIA POLITICS. Ever since 1910, when Los Angeles passed San Francisco in population and the first urban-rural and sectional conflict over redistricting bitterly divided the state's legislature, the issue has disrupted politics every ten years. (Wilkening, 1977.) But never before has it lasted for the entire decade, coloring political events nationally as well as locally and spilling over into the next reapportionment cycle. From 1981 to 1991, Republicans contended that if only they could obtain a "fair" reapportionment through a court or commission, they would control the congressional delegation and that of the lower house of the state legislature. Attempting to overturn what they considered partisan gerrymanders, the GOP sponsored seven largely unsuccessful referenda on the subject from 1982 to 1990 and flirted with leaders of minority groups, offering them safely "packed" seats at the expense of Anglo Democrats.

In 1991-92, the Republicans, led by newly elected Gov. Pete Wilson, finally got their wish, adamantly refusing to compromise or even negotiate seriously with the Democratic majority in the legislature and thereby insuring that their partisan allies on the state's courts would superintend the drawing of the new districts. Although Democrats and, to a lesser extent, Latino groups were displeased with the resulting boundaries, Republicans were jubilant. Nonetheless, Democrats carried the 1992 elections for the state Assembly and Senate and for Congress by almost exactly the same margins as with the old "gerrymandered" lines of the 1980s. These results called into question the dogma held so unquestion-

[1] Micah Altman, Tim Hodson, Daniel Hays Lowenstein, and Jonathan Steinberg made this a better paper with their helpful comments on earlier drafts. Most writers on California reapportionment have been participants in the process. E.g., Baker, 1962; Cain, 1984; Hinderaker and Waters, 1952; Lowell and Craigie, 1985; Quinn, 1981 and 1984; Wilkening, 1977. Although I have never helped to draw a district, I did serve as an expert witness for most of the members of the Democratic congressional delegation in an unsuccessful federal court challenge to the 1991 Special Masters' Plan.

ingly during the 1980s by political elites of both parties in the state that the exact placement of district lines was the key to political control of the state.[2] Although the fortunes of individual politicians can often be dramatically affected by redistricting, it may be much more difficult, at least in a state as large and complex as California, to transform the statewide results by line-drawing.

This chapter reviews the extraordinarily complicated and conflicted course of redistricting in California from the 1970s through the 1990s and applies new and revealing measures of the partisan effects of redistricting to determine the significance of redistricting in changing the balance of political power in the state.[3] Using evidence not only from plans that were adopted, but from those that were rejected, it simulates the outcomes in actual elections under a range of alternative plans. It gives explicit, easily replicable answers to the question of how election outcomes would have differed if other redistricting schemes had been chosen. In particular, it assesses the effect of the so-called "Burton gerrymander" of congressional seats in the 1980s, which has been credited with "derailing the Reagan Revolution" in national politics. (Quinn, 1984, introduction, 1.)

A second purpose of the chapter is to assess the importance for political parties and ethnic minority groups of the constraints on redistricting imposed by national, legal, and constitutional standards. Is it safe now to withdraw Congress and the federal courts from the "political thicket" of redistricting, except perhaps to protect the rights of allegedly beleaguered Anglo majorities, as some people claim?[4] A quick glance at reapportionment politics in the period from 1920 through 1965 in California suggests how important judicial intervention has been in the past. The state's 1879 constitution mandated reapportionment once a decade and required that districts contain equal numbers of people. Nevertheless, the urban-rural conflict in the increasingly urbanized state of the 1920s prevented agreement over redistricting in the 1921, 1923, and 1925 legislatures, and in 1926, the Farm Bureau Federation led a referendum campaign to malapportion the state senate by constitutional amendment. No county could have more than one state senator, and not more than three counties could compose a state senate district. By 1960, the ratio of the population of the largest to the smallest senate district was 422:1. (Baker, 1962, 51.) Lobbyists, personified by the notorious Artie Samish (Samish and Thomas, 1971), dictated many of the state's policies, while the Republican party and the reactionary urban press, led by the *Los Ange-*

[2] For similar questioning about the 1950s and 60s in California, see Way, 1962, 261, and Quinn 1984, ch.1,40; and for other states, Basehart and Comer, 1991.

[3] As Tim Hodson pointed out in a personal communication, the stories might have been somewhat different if I had included more information on the considerably less partisan state senate, with its longer terms and, at least recently, higher proportion of experienced members. The problem is that because numbers of senate districts often get rearranged during redistricting and four-year terms may overlap the redistricting year, some members' terms may be extended, in effect, to six years, making it very difficult to measure the effect of redistricting systematically.

[4] This is the implication of the views of U.S. Supreme Court Justices Clarence Thomas and Antonin Scalia, putting together their concurrence in *Holder* v. *Hall*, 114 S.Ct. 2581 (1994) and their assent to *Miller* v. *Johnson*, 115 S.Ct. 2475 (1995).

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les Times, denounced any attempt to overturn the grossly unequal apportionment rules for the senate as a plot by "un-American," communist-dominated unions to impose "boss rule" on the state and to tax worthy farmers to provide social welfare schemes for poor city-dwellers. (Barclay, 1951; Hinderaker and Waters, 1952). Initiative measures to decrease the malapportionment failed in 1928, 1948, 1960, and 1962. (Baker, 1962; Quinn, 1981.) Naturally, because the vast majority of politically active Latinos and African-Americans lived in the cities, there were no minority state senators, although Los Angeles and Oakland did elect a string of black representatives to the Assembly. It was only after the equal state apportionment case of *Reynolds* v. *Sims* (377 U.S. 533) in 1964 that urban areas received their fair numbers of representatives and that it became possible to elect members of minority groups to the state senate.

Such Supreme Court decisions not only guarded democracy in general, they also constrained the ability of those who drew district lines to distort the results by party or other group. If there were no limit to the size of districts, it would be simple enough to pack opposing partisans into a few districts and create the maximum number of seats for one's own party, faction, or race. A population equality requirement, however, imposed a severe constraint on the ability of redistricters to manipulate outcomes. (Quinn, 1984, Ch. 1, 20-32 gives examples of the pre-*Reynolds* situation.) Moreover, the 1965 Voting Rights Act and its subsequent expansion by Congress and the courts forced state officials to pay special attention to the impact of line-drawing on the ability of members of minority groups to elect candidates of their choice, and by the 1990s, some attempted to extend interpretations of the Act to safeguard the ability to *influence* the election of candidates.

A third goal of the chapter is to trace the evolution of racial and partisan representation in the state and the connection between them. Which party (if either of them) has been more sympathetic to the claims of ethnic minorities and how has the level and expression of sympathy changed over time? How have "nonpartisan" or at least non-legislative redistricting institutions treated minorities? Would ethnic minorities be better off in the future if reapportionment were removed from legislative control?

Fourth, how have court-ordered and partisan plans differed? This question assumes particular importance because of the strong likelihood of deadlock and litigation in redistricting in California and throughout the country in the post-millennial redistrictings. Are ethnic minorities better off trusting the courts than the legislature? Have court-ordered plans in the past been neutral in their effects on political parties?

The nation's most heavily populated and culturally diverse state, California, has been the focal point of conflict over social and economic policy since the 1960s—from higher education policy to tax limitation to welfare "reform" to prison building to immigration restriction to affirmative action. But in many ways, the centerpiece of its political battles has been redistricting, an amazingly

expensive, seemingly almost continuous conflict that fostered or blighted political careers and, some have said, strongly affected public policy for the nation. What can we learn from the Golden State's reapportionment wars?

II. THE 1970S: MINORITIES, MAJORITIES, AND MASTERS

A. A "Balanced and Representative Plan"

The reapportionment struggle of the 1970s so closely paralleled and so directly affected that of the 1990s that the earlier battle deserves detailed attention here. Despite a pro-Democratic redistricting in 1965, when the state faced up to the strict equal population standards that federal courts had imposed after *Baker* v. *Carr*, Republicans gained a slight majority in the lower house, the Assembly, in the 1968 election. Assuming that his party would retain control in 1970, and would therefore be able to design a partisan reapportionment, Rep. Jerry Lewis of the Elections and Constitutional Amendments Committee drafted a memo outlining Republican plans. "In my judgment," he proclaimed, "our number one criteria [sic] should be a program designed to establish districts in California that will elect the highest possible number of Republicans to the State Legislature and the House of Representatives. A second item for consideration is to include in the plan Democrat [sic] districts with sizable majority [sic] for those who are measured to be the 'least effective members' of the minority party....I believe we have an unusually good opportunity to develop a 'balanced and representative plan' which in reality is totally designed for partisan purposes." [5] Unfortunately for the GOP, the party lost its Assembly majority in the 1970 elections, and Democrats retained a slim majority in the State Senate. To add mortification to defeat, Lewis's revealing memo was left in the Committee files when the Democrats took over. When Lewis gave an especially sanctimonious speech on the floor denouncing the Democrats for engaging in what he termed partisan gerrymandering, Democratic Speaker Bob Moretti whipped out the memo, quoting the pertinent passages, no doubt to Democratic guffaws and Republican chagrin.[6] In fact, both parties viewed reapportionment as primarily a partisan battle—the Democrats were just a bit more open about it.

With Ronald Reagan in the governor's chair and thin Democratic majorities in both houses of the legislature and in the congressional delegation, the 1971 redistricting should have been a compromise, an incumbent gerrymander that did not overly advantage or disadvantage either party. It nearly happened that way. In late 1971, Governor Reagan, the Democratic state legislative majority, and the 38 incumbent members of Congress from both parties[7] had agreed on boundaries for the congressional and State Senate seats and had just settled on a redistricting of

[5]Reproduced in Lowenstein, 1972, vol. II, Exhibit E, and quoted in Brown and Lowenstein, 1990, 67-68.

[6]Jerry Gillam, "Assembly Approves Redistricting Plan; Court Test Expected," *Los Angeles Times*, Nov. 24, 1971, 3.

the State Assembly when a millionaire Anglo Republican upset a Latino Democrat in a special election. Attracting state and national attention in his effort to become the third Latino in the Assembly, Richard Alatorre was a solid favorite to carry a heavily Democratic, ethnically and culturally diverse district in Los Angeles. Alatorre was derailed, Democrats charged, by a series of "dirty tricks" in a West Coast Watergate campaign managed by the future Los Angeles county chairman of the "Committee to Reelect the President"—i.e., Richard Nixon. (Kousser, 1991, 655-56).

Having won the district, Republicans demanded that it be redrawn to favor the Republican victor. (Waxman, 1972.) Outraged Democrats refused, and the deal collapsed when Gov. Reagan refused to pledge to endorse agreements negotiated by Republicans in the legislature. After a stormy confrontation between Reagan and the Republican legislative caucus, Democrats passed their own redistricting bill for the Assembly and the bipartisan bills for the other two bodies on Dec. 20, 1971, Reagan immediately vetoed all of them, and power passed to the State Supreme Court.[8] Thus, the 20-year partisan battle over reapportionment in California was set off when an attempt by Democrats to increase ethnic minority representation was blocked by Republicans. Partisan and ethnic factors in California reapportionment are inseparably intertwined.

Attorneys representing Latinos and African-Americans filed briefs asking the California Supreme Court to reject the legislative plans as ethnically discriminatory, claiming that they protected Anglo incumbents, rather than creating more districts where members of minority groups would have a chance to elect candidates of their choice. Democrats pointed to increased minority opportunities in their original plans, criticized the proposed Republican plans for endangering four of the seven currently minority-held seats in the Assembly, and underlined the extreme partisan nature of the compact-looking Republican plan, which paired or put in marginal seats nearly every Democratic leader in both houses of the legislature. Although Republicans claimed to be creating three new "minority districts," two of them considerably overlapped areas then represented by major Democratic incumbents, pointedly forcing Democrats to choose between Anglo leaders and minority challengers. (Lowenstein, 1972; D'Agostino, 1972; Quinn, 1984, ch. 4, 9-10.) In a separate brief, Republican State Controller Houston Flournoy asked the court to adopt the Republican plans, which the legislature had voted down, on the grounds that they provided for more competitive districts.[9] Brushing aside all of these arguments without so much as a comment, the high court quickly and unanimously issued a ruling that merely carried the redistricting battle over until

[7]A court-ordered, but not court-designed plan in 1967 had produced a bipartisan incumbent gerrymander for congressional seats. (Mayhew, 1971: 282.)

[8]William Endicott, "Reapportionment Plan Favoring GOP Studied," *Los Angeles Times*, Jan. 5, 1972, I-24; "Assembly Democrats Reject Remapping Bid," *ibid.*, Jan. 6, 1972, I-2; Richard Bergholz, "32 Congressmen Petition Court to Overrule Redistricting Veto," *ibid.*, Jan. 7, 1972, I-3; Quinn, 1984, ch. 4, 17-20.

after the 1972 elections. (*Legislature* v. *Reinecke*, 10 Cal. 3d 396 (1973).)

Chief Justice Donald Wright, a Reagan appointee, began by jettisoning the only redistricting commission that California has ever had. One portion of the 1926 Farm Bureau Federation Amendment had provided for a Reapportionment Commission composed of certain statewide elected officials, which was to act if the legislature and the governor could not agree on a reapportionment plan. Although the rest of the 1926 Amendment had previously been declared contrary to the U.S. Constitution's Equal Protection Clause (*Silver* v. *Brown*, 63 Cal.2d 270 (1965)), it was not absolutely clear whether the Commission was so intertwined with the Senate apportionment scheme that it had to die, as well. Reasoning that the 1926 plan was adopted in a referendum as part of a coherent whole, the court ruled that the Commission had to follow the malapportioned Senate into oblivion. It is significant to note that while the case was pending in the Supreme Court, the Republican-dominated Commission was focusing on a plan drafted by Alan Heslop and Thomas Hofeller, the Republicans' chief political consultants on reapportionment, that, the *Los Angeles Times* opined, "would wipe out the Democratic majority in both the Senate and Assembly."[10]

Because the state's population gains entitled it to five more members of Congress than it had had in the 1960s, the court had to decide whether to adopt the legislature's proposed congressional lines temporarily, to use the lines drawn in 1967 and elect the extra five members of Congress at-large (as some Republicans proposed), or to draw districts itself. Operating under a February 23 deadline for candidates qualifying for the June 1972 primaries, the court ruled on Jan. 18, one day after the final briefs were due in the case and less than a month after Reagan's veto, that it had no time to draw districts itself and provide for public comment on them. It rejected statewide at-large elections because they would burden candidates with massive expenses and confuse voters by offering them choices for too many offices. Since all 38 incumbent congresspersons had endorsed the legislature's bipartisan plan, the court did, too.[11]

Despite uneven population growth that seriously unbalanced the populations across districts, the court ruled that the 1972 State Assembly and Senate elections

[9]"Minority Groups Ask for Rejection of Bills," *Los Angeles Times*, Jan. 18, 1972, I-18; "High Court Asked to Void Democrats' Redistricting Bills," *ibid.*, I-3. Nothing in state or federal law explicitly favors competitive districts. Regression estimates by methods detailed in Kousser, 1995a, show that had the Republican plan been in effect in 1972, Democrats would probably have won 46 (out of 80) seats in the Assembly, rather than the 51 that they actually carried under the old 1965 lines. Under the Masters' Plan, Democrats would have won only 42 races in 1972. After the extraordinary registration and behavioral shifts in a Democratic direction in 1973-74, all of the plans would have provided for huge Democratic majorities, the Republican plan protecting the most Republican seats, 28.

[10]William Endicott, "Reapportionment Plan Favoring GOP Studied," *Los Angeles Times*, Jan. 5, 1972, I-24; Quinn, 1984, ch. 4, 8. Hofeller had drawn the basic plans that the Republicans had presented in the legislature. Controller Flournoy, who advocated the Republican plans before the Supreme Court, was a member of the Reapportionment Commission.

[11]Glazer et al., 1987, 694-97, find that California was one of only two states in the country in which there was a significant partisan congressional gerrymander in 1970-72. Democrats, they believe, gained about one seat by it.

would be held under the same arrangement as in 1970. Democrats, whose districts had generally lost population or gained less than the more suburbanized Republicans during the 1960s, were satisfied with this ruling, and the Republicans could at least solace themselves with the fact that the court had rejected the Democratic legislature's proposals. Finally, the court gave the legislature further time to cut a deal that would go into effect for the 1974 elections. Otherwise, it would appoint three Appeals Court judges as "special masters" and come up with a program of its own.

Republican Lt. Gov. Ed Reinecke, a rather taciturn member of the now moribund Reapportionment Commission and a man with no previous or subsequent reputation for special solicitude toward minority groups, comically overreacted to the court's opinion. It was the "most shocking instance of poor logic and bad judgment on the part of the Supreme Court I've ever seen in my existence...a total copout." The legislature, he declared, had "fragmented" minority communities "for the purpose of perpetuating the liberal Caucasians in office....this is an example of why the people of this country as well as this state took to the streets. They saw there was no relief by working within the system. In fact I must say that today I would join them."[12] While avoiding Reinecke's graphically ludicrous hyperbole, Governor Ronald Reagan no doubt evoked similar hilarity in Sacramento watering holes with his comment that "There is only one way to do reapportionment—feed into the computer all of the factors except political registration. That should not be a part of it." Democrats claimed that the Republican plans would have overturned their majority in the Assembly and guaranteed Republican dominance for a decade.[13]

The legislature then somewhat desultorily resumed its effort at a compromise, the serious action taking place in the closely divided Senate, in which Democrats enjoyed a bare two-seat majority. (See Table 1.) In the 1971 plan, Elections and Reapportionment Committee chairman Mervyn Dymally, the only African-American in the Senate, had solidified his own district, bolstered the black population of a district then represented by an Anglo Democrat, offering blacks the possibility of doubling their numbers in the Senate during the coming years, and created a district centered in East Los Angeles that was designed to elect the first Latino to the Senate since 1911.[14] After the Supreme Court decision, the Republicans and nearly half of the Democrats, led by conservative Democrat George Zenovich of Fresno and Republican John Harmer of Glendale, proposed a new alignment that moved Dymally's district east, into the heavily Latino area of East Los Angeles, and reduced the black percentage of the second district that Dymally had drawn from 52% to 27%. The scheme effectively capped combined black and Latino representation in the Senate at one and potentially pitted Dymally against ambitious Latinos in the remaining district. Three Republican Senators stalked out of an Elections and Reapportionment Committee meeting when Herman Sillas, the Chairman of the California Advisory Committee to the U.S. Commission on Civil Rights, charged that the plan was "fathered by racism and nurtured by hate and fear." Before he left, John Harmer denounced the Mexican-American Sillas as "a discredit to his people."[15] Eventually, Zenovich and Harmer strung together a district stretching east from East Los Angeles through Orange and Riverside counties, finally terminating in San Bernardino. Uncharacteristically disregarding political reality, Harmer termed this a "Mexican-American district" despite the fact that it was only 47% Spanish-surnamed in population and no doubt much less in registered voters.[16]

[12]Tom Goff, "Reagan, Reinecke Denounce Court; Legislative Leaders Praise Action," *Los Angeles Times*, Jan. 19, 1972, I-14.

[13]Tom Goff, "Governor Urges Redistricting Plan Without Partisan Politics," *Los Angeles Times*, Jan. 21, 1972, I-3.

[14]Dymally called increased Latino representation "the most pressing political business in California." Quoted in Wilkening, 1977, 249.

TABLE 1. The Partisan Balance among Legislators in California, 1970-94 Elections

Election	Assembly		Senate		Congress	
Year	D	R	D	R	D	R
1970	43	37	21	19	20	18
72	51	29	22	18	23	20
74	55	25	25	15	28	15
76	57	23	26	14	29	14
78	50	30	26	14	26	17
80	47	33	21	19	22	21
82	48	32	23	17	28	17
84	47	33	25	15	27	18
86	44	36	24	15*	27	18
88	47	33	24	15*	27	18
90	48	32	24	13**	30	19
92	48	32	22	13**	30	22
94	39	41	21	17***	27	25

*One independent
**Two Independents and three vacancies
***Three Independents
Source: *California Journal*, selected issues, 1970-94

[15]Jerry Gillam, "Reapportionment Plan Favoring Democrats Gains in Assembly," *Los Angeles Times*, Feb. 16, 1973, I-3; "3 GOP State Senators Walk Out of Redistricting Hearing," *ibid.*, Feb. 9, 1973, I-3; Herman Sillas, "Dear State Senators, Whatever Happened to East Los Angeles? (It's Missing)," *ibid.*, Feb. 21, 1973, II-7. The quoted phrase is as reported by Sillas.

[16]"Senators Deadlock on Latin Districting Plan," Los Angeles Times, Mar. 23, 1972, I-2; "Senate Panel 'Packed' in Surprise Maneuver," ibid., Mar. 29, 1972, I-21; Tom Goff, "'Bipartisan' Redistricting Plan OK'd by State Senate 25 to 13," ibid., May 24, 1973, I-3; Lowenstein 1972, I, 14-15.

B. The Masters' Plan: "Flagrant Democratic Gerrymandering"?

The Assembly deadlocked until the State Supreme Court appointment of three Special Masters in May 1973 pressured the lower house into passing a bipartisan plan which, despite overwhelming support from incumbents of both parties, was vetoed (again) by Gov. Reagan.[17] The three Masters were all retired Anglo judges, two Democrats, Harold F. Collins of Los Angeles and Alvin E. Weinberger of San Francisco, and one Republican, Martin J Coughlin of Los Angeles. All had been appointed to their highest judicial positions by Democratic Governor Pat Brown, though two had originally been selected for judgeships by Republican Governor Earl Warren. (California Journal, 1973.) No one seems to have noted publicly the absence of any minorities or women on the panel. Because of past discrimination, of course, there were few or no retired black, Latino, or female judges at the time. In hearings before the Masters, however, representatives of black, Latino, and women's groups denounced the revised legislative plans as incumbent gerrymanders and urged more attention to minority groups and less to incumbents, especially in the Senate.[18]

Unveiled in September 1973, the plans, which were actually drawn by the Masters' staffers, law professor Paul McKaskle and political scientist Gordon Baker, appeared likely to decimate incumbents, especially in the Senate, placing the homes of 29 members of the Assembly (18 Democrats and 11 Republicans) and 18 Senators (10 Democrats and 8 Republicans) in districts that contained at least one other incumbent. (Wilkening, 1977, 401-02.) They also substantially increased the possibilities for minorities in the Senate, returning, in effect, to Dymally's proposed configuration in Los Angeles and securing recently won Assembly seats for blacks and Latinos.[19] (See Table 2.) Popular accounts seemed to indicate that the Masters' plans also improved the opportunities for ethnic minorities in the other two bodies. "Mexican Americans and blacks are the winners and long-entrenched incumbent legislators are the losers in a state Supreme Court-sponsored reapportionment that could make major changes in California politics," began the lead story in the *Los Angeles Times*. Herman Sillas exuberantly announced "It's a great day," while Stephen Reinhardt, vice chairman of the

[17]"The Job of Reapportionment," *Los Angeles Times*, Nov. 13, 1972, II-8; "Jerry Gillam, "Assembly Remapping Plan Shelved by Democrats; GOP Lies Charged," *ibid.*, Mar. 9, 1973, I-3; "Pact Near on Redistricting of Assembly," *ibid.*, May 11, 1973, I-28; Tom Goff, "Assembly Redistricting Bill OK Seen by Moretti," *ibid.*, May 19, 1973, I-3; Jerry Gillam, "Assembly Approves Reapportionment Proposal 63 to 12," *ibid.*, May 18, 1973, I-1; "Reagan Urged to Veto Bill on Redistricting," *ibid.*, May 26, 1973, I-22; Jerry Gillam, "Assembly Reapportion Plan Hit by Veto Threat," *ibid.*, June 13, 1973, II-1; Gillam, "Last-Chance Reapportionment Plan Given to Reagan, Veto Expected," *ibid.* June 15, 1973, I-3; Tom Goff, "State Reapportionment Plan Vetoed by Reagan," *ibid.*, June 28, 1973, II-1; "Senate Democrats Fail to Override Reagan's Veto of Redistricting Bill," *ibid.*, June 29, 1973, I-3; *California* Journal 1972.

[18]Richard Bergholz, "State Supreme Court Preparing Its Own Reapportionment Plan," *Los Angeles Times*, June 19, 1973, II-1.

[19]Daryl Lembke, "Panel Submits Remapping Plan to California Supreme Court," *Los Angeles Times*, Sept. 1, 1973, I-1.

California state advisory committee to the U.S. Commission on Civil Rights, called the plan "outstanding, particularly because it attempts to provide more representation for racial minorities." Editorially, the *Times* announced that "The recommendations would end the practice of gerrymandering Mexican-Americans, blacks and other minorities into ethnic voting pockets in order to dilute their political effectiveness....The masters' plan is particularly attractive because it redresses the wrong done for so long to Mexican-Americans and other minorities."[20] In fact, African-Americans had increased their representation in the Assembly in 1972 from five to six, and Latinos, from two to five, and that election produced a second black Member of Congress, as well. (*California Journal*, 1972a.) In the Senate and in the Congress, the McKaskle boundaries were more favorable to minorities than the bipartisan lines drawn by the 1973 legislature had been, although in the Assembly, the number of members of minority groups elected actually decreased after the 1974 election, as Ray Gonzales of Bakersfield went down to defeat.[21]

TABLE 2. Ethnic Minority Legislators in California, 1970-1994

ELECTION	ASSEMBLY			SENATE			CONGRESS		
YEAR	B	L	A	B	L	A	B	L	A
1970	5	2	1	1	0	1	1	1	0
72	6	5	1	1	0	1	2	1	0
74	6	4	1	2	2	1	3	1	1
76	6	4	1	2	2	1	3	1	1
78	6	3	1	2	3	1	3	1	1
80	5	4	0	2	3	0	4	1	2
82	6	4	0	2	3	0	4	3	2
84	6	4	0	2	3	0	4	1	2
86	6	4	0	2	3	0	4	3	2
88	7	4	0	2	3	0	4	3	2
90	7	4	0	2	3	0	4	3	2
92	7	7	1	2	3	0	4	4	3
94	7	9	1	2	4	00	4	4	3

Source: *California Journal*, selected issues, 1970-94, and Professor Fernando Guerrero, personal communication June 22, 1993.

The partisan consequences of the McKaskle-Baker plan were even less clear. Apparently a glance at 1970 registration totals and the numbers of the new districts

[20]Bill Boyarsky, "Redistricting Plan: New Faces in '74," *Los Angeles Times*, Sept. 3, 1973, I-1; Daryl Lembke, "High Court Hears Complaints on Computerized Remap Plan," *ibid.*, Oct. 31, 1973, I-3; "Finally: Sensible Reapportionment," *ibid.*, Oct. 30, 1973, II-6.

[21]A systematic comparison of the "Spanish heritage" population in the congressional districts drawn by the Democrats and the Masters indicates no substantial differences. The Masters packed Latinos into Edward Roybal's district, the only one that elected a Latino before 1982, leaving slightly smaller populations to influence surrounding districts than the Democrats provided. Thus, the Democrats drew three districts in which the population was 35% Latino or more, and two more in which the proportion was 25%, while McKaskle drew only two over 35% and one more that was 26%. In practical political terms, there was little difference between the two plans. I have not located ethnic percentages for voters in Senate or Assembly districts.

that would have been carried by the 1970 candidates for Governor and U.S. Senator[22] convinced the Masters and their staff that their plan was "neither politically unfair nor unfair to incumbents, but may result in fewer 'safe seats' and more 'competitive seats'." Yet seven years later, former Democratic Assembly Speaker Jesse Unruh remarked that "There was a hell of a lot more flagrant Democratic gerrymandering (in the court plan) than I ever would have had the guts to do in my most arrogant moment."[23] Blessed with less hindsight, the Speaker in 1973, Bob Moretti, predicted that Democrats would win 45 to 49 of the 80 Assembly seats under the proposal, while GOP Assembly Floor Leader Bob Beverly thought it gave Republicans a good chance to take control of the body. Democratic Congressman Phil Burton pronounced the Masters' congressional districts "fair, just and equitable. This plan unites more communities than ours did and eliminates the dilution of the minority group vote." But similarly cheery was Gordon Luce, the chairman of the Republican State Central Committee, who declared the plan "an enormous improvement over the gerrymander advanced by the Democratic leadership in the Legislature." An editorial writer for the *Los Angeles Times* went so far as to suggest that the Masters' Plan might represent "the death of gerrymandering."[24] The knowledgeable editor of the *California Journal*, Ed Salzman, predicted only one or two seat changes in the party balance in each legislative body and calculated that only about 10 of the 163 incumbents in the Assembly, Senate, and Congress would lose their seats as a result of the redistricting.[25]

Because they did not have to obtain majorities of the legislator, the support of the Governor, and at least the acquiescence of members of Congress, the McKaskle-Baker districts were certain to look more regular than the legislators' districts on a map that contained neither geological nor sociological features—which was how they were usually presented to the public. The bitter clashes of self-interest, partisan interest, and ideological interest that deeply divide California politicians can only be compromised in reapportionment by drawing oddly-shaped districts.[26] Moreover, the 20th century American media's habitual scorn for politicians and the "scientific" mystique that surrounded computers in the early 1970s also helped to insure an enthusiastic public response for the court-

[22]Tables of these figures, but no further analyses, are in the Masters' files at the Institute for Governmental Studies, University of California, Berkeley.

[23]Daryl Lembke, "Panel Submits Remapping Plan to California Supreme Court," *Los Angeles Times*, Sept. 1, 1973, I-1; Richard Bergholz, "A Challenge: Fair Plan for Redistricting," *ibid.*, Dec. 7, 1980, I-3.

[24]Tom Goff, "Can Find No Reason to Oppose Panel Remapping Plan—Moretti," *Los Angeles Times*, Sept. 6, 1973, I-3; Paul Houston, "State Redistricting Plan Perils 4 Congressmen," *ibid.*, Sept. 9, 1973, I-3; Bill Boyarsky, "Redistricting Plan: New Faces in '74," *ibid.*, Sept. 3, 1973, I-1; "The Death of Gerrymandering?" *ibid.*, Sept. 5, 1973, II-6.

[25]Salzman, 1973. Similarly, Richard Bergholz of the *Los Angeles Times* predicted that Democrats would win 20-23 seats in Congress, 18-22 in the Senate, and 44-51 in the Assembly. Bergholz, "Both Parties Optimistic Over Redistricting Plan: Democrats Expect to Retain 23-20 Margin in Congress; GOP Sees Chance to Narrow Gap," *Los Angeles Times*, Nov. 29, 1973, I-1.

[26]Tom Goff, "State Remapping Appears Headed Back to Courts," *Los Angeles Times*, Mar. 21, 1972, I-3.

ordered scheme. Thus, the *Times* reported that at a hearing on the proposal, politician-complainants were "fighting for their political skins," against McKaskle-Baker, which was "Devised by feeding population data into a computer..."[27] These images of squarish districts mechanically drawn by supposedly disinterested technicians who were insulated from the pressures of politics or publicity were to recur repeatedly over the next two decades—pristine technocracy, as opposed to the messy, imperfect compromises that characterized the legislative process. It is one of the ironies of the late twentieth century that citizens of the world's foremost democratic country put so little trust in the officials they elect, have so little understanding of the process by which laws are made, and accept so readily the intervention of unknown and unaccountable "experts" in making fundamental policy.

When the districts were drawn in the summer of 1973, no one could have foreseen that by the time of the 1974 elections, the oil price shock would rumble through the economy, producing a sharp recession, and that President Nixon would resign and be pardoned in the aftermath of a scandal that would severely damage the reputation of the Republican party. The result was a dramatic victory for the Democrats in the nation generally and in California, in particular. In the Assembly, Democrats made a net gain of seven, giving them their largest majority since 1877. In the Senate, they won 17 of 20 of the four-year seats up for election in 1974, raising their total by a net of three. In the Congress, Democrats picked up five seats in what state Democratic party chair John Burton called a repudiation of "the party of Watergate." Suggesting in November 1973 that the Masters' Plan had reduced partisan margins in seats across the state, Michael Berman, a Democratic political consultant and staffer of the Assembly Elections and Reapportionment Committee, had predicted a 30-seat turnover in the Assembly. Although the Democratic surge probably reduced the carnage, there were 23 new members of the Assembly elected in 1974.[28] To what degree was the Democratic triumph the result of redistricting, and to what degree, of other factors? How well would each party have done under the 1972, rather than the 1974 boundaries?

One way to answer this question is provided by *Congressional Quarterly* retabulations of the results of the 1968, 1970, and 1972 congressional elections using the McKaskle-Baker boundaries. (*Congressional Quarterly*, 1974.) In 1968, Democrats actually won 21 of the 38 districts. If those votes had been cast in the 43 districts drawn by the Masters, Democrats would have won only 19, while Republicans would have carried 24. In 1970, Democrats won 20 of 38 seats (52.6%), and would have been victorious in 23 of 43 (53.5%) under the

[27]Daryl Lembke, "High Court Hears Complaints on Computerized Remap Plan," *Los Angeles Times*, Oct. 31, 1973, I-3.

[28]Daryl Lembke, "Court Orders State Remapping, Ignores Factor of Incumbency," *Los Angeles Times*, Nov. 29, 1973, I-1; Kathy Burke, "Rep. Burton Predicts Democratic Landslide," *ibid.*, Aug. 29, 1974, II-2; Robert Shogan, "GOP Founders in Riptides, Watergate, Pardon, Economy," *ibid.*, Nov. 5, 1974, I-1; George Skelton, "Democrats Take 72 of 100 Races," *ibid.*, Nov. 7, 1974, I-1; William Endicott, "State's Democrats Add Four Seats in Congress," *ibid.*, Nov. 7, 1974, I-3.

Masters' plan.[29] In 1972, Democrats won 23 of the 43 under the bipartisan proposal put into place temporarily by the state Supreme Court; they would have won 25 under the Masters' plan. In the actual election of 1974, Democrats won 28 congressional seats. By this measure, then, the Masters' districts probably gave the Democrats at most one or two congressional seats, compared with the districts drawn by Democratic-majority legislatures in 1965 for the Assembly and Senate and in 1971 for Congress, while the Watergate scandal and the recession accounted for two or more of the five-seat gain.

A second approach to the question is to place the 1972 and 1974 elections in the context of general trends over the whole period from 1970 to 1994. Figures 1 and 2 illustrate several aspects of these trends for congressional and Assembly races, tracking differences in party registration and estimates of the margin between Democratic and Republican candidates in hypothetical districts where the party registration was that in an average district, a district where 55% of the total registrants were Democrats and 40% were Republicans, and one where the proportions were 55% and 38%.[30] (The figures will be discussed again at later points in this chapter.)

1974 was certainly a landslide year for the Democrats. In a district where the registration was 57.5% Democratic and 35.5% Republican, the average Democratic vote margin was 22% in Congressional and 18% in Assembly races—an increase from 9% and 12%, respectively, in 1972. Similarly, Democratic margins more than doubled from 1972 to 1974 in hypothetical 55/40 and 55/38 districts. These results suggest that the effects of the Watergate, recession, and pardon issues spilled over into Assembly contests and that they outweighed line-drawing in their importance for the 1974 results.

[29] *Congressional Quarterly* (1973) also retabulated the 1970 results by the 1972 districts. If the 1970 election had been held within the 1972 boundaries, Democrats, by this measure, would have won 22 of the 43, one less than under the 1974 boundaries.

[30] The Senate is omitted because the small number of elections (its terms are for four years) makes it less predictable. Total registration, rather than two-party registration is used because the percentages of third-party or no-party registrants differ considerably in size and behavior from district to district. The 55% Democratic and/or 38-40% Republican rule of thumb for competitive seats is repeatedly mentioned. See, e.g., Way, 1962, 253; Salzman, 1974; D'Agostino, 1972, 3. In the 1972 congressional contests, Democrats lost only 3 districts that were 55% or more Democratic, and Republicans lost only one that was 38% or more Republican; in the Assembly, the analogous figures were eight and ten. In 1981, a report in the *Los Angeles Times* highlighted Senate districts that were 55% and above Democratic and remarked that "Republicans can win in districts where their registration is as low as 40%." Claudia Luther and Jerry Gillam, "Democrat in State Senate Unveil Redistricting Plan," *Los Angeles Times*, Sept. 3, 1981, I-1. By 1991, an insider newsletter called a district "safe" for the Democrats if it was 54% or more Democratic, and safe for the Republicans if it was 40% or more Republican. Dick Rosengarten, *Calpeek: California Political Week*, 13, #45 (Dec. 9, 1991), 3. The 38% rule is referred to in Daniel M. Weintraub, "Incumbents Come First in Redistricting, Speaker Says," *Los Angeles Times*, Aug. 30, 1991, A-3; Weintraub, "Remap Plans Would Add 4 House Seats in Southland," *ibid.*, Sept. 12, 1991, A1. Edmond Costantini and Charles Dannehl, "Party Registration and Party Vote: Democratic Fall-Off in Legislative Elections," *Legislative Studies Quarterly*, 18 (1993), 33 indicates that a district in which the Democratic percentage of the two-party registration in California legislative races from 1972 through 1990 was 56% would be rated a "virtual toss-up."

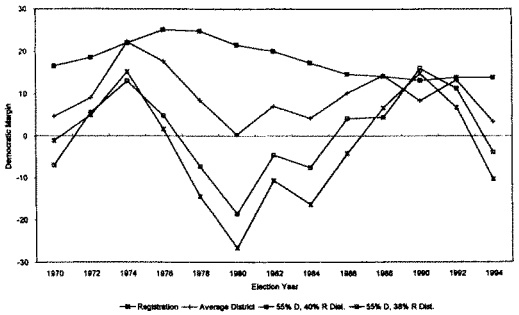

Figure 1. Democratic Margins in Congressional Contests, 1970-1994

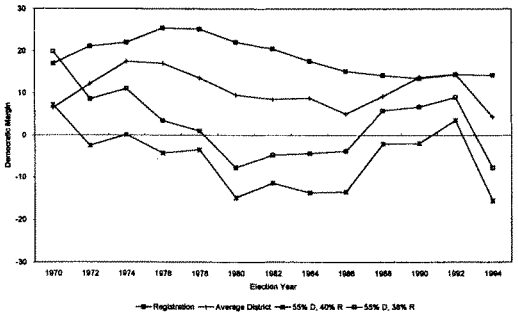

Figure 2. Democratic Margins in State Assembly Contests, 1970-1994

A third approach, explained in detail in Kousser, 1995, implies that Democrats might have done even better if the 1972 lines had been in effect in 1974 and for the rest of the decade. Using methods somewhat more sophisticated than, but essentially similar to those that produced the results for hypothetical districts in Figures 1 and 2, I estimate how well the candidates of each party would have fared in 1972 if the relationships between registration by party and the vote had been the same as they were in 1974. Conversely, I estimate how many seats each party would have won in 1974 if the relationships between registration and voting had been the same as those in 1972. If voters had behaved as they did in 1974, but the 1972 lines (and patterns and levels of party registration) had been in effect, my estimate is that the Democrats would have won 30 congressional seats, instead of 23. Had they behaved as in 1972, but within the 1974 boundaries, they would have won 29, instead of 28.[31] The Assembly results are similar. In actuality, Democrats won 51 and 55 seats in the November, 1972 and November, 1974 elections. Had the lines been those of 1972 and the behavior that of 1974, Democrats would have won 57 seats; in the opposite case, 58.[32]

TABLE 3. What If Voters Had Behaved as in 1972, But in the 1974 Districts, and Vice Versa?

Boundaries in Effect	Behavioral Pattern*	
	1972	1974
	Panel A: Congress	
1972	23**	29
1974	30	28
	Panel B: Assembly	
1972	51	58
1974	57	55

*Patterns are the regression relationships estimated from the rows for 1972 and 1974, respectively in Table 1, Kousser, 1995.
**Number or estimated number of Democratic victories

A fourth approach is to compare the degree of "packing" of Democrats and Republicans into overwhelmingly partisan districts in 1972 with that at the time that the Masters' districts were announced in 1973.[33] Although any definition of "packing" is time-bound and somewhat arbitrary, let us define one empirically. In

[31]These estimates, of course, do not allow for the idiosyncrasies of individual campaigns. If one uses the regressions for 1974 and computes the number of districts that the Democrats "should" have carried on the basis of party registration alone, the result is 33. In other words, the estimate in the text of 29 seats in 1974 if the behavior pattern had been that of 1972 is actually 4 seats less than the estimate if the 1974 behavior pattern and the 1974 districts are used.

[32]Again, the estimates from same-year regressions show higher numbers than the actual numbers of Democratic victories—54 and 62, respectively. It should also be noted that the "1972" lines for the Assembly were actually those adopted in 1965, which were kept in effect for 1972 by the State Supreme Court.

1972. Democrats won every congressional district that was 36% Republican or less (to the nearest percentage point) and lost every one that was 39% Republican or more. In the Assembly in 1972, Democrats won 39 of the 41 districts that were 36% Republican or less, and lost 24 of the 33 districts that were 39% Republican or more.[34] Suppose we allow for some uncertainty by defining relatively "safe" districts at the time as 34% Republican or below, and 41% Republican or above. Then the number of safe Democratic districts in the Masters' plan was 36 in the Assembly, while the number in 1972 was 33; and the numbers of safe Republican districts were 23 and 27, respectively. In the Congress, the numbers of safe Democratic districts were 17 and 18, while the numbers of safe Republican districts were 14 and 17. By these definitions, the Masters' plan had about the same number of "competitive" districts in the Assembly as the previous plan had, but McKaskle-Baker was somewhat more favorable to Democrats than the scheme that it replaced. For Congress, McKaskle drew four more competitive districts and three fewer safe Republican ones.

Overall, then, three retired judges who had been appointed by a Democratic governor, superintending a redistricting by a former poverty lawyer (McKaskle), produced lines that were very similar in their prospective effects to districts that had been drawn by legislatures containing Democratic majorities.[35] It is not surprising, then, that after 1974, Assembly Democratic leaders believed that the courts would not deal with them unfairly, especially if advised by McKaskle.[36]

III. THE 1980S: THE "BURTON GERRYMANDER" AND ITS CONSEQUENCES

A. Burton, Berman, and the Two Roses

As the next round of redistricting approached, the political situation in California had changed considerably. Six percent fewer voters registered with one of the two

[33]The Masters' papers at the Institute for Governmental Studies, University of California, Berkeley, indicate that they aggregated only the 1970 registration figures into their districts. A comparison of these with partisan registration margins in the actual 1970 Assembly districts, using the same technique as in figures 3-7, below, shows almost no difference in competitiveness between the Masters' Plan and the 1965 legislature's plan. A similar comparison, using 1973 data, between the Masters' Plan and Senate Bill 195, the compromise that was vetoed by Gov. Reagan in 1973, similarly demonstrates no visible differences within the competitive range of districts.

[34]As Kousser, 1995a, Table 1 shows, election outcomes are considerably more dependent on the level of Republican than of Democratic registration.

[35]More informal analyses come to the same conclusion. Butler and Cain, 1992, 37; Quinn, 1984, ch. 4, 73-74.

[36]It would be going too far, however, to agree with *California Journal* editor Ed Salzman, who announced in June 1974 that "With hindsight, it is easy to see that the Republican Party would have been better off with any of the various compromise reapportionment plans developed by the Legislature." (Salzman, 1974.) Similarly (and contradictorily) Quinn Chapter 4, 58, 65, states that Republicans would have won "far more seats" under the 1973 compromise districts than under the McKaskle Plan, but also that McKaskle's lines "did not favor one party or another." Since the compromise congressional proposal was almost exactly the same as that used for the 1972 elections, it seems nearly certain that Democrats would have been at least as well off with the 1972 as with the McKaskle lines. Gov. Reagan and his advisers correctly recognized their partisan interest in not compromising with the legislature in 1971-73, swapping a certain disadvantage for an unknown one.

major parties in 1980 than in 1972, and the volatility of voters and their tendency to split tickets rose with the amount of political independence. Although Democrat Jerry Brown had replaced Republican Ronald Reagan as governor and the Democrats still held the edge in both houses of the legislature and the state's congressional delegation, their majorities had been much reduced by the reverberations of the Proposition 13 (property tax reduction) campaign in 1978 and the electoral thunder of Ronald Reagan's presidential campaign in 1980. After the 1976 election, the numbers of Democratic seats in the Assembly, Senate, and Congress, respectively were 57, 26, and 29; after the 1980 election, 49, 21, and 22. While Republicans wished to lock in their recent gains with favorable district lines, Democrats wanted to reclaim several close districts that they had previously controlled. The Democratic majority on the State Supreme Court was more solid, 6 to 1, but Republicans had already backed an almost-successful campaign against the state's first female Chief Justice, Rose Bird, three of the Jerry Brown-appointed Justices were subject to voter rejection on the 1982 ballot, and Republicans hoped that threatened judges would veto any partisan Democratic reapportionment. If all else failed, Republicans believed that they might be able to cut a deal with the Democrats. It was this last belief that so inflamed the fight for the Assembly Speakership

Since Jess Unruh modernized the California legislature during the 1960s, the Speaker has been the state's second most powerful official, centrally coordinating fundraising and campaign planning, controlling the agenda and appointing all committee chairs in the Assembly, doling out or denying perquisites, and using these powers to foster or blight legislation and careers.[37] (Crouch et al., 1967, 137-38.) Because the Speaker is elected by the members of the Assembly and can theoretically be replaced at any time, she must particularly concerned with redistricting. In 1980, Republicans were frantic over the prospect that Howard Berman might become Speaker and his brother Michael might be in charge of reapportionment.[38]

In 1974, Assemblyman Leo McCarthy of San Francisco, with the help of the Bermans, had challenged Bob Moretti as Speaker and beaten Willie Brown of San Francisco for the post after Moretti dropped out of the contest. Howard Berman had become Majority Leader, with the promise of ascending to the Speakership eventually. By 1979, Berman, chafing at being second in command, challenged McCarthy directly, winning 27 of 50 votes in the Democratic caucus.

[37] Crouch et al., 1967, 137-38.

[38] A political organizer from the age of 16, Michael Berman managed his first successful Assembly campaign, an upset of a 26-year Assembly incumbent, before he was 21 years old. With his brother and the victor in the upset, Henry Waxman, Michael became the core of what eventually became known as the "Berman-Waxman Machine," which was in fact a loose grouping of Jewish, African-American, and Latino liberal Democratic politicians in Los Angeles. Waxman chaired the Assembly Elections and Reapportionment Committee in 1971, and Michael was a consultant to that committee. W.B. Rood, "Michael Rows the Boat for Berman," *Los Angeles Times*, Jan. 28, 1980, I-3. On Republican fears, see Claudia Luther, "Democrats Get Slow Start on Redistricting," *ibid.*, March 8, 1981, I-3.

At this point, bitter McCarthy supporters refused to solidify behind Berman on the Assembly floor, Assembly Republicans refused to vote for either side, McCarthy retained his position, and the battle was put off until after the 1980 elections. In those elections, McCarthy and Berman actively supported different Democratic candidates, Berman's allies won more seats, and McCarthy dropped out of the race, but threw his support to his former enemy Willie Brown. When five Democrats defected from Berman and the Democratic caucus deadlocked, the Assembly Republican leadership decided to vote for Brown in return for veto power over Republican committee assignments and a rather vague promise of partisan fairness in redistricting.[39]

Republicans deployed four more weapons during the 1981 reapportionment. Although attempts during the 1970s to set up a reapportionment commission had failed, Republicans and nonpartisan "good government" supporters had successfully backed a toothless initiative in June 1980. Proposition 6 required all public bodies to pay attention to contiguity and city, county, and regional boundaries during reapportionment, but never defined these terms, provided no method of enforcement or advice on how to resolve contradictory objectives, and contained no protections for ethnic minorities.[40] Republican businessmen also financed a computerized reapportionment center at the Rose Institute of Claremont McKenna College in Southern California. Led by Alan Heslop and Tom Hofeller, two veterans of the Republican redistricting efforts of 1971, Rose invited Latinos to use their facilities without charge in hopes that their push for more Latino representation would at the least embarrass Democrats, and at the most, reduce the overall number of Democratic seats. Although Hofeller denied that Rose was "a Republican appendage," Assembly Republican Minority Leader Carol Hallett announced long before any proposed reapportionment was produced that "The Rose Institute plan (whenever it emerges) is a Republican plan."[41] Among the

[39] Al Martinez, "Speakership Fight: a Study in Power," *Los Angeles Times*, Feb. 19, 1980, I-3; Claudia Luther and Robert Fairbanks, "Willie Brown Vies for Speaker's Post," *ibid.*, Nov. 21, 1980, I-3; "Chicanos Take Plea to Capital," *ibid.*, Dec. 1, 1980, II-4; Claudia Luther and Tracy Wood, "Willie Brown New Assembly Speaker," *ibid.*, Dec. 2, 1980, I-1; Kenneth Reich, "Reapportionment: L.A.'s Time to Pay the Piper," *ibid.*, Jan. 4, 1981, II-1; Claudia Luther and Jerry Gillam, "2 Redistricting Plans Advance in Legislature," *ibid.*, Sept. 12, 1981, I-1; Luther, "Speaker's Crown Firmly Affixed," *ibid.*, Sept. 28, 1981, I-3. After Brown proved less nonpartisan in redistricting than they had hoped, Republicans tried—unsuccessfully—to play Howard Berman off against the Speaker. Quinn, ch. 5, 48-50.

[40] Art. XXI, Sec. 1, State Constitution; *California Journal*, 1972a; Walter A. Zelman, "It's Time to Defeat Rep. Gerry Mander," *Los Angeles Times*, April 20, 1979, II-7; "Fairer Apportionment: Yes on 6," *ibid.*, May 16, 1980, II-6; Richard Bergholz, "New Lines: Both Parties Are Worried," *ibid.*, Jan. 4, 1981, I-1.

[41] Richard Bergholz, "New Lines: Both Parties Are Worried," *Los Angeles Times*, Jan. 4, 1981, I-1; Henry Mendoza, "Latinos Backed on Political Concern," *ibid.*, Feb. 1, 1981, II-4; Claudia Luther, "Latinos Warn on Reapportionment," *ibid.*, Feb. 21, 1981, II-1; Richard Santillan, "For Chicanos, a Louder Voice," *ibid.*, March 5, 1981, II-7; Claudia Luther, "Latinos May Get Little in Redistricting," *ibid.*, April 30, 1981, I-3; Jerry Gillam, "Latinos Seek New Assembly District," *ibid.*, May 5, 1981, I-23; Kenneth Reich, "Latino Coalition Submits Plan to Increase State Representation," *ibid.*, II-4; Kenneth Reich, "Top Democrats Cool to Reapportionment Plan," *ibid.*, June 17, 1981, I-3.

Democrats whose districts the Rose plan ultimately splintered was Speaker Willie Brown—not a move aimed at conciliation.[42] The third weapon, the threat of legal suits, finally proved no more efficacious than the previous two, while the fourth, a statewide referendum on accepting or rejecting the Democrats' plans, ultimately proved to be a pyrrhic victory for the GOP, as we shall see below.

Minority legislators had more power in shaping a reapportionment plan that was ultimately put into effect in 1981 than at any other time in California's history. In 1971, Mervyn Dymally had been head of the Senate Elections and Reapportionment Committee, but Gov. Reagan had vetoed his plan, a conservative coalition had taken control of the committee, Reagan had vetoed even their effort, and the Masters' plan had superseded everything anyway. Ten years later, Assemblyman Richard Alatorre, who had been pledged to Howard Berman in the Speakership contest, went over to Willie Brown and was named chairman of the Assembly Elections and Reapportionment Committee.[43] Together with the Speaker, an African-American, Alatorre made sure that minority concerns were taken into account in the redistricting of all three legislative bodies. Latino activists also pressured Brown and Alatorre, openly threatening to join Republicans in court if reapportionment plans disappointed them, storming out of committee hearings, and even sitting in at the Speaker's office.[44]

The actual districts that were drawn for the Congress and the Assembly satisfied blacks, delighted Latinos, and reassured Democratic politicians. Comprising a relatively stable proportion of the population and heavily concentrated geographically, African-Americans from California were already represented proportionately in all three bodies, and the new lines threatened no black incumbent or major aspirant.[45] Latinos, angered because the State Senate plan did not create another Latino district in Los Angeles, were, however, "pleasantly surprised...shocked favorably" by Alatorre's concentration of Latino areas into potential "influence districts" for the State Assembly and pleased that the number of Latinos from California in Congress seemed likely to triple under the new boundaries.[46] The plans also conciliated Howard Berman and his allies Assemblymen Mel Levine and Rick Lehman by tailor-making congressional seats for them, thus simultaneously promoting them and removing them from Sacramento.[47]

Republicans, however, exploded, especially over the congressional plan drawn by liberal Democratic Congressman Phil Burton of San Francisco. Report-

[42]Claudia Luther, "Legislators to Determine Own Survival," *Los Angeles Times*, June 28, 1981, I-3.

[43]"Chicanos Take Plea to Capital," *Los Angeles Times*, Dec. 1, 1980, II-4; Kenneth Reich, "Reapportionment: L.A.'s Time to Pay the Piper," *ibid.*, Jan. 4, 1981, II-1; Claudia Luther, "Latinos Warn on Reapportionment," *ibid.*, Feb. 21, 1981, II-1.

[44]Claudia Luther, "Latino Walkout Climaxes Session on Redistricting," *Los Angeles Times*, Aug. 5, 1981, I-21; Luther and Jerry Gillam, "GOP Bloc Threatens to Delay Bills in Rift Over Redistricting," *ibid.*, Aug. 25, 1981, I-3.

[45]Tracy Wood, "Remap Fight Pits Pair of Democrats," *Los Angeles Times*, Dec. 23, 1982, I-3; Wood, "Democrats Seek to Add to Margin in Congress," *ibid.*, Dec. 28, 1982, I-3.

edly relying only on a mechanical adding machine, his encyclopedic knowledge of the political proclivities of Northern California, and the expertise on the L.A. area of Michael Berman and Cal State–Long Beach Prof. Leroy Hardy, Burton drew irregular districts that punished his particular enemies and protected his friends.[48] In high dudgeon, one Republican denounced the Burton plan as an "outrageous, blatant, partisan carving up of the people," another likened it to the Jewish Holocaust, while a third, adding one more insensitive religious metaphor, compared Speaker Brown to the contemporary Iranian theocrat, the Ayatollah Khomeini.[49] Claiming that the Burton redistricting would cost them between six and ten seats in Congress,[50] the Republicans put a referendum on the June 1982 ballot that allowed voters to reject the plans for each of the legislative bodies. At the same time, they asked the State Supreme Court and a federal district court to suspend the new district lines and either establish different temporary lines or run the 1982 elections within the districts that had been used in 1980. The GOP also joined with the good government group Common Cause in sponsoring a referendum on a reapportionment commission which, if approved on the November 1982 ballot, would draw wholly new districts for subsequent elections.[51]

As in 1971, the State Supreme Court unanimously decided to put the new congressional districts into effect immediately, because otherwise, the two additional members of Congress would have to be selected at-large, which was illegal under a 1967 federal law. But unlike the case decided a decade earlier, the Court also ruled that the 1982 elections for the Assembly and the Senate should be held in the new districts. For a four-three majority, Chief Justice Rose Bird wrote that to use the old, by now severely malapportioned districts would violate the equal population requirement that courts had ruled to be

[46]Claudia Luther and Jerry Gillam, "Democrats in State Senate unveil Redistricting Plan," *Los Angeles Times*, Sept. 3, 1981, I-1; Maria L. La Ganga, "Latino Group Urges Veto of Remapping," *ibid.*, Sept. 5, 1981, I-24; Claudia Luther and Jerry Gillam, "Assembly Remapping Plan Unveiled; GOP Vows Fight," *ibid.*, Sept. 9, 1981, I-1; Frank del Olmo, "Latinos Get a Break in Assembly Remapping," *ibid.*, Nov. 5, 1981, II-11. Prof. Bruce Cain became Alatorre's chief redistricting consultant, battling the Rose computers at Claremont McKenna College with the Caltech mainframe, twenty miles down the road. From the beginning, the focus of this bitter rivalry was on Latinos, whom both sides sought to woo and use.

[47]Claudia Luther, "Speakers' Crown Firmly Affixed," *Los Angeles Times*, Sept. 28, 1981, I-3.

[48]Butler and Cain, *1992*, 42; Ellen Hume, "Plan to Ensure Congress Seat for Latino May Be Backfiring," *Los Angeles Times*, April 18, 1982, II-1; Quinn, 1984, ch. 5, 14-25.

[49]Claudia Luther and Jerry Gillam, "2 Redistricting Plans Advance in Legislature," *Los Angeles Times*, Sept. 12, 1981, I-1; Luther and Gillam, "3 Plans for State Redistricting OK'd," *ibid.*, Sept. 16, 1981, I-1.

[50]These guesses imply that what the Republicans considered a "fair" redistricting would have produced Republican majorities in the congressional delegation ranging from 27-18 to 31-14, a rather audacious claim in a state where Democratic registrants outnumbered Republican by 55%-33% in 1980.

[51]George Skelton, "GOP Opens Drive for Remapping Measure," *Los Angeles Times*, Sept. 23, 1981, I-3; Claudia Luther, "GOP to Aid Remapping Reform Bid," *ibid.*, Dec. 6, 1981, I-3; Charles Maher, "GOP Congressmen Ask Judges to Remap State," *ibid.*, Dec. 15, 1981, I-3; Claudia Luther, "Court Views Choices in Districting Battle," *ibid.*, Jan. 12, 1982, I-3; Luther and Richard Bergholz, "Campaign Launched for Remap Initiative," *ibid.*, Feb. 3, 1982, I-3

implicit in the federal and state constitutions. She rejected Republican arguments that even though both houses of the legislature had passed the measures and Gov. Jerry Brown had signed them, they should not be considered enacted until the electorate had had a chance to veto them—as Governor Reagan had vetoed the 1971 lines—in the first initiative on a particular redistricting plan in the state's history. Republicans responded by threatening to join an ongoing recall effort against the four Jerry Brown-appointed members of the Court, and the party did oppose three of them in the November election.[52] In the federal court, Republican moves for a temporary injunction against the plans on the grounds that they favored the Democratic party, that they had not yet been precleared by the U.S. Department of Justice, and that shifts in Senate lines would prevent some voters from selecting senators for six years were unceremoniously rejected.[53] The GOP was more successful in the June referendum, as voters objected to each of the Democratic plans by margins of 62-65%, setting the stage for a vote on a redistricting commission.[54]

Written by Republican activist and attorney Vigo Nielsen, Jr. and backed by Common Cause—and $400,000 from the state Republican party—the complicated 10-person commission plan appeared, on the surface at least, so carefully balanced between the two major political parties that it was likely to result in a bipartisan gerrymander.[55] (Proponents of the plan, numbered Proposition 14 on the November ballot, did not stress this implication of their handiwork.) Six members were to be representatives of the two major parties selected by partisan caucuses in the Assembly and Senate and by the state party chairpersons. Four "independent" members who were, in the words of the initiative, to "bring ethnic, social and geographic diversity to the commission," were to be chosen by a two-thirds vote of the seven most senior justices on the State Court of Appeals.[56] Since it took seven votes to adopt a plan in the commission, at least one partisan from each side would have to approve

[52]Philip Hager, "Court Backs Remapping Plan and Ballot Challenge," *Los Angeles Times*, Jan. 29, 1982, I-1; Richard Bergholz, "GOP Will Take Aim at Ruling on Redistricting," *ibid.*, Feb. 1, 1982, I-3; Philip Hager, "GOP-Backed Group Begins Drive to Unseat Justices Named by Brown," *ibid.*, Sept. 30, 1982, I-3; election returns, *ibid.*, I-16; Salzman, 1982a. The insider view of the Republicans' chief redistricting consultant for the Assembly in 1981 makes it clear that it was this decision, not those concerning capital punishment, that really motivated the Republican leadership of Bird's eventually successful recall. (Quinn, 1984, ch.5, 78.)

[53]Claudia Luther, "GOP Renews Challenge on Redistricting," *Los Angeles Times*, Feb. 9, 1982, I-3; Charles Maher, "Judge Refuses to Stop Remapping," *ibid.*, Feb. 11, 1982, I-16; "Court Denies Districting Plea," *ibid.*, March 23, 1982, I-17.

[54]Claudia Luther, "Remapping Challenge May Be Just Warm-Up," *Los Angeles Times*, May 10, 1982, I-3; "Election Districts: No, Yes, Yes," *ibid.*, May 21, 1982, II-6; Claudia Luther, "Initiative to Create Redistricting Commission Qualifies for Ballot," *ibid.*, June 22, 1982, I-3.

[55]Richard Bergholz, "GOP Will Take Aim at Ruling on Redistricting," *Los Angeles Times*, Feb. 1, 1982, I-3. Details on the commission plan are taken from Salzman, 1982b.

[56]Michael Asimow and Walter Zelman, "Prop. 14: Is It Real 'Reform'?" *Los Angeles Times*, Oct. 10, 1982, IV-3. To guard in another way against partisanship, no more than four of the seven Appeals Court justices who nominated independent commission members could have been members of the same political party at the time that they had been named to the Appeals Court.

any redistricting. If the commission deadlocked, the State Supreme Court had 60 days to draw up a proposal, probably using the commission and its staff as special masters.[57]

While the commission was directed to encourage electoral competition, there was no mention of protection of the rights of ethnic minorities as a goal of its plans—an omission that Democrats and representatives of minority groups harshly attacked.[58] The reapportionment commission, said Assembly Democratic caucus leader Don Bosco, "would relegate the most important decision the Legislature makes to a bunch of old, white, upper-middle class men." Just as members of ethnic minorities had finally gained power in the legislature, *Los Angeles Times* editorialist Frank del Olmo and Speaker Willie Brown charged separately, it was proposed to take it away and give it to a body that was not likely to have "the kind of ethnic, racial and sexual balance found in the Legislature." Echoing similar comments by the California Teachers' Association and the State Advisory Committee to the U.S. Commission on Civil Rights, Senate Majority Leader David Roberti noted that "There's less for minorities in the Common Cause plan than there was in the process the Legislature underwent."[59] While surely self-serving, the Democrats' comments were not untrue. By 1981, ethnic minorities were such an important part of the Democratic coalition, not only in the electorate, but also in the legislative and congressional delegations, that white Democrats had no alternative but to satisfy most of their redistricting demands. No bipartisan or nonpartisan commission offered so certain a prospect of influence.

Attracting only 79% of the number of votes that were cast for Republican George Deukmejian for governor the same day, the commission proposition went down to a stunning 55%-45% defeat. Faced with a tough nationwide campaign in the midst of the highest unemployment since the Great Depression, the Republican National Committee reneged on a promise to provide $300,000 for the Proposition 14 campaign. In California itself, Republicans strained every bit of financial muscle they had to defeat Tom Bradley, the first serious black candidate for governor in the state's history, a feat that they accomplished, after a subtly racist campaign, by a margin of only 50,000 votes out of 7.5 million cast. (Pettigrew and Alston, 1988.) Extreme conservatives focused on defeating a handgun control initiative on the same ballot. Without a serious campaign in

[57]This provision would pressure the party that did not have a majority on the Supreme Court to compromise, for fear that if it did not, the Supreme Court would put the commission's plan into effect, anyway. It is noteworthy that the elaborate nonpartisan rules did not apply to the State Supreme Court, which was not prohibited from dividing along party lines or given any nonpartisan guidelines. For other evaluations, see Bill Billiter, "Prop. 14: Election Reform or a Trojan Horse?" *Los Angeles Times*, Oct. 14, 1982, I-C-1.

[58]The national Common Cause "Model State Constitution" and statutory provisions also included no protections for ethnic minorities. (Adams, 1977.)

[59]Claudia Luther and Richard Bergholz, "Campaign Launched for Remap Initiative," *Los Angeles Times*, Feb. 3, 1982, I-3; "Civil Rights Panel Opposes Redistricting Commission," *ibid.*, Oct. 15, 1982, I-11; Frank Del Olmo, "Prop. 14 Endangers Latinos' Gains," *ibid.*, Oct. 28, 1982, II-11.

its behalf, the complex reapportionment proposition was lost in the cacophony of other contests. Two weeks before election day, 48% of Californians polled had not decided how they would vote on Proposition 14, and they apparently decided that, when in doubt, they would abstain or vote no.[60] After the election, but before Deukmejian took office, Democrats passed and Gov. Jerry Brown signed plans that offered additional protection to enough Republican legislators to obtain a two-thirds majority and consequent "urgency" status, thus precluding another referendum. In most cases, however, the new boundaries, drawn with the assistance of Michael Berman, were only slightly different from those that the voters had rejected in June. Republicans put up only lackadaisical resistance, Senate Minority Leader Bill Campbell remarking, "I'm sick and tired of reapportionment."[61]

Other Republicans, however, persisted. When in February, 1983, national GOP operatives turned down a proposal by California state leaders that the Republican National Committee commit $1 million to a new campaign to redraw California districts, right-wing Assemblyman Don Sebastiani, young heir to his family's wine fortune, funded an initiative initially without asking for money from the official Republican party.[62] Republican campaign consultants who were angry at the Burton Plan because its safe districts robbed them of the business that might come their way if more competitive districts encouraged more active campaigns eagerly signed on with Sebastiani. (Quinn ch. 5, 99.)[63] Phrased as a statute, rather than an amendment to the State Constitution, the initiative largely consisted of Assembly, Senate, and congressional district maps drawn at the Rose Institute by Republican political consultant Joseph Shumate. Responding to right-wing pressure, the Republican State Committee pledged $300,000 for the Sebastiani Initiative, and Gov. Deukmejian set a special election for Dec. 13, 1983, a date whose proximity to religious holidays was a patent attempt to guarantee a low turnout.[64] Charging that it would

[60]Election returns, *Los Angeles Times*, Nov. 4, 1982, I-16; Richard Bergholz, "State GOP Wants Party Help for Remap Fight," *ibid.*, Feb. 2, 1983, I-3; Brazil 1982.

[61]Tracy Wood, "Senate Quiets Fears, Passes Its Reapportionment Plan," *Los Angeles Times*, Dec. 24, 1982, I-3; Lowell and Craigie, 1985, 249.

[62]Herbert A. Sample and Richard Bergholz, "Remap Referendum Called Impractical," *Los Angeles Times*, Jan. 7, 1983, I-3; Bergholz, "New GOP Strategy on Redistricting Develops," *ibid.*, Feb. 4, 1983, I-3; Bergholz, "New Effort to Overturn Reapportionment Begins," *ibid.*, Feb. 24, 1983, I-21; Bergholz, "GOP Assemblyman Announces Petition Drive to Get Redistricting Plan on Ballot," *ibid.*, 1983, I-22. For a sympathetic version of the events surrounding the initiative by Sebastiani's lawyers, see Lowell and Craigie, 1985. In legal papers, they charged, astoundingly, that the legislature's plan diluted minority votes, presumably meaning that it did so more than the Sebastiani plan.

[63]While it may be doubted that more competitive districts will improve the quality of policymaking or invigorate democratic participation, there is no question that it would increase the demand for political consultants—a consequence not often mentioned in debates over the issue.

[64]Richard Bergholz, "GOP Weighs Effort to Redraw Voting Districts," *Los Angeles Times*, May 25, 1983, I-23; John Balzar and Douglas Shuit, "Redistricting Election Ordered," *ibid.*, July 19, 1983, I-3, Balzar, "Democrats Facing Uphill fight on Remapping Plan," *ibid.*, Aug. 19, 1983, I-1; William Schneider, "Voter Turnout Is Key To Sebastiani's Hopes," *ibid.*, Aug. 21, 1983, IV-1.

reduce the power of minorities and women, and that the state constitutional provision mandating a reapportionment every decade should be interpreted to mean exactly one, and no more, Democrats successfully sued in the State Supreme Court to keep voters from considering the Sebastiani Initiative. As an example, the lawyers pointed out that the plan reduced the Latino population percentage in Edward Roybal's Los Angeles congressional district from 63% to 16%, and placed his home in the most Republican district in the state. It also moved a conservative Anglo area into a second Latino-majority Los Angeles congressional district, endangered at least one Los Angeles congressional seat then held by a black incumbent, removed the homes of State Senator Art Torres, Assemblyman Richard Alatorre, and Speaker Willie Brown from their current districts, packed blacks into a Bay Area congressional seat in which blacks had been able to elect their candidate of choice since 1968, and completely redrew Democratic districts throughout the state. Democrats quipped that Sebastiani has jammed so many African-Americans into one Los Angeles Assembly district that it had more blacks in it "than any district this side of Lagos, Nigeria." (Quinn, 1984, ch. 5, 110.) The justices' vote went strictly along party lines.[65] The main emphasis in the opinion was on the once-a-decade provision of the State Constitution. (*Legislature* v. *Deukmejian*, 34 Cal. 3d 658 (1983).)

After Sebastiani's judicial rejection, Common Cause Executive Director Walter Zelman sought a compromise—a reapportionment commission that would control the 1991 redistricting, but not continue the effort to overthrow the current lines. Adamant Republicans refused. When Sebastiani announced plans for an initiative that would write new lines into the State Constitution, thereby circumventing the State Supreme Court decision, Gov. Deukmejian muscled him aside, putting his chief political operative, Sal Russo, in charge of a campaign to establish a redistricting commission by state constitutional amendment. Instead of the balanced bipartisanship of the 1982 Common Cause/Republican Commission proposal, Deukmejian's commission, which would draw new boundaries for all state elections from 1986 on, was to be comprised of current Appeals Court justices. After the State Judicial Council objected that the task was too political for sitting judges to be involved in, Deukmejian substituted retired Appeals Court

[65]Sebastiani's plan, which made no effort to protect minority or female incumbents, was not helped by his right-wing radicalism—he was the only member of the Assembly to vote against making Martin Luther King, Jr.'s birthday a state holiday—and his penchant for insensitive comments, such his statement on the Assembly floor that he approved of female astronauts "as long as they have a one-way ticket." Keith Love, "Sebastiani Redistricting Plan a Political Time Bomb," *Los Angeles Times*, July 10, 1983, I-1; John Balzar and Douglas Shuit, "Redistricting Election Ordered," *ibid.*, July 19, 1983, I-3; Philip Hager, "Democrats Ask State Supreme Court to Stop Redistricting Vote," *ibid.*, July 20, 1983, I-3; Philip Hager, "Court to Hear Challenge to Remap Election," *ibid.*, Aug. 3, 1983, I-1; Hager, "State High Court Asked to Halt Remapping Vote," *ibid.*, Aug. 6, 1983, II-1; Douglas Shuit, "Blacks to Fight Remap Plan as 'Resegregation'," *ibid.*, Aug. 27, 1983, I-25; Philip Hager, "Remapping Issue Moves Into Court," *ibid.*, Sept. 1, 1983, I-3; Hager, "High Court Cancels Redistricting Vote," *ibid.*, Sept. 16, 1983, I-1.

justices.[66] Refusing all offers of compromise from the Democrats, Republican leaders declared that the 1981 district lines made Democratic incumbents so safe that they would target only a handful of them in 1984 (a self-fulfilling prophesy), instead spending $4 million on qualifying and seeking to pass the initiative, which became known as Proposition 39.[67]

Matching the Republicans dollar for dollar, billboard for billboard, and simplistic TV commercial for commercial, the Democrats capitalized on the weariness of the public and the media with the reapportionment issue and the widespread skepticism that partisan politics could ever be entirely removed from reapportionment.[68] Deukmejian's billboards read "Fairness, not politics," while one Democratic TV commercial featured an actor dressed like a judge raising his hand and pronouncing "In keeping with Proposition 39, I swear to protect my political party," and another ended with the slogan "Say no to the politicians."[69] More substantively, Democrats charged that 34 of the 38 current retired Appellate Court judges were white males whose average age was 73, whose current law practices might pose conflicts of interests with their reapportionment duties, and whose actions would not be accountable to the voters. The only female among the 38, former U.S. Secretary of Education Shirley Hufstedler, denounced Prop. 39 because it would "shut out of the reapportionment process such traditionally underrepresented groups as women and Hispanics," and Latino activist Cesar Chavez denounced the proposal before Latino community groups in Los Angeles and Orange counties.[70] Even President Reagan's landslide reelection victory could not save Prop. 39, which lost by the same

[66]Walter A. Zelman, "Time's Up on Sacramento's Game-Playing," *Los Angeles Times*, Sept. 19, 1983, II-5; John Balzar, "Deukmejian Seeks to Form Nonpartisan Remap Panel," *ibid.*, Oct. 2, 1983, I-1; Balzar, "Sebastiani to Work for New Remap Effort," *ibid.*, Oct. 3, 1983, I-1; Balzar, "Governor's Aide Will Lead GOP Remap Effort," *ibid.*, Oct. 12, 1983, I-3; Douglas Shuit, "Deukmejian remap Plan Hits Legal Snag," *ibid.*, Nov. 10, 1983, I-3; Shuit and Balzar, "Deukmejian Sets Remap Proposal Before Judges," *ibid.*, Nov. 18, 1983, I-3; Jerry Gillam, "Remap Panel Plan Amended by Governor," *ibid.*, Dec. 2, 1983, I-3; William Endicott, "Governor Sets Redistricting Board in Motion," *ibid.*, Jan. 21, 1984, II-1; William Kahrl, "Deukmejian Comes Out Ahead—Except in Party," *ibid.*, Nov. 14, 1984, II-5.

[67]Bill Lockyer, "Let's End the War of Reapportionment With Fair Principles," *Los Angeles Times*, Oct. 5, 1983, II-7; Keith Love, "State GOP to Lower Its Sights in '84," *ibid.*, Nov. 5, 1983, I-25; Jerry Gillam, "Democrats Draw Up Remap Plan," *ibid.*, Dec. 1, 1983, I-3; Gillam and John Balzar, "Democrat Proposal for Remap Panel Advances," *ibid.*, March 8, 1984, I-3; Carl Ingram, "remap Panel Chief Clashes With Colleagues, Resigns," *ibid.*, March 9, 1984, I-3; Balzar, "GOP Remap Plan Trounced in Assembly," *ibid.*, May 2, 1984, I-3; Balzar, "Prop. 39—the Battle that Could Determine the Game," *ibid.*, Sept. 10, 1984, I-3; Ingram and Gillam, "Racing Industry's $2.6 million Fights Lottery," *ibid.*, Oct. 30, 1984, I-13.

[68]Editorial, "Enough is Enough," *Los Angeles Times*, Oct. 5, 1983, II-61; John Balzar, "Deukmejian, Unfazed by Prop. 39 Loss, Vows to 'Reform' State Remapping Laws," *ibid.*, Nov. 8, 1984, I-3.

[69]John Balzar, "Prop. 39—the Battle that Could Determine the Game," *Los Angeles Times*, Sept. 10, 1984, I-3; Balzar, "Remapping Plan Causes Turmoil on Wide Front," *ibid.*, Oct. 16, 1984, I-3.

[70]John Balzar, "Prop. 39—the Battle that Could Determine the Game," *Los Angeles Times*, Sept. 10, 1984, I-3; Gerald F. Uelmen, "Don't Plunge Judges Into Political Thicket," *ibid.*, Sept. 19, 1984, II-5; "Chavez Recruits Opposition to 4 Ballot Initiatives," *ibid.*, Oct. 6, 1984, I-30; Balzer, "Remapping Plan Causes Turmoil on Wide Front," *ibid.*, Oct. 16, 1984, I-3; editorial, "Reapportionment: No on 39," *ibid.*, Oct. 31, 1984, II-4.

55%-45% margin that Prop. 14 had two years earlier.[71]

Still, they did not stop. In February 1985, Sebastiani proposed a two-part initiative—first, his maps, and second, a constitutional amendment preventing the State Supreme Court from overturning them. Although Sebastiani had become "a folk hero" among conservative Republicans through his reapportionment efforts, Deukmejian and other Republican leaders shunted Sebastiani aside again, but continued *Badham* v. *Eu*, a legal challenge to the congressional reapportionment, in federal court.[72] When a Republican attorney charged that the Burton plan was "the most egregious partisan gerrymander, not only of this decade but any other decade as well," Democratic attorneys answered that, in contrast to cases of racial gerrymandering, Republicans in California could hardly argue that they had been "shut out" of the political process, and that political parties did not deserve more protection from the courts in this regard than ethnic minorities enjoyed. A three-judge panel agreed with the Democrats in a party-line vote, and in 1989 the U.S. Supreme Court, after some apparent behind-the-scenes maneuvering, summarily affirmed the district court's dismissal of the Republicans' case. Only three Justices wished to hear the case, the first to come before them since they had ruled political gerrymandering a justiciable issue in 1986.[73] (*Badham* v. *Eu*, 694 F.Supp. 664 (N.D.Cal., 1988), aff'd mem. 109 S.Ct. 829 (1989).)

B. Did Phil Burton Singlehandedly Reverse the "Reagan Revolution"?

How partisan were the plans drawn in 1981, especially the "Burton Plan" for Congress? How true were Republican claims that the reapportionment cost them six or more seats in Congress and that it "preordain[ed] election results for a decade"? (Quinn, 1984, ch. 5, 56; Atwater, 1990, 670-71.) How did the habits and identifications of the voters change over the 1980s, and what implications did these changes have for the redistricting of the 1990s? How did minorities fare under the Democratic plans? Were sporadic Republican charges that Democrats split minority communities in order to insure the election of Anglo Democrats true?

The *Congressional Quarterly* retabulations imply that the Burton/Berman lines adopted in 1982 helped the Democrats somewhat in years in which voting trends were generally favorable to the party, but might have hurt them slightly in "bad years."[74] Democrats won the most congressional seats that they had ever

[71]John Balzar, "Deukmejian, Unfazed by Prop. 39 Loss, Vows to 'Reform' State Remapping Laws," *Los Angeles Times*, Nov. 8, 1984, I-3.

[72]John Balzar, "Sebastiani Revives Reapportionment," *Los Angeles Times*, Feb. 13, 1985, I-3; Philip Hager, "GOP Presses Challenge to '82 California Remapping," *ibid.*, Dec. 4, 1986, I-3.

[73]Philip Hager, "Judges Question GOP's Bid to Dump California Remap Plan," *Los Angeles Times*, Dec. 6, 1986, II-1; Philip Hager, "Court Upholds Democrats' '82 State Reapportionment," *ibid.*, April 23, 1988, I-1; David G. Savage, "Court Rejects GOP Bid to Overturn District Lines," *ibid.*, Oct. 4, 1988, I-3; Savage, "High Court Revives Political Remapping Case," *ibid.*, Nov. 15, 1988, I-3; Savage, "Justices Deny GOP Appeal of California Redistricting," *ibid.*, Jan. 18, 1989, I-1.

[74]Curiously, the *CQ* data do not appear to have been mentioned during the public debate in California over the "Burton Plan." It has been employed as an index of the intent of the redistricters by Born, 1985.

won in the state, 29 of 43, or 67.4%, in 1976. If the 1976 congressional votes are tabulated in the 1982 lines, the Democrats would have won 31 of 45, or 68.9%. In 1978, Democrats actually won 26 of 43, or 60.5%, the aggregated totals under the Burton plan would have been 26 of 45, or 57.8%. In the 1980 election, which Republicans touted throughout the decade as the proper election to use to determine the effect of the "Burton gerrymander,"[75] Democrats won 22 of 43 seats, or 51.2%, but if the Burton plan had been in effect, they would have carried only 21 of 45, or 46.7%.

Trends depicted in Figures 1 and 2 (page 147) also lend little support to the Republicans' charges. Although the Democratic advantage in voter registration dropped for a decade from its high point in 1976, it roughly flattened out after that, and the decline was offset by an apparent increase in party loyalty by those who did register as Democrats and a decrease among Republicans. As Senate Majority Leader David Roberti remarked at the time, "what is happening is that very, very conservative Democrats are now registering Republican. They are registering the way they vote."[76] In hypothetical congressional and Assembly districts in which 55% of the total registrants were Democrats and either 38% or 40% were Republicans, 1980 marked the low point for the Democrats. Democrats could expect to have carried a "55/40" congressional district by 15% in 1974, to have lost it by 27% in 1980, but to have won it by a 15% margin in 1990. In the Assembly, the figures are less dramatic, but there was still an estimated 15% swing over the period. The wide variation in such numbers suggests that redistricting did not produce a static political system, as the bare statistics on the number of seats switching from one party to another might seem to imply, and that it was unrealistic for Republicans to expect to do as well the rest of the decade, particularly in congressional races, as they did in the extraordinary year of 1980.[77]

Table 4 applies the behavioral patterns of the 1982 and 1984 elections to the registration patterns and boundary lines of 1980, and vice versa. It parallels Table 3 (page 148) and was estimated in the same manner. If the ordinary least-squares regression relationships between voting and registration in congressional districts had been those of 1982, but the Democratic and Republican registration percentages been the same as the 1980 boundaries, Democrats would have won 27 of 43 seats (62.2%), instead of the 22 of 43 (51.1%) that they actually won in 1980. This suggests that the 1980 party balance in congressional seats is a very misleading baseline with which to compare the results under the Burton plan. In the Assembly, the comparable figures are 49 and 47. The trends in 1982, a year of

[75]Computed from data in: *Congressional Quarterly*, 1983, 33-85. Curiously, the anonymous author of the narrative section on California redistricting in the same volume (p. 29) does not appear to have bothered to make these calculations.

[76]Jerry Gillam and Douglas Shuit, "GOP Faces Hard Road in Senate Campaign," *Los Angeles Times*, Nov. 14, 1985, 1-3.

[77]Daniel M. Weintraub and Jerry Gillam, "Remap Process No Longer a Narrow Political Concern," *Los Angeles Times*, March 11, 1990, A1.

Republican recession, were simply more favorable to the Democrats than those of 1980, a year of Democratic inflation.

TABLE 4. What If Voters Had Behaved as in 1982 and 1984, but in the 1980 Districts, and Vice Versa?

Boundaries in Effect	Behavioral Pattern		
	1980	1982	1984
	Panel A: Congress		
1980	22	27	28
1982	26	28	–
1984	22	–	27
	Panel B: Assembly		
1980	47	49	57
1982	50	48	–
1984	41	–	47

Entries are numbers of seats won or estimated to have won by Democrats.

To estimate the effect of changing boundaries, one should read down the columns of Table 4 and similar tables, thus keeping the behavior constant, but varying the boundaries. In a bad Democratic year such as 1980, the 1982 Burton boundaries seem to have gained the Democrats at most three seats,[78] while those of 1984[79] actually lost them 2.2% of the seats (22 of 45 in 1984 vs. 22 of 43 in 1980). The pattern is very similar in the Assembly. In 1982, the boundaries seem to have made little difference in the outcomes, as Democrats are predicted to have won a half of a percentage point more seats under the Masters' Plan than under Burton, and one more Assembly seat. In 1984, when President Reagan's coattails disappeared, the Democrats might well have won an additional congressional seat and as many as ten Assembly seats if they had still been operating under the Masters' Plan. These results suggest that Burton and Berman were quite risk averse, padding the margins of incumbents, instead of gambling that a series of

[78]26 of 45 is 57.8%. Applying this percentage to the 43 districts the State had in the 1970s gives 24.8 seats, or 25 rounded off. Democrats actually won 22 of 43 in 1980, and 25-22=3.

[79]1984 was actually a good year for Democrats below the Presidential level in California, as Republicans targeted only two marginal Democratic congressmen in 1984, both parties concentrated on Proposition 39, and every political observer knew very early that turnout in the presidential contest between Walter Mondale and Ronald Reagan would make little difference in Reagan Country. Therefore, neither party's vote for Congress or the Assembly was very high, and there were few close contests, especially for Congress.

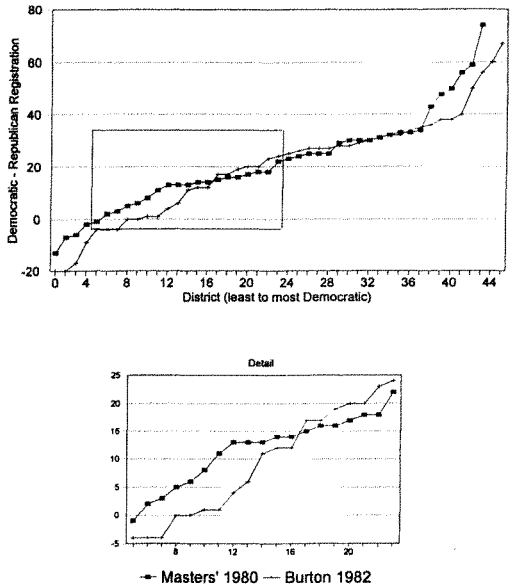

Figure 3. Registration Margins, Congress Masters' (1980) vs. Burton (1982)

close districts might fall their party's way. While such a strategy reduces turnover, it does not maximize partisan gains. By this measure, the Burton partisan gerrymander was largely a fiction.

A final way to gauge the difference between the Burton Plan and the 1970s Masters' Plan is to subtract the Republican from the Democratic registration in each district in 1980 and again in 1982, order each series (separately) from the most Republican to the most Democratic district, and graph one plan against

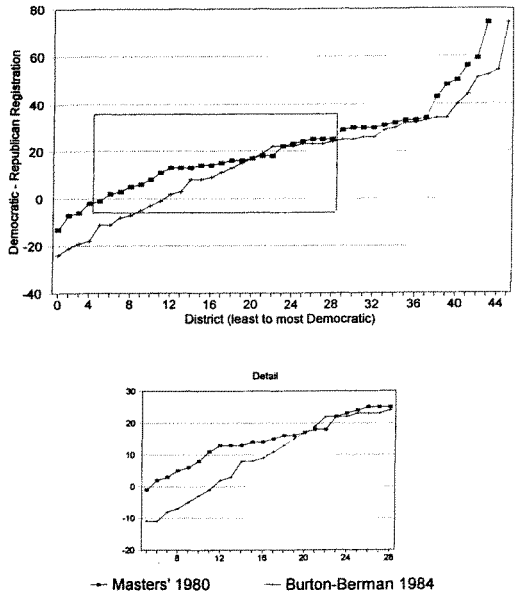

Figure 4. Party Registration, Congress Masters' (1980) vs. Burton-Berman (1984)

another. Figure 3 compares registration figures from the last year of the Masters' Plan, 1980, against those of the first Burton Plan as it stood at the time of the 1982 election. Figure 4 compares 1980 with the amended Burton Plan, using November 1984 statistics.

Figure 3 shows that while Burton packed somewhat larger percentages of Republicans into safely Republican districts, McKaskle had packed more Democrats into overwhelmingly Democratic districts. Figure 4 demonstrates

that the revised congressional plan, which enough Republican members of Congress and the legislature preferred to allow to pass easily, created even safer Republican districts. In the range of competitive districts, however, the more detailed inset graphs above Figures 3 and 4 make clear how little the registration patterns of the three plans differed. Democrats won only two congressional districts in 1982 in which they enjoyed a registration margin over the Republicans of less than 20%. In the roughly competitive terrain of 10% to 30% Democratic registration margins, there was little to distinguish the court-ordered plan of the 1970s from the "partisan gerrymander" of the 1980s. The Burton Plan created slightly more districts with about a 20% Democratic registration margin, while McKaskle's plan, by 1980, had more at approximately the 15% level. Shifts in the party balance over the decade, the influence of economic events or scandals, or the presence of especially attractive or unattractive candidates could easily outweigh such tiny registration differences. Analogous graphs for the Assembly, not presented here, yield similar conclusions.

In a 1991 press conference on redistricting, Speaker Willie Brown asserted that Republicans failed to capture control of the Assembly during the 1980s not because of partisan gerrymandering, but "because they have fielded inferior candidates and run poor campaigns."[80] Before he died in 1983, Congressman Phil Burton described his strategy in redistricting: "The most important thing you do, before anything else, is you get yourself in a position (to) draw the lines for (your own) district. Then, you draw them for all your friends before you draw anyone else's."[81] These two statements illuminate the preceding statistical comparisons of the plans of the 1970s and 80s. By concentrating their money and energy on repealing the Democrats' boundary lines, Republicans may not only have failed to target their funds wisely. They may also have created such low expectations of victory as to discourage better potential candidates from running and potential supporters from contributing time and funds to them. Railing against reapportionment, in other words, may have been self-defeating for the GOP. Burton's typically crusty boast reflects widely known facts: He buttressed the congressional district of his brother John Burton (who, however, declined to run for reelection in 1982), collapsed that of his bitter opponent Congressman John Rousselot, and drew three districts for Howard Berman and his allies and two more designed to elect Latinos. After accomplishing this—all six of these Democratic districts had at least a 27% registration advantage in 1982—even Phil Burton and Michael Berman could not do much more than protect enough incumbents to get a plan through the legislature. Although it was in their interest to claim as much credit as they could, they simply did not have extra Democratic voters left over to change the face of California politics for a decade.[82]

[80]Daniel M. Weintraub, "Incumbents Come First in Redistricting, Speaker Says," *Los Angeles Times*, Aug. 30, 1991, A3. Tim Hodson noted instructive examples: Assembly campaigns in Santa Barbara in 1982 and 1984 and in Riverside in 1984, and Senate elections in Los Angeles in 1985, and Santa Barbara, Riverside, and coastal northern California throughout the decade.

[81]Quoted in Baker, 1989, 13.

IV. THE 1990S: BACK INTO THE JUDICIAL THICKET

A. "The Maximum Number of Republican Seats"

Less than a year after losing their judicial challenge to the California reapportionment of the 1980s, Republicans began their campaign to control the redistricting of 1991. In fact, they might be said to have begun it in 1986, when they fervently supported a campaign to replace the Democratic majority on the State Supreme Court with a Republican one. Republicans, *Los Angeles Times* reporter John Balzar noted, "lead the opposition to the chief justice," Rose Bird, charging that she "has sided with Democrats, or at least liberals, on some key cases over the years—in particular, protecting a Democrat-drawn reapportionment plan for the Legislature and Congress from a GOP initiative challenge, a ruling that partisans on both sides take personally to this day." According to Bird's defenders, the opposition's $9 million campaign against her, led by Republican Gov. George Deukmejian, amounted to "the slease parade of 1986,...an unheard-of intrusion by the executive branch into the...independence of the judiciary."[83] After spearheading the defeat of the state's first female Chief Justice, its first Latino liberal Associate Justice, and another liberal Anglo, Deukmejian appointed his former law partner Malcolm Lucas, like him an Anglo male conservative, as Chief Justice.

Reapportionment was the Republican National Committee's "No. 1 national goal" in the 1990 election cycle, according to National Chairman Lee Atwater, and "the governorship of California has more than any other single thing to do with the national reapportionment than anything I can think of." Closer to home, Assembly Minority Leader Bill Jones asserted that "Reapportionment is the whole ballgame....The political landscape in California will be shaped in no small part by that for the next 10 to 20 years."[84] Coupled with the push to elect nationally ambitious Pete Wilson governor, Republicans sponsored two initiatives on the subject for the June 1990 ballot. Written by "top Republican activists," proposition 118 aimed at forcing a bipartisan plan by requiring that it be passed by two-thirds of both houses of the legislature, signed by the governor,

[82]For a similar general conclusion about reapportionment in the 1970s and 80s throughout the country, see Niemi and Jackman, 1991, 199.

[83]John Balzar, "GOP Relishes, and Democrats Fear, Impact of Bird Campaign," *Los Angeles Times*, Feb. 10, 1986, I-3; untitled story, *ibid.*, April 18, 1986, I-2; Frank Clifford, "Supreme Court: An Ominous Question," *ibid.*, I-1. The leading ostensible issue in the campaign against Bird and the other Democrats on the Court was the death penalty. In the nine years since the Republicans took over the Court, the State has executed two persons.

[84]Robert Shogan, "90 California Governor Race Seen as Key to Redistricting," *Los Angeles Times*, Oct. 26, 1989, A5; Daniel M. Weintraub, "Lawmakers' Fall Session Is Sure to Be Divisive," *ibid.*, Aug. 18, 1991, A3

and ratified by the voters. If the legislature did not act by July 15 in the year after the census, the State Supreme Court (by 1990, safely Republican) would take over. A competing proposition, backed by other Republicans, would take effect if it got a larger majority than Proposition 118 did. Proposition 119 proposed to establish a judge-appointed commission of five Democrats, five Republicans, and two independents, chosen with concern for racial, ethnic, gender, and geographic diversity, to consider plans submitted to it by interested groups

Although both propositions established guidelines about following geographic and city-county boundaries and requiring "competitive" districts, neither mentioned protection of ethnic voters, leaving the propositions open to charges by Democrats that "both measures are designed to aid Republicans by concentrating ethnic minorities into a few districts," and that by scrambling current boundaries, they would "unseat minority and women legislators, who only recently have begun to make gains after decades of being shut out of office." Others claimed that it would decrease congressional support for the environment, since it would reduce the number of Northern California members whose districts touched the coast, where voters of both parties tended to be more environmentalist. Common Cause, the National Organization for Women, the Sierra Club, the League of Conservation Voters, and the Mexican-American Legal Defense and Education Fund (MALDEF) opposed both propositions, while major corporations such as Chevron, Hewlett Packard, and TransAmerica Insurance Company supplemented the Republican National Committee's $675,000 contribution in favor of them. With Democratic candidates pooling funds to oppose the measures and organized labor and other Democratically-oriented interest groups joining them, the grand total of spending in the campaigns for and against the initiatives topped $6 million.[85]

Once again, the Democrats surprisingly turned back redistricting initiatives. In early May of 1990, fewer than one in four voters felt they knew enough to express opinions on Propositions 118 and 119, but when read descriptions of them, solid pluralities backed both. Yet a month later, after another skillful TV and direct mail campaign directed for the Democrats by Michael Berman, the electors vetoed both propositions by 2-1 margins, nearly half of self-identified Republicans joining 80% of the Democrats in defeating them.[86] November, however, brought more cheerful news for the GOP, as voters not only moved U.S.

[85]Daniel M. Weintraub and Jerry Gillam, "Remap Process No Longer a Narrow Political Concern," *Los Angeles Times*, March 11, 1990, A1; Joe Scott, "Old Allies Go to War Over Remap," *ibid.*, April 1, 1990, M5; Weintraub, "Common Cause Opposes Plan for Redistricting Commission," *ibid.*, May 2, 1990, A3; Weintraub, "Brown Calls Redistricting Propositions GOP 'Fraud,'" *ibid.*, May 9, 1990, A3; Weintraub, "Fraud Charges Traded on Redistricting Propositions," *ibid.*, May 17, 1990, A3; Weintraub, "Voters Could Radically Alter Redistricting," *ibid.*, May 27, 1990, A3; Weintraub, "Redistricting Measures Costliest on the Ballot," *ibid.*, June 2, 1990, A29.

[86]George Skelton, "Feinstein Widens Support, Increases Lead," *Los Angeles Times*, May 6, 1990, A1; Daniel Weintraub, "Voters Could Radically Alter Redistricting," *ibid.*, May 27, 1990, A3; Daniel Hays Lowenstein, "The Message That Voters Sent in Rejecting Propositions 118 and 119," *ibid.*, June 17, 1990, M5.

Senator Pete Wilson into the Governor's mansion, but also limited members of the Assembly to three two-year terms and Senators to two four-year terms and sliced legislative staffs by a third. Using Wilson's veto power, Republicans would be able to block any reapportionment that they did not like, and even if they did not get just the districts they desired, they would at least be able to retire experienced Democrats, especially their nemesis Speaker Willie Brown, later in the decade.[87] And according to the Democrats' national reapportionment leader, Congressman Vic Fazio of Sacramento, some Republicans hoped to wield enough power in reapportionment to reduce the Democratic congressional delegation from 26 of 45 in 1990 to 20 of 52 in 1992.[88]

The Democratic strategy on reapportionment in 1991 was simple: conciliate minority groups and make a deal with either conservative or moderate Republicans. Thus, they made Peter Chacon, a San Diego Latino, chairman of the Assembly Elections and Reapportionment Committee, named Sen. Art Torres to the Senate Elections and Reapportionment Committee, appointed Latinos as counsels to each committee, and instructed redistricting technicians to group together nearby areas of ethnic minority concentration. When MALDEF had trouble with the technical details of some of its plans, Democrats offered assistance without distorting MALDEF's intentions. The Assembly Democrats' preferred sets of plans (referred to as "Plan A" for each house) were primarily negotiating documents, Democratic daydreams floated in order to be bargained away or pressed in court, should the negotiations with the Republicans deadlock. To conservative Republicans, the Democrats offered a set of plans, termed "Plan B," that concentrated Republican seats in areas thought to be strongly anti-abortion and anti-gun control, and they managed to obtain the endorsement of Georgia Congressman Newt Gingrich for the congressional version of this scheme. Another set of plans, designated "Plan C," created seats in areas where Republicans were considered more likely to be pro-choice and pro-environment, which was believed to be attractive to the supposedly "moderate" Pete Wilson. The three plans constituted a public announcement that the Democrats were willing to bargain with anyone.[89]

The less partisan Senate managed a bipartisan compromise, which passed, 37-0. The same Senate plan was attached to all three of the Assembly Democrats'

[87]Republican Assembly candidates often seemed to run against Brown as much as against their actual opponents, and their pamphlets sometimes featured photos of Brown and made transparent appeals to racial bigotry in their references to him. Dan Morain, "Speaker's Rearranging of Assembly Is Lesson in Power," *Los Angeles Times*, Jan. 1, 1993, A25.

[88]William J. Eaton, "Fazio Sees Battle Over 100 New House Seats in Remap," *Los Angeles Times*, Nov. 9, 1990, A4.

[89]Daniel M. Weintraub, "Remap Plans Would Add 4 House Seats in Southland," *Los Angeles Times*, Sept. 12, 1991, A1; Weintraub and Mark Gladstone, "Lawmakers Miss Deadline for Redrawing Districts," *ibid.*, Sept. 14, 1991, A22; Gladstone, "Redistricting Expertise Brings Berman Back to Sacramento," *ibid.*, B1; Weintraub, "Bipartisan Redistricting Deal Taking Shape," *ibid.*, Sept. 15, 1991, A3; Weintraub, "Wilson Demands Remap Changes That Favor GOP," *ibid.*, Sept. 19, 1991, A3; Weintraub, "Democrats Pass Redistricting Plans," *ibid.*, Sept. 20, 1991, A3.

proposals. Although Senators favored presenting their plan to Gov. Wilson separately, partly in hopes that he might honor the Senate compromise, and partly because a unanimously-passed bipartisan plan might appeal to the State Supreme Court if it were not attached to a partisan plan, Speaker Brown refused to allow the separation, probably to increase the pressure on the Governor not to veto everything.[90]

Gov. Wilson's strategy was even simpler: Refuse to negotiate or to let any other Republican seriously negotiate with the Democratic majorities in the Assembly, Senate, or Congress, appoint a "commission" without consulting any Democratic or minority group leader, veto all legislative plans, turn the issue over to the State Supreme Court—which Wilson aides privately referred to during this period as "Pete's law firm"—and suggest that the Court's special masters use the Commission's proposal as a starting point.[91] From time to time, the Governor and other Republicans, as well as the Democratic leaders, issued various "good government" statements, such as that Wilson wanted "an honest reapportionment, one that favors people over politicians," and from time to time, Republicans murmured nice things about ethnic minorities. "We think we have a lot in common with some of those minority groups," the Governor's aide Marty Wilson declared awkwardly. But when they came to define "fair" districts, Republican leaders acknowledged that they were fundamentally interested in partisan advantage. A "fair district," Assembly Minority Leader Bill Jones announced, was one in which Republican registration was at least 38% and which George Bush had carried in 1988. "Our position," said Congressman John Doolittle, the spokesman for California's Republican delegation in reapportionment matters in 1991, "has always been to push for the maximum number of Republican seats."[92]

At first, some blacks and Latinos thought that Republicans might deal with them. Black Republican Steve Hamilton, vice chair of the nationalist Congress of Racial Equality, charged that "The current districts take advantage of blacks.

[90]Tim Hodson, a principal staff member in the Senate reapportionment, helped me to understand the significance of the Senate's actions.

[91]Wilson spent approximately $1.5 million of his campaign funds on Republican efforts during the 1991 redistricting. Daniel M. Weintraub, "Brown Leads Campaign Race for Cash," *Los Angeles Times*, Feb. 1, 1994, C1.

[92]Richard C. Paddock, "Big Population Gains Will drive State Redistricting," *Los Angeles Times*, March 25, 1991, A1; Daniel M. Weintraub and Alan C. Miller, "Governor Stops Plan to Negotiate Remap Deal," *ibid.*, May 23, 1991, A3; Weintraub, "Wilson Outlines redistricting Strategy," *ibid.*, July 19, 1991, A3; Jerry Gillam, "Wilson Picks Redistricting Panel," *ibid.*, July 27, 1991, A21; Sherry Bebitch Jeffe, "This Year's Reapportionment Script is Still Full of Question Marks," *ibid.*, Aug. 18, 1991, M6; Weintraub, "Wilson Asks Court Takeover of Redistricting," *ibid.*, Sept. 7, 1991, A1; Weintraub and Mark Gladstone, "Lawmakers Miss Deadline for Redrawing Districts," *ibid.*, Sept. 14, 1991, A22; Weintraub, "Bipartisan Redistricting Deal Taking Shape," *ibid.*, Sept. 15, 1991, A3; Weintraub and Carl Ingram, "Chance Fading for Bipartisan Deal on Reapportionment," *ibid.*, Sept. 17, 1991, A3; Sherry Bebitch Jeffe, "Wilson Under Fire," *ibid.*, Sept. 22, 1991, M1; Weintraub, "Remap Bills Are Vetoed by Wilson," *ibid.*, Sept. 24, 1991, A1; Philip Hager and Weintraub, "Redistricting Task Goes to State Justices," *ibid.*, Sept. 26, 1991, A3.

You're nothing more than a pawn." Not only was his charge patently false,[93] but his solution, to pack more blacks into districts that already elected black representatives, thereby reducing black influence in surrounding districts and overall, aimed more at assisting Anglo Republicans than the people he claimed to speak for. Bay Area Republicans circulated maps that lumped all minorities together and shifted lines allegedly to create several minority influence districts and assuredly to increase the number of districts potentially winnable by the GOP. Seeking to avoid being captured by either side, MALDEF, the Asian Pacific Legal Center, and California Rural Legal Assistance worked independently of either party, proposing partial plans for minority areas that did not take into account the spillover effects on predominantly Anglo districts—demonstrating a naivete that Democratic politicians of all ethnic groups decried and Republicans applauded. Pointing out that without Democratic control of the legislature, African-American and Latino officials would lose powerful committee chairs and control of committee majorities, Speaker Willie Brown argued that MALDEF's plan "would be worse for minorities" in the long run than Democratically-produced proposals for the Assembly.[94] In the end, all the maneuvering was irrelevant, because Gov. Wilson refused to negotiate with anyone and even used White House pressure to shepherd any straying Republicans back into the compliant fold.[95]

A month and a half before the legislature's scheduled adjournment, Wilson appointed an ethnically, sexually, and nominally politically balanced six-person reapportionment panel: two retired Republican judges, one of whom was Asian-American; a female black Republican expert on Russian politics who had served on the staff of the National Security Council under President Bush; and three Democrats, including one Latino, ranging in age from 70 to 83.[96] None of them appears to have held elective office or had any previous experience in reapportionment. No doubt their races, genders, and political affiliations were sufficient qualification, since they scotched predictable charges of partisanship and insensitivity to minority group and female concerns.[97] Their two chief consultants were Prof. Gordon Baker, the junior member of the 1973 McKaskle-Baker team and a political scientist at the University of California at Santa Barbara whose standards for redistricting in a 1989 article ignored the effect on minority ethnic

[93]The proportion of African-Americans in the Assembly, Senate, and Congress from the state, 7.9%, was slightly higher than their proportion in the general population, 7.4%.

[94]Daniel M. Weintraub, "Minorities Get GOP Support in Remap Battle," *Los Angeles Times*, Aug. 26, 1991, A3; Irene Chang, "Asians, Latinos Join in Proposal for Remapping," *ibid*, Aug. 31, 1991, B2; Bill Boyarsky, "New Agenda for Asians and Latinos," *ibid.*, Sept. 4, 1991, B2; Weintraub, "Proposed Senate Districts Protect Most Incumbents," *ibid.*, Sept. 5, 1991, A3; Weintraub, "Latinos Offer Own Plan for Redistricting," *ibid.*, Sept. 6, 1991, A3; Weintraub and Carl Ingram, "Chance Fading for Bipartisan Deal on Reapportionment," *ibid.*, Sept. 17, 1991, A3.

[95]Daniel N. Weintraub, "Bipartisan Redistricting Deal Taking Shape," *Los Angeles Times*, Sept. 15, 1991, A3.

[96]Jerry Gillam, "Wilson Picks Redistricting Panel," *Los Angeles Times*, July 27, 1991, A21.

[97]Daniel M. Weintraub, "Wilson Outlines Redistricting Strategy," *Los Angeles Times*, July 19, 1991, A3.

groups, and Prof. Richard Morrill, a Geographer at the University of Washington, who had drawn plans for the Rose Institute in 1981.[98] Unfortunately for Wilson's strategy, his Commission took much longer to draw districts than expected, robbing him of a debating point against the Legislature.[99] When the Commission's plans were revealed, moreover, they decimated districts then represented by members of minority groups, reducing the number of congressional seats winnable by blacks in Los Angeles from three to one and the number of probable Latino seats in all three bodies from 10 to 5. In the Assembly, the professors had overconcentrated blacks in one Los Angeles Assembly district and set up a probable confrontation between African-Americans and Latinos in another. As a consequence, the Governor had to bring in his redistricting consultant, Joe Shumate, the author of the 1983 Sebastiani Plan, to fix up the minority districts to fight an almost certain Voting Rights Act challenge.[100] (See Table 5, page 175, for further details.) No further demonstration of the effect of "balanced" commissions or "nonpartisan" consultants on minority representation is necessary.

Stymied by Wilson, Democrats in mid-September mechanically passed three plans for each legislative body, perhaps hoping that Wilson would finally choose one, but more probably out of frustration. "I'm at the breaking point," said Speaker Brown, the veteran of more drawn-out legislative struggles than any other legislative leader in the state's history. "I do better letting the courts rip me off....Not from Day 1 did I believe that the governor and [Assembly Republican leader Bill] Jones wanted to do anything except have me deliver the Democratic Party to them. I, of course, was not going to do that."[101] Immediately vetoing all three, Wilson turned over the task to the State Supreme Court, which appointed as Special Masters three retired Anglo[102]

[98]Baker, 1989. On Morrill's 1981 plan, see Cain, 1984, 13-14.

[99]Daniel M. Weintraub, "Wilson Asks Court Takeover of Redistricting," *Los Angeles Times*, Sept. 7, 1991, A1.

[100]Daniel M. Weintraub, "Wilson Panel Remap Plan Would Help Republicans," *Los Angeles Times*, Oct. 12, 1991, A31. Under the Governor's Commission's plan, the black population percentages in the three most heavily African-American congressional districts in Los Angeles County were 57.3, 20.7, and 14.7. One district was heavily packed, and black incumbents would have lost one and probably two of the three seats. By contrast, the Democrats' plans spread the black population around in the three seats, making their percentages 40.5, 38.3, and 30.1 and keeping the boundaries relatively stable, and the final Masters' Plan set the same percentages at 40.3, 42.7, and 33.6. Under each of these plans, given contemporary voting patterns in the area, black incumbents would quite probably retain their seats.

In the Assembly, the black population percentages in the relevant districts in Los Angeles under the Commission plan were 53.9, 40, 32, 25.5, and 21; under the Democratic plans, they were 38.6, 35.8, 33.8, 29, and 24.8. While the Latino population percentages were generally high in all of these districts, Democrats made sure they were always substantially below the black percentages, avoiding interethnic confrontations. By contrast, the Commission's 21% black district was 75.1% Latino in population and 26.2% Latino in registration.

[101]Daniel M. Weintraub, "Democrats Pass Redistricting Plans," *Los Angeles Times*, Sept. 20, 1991, A3 (first part of quotation); Weintraub and Carl Ingram, "Chance Fading for Bipartisan Deal on Reapportionment," *ibid.*, Sept. 17, 1991, A3 (quotation after elision). Republicans and some Democrats thought at first that this was just another of the Speaker's negotiating ploys.

judges, two Republicans and one nominal Democrat, all of whom had been appointed to the bench by Republican governors. The Masters, in turn, relied chiefly on University of San Francisco law professor Paul McKaskle, who had drawn the 1973 Court-sponsored plans.[103]

Speaking as though electoral boundaries had nothing to do with electing people, the Special Masters claimed to have acted utterly apolitically. "We had no agenda, no political purpose, and we did not consider any political consequences," announced George A. Brown, a Reagan appointee to the bench from the conservative Central Valley county of Kern.[104] Nonetheless, the immediate reaction to the plans from *Los Angeles Times* pundit Sherry Bebitch Jeffe was that it portended "a Democratic disaster of major proportions: their majority in the Assembly is at risk; their margin in the state Senate is likely to decline, and their lopsided domination of the state's congressional delegation is at an end." Rose Institute Republican Alan Heslop declared that Pete Wilson and Willie Brown "rolled the dice. It seems to me the governor won and won pretty big. Willie Brown lost and may have lost in a decisive fashion and a rather permanent fashion." Republican leaders in Sacramento were said to be "overjoyed," predicting that Republicans would win majorities in the Assembly and congressional delegations and 19 of the 40 seats in the Senate, while Assembly Democrat Steve Peace denounced the Masters' plan as a "partisan gerrymander of gigantic proportions," and an unidentified associate of the Berman-Waxman group asserted that "It looks like a partisan Republican plan drawn by a partisan Republican court." The seats of Democratic reapportionment leaders seemed especially targeted: Congressman Vic Fazio's Sacramento-area district was extensively reshaped and made much more conservative, while the Berman-Waxman allies' West Los Angeles seats in Congress were reduced from four to two, and the residences of three of their Assembly allies were placed in the same district.[105] The

[102]One judge, Rafael Galceran, had a Spanish surname, though he was born in Jackson, Mississippi in 1921 (Livermore, 1985/86, 295) and was completely unknown to the Latino legal community in Los Angeles county, where he lived, in 1991. "When I testified before the Masters," said MALDEF reapportionment leader Arturo Vargas (personal communication, Aug. 2, 1995), "all I remember is looking up at three old white men."

[103]Daniel M. Weintraub, "Remap Bills Are Vetoed by Wilson," *Los Angeles Times*, Sept. 24, 1991, A1; Philip Hager and Weintraub, "Redistricting Task Goes to State Justices," *ibid.*, Sept. 26, 1991, A3; Hager, "Wilson Asks Federal Court to Stay Out of Redistricting Fight," *ibid.*, Oct. 9, 1991, A3; Hager, "How Panel Redrew the Political Map," *ibid.*, Dec. 8, 1992, A3.

[104]Philip Hager, "How Panel Redrew the Political Map," *Los Angeles Times*, Dec. 8, 1992, A3. Intentionally or unintentionally, the State Supreme Court distorted what had transpired when they claimed that "the parties and amici curiae uniformly confirmed at oral argument that the process employed by the Masters was entirely free of political bias or intent." *Wilson v. Eu*, 1 Cal.4th 707, 719 (1992). In fact, what the Democratic attorneys said in oral argument was that they were not prepared to make an affirmative case that the plan had a partisan intent—a "Scotch verdict," rather than a "not guilty" verdict, and they argued strenuously that the plan had a pro-Republican effect or bias.

[105]Jeffe, "Why Republicans May Rue Their Heartfelt Support for Term Limits," *Los Angeles Times*, Dec. 8, 1991, M6; Daniel M. Weintraub, "Wilson Got His Wish in Remap Plan," *ibid.*, Dec. 5, 1991, A3; Weintraub, "Remap Could Bring Major Gains for GOP," *ibid.*, Dec. 4, 1991, A1; Bill Stall and Alan C. Miller, "Plan Would Carve Up Democratic Stronghold," *ibid.*, Dec. 4, 1991, A25.

district of the longtime Democratic Senate leader David Roberti, who had negotiated the compromise Senate proposal, was completely collapsed, leaving him a district to run in only because of the forced resignation on corruption charges of another Senator, and shortly thereafter making Roberti the nation's first victim of term limits.

Minority reaction to the Masters' Plan was unfavorable, if less harsh. One much more secure black Assembly district could have been drawn in Los Angeles county, and African-American Congressman Julian Dixon's seat gained affluent Jewish Democrats and lost Anglo Republicans, setting up a potential intraparty, interethnic battle in case the popular Dixon retired.[106] The rapidly growing Latino population gained another congressional seat in Los Angeles in this and every other proposed plan, but the Masters' configuration substituted Anglo for black and Latino Democrats in the adjoining Latino seat held by Edward Roybal since 1962. Only the unwillingness of the Berman-Waxman alliance to back a non-Latino candidate kept the seat in Latino hands when Roybal retired in 1992. In Los Angeles county, MALDEF's proposed plan created six Assembly and three State Senate districts in which Latinos comprised at least 40% of the estimated registered voters. Comparable numbers in the Masters' Plan were four and two.[107]

McKaskle also believed that legally he had more responsibility to adhere to the vague state judicially created criteria of compactness and minimizing the crossing of political boundaries than he did to join centers of minority population—unless they could obviously control the politics of a district. And while in considering "majority-minority" or "control" districts, the Masters did consider the ethnicity of the other people in the districts, they claimed not to have considered the political composition of the others in "influence districts"—that is, those in which minorities could not by themselves elect a candidate of choice, but where they could strongly affect the choice of the district. (*Wilson* v. *Eu*, 1 Cal. 4th 707, 714-15, 722, 751-53, 767-69, 775-78, 790-91 (1992).)

Yet to blind oneself to partisanship (if that is what the Masters really did) is to endanger minority positions and restrict minority influence. As the Dixon and Roybal examples above spotlight, to control an overwhelmingly Democratic district, minorities need to compose a larger proportion of the population than in a district with a somewhat larger proportion of Republicans, because the crucial contest in the Democratic district will be the primary. Moreover, to place African-Americans or Democratic Latinos in a district that Republicans can easily carry will deprive the minorities of nearly all influence over the winning office-

[106]When two longtime Anglo Democratic incumbents were thrown into the same district, Carson City Councilwoman Juanita M. McDonald, an African-American, won a startling upset victory in the primary and faced no Republican opposition in the general election.

[107]Daniel M. Weintraub, "Latino Group Seeks to Alter Remap Plans," *Los Angeles Times*, Dec. 17, 1991, A3.

holder. Their votes will be almost entirely wasted.[108] Even before mainstream California Republicans embraced the anti-immigrant Proposition 187 in 1994 and the effort to end affirmative action for underrepresented minorities in 1995-96, members of the party had based campaigns on the immigrant "invasion" from the south, circulated scurrilous anti-Latino doggerel in the legislature, and run anti-welfare TV ads that featured black and brown "welfare mothers."[109] Since all such ethnically divisive efforts help to insure that African-Americans and Latinos will remain loyal Democrats, partisan and minority group concerns will necessarily continue to overlap in redistricting.

Table 5 summarizes the ethnic percentages in each of the 45 congressional districts in the Burton-Berman reapportionment (as of 1990), and in the 52 districts in the 1991 Masters' Plan and the seven alternative plans. Except for the egregious design of the Governor's Commission, which clearly overconcentrated the black population and the Latino registration, the contrast between the plans lies more in districts in which minorities could influence the result than in those which they could effectively dominate by their numbers. Pro-Democratic plans (1990, A, B, C, and MALDEF) concentrated minorities, while pro-Republican plans (the Masters' plan, the Commission's, Shumate, and Jones) scattered them. Thus, the favorite plans of the Democrats, A and C, created two more districts than any of the Republican plans in which the black population made up 10% or more, and Plan A drew two or three more districts in which the Latino registration was above 20% than any of the Republican plans did.

Equally important, the Republican plans tended, much more than the Democratic plans, to dilute ethnic minority influence by adding minority voters to Republican districts. For instance, congressional Plan A created 11 districts in which the Latino population percentage was between 30% and 60%—which, in contemporary California, will usually produce too low a percentage of Latino registrants and potential crossover voters to elect a candidate of choice of the Latino community—and where the Democratic registration margin over the Republicans

[108]Examples are the heavily black and brown Los Angeles county community of Pomona tacked onto the predominantly Republican Orange county 41st Congressional District, and rural 65% Latino Imperial county, tacked onto the heavily Republican San Diego suburbs in the 52nd Congressional District. The victorious Republicans in these two districts averaged 97 (where 100 is the most conservative) on the *Congressional Quarterly* "conservative coalition" index in 1993 and 1994. The average score for Latino members of Congress from Southern California in the same years was 26.

[109]"Bill (Tax Reduction) Hoge for Assembly," "Invasion: U.S.A." (pamphlet, 1992, in author's possession); English Language Political Action Committee, "Protect English: Vote Against Feinstein For U.S. Senator November 3, 1992," (pamphlet, 1992, in author's possession); Eric Bailey and Dan Morain, "Anti-Immigration Bills Flood Legislature," *Los Angeles Times*, May 3, 1993, A3; Morain and Mark Gladstone, "Racist Verse Stirs Up Anger in Assembly," *ibid.*, May 19, 1993, A3; Gladstone, "Assemblyman Takes Heat for Anti-Immigrant Poem," *ibid.*, May 20, 1993, A3. TV ads for Gov. Wilson's proposal to cut Aid to Families with Dependent Children by 25% spotlighted minorities. The November 1992 ballot proposition was rejected by the voters of the state. In the summer of 1993, Gov. Wilson sought to raise his 15% approval rating by calling for the repeal of the citizenship section of the 14th Amendment, and he rode his endorsement of Prop. 187 to reelection and the launching of his 1996 presidential bid.

was 15% or more.[110] By contrast, the Masters' plan contained only 9 such districts, that of the Governor's Commission, 8, and the Jones or Republican plan, 7. Since Latinos and, even more so, African-Americans are reliable Democratic voters, it is in the interests of Democrats to concentrate them in influence districts, just as it is in the interests of Republicans to disperse or waste those minorities who cannot be packed into a minimal number of districts.[111] At least as interpreted by most political professionals in the state in 1991, the Voting Rights Act kept Republicans from overpacking minorities and kept Democrats from spreading them into a maximum number of influence districts, rather than first creating minority control districts, and then joining the remaining clusters to increase minority (and Democratic) power. Even apart from the necessity of complying with the Voting Rights Act and the ideological affinity between Anglo and minority Democrats, Democrats are likely to be more responsive than Republicans are to minority concerns in reapportionment because minorities are now firmly entrenched in the Democratic leadership and because minority voters form appreciable proportions of the coalitions required to elect Anglo Democrats.

Challenges to the Masters' plans by Democrats and representatives of MALDEF and the NAACP in the State Supreme Court and before a three-judge federal panel were brushed aside after brief hearings on straight party-line votes, each of the ten judges voting for the party of the person who had appointed her or him.[112]

B. Was The Masters' Plan Nonpartisan?

The initial election under the new lines was a Republican disaster, as Bill Clinton became the first Democratic presidential candidate to carry the state since 1964 and the first to carry San Diego county since 1944, and Democrats won two U.S. Senate seats. Under the Masters' plan, Democratic dominance of the congressional delegation declined by only one-tenth of one percent of the seats, and the party exactly maintained its 1990 margins in the Assembly and Senate. Three weeks before the election, Republican State Chairman Jim

[110] As Figures 1 and 2 (page 147) show, a 15% Democratic registration margin was approximately the minimum needed for the district to be fairly reliably Democratic in 1990 or 1992. In 1994, the necessary margin was about 20%. Because of the geographic and economic segregation of Anglos from ethnic minorities in contemporary California, minorities will usually automatically fall into overwhelmingly Democratic electoral districts. Thus, the fact that the Republican plans create both fewer Latino influence districts and fewer still that are contained in districts generally winnable by Democrats constitutes *prima facie* evidence of intentional discrimination.

[111] For a much extended argument about influence districts, see Kousser, 1993.

[112] Philip Hager, "Court Rejects Appeal of Redistricting Plan," *Los Angeles Times*, Jan. 29, 1992, A3. Federal Judge Thomas Tang, a Democrat, concurred with his two Republican colleagues on the narrow ground that, without a full hearing, the Voting Rights Act challenge to the Masters' Plan had not been conclusively proven—a position with which the plaintiffs did not disagree. The cases were *Wilson* v. *Eu, 1 Cal. 4th 707 (1992)* and *Members of the California Democratic Congressional Delegation* v. *Eu* (Case No. C 91 3383 FMS, N.D. CA). Speaker Willie Brown had reportedly had so much faith in the partisan fairness of Paul McKaskle that he allowed legislative Democrats to drop any prospective federal court challenge until it was too late to file. The NAACP apparently did not object to the congressional plan before the State Supreme Court, but did before the federal court.

TABLE 5. Ethnic Percentages for 1990 & 1991 Congressional Plans

Decile	1990 Plan	Masters	A	B	C	Gov Com	Shumate	Jones	MALDEF
					Proposed Plans				
Panel A: Black Population									
0-9.9	29	43	41	43	41	43	44		42
10-19.9	11	5	7	5	7	5	4		6
20-29.9	1	0	0	0	1	2	0		1
30-39.9	1	2	3	2	1	1	3		2
40-49.9	2	2	1	2	2	0	1		1
50-59.9	1	0	0	0	0	1	0		0
Panel B: Latino Population									
0-9.9	6	4	7	6	3	6	6	5	4
10-19.9	17	20	23	21	26	20	19	21	25
20-29.9	6	12	4	10	7	11	13	12	8
30-39.9	9	6	8	6	7	5	5	6	4
40-49.9	3	4	4	3	3	4	3	0	4
50-59.9	1	3	2	2	2	4	4	5	5
60-69.9	3	2	3	3	3	1	1	2	1
70-79.9	0	0	0	0	0	1	0	1	0
80-89.9	0	1	1	1	1	0	1	0	1
Panel C: Latino Registration (estimate)									
0-9.9	22	27	29	29	29	27	28	27	31
10-19.9	19	18	14	15	15	18	20	18	13
20-29.9	1	2	5	4	4	5	1	2	3
30-39.9	2	2	2	2	2	1	2	3	3
40-49.9	1	3	2	2	2	0	3	2	2
50-59.9	0	0	0	0	0	1	0	0	0

*Entries are numbers of districts with stated percentages of population.
Masters' = 1991 Special Masters Plans (Feb. 1, 1992 registration data).
Plans A, B, C = Plans passed by Democratic legislature.
Gov. Com. = Plans drawn by Gov. Wilson's "nonpartisan" commission.
Shumate = Modification of Governor's Commission plans by Gov. Wilson's redistricting consultant.
Jones = Plans offered by Republicans in legislature.
MALDEF = Plans offered by Mexican-American Legal Defense & Education Fund.
Source: Computed from data supplied by Pactech Data Research

Dignan was predicting that the GOP would carry 26-29 congressional contests, but the party ended up with only 22, two of those extremely close GOP victories.[113] Why was the Republicans' faith in reapportionment frustrated, temporarily, at least, and what might have happened under other redistricting plans?

Certainly the recession, the deepest and longest in California since the Second World War, was the dominant force in the election results.[114] Particularly affecting Republican strongholds in Southern California, the economic downturn made George Bush so unpopular that he did not appear west of the Sierra Nevada mountains after October 1. Second was the fact that Democrats nominated more experienced and moderate candidates who often raised considerable sums. Thus, Vic Fazio spent $1.6 million, the fourth largest amount for a congressional candidate in the country, to defend his considerably altered Sacramento district against far-right gun lobbyist H.L. Richardson, Jane Harmon amplified her appeal with her husband's family's fortune in an open seat contest against conservative anti-abortionist Joan Milke Flores, and liberal Democrat Tony Beilenson survived the addition of Ventura county suburbs to his West Los Angeles district by conducting a well-tailored and well-financed campaign against Tom McClintock, the leader of the self-described "cavemen" faction of Assembly Republicans. Frank Riggs, a clear-cut Republican loser, was the only congressional incumbent of either party to fall, though several were endangered and eight retired. Nearly a quarter of the Republican primaries for the Assembly featured bitter conservative-moderate contests, and while conservatives won eleven of them, they lost five of those seats in November. Especially in Southern California, some of these were candidates of what might be termed the "bizarre right," including one who was caught on audio tape declaring his belief that the U.S. Air Force and four states had "official witches"[115] and another "Christian" candidate who equated his Jewish opponent's pro-choice stance with support for the Nazi Holocaust. Democrats picked up a few seats where, according to the registration percentages, they should never have had a chance. Third, Democrats energized by their party's presidential and U.S. Senate nominations registered more than twice as many new voters as the Republicans between May and October, increasing their statewide registration margin over the Republicans from nine percent to twelve percent, and outregistering the Republicans for the first time in the last four presidential election years.

[113]Patt Morrison, "Congress Races Being Run on Road Full of Potholes," *Los Angeles Times*, Oct. 13, 1992, A1.

[114]In this paragraph, I draw on the excellent detailed analysis in *California Journal*, 1992, as well as Daniel M. Weintraub and Mark Gladstone, "GOP Loses 2 Assembly Seats Despite Remap," *Los Angeles Times*, Nov. 5, 1992, A1; George Skelton, "Wilson Hints at Softer Style After Election Drubbing," *ibid.*, Nov. 5, 1992, A1; Glenn F. Bunting and Dan Morain, "Democrats Win 10-Seat Edge in Congressional Delegation," *ibid.*, Nov. 5, 1992, A3.

[115]In a 1994 rematch, this candidate won, allowing him to hunt whomever he wants to in Sacramento.

The registration drive often nudged districts that had seemed likely to go Republican in December 1991, when the Masters' Plan was announced, over into the competitive category, just as it bolstered marginally Democratic districts.[116]

Like the simulations from the elections and districting schemes of the 1970s and 1980s, simulations comparing the 1990, 1992, and 1994 contests undercut the notion that the Democratic redistricting of the 1980s drastically changed partisan outcomes. The first row of Table 6 (Plan A), which is computed in the same way that Tables 3 and 4 were, estimates what might have happened if the boundaries in effect had been those of the 1980s, but the relationships between voting and partisan registration had been those of 1992 or

TABLE 6: What If Voters Had Behaved as in 1990, 1992, or 1994, But Under Different Redistricting Arrangements?

	Behavioral Pattern					
	Congress			Assembly		
	Year					
	1990	1992	1994	1990	1992	1994
Plans						
Actual Lines						
1990	26**	28**	25**	48	48	40
Masters' (Nov. 1992, 1994)	–	30	27	–	48	39
Proposed Plans (Feb. 1, 1992)						
Plan A	32	33	28	50	48	41
Plan B	27	28	26	49	47	40
Plan C	30	31	27	49	46	39
MALDEF	30	30	24	47	43	38
Governor's Commission	29	28	19	45	41	33
Shumate	26	28	22	45	40	35
Jones	25	24	24	44	43	36
Masters' (Feb. 1992)	26	28	22	45	41	37

*Entries are numbers of seats won or estimated to be won by Democrats
**of 45 seats—all other congressional results are of 52 seats.
Behavioral Pattern = Based on regression of relationships between election outcomes and registration in the stated year
1990 = 1984 redistricting plans, with registration data as of 1990.
Masters' Actual = 1991 Special Masters' Plans (Nov. 1992 and 1994 registration data).
Plans A, B, C = Plans offered by Democratic legislature.
Maldef = Plans offered by Mexican-American Legal Defense & Education Fund.
Gov. Com = Plans drawn by Gov. Wilson's "nonpartisan" committee.
Shumate = Modification of Governor's Commission plans by Gov. Wilson's redistricting consultant.
Jones = Plans offered by Republicans in legislature.
Masters' Proposed = Special Masters' Plan with registration data as of Feb. 1, 1992.
Source: Computed from data supplied by Pactech Data Research.

[116]The Republican registration as a percentage of all voters declined in 17 of the 18 most competitive Assembly districts from January to September 1992. Daniel M. Weintraub, "GOP Bid for Assembly Control Becomes Long Shot," *Los Angeles Times*, Oct. 5, 1992, A1; Patt Morrison, "Congress Races Being Run on Road Full of Potholes," *ibid.*, Oct. 13, 1992, A1.

1994, instead of 1990. The differences between what actually happened in 1990 (Democrats won 26 and 48 seats, respectively, in Congress and the Assembly) and what could have been expected to happen if the voters had behaved as in 1992 are small. In a landslide Democratic year like 1992, under the "Burton gerrymander," the Democrats would have won 28 of 45 (62.2%) of the congressional seats, instead of the 30 of 52 (57.7%) that they did win in 1992 under the Masters' Plan. (Compare the first and second rows of the table.) The Assembly would likely have contained 48 Democrats, instead of the 47 actually elected in 1992. In a good year for the Democrats, then, the Burton plan would have given the Democrats approximately two more congressional seats than the Masters' Plan with the registration patterns of November 1992. These patterns were, as has been noted above, significantly more favorable for the Democrats than the patterns had been in 1990 or during the fall of 1991, when the Masters' Plan was drafted. (Compare row 2 with row 8.)

Nonetheless, reapportionment plans that were not adopted would probably have changed the outcomes dramatically. Rows 3-8 of Table 6 show how many seats Democrats could have expected to win under each of the plans if the relationships between party registration and voting had been those observed in the 1990, 1992, or 1994 elections.[117] If the relationships between party registration and voting had been the same as in 1990, Democrats could have expected to win 32 seats in Congress under the most pro-Democratic plan, Plan A, while under the plan proposed by the Republicans, termed the "Jones Plan" in the table, Democrats were likely to win only 25. For the Assembly, the expected difference in the two plans was six seats in 1990. Under the conditions of 1990, results under the Masters' plans tracked those under the more openly pro-Republican Jones and Shumate plans much more closely than under the plans proposed by the Democrats. Since it reflects the consequences that keen political observers might reasonably have anticipated on the basis of the most relevant recent data, columns 1 and 4 of these rows of Table 6 give the best indications of the partisan intent of each plan.[118]

As the extent of the 1992 Republican debacle in California became clear, some Democratic insiders claimed privately that the party was better off with the Masters' lines than they would have been with the plans they had fought for so hard, reasoning that some of the supposedly large number of marginally pro-Republican districts in the Masters' plan would wash ashore in the Democratic tide. However plausible the reasoning, Table 6 suggests that it is wrong. If the behavioral relationships in 1992 had been just as they were under the Masters'

[117]The Masters' Plan is listed in row 8 with its registration as of February 1992, to make its registration patterns comparable with the proposed plans that were not adopted. In row 2, its registration is as of November 1992 and November 1994, respectively.

[118]Even if the contentions of the Governor's Commission and the Special Masters that they ignored partisan considerations are credited, no one else ignored the partisan consequences of their plans, and those consequences played a large role in the reception each group gave to the "nonpartisan" plans.

Plan, but Plan A had been in effect, Democrats would have won 35, instead of 30 seats in Congress, and the same number, 48, in the Assembly. Under Plans B and C and the MALDEF Plan for Congress, which Democrats ended up backing during the federal court challenge to the Masters' Plan, Democrats would have carried from one to three more seats than under the Masters' Plan. For the Assembly, they would likely have done much better under Plans A, B, and C, and somewhat better under the MALDEF plan than under the Masters' plan. The most striking differences in Table 6, however, are between the Jones or Republican plan for Congress and the Masters', Commission, and Shumate plans for the Assembly, on the one hand, and all the other plans, on the other. The Masters' plan with the registration percentages at the time it was approved, as well as the Governor's Commission plan and its modification by Shumate would have been likely to give Democrats the barest of Assembly majorities. The Jones Plan so artfully packed Democrats into as few districts as possible that even in a year of Republican disaster—Democrats won 57.1% of the two-party vote for Congress in the average district—Republicans would be expected to win 28 of the 52 congressional seats (53.8%).[119] The difference between Plan A and the Jones Plan was nearly as large as the national swing in congressional seats in 1992!

Although the party registration percentages in California barely budged between November 1992 and November 1994, the national surge in the tendency to vote Republican (Ladd, 1995) cost California Democrats 9 Assembly and 3 congressional seats in 1994, several on each side being decided by extremely close margins. Had the Burton plan been in effect, Democrats would probably have held two more seats in Congress, and Plan A would have given them one more. (See Table 6.) Likewise, the Democratic plans of the 1980s or 90s might well have retained slight Democratic majorities in the Assembly. The contrast with the Republican and Masters' plans is again stark. Although Democrats won 51.7 % in the average California congressional district and 52.3% in the average Assembly district, the esthetically correct Governor's Commission plan would have awarded them only 36.5% of the congressional and 41.3% of the Assembly seats. The Republicans would likely have won fewer congressional seats in their banner year of 1994 under the Jones plan than under the Masters' plan.

Why different plans would be likely to lead to different results is made strikingly clear in Figure 5, which compares Democratic registration margins in the 52-seat Jones congressional plan with those in the 45-seat Burton-Berman plan of the 1980s. The upper right-hand corner shows that the Jones plan contained many more heavily Democratic districts than the 1982 plan, which enabled it to shave Democratic totals elsewhere. In the crucial central portion

[119]The Democrats' margins in an average district in 1992 would have been approximately the same under almost all of the proposed plans. See Kousser, 1995a, Appendix B.

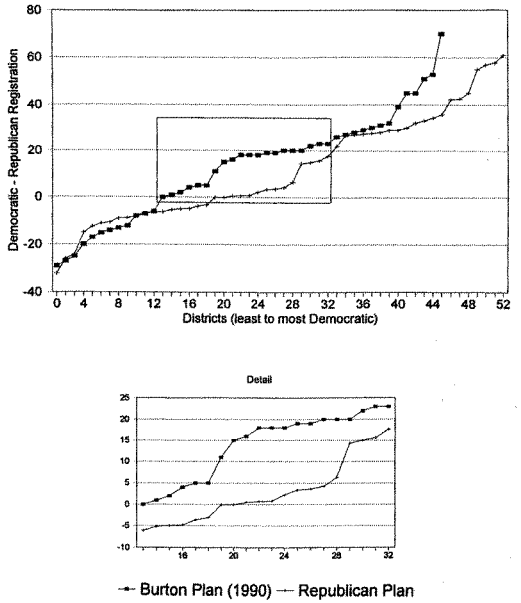

Figure 5. Registration Margins, Congress Burton Plan vs. Jones (Republican Plan)

of the graph, Republicans created as many districts as possible in which the Democratic margin was below five percent, and then jumped to fairly safely Democratic districts in which Democratic margins were fifteen percent or more. The apparent Democratic strategy was the mirror image of that of the

Republicans—pack Republicans and create as few districts with less than a five percent margin and as many with fifteen or more percent as possible. Three points follow: First, both parties had incentives to establish as few highly competitive districts as possible, and they acted in accord with those incentives. Second, the technicians of both parties were sufficiently competent that they could simultaneously maximize their potential number of victories in "good" years and minimize their losses in somewhat worse years.[120] Third, although comparisons between plans are instructive and clearly demonstrate their intentions, it is impossible to determine which is less partisan without choosing some "fair point" or making an inescapably arbitrary definition of a competitive range of districts.[121] For instance, the Jones plan contained only four districts in which the registration gap in Figure 5 was more than 6% and less than 20%, while the Burton plan, as of 1990, contained 11. On the other hand, 10 of the Jones plan's districts had registration margins of between 0 and 6%, while this was true in only 6 of the Burton plan's districts. What is the legally or social scientifically correct fair point, and how would one practically apply a standard based on the widely discussed principle of symmetry? (Gottlieb, 1988)

Figures 6 and 7 show that the 1991 Masters' plan for Congress resembled the Jones plan much more closely than it did Plan A.[122] The Masters' plan packed Democrats more and Republicans less than Plan A did, and the registration gap between Democrats and Republicans was consistently less in the middle range of the Masters' plan than it was in Plan A. Both created about the same number of highly competitive districts. Figure 7 demonstrates that there were only subtle differences between the Masters' plan (using February 1992 registration data) and the Jones plan. Essentially, the Jones plan had somewhat larger jumps in the center portion of the graph, while the pattern of registration differences in the Masters' plan climbed a bit more smoothly. Although such tiny distinctions could lead to as much as a four-seat shift in such a very good Democratic year as 1992, they would become unimportant in a more normal election year.

[120] If the relation between votes and registration were that of 1980 (which is unlikely, since Republican voters grew increasingly less loyal and Democrats more loyal during the 1980s), then all the congressional plans of 1991 would imply a Republican congressional landslide of 32-33 of the 52 seats.

[121] Even the most statistically complex attempts to estimate partisan bias in redistricting plans make such arbitrary assumptions, as, for instance, Gelman and King's decision to calculate Bayesian posterior distributions of hypothetical seats-votes curves between the voting percentages of 45% and 55%, or Campagna's decision, using a simpler but parallel model, to set the range at 40% to 60%. See Gelman and King, 1990, 278; Campagna, 1991.

[122] The patterns of other Democratic plans and the MALDEF plan, and their contrast with the other pro-Republican plans are very similar, as are the contrasts for the Assembly plans.

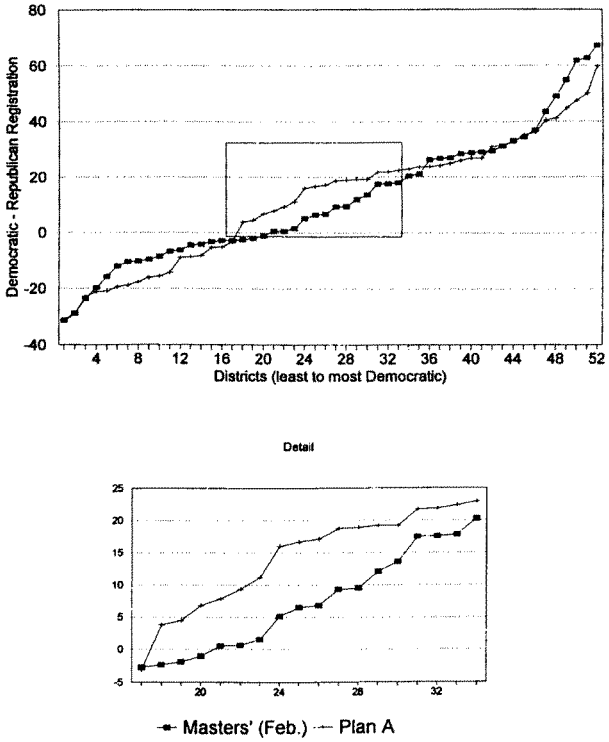

Figure 6. Registration Margins, Congress Masters' Plan vs. Plan A

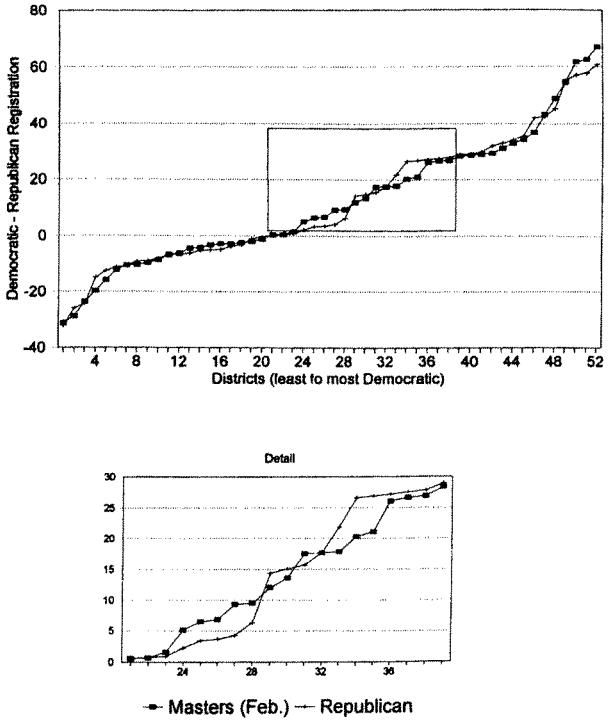

Figure 7. Registration Margins, Congress Masters' vs. Republican Plan

C. Judicial Challenges to the Masters' Plan

The opinion in *Wilson* v. *Eu* by the Republican Chief Justice[123] scornfully dismissed charges by the Assembly Democrats that the Masters' Plan was biased in favor of his party, characterizing their comparison of the districts with the 1990 gubernatorial election returns as "dubious" and a second test based on registration statistics as "of similarly doubtful utility." "Yet predictions of future election contests are quite obviously speculative and imprecise, involving the weighing of countless variables," Chief Justice Lucas declared. Purported attempts by the Masters to comply with the Voting Rights Act and the various amorphous state criteria for redistricting, he asserted without evidence or further argument, would automatically produce plans that were as fair to all concerned as any devised by the legislature—and that is all that was required.[124]

Lucas's argument was disingenuous, false, and illogical. It was disingenuous for the head of a court that had been taken over through an eight-year-long, highly partisan series of expensive election campaigns to dismiss summarily, without offering any reasoning or evidence himself, the plausible attempts by his Democratic foes to gauge the partisan effect of the Masters' plan. When everyone else freely discussed what they agreed were the likely pro-Republican consequences of the Masters' districts, Lucas's pose of innocent ignorance was unconvincing. It is false because, as I show elsewhere (Kousser, 1995a), winners in the Assembly and Congress can usually be predicted about 90% of the time by one who knows only major party registration statistics in each district. If the Justices wished to test the predictive power of party registration on voting, they had only to look in the mirror, because every Republican Justice voted for the Masters' plan and the one Democratic Justice voted against it. Lucas's stance was illogical because the assertion that—allegedly—pursuing goals of ethnic fairness, compactness, etc. would guarantee the attainment of the wholly different goal of partisan fairness is a *non sequitur*.[125] Whatever the criterion of partisan fairness, it must be related only to the partisanship of outcomes. And the much closer resemblance of the registration patterns of the Masters' plans to

[123]Chief Justice Lucas continues to be an active and open partisan. Three years before the 1998 gubernatorial election, Lucas, in an infraction of the State Judicial Code of Conduct, publicly endorsed State Attorney General Dan Lungren, who argued *Wilson* v. *Eu*, and who has often argued major cases before the California Supreme Court, for Governor. Maura Dolan, "Justice Says He's Sorry About Endorsement," *Los Angeles Times*, Aug. 10, 1995, A3.

[124] *Wilson* v. *Eu*, 1 Cal.4th 707, 727 (1992). For similar comments, see *Davis* v. *Bandemer*, 106 S.Ct. 2797, 2825 (1986), (O'Connor, J., concurring.) In contrast to 1973, when McKaskle assessed the partisan consequences of his plan and found it fair, this time he listed a long series of possible complications with such a measurement. In fact, as Kousser, 1995, Tables 1 and 2 show, outcomes were less, not more predictable in the 1970s than in the 1980s. The Report's discussion seems, therefore, less a cautious recognition of complexity than a rationalization of a recognized partisan outcome. *Ibid.*, 795.

[125]In fact, application of many of the popular redistricting criteria are likely to lead to pro-Republican outcomes. See Lowenstein and Steinberg, 1985.

those of the Republicans than to those of the Democrats suggests that the predictable partisan effects of the Masters' schemes tilted toward the party of the majority of the Supreme Court and of the Masters' panel.[126] While it may not be possible to determine the degree of partisanship of any particular plan in an absolute sense, it is demonstrably simple to compare one plan with another. If courts want to be considered more than just another venue for cutthroat reapportionment politics, they should take the effort to assess partisan consequences more seriously than the Deukmejian Court did.[127]

After the U.S. Supreme Court's 1993 decision in *Shaw* v. *Reno* (113 S.Ct. 2816) that "racial gerrymandering" was justiciable, two Richmond, California attorneys, seemingly unconnected to any party or interest group, filed a federal court challenge to the Masters' Plan and to other aspects of the state election code, including, quirkily, the provision that prevents a person from running for more than one congressional seat in the state at the same time. Pointing out that the Masters' Report openly admitted—indeed, emphasized—that the Masters had taken account of the racial characteristics of the population in order to draw districts that would "withstand section 2 [Voting Rights Act] challenges under any foreseeable combination of factual circumstances and legal rulings," and that in Los Angeles County, they started "by tracing a line around census tracts with majority or near majority Latino population," (*Wilson* v. *Eu*, 1 Cal.4th 707, 745, 776 (1992)), the Anglo plaintiffs charged that they and other white people had been discriminated against.[128] Taking race into account at all in districting, they claimed, "segregated" voters in violation of *Brown* v. *Board of Education* (347 U.S. 483 (1954)) and set up racial "quotas," which fell afoul of *University of California Regents* v. *Bakke* (438 U.S. 265 (1978). (Smith and DeWitt, 1995.)

A three-judge panel consisting of one Democrat and two ethnic minority Republicans, in a six-page opinion written by Ninth Circuit Judge Procter Ralph Hug, Jr., a Carter appointee, concluded that the Masters' districts did not

[126]A telltale indication of the partisan bias of the Masters' panel is the treatment of the proposed Republican and Democratic plans in the panel's report. The report dismissed the Democrats' plans for having "calculated partisan political consequences (the details of which are unknown)," while the presentations in favor of the Republican plans were said to be "clear and persuasive." The Masters refused to adopt the Republican plans, they claimed, only because they were flawed in (unspecified) detail and presented late in the process. *Wilson* v. *Eu*, 1 Cal. 4th 707, 765, 768 (1992).

[127]U.S. Supreme Court Justice Byron White noted in *Gaffney* v. *Cummings*, 93 S.Ct. 2321, 2332 (1992) that a "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended." As governor, Deukmejian led the campaigns to reject Burd and the other Democrats, and he appointed a majority of the membership of the court that sat in *Wilson* v. *Eu*.

[128]They also contended that allocating seats on the basis of population, rather than proportionally to registration or to votes actually cast systematically discriminated against Anglos, because minorities registered and voted in smaller proportions. The three-judge panel scornfully dismissed this argument that the effects of past discrimination should justify more, not less, present and future discrimination, and the Supreme Court affirmed this finding without comment. (Smith and DeWitt 1995; *DeWitt* v. *Wilson*, 115 S.Ct. 2637(1995)).

violate "the narrow holding of *Shaw*," because race was not the "sole" criterion used for drawing districts and because the resulting districts did not have "extremely irregular district boundaries." According to Hug, the Masters' Report indicated that they had engaged in "a judicious and proper balancing of the many factors appropriate to redistricting....[W]here race is considered only in applying traditional redistricting principles along with the requirements of the Voting Rights Act,...strict scrutiny is not required. However, if it were required, we conclude that this California redistricting plan has been narrowly tailored to meet a compelling state interest." (*DeWitt* v. *Wilson*, 856 F.Supp. 1409, 1413, 1415 (1994).) The compelling interest was apparently compliance with the Voting Rights Act, and an informal "eyeball" evaluation of compactness was all that the Court felt necessary to satisfy narrow tailoring. On the same day that the U.S. Supreme Court decided *Miller* v. *Johnson*, which held that a districting plan would be subject to strict scrutiny only if race were the "predominant factor motivating the legislature's opinion," disregarding "traditional race-neutral districting principles," it summarily affirmed Hug's decision in *DeWitt*. (115 S.Ct. 2637(1995)). The implication seemed to be that even if race were admittedly the predominant motive for drawing minority opportunity districts, those districts could be sustained if they did not appear too irregular to a judge's glance and if their boundaries did not cross more jurisdictional lines than necessary. This, at least, was the interpretation of the pivotal Supreme Court Justice, Sandra Day O'Connor, on the issue. (*Bush* v. *Vera*, 116 S.Ct. 1941, 1951 (1996))

V. CONCLUSION: POLITICS, COURTS, AND MINORITY VOTING RIGHTS

What lessons should we draw from the reapportionment experiences of the nation's most populous state for three decades? First, constraints matter. Had there been no *Reynolds v. Sims*, and had the passions of reapportionment been as high as they were, it is difficult to imagine that one party or another would have refrained from creating massively overpopulated and underpopulated districts. Given the chance, Republicans might have made Los Angeles county one Senate district, as it had been before 1965, while Democrats might have crammed Orange and San Diego counties and as many affluent suburbs of Los Angeles county into as few districts as they pleased. Depending on which party controlled reapportionment, the lack of an equal population standard might have more gravely disadvantaged Latinos and especially African-Americans, concentrated as they are in major urban areas, than the lack of the Voting Rights Act would have. Nonetheless, without the Voting Rights Act, the ability of Republicans to pack ethnic minorities (as in the 1991 congressional and Assembly plans of the Governor's Commission) and of Democrats to place them in areas that maximized Democratic, but not necessarily minority political power would have been much greater.

Second, history matters. The experience of deadlock and a court-ordered reapportionment drawn by Paul McKaskle in the 1970s, and of the reapportionment decisions of the Bird Court in the 1980s created expectations on both sides of the partisan divide in the 1990s. Speaker Willie Brown believed that McKaskle would be unlikely to create plans that would be as bad for Democrats as those that the Republicans were offering, which reduced his incentive to compromise. Republicans believed that the State Supreme Court had acted in a pro-Democratic fashion in both the 1970s and 1980s, and they were sure that their Court would reverse the sign of partisanship, but retain the intensity in the 1990s, so Gov. Wilson and the state and national Republican leadership never seriously considered compromises with the Democrats. The Republican furor over the "Burton gerrymander" fueled referendum campaign after campaign in the 1980s, fired their special effort to keep the governorship in 1990, and consumed them with a desire for revenge. Republican bitterness over failing to gain control of reapportionment during the 1980s stimulated their successful effort to limit legislative and congressional terms.

Third, the concerns of ethnic groups cannot be separated from partisan politics. The redistricting deal of 1971 unraveled because the Democratic party's effort to elect a third Latino to the Assembly (from a district in which only about 20% of the registered voters were Latino) failed in one of the roughest campaigns that Republicans have ever run in the state. The only reapportionment in three decades in California controlled by the legislature, that of the 1980s, tripled the number of Latino members of Congress and drew numerous districts that increased the influence of minority ethnic groups. All of the pro-Republican plans of 1991, including the Masters' plan, scattered blacks and Latinos, diluting their influence far more than the MALDEF or Democratic plans did. The Republican strategy of bashing minorities for 9 out of every 10 years and then courting some of them during the redistricting year lost its viability as Democrats gradually and somewhat grudgingly agreed to draw districts where African-Americans or Latinos enjoyed good chances to elect candidates of their choice. As the minorities elected became key Democratic leaders, the Republicans abandoned all pretenses of conciliating minorities and consequently, the interests between Democrats and minority constituents became even more strongly positive.

Fourth, having to take account of incumbency in order to pass a plan in a legislature dampens partisanship in redistricting, while being able to write on a much cleaner slate allows partisanship (or any other motive) much freer rein. Like other self-interested individuals, legislative incumbents generally prefer individual safety and certainty to the good of some larger group, such as their political party. Indeed, incumbent self-interest is undoubtedly a much more effective constraint in redistricting run by a legislature than such nebulous concepts as "compactness" or "communities of interest," which can easily be

manipulated to rationalize any plan.[129] Two important implications of this reflection follow: First, reapportionment by commission may allow a more partisan plan to be put into force. While every redistricting commission proposal made during the 1980s recognized this obvious danger by institutionalizing some scheme of partisan balance, the Governor's Commission, appointed by Gov. Wilson alone, and the Special Masters, appointed solely by the State Supreme Court in 1973 and 1991, made only small gestures toward bipartisan control, and, as Tables 3 (page 148) and 6 page 177 and Figure 7 (page 183) demonstrate, all three produced plans that reflected the partisan interests of those who appointed them. Second, when six- and eight-year term limits in the state legislature remove incumbency as a softening factor in reapportionment in the year 2001, partisan advantage is likely to become an even more important motive, and conflict is likely to be even more virulent—difficult as that may be to believe. If one party controls all four of the most relevant political bodies (the Assembly, the Senate, the governorship, and the State Supreme Court) during the redistricting, the "Burton gerrymander" may seem tame by comparison with the plan that will emerge. If control is split, or perhaps even if it is not, the State Supreme Court will be trumps, as in 1991. If a political monopoly by one party seems likely in 1998 or 2000, the other party will presumably seek to pass a commission initiative, and the intellectually unedifying spectacles of the 1980s, which did so much to bring the state government into disrepute, will be revisited.

Fifth, despite extreme claims by some journalists and scholars, redistricters who have to get plans ratified by legislatures have not, in the past, at least, been able to perform partisan miracles. In a 1992 article, Professors James Fay and Kay Lawson assert, without presenting any evidence whatsoever, that in California reapportionment, "Whichever party rules the game can give itself about a three-to-two advantage in the House delegation."[130] Yet as a close analysis of the "Burton gerrymander" has shown, and as other careful scholars have argued more generally, the overall effects of redistricting on the partisan balance have

[129]A good example of rationalization on the basis of a supposed "community of interest" may be found in "Declaration of Joseph Shumate in Support of Defendant Pete Wilson's Opposition to Plaintiffs' Motion for Preliminary Injunction," filed in connection with *Members of the California Democratic Congressional Delegation* v. *Eu* (Case No. 91-3383 FMS Civil, U.S. District Court, Northern District of California), 8-9. Defending the Masters' congressional plan, Wilson's redistricting consultant defends the decrease in the Latino population percentage in District 30 on the grounds that it was necessary to avoid splitting the "Koreatown" section of the city of Los Angeles. There are only three difficulties with this position. First, the Masters' did in fact split the generally recognized bounds of that unincorporated area almost exactly in half. Second, only 13% of the Koreans in Los Angeles county in 1984 were registered to vote. Third, of that 13%, about a fifth did not register with a major party, and many others, perhaps a majority of those remaining, were Republicans. (Nakanishi, 1991.) Since the district was overwhelmingly Democratic, Koreans would be extremely unlikely to compose more than five percent of the decisive Democratic primary electorate—a proportion much lower than the Masters or Shumate attempted to corral in black or Latino influence districts.

[130]Fay and Lawson, 1992, 27. It is not clear what they mean by a "three-to-two" advantage—a higher seats/votes ratio? 60% of the delegation?

been small to nonexistent.[131] Why, then, have such exaggerated tales persisted? One reason, it seems likely, is the inattention and cynicism of the public, which is ready to believe almost anything bad about legislators. Another is the self-interest of all the insiders. Phil Burton and other reapportionment experts basked in their reputations as wizards who put a curse on the evil opposition. Republican losers consoled themselves with the thought that the outcomes were beyond their control, that they and their ideas were not really rejected in a fair contest. Others, by exaggerating the effect of current or past districting schemes, tried to promote "reforms" that they believed would help their party by mandating "compact" and/or "competitive" districts, districts in which (they hope) their superior financial resources will prove decisive, and which will in any event limit the number of seats that the more geographically concentrated Democrats can win. (Atwater, 1990.) Journalists tried to convince themselves and their readers that their stories on arcane subjects really mattered. In sum, the effect of redistricting may be blown out of proportion because participants may want to puff their reputations or justify what they have done or had done to them, while citizens may seek to rationalize their alienation and apathy.

Sixth, term limits have swept experienced ethnic minority politicians, especially Speaker Willie Brown, out of the legislature, No minority politician—and few Anglo politicians—with experience in redistricting is likely to be in the California legislature in 2001, even assuming that the legislature has any real power over that reapportionment. As a result of the term-limit "reform," real power, in this and other legislative activities, will pass to lobbyists and unelected and unknown technicians, with little effective oversight from the transient, unprofessional politicians that term limits guarantee.

Finally, if *Shaw* v. *Reno* and *Bush* v. *Vera* encourage redistricters to exalt esthetics over the social and political reality of continued racial polarization and discrimination, and if *Miller* prevents those interested in redistricting from explicitly talking about its ethnic consequences and encourages challenges from Anglo voters to every minority opportunity district, then the state could easily end up with plans like those of the Governor's Commission, under which the chances for minorities to elect or even to influence the election of candidates of their choice would be drastically reduced. Across the nation in 1991, minority organizations participated in redistricting more than they ever had before, and they had on their side the pressure of the Voting Rights Act, interpreted by the U.S. Department of Justice to require states and localities to offer special justifications for rejecting proposed or possible minority opportunity districts. In California, everyone except the Governor's Commission appeared to accept as a first principle the Ninth Circuit Court's statement in *Garza* v. *Los Angeles County Board of Supervisors* that "The deliberate construction of minority controlled voting districts is exactly what the Voting Rights Act

[131]Glazer *et al.*, 1987; Butler and Cain, 1992, 8-10.

authorizes." (918 F.2d 763, 776 (1990), quoted in *Wilson* v. *Eu*, 1 Cal.4th 707, 717 (1992).) Without the leverage that that interpretation of the law gave them, members of minority groups would have had much less power to force politicians, judges, and bureaucrats to listen to them, and the discussions of minority representation in the news media and in the corridors of power would have been much less open and informative. If courts and Republican politicians insist on a "color blind" reapportionment in 2001, only the public is likely to be kept in the dark, and the resultant plans are likely to insure that the legislators become, in their ethnic characteristics, more like those of the 1950s and '60s than like the multi-hued group elected during the 1990s.

REAPPORTIONMENT STRATEGIES IN THE 1990s: The Case of Georgia

Robert A. Holmes

ONE YEAR AFTER EACH DECENNIAL CENSUS the Georgia General Assembly undertakes the task of redrawing the state legislative and Congressional districts. For most state legislators this may be the most important activity they are involved in during their tenure. This high stakes legislative battle involves decisions which will directly affect their political survival.

The struggle of the Georgia Legislative Black Caucus (GLBC) to carve out three Black Majority Congressional districts and 41 State House and 13 Senate districts in Georgia during the Special Session from August 19 to September 4, 1991, the regular session of the Georgia General Assembly from January 13 to March 31, 1992, and the 1995 special session held after the Supreme Court declared unconstitutional the 11th Congressional District, were among the most intense, combative, and divisive political battles in the history of Georgia state politics. The intensity of the battles caused many white legislators in metro-Atlanta and North Georgia as well as GLBC members to challenge the nation's longest tenured (23 years) House Speaker, Tom Murphy, on two critical actions: 1) the maps which he supported; and 2) the composition of the conference committee, which included three white males from rural South Georgia. Several meetings of the House and Senate conference committees on reapportionment lasted until well past midnight, and charges of "sell-out," "racism," and "political favoritism," and attacks on the personal integrity of legislators involved in the map drawing were pervasive. During the 1991 special session, the GLBC was split into two factions of almost equal size over the feasibility of creating two majority-Black Congressional and one "influence" (approximately 40 percent Black) district versus three majority-Black districts. A similar division was evident over how many "electable" state House and Senate seats it was feasible to create. Both factions went to Washington, D.C. to meet with officials of the U.S.

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Department of Justice. During the last days of the 1992 legislative session the Justice Department had not approved the Georgia House and Senate plans, and the Georgia General Assembly leadership accused it of holding them hostage until the legislature enacted an acceptable three-majority-Black Congressional district plan.

At a meeting attended by 32 of the 35 GLBC members, they voted unanimously to support a three Black majority Congressional district plan. The contrasting positions within the GLBC are reflected in the following statements. First, Representative Michael Thurmond, Chair of the GLRC of Athens, who embraced the two-majority-Black House leadership plan commented: "Two birds in the hand is (sic) better than one possible influence district in the bush." Black Senate Reapportionment Committee Chairman Eugene Walker, said it was impossible to draw three "legitimate" Black Congressional districts. And Representative Calvin Smyre, the first Black to serve as a Governor's Floor Leader (1987-91) and a member of the Georgia State and National Democratic Committees, indicated that at best only a marginal 51 percent district could be created, which would not allow the election of a Black Congressperson, and asked rhetorically: "Are we trying to create districts on paper? Or do we want to get Blacks elected to the districts we draw."

Led by Mary Young-Cummings, Representatives Tyrone Brooks, Cynthia McKinney, and John White, several GLBC members disagreed with the Thurmond/Smyre/Walker position and labeled it a sellout. Representative John White told a group of capitol reporters:

> There are a few of us who don't see eye-to-eye with him (Thurmond) on this question. We believe that we ought to maximize in every way we can. Those Black legislators who are acquiescing will be faced with an angry Black public when that public understands that they're been sold short. We may not win it (the 3rd Black district) in this coming election, but if we don't draw it, we won't ever win it.

A similar debate ensued in 1995 over whether three Congressional Black majority districts could be retained and if state legislative districts should be redrawn to avoid another court suit even though it might result in several existing Black majority districts becoming majority white.

THE GLBC REDISTRICTING/REAPPORTIONMENT STRATEGY

Reapportionment in Georgia in 1991-92 and 1995 was in many ways a repeat of what occurred a decade earlier. (Holmes, 1984). Many of the same strategies and techniques were employed by the Georgia Legislative Black Caucus (GLBC) in it's efforts to maximize the number of majority-Black Congressional and state legislative districts. Black lawmakers attempted to utilize the following techniques:

1. Negotiate with the White legislative leadership in the Georgia General Assembly to increase Black majority districts.
2. Formulate alternative reapportionment plans to be submitted to the House Legislative and Congressional Reapportionment and Senate Reapportionment Committees.
3. Utilize the threats of appealing to the U.S. Department of Justice under Section 5 of the Voting Rights Act (VRA) or filing a suit in the Federal District Court to pressure the legislature to "do the right thing."
4. Form tacit coalitions with Republican legislators to achieve mutually beneficial goals.
5. Develop a multifaceted strategy using three different groups of Black legislators: 1) "Insiders," Black members of the House and Senate Reapportionment Committees; 2) "Outsiders," Black legislators who would develop maximum ("Max Black") majority-Black district plans to be used as leverage to increase the Black districts in the Committee plans; and 3) a GLBC Task Force on Reapportionment which would develop alternative compromise plans.

Four of these major techniques were utilized in 1981, but the fifth was a new development resulting from a conscious effort on the part of the Georgia Legislative Black Caucus to achieve its goals without the lengthy and time consuming effort of having to go through the Justice Department, the federal district court and the U.S. Supreme Court as occurred in 1981.

Shortly after the adjournment of the legislative session in March 1991, the Chairmen of the House and Senate Reapportionment Committees sent out guidelines to the members and announced a schedule of 13 joint public hearings in the 10 Congressional Districts to receive public comments. Upon the advice of Speaker Murphy, the House Chair divided the state into 18 arbitrary multicounty geographical districts which were designated as "work areas" whose legislators were to meet and draw the number of districts specified based on the ideal size of 35,900 population.

The GLBC Executive Committee met to discuss reapportionment issues. A consensus was reached that the Chair of the GLBC should appoint a task force on reapportionment to devise strategies and plans prior to the convening of the anticipated August 1991 special legislative session on reapportionment. It was believed that this development would enhance considerably the ability of Black Georgians to be more effective in the 1991 redistricting political process. A conscious effort was made to appoint legislators who were not members of the General Assembly Reapportionment Committees to the Task Force.

There were two important developments that were different from 1981. Senator Eugene Walker, a three-term Black legislator, was the Chair of the Senate Reapportionment Committee, and Representative Georganna Sinkfield was one of the senior members of the House Legislative and Congressional Reapportionment Committee. These two Black legislators, in their capacities as "insiders," were to lead the push for more Black districts within their committees. Representatives Tyrone Brooks and Cynthia McKinney were the lead "outsiders" who worked with American Civil Liberties Union lawyer, Kathy Wilde, to develop "Max Black Plans" for the Congressional, State Senate and State House districts. They attempted to use census data to develop the highest number of Black majority legislative and Congressional districts that was statistically possible. They designed a Congressional plan that had three majority-Black districts, a House of Representatives plan that had 51 Black majority legislative seats, and a Senate plan that had 15

Black majority senatorial districts. The GLBC Task Force worked to develop alternative plans that would serve as a middle ground between the proposals pushed by the White House and Senate leadership and those plans developed by Brooks/McKinney. GLBC Task Force members from the seven urban areas in the state attempted to work with their white colleagues in the "work areas" to draw their own districts and to create a maximum number of new Black majority districts within their metro area as well as adjacent rural counties.

The GLBC Task Force comprised a cross section of Black legislators throughout Georgia. All 35 incumbent Black legislators were from the major metropolitan areas (Atlanta, Albany, Augusta, Columbus, Macon, and Savannah) in the state, and they were asked to develop a consensus concerning House and Senate plans for their particular areas. Also, the three Black members who served on the House Reapportionment Committee, including Representative McKinney, and one other Black Senator, Sanford Bishop, who served on the Senate Reappointment Committee, from different areas in the state were also asked to develop majority-Black legislative and Congressional districts for the rural areas in close geographic proximity to them. A statewide map was to be drawn which would include the maximum number of majority-Black districts that the GLBC could agree upon. This composite plan would be presented as a statewide alternative plan to the House and Senate committees' recommendations. This three-tiered strategy adopted by the GLBC was one which it was thought would provide the most effective means by which Blacks could ensure that they could have an opportunity to significantly increase the number of majority-Black legislative districts in the 1992 election.

The Caucus Task Force members began meeting in mid-May 1991, and the legislators from the seven metro areas were asked to submit their plans to the chair of the Task Force by July 1, 1991. This was to provide time for the integration of the individual area plans prior to the holding of a general GLBC meeting at a late July 1991 retreat to discuss the Congressional, House, and Senate proposals.

Governor Zell Miller announced in mid-July that he would convene a special session of the Georgia General Assembly on August 19, 1991 to deal with reapportionment, budget reductions, and local legislation.

On July 27-28, 1991, 30 of the 35 members of the GLBC attended a retreat at Lake Lanier Islands, Georgia to focus on and discuss the various redistricting and reapportionment plans proposed by its members. Unfortunately, not all of the metro plans were completed by the deadline and a consensus could not be reached on several of the area plans. Concerning the Congressional proposal, some GLBC members pushed for three majority-Black districts while others supported two majority-Black and a third influence district (about 40 percent Black) because creating a third would involve splitting at least three of the metro core cities (Columbus, Macon, and Savannah) into two separate Congressional districts each. At the end of the retreat, it was agreed that another attempt would be made to meet the next week to finalize the three GLBC plans. At a dinner meeting held on August 4th at Black-owned Pashcal's Hotel in Atlanta, a consensus was reached on several rural districts, but there remained some disagreement in the Augusta area. Still another meeting was called by the Chair of the GLBC, for the evening of August 19, 1991 at Pashcal's' Hotel, the first day of the special session, to discuss the GLBC's House and Senate plans. Concerning these proposals, the GLBC Chair, Representative Michael Thurmond, wrote in a confidential memo to the Black legislators:

> I am proud that these plans, which reflect the collective effort of the Caucus, maximize the voting strength of African-American citizens in the State. The Caucus' plans include the delegation plans from those delegations with Caucus members. Incumbent Caucus members are protected, while maximizing the number of other majority-Black districts, particularly in rural Georgia. We have considered Black populations, voting age population, registered voters, voting patterns, and pools of local elected officials (such as city councilpersons, school board members, and county commissioners).
>
> Many of you worked long and difficult hours to develop these plans. I want to thank those of you who served on the house and senate reapportionment committees...; we owe a special debt of gratitude to the Caucus' reapportionment committee; Representatives Cynthia McKinney and Tyrone Brooks played a major role in the development of the Caucus' plans, often adopting unpopular positions in the best interest of the State's Black citizens.

Thirty-two of the 35 Black legislators attended this session, and after more than two hours of discussion, a consensus was reached that the GLBC would support a 42-majority-Black State House district plan (compared with 29 in the 1981 reapportionment plan); a 13-majority-Black Senate plan (compared with 9 in 1981); and a 3-majority-Black district Congressional plan (compared with 1 in 1981). GLBC Chair Thurmond agreed to contact the Legislative Legal Counsel's office to have the final State House plan drafted so it could be introduced in the General Assembly during the first week of the special session.

Given the varied approaches to drawing the district lines, there were considerable differences in the three plans to be proposed in the Special Session.

TABLE 1. 1992 Special Session.
Comparison of Plans for Redistricting/Reapportionment of Majority-Black Districts

	House	*Senate*	*Congress*
House/Senate Committees/ Plans	35	10	2
GLBC Task Force Plans	42	13	3
Brooks/McKinney "Max Plans"	51	15	3

THE 1991 SPECIAL SESSION

On August 19, 1991 the Special Session of the Georgia General Assembly convened in an attempt to complete the redistricting/reapportionment process begun after the regular session by the House and Senate Reapportionment Committees.

Georgia comes under the provisions of the 1965 Voting Rights Act as amended in 1982 which requires that the legislature avoid diluting Black voting strength and pre-clear all voting changes with the U.S. Department of Justice. Indications were

that Georgia would be held to a strict standard of creating as many majority-Black districts as possible in order to elect the maximum number of Black legislators.

This goal was supported by Republicans, who believed that the more majority-Black districts that are created, the better the chances of electing more Republicans. They believed that the concentration of Black voters into districts drawn to maximize their political strength will have the effect of packing white suburban voters into areas that may be fertile soil for Republican candidates.

Republican optimism was promoted by the population shifts in Georgia between 1980 and 1990. South Georgia, a solidly Democratic area, lost legislative seats while many of the new state House and Senate seats to be created were in metro Atlanta's rapidly growing suburbs which were strongly Republican.

State Legislative Reapportionment

Each house in the General Assembly was responsible for its own redistricting. Both had the responsibility of drawing Congressional districts. The Georgia Legislative Black Caucus (GLBC) proposed a 42-Black-majority district plan for the House and a 13-majority-Black Senate district plan. The compromise plan adopted by the Senate, SB 1 EX, provided for ten districts in which African-Americans make up a majority of the population. This compared with eight such districts that existed. The House approved a plan (HB 8 EX, Hanner 131 and others) which created 35-majority-Black districts. In 1991, 28 members of the House were Black. If Blacks were elected in each majority-Black legislative district, Black representation in the state Senate could be raised to 21 percent and in the state House to 17 percent under the GLBC plans. The Black population in Georgia is 27 percent.

While the GLBC Chairman Thurmond indicated the Caucus would not challenge the results of the House plan, individual Black legislators promised to bring suit in federal district court.

Congress

After the U.S. Census Bureau count of the 1990 population, Georgia gained a seat in Congress, thus increasing its representation from 10 to 11. At the Special Session the Assembly's job was to draw the lines of the new Eleventh District and to redraw all other Congressional district lines to create districts of relatively equal populations (a variance of 1 percent is permitted).

Congressional redistricting was the most controversial aspect of the special session. With regard to Congress, the General Assembly, after days of lobbying by incumbent Congressmen, long and acrimonious conference committee meetings (one ended at 3 a.m.), and intense negotiations, adopted a new Congressional map. The Senate approved the plan SB 2 EX, by a vote of 36-17. The house vote was 107-66. The final vote on September 5 resulted in a splitting of the votes of Black legislators and Republicans. This came several days after an earlier plan on August 31 had been defeated in the House (75 yeas and 86 nays) with much of the opposition coming from Black legislators, Republicans, and lawmakers from Atlanta's suburbs.

The new Congressional map created a second majority-Black district (the Eleventh) in addition to the Fifth District. The new district stretched from South Dekalb County east to Augusta and south to Macon. GLBC member Bob Holmes submitted a map with a third majority-Black Congressional district (57.6%) in South Georgia, but there was no House or Senate leadership support for the proposal.

Speaker Murphy led the move to break up Congressman Newt Gingrich's Sixth district and divided it among four Congressional districts. For example, the Fifth District, currently represented by Representative John Lewis, was given half the Atlanta airport (with the other half in the Third District) along with the home of Republican Minority Whip Gingrich. This raised the possibility of a contest between Representative Gingrich and the incumbent Representative Richard Ray. The home of Fourth District Congressman Ben Jones was put into the new Tenth District. Because members of Congress do not have to live in a district to run in it, Mr. Jones could have run again in a redrawn Fourth District. A significant portion of Representative Newt Gingrich's old district was moved into the Third District. In addition, the new Sixth District, then located in Atlanta's northern suburbs, became strongly Republican. Redistricting in Georgia was to be reviewed by the Justice Department and if it survived this agency's scrutiny, it was certain to be challenged in the courts. Republicans claimed that they had been the victims of partisan gerrymandering in the state to keep Republican gains to a minimum. All three plans appeared to be subject to challenge on the basis of not providing African-Americans with the maximum opportunity to increase Black representation. Several individuals and organizations threatened to bring suit against the reapportionment plans on the grounds that they failed to meet this standard.

During the special session held from August 19 to September 4, 1991, a House redistricting plan was passed which provided for 35 majority-Black districts (three did not have Black majority voting age populations); a Senate plan included 10 such districts; and the adopted Congressional plan had two majority-Black districts. As was noted, several members of the GLBC and leaders of civic/community organizations across the state said they would ask the Justice Department to reject all three plans.

Several Georgia delegations of opponents and proponents of the plans went to Washington, D.C. to meet with Justice Department officials to state their respective positions. On the morning that several Black legislators and more than 30 civil rights leaders from Georgia were to board a bus for their trip to Washington, Representative Tyrone Brooks proved to be clairvoyant when he remarked, "I am more confident today than ever before that Georgia's reapportionment plan is in serious trouble. When we convene in January, we will have to deal with reapportionment again."[1]

THE 1992 SESSION OF THE GENERAL ASSEMBLY

Although the Voting Rights Act of 1965 gives the Justice Department a 60-day review period, this period can be prolonged if additional information is

[1]Charles Walston, "Brooks: Redistricting will be redone" *Atlanta Journal/Constitution*, 2 November 1991.

requested from the state—which is what occurred. The state did not submit the plans and accompanying documents until October 1, almost one month after they were adopted. Rumors abounded as to when Justice would render its decision, but no reply had been received by the day the General Assembly convened for its regular session on January 13, 1992. Legislators became even more anxious because Washington still had not notified the state as the legislature began its traditional recess (one week after convening) to hold budget hearings. As the legislators left the Capitol for their break, Representative Bob Hanner, chairman of the House Reapportionment Committee, remained until he received word that a response would not be forthcoming that week. Expressing his frustrations, Hanner feared the Justice Department would notify the state so late in the session that it would be difficult to redraw the maps before the General Assembly adjourned.

Finally, on Tuesday, January 21, a letter was received by Mark Cohen, Senior Assistant Attorney General for Georgia, from John Dunne, U.S. Assistant Attorney General for Civil Rights. Dunne said the dilution of minority voting strength seemed to be a deliberate policy of the legislature in its drawing of all three plans. He noted that numerous opportunities were available to draw more minority districts and that several alternative proposals submitted by Black legislators had been rejected. It was pointed out also that the state plans were designed "to benefit incumbents and minimize Black voting strength." (Dunne, 1992a) Powerful House and Senate members' districts were drawn first, and this resulted in fragmentation of several concentrations of Black communities throughout Georgia.

Concerning the Congressional Plan, as noted, Speaker Tom Murphy attempted to destroy Republican Congressman Newt Gingrich's district, which then had a ripple effect on the 10 other districts. Also, several parts of the district represented by Georgia's only Black Congressman (John Lewis) were extended into suburban counties such as Clayton, Coweta, and Fayette, which had large white population concentrations. Justice also questioned why minority communities in central Georgia were divided among two districts rather than united in a new majority-Black 11th district. Finally, the GLBC had supported the creation of a majority-Black 2nd Congressional district, but the state plan had created a 39.4 percent "influence district." The Dunne letter said the plan "did not recognize...the Black voting potential of the large concentrations of minorities in Southwest Georgia." Concerning the reapportionment process itself, the Washington officials asserted that it "discouraged alternative plans from being presented and debated," and it "rushed the process in order to manipulate the adoption of plans that minimized minority voting strength overall."

Senator Gene Walker and Representative Bob Hanner, chairs of the legislature's reapportionment committees, expressed disappointment regarding the federal agency's actions and its statement about the racial motivation of the state. Walker lamented, "I'm certain that we operated in good faith. I'm disappointed in the kind

of tone they used. I'm Black, and I'm not a racist." And Hanner stated simply, "It's very disturbing." But Representative Brooks said the legislature was to blame because it ignored the warnings of the GLBC that the plan would not be approved because it failed to protect Black voters' interest. The Reapportionment Committee chairs urged their colleagues to start immediately on the state plans so that they could remedy the deficiencies and avoid a delay in primary elections. Senator Culver Kidd remarked, "It would behoove each and every one of us to try to have something ready to drop in when the legislature reconvenes." Senator Walker concurred, saying, "That's my hope, that we can achieve something like that. But right now, I just want to let the process unfold a little bit and give us an opportunity to reflect on it."[2]

By the middle of the two-week recess, three of Georgia's incumbent Congressmen, Lindsey Thomas, Ed Jenkins, and Doug Barnard, had announced they would not seek reelection. The question arose concerning whether several state legislators who either had announced or were expected to announce their candidacies for Congress should participate in the redistricting process. Reactions were mixed as Senator Don Johnson asked to be removed from the Senate Reapportionment Committee "to avoid any appearance of impropriety." Representative Mike Thurmond said he had not announced his candidacy so he could remain neutral. He remarked, "My responsibility is to help develop a fair plan statewide....I think it creates serious ethical quandaries when you mix personal ambition with public responsibility." On the other hand, Representative Cynthia McKinney said there was no conflict in helping to draw a district from which she might run, commenting, "If I draw a plan that provides for the needs of all Georgians to be fairly represented, and others draw plans that do not, then the people benefit because I was around to draw a plan."[3]

The Senate and House decided to hold public hearings during the recess to get more citizen input. Much of the focus was on Southwest Georgia and the goal was to have a draft plan ready when the legislature reconvened on February 3. However, Representative Brooks warned that if moving with such haste resulted in the adoption of plans that did not protect minority voting interests, then Blacks would again appeal to the Justice Department to object. Black Representative J.E. "Billy" McKinney testified before the Senate Reapportionment Committee that since five of its members were running for Congress, he doubted their ability to be fair or objective. And he told the House committee, "We've spent a whole lot of our money to get your plan rejected. The fight will not end. The fight will go on. This whole fight is about power."[4]

[2]Rhonda Cook and Gary Hendricks, "Black vote was minimized, so redistricting starts again today," Ibid. 22 January 1992 and Mickey Higginbotham, "Lawmakers again face redistricting," *The Times* (Gainesville). 22 January 1992.

[3]"Who should draw state's districts?" *The Valdosta Daily Times*, 24 January 1992.

[4]Rhonda Cook, "Blacks Renew Push for More South Districts," *Atlanta Journal/Constitution*, 29 January 1992.

HOUSE AND SENATE REAPPORTIONMENT

The GLBC made a concerted effort to ensure Black representation in the General Assembly from rural areas of the state. All 35 Black legislators who served during the 1991-92 session were from the six urban centers (Albany, Atlanta, Augusta, Columbus, Macon and Savannah). The last Black legislator from a rural Black Belt county literally was run out of office in 1907! A major road block had been that many committee chairmen and top leaders in the General Assembly were from rural regions. Expressing the urgency of the need to remedy this situation, GLBC chair Thurmond observed, "One of our primary objectives was to seek political empowerment for rural Georgia. I believe we have reached an historic point in this state. It is a victory that we have committed ourselves to doing what is necessary." The proposed House plan seemed to focus on tampering with majorities in the earlier plans rather than creating more Black districts. Representative Brooks expressed the sentiments of the majority of Black members when he said, "The Legislature has simply not gone far enough when it comes to Blacks and poor people, those voices just aren't there." The ten rural counties with the highest percentage of Black populations (Randolph-57.9 percent; Macon-58.7 percent; Calhoun-58.7 percent; Terrell-59.9 percent; Warren-60.2 percent; Clay-60.8 percent; Taliaferro-60.0 percent; Talbot-62.3 percent; Stewart-63.3 percent; and Hancock-79.4 percent) all had white legislators. Black Burke County Commissioner Herman Lodge said, "What people need is to have somebody in government who is going to look out for their interests. I feel we just don't have representation." [5]

The attempt to put the revised state House and Senate plans on a fast track met with a few delays as members sought to fine-tune some of the districts to which the Justice Department had objected. For example, there were efforts to create three additional majority-Black House districts—one combining Burke with Augusta/Richmond County, a second involving Columbus/Muscogee and Chattahoochee Counties, and a third—Dooly, Crisp, Macon, Peach, and Houston counties—the "Heart of Georgia" district. Representative Brooks again warned the House leadership that if they did not address these districts Justice would again reject their plan. The Senate plan only added one more majority-Black district for a total of 11.[6] A decision was made to address the Congressional plan later in the session.

On January 30, the Senate Reapportionment Committee passed a plan creating 12 majority-Black districts. However, two of them had only slim majorities, such as a 50.7 percent district in Southwest Georgia which contained two incumbents. The plan also increased Black majorities in four Black incumbents' districts. Senator Walker said that the General Assembly had effectively addressed the concerns of the Justice Department and that he expected it would approve the maps.

[5]"Rural Georgia had no black vote," *Atlanta Journal/Constitution*, 12 February 1992.

[6]Kenneth Edelstein, "New redistricting lines don't end old grievances," *Columbus Ledger-Enquirer*, February 1992.

However, after Senator Garner and two Black Senators, David Scott and Sanford Bishop, met with a Justice Department attorney for four hours on March 9th, Garner predicted, "The Senate plan's coming back, the House plan's coming back." Representative Brooks asserted that, "Its amazing that these legislators can sit so many days...and still not do the right thing. Obviously, this doesn't meet the letter of the law." And Representative Billy McKinney argued that a 50 percent Black district was simply an "influence district and not one where a Black person could be elected."[7]

The House Committee's revised plan contained 38 majority-Black districts, including three with no incumbents, and it increased the Black percentage in eight districts. The House passed this plan 128-37. The two plans were then submitted to the Justice Department.

Several Black legislators voted against both plans, but the GLBC Chair, Representative Thurmond, held a press conference at which he asserted that the Caucus had endorsed the plan! He said:

> This plan addresses the eight areas of concern when you consider the totality of circumstances. This is not a perfect plan. Some judgment calls were made. We are here convinced that we can do the right thing. We stand ready to defend and advocate on behalf of this plan.[8]

Thurmond and three other Black legislators met on March 11 with Justice officials and attempted to convince them that creating three additional marginal Black districts would not result in more Blacks being elected in middle Georgia, east central Georgia and Columbus. Senator Majority Leader Wayne Garner was more blunt in his view of federal officials, "We deal in practicality. They deal in theory. It's hard to bring those two together." His point was that drawing more Black districts based on population alone does not help to elect more Blacks because other factors such as low voter registration, low turnout, and lack of political awareness need to be considered. However, Representative Brooks said he would ask the Justice Department to object to the plans. Two Cobb County Republican activists filed a suit in federal district court in Atlanta in which they asked the court to redistrict the state if the legislature did not get all three plans approved by March 13.[9]

CONGRESSIONAL REDISTRICTING

Redrawing the Congressional lines proved to be an even more difficult task. The most divisive issue was over the creation of a third majority-Black district in Southwest Georgia, the 2nd Congressional District of Congressman Charles Hatcher. The legislative leadership had agreed to a configuration of a second majority-Black 11th district which stretched from South Dekalb east to (Augusta) Richmond

[7]Rhonda Cook, "Blacks attack Senate panel's redistricting plan," *Atlanta Journal/Constitution*, 31 January 1992.

[8]Cited in M. Elizabeth Neal, "Lawmakers approve revised map with more black districts," *Marietta Daily Journal*, 1 February 1992.

[9]Rhonda Cook, "Feds urged to set redistricting deadline," *Atlanta Journal/Constitution*, 13 February 1992.

County and south to (Macon) Bibb County. The only way to create a third majority-Black district was to include parts of Columbus and Macon along with Albany and the Black Belt rural counties. The House and Senate passed different plans, and hoped that a conference committee could reconcile them. The House plan passed 116-49 and simply increased the 2nd district by only two percentage points. The Senate made more substantive charges in its plan, which passed 35-17. Its plan pushed the 11th district into Savannah and created a majority-Black 2nd district by including parts of Albany, Columbus, Macon and Valdosta.

Speaker Murphy angered some GLBC members as well as North Georgia legislators by appointing three rural South Georgia legislators to the conference committee, including a second-term legislator (Representative Sonny Dixon) instead of a five-term Black Atlanta legislator, Representative Georganna Sinkfield. After almost two weeks of negotiations, the Senate conferees backed away from their insistence on a third majority-Black district and supported a 49 percent 2nd district. The conference committee report was adopted on February 26 by the House 102-54 and in the Senate 37-13. Under this plan Savannah would remain in the 2nd district. Lt. Governor Pierre Howard said,

> The Senate was never anxious to go to Chatham with the 11th District to begin with. We were just trying to do what the Justice Department was requiring. What we seem to be getting from the Justice Department is that the 11th District going all the way to Savannah can disadvantage a minority candidate.[10]

Howard was alluding to the assertion that the cost of running in three major metro media markets (Atlanta, Augusta, and Savannah) would make it very difficult for a Black candidate to win. Representative Thurmond again embraced the adopted plan, commenting, "Two birds in the hand is (sic) better than one possible influence district in the bush." Other Black legislators said that at best only a 51 percent Black district could be created, which would not allow the election of a Black Congressman. This argument was similar to the position taken by Senator. Walker during the special session when he said, "We looked seriously at the possibility of drawing three legitimate Black districts. [But] we couldn't do it and legitimately draw the other eight, too." This was a rather strange argument in view of the fact that three different GLBC members had drafted and submitted plans with a third district having 58.2 percent (Brooks and McKinney), 57.6 percent (Holmes) and 53.4 percent (Bishop) majority-Black populations. Therefore, other Black legislators disagreed with the Thurmond/Walker position. Representative McKinney said the districts needed to have as high a Black percentage as possible to get Black representation. And Representative Brooks called the three media market issue raised by Lt. Governor Howard, "nonsense," "poppycock," and "irrelevant" to reapportionment.[11]

The Senate conferees expressed optimism that the plan would be approved by

[10]Sonja Ross, "Idea of 3rd black seat loses steam in capitol," *Gwinnett Daily News*, 27 February 1992.

[11]Rhonda Cook, "Waiting starts for Feds' view of new districts," *Atlanta Journal/Constitution*, 28 February 1992.

Justice. Senator Wayne Garner, the majority leader and one of the Senate conferees, said, "I don't think Justice is going to take the full 60 days...and I think they'll approve it." Representative Sonny Dixon, one of the House conference committee members, said, "From all indications, we have met the Justice Department objections. I believe we have exhausted every opportunity to maximize minority voting strength." Senator Bishop seemed resigned to acceptance of the revised plan by Justice officials, saying, "It is a plan the state of Georgia can defend. It does not unduly dilute minority voting strength." However, Representative Brooks said, "This plan is worse than the plan that went to Washington last September." He surmised that "the plan will be right back here in our laps in a few days." Warning against taking the issue to the courts as was done in 1981, Brooks asserted, "the taxes of this state will be used to defend a hopeless case." Concern was expressed regarding whether a decision would be made prior to the April 27 qualifying date for the Democratic primary election. Senator Walker noted that Justice was aware of the election dates and suggested it would act in good faith by rendering a decision in a timely manner.[12]

As happened in 1991, different groups of Black legislators met with Justice officials to support the plan. And other groups, such as the Concerned Black Clergy, urged Justice to again reject all three plans. Senator Garner returned to Atlanta after a four-hour meeting in Washington and surmised that the plan would be rejected; "I believe we'll have it back by the end of the week." Representative Calvin Smyre and three other Black legislators asked Justice not to require the changes in Muscogee County which could create three rather than two majority-Black State House seats! Justice officials also suggested that two additional Black majority districts could have been drawn in Southwest and middle Georgia and others could have been strengthened by having a higher Black percentage. Representative Smyre said the two incumbent Black state legislators would be put at risk by the attempt to create a third seat in Columbus, and asked, "Are we trying to create districts on paper? Or do we want to get blacks elected to the districts we draw?" On the other hand Representative White asserted, "Those Black legislators who are acquiescing will be faced with an angry Black public when that public understands that they've been sold short." He added, "We may not win it in this coming election, but if we don't draw it, we won't ever win it."[13]

Members of the Concerned Black Clergy (CBC) criticized the three plans passed by the legislature and sent a delegation to Washington to express their opposition to them. Dr. Joseph Lowery, President of the Southern Christian Leadership Conference, along with Reverend Bernie Mitchell of Savannah and Lonnie Miley, a City Councilman from Macon, met with Assistant Attorney General John Dunne. They focused on the Congressional Plan. In a March 17 letter to Dunne, Lowery

[12]Charles W. Walston, "Senate remapping plan faces pessimism," *Atlanta Journal/Constitution*, March 12 1992.

[13]Ken Edelstein, "Assembly's mood pessimistic on redistricting plans." *Columbus Ledger-Enquirer*, 12 March 1992.

noted that the legislature had rejected four plans with 3 majority-Black districts. He charged that the adopted plan "does not fairly and equitable represent the 30 percent Black population of Georgia." Representative Cynthia McKinney said, "The community leaders know who's supporting them and who's supporting the (State) leadership." Representative Thurmond then indicated he had supported the three Congressional Districts plan in discussions with federal officials.[14]

The week after returning to Georgia, Thurmond held a joint press conference at the Capitol with the Concerned Black Clergy, whose president said, "The organization is perplexed by the fact that some members of the Black Caucus would go to the Justice Department to plead on behalf of the state's plan." To which Representative Thurmond responded that the Caucus supports three Congressional districts, but "there is some disagreement how they should be configured."[15]

On March 20, 1992, Dunne informed the state of his decision. In the letter, he said that while the state had remedied several of the objections noted in the January 21 letter, the "Heart of Georgia" district continued to "fragment and submerge significant Black population concentrations" by splitting Black voters in Houston County into three majority white districts. Dunne also objected to fragmentation in Southwest Georgia "to insure the reelection of white incumbents," the failure to create a third Black majority district in Muscogee/Chattahoochee, and the inclusion of part of Columbia County in Augusta/Richmond to maintain a majority white (4-3) delegation. Similar objections to giving priority to protecting incumbents over Black interests were raised about the configuration of several Senate districts in the Atlanta metro area which Dunne alleged "minimized Black voting potential." Also, it was pointed out that three districts with majority-Black voting age populations could have been created in the central and southwest parts of the state. Finally, he noted that the legislative leaders apparently had decided to create only two voting age Black Congressional districts. He said the Senate had attempted to draw a third district by including parts of Chatham in the 11th. Dunne said the state had split counties and cities in other areas of the state, but refused to do so in the 2nd Congressional district, thereby diminishing the effectiveness of the minority electorate.(Dunne, 1992b)

Of course, reactions of Georgia lawmakers were mixed. A House conferee, Representative Sonny Dixon, lamented, "I couldn't be more disappointed. I feel like I've been punched in the stomach. The question is, can we pass a plan that goes as far as we are being pushed?" Representative Hanner complained, "I'm very disappointed with what came back. I'm very surprised." On the other hand, Representative Cynthia McKinney was "ecstatic" and called the Justice Department action "a landmark decision." Lt. Governor Howard said Dunne made clear what needed to be done and urged the General Assembly "to act with dispatch" to remedy the

[14]Sharyn Wizda, "SCLC President meets with Justice official," *Gwinnett Daily News*, 19 March 1992 and "Feds reviewing redistricting plans, "*Rome News-Tribune*, 13 March 1992.

[15]Charles Walston, "Black caucus leader joins call to revise district plan," *Atlanta Journal/Constitution*, 10 March 1992.

problems so the courts will not step in and draw the districts."[16] The need to move quickly was obvious because there were only five working days left in the forty day 1992 legislative session.

As legislators headed home for what they had hoped would be the last weekend of the session, the legislative staff and two committees went back to the drawing board. A March 21, 1992 *Atlanta Constitution* editorial criticized the legislature's approach as doing as "little as possible to see how much they could get away with." It urged the General Assembly to address the Justice Department's objections as quickly as possible.

During the weekend, the House and Senate Committee hammered out plans for the Senate, House and Congress. Both chambers worked late into the night. Close to midnight on the 37th day of the session, the Senate voted to create three additional majority-Black Senate districts. The new 11th district was over 200 miles long and C-shaped, with a 54 percent Black population. Senators from the area called it "an abomination." They added part of Dekalb County with Clayton to increase the Black VAP to 63 percent in one district and enhanced the 55th district to 60 percent by reducing the Black percentage in the 43rd District, whose incumbent was Senator Walker. This adopted plan had 13 majority-Black districts. The House also added three new Black majority VAP districts, one of which was that of the Majority Leader, Representative Larry Walker. The legislative leader remarked, "I'm going to have a 59 percent [Black] district. But I am displeased with the process, with the fact that, apparently an American Civil Liberties Union lawyer can sit here in Atlanta and tell us if this plan is going to be approved."[17] The two plans were submitted to the Justice Department, but several weeks went by without any response from the federal agency.

There were rumors that Justice was holding the revised House and Senate plans hostage until the legislature enacted an acceptable three majority-Black district Congressional plan. The official word out of Washington was that a computer malfunction was the reason that a reply had not been given on the two plans. To which Senate Majority Leader Garner said, "I suspect that if one of these Congressional maps is agreed to, it would start the computer up." Representative Hanner feared that it would be very difficult to pass a plan because of the opposition from white legislators in Columbus, Macon, Savannah, some northern counties as well as several southern counties. On March 26 the committee presented the new map, and its members criticized the Justice Department for coercing them into drawing "bizarrely shaped districts." Representative Dixon remarked, "To exploit the Voting Rights Act, to mandate gerrymandering, rendering asunder these regions for negligible differences in the numbers, is an absolutely baffling mystery to me."[18] On Sunday, March 30 the Justice Depart-

[16]James Salzer, "Redistricting Map Booted Back to State," *Athens Daily News/Athens Banner*, 21 March 1992.

[17]Charles Walston and Steve Harvey, "Districting plan no. 3 approved," *The Atlanta Journal/Constitution*, 25 March 1992.

ment again rejected the House district plan, and now there were only two working days left in the session. Representative Thurmond said, "I think the Justice Department needs to butt out of our legislative business. I don't think Congress intended for the (Voting Rights) Act to be administered in such a petty, vindictive and partisan way." Once again, the Justice Department called for another Black majority district in the Columbus area. It said the House plan "packed" the two majority-Black districts to protect a white incumbent. This change was made and sent back to Washington along with a major increase in the Black percentage in Senator Eugene Walker's district.[19]

On the last day of the session, the House passed a Congressional plan by a single vote with Speaker Murphy having to cast a vote to make the required 91 needed for a constitutional majority. The Senate also approved the plan. The plan contained three majority-Black Congressional districts with percentages of 56.52 (2nd), 62.27 (5th), and 64.07 (11th). Before the vote, several speakers asked members to reject the plan. One notable speech was given by House Majority Whip Denmark Groover, who said: "The time has come when you and I...must show some steel in our backbone. I'm not prepared to vote for a plan which jerks the heart out of the county in which I live. I am not prepared to vote for a plan in which, for the third time, we have made concessions that has (sic) emasculated areas of community interest." Representative Brooks also spoke against the plan, saying a larger Black percentage could have been drawn in the new 2nd district and noted there was still some fragmentation which dilutes the Black vote. He promised to ask Justice to object to the plan so the legislature could draw a better one in a second special session. However, ACLU attorney Kathy Wilde said she felt the plan would be approved by Justice, saying, "I don't think its the best plan, but I think it's a decent plan."[20]

Finally, on April 2, 1992, the Justice Department approved the House, Senate and Congressional Plans. Brooks said, "We got 98 percent of what we were fighting for." The final maps contained 41 House, 13 Senate and 3 Congressional Black majority districts. The two committee chairs breathed sighs of relief, but expressed regrets at the outcome. Hanner said, "I'm not happy at all with what we had to do to the state to get it approved." Commenting on the elongated rural districts in south Georgia, such as the 130-mile-long, 58.8 percent Black 158th district, he said, "I believe it actually hurts the Blacks in those areas when you just reach in and get a finger to maximize Black voting strength." And Senator Walker said, "It caused some serious political pain for me and a host of my colleagues."[21] The only good thing that most legislators could say about the reapportionment/redistricting process is: Thank God it only happens once a decade!

[18]James Salzer, "Congressional districts take bizarre turns in new plan" *Athens Daily News/Athens Banner*, 27 March 1992.

[19]Steve Harvey, "House districts rejected again," *Atlanta Journal/Constitution*, 30 March 1992.

[20]Steve Harvey, "House districts rejected again," *Atlanta Journal/Constitution*, 30 March 1992.

[21]David Savage, "The redistricting triangle," *State Legislature* (September 1995): 20-24.

REFLECTIONS ON THE 1991-92 SESSION

The decennial struggle over redrawing state lines is perhaps the most difficult activity in which any legislator becomes involved during their tenure. It is a struggle for political survival which necessarily makes political enemies out of neighbors since everyone seeks to maximize his or her own position. The Black legislators had a powerful ally in the U.S. Department of Justice, which enabled them to leverage their position and achieve most of their goals. As a result of reapportionment, the makeup of the 1993-94 legislature seemed destined to change from the 1991-92 body. It would most likely become more suburban, more urban, more Black, more female and more Republican. Also, with four of the ten incumbent Congressmen not running for reelection and the open 11th Congressional district, 18 members of the House and Senate offered their candidacies. Thus the Georgia Congressional delegation will likely have many new faces.

The GLBC's three-tiered strategy had worked to perfection up until the last 10 days of the 1991 special legislative session, at which time it appears that the personal agenda's of some caucus members took priority over the interests of Black Georgians. Three incidents illustrate this point. First, the Chair of the GLBC "forgot" to get the Legislative Counsel to draw up an actual bill incorporating the Caucus's 42 House district Black-majority plan. Consequently, a floor substitute bill had to be offered. Since the main bill was adopted, there was never a vote taken on the substitute because it was now out of order. Second, after Justice objected to the legislature's 35 Black district plan, and the General Assembly subsequently sent up a 38 Black-majority district plan, the Chair and five other Caucus members flew up to Washington, D.C. to meet with Justice Department officials to express their support of the legislative leadership's plan. Third, there were reports that the Caucus Chair and a few other Black legislators actively lobbied against the creation of a three Black Congressional district plan in conference committee and with the Lt. Governor. And Senator Walker strongly backed the 11-majority-Black district Senate plan.

The General Assembly leadership continued to adamantly oppose the creation of a third viable Black Congressional district up until March 31, the very last day of the regular 1992 legislative session. In his objection letter of March 20, 1992, Assistant Attorney General John Dunne once again objected to all three redistricting plans because in each case he said there were no logical reasons why the state had not adopted any of the alternative plans that had been presented which would have eliminated the fragmentation of certain Black areas in the adopted Senate and House plans. One week before adjournment, the legislature adopted a 41-Black-majority district House plan and a 13-Black-majority district Senate plan. Dunne noted that the Georgia legislative leadership had attempted to limit Black voting potential to two Congressional districts, and had refused to seriously consider various alternative plans which would not have diminished Black potential voting strength in a Southwest district, including parts of Albany, Columbus and Macon with their heavy concentrations of Blacks. Approximately one hour before adjournment on the last night of the session, the General Assembly adopted a Congres-

sional plan with a 56.7 percent Black majority Southwest Georgia district, but only after the House Speaker cast his vote to provide the one vote margin of victory! The Justice Department approved all three plans the following week.

It seems clear that the 1991-92 strategy of the Georgia Legislative Black Caucus yielded more effective results than the 1981 round of reapportionment. The three tiered strategy proved to be a most productive innovation, but there were some problems because as the Caucus did not maintain its unity until the end. In fact, the majority of its members actually voted to support the two-majority-Black District Congressional Plan to which Justice objected. While the Chairman had expressed support for three majority-Black Districts during the Special Session, he, in fact, went to Washington. D.C. to speak in favor of the House committee's two-majority-Black district plan that passed the General Assembly, as did Representative Georganna Sinkfield, the senior Black member of the House Reapportionment Committee. A majority of the GLBC did not oppose the final version of the penultimate plan adopted by the General Assembly. In fact, only one Black Senator voted against the conference committee report on February 27, 1992 which included a 49.15 percent Black 2nd Congressional district while five (5) had voted for it and 3 did not vote! On the same conference report, 10 Black House members opposed it, 8 voted for it and 8 did not vote! However, 14 GLBC members and a host of Black organizations, such as the NAACP, and the SCLC, the Concerned Black Clergy, wrote letters, called and traveled to Washington, D.C. to voice their objections. They prevailed and Justice forced the white state leaders to approve a viable third Black majority Congressional district on the final day of the legislative session.

It seems clear that the members of the GLBC gained valuable experience from the reapportionment political process in 1981 and did, in fact, learn some important lessons and attempted to apply those lessons to the 1991-92 process. The final outcome of their legislative efforts to draw the maximum number of majority-Black seats was greatly facilitated by the new strategy. While there were new opportunities created to elect more minorities to legislative seats, it also seemed clear that the results of the GLBC strategy would not be immediately realized in the 1992 elections. This was likely to be the case for two reasons. First, many of the newly created Black majority legislative districts had powerful white incumbents, such as House Majority Leader Larry Walker, chairman of the House Agriculture Committee Henry Reeves, a 26-year veteran, Bob Hanna, Chair of the House Reapportionment Committee, Jimmy Lord, Chair of the Insurance Committee, and other close allies of Speaker Tom Murphy. Second, the lines were drawn extremely late, less than four months prior to primary election day which left inadequate time for candidates to organize, register and mobilize the Black electorate in rural areas. Concerning this situation, GLBC Chair Representative Michael Thurmond made a very sage remark which warrants repeating here: "This is not the final evaluation of reapportionment. It takes at least two elections until you see results."

THE AFTERMATH OF THE 1992 REDISTRICTING PROCESS

In the 1992 General Assembly elections, Blacks increased their representation

from 28 to 31 in the House and from 6 to 9 in the Senate while the GOP more than doubled its membership in the House from 25 to 52. Blacks increased their numbers in the Congressional delegation from one to three and Republicans went from one to four Congressmen. Blacks gained one additional seat each in the 1994 election to raise their numbers to 32 in the House and grew to 10 in the Senate. The GOP gained 15 additional House seats for a total of 67, increased their numbers to 21 in the Senate and to 8 in the U.S. House of Representatives.

In the 1992 Congressional elections, State Representative Cynthia McKinney won a hard fought Democratic primary election for the newly created Eleventh Congressional seat. Among the opponents she defeated were State Senator Eugene Walker, Chair of the Senate Reapportionment Committee, and Representative Michael Thurmond, Chair of the GLBC. In the primary runoff, her challenger was white Democrat Charles DeLoach. McKinney won the election and became the first Black woman to be elected to Congress from Georgia. Also, Black Senator Sanford Bishop defeated incumbent Congressman Charles Hatcher in the 2nd Congressional District, and 5th District Congressman John Lewis easily won reelection. Blacks won three of the 11 contested Congressional seats, Republicans were victorious in seven districts, as was one white Democrat (he changed to the Republican party after the 1994 election).

Miller v. Johnson

Five persons from the 11th District, including defeated candidate George DeLoach, filed a suit in the United States District Court for the Southern District of Georgia stating that racial gerrymandering was used to create the district in violation of the Equal Protection Clause (14th Amendment), which prohibits race biased decision-making. The contention of the plaintiffs was that the configuration of the district was based exclusively on racial considerations. A 1982 amendment to the VRA sought to help minorities "to elect representatives of their choice" and the Supreme Court in *Thornburg v. Gingles* (1986) prohibited state legislatures from diluting minority voting strength. After the 1990 census, the U.S. Justice Department decided to prod Southern states to draw the maximum number of majority minority legislative districts. Critics of this thrust called it "racial gerrymandering."

In 1993, the Supreme Court addressed this issue in *Shaw v. Reno*, but did not issue a clear ruling. However, two years later on June 26, 1995 in *Miller v. Johnson*, the court clarified its position concerning whether the bizarre shape or racial rationale was a key factor in determining the constitutionality of a redistricting plan. Asserting that race neutral principles, such as compactness, communities of shared interest, and respect for political subdivisions were factors to be considered, the Court declared in a 5-4 decision that if race were the predominant factor, then this was impermissible and the plan was unconstitutional. (*Miller v. Johnson* 115 S Ct 2475 (1995))

More specifically, the Southern District Court of Georgia declared unconstitutional the 11th Congressional District because the Georgia General Assembly had

used race as the predominant factor in drawing the districts. The state agreed, arguing that the Justice department refused to preclear two earlier plans with two majority-Black districts. Speaker Thomas Murphy and Lt. Governor Pierre Howard made no effort to defend the plan adopted by the Georgia legislature and they were critical of it in their court testimony. The District Court said the VRA did not require race based districting nor the maximization of Black representation. It said race cannot be used as the leading factor in policy making and that the Justice Department had exceeded its authority in forcing states to create as many majority-Black Districts as possible. (Savage, 1995)

Justice Kennedy, writing for the five-member majority of the U.S. Supreme Court, said there was no rational explanation except separating voters on the basis of race that explained the bizarre geographic configuration of the Eleventh Congressional district. He noted that the redistricting was not based on either a compelling state interest to eradicate the effects of past discrimination or traditional principles, such as communities of interest. The majority opinion noted the involvement of the Justice Department in demanding race based revisions of plans submitted by the General Assembly and the findings of the U.S. District Court for the Southern District of Georgia which ruled 2-1 that the Eleventh District was racially gerrymandered and violated the Equal Protection Clause. The defendants stipulated that race was the overriding factor and the evidence was overwhelming that this was the Georgia General Assembly's intent. Kennedy said the District Court had applied the correct analysis in concluding that Georgia was responding to Justice Department's pressure to create three majority-Black districts. Attorney General Mike Bowers' written objections to these demands were cited in which he claimed that the state's efforts to meet the Justice Department's demand would "violate all reasonable standards of compactness and contiguity."

Finally, Speaker Tom Murphy and Lt. Governor Pierre Howard testified that the legislature did not create the Eleventh District to remedy past discrimination, but only to satisfy Justice's preclearance demands of a "Black maximization policy." The federal agency has interpreted Section 2 of the Voting Rights Act (VRA) to mean that whenever possible, the state must draw a majority-Black district. Finally, Associate Justice Kennedy said the VRA purpose was to stop official efforts to abridge or dilute minority voting rights and eradicate discrimination in the electoral process. He said the Justice Department's "shortsighted and unauthorized" application of the VRA would continue racial stereotyping prohibited by the 14th amendment. Thus, the Supreme Court affirmed the District court's decision and remanded the case for further proceedings.

The four dissenting Justices led by Justice Stevens asserted that the court had misapplied the term gerrymander because the white plaintiffs were not legally injured and, therefore, had no cause of action or standing under the Shaw decision. Stevens wrote that the issue was the exact opposite of the earlier cases which had frustrated African-Americans from participating in the political process because the Georgia districting plan sought to improve diversity by increasing the likelihood of

Black representation. Traditional gerrymandering had sought to maintain the dominant white group's power and not share it with an underrepresented group and thus violated the Equal Protection Clause. He said a plan which favors the politically weak does not violate the equal protection provision and a state is permitted to adopt such policies to promote fair representation for different groups.

Justice Ginsburg said legislative districting was a political business which should be left to the state legislatures except where intervention was necessary to prevent dilution of minority voting strength. She accused the court of adopting a new unwarranted standard. Because of past practices of exclusion of Blacks from the political process, state legislatures must sometime consider race as a factor relevant to drawing of district lines and concentrate members of the group in one district for legitimate purposes. She also reiterated that reapportionment is primarily the duty and responsibility of the state legislatures, not the federal courts. The courts should intervene only in exceptional situations to secure equal voting rights denied by states such as Georgia. It was also noted that significant consideration was given to traditional districting factors and the political process of compromises and trades. The dissenters asserted that the geographical configurations were not any more irregular than the 1980s reapportionment districts and that the adopted plan had respected boundaries of the majority of political subdivisions. In fact, the percentage of intact counties was greater in the 11th district than the average of seven other Congressional districts. Traditional districting principles, such as compactness, contiguity, and respect for political subdivisions were said to be objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines, but the majority's decision ended this situation. She observed that a plethora of litigation will be required under the Miller standard and will involve the federal judiciary's involvement to an unwarranted extent. She argued that the court should have supported the plan that resulted from Georgia's political process.

The Aftermath of the *Miller v. Johnson* Decision

The Supreme Court's decision on June 26, 1995 to sustain the federal district court's ruling sent political shock waves through Georgia and Southern politics. ACLU attorney Laughlin McDonald said "I really fear this court is sending us back to the dark days of the 19th century." Black Georgia leaders said the decision was an attack on Black political gains and would lead to suits challenging Black majority districts at all levels of government. Many pundits said Republicans would be losers and the winners would be mostly white Democrats.[22] The court ruling placed hundreds of Black legislators, county commissioners, city councilmen, and school board members at risk. Black elected officials and community leaders as well as Georgia's eight-member Republican Congressional delegation expressed concern that the Georgia General Assembly would wipe out two of the majority-Black Congressional districts as well as reverse GOP gains of 1994 and increase the number of white Democratic Congresspersons.

[22] "Will Democrats get back on map?" *Atlanta Journal/Constitution*, 30 June 1995.

After meeting with Speaker Thomas B. Murphy and Lt. Governor Pierre Howard and some members of the House and Senate Democratic leadership (only one of the 10 legislators present was Black), Governor Miller issued a call for a special legislative session to convene on August 14, 1995. He listed four items that could be considered: 1) Congressional redistricting; 2) House and Senate reapportionment; 3) Driving Under the Influence (DUI) legislation; and 4) bills affecting local political jurisdictions. (Miller 1995) The consideration of General Assembly seats came as a surprise since there was no court ruling/mandate nor had a suit been filed in federal district court concerning the issue. However, A. Lee Parks, the attorney for the plaintiffs in *Miller v. Johnson* had threatened to file a suit against 17 House and 5 Senate districts alleging that the legislature had drawn racially gerrymandered districts relying on the predominance of race in drawing legislative district boundaries.

A confidential memorandum written by Parks' law partner, Larry Chesin, noted that there are "several instances of racial gerrymandering...that are fairly blatant," but ironically white Democrats won several of these seats. He cautioned that state legislative districts have a different meaning, that the many irregularly configured districts makes disregard of "traditional districting principles more difficult to establish." Chesin further noted that since smaller areas are involved in state legislative districts, it would be easier to establish communities of interest.[23]

Speculation was rampant concerning the possible growing fissure between white and Black Democratic legislators, prospects for a Black-GOP coalition to maintain three African-American majority-Black and the eight Republican Congressional Districts, (the 66 GOP and 32 Black members in the House and 21 Republicans and 10 Black Senators constituted majorities in both chambers of the legislature). There was considerable debate on the subject of why General Assembly districts were included in the Governor's call, scenarios regarding the types of maps that would be drawn, implications regarding the impact of the General Assembly's actions on other challenges to majority-Black District cases in Florida, Louisiana, North Carolina, and Texas, and finally, whether redistricting would be done by the federal court itself or the state legislature. There was uncertainty regarding whether the Georgia legislature would redraw only the 11th Congressional district and readjust the adjacent 1st, 4th and 10th districts or redraw the entire state's Congressional and state legislative districts.

There was considerable conjecture regarding several white Democratic lawmakers. Some were contemplating a switch to the GOP and would have to make a critical decision whether to vote with or against the Republican position on Congressional redistricting, and other white Democrats not contemplating jumping to the other party would be challenged to work closely with their Black Democratic colleagues. He noted that the likely challenge to state legislative districts based on the principle set forth in *Miller v. Johnson* would be a significant factor in General

[23]Memorandum from Larry Chesin to Lee Parks regarding Georgia House and Senate districts, July 21, 1995.

Assembly members' actions on Congressional redistricting as "any double crosses, deals or allies established" might alienate Black Democrats. Congressperson Cynthia McKinney said she would fight to keep her district intact while GOP member John Linder surmised that he might have to move to get reelected.[24]

The GLBC had scheduled a strategic planning retreat at Lake Lanier Island in mid-July 1995, and its leadership decided to add the reapportionment issue to the agenda. Prior to the session, the GLBC Chairperson, Senator Diane Harvey Johnson, had appointed a task force on redistricting to devise a Congressional plan, to negotiate with the General Assembly leadership, to monitor the work of the Senate and House Reapportionment committees, and to regularly report to and dialog with the full caucus on such matters. Civil Rights organizations led by the SCLC and NAACP along with a Black ministers group (Concerned Black Clergy) said the Democratic party should stop making Blacks the culprits for their losses of Congressional seats and warned them about reducing the number of Black majority districts and representation.[25] They and Black lawmakers were concerned that the General Assembly leadership would destroy the Black majority districts by dispersing Black loyal Democratic voters among several districts, thus enhancing the electoral prospects of white Democrats.

The GLBC emerged from its retreat exposing the slogan "3 Seats, No Retreat" and its chair presented to the House and Senate legislative reapportionment committees the plan delineated in Table 2, which embodied this concept. The plan made changes in the three majority-Black districts and reduced the Black percentages from 56.62 to 54.45 (2nd), 62.27 to 56.70 (5th) and 64.04 to 56.56 (11th).

TABLE 2. Georgia Congressional Districts:
Plan Presented by the Georgia Legislative Black Caucus
1995 Special Session

District	*White*	*%White*	*Black*	*%Black*	*Total VAP*	*White VAP*	*%White VAP*	*Black VAP*	*%Black VAP*
1	398607	67.74	179805	30.56	426375	301018	70.60	118451	27.78
2	259587	44.11	320418	54.45	414393	200257	48.33	208194	50.24
3	455817	77.39	124222	21.09	431175	341617	79.23	83421	19.35
4	509790	86.38	51161	8.67	450110	392142	87.12	37193	8.26
5	240478	40.84	333895	56.70	447848	203393	45.42	233875	52.22
6	526103	89.34	45908	7.80	440796	396858	90.03	32183	7.30
7	506077	85.96	76946	13.07	427992	372984	87.15	51123	11.94
8	435636	73.98	146096	24.81	423174	325735	76.97	92566	21.87
9	568015	96.38	14588	2.48	437597	422418	96.53	10530	2.41
10	454892	77.25	120640	20.49	437714	346904	79.25	81129	18.53
11	245146	41.65	332886	56.56	413739	187088	45.22	219477	53.05

In a surprise move, the Southern District of Georgia Federal Court issued an order on August 2nd, less than two weeks before the special session of the legislature was to convene, setting a hearing date of August 22 and inviting the parties to

[24]"Who Will Draw the Lines?" *Georgia Legislative News*, 7 August 1995.

[25]Joan Kirchner, "Clergy joins fight to keep 3 black seats," *The Atlanta Voice*, 29 July - 4 August, 1995.

the suit to submit plans and ideas "narrowly conceived" to "cause minimal disruption to the political processes of the State of Georgia" by August 15 (one day after the special legislative session was to begin). The judges also asked the parties to explain why the court should not draw a redistricting plan![26] Once again speculation was rampant concerning the court's action and its timing, which seemed to preempt the legislature's authority to draft a Congressional plan, an action apparently contemplated in 1995 before the Supreme Court agreed to hear the case. Also, it was surmised that the order was an effort to caution the legislature about making major changes in the map.

In a meeting held a few days after the court order was issued, there was a meeting involving the GLBC Reapportionment Task Force, Speaker Murphy, the House leadership, and Georgia Attorney General Bowers. A Black House member suggested that the defendants (the Speaker, Governor, Lt. Governor and Secretary of State) write to the court and ask for a delay, but the suggestion was rejected on the grounds that it might "anger" the court. Attorney General Bowers suggested that a progress report on the General Assembly's actions during the special session would be sufficient. However, House Speaker Murphy attempted to use the August 2nd court order to get the GLBC to agree to a Congressional plan prior to the convening of the legislature.

While the district court's intentions were unknown and the court action was said to be "highly unusual," there was a consensus that the General Assembly should try to draw a map. Joint meetings of the Senate and House Reapportionment Committees began on July 31. Senator Peg Blitch, the Senate Chair, expressed frustration at the lack of guidance from the federal district court and the conflicting legal advise concerning what the proper remedy should be from several lawyers who presented testimony before the Committees. Pamela Susan Karlan, a professor of law at the University of Virginia, who was an adviser to the GLBC, told the panel, "you are walking a tightrope right now. Whichever way you draw the districts, someone is going to sue." Congresswoman Cynthia McKinney, along with the GOP, joined the GLBC in urging the legislature to make the minimum changes required and not completely redraw the state map.[27]

While much of the public focus was on redrawing the Congressional boundaries prior to the convening of the special session, once it opened on August 14 the legislature focused on state House and Senate reapportionment. For the entire first week, the Reapportionment staff huddled with groups of state legislator's from different parts of the state in an effort to reshape their districts. It seemed clear that the "real agenda" of the House leadership was to protect white Democratic committee chairs, the Majority Leader, and a few other close allies of Speaker Murphy.

[26]U.S. District Court for the Southern District of Georgia, Augusta Division, No. CV 194-008. Filed 2 August 1995 (5:03 p.m.).

[27]Mark Sherman, "Redrawn districts expected to face challenge," *Atlanta Journal/Constitution*, 3 August 1995 and Herbert Denmark, Jr. "Black caucus launches effort to maintain seats," *The Atlanta Voice*, 5-11 August 1995.

Observing this development, the *Atlanta Journal* editorialized that the General Assembly had apparently forgotten why it had been called into session—to fix the 11th Congressional District. With only two working days before the scheduled court hearing date on August 22, neither chamber had considered a Congressional plan. Noting the legislature's leadership said it was trying to take a proactive stance to protect the state districts from suffering the same fate that befell the 11th Congressional district, the newspaper said there had been no suit filed against the state districts. It accused the General Assembly of playing politics in trying to help some powerful members to get reelected in 1996 rather than redrawing the lines during the regular cycle after each 10-year census. A second criticism was that the leadership was attempting to divert attention from the hard task of responding to the Supreme Court's ruling. It was conjectured that the Democratic leaders recognized they couldn't get the votes of Black lawmakers to pass the type of plan desired by them, one majority-Black district, and their strategy seemed to be to wait for the court to draw such a Congressional redistricting plan. The paper urged the legislature to return to its original task and to only redraw state legislative districts for "compelling legal reasons."[28]

Despite this criticism, the legislature moved ahead. While several Black legislators also expressed concern about the new strategy by the legislative leadership, others, whose districts were mentioned as targets by the plaintiffs' attorneys, began to negotiate individually with their legislative colleagues in their region to redraw their districts.

In the Senate, two majority-Black districts represented by white Democrats were reduced from 62 percent to 43 percent and from 59 percent to 42 percent Black by the Senate Committee with only one of the four Black members of the Committee voting no. Senate David Scott, who served as Chair of the GLBC Task Force on Reapportionment, voted against this dilution of majority-Black Senate districts. An attempt by the Governor's floor leader, Senator Mark Taylor of Albany, to reduce his district below 50 percent Black was unsuccessful, but it did decrease from 56 to 52 percent. Scott said the Senate was illegally trying to change the 1992 plan. The Senate plan also helped the reelection prospects of other Democratic Senate leaders, such as Senator Terrell Starr (Chair of Finance) and Senator Jake Pollard (Chair of Insurance) who had the number of Black voters increased in their districts by approximately 13 percent each to help withstand prospective GOP challengers.

The House Committee made even more extensive changes in the state House map by making reductions in 10 formerly majority-Black districts. Among the key legislators affected were the Majority Leader Larry Walker (59.04 to 26.03 percent), House Agriculture Chair Henry Reeves (63.10 to 27.20 percent) and Representative Bob Hanna, Chair of the Natural Resources and Environment Committee (62.22 to 43.11 percent). However, Black Representative Eugene Tillman saw his district slashed from a 57.29 percent Black voting age population to 38 percent, and

[28]"Fix the 11th district, change state lines later," *The Atlanta Journal*, 17 August 1995.

GLBC Vice Chair Carl Von Epps' district was reduced from 60.07 to 55.68 percent Black. Overall, the Committee made changes in 69 House districts despite claims by the leadership that its only purpose was to take preemptive steps to avoid a threatened law suit against 17 districts.

The GLBC held several meetings to discuss the strategy that should be followed when the House reapportionment bill reached the floor. After one marathon meeting lasting over four hours, there was unanimous agreement among the 32 Black House members to vote against it. They were perturbed over the fact that there had been no formal consultation with the Caucus before the House leaders made the drastic reductions in the Black population in several house districts. House GOP Minority Leader Bob Irvin attacked the Democratic leadership's actions as "a deliberate assault on both Black and Republican districts using the Supreme Court as a poor excuse. It's a deliberate calculated attempt to undo the elections that resulted in more blacks and Republicans being down here."[29] In response, the House leadership increased Representative Tillman's district up to 48 percent and Von Epps to 55 percent. However, several GLBC members argued that its members should still vote against the plan in order to use it as leverage to force passage of an acceptable Congressional redistricting plan. It was suggested that the two plans be "paired" and that no action be taken unless there was agreement on both. When the leadership decided to push the plan on the House floor, a tacit GLBC-GOP coalition managed to narrowly block the passage of the measure by a vote of 89 to 87, two votes short of a constitutional majority. While 10 Republicans voted with the White Democrats, all 32 Black legislators opposed it. Majority Leader Walker served notice that he would ask for reconsideration of the vote the next day.

In the Senate, the members of the Caucus split down the middle (5-5) on the vote to pass that chamber's plan. Senator Scott led the opposition calling the plan a "terrible mistake" and excoriated his Democratic colleagues who supported the plan for diluting the Black vote by "dismantling Black majority districts" and then expecting Blacks to support the Democratic party. Senate GLBC members who voted for the plan justified their position on the grounds that they "got the best deal" possible to preserve incumbents seats. And Senator Charles Walker, Senate Democratic Majority Caucus Chair and one of the three Senate conferees on the Budget, said "I can hardly lose something I never had"—a reference to the fact that the diluted districts were currently represented by white Democrats. This seemed to contradict the 1991 position of the Caucus members John White and Mike Thurmond who asserted that the seats created in 1991 may not be won in the 1992 or 1994 elections, but if they were not drawn then Blacks would never have the opportunity to win them.

With the August 22 Federal court public hearing less than 12 hours away, the Georgia House committee passed a Congressional plan that was similar to one outlined by Speaker Murphy and the plaintiffs attorney Lee Parks! Its primary feature

[29] Alexander, Kathy and Mark Sherman, "2 Houses Try to Reduce Majority-Black Districts," *Atlanta Journal/Constitution*, 22 August 1995.

was one Black-majority district (Congressman John Lewis), and two 40 percent districts which confined Congressperson McKinney's district to two counties in metro Atlanta (Dekalb and Clayton) and pushed Congressman Bishop's residence out of his own district into one currently represented by GOP Congressman Mac Collins.

In a New York Times Op-Ed article (August 23, 1995) titled "Georgia's Unholy Alliance," attorney A. Lee Parks lamented the fact that no white Democrats were in the Georgia Congressional delegation because Blacks were concentrated in a few districts. He criticized the effort of Black and GOP legislators to block the special session from adopting a plan that would recoup power for the Democratic Party, and urged Blacks to work with white Democrats against the Republican party. Parks said they should seek to elect candidates based on biracial coalitions. He warned that the federal court would draw the plan if the legislature did not seize the opportunity.

At the August 22 hearing, the federal judges again criticized the Justice Department and blamed it for the current predicament. Judge Bowen said the state had been "bludgeoned into passing a monstrosity Congressional redistricting plan." They then set a deadline of October 15th for the General Assembly to draw a new plan and secure approval from either the Justice Department or the Washington, D.C. federal district court.

It was believed that failure to pass the reapportionment plan on the House districts would enhance Black and Republican leverage in the Congressional redistricting battle. As long as both plans were on the table, Blacks would be able to bargain for a better deal in protecting incumbent Black lawmakers in the state House, Senate and Congressional delegations. However, this opportunity was lost as several GLBC members voted in favor of reconsideration of the failed plan despite pleas from many Caucus members who argued that to do so would be a step backward and reduce their ability to secure passage of a plan to protect the three incumbent Black Congresspersons. Several publicly proclaimed their allegiance to the Democratic party and called their previous unanimous vote on the plan along with a solid 85 percent Republican support merely a coincidence rather than an alliance or coalition. After a lengthy GLBC meeting marked by an acrimonious debate over the indefensibility of voluntarily dismantling several majority-Black districts currently represented by white Democrats and reducing the Black VAP below 50 percent in four others, 26 of the 32 GLBC members in the House reversed their previous position and voted for the Democratic leadership's plan. Table 3 shows changes in 11 majority-Black House districts.

After the adoption of the State Senate and House reapportionment plans, Walter Butler, President of the Georgia Conference of the NAACP, and other civil right leaders criticized the action of the General Assembly. In a letter sent to Caucus members, Butler called the vote "an attempt to turn back the clock on the voting rights of African-Americans in the state," which constituted "retrogression and vote dilution" in violation of Sections 2 and 5 of the Voting Rights Act. He called the reapportionment of state legislative districts unwarranted because there was no legal challenge or court ruling requiring such action, and he noted that the Supreme

Court decision dealt only with the 11th Congressional District. Criticizing the GLBC members who voted for the plans, Butler wrote:

> The most disturbing aspect of the plans adopted is that for the first time since the passage of the 1965 Voting Rights Act, significant numbers of African-American state legislators have voted to dilute the voting strength of African-American voters. The decision by several members of this caucus to support plans to reduce the number of majority-Black districts sets a dangerous precedent. The actions of some of the Black legislators will make it harder to convince the Department of Justice to interpose an objection to these discriminatory plans. Even worse, by siding with the white majority against the voting rights of African-Americans, Black legislators have made future litigation against these plans more difficult, time consuming and costly. (Butler, August 25, 1995)

Table 3. Major Changes in Majority-Black House Districts*
1995 Special Session
(percentages)

	1992 % Black Pop.	*1992 % Voting Age Pop. (VAP)*	*1995 % Black Pop.*	*1995 % Voting Age Pop.*	*Decrease*
Jimmy Lord (121), Chair, Insurance Committee	62.60	58.84	53.60	49.83	- 9
Larry Walker (141), Majority Leader	59.06	54.04	26.03	23.90	-33.03
Tom Bordeaux (151) Governor's Assistant Floor Leader	61.14	56.25	51.65	46.88	- 9.94
Bob Hanner (159), Chair, Natural Resources & Environment Committee	62.22	57.43	43.11	40.39	-19.11
Henry Reaves, (178) Chair, Agriculture Committee	63.10	58.01	27.20	24.64	-35.9
Gerald Greene, (158) Secretary, Appropriations Committee	63.62	58.79	55.70	50.89	- 7.92
Kermit Bates (179)	63.28	59.13	37.32	33.51	-25.96
Frank Bailey (70)	57.24	54.18	52.90	50.05	- 4.34
Mickey Channell (111)	54.45	50.11	36.57	32.64	-17.88
E.C. Tillman (173) (Black Legislator)	60.58	57.29	48.12	47.48	-12.46
Carl Von Epps (31) (Black Legislator	60.07	51.07	55.68	47.27	- 4.39

*Source: Compiled by author.

THE CONGRESSIONAL REDISTRICTING BATTLE

The original House Reapportionment Committee's Congressional plan that was voted on the floor was so bad that it received only 19 votes in the House and 2 in the Senate. The GLBC Task Force members worked long into the night and on weekends in an effort to craft a plan that could gain the support of the white Democratic leadership. Finally, on August 24, a plan that seemed to offer the possibility of reelecting the 3 Black incumbent Congresspersons and 3 or 4 white Democrats was agreed to and introduced by Speaker Murphy as a floor substitute. The plan passed the House 103 to 66 with all GLBC members voting in favor. It contained two majority-Black districts (the 5th at 56.31 percent and the 11th at 53.37 percent) while the 2nd had a 49.5 percent Black population. This plan passed after a vote to defeat (62 to 108) a plan backed by the Georgia GOP that had been submitted to the federal district court by Congressman John Lewis and Speaker Newt Gingrich. Under this plan, the 5th district was 57.1 percent Black, the 11th had a 54.85 Black majority and District 2 was 49.36 percent Black. The House plan that passed was then submitted to the three-judge federal court panel as a status report representing action by the General Assembly to meet the court's mandate.[30]

Charges of betrayal were made in the Senate after a reapportionment plan with only one majority-Black Congressional district was passed 34-21 in a racially polarized vote. Senator Mark Taylor, the Governor's Floor Leader, who was believed to be interested in running for the 2nd Congressional District seat, introduced the plan as a floor substitute. In an obvious appeal to the "angry white male" Senators, Taylor urged them to support his plan "if you're tired of paying for the sins of your fathers and grandfathers." However, Black Senator Ed Harbison said, "to put it plainly, it (the plan) stinks and represents a deliberate attack" against Black Congressmen. And his colleague, Senator Charles Walker, accused Taylor of trying to further his own Congressional ambitions. All 10 Black Senators voted against the plan drawn by Senator Mark Taylor, but a coalition of GOP and white Democratic lawmakers voted overwhelmingly in support of it. Unlike the House version, the Senate plan did not put Speaker Gingrich and Congressman Bob Barr in the same district, but it "kicked" Congressman Bishop out of his 2nd Congressional District and put him in the 3rd District. However, Speaker Murphy objected to their placing Cobb county in his 7th District.[31] It was clear that the two bodies were too far apart for a quick resolution of their plans and that a conference committee would have to try to work out their major differences. It was known that Black Senator Charles Walker was to be a Senate conferee, and Speaker Murphy indicated he would place veteran Black legislator David Lucas on the House con-

[30]Civil Action File No. CV 194-008 by Defendants, Zell Miller, Pierre Howard, Thomas Murphy and Max Cleland, 30 August 1995.

[31]Dick Pettys, "Black Democrats are betrayed," *Augusta Focus* 31 August - 6 September 1995 Mark Sherman and Kathy Alexander "Senate would reduce majority black districts to 1," *Atlanta Journal/Constitution*, 31 August 1995.

ence committee and require unanimity among the three House negotiators on y agreed upon conference committee plan.

A coalition of Black civil rights organizations condemned the Senate action as icist and absurd." Their statement accused the White Democrats and Republi- as of "abandoning and emasculating" the Voting Rights Act and compared Sena- Mark Taylor to California Governor Pete Wilson, who launched his bid for the P Presidential nomination by initiating anti-affirmative action and anti-immi- ant policies. The leaders urged the General Assembly to adopt a plan similar to House passed two Black majority and one heavy influence district. Finally, they eatened to file a lawsuit under Section 2 and they urged the Department of Jus- e to reject the plan under Section 5 because the plan diluted Black voting ength. Concerning the state legislative district plans, they said the Senate and use bills represented vote dilution and retrogression. The group planned a series town hall meetings in the state to educate/inform the public regarding these orts to dilute Black voting strength. The concluding sentence stated, "We have me too far, marched too long, prayed too hard, wept too bitterly, bled to pro- ely, and died too young to let anybody turn back the clock on our journey to jus- e."(Joint Statement For the Preservation of African-American Voting Rights)

A Black-owned newspaper, *Augusta Focus* (August 31, 1995), editorialized t white Democrats were apparently seeking affirmative action in terms of Con- ssional representation. It said that Black ad hoc coalitions with Republicans uld be useful, but that there was no significant commonality of interest or philos- hy between the two groups. Instead, Blacks were urged to adopt an independent sture because the traditional alliance with white Democrats would not work en political survival was at stake.

When the Senate and House each insisted on their positions on the respective ps, a conference committee was appointed. The Black legislators were still reel- from the white Democrat-Republican Senate action and tried to stake out their sition and effect an acceptable compromise. The GLBC gave up its battle to ure three majority-Black districts and some expressed concern that House publicans and Democrats might somehow coalesce and pass a plan close to the nate version. The House negotiators focused on Speaker Murphy's priority of get- g Cobb county completely out of the 7th District, thus placing two Republican ngressmen, Barr and Gingrich, in the same district. This was obviously unaccept- e to House and Senate Republicans. There was also the recognition that even if six conferees agreed on a map, there was no certainty of passage in either the use or Senate. Many political games were being played with multiple agendas, luding efforts of several Senators to position themselves for a Congressional race. r examples, Senator Taylor, whose plan would push Congressman Bishop into the l district and cut the Black VAP to 39 percent, has already been mentioned. Senate jority leader Sonny Perdue was said to be interested in the 8th Congressional strict seat and favored a plan which added the northern majority-Black portion of city of Macon (Bibb county) into the district and shifted incumbent GOP Con-

gressman Saxby Chamblee's home county of Colquitt out of the district. Lt. Governor Pierre Howard's former Executive Assistant, Lewis Massey, reportedly had his sights on the 9th district and sought to move Clarke county (home of his Alma Mater, the University of Georgia) from the 10th to the 9th district.

Eleven days after the conference committee had been appointed, the frustration level of the Senate led to the passage of a resolution to adjourn the special session by a vote of 30 to 21 with seven of the 10 GLBC members voting in favor of the resolution. However, by a 73 to 88 vote, with all GLBC members opposing the *sine die* resolution, the House refused to end the special session. Speaker Murphy had reportedly sent a state plane to fly in some legislators who had left the Capitol to return home to their places of business in an attempt to muster enough votes to pass the adjournment resolution. The House also convened on Saturday, September 9 with the expectation that its members would have an opportunity to vote on a conference committee plan. There was a vote to reconsider the failed vote to adjourn *sine die,* and it passed 82 to 70. However, this was still nine votes shy of the 91 votes needed to adjourn.

The session then turned into a surrealistic, Rod Serling "Twilight Zone" event. Some days had lasted from 10 a.m. until 1 a.m. with members being asked to "stand at ease pending the call of the Chair" for 2 or 3 hours at a time, only to reconvene for 2-3 minutes and then recess again for an undetermined amount of time. Factionalism existed among the GOP as well as white and Black Democrats. Speaker Newt Gingrich urged his Republican colleagues to end the session to minimize the possible damage that could happen if the Democrats united. Most of the GOP House members publicly rejected his request, some from the House floor, while an overwhelming majority of the Republican Senators heeded his call! Meanwhile, many House GLBC members became suspicious of a possible move by dissident House Democrats and Republicans to pass a one-majority-Black Congressional plan. This fear came to outweigh the concern that the federal district court might draw the plan. Tempers flared almost continuously among the Senate and House conferees as each blamed the deadlock on the other side. Black Representative David Lucas, accused the Democratic Senate negotiators of "cutting a deal with the devil" in voting for a one-majority-Black district plan which helped Republicans rather than the Black Democratic Congressmen. Senator Jack Hill retorted that the House was being unreasonable in its insistence on dealing with the 7th district first per Speaker Murphy's request. Citing their "fixation" on this part of the map, he said, "Let's be real clear that one fix the blame where the blame ought to be—your unwillingness to negotiate on the rest of the map until the 7th is completed." After the conferees adjourned Sunday night at 10 p.m., the Speaker said the legislature should go home.[32] After another day of acrimonious negotiations, a clear majority of the House members had had enough. When they returned from a lunch

[32]Mark Sherman, "Sniping the order of the day in redistricting negotiations," *Atlanta Journal/Constitution,* 11 September 1995.

break, the members voted 102 to 50 to adjourn *sine die* and the Senate voted 40 to 13 to go home.

The media were very critical of the General Assembly for staying in session for more than five weeks at a cost of $500,000 ($25,000 per day) and leaving without accomplishing their task. The legislature was accused of abdicating its responsibility to the federal judges. The General Assembly had spent most of its time on state legislative districts for the first two weeks of the special session which was a clear indication of the legislators' priorities—"to protect their own political interests." The media blamed all three factions of the General Assembly (Republicans, African-Americans and white Democrats) for putting "their narrow political agendas ahead of the larger interests of the voters, thus resulting in a deadlock."[33]

Columnist Tom Baxter called the session "a watershed event" which marked the end of the old monolithic politics of the past. Neither presiding officer could hold his body together. Several observers commented that the era of Speaker Murphy's 22-year control of the Georgia House of Representatives had come to an end. Others surmised that a Black-Republican-dissident Democrat Coalition similar to what happened in North Carolina in the 1980s, which enabled Blacks to elect Black House Speaker Daniel T. Blue, could happen in Georgia in 1997. Another scenario was that a Republican-White Democrat alliance which passed the Senate Congressional plan, might become the controlling force in future sessions. Speaker Newt Gingrich said he was glad the session had ended because the legislature was "on the verge of becoming destructive." Congressperson Cynthia McKinney called it a shame that the legislature decided "to throw in the towel." Reverend Joseph Lowery blamed white Democratic Senators for their refusal to agree to a modified version of the House-passed Congressional plan. Congressman Bishop said the legislature did its best, but there were too many "serious disagreements." GOP Congressman John Linder said he was happy that the court would decide the matter rather than the "spiteful Speaker (Murphy)." And Lt. Governor Howard said that any map passed by the legislature would have been suspect because of the focus on race in drawing any plan.[34] Representative Denny Dobbs perhaps best characterized the reason why the special session ended without drawing new Congressional lines when he said, "We just split up into too many factions..." Black and white Democrats were split over how many majority-Black districts to draw. And Republican efforts to retain their eight Congressional seats caused them to refuse to compromise. Even the specter of court intervention proved insufficient to force action by the General Assembly. The GOP decided to take their chances with the court rather than accept a House map placing Congressmen Gingrich and Barr in the same district. Black legislators, who observed the momentum in the House shifting to the Senate version, decided they too would take their chances with the federal judges. And White Democrats became confident that the judges would reconfigure

[33]"Maps lead to nowhere," *Macon Telegraph*, 14 September 1995.

[34]Tom Baxter, "Failed map-makers lost their sense of direction," *Atlanta Journal/Constitution*, 13 September 1995.

the 11th district and disperse Black voters into other adjacent districts, thus increasing the prospects of electing more white Democratic Congressmen. According to the House Reapportionment Committee Chair, Representative Tommy Smith, "There's a large segment of the General Assembly that has felt from the beginning that the courts would draw it (Congressional plan) more to their liking."[35]

CONCLUSION

The GLBC retained its unity on Congressional redistricting, but this was not enough to gain the support of their White House or Senate Democratic colleagues. The fragile coalition of Democrats was fractionalized, perhaps beyond repair. It remains to be seen whether this division will carry over into future sessions of the General Assembly. It has long been said that legislative reapportionment is politics in its rawest form and many General Assembly members found out just how ugly the process can be. As Senator Mark Taylor said, "if the people could have seen this process, they would have been outraged."

Finally, on December 13, 1995, federal district judges Dudley H. Bowen, Jr. and B. Avant Edenfield put an end to the speculation concerning what the Georgia Congressional map would look like as they released the new Congressional map they had drawn. After the special session ended, Attorney Parks filed a suit against the 2nd Congressional district and the court also declared it unconstitutional. The judges' map made drastic changes, shifting more than 60 percent of Georgia's residents into new Congressional districts, and reduced the number with Black majorities from three to one.

The plan drawn by the court was the one under which the 1996 elections would take place. The options of African-American Georgians were somewhat limited: 1) the plan could be appealed, 2) an attempt could be made to get a Supreme Court justice to block the implementation of the plan; and 3) the legislature could make another attempt to redraw the map during a regular or a special session in 1996. However, Governor Miller said enough money had already been spent on reapportionment legal matters, and Lt. Governor Howard said he did not want to deal with reapportionment in 1996. President Clinton asked the Solicitor General to prepare a petition asking the Supreme Court to rehear the Georgia Case, but the Court refused. Still a third law suit was filed by Attorney A. Lee Parks against the state legislative district plans. The district court again ruled in favor of the plaintiffs. It drew a plan which was a modified version of the one passed by the General Assembly in the 1995 Special session and ordered that the 1996 elections be held under these plans. There is a possibility that another, permanent plan will have to be either drawn by the General Assembly or the federal court under which future elections will occur up to 2000.

The court plan made far reaching changes in seven of the 11 Congressional dis-

[35]Mark Sherman and Mike Christensen, "Democratic leaders take the heat," and Kathey Alexander, "Retreat on redistricting," *Atlanta Journal/Constitution*, 13 September 1995.

tricts, including putting two Black Democratic Congressmen in the same districts with two white GOP incumbents-in the 4th (Cynthia McKinney and John Linder) and the 3rd (Sanford Bishop and Saxby Chambliss). Two districts, the 8th and 11th, were left without an incumbent. Table 5 compares the new plan with the 1992 plan in terms of the Black population by each Congressional district. While Congressman John Lewis' district was untouched, Congressman Bishop's second district had its Black percentage reduced from 50.52 to 39.21 percent while Congresswoman McKinney's 11th district was reduced from 64.07 to 11.79 percent Black.

TABLE 4. Georgia Congressional Map Drawn by Federal District Court (1996)

District Number	*Total Pop % Deviation*	*Black Pop % of Total*	*VAP % of Total*	*Black VAP % of VAP*
1	589546	133616	429079	87200
	0.10	22.66	72.78	20.32
2	591681	334433	416052	217320
	0.47	56.52	70.32	52.23
3	591712	105893	429385	70042
	0.47	17.90	72.57	16.31
4	588293	67968	448179	48225
	-0.11	11.55	76.18	10.76
5	586485	365206	440910	253413
	-0.41	62.27	75.18	57.47
6	587118	35366	438847	25567
	-0.31	6.02	74.75	5.83
7	588071	75813	431939	50533
	-0.15	12.89	73.45	11.70
8	591249	124253	427130	78517
	0.39	21.02	72.24	18.38
9	586222	21516	436725	15161
	-0.46	3.67	74.50	3.47
10	591644	106916	439254	72631
	0.46	18.07	74.24	16.54
11	586195	375585	413413	249533
	-0.46	64.07	70.52	60.36

Perhaps the most significant changes were in the creation of four districts with Black populations between 30.55 and 39.21 percent. Such districts are considered ideal for white Democratic candidates because they have a strong Democratic base of Black voters and a core of "Yellow Dog (white Democrats)," and this coalition is likely to constitute more than 50 percent of the electorate. Thus, the prospects are good for three or four new Democrats to be elected in the 1996 general election, and for the number of Black Congresspersons to decline to one or two.

Supporters of the VRA were devastated and said the decision voided the application of this historic legislation. They surmised that in other states where minority

districts have been challenged that Georgia would be used as a model, thus leading to a decrease in minority Congressional seats in 1996 as well as further reductions in the next round of redistricting after the year 2000 census. Essentially, the plan adhered closely to the one submitted by the plaintiffs' attorney, A. Lee Parks. Several incumbent GOP Congressmen accused the two judges, both of whom were Democrats, of playing politics. Congressman John Linder said Speaker Murphy managed to get the court to do what he was unable to push through the legislature—namely to draw a map favoring white Democrats.

TABLE 5. Comparison of Old and New Congressional Maps

		1995		*1992*	
District	*Black % Change*	*Black Population*	*Black Percentage*	*Black Population*	*Black Percentage*
1	+7.89	179,809	30.55	133,616	22.66
2	-17.31	230,419	39.21	334,433	56.52
3	+6.76	145,377	24.66	105,893	17.90
4	-25.05	215,700	36.60	67,968	11.55
5	-0.28	365,330	61.99	365,206	62.27
6	-0.36	37,597	6.38	35,366	6.02
7	-0.32	7,787	13.21	75,513	12.89
8	+10.05	182,636	31.07	124,253	21.02
9	-0.02	21,520	3.65	21,516	3.67
10	+19.48	220,803	37.55	106,916	18.07
11	-52.28	69,503	11.79	375,585	64.07

Source: U.S. District Court of the Southern District of Georgia.

As this text goes to press, the general primary and runoff elections have been held in Georgia. Regarding the Congressional primary on July 9, 1996, both Congresspersons Bishop and McKinney moved their residences into their new districts and won with more than 60 percent of the vote in the general primary election against multiple white challengers. It should be noted that Black voters in both of their districts comprise close to a majority of the electorate in the Democratic party primaries and also that they both managed to gain more than 20 percent of the white vote in their respective districts. However, McKinney faces strong Republican opposition in the 4th Congressional District, while Bishop is rated a heavy favorite to prevail in the November 6th general election.

In the General Assembly, all Black incumbents won their Democratic primary elections in cases where they had challengers. However, seven of them face GOP opposition. In the general election, in three of these cases, there is uncertainty as to the outcome. (See Epilogue, page 227.)

LESSONS LEARNED

As noted above, in the 1991-92 round of reapportionment/redistricting politics, Black legislators used a multifaceted strategy involving five techniques. However, during the 1995 special session, The GLBC did not use either the threat to

appeal to the DOJ, form an alliance with the GOP, or use the three separate groups approach (Insider, Outsider, and Task Force). Its efforts focused primarily on negotiating with the Democratic leadership and forming a task force to develop alternative plans and lead the negotiation effort.

As noted above, 26 of the 32 House GLBC members and 5 of the 10 Black Senators discarded the opportunity of aspiring Black office seekers in nine House districts and two Senate districts to gain more General Assembly seats without securing anything in return, except a small decrease in the Black population percentage in the districts of two incumbent GLBC members. This happened despite the unity displayed in the first vote on the House plan and without any new development occurring prior to the second vote. The State NAACP President, Walter Butler, noted this precedent of Black legislators voting to dilute African-American voting strength. Interestingly, there was a reluctance to vote a second time with the GOP to maintain the opportunity for more Blacks to win state legislative seats currently held by white Democrats.

In fact, the incumbent Black representatives were also forgoing the opportunity to assume additional chairmanships in the House which would have been possible with the likely defeat of four white Democratic chairmen. For example, the Chair of the Insurance Committee had already announced his plans to retire from his seat, then a 62 percent Black-majority district, but announced for reelection stands after his district was reduced to a 49.83 Black voting age population. Likewise, the Chair of the Agriculture Committee had won his election in 1994 by only 7 votes in a 63.1 percent Black-majority district. His district was not only reduced to 27.2 Black percent, but his African-American female opponent in the 1994 election had her residence moved from his district into another.

Unlike the Congressional situation where there was the allegation that the GOP had benefited the 1992 district configuration, the maintenance of the 1992 state legislative map would only benefit Democratic political aspirants. It may have been possible for Blacks to win six to eight new seats in the House, but this prospect may have been eliminated.

Party loyalty apparently was given the highest priority by 26 GLBC members who sought to be good team players and Democratic party loyalists on the state plan. They also asserted that they had protected two Black incumbents and got the best deal possible.

The GLBC stood firm in its demand for three majority-Black Congressional districts, but Senate Democratic favored a plan that would create a map designed to boost the electoral prospects for white Democratic Congressional aspirants. Ultimately, the federal district court did impose a map which reflected this position. However, initially they failed to achieve this goals, as both Bishop and McKinney prevailed in their Democratic primary contests without a runoff. It remains to be seen whether the GOP will capitalize on the split between white and Black Democrats by winning one or both of these seats in the general election on November 6, 1996.

EPILOGUE

As noted, there was great uncertainty concerning the ability of 2nd District Congressman Sanford Bishop and Fourth District Congresswoman Cynthia McKinney to retain their seats in their drastically reconfigured districts, which were now only approximately 35 percent African-American. It was feared that their greatest threats would come in the July 9 Democratic Party primary election because districts containing a Black population between 30 and 40 percent were deemed ideal for a white Democratic candidate. With a solid base of Black Democratic votes, a victory could be secured by gaining only 25-30 percent of the white electorate.

Both Bishop and McKinney faced multiple challenges in the Democratic primary, with McKinney facing the more formidable task. Among her three primary opponents were Attorney Comer Yates, who had been a candidate in the 4th District general election in 1994 against incumbent Republican John Linder, and State Senator Ronald Slotin. Yates had the backing of some of the most powerful officials in the state Democratic Party after he announced his candidacy even before the three-judge panel finalized the Congressional district boundaries. Rather surprisingly, both McKinney and Bishop won their primary elections without runoffs, with each receiving approximately 60 percent of the votes.

While not proving that majority-Black districts were no longer necessary to elect Blacks, it did show the power of incumbency. Both had outstanding records of accomplishments that showed they could do the job, both had great name recognition, and both were able to raise considerably more money that their opponents.

In the general election, McKinney faced Republican John Mitnick, who sought to link her with Minister Louis Farrakhan and to subtly inject race into the election. McKinney's father, State Representative Billy McKinney, responded by calling her opponent a "racist Jew." Much of the election contest focused on personalities rather than issues. McKinney prevailed in the November 5 general election, winning 57.8 percent to 42.2 percent for Mitnick. Bishop's race was a low key affair, and he too defeated his opponent, Darrell Ealum, by 54 to 46 percent. McKinney commented that her victory should not be interpreted to mean that majority-Black districts are unnecessary. She noted that she was able to win only because she had had the opportunity to serve in Congress from the 11th District from 1993 to 1996 and to prove herself.

The District Court had approved an interim plan for the state House and Senate elections that combined features of the 1992 plan and the one adopted for the 1995 special session. There was concern that as many as four incumbent Black legislators were vulnerable because of a decrease in Black voters in their districts. However, there was actually a net gain of two members for the GLBC, as a Clark Atlanta University history professor, Vincent Forte, won the Atlanta Senate seat vacated by Ron Slotin, who had resigned to run for Congress, and a Black attorney, Arnold Ragas, upset a 16-year Republican House member in suburban DeKalb county. This increased the total of Georgia Black legislators to 44, thus giving Georgia the largest number of Black legislators in the nation.

The election outcome bodes well for Black legislators and demonstrates the power of incumbency. There are indications that although they managed to retain their numbers, consideration may need to be given to considering alternatives to single member majority districts to make further gains. Congresswoman Cynthia McKinney and State Representative Bob Holmes are sponsoring legislation calling for use of alternative non-racial voting systems such as cumulative voting, limited voting, and the single transferable vote. These new electoral arrangements may be critical new factors in the next reapportionment battle in the 21st century.

RACE AND REPRESENTATIONAL DISTRICTING IN LOUISIANA

Richard L. Engstrom and Jason F. Kirksey

FOLLOWING THE 1990 CENSUS A NUMBER OF STATES adopted congressional districts that made the original "gerrymander" of 1812, in Essex County, Massachusetts (Figure 1), look like a model of compactness. Louisiana was among that group. Louisiana's entry in the contest for the least compact district in America was the new Fourth Congressional District (Figure 2). It was said to resemble the mark of Zorro, "a giant and somewhat shaky 'Z'".[1] Its perimeter was 2,558 miles long, exceeding that of any other congressional district in the country except Alaska's at-large district (Huckabee 1994, 20, 38-45). It was ranked as the fourth least compact district in the nation according to one quantitative measure, eleventh according to another (Huckabee 1994, 38-45; Pildes and Niemi 1993, 565).

District Four was called a "gerrymander" by people preoccupied with the shapes of individual districts. It was not a gerrymander, however, if by gerrymander one means a districting plan that dilutes the voting strength of a cohesive group of voters within a particular political jurisdiction.[2] There were no allegations that the plan the district was a part of, adopted in 1992, was a political or partisan gerrymander. And while there was an allegation that the plan was unfair to African-Americans (discussed below), this was not an allegation made by the state's African-American community. Indeed, the district was designed to empower African-American voters, not discriminate against them.

The shape of District Four was directly related to its purpose. It was designed to be a majority African-American district, one that would provide African-American voters with a viable opportunity to elect a candidate of their choice to the United

[1] *Hays* v. *State of Louisiana*, 839 F.Supp. 1188, 1199 (W.D. La. 1993).

[2] See, e.g., the entries for "gerrymandering" in Plano and Greenberg (1993: 140) and Renstrom and Rogers (1989: 108).

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FIGURE 1. The "Original" 1812 Gerrymander
Source: E. Griffith: The Rise and Development of the Gerrymander 18 (1907).

States Congress. This was accomplished by linking dispersed concentrations of African-Americans across the state into a district. This search and include policy dictated the shape of the district. The result was a district boundary allegedly longer than the boundary around the state itself.[3] African-Americans, according to the 1990 Census, constituted 66.4 percent of all of the people residing in the district, and 62.6 percent of those of voting age. The state's voter registration data revealed that, as of June 1992, African-Americans constituted 63.2 percent of the people registered to vote in the district. Percentages such as these could only be attained by creating a district that was severely contorted.

RACIAL FAIRNESS VERSUS COMPACTNESS

The Fourth District was one of two majority African-American districts in the new plan. The other was the Second District, based in New Orleans. This was essentially a modification of the Second District in the previous plan, a majority

[3]This comparison, which was never documented, was asserted in the post-trial brief of the plaintiffs challenging this district in *Hays*. Memorandum in Support of the Plaintiffs' Claims that Act 42 of the 1992 Louisiana Violates the Voting Rights Act, p. 5 (hereinafter Plaintiffs' Memorandum).

Figure 2. Louisiana's Fourth Congressional District, 1992
Source: *Washington Post*, November 3, 1992

African-American district that had, in 1990, elected William Jefferson to be its representative. Jefferson was the first African-American to serve in Congress from Louisiana since Reconstruction. The new Second District was 61.0 percent African-American in total population, and 56.2 percent in voting age population. Voter registration in June 1992 was 60.0 percent African-American.

By providing two viable African-American districts, the new congressional districting plan offered the state's African-American minority an opportunity to be proportionally represented, in a descriptive sense (see Pitkin, 1967, 60-91), in Louisiana's delegation to the U.S. House of Representatives. According to the 1990 census, African-Americans constituted 30.8 percent of the state's population, and 27.7 percent of its residents of voting age. The state's voter registration figures for June, 1992, revealed that African-Americans constituted 27.9 percent of the state's registered voters. Two districts would be 28.6 percent of the state's new total of seven (down from eight) congressional districts.

Given the distribution of the minority population across the state, it was not

possible to create a second majority African-American district with boundaries that remotely resembled a rectangle. While District Four, as adopted, was one of several possible designs for a viable African-American district outside the New Orleans metropolitan area, all of the alternatives were far from compact. The presence of a second African-American district in the 1992 plan, therefore, reflected an important policy decision by the state—drawing districts that would be racially fair had a higher priority than drawing districts that would be pleasingly shaped.[4]

DEPARTURE FROM PAST PRACTICE

The adoption of District Four constituted a significant departure from past statewide districting experiences in Louisiana. Never before had the state engaged in such an affirmative effort to empower, electorally, its African-American minority. The usual practice, in contrast, had been to adopt districting plans that diluted the voting strength of African-Americans. These plans would then be invalidated under the Voting Rights Act, by either the United States Attorney General or a federal court, for being racially unfair. Revised plans providing the minority with more electoral opportunities would then be adopted by the state in response to these adverse decisions by federal authorities (see Engstrom et. al., 1994, 111-112, 117-120).

The congressional districts that the new plan would replace had themselves been drawn in response to a federal court decision that invalidated, on racial grounds, the first plan the state had adopted following the 1980 census. Although a majority African-American district could have been created within the City of New Orleans, the state plan, adopted in 1981, failed to contain such a district. The state chose instead to divide the city, and its African-American voters, into two districts, each of which extended into white suburban areas and had white majorities in population and voter registration. This was accomplished by drawing a contorted and racially selective district boundary through the city that left one of the districts with a shape resembling that of a duck, resulting in the scheme being referred to derisively as the "gerryduck" (Engstrom, 1986). That plan was invalidated by a federal district court in 1983, however. The dispersion of the African-American vote was found to be a violation of section 2 of the Voting Rights Act, which prohibits the use of electoral arrangements that have dilutive consequences.[5] The state then adopted another plan that year, one containing a New Orleans-based majority African-American district, the Second District, the first majority African-American congressional district in Louisiana this century.

The state's preference for districting plans that dilute the minority's voting strength was evident again in 1991, in its first efforts to redraw representational

[4]On the issue of conflicting districting criteria generally, see Butler and Cain (1992, 65-90).

[5]*Major* v. *Treen*, 574 F. Supp. 325 (E.D. La. 1983).

district boundaries following the 1990 census. The state adopted three statewide districting plans that year, and all were disapproved by the Attorney General. These plans were for the two chambers of the state legislature and for the state Board of Elementary and Secondary Education (BESE). Each of these plans was rejected by the Attorney General for being unfair to the African-American minority.

In sharp contrast to the state's usual practice, the new congressional District Four was adopted in 1992 in an effort to avoid another invalidation, rather than as a direct response to one.

PRECLEARANCE AND THE 1991 REJECTIONS

While District Four was not a direct response to an invalidation of another congressional plan, it was clearly a reaction to the state's legal responsibility under the Voting Rights Act to be fair to its African-American minority. Due to its history of race-based disfranchisement (see Engstrom et. al., 1994, 104-108), Louisiana is subject to the *preclearance* provision contained in section 5 of the Voting Rights Act. Under this provision, any change that the state makes in its election laws and procedures, including any changes it makes in election districts, may not be implemented until either the federal Attorney General or the United States District Court in Washington, D.C. has concluded that the change does not have a racially discriminatory purpose or effect.[6] The state's resistance to creating electoral opportunities for African-Americans had resulted in the failure to obtain preclearance for many of its past redistricting efforts.

The state's failure to gain preclearance for its initial post-1990 census state legislative districting plans kept intact a record of consistent rejection. Never has the state gained preclearance for its initial redistricting plans for both chambers of the legislature. The first legislative plans subject to this requirement were those adopted in response to the 1970 census. Both the state house and Senate plans adopted following that census were objected to by the Attorney General. Both were replaced by plans imposed by the federal judiciary (Halpin and Engstrom, 1973, 52-57, 63-65). Following the 1980 census, the state gained preclearance for its new Senate districts, but not those for the lower house. Preclearance was not obtained until the House districts were redrawn a second time (Weber, 1993, 112-113, and Engstrom et. al., 1994, 111-112). The Attorney General's rejections of the initial plans for both chambers following the 1990 census extended the post-census rejection record to three-for-three.

By 1990 African-Americans had constituted a majority of the registered voters in 15 of the 105 state House districts and five of the 39 state Senate districts. At the time of redistricting, each of these districts (and only these districts) was represented by an African-American legislator. New plans for both the House and the

[6]79 Stat. 439, as amended, 42 U.S.C. sec. 1973c.

Senate, bringing the districts into compliance with the basic "one person, one vote" rule following the 1990 census, could be created that would increase significantly the number of districts with African-American registration majorities.[7]

Redistricting the State House, 1991

During a special session of the legislature in 1991, a new plan for the House was adopted that satisfied the "one person, one vote" standard and also increased the number of districts in which African-American voters would have a viable opportunity to elect candidates of their choice. No district in the plan deviated from the ideal, or average, district population by as much as five percentage points. The most populous district was 4.98 percentage points above the ideal, while the least populous was 4.86 percentage points below. The plan contained 20 districts with African-American population majorities, 19 of which also had African-American voter registration majorities.

Although the House plan expanded the number of African-American districts, it was opposed by the African-American members of both legislative chambers. This opposition was based on the fact that many more electoral opportunities for African-Americans could have been created. Amendments that would have increased the number of African-American districts were offered, but defeated. All 14 African-American members of the House at that time voted against passage of the plan, while the other House members voted 71 to 15 in favor of it. In the Senate, four of the five African-American members opposed the plan (one African-American member was absent), while 25 of the 26 white members voting on the plan voted for it.[8]

This initial House plan, like its predecessors in 1971 and 1981, failed to survive section 5 scrutiny. Preclearance was again denied when the Attorney General concluded that the plan had both a discriminatory purpose and a discriminatory effect. The Attorney General identified seven areas in the state where African-American voters had been either unnecessarily packed (overconcentrated) into one or a few districts or unnecessarily cracked (dispersed) across two or more districts. Districting decisions were found to be driven by a desire to retain white voting majorities. The Attorney General concluded that alternative sets of districts, "drawn as logically as in the proposed plan," could have been adopted that would have provided African-Americans with more electoral opportunities.[9]

[7]The Louisiana Constitution specifies that the districts for each chamber of the state legislature must be single-member districts. The only state constitutional constraint on the drawing of these districts is that they be apportioned on a population basis "as equally as is practicable". La. Const, Art. III, sec. 1(A) and 6(A).

[8] In the House, all 17 Republicans voted in favor of the plan, as did 54 of the 68 white Democrats casting votes on it. One Independent voted in opposition. In the Senate, all four Republicans voting on the plan were in favor (two were absent), while white Democrats split 21 to five in favor.

[9]Letter from John R. Dunne, Assistant Attorney General of the United States, to Hon. Jimmy N. Dimos, Speaker, Louisiana House of Representatives (July 15, 1991).

Following the failure to gain preclearance, another House plan was adopted. Fifty-one of the districts in the initial plan were altered in this revision. The population deviations in the revised plan remained under five percentage points (the largest being +4.99 and -4.98), while the number of districts with African-American population majorities now increased to 26, with 25 also having African-American voter registration majorities.

African-American registered voters were much more efficiently distributed across districts in the revised plan. The overall increase of six more districts with voter registration majorities in the second plan was due primarily to more districts being created in which African-Americans constituted between 55 and 60 percent of the registered voters. Whereas 42.7 percent of the African-Americans registered to vote was included in the 19 districts with African-American registration majorities in the initial plan, 53.0 percent were included in the 25 districts with registration majorities in the revised plan.

The revised plan was supported by the African-American legislators. In the House, 14 of the 15 African-American members voted for the plan (with one absent), while the other members divided 48 to 27 in favor. In the Senate, all five African-American members voted for the revised plan, compared with 24 of the 29 other members voting on it.[10] The Attorney General granted preclearance to this plan, and elections were held under it in October of 1991, with runoffs in November.[11] African-American candidates were elected in 23 of the 25 House districts with African-American voter registration majorities. An African-American was also elected in the other district with an African-American population majority, a New Orleans district that at the time of the election had a slight African-American plurality (49.8 percent) in registered voters.

Redistricting the State Senate, 1991

A new plan for the state Senate was also adopted during the special session. Deviations from perfect population equality among the districts were again kept below five percentage points, as the largest district deviated from the ideal by 4.98 percentage points and the smallest by 4.86. The plan contained eight districts with African-American population majorities, seven of which also had African-American voter registration majorities.

This plan also was opposed by the African-American legislators, again because more minority electoral opportunities could have been created. As with

[10]Ten of the 14 Republicans voting on the plan in the House voted for it (three were absent), compared to 38 of 58 white Democrats. In the Senate, two Republicans supported it and three opposed it (with one absent), while white Democrats voting on it split 22 to two in favor.

[11]Under Louisiana's election law, all of the candidates for a state legislative or congressional seat, regardless of their party affiliations, compete in a single primary election in which all registered voters may participate. The party affiliations of the candidates are identified on the primary ballot. If no candidate receives a majority of the votes cast in the primary election, a runoff election is held between the top two vote recipients, again regardless of the candidates' party affiliations. On the adoption and use of this election system in Louisiana, see Hadley (1986).

the House plan, amendments to the Senate plan that would have created additional opportunities were offered, but rejected. All five of the African-American senators voted against the plan, while 23 of the 33 white senators voting on it opposed it. On the House side, 13 of the 14 African-American members voted against it (one was absent), compared with only 5 of the 76 white members voting on it.[12]

The Senate plan also failed to survive section 5 scrutiny. The Attorney General objected to it for the same reason the African-American legislators opposed it; additional districts with African-American majorities could easily have been created. The Attorney General specifically identified two areas of the state where the African-American voting strength had been cracked, and concluded that in both areas this was due to an effort to protect white incumbents. In the Monroe area in northeast Louisiana the reelection concerns of white senators were found to be "the primary, if not exclusive, reason" for the division of African-American voters across districts. In the Lafayette area in southwest Louisiana African-American voters were split between districts in order to keep their presence in one of the districts at a level "considered acceptable to [the] white incumbent". Although the protection of incumbents does not by itself violate any federal law, the Attorney General pointed out that it cannot be done "at the expense of black voters".[13]

The Senate plan was revised in response to the Attorney General's objection. While 20 districts were affected in some way by the changes, the major change was the creation of two additional districts with African-American voter registration majorities in the areas identified by the Attorney General. This brought the number of districts with African-American majorities, in both population and voter registration, to nine. A district was created in the Monroe area that was 60.5 percent African-American in registration. Another was created in the Lafayette area that was 57.2 percent in registration. Whereas 37.3 percent of the state's African-American registered voters were in seven districts with African-American registration majorities in the initial plan, 48.1 percent were in nine districts with registration majorities in the revised arrangement.

The revised plan was supported by all five of the African-American state senators and all 14 of the African-American House members voting on the plan (one was absent). Their white colleagues in the Senate split 24 to 5 in favor of the plan, while the white members of the House supported it by a vote of 47 to 29.[14]

[12] In the Senate, five Republicans voted for it and one against it, while the white Democrats split 18 to 9 in favor of the plan. In the House, only one Republican and four white Democrats opposed the plan.

[13] Letter from John R. Dunne, Assistant Attorney General of the United States, to Hon. Samuel B. Nunez, President, Louisiana Senate, and Hon. Dennis Bagneris, Chairman, Louisiana Senate Committee on Senate and Governmental Affairs (June 28, 1991).

[14] Republicans in the Senate split three to two in opposition to the plan (with one absent), while the white Democrats voting on the plan divided 22 to 2 in favor. In the House, 11 of the Republicans voting on the plan favored it, and four opposed it. The white Democrats in the House supported it 36 to 25.

The Attorney General granted preclearance to this plan, which was then used in the 1991 Senate elections. Eight African-Americans won Senate seats in those elections, each from a district with an African-American registration majority.

Redistricting BESE, 1991

The Attorney General's rejection of the initial state House and Senate plans no doubt influenced the decision to create two majority African-American districts in the congressional plan the following year. But probably of more importance was the Attorney General's objection, a few months later, to the state's plan for its Board of Elementary and Secondary Education (BESE). BESE is an 11-member body of which eight members are elected, each from a single-member district. The BESE plan, therefore, would contain just one more district than the new congressional plan. There was already, as in the malapportioned congressional plan, one BESE district in which African-Americans were a majority of the registered voters. Like its congressional counterpart, this was a New Orleans-based district in which an African-American had already been elected. A second district with an African-American majority could have been created in the new BESE plan, but was not. The Attorney General's rejection of this eight district plan with a single African-American district was a much more immediate precedent for the forthcoming congressional redistricting than the earlier objections to the state legislative plans.

The initial BESE plan was adopted during the regular legislative session of 1991. The most populous district in the plan deviated from the ideal district population by 1.85 percentage points, while the least populous deviated by 1.69. The plan retained a majority African-American district in the New Orleans area. This new district's population was 63.6 percent African-American, while its voter registration was 58.5 percent African-American. The highest African-American registration percentage in any of the remaining seven districts was 35.8.

Two African-American majority districts in voter registration could have been created, and African-American legislators therefore opposed this plan. In the House, all 10 African-American members voting on the plan opposed it (five were absent), while in the Senate, all five African-Americans voted against it. The rest of the House members voted 76 to 5 in favor of passage, while in the Senate the white members voted 23 to 8 in favor of the plan.[15]

The Attorney General objected to this plan because of the failure to create a second majority African-American district. In denying preclearance, the Attorney General noted that a number of other configurations could have provided two such districts. The focus of the objection was three adjacent districts in which African-Americans constituted 38.4, 31.7, and 28.0 percent of the

[15] All 17 Republicans in the House supported the plan, as did all 58 white Democrats and the one Independent voting on it. Five of the six Republicans in the Senate supported it, along with 23 of the 25 white Democrats voting on it.

residents respectively, and 35.8, 28.2, and 22.2 percent of the registered voters. An alternative configuration could have included many of these African-Americans in a single district. In a comment that would be directly applicable to the congressional context as well, it was specifically noted in the objection that:

> ...it appears that the significant concentrations of black voters in northeastern Louisiana and in the parishes bordering the State of Mississippi, both along the river and the state's southern border, can be combined in a way that recognizes the black voting potential in these areas.[16]

The state adopted a second plan during the 1992 regular session of the legislature. The most populous district in the revised plan had only 467 more people residing in it than the least populous. The maximum deviations from precise population equality were only +0.06 percentage points and -0.03. The 1992 plan contained two majority African-American districts. The New Orleans based district was now 63.8 percent African-American in population, 61.9 percent in voter registration. A second district, containing the concentrations specifically identified by the Attorney General, was 65.5 percent African-American in population and 61.9 percent in registration. All 21 African-American legislators in the House who voted on it favored the plan (the remaining three were absent); in the Senate, all seven voted in favor (with one absent). White members of the House split 42 to 30 in favor, and the white senators 20 to seven.[17] This plan was precleared by the Attorney General and used in the 1992 election, in which African-Americans were elected in both of the majority African-American districts.

The Attorney General's objection to the initial BESE plan because it did not contain a second majority African-American district was directly applicable to the forthcoming congressional redistricting task. African-Americans in northeastern Louisiana could be combined with those along the Mississippi River and in the parishes under the State of Mississippi within a congressional district as well. While a congressional district would have to be more populous than a BESE district, given that there would be seven rather than eight districts, that did not preclude the creation of a second majority minority district. Two contiguous, viable African-American congressional districts could be created. In light of the BESE objection, it was reasonable to assume that two such districts would be necessary if preclearance was to be obtained, at least from the Attorney General, for any congressional plan.[18]

[16] Letter from John R. Dunne, Assistant Attorney General of the United States, to Angie Rogers LaPlace, Assistant Attorney General, State of Louisiana (October 1, 1991).

[17] In the House, the Republicans split nine to five in opposition to the plan, while the white Democrats voted 37 to 20 in favor. In the Senate, the Republicans split three in favor and two against (with two absent), while the white Democrats favored the plan 17 to five.

[18] Preclearance may also be granted by the United States District Court for the District of Columbia.

CONGRESSIONAL REDISTRICTING

Due to insufficient population growth, Louisiana lost a seat in the United States House of Representatives following the 1990 census. The old eight-district plan therefore had to be replaced with a new seven-district scheme. A new set of districts received legislative approval in May of 1992, during the first regular session of the newly elected legislature, and was agreed to by the new governor, Edwin Edwards, on June 1. This plan, as noted above, contained two viable African-American districts, one more than the plan it would replace.

The adoption of two majority African-American districts was stimulated by a perception that two such districts would be necessary if a plan was to be precleared by the Attorney General. Contributing to this perception, along with the objection to the BESE plan, were decisions by the Attorney General denying preclearance to the congressional redistricting plans of three other southern states. These decisions, announced after the objection to the BESE plan, served to reinforce the inference that if Louisiana were to gain preclearance for a congressional plan, that plan would have to include two viable African-American districts.

The North Carolina, Georgia, and Alabama Rejections

North Carolina's new congressional districts were the subject of the first objection. North Carolina had gained a congressional seat as a consequence of the census, bringing its total to 12. Although none of that state's existing districts had an African-American majority within it, two such districts could be created in a 12-district plan. The plan the state adopted in 1991, however, contained only one. While it would have been the state's first majority African-American congressional district this century, being the first was not a justification for being the only, and in December, 1991, the Attorney General declined to preclear the plan.[19]

The state subsequently adopted, in 1992, another plan containing a second African-American district. This second minority district was about 160 miles long and so narrow at points that it relied upon a highway, Interstate 85, for contiguity. North Carolina's revised plan was granted preclearance by the Attorney General and, while the Louisiana legislature was in session, withstood two challenges in federal court. One challenge was a partisan gerrymandering claim brought by Republicans, the other a racial gerrymandering claim brought by white voters. The state prevailed, at least in 1992, with summary judgment motions on both claims.[20]

About a month after the North Carolina objection, the Attorney General

[19] Letter from John R. Dunne, Assistant Attorney General of the United States, to Tiare B. Smiley, Special Deputy Attorney General, State of North Carolina (December 18, 1991).

[20] *Pope* v. *Blue*, 809 F. Supp. 392 (W.D. N.C. 1992) and *Shaw* v. *Barr*, 808 F. Supp. 461 (E.D. N.C. 1992). The rejection of the partisan gerrymandering claim was summarily affirmed by the Supreme Court, *Pope* v. *Blue*, 506 U.S. 801 (1992), but the rejection of the racial gerrymandering claim was subsequently reversed, and the case remanded for further consideration, in *Shaw* v. *Reno*, 509 U.S. 630 (1993).

objected to Georgia's new congressional districting plan. Georgia had also gained a congressional seat, bringing its House delegation to 11. Its new 11-district plan contained two majority African-American districts, one more than in the 10-district plan it was to replace. Despite this increase, the Attorney General found that the plan still fragmented the African-American electorate. A third district with an African-American majority in voting age population could have been created in the southwestern portion of the state. In addition, the electoral opportunities provided by each of the districts that had African-American majorities could have been enhanced easily. African-Americans constituted 62.2 and 60.6 percent of the general population and 57.8 and 56.6 percent of the voting age population in these two districts. These figures, the Attorney General noted, could have been increased by simply replacing white residents within these districts with African-Americans residing in areas adjacent to the districts.[21]

The Georgia legislature adopted a second set of congressional districts the day after Louisiana's legislature convened in 1992. This second plan added a third majority African-American district. This district, which was 56.6 percent African-American in total population and 52.0 percent in voting age population, kept the concentrations of African-Americans in the southwestern portion of the state intact. The African-American percentages of the total and voting age populations in one of the other majority minority districts were increased from 60.6 to 64.1 and from 56.6 to 60.4, respectively. The other majority minority district was altered only slightly, with the total population percentage increasing from 62.1 to 62.3 and the voting age percentage declining from 57.8 to 57.5.

The third objection by the Attorney General concerned a congressional redistricting plan for Alabama. The state had adopted a new seven-district plan that contained one district in which African-Americans constituted a majority of the registered voters. As in North Carolina, this would have been the first majority minority district this century in Alabama. Three days before the start of Louisiana's legislative session, however, the Attorney General objected to Alabama's plan because two districts with African-American voting age majorities could have been created.[22]

As a result of this objection, Alabama's new congressional districts, at least for the 1992 elections, were determined by a federal court. A three-judge district court in Alabama had adopted an interim plan that was to go into effect if preclearance was not obtained for the state's plan. The plan imposed by the court also contained one district in which African-Americans constituted a majority of the registered voters. Although the African-American intervenors in the litigation[23] had included a plan containing two majority African-American districts in

[21] Letter from John R. Dunne, Assistant Attorney General of the United States, to Mark H. Cohen, Senior Assistant Attorney General, State of Georgia (January 21, 1992).

[22] Letter from John R. Dunne, Assistant Attorney General of the United States, to Hon. Jimmy Evans, Attorney General, State of Alabama (March 27, 1992).

[23] The suit was brought initially by Paul Charles Wesch, a Republican Party official in Mobile County.

voting age population among the plans they presented to the court, in neither of those districts did African-Americans constitute a majority of the registered voters. In rejecting this plan, the court noted that it failed to comply with the "one person, one vote" requirement and that the intervenors themselves had questioned whether either of the two African-American districts had a sufficient minority presence to provide the minority with a viable opportunity to elect a candidate of the its choice.[24]

In Louisiana two congressional districts could be created in which African-Americans constituted not only a majority of the voting age population, but a majority of the registered voters as well. Given that fact, and the Attorney General's objections to the congressional plans of these other states, it was reasonable to infer that the Attorney General would not grant preclearance to a new Louisiana plan unless that plan contained two viable minority districts. Indeed, these objections, along with that to the BESE plan, resulted in two majority-minority districts being widely viewed as a basic legal requirement, just as was creating districts with only minimal deviations from the average district population. Being widely recognized as a "requirement," however, was not the same as being well received. Many of the state's white legislators no doubt shared the attitude expressed by state Representative Jerry LeBlanc, who was quoted as saying, "I don't like it...but these are the cards that are dealt to us by the federal government and we have to play with them."[25]

This perception of "the cards" applied as well to the other redistricting tasks still before the legislature in 1992. As already noted, a second BESE plan with two African-American districts was adopted that year. In addition, the state created the first majority African-American district (62.1 percent African-American in population, 60.3 percent in voter registration) for its five-member Public Service Commission, the state's main regulatory body for public utilities. An African-American was elected to serve on that body for the first time, from that district, later that year. In stark contrast to the state's failure to gain preclearance for any of its initial redistricting efforts in 1991, all three statewide redistricting plans adopted in 1992 were granted preclearance by the Attorney General.[26]

The 1992 Context

The virtual certainty of having redistricting plans denied preclearance had not been sufficient to deter the state from adopting dilutive schemes in the past. The

[24] *Wesch v. Hunt*, 785 F. Supp 1491 (S.D. Ala. 1992).

[25] Quoted in Mike Hasten, "Surprised House Passes Remap Plan," *Advertiser* (Lafayette), May 6, 1992.

[26] In addition, the state also settled two voting rights lawsuits concerning the election of judges, settlements that created many new opportunities for African-American voters to elect judicial candidates of their choice (see Engstrom, Halpin, Hill, and Caridas-Butterworth, 1994: 121-124). These opportunities, not surprisingly (see Engstrom, 1989), resulted in the election of numerous African-Americans to judicial positions throughout the state, including that of Justice of the Louisiana Supreme Court.

legislature's behavior in 1992, however, was less defiant. Much of this change was no doubt attributable to turnover in both the legislature and the governor's office resulting from the 1991 election. As already noted, the 1991 state legislative elections were held under the plans precleared by the Attorney General. The result was a substantial increase in the number of African-American legislators. African-Americans now held over 20 percent of the seats in each chamber, and they could be expected to be particularly cohesive on an issue like congressional redistricting (as well as on the other statewide redistricting tasks). Their numbers and cohesion would make them a more significant voting bloc in redistricting politics than they had been previously.

Probably of more importance, however, was the change in the gubernatorial office resulting from the 1991 election. Edwin Edwards, a former three-term governor, had replaced Charles "Buddy" Roemer, the previous governor who had given his assent to the dilutive plans adopted in 1991. Edwards had been heavily dependent on the state's African-American voters in his victory over ex-Ku Klux Klan leader David Duke in 1991. Indeed, a statewide exit poll of the gubernatorial runoff between Duke and Edwards revealed that Duke had been the choice of the state's white voters by a margin of 10 percentage points (55 percent to 45 percent). The African-American voters, however, cast 96 percent of their votes for Edwards, providing him with a comfortable victory overall (61 percent of the total vote).[27] Edwards made it clear before the start of the legislative session that he supported creating two African-American congressional districts, which he maintained would be necessary for preclearance. A gubernatorial veto was therefore likely for any plan that fell short of that standard.[28]

When the legislature met in 1992, therefore, both federal law and gubernatorial approval appeared to require that two of the state's seven congressional districts contain viable African-American electoral majorities. The fact that this could not be accomplished through districts with compact shapes did not appear to be a serious impediment. Compact districts were not required by either federal or state law, and compactness certainly had not been a districting criterion that the state had taken seriously in the past.[29] The real issue going into the 1992 session of the legislature therefore was not whether to create a second majority-minority district, but rather, as a Baton Rouge newspaper editorialized, "where and how such a district will be configured".[30]

The Adoption of District Four

The debate over "where and how" to create a second African-American district revolved around two basic variants. Both combined African-Americans in the

[27]The exit poll was conducted by Voter Research and Surveys, a polling organization created by the four major television networks, ABC, CBS, CNN, and NBC.

[28]See, e.g., Marsha Shuler, "EWE Favors 2nd Majority Black House District," *Advocate* (Baton Rouge), March 11, 1992, or Marsha Shuler, "McMains Submits Another Plan for Reapportionment," *Advocate* (Baton Rouge), April 9, 1992.

Monroe area, in northeastern Louisiana, with African-Americans in Baton Rouge, in central Louisiana. This linkage was accomplished by including in the district a long and relatively narrow strip of lightly populated but heavily African-American areas along the west bank of the Mississippi River, where the river forms the state boundary between Louisiana and Mississippi. Both variants also extended west into Alexandria, in the center of the state, and into Lafayette, in the southern part, as well as east into the parishes under the southern boundary of Mississippi. The major difference was whether another approximately 38,000 African-American registered voters, which would constitute close to 20 percent of the total African-American registration within the district, would be from the northern or southern sections of the state.

The decision concerning the new minority district had more than racial implications, of course. One of the state's incumbent congressmen, Democrat Billy Tauzin, was quoted as saying that "How you shape it shapes all the others."[31] While there was, in fact, considerable discretion in the design of the other six districts, regardless of where the second minority district was located, there was also no doubt that the structure of the new minority district could have an impact on the reelection prospects of particular members of the congressional delegation. Which of these incumbents were treated more favorably would, in turn, have partisan consequences.

None of the incumbent members of Congress had announced any plans to terminate their congressional service in 1992. With the loss of a seat overall, and the creation of a second African-American district, it was clear that two of the seven white incumbents would probably have their congressional tenure terminated (or at least interrupted) involuntarily. Different districting designs would have different implications for these white incumbents. The loss of a seat had meant that every district in the old eight-district plan was now underpopulated. The least underpopulated was 7.4 percent below the new seven-district ideal; the most, 22.7 percent below. Every incumbent's district therefore was vulnerable to drastic revision. The fact that four of the white incumbents were Republicans and

[29]The 1969 congressional redistricting plan, for example, contained a district that extended from the Sabine River at the Texas-Louisiana border all the way to Lake Pontchartrain in the southeastern part of the state (see Engstrom, 1980). It was, like the Massachusetts gerrymander of 1812, the subject of a political cartoon, with eyes, a mouth, and hands added to highlight the noncompact shape of the district [*Times-Picayune* (New Orleans), June 4, 1969]. The next time the legislature revised the congressional districts, in 1972, "partisan politics had dictated that geographical compactness should be ignored" (Weber, 1993, 111). The 1972 plan, for example, also contained a "narrow, elongated" district, the motivation for which was "to ensure the election of a Democratic congressman" (Weber, 1993, 111). The state's next set of congressional districts, adopted in 1981, contained the infamous "gerryduck" district, and was found to be a racial gerrymander that violated the Voting Rights Act [see *Major* v. *Treen*, 574 F.Supp. 325 (1983), and Engstrom 1986].

[30]"Reflections on Redistricting for Congress," *Sunday Advocate* (Baton Rouge), March 15, 1992. See also the testimony in *Hays* of state Representative Robert Adley, Transcript (August 26, 1992), at 45, 69, 74-75.

[31] The Honorable Billy Tauzin, quoted in Joan McKinney, "Remap Plan Unraveling on Way to Senate," *Advocate* (Baton Rouge) April 12, 1992.

three were Democrats added a serious partisan dimension to the incumbent concerns as well. Although Louisiana politics are rarely acutely partisan (see Parent, 1988), this was a context in which partisan concerns could be expected to be, and were, elevated. Indeed, the dean of the state's delegation in the U.S. House, Democrat Jerry Huckaby, noted prior to the legislative session: "The Louisiana delegation has traditionally been a delegation—not four Democrats and four Republicans—but this has made us into Democrats and Republicans."[32]

The state Senate initially passed a bill containing a southern variation for the new minority district. In this version, the district was extended into southeastern and south-central Louisiana. The district, which was 61.6 percent African-American in population and 59.2 percent in voter registration, was widely reported to have been designed to favor state senator Cleo Fields, an African-American from Baton Rouge who was expected to be a candidate in the new majority minority district. Fields had unsuccessfully challenged the Republican incumbent in the old Eighth District, Clyde Holloway, in 1990. Although he received only 29.6 percent of the vote in that election, he is estimated to have received 84.7 percent of the votes that had been cast by African-Americans.[33] Over 30,000 of the additional African-American registered voters included in this southern extension were from the old Eighth District, and Fields' previous exposure among these voters was expected to benefit his candidacy. All of the African-American senators voted in favor of the bill except Charles D. Jones, of Monroe, who was expected to be an opponent of Fields in the new minority district.

The five white majority districts in this plan had pronounced partisan consequences. The three white Democratic incumbents, Huckaby, Tauzin, and Jimmy Hayes, were each placed in a district in which no other incumbent resided. So also was Republican incumbent Bob Livingston. The other three Republican incumbents, however, Holloway, Richard Baker, and Jim McCrery, were all placed in the same district. This arrangement was widely regarded to have been designed to protect primarily Huckaby, the most senior member of the state's delegation, who had been implicated in the recent House banking scandal.[34] The plan kept Huckaby separated from the other congressman from North Louisiana, McCrery, whom he reportedly did not want to run against.[35] It also placed over

[32]Quoted in Bruce Alpert and Jack Wardlaw, "La. Delegation Awaits its Fate in Redistricting," *Times-Picayune* (New Orleans), March 15, 1992.

[33]These estimates, and others presented below, are derived from bivariate ecological regression analyses in which the votes cast in precincts are regressed onto the racial composition of the precincts (the African-American percentage of the registered voters for elections prior to 1988, the African-American percentage of the people signing-in to vote for elections in or after 1988). For an illustration of this methodology applied to Louisiana elections, see Engstrom , 1989.

[34]Huckaby had 88 overdrafts listed with the House "bank," ranking him 36th among the 303 members and former members of the House with overdrafts identified in the *Washington Post*, on April 17, 1992.

[35]Indeed, one of his Democratic colleagues was quoted as saying that being placed in the same district with McCrery was an "anathema to Huckaby. He does not want to face McCrery." The Hon. Billy Tauzin, quoted in Joan McKinney, "Remap Plan Unraveling on Way to Senate," *Advocate* (Baton Rouge), April 12, 1992.

87,000 African-American registered voters in Huckaby's district, an increase of about 6,000 over his previous district. This African-American presence, constituting 27.0 percent of all of the registered voters in the district, was expected to help Huckaby with any challenge from a Republican candidate, even though Huckaby himself had a very conservative voting record in Congress.[36] The plan was described by one Republican state senator as "a Jerry Huckaby-gerrymandered plan,"[37] and by McCrery as "gerrymandering at its highest level."[38] All five of the Republican senators voting on the plan opposed it (one was absent), while the white Democrats split 13 to 11 in favor (with one absent). Combined with the votes of the seven African-American senators (all Democrats), the plan received the minimum number of votes necessary for passage, 20. Republicans made it clear that they would challenge the arrangement in court if it was ultimately adopted by the state.[39]

This version of the plan would not be adopted, however. It was pronounced "dead on arrival" when it reached the state house, where a coalition including African-American and Republican legislators backed what was referred to as a "consensus" plan.[40] The second minority district in this plan extended northwest, rather than south. Sherman Copelin, the African-American representative who sponsored the plan, complained that the new minority district in the plan passed by the Senate did not contain enough African-American voters to ensure that African-Americans would elect a candidate of their choice.[41] The northern version extended the district west, under the Louisiana-Arkansas border, all the way to the Shreveport area in the northwestern corner of the state, where over 30,000 African-American registered voters were brought into the district. The percentage of African-Americans among the registered voters in this district was 63.2, almost 4 percentage points higher than the second minority district in the other version.

[36]Huckaby's support for the "conservative coalition" in the House, as identified by Congressional Quarterly, averaged 96 percent for the years 1987 through 1991. He voted against the Civil Rights Act in both 1990 and 1991.

[37]State senator Max Jordan, quoted in "Senate OKs Remap Plan," *News-Star* (Monroe), May 1, 1992.

[38]Quoted in Jack Wardlaw, "Lawmakers OK Rival Plans in Redistricting," *Times-Picayune* (New Orleans), May 1, 1992.

[39]See "Senate OKs Remap Plan," *News-Star* (Monroe), May 1, 1992. The Republican incumbents did file a suit in federal court on May 25, asserting that the state was unlikely to adopt a plan in sufficient time for it to be precleared and implemented prior to the candidate qualifying period, and requesting that the court therefore adopt a plan. They also informed the court that they were prepared to submit a plan for the court's consideration. Complaint for Declaratory Judgment, Injunctive and Other Relief, *Baker v. McKeithen*, CV92-0973 (W.D. La. 1992). The Republican incumbents had earlier established the Committee for Fair Representation for the purpose of supporting their interests in the redistricting process through lobbying and, if necessary, litigation. See Joan McKinney, "Reapportionment Round 1," *Sunday Advocate*, (Baton Rouge), March 8, 1992.

[40]Marsha Shuler and Bill McMahon, "Congressional Remap Plans Advance in Legislature," *The Advocate* (Baton Rouge), May 1, 1992, and Marsha Shuler, "Lawmakers See House Remap Plan Thriving, Senate Bill Dying," *The Advocate*, May 4, 1992.

[41]Jack Wardlaw, "Lawmakers OK Rival Plans in Redistricting," *Times-Picayune* (New Orleans), May 1, 1992.

This plan also treated the white incumbents more equitably, at least in partisan terms. While Republicans Baker and Holloway would continue to reside in the same district, McCrery and Huckaby were placed together in a north Louisiana district. The more northern version of the minority district reduced the number of African-American registered voters available to be placed in Huckaby's district, which in this plan would be 18.6 percent, (compared with 27.0 percent in the plan passed by the Senate). If McCrery, who had been quoted as saying "If I have to run against Huckaby, so be it,"[42] were reelected from that district, then the loss of two white incumbents would be shared equally between the two parties (assuming, of course, that both Baker and Holloway were not defeated in their new district, an unlikely occurrence).

This plan, in which the largest and smallest districts were only 0.01 and 0.006 percentage points respectively above and below the ideal district population, passed the House by a vote of 61 to 41. All 24 African-American representatives (all Democrats) voted for it, as did 12 of the 14 Republicans. White Democrats, as a group, did not support it. Only 25 voted for it, while 39 voted against it (with three absent). The House adopted the plan a second time, in the form of a House amendment to the Senate-passed bill. Group support remained the same, except white Democrats split 26 to 40 this time (with only one absent). The Senate acceded to the Copelin plan by accepting the House amendment. The vote in the Senate was 22 to 13. Five of the African-American senators (including Jones) voted for it, with two against (and one, Fields, absent). All six Republican senators supported it, while the white Democrats split evenly, 11 to 11 (with three absent). The largest and smallest districts in the plan were only 0.01 and 0.006 percentage points above and below the ideal district population, respectively. It became the state's plan when Governor Edwards signed the bill on June 1, and became law when the Attorney General granted preclearance on July 6.[43]

HAYS V. *LOUISIANA*

Following preclearance of the plan, a lawsuit was filed seeking to prevent it from being used in the 1992 congressional elections. The plaintiffs in this case, *Hays* v. *Louisiana*, were two white, one Asian-American, and one African-American resident of Huckaby's old district in north Louisiana.[44] They argued, essentially, that the plan was unfair to minority voters because it overconcentrated African-Americans in the Second and the Fourth Districts. Some of the African-Americans should be removed from these districts, they maintained, and placed in adjoining districts so that they would have more "influence" on the elections in these other districts. This argument, needless to say, fueled

[42]Debbie Edney, "McCrery Says Reapportionment Unfair," *News-Star* (Monroe), April 24, 1992.

[43]Letter from John R. Dunne, Assistant Attorney General of the United States, to Angie Rogers LaPlace, Assistant Attorney General, State of Louisiana (July 6, 1992).

[44]See note 1, *supra*. The case was originally filed in a state court, but was removed to and tried before a three-judge federal district court upon petition by the State.

speculation that the suit was little more than an effort to get the judiciary to do what the legislature had not done, which was enhance Huckaby's reelection prospects by increasing the African-American vote in his new district.[45]

The plaintiffs described the state's plan as "a sophisticated voter dilution scheme" that violated both the Constitution and the Voting Rights Act.[46] They claimed that the Second and the Fourth Districts were both safe, "super-majority" African-American districts into which minority voters had been unnecessarily "packed,"[47] while all of the other districts were safe white districts. The plan therefore would assure that two African-Americans and five whites would be elected, resulting, according to them, in "the functional disenfranchisement" of the African-American voters in the white districts and the white voters in the African-American districts.[48]

This disfranchisement, the plaintiffs further maintained, was intentional. The scheme, they argued, was "the 'illegitimate' child" of an "illicit political love affair" between African-American leaders and the Republican Party.[49] Although the plaintiffs had explicitly stated that they were not alleging that there had been any partisan bias behind the formulation of the plan,[50] they did maintain that "partisanship was indirectly impacted through manipulation of racial composition of the districts."[51] Their explanation for the joint support of African-Americans and Republicans for the plan was:

> The super-majority or "safe" district is treasured by black elected officials, while the reduction in black influence in the remaining majority white [districts] is supported by the Republican Party as an effort to eliminate the effectiveness of the black minority in the remaining districts.[52]

The plaintiffs proposed that Districts Two and Four be reduced to racially "competitive" districts. This would allow African-American voters to be dispersed among districts in such a way that they could constitute at least 20 percent of the registered voters in three other districts, rather than just one, and therefore have "an opportunity to influence" the elections in those three districts.[53] Such a scheme would not only be more fair to African-Americans,

[45]While not made explicit, this motivation was no doubt implied in the post-trial brief for the Louisiana Legislative Black Caucus, which maintained that "this lawsuit is simply a vehicle for a few disgruntled white people who lost a political battle and are trying to get this Court to interfere with the political process and reverse the result." Memorandum of Amicus Curiae Louisiana Legislative Black Caucus, at 7 (hereinafter Black Caucus's Memorandum).

[46]Plaintiffs' Memorandum, at 27.

[47]Plaintiffs' Memorandum, at 5, 13, 16, and Weber testimony, (August 26, 1992) at 118-119, 126-127, and 177, and (August 27, 1992) at 317.

[48]Plaintiffs' Memorandum, at 11.

[49]*Id.*, at 14.

[50]Complaint Seeking Permanent Injunction and Declaratory Judgment and Motion for Preliminary Injunction, at 2 (hereinafter Plaintiffs' Complaint).

[51]Plaintiffs' Memorandum, at 15.

[52]*Id.*, at 15.

[53]Weber testimony, (August 26, 1992) at 224-245.

they argued, it would also allow the districts to better reflect "the traditional criteria of contiguity, compactness, minimal violation of existing political subdivision boundaries and substantial commonalities of interest."[54]

The plaintiffs introduced a plan purporting to accomplish these goals. The African-American voting age percentage in District Four was reduced to 53.7 in this plan, and the voter registration percentage to 53.5. In District Two, the African-American voting age population (VAP) was reduced to 55.9 percent, and the registration to a reported 60.2 percent. (A variation of the plan affecting only two districts in the New Orleans area brought the VAP percentage in District Two down further, to 52.8; registration figures were not provided for this variant.) The African-American VAP percentages for the three so-called "influence" districts in the plaintiffs' plan were 25.2, 21.2, and 19.9, while the voter registration percentages were 23.5, 20.6, and 20.5.

The extent to which the greater dispersion of the African-American vote within the plaintiffs' plan would significantly enhance minority "influence" in the majority white districts was seriously questioned by all three judges on the court.[55] The state's plan had three districts that were 19.5, 19.5, and 17.7 percent African-American in VAP, and 21.3, 18.8, and 17.8 percent in voter registration. The differences in the plans in this respect, as one judge noted, were in fact *de minimus*.[56] And while the plaintiffs' plan did divide fewer parishes into more than a one district than did the state's plan (16 compared with 28), the extent to which it satisfied any notion of compactness or commonality of interest was also seriously questioned by the judges.[57] One district in the plaintiffs' plan ran the length of the state, from the Arkansas border to the Gulf of Mexico.[58] Indeed, so noncompact were some of the plaintiffs' districts that one judge queried, "If I've got to take a craziness, why should I take yours over the legislature's?"[59]

The plaintiffs responded to the judges' concerns by suggesting that the African-American voters could be even more dispersed. Relying on the testimony of a political scientist, they argued that districts in which African-Americans constituted only 40 to 45 percent of the voting age population would still be racially "competitive."[60] Districts Two and Four therefore could be further "unpacked," and the other districts drawn more consistently with the other criteria.[61]

[54]Plaintiffs' Memorandum, at 33.

[55]See the questions and comments from the bench of the Honorable Jacques L. Wiener, Jr., the Honorable John M. Shaw, and the Honorable Donald E. Walter, Transcript (August 26, 1992), at 219-222, 226-227.

[56]*Id.*, at 221-222.

[57]*Id.*, at 191, 199, and 205-206, and Transcript (August 27,1992), at 313-316.

[58]Transcript (August 27, 1992) at 313-314.

[59]*Id.*, at 313-314.

[60]Plaintiffs' Memorandum, at 14, 16, 31-33; Weber testimony, (August 26, 1992) at 198, 218-219, and (August 27, 1992), at 330, 391.

[61]Plaintiffs' Memorandum, at 33; Weber testimony, (August 26, 1992), at 198-199, 202-203, 209-210, 218-219.

The state acknowledged that "The primary motive for drawing these districts was to enhance black voters' ability to elect the candidates of their choice,"[62] but argued that neither of the two majority African-American districts was a "packed" district. Evidence was presented showing that voting in the state's congressional elections had been racially polarized. In the elections held under the previous districting arrangement, voters had been presented with the choice between or among African-American and white candidates on seven occasions, and on each occasion they had responded in a racially divided manner. The African-American voters preferred an African-American candidate and the white voters a white candidate.[63] Given the racial divisions in Louisiana politics, the state argued, "viable" minority districts would need to be majority minority districts.[64]

Districts Two and Four, in which African-Americans would constitute 60.0 and 63.2 percent of the registered voters, were described by state's expert witness as providing African-Americans with "two really good shots" at electing the candidates of their choice, but not a guarantee of such.[65] In the previous year's state legislative elections, it was pointed out, white candidates who had not been the choice of African-American voters had won in three districts in which African-Americans were a majority of the registered voters. The African-American voters in each of these districts overwhelmingly preferred African-American candidates.[66] One of these districts was a state senate district in which African-Americans constituted 60.9 percent of the VAP and, at the time of the election, 56.3 percent of the voter registration.[67] Higher rates of voter participation and cohesion among the whites allowed the white candidate to win, despite that candidate's support among the African-American voters being estimated at only 15.7 percent.[68] Given this experience, it was argued that neither Districts Two and Four could be considered so disproportionately African-American that minority votes would be "wasted" in them.[69] Indeed, an African-American state legislator testified

[62]Post Trial Brief of Defendants, p. 10 (hereinafter Defendants' Memorandum).

[63]These elections were the 1984 and 1990 primary elections in the old District Two, and the 1986 primary and runoff, 1988 primary and runoff, and 1990 primary in the old District Eight. Testimony of Richard L. Engstrom, Transcript (August 27, 1992), at 337-342 (hereinafter Engstrom testimony); Defendants' Exhibits 2, 3, 7, and 8.

Racially polarized voting is certainly not unique to congressional elections in Louisiana. For judicial findings of racially polarized voting in other types of elections across the state, see e.g., *Clark* v. *Edwards*, 725 F. Supp. 285, (M.D. La. 1988), *East Jefferson Coalition for Leadership and Development* v. *Parish of Jefferson*, 691 F. Supp. 991 (E.D. La. 1988), *Citizens for a Better Gretna* v. *City of Gretna*, 636 F. Supp. 1113 (E.D. La. 1986), and *Major* v. *Treen*, 574 F. Supp. 325 (E.D. La. 1983).

[64]Engstrom testimony, at 342, 386. See also the testimony of state representative Willie Hunter, Jr., concerning racial differences in political participation, Transcript (August 26, 1992), at 249, 259-260 (hereinafter Hunter testimony).

[65]Engstrom testimony, at 343; see also Hunter testimony, at 251, 258.

[66]Engstrom testimony, at 344-346; Defendants' Exhibit 6.

[67]See Plaintiffs' Exhibit 8.

[68]Defendants' Exhibit 6.

that the new Fourth congressional district could likewise be won by a white candidate who was not the preference of African-American voters.[70]

The state also argued that there was no evidence to support the plaintiffs' theory about "influence" districts. The notion that a 20 percent minority presence was somehow a threshold at which minority voters could be expected to influence election outcomes was flatly rejected.[71] The state's own experience, it was maintained, contradicted that suggestion.[72] Among the seven majority white districts in the previous plan, the district with the most African-Americans was the Eighth, which had a VAP that was 36 percent African-American in both 1980 and 1990.[73] Voter registration in the district was 36.3 percent by 1992. The white incumbent in this district, Holloway, had never received as much as 10 percent of the votes cast by the district's African-American voters. African-American candidates who had been overwhelmingly favored by the African-American voters had attempted to unseat him in 1988 and 1990, but were unsuccessful due to the strong support for Holloway among white voters.[74] Not only had African-American voters had little influence on these election outcomes, they also had little influence, the state argued, on Holloway himself. When asked whether African-American voters within the old Eighth District had any influence over Holloway, an African-American state legislator responded, "No, certainly not,"[75] a conclusion supported by testimony concerning Holloway's voting record in Congress.[76] Indeed, the state's own expert witness acknowledged that Holloway's votes in Congress had been "unresponsive" to the concerns of African-Americans.[77]

The minimal increases in the number of African-Americans in the majority white districts in the plaintiffs' plan compared to the state's plan, it was argued, could not be said to significantly benefit minority voters.[78] This was especially the case if the consequent reduction in the African-American voting strength in Districts Two or Four would place the group's opportunity to elect candidates of their choice in those districts at risk, as was the case in the plaintiffs' plan.[79] The plaintiffs' proposal, the state maintained, amounted to leaving the five white districts safe but making the two African-American districts at best "marginal," or "competitive," an arrangement that could hardly be considered more racially fair than the state's plan.[80]

[69]Engstrom testimony, at 345-346, 352.

[70]Hunter testimony, at 262-265.

[71]Engstrom testimony, at 346-8, 352.

[72]Defendants' Memorandum, at 6; United States' Memorandum, at 7.

[73]Plaintiffs' Exhibit 6.

[74]Engstrom testimony, at 347-348, 357-358. Defendants' Exhibits 4, 5, 7, and 8.

[75]Hunter testimony, at 268.

[76]Engstrom testimony, at 358-359; Weber testimony (August 27, 1992), at 280-281.

[77]Weber testimony, at 280-281.

[78]Defendants' Memorandum, at 5-6, 8-9; see also United States' Memorandum, at 16 n.12.

[79]Engstrom testimony, at 343-344, 347, 349-351; Hunter testimony, at 259-260. See also Black Caucus's Memorandum, at 7.

[80]Engstrom testimony, at 351, 359, 376-377.

The state defended its districts by arguing that they were "functional and perform the very purpose for which they were enacted."[81] The state intended to provide African-American voters with viable opportunities to elect two candidates of their choice to Congress. In doing so, it recognized that "commonalities of interest" are not limited to people who happen to reside in close geographical proximity to one another. Witnesses testified that African-Americans across the state share social and economic problems that, due to their race, are particularly intense. Consequently, African-Americans residing in Baton Rouge, for example, may feel that they have more in common with African-Americans in Shreveport than with whites in Baton Rouge.[82] The state acknowledged that the districts "may not be pleasing to the eye," but that in itself did not make them legally infirm.[83]

The court denied the plaintiffs' request that the forthcoming congressional elections be enjoined. It also, in a brief memorandum ruling, rejected the plaintiffs' claim that the state's plan was unconstitutional. No decision was reached, however, on whether the plan was a violation of the Voting Rights Act. Supplemental briefs were specifically requested on whether the voting strength of either whites or blacks was being diluted by the plan, or by any particular district within it.[84]

THE 1992 ELECTIONS

The primary elections for congressional seats under the state's plan were held in October 1992, with runoffs, where necessary, on the same day as the presidential election that year. As a result of these elections, the number of African-Americans serving in Congress from Louisiana increased to two. None of the white candidates that ran in the majority African-American districts could be classified as strong candidates (see, e.g., Jacobson, 1992: 168, 177). The African-American incumbent in the new Second District, William Jefferson, was reelected easily in the primary. Jefferson had only two opponents, a white independent who had been an unsuccessful candidate for Congress on four previous occasions, and an African-American councilwoman from suburban Kenner, in the Jefferson Parish portion of the district. Voter registration in the Second District was 60.2 percent African-American at the time of the primary, and 58.3 percent of those signing-in to vote that day were African-Americans. Jefferson won 73.5 percent of the votes cast. He was the overwhelming choice of the African-American voters, receiving an estimated 90.3 percent of the votes cast by them. And while he was the plurality choice of the other voters, he did not receive a majority of the votes cast by them. Jefferson is esti-

[81]Defendants' Memorandum, at 11.

[82]Hunter testimony, at 248, 254-255; Engstrom testimony, at 385-386.

[83]Defendants' memorandum, at 11; see also Black Caucus's Memorandum, at 6, and United States' Memorandum, at 12.

[84]Memorandum Ruling and Order, Hays v. State of Louisiana, Civ. No. 92-1522 (W.D. La. August 27, 1992).

mated to have received a vote from only 48.5 percent of the whites voting in this election. The white independent candidate, Roger Johnson, finished second among white voters, receiving an estimated 26.2 percent of their votes.

An African-American was also elected in the new Fourth District. The contest in this majority African-American district, in which there was no incumbent, drew a field of eight candidates. Six of these candidates were African-Americans. Both of the white candidates were Republicans who had never held elective office. As expected, state senators Fields and Jones were among the candidates, and they had to faced each other in a runoff. The district's voter registration was 63.3 percent African-American at the time of the primary, and 65.8 percent of those signing in to vote in that election were African-American. Fields had a commanding lead over Jones in the primary, receiving 47.8 percent of the votes compared with Jones's 14.0. Fields received an estimated 60.8 percent of the votes cast by African-Americans in the primary, while Jones was the second preference of this group, at 18.6 percent. White voters cast a plurality of their votes for one of the white candidates, Steve Myers, a Baton Rouge attorney who had unsuccessfully sought a state legislative seat in 1991. Myers received an estimated 23.1 percent of the votes cast by whites, while Fields was the second choice of white voters, with 22.5 percent.

The African-American voter registration percentage in the Fourth District at the time of the runoff election was 63.1 percent. Among those signing in to vote that day, 60.4 percent were African-American. Fields won the election, receiving 73.9 percent of the votes cast. He is estimated to have received a vote from 79.2 percent of the African-Americans voting in the runoff, and 64.7 percent of the whites.

The three white incumbents who had been placed in districts of their own in the new plan were, like Jefferson, reelected by large margins in the primaries. This included Livingston, the Republican in the new First District, and Democrats Tauzin and Hayes, in the Third and the Seventh, respectively. Despite having five opponents, Livingston received 72.7 percent of the votes cast in his primary. Tauzin won 81.7 percent of the primary vote against a single opponent in his district, and Hayes won 73.0 percent against two opponents (one of whom was his brother).

The other two districts each contained two incumbents. Republicans Holloway and Baker, along with a Democratic state senator, Ned Randolph, were candidates in the new Sixth District, while Democrat Huckaby, Republican McCrery, and three other candidates competed in the new Fifth District. In both districts, the incumbents had to face each other again in runoff elections. In the Sixth District, Republicans Holloway and Baker received 36.7 and 33.1 percent of the vote, respectively, in the primary, while Randolph received 30.2 percent. Baker then edged Holloway in the runoff, receiving 50.6 percent of the vote. In the Fifth District, McCrery led the primary by a substantial margin, receiving 44.1 percent of the votes, while Huckaby received 29.4. In the runoff, McCrery won with 63.0 percent of the votes. One incumbent from each party therefore lost their seat following the redistricting, leaving the state's new seven-member House delegation at four Democrats and three Republicans.

The 1992 elections, it turned out, were the only elections held under this districting configuration. The following summer the United States Supreme Court, in the case involving congressional districts in North Carolina, *Shaw* v. *Reno*, established a new standard for evaluating racial gerrymandering claims under the Fourteenth Amendment.[85] The federal court in Louisiana therefore revisited the *Hays* plaintiffs' gerrymandering allegation in light of this new precedent, and further elections under the arrangement were precluded as a result of that evaluation.

Hays v. *Louisiana*, Round II

The federal court in Louisiana never did rule on the Voting Rights Act issue on which it had requested post-trial briefs in 1992. The court instead returned, in 1993, to one of the plaintiffs' claims that it had expressly denied the previous year, that the Fourth District was a "racial gerrymander" that violated the equal protection clause of the Fourteenth Amendment. This issue was resuscitated when the Supreme Court held in *Shaw* that race-based districting, even when designed to benefit rather than harm an African-American minority, must be "strictly scrutinized" under the Fourteenth Amendment. In *Shaw* the Court took a district-specific approach to the concept of gerrymandering, divorcing it from any requirement that the voting strength of a cognizable group be systematically diluted by a set of districts.[86] If a district is drawn solely for the purpose of separating voters along racial lines, and "traditional districting principles" are disregarded in the process, strict scrutiny must be applied. To survive such scrutiny, a state must have a "compelling interest" in basing the district on race, and the district itself must be "narrowly tailored" to satisfy that interest.[87]

As noted above, the state had argued in 1992 that "The primary motive for drawing these districts was to enhance the ability of black voters to elect the candidates of their choice."[88] In 1993, in the post-*Shaw* context, the state argued that despite this motive, the actual *shape* of District Four was the result of partisan and incumbent politics, rather than race, and therefore strict scrutiny was not necessary. Testimony about the districting process was elicited from Fields, Congressman Hayes, and an African-American state senator, Marc Morial. This testimony revealed that a majority of the legislators believed that the Justice Department would not preclear a plan that did not include a second majority African-American district, and therefore the issue before the legislature was, as Fields expressed it, "Where do we create it?"[89] The shape of the Fourth District,

[85] 509 U.S. 630 (1993).

[86] Compare this with the treatment of the partisan gerrymandering issue in *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), and *Davis* v. *Bandemer*, 478 U.S. 109 (1986).

[87] *Shaw* v. *Reno*, 509 U.S. 630 (1993).

[88] Post Trial Brief of Defendants, p. 10 (hereinafter Defendants' Memorandum).

especially the extension along the northern border of the state, was said to be driven by partisan and incumbent considerations rather than race. According to Fields, "Politics led the district to look the way it looked."[90] In addition, the state presented statistical evidence concerning the demographic and socioeconomic characteristics of the districts that it argued demonstrated that District Four was a "coherent" district within which there were "commonalities" other than race.[91] The court dismissed these arguments as "no more than disingenuous, *post hoc* rationalizations."[92] It found the districting principles of compactness, contiguity, and respect for political subdivisions and "commonality of interests" to have been "cavalierly" disregarded in the creation of the Fourth District. "No one could claim," the court stated, "that District 4 is compact, at least not with a straight face." And while the district was unquestionably contiguous, it was quite narrow in places, prompting the court to say that it satisfied this principle "only hypertechnically and thus cynically." Twenty-eight of the state's 64 parishes (counties) were divided in the plan, compared with only seven in the previous eight-district arrangement. District Four itself included only four whole parishes and parts of 24 others. Most of the major municipalities had also been divided in the plan. District Four was ultimately characterized as an "un-district" that included "bits of every religious, ethnic, economic, social, and topographical type found in Louisiana."[93] While politics might have affected "the general location of the gerrymander," the court concluded, it was "the core decision" to create a second majority African-American district that caused these deviations from traditional districting principles.[94]

The state argued that there were "compelling" reasons for the Fourth District. If African-American voters were not provided with two viable opportunities to elect congressmen of their choice, it maintained, the plan would not be in compliance with the Voting Rights Act. As noted above, it was widely believed that a plan without two majority African-American districts would be denied section 5 preclearance. Such a plan could also be vulnerable, the state argued, to invalidation under section 2 of that Act, which prohibits election arrangements that result in minority vote dilution. (The state's first effort at congressional districting following the 1980 census was precleared but then found to conflict with that provision.)[95] The state also maintained that the districting plan was justified as a remedial measure that would help politically empower the state's African-Americans. While African-Americans constituted close to 30 percent of the state's population, the state's congressional delegation had been exclusively white until 1991 and largely unresponsive to African-American interests. State senator Morial testified that this "history of legislative indifference to the black population of this state is something that the creation of a second majority black district seeks to address."[96] The history of discrimination had also resulted in severe disparities in the socioeconomic characteristics of the state's white and African-American residents, disparities that usually result in levels of political participation among African-Americans that are lower than those for whites. District Four was therefore constructed to have a voter registration over 60 percent African-American so that minority voters would have a viable opportunity to elect a candidate of their choice.[97]

[89]Testimony of Cleo Fields, Transcript (August 20, 1993), at 7, 18 (hereinafter, Fields testimony).

[90]*Id.*, at 18. See also the testimony of Marc Morial, Transcript (August 19, 1993, morning session), at 11-24 (hereinafter Morial testimony), and the testimony of James A. Hayes, Transcript (August 19, 1993, afternoon session), at 37-38.

[91]See the expert witness testimony of Allan J. Lichtman, Transcript (August 20, 1993), at 41-94.

[92]*Hays* v. *State of Louisiana*, 839 F.Supp. 1188, 1201 (W.D. La. 1993).

[93]*Id.*, at 1200-1201.

[94]*Hays* (1993), at 1201.

[95]See *Major* v. *Treen*, 574 F.Supp. 325 (E.D. La. 1983).

The court found it unnecessary to rule on the state's compelling interest arguments because, in its opinion, even *if* the reasons for a second majority African-American district were compelling, District Four had not been "narrowly tailored" to achieved them.[98] According to the court, District 4 contained more African-Americans than necessary to provide the group with a reasonable opportunity to elect an African-American. In the court's view:

> ...a district with a black voting age population of not more than 55%—and probably less—would have been adequate to ensure that blacks could elect a candidate of their choice, assuming they chose to exercise their franchise and assuming the candidate of their choice had more than a modicum of appeal for non-black voters.[99]

Such a district could have been created, the court added, with "substantially less violence to traditional redistricting principles."[100] The state's plan was found therefore to fail the strict scrutiny test, and further elections under it were prohibited.

CONGRESSIONAL DISTRICTING, 1994

The legislature, not surprisingly, interpreted the *Hays* decision to mean that a second majority-minority district would be permitted, provided it was not over 55 percent in voting age population and did not deviate from traditional districting criteria as dramatically as District Four in the 1992 plan. Just such a district was adopted during a special legislative session in 1994.[101]

[96]Morial testimony, at 14.

[97]See Morial testimony, at 15-16; Fields testimony, at 15-17; and the testimony of State Senator Tom Greene, Transcript (August 20, 1993), at 121-122.

[98]The court did provide an extensive footnote, however, expressing its opinion that neither section 2 nor section 5 of the Voting Rights Act required the state to create a second majority African-American district, and castigating the Justice Department for in effect requiring the state to adopt one. *Hays* (1993), at 1196-1197, n.21. In addition, one member of the three-judge panel did explicitly reject the state's "compelling interests" arguments, finding them "so slim that they reek of the pretextual and the contrived." *Id.*, at 1218, (Walters, J., concurring).

[99]*Id.*, at 1208.

[100] *Id.*, at 1208.

A new version of a majority African-American Fourth District was developed by the staff of the state senate. For many years the congressional district with the highest percentage of African-Americans, outside of the New Orleans area, had been the Eighth. In a plan adopted in 1969, following Supreme Court decisions tightening the one person, one vote requirement for congressional districts (see Engstrom, 1980), the Eighth stretched from the middle of the state's western border with Texas all the way to Lake Pontchartrain in the southeastern part of the state. The district was elongated, with its eastern portion considerably more narrow than the western part. It shared borders with all of the other congressional districts except the two containing parts of New Orleans. It was, by any standard, not compact. Indeed, it was the subject of the traditional political cartoon at districting time, highlighted by an artist's addition of eyes, mouth, and hands.[102] Subsequent versions of the Eighth were more wedge-shaped districts running from Rapides Parish in the center of the state down to Lake Pontchartrain. The "Old Eighth" became the conceptual basis for a new Fourth District, modified to bring it close to 55 percent African-American in voting age population.

The new Fourth District was also wedged-shaped (Figure 3). It ran from Caddo Parish in the northwestern corner of the state to Ascension Parish in the southeast, a distance of about 250 miles. It included three entire parishes and parts of 12 others. African-Americans constituted 58.4 percent of the population and 54.4 percent of the voting age population of the district, according to 1990 census figures. They also constituted, as of 1994, 55.3 percent of the registered voters. A plan including this district was agreed to by the state's congressional delegation. District Two, the other majority African-American district, was changed very little by the plan, retaining a 61.0 percent African-American population and 60.7 percent African-American voter registration in 1994. The African-American percentage of registered voters in the other five districts ranged from 9.6 to 23.7. Congressman McCrery was quoted as saying, concerning the congressional delegation, "I wouldn't say we're all in favor of it, but nobody expressed any grave reservations in terms of their own particular districts. We said if the plan was passed by the Legislature we could live with it."[103] The plan, in which both the largest and smallest districts deviated from the ideal population

[101] Despite the *Hays* court's belief that neither section 2 nor section 5 required the state to adopt two districts with African-American majorities (see note 98, *infra*.), it was still widely believed that a plan without two would not be granted preclearance by the Justice Department. If there had been any ambiguity about this, it was dispelled when the Justice Department took the position, in an *amicus curiae* brief in support of the state's appeal of the *Hays* decision, that the *Hays* court was in error. Brief for the United States as Amicus Curiae, *State of Louisiana et al., v. Hays et al.*, No. 93-1539, at 12-13, n.3. In addition, just prior to final passage of the new districting plan, the Assistant Attorney General for Civil Rights provided attorneys representing the Louisiana Legislative Black Caucus a letter indicating that two majority African-American districts would be required for preclearance, a letter that was circulated among legislators. See Letter from Deval L. Patrick, Assistant Attorney General, to Brenda Wright and Robert McDuff, April 20, 1994 (via facsimile transmission).

[102] *Times-Picayune* (New Orleans), June 4, 1969.

[103] *Times* (Shreveport), March 27, 1994, at 1A.

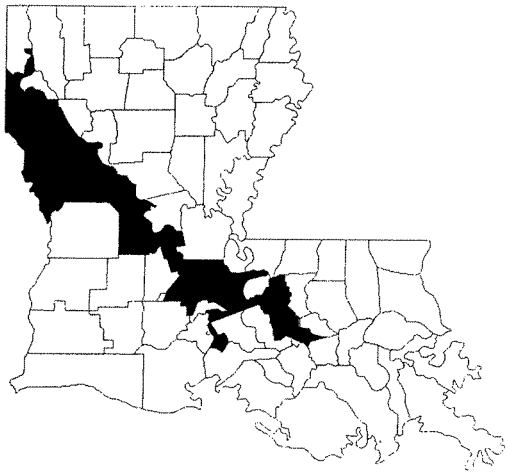

FIGURE 3. Louisiana's Fourth District. 1994

by only 0.01 of a percentage point, was passed by a vote of 61 to 43 in the House and then 21 to 15 in the Senate. All 24 African-American members of the House voted in favor of the plan, as did seven of the eight African-American senators (one being absent). White members of the House and Senate voted in opposition to the plan, however. In the House, 37 voted in favor and 43 against (with one absent), and in the Senate, 14 voted in favor and 15 against (with two absent).[104] The new districts were precleared by the Department of Justice, but before elections could be held in them, another hearing was held in the *Hays* case.

[104] White Democrats in the House were divided, with 32 voting in favor of the plan and 31 against it. House Republicans split five in favor and 11 against. In the Senate, 13 of the white Democrats voted in favor of the plan and nine against it, while only one Republican voted for it and six Republicans voted against it.

Hays v. *Louisiana*, Round III

The plaintiffs in the *Hays* case were not satisfied with the state's second effort at revising congressional districts. They therefore continued their *Shaw* challenge, describing the new plan as only "a slightly less egregious racial gerrymander" than its predecessor.[105] Traditional districting criteria continued to be sacrificed, they argued, in a quest for racially determined districts. The mark of Zorro, in their opinion, had simply been replaced by "a racial dagger."[106] They also maintained that the state had no compelling interest in the creation of a second majority African-American district, and that even if it had, District Four was still not narrowly tailored. This version of District Four, they argued, was also "packed" with more African-Americans than necessary to provide that group with a "realistic chance" to elect a candidate of its choice.[107] Indeed, according to the plaintiffs, "districts within thirty-five (35%) to forty-five (45%) percent black citizens" would be sufficient to provide African-Americans in Louisiana with such a chance.[108]

The court agreed that the new Fourth District was a racial gerrymander, stating that "we called for major surgery. [This] is at best a cosmetic makeover."[109] The state's argument that the new Fourth was based on the old Eighth and therefore consistent with past districting practices was rebuffed as "mere pretext." In the court's opinion, "The State did not imitate the 'old Eighth' for tradition's sake. ...New District Four was drafted with the specific intent of ensuring a second majority-minority Congressional district."[110] References to the old Eighth, a majority white district, were even dismissed as irrelevant, because the constitutionality of that district had never been challenged in court.[111] The court likewise rejected the state's other argument, that District Four followed the Red River valley and consequently reflected a "commonality of interest," as "clearly a *post hoc* rationalization."[112]

The court flatly rejected the plaintiffs' assertion that African-Americans in

[105]Memoranda in Support of Motion for Preliminary Injunction and Adoption of an Interim Congressional Districting Plan for the 1994 Congressional Elections in the State of Louisiana, at 12.

[106]*Id.*, at 27.

[107]*Id.*, at 15.

[108]*Id.*, at 17.

[109]*Hays v. State of Louisiana*, 862 F.Supp. 119, 122, n.1 (W.D. La 1994).

[110]*Id.*

[111]*Id.*, at 122, and at 127 (Shaw, J., concurring). The court, however, did not identify any grounds for such a challenge. The only features of the Eighth referenced by the court were its shape and its purpose—it was a "bizarre" district designed to ensure "the reelection of Congressman Gillis Long" *Id.*, at 122. (In fact, the incumbent at the time the district initially assumed its bizarre shape was Speedy Long, not Gillis Long. The district had been extended into the southeastern part of the state initially in 1967, and further in that direction in 1969. Gillis replaced Speedy in 1973.) Neither of these features, without more, violates the Constitution. Compactness is not a requirement of congressional districts in either federal, see *Shaw v. Reno*, 509 U.S. 630, 647 (1993), or state law, and there is no constitutional prohibition against protecting incumbents, see *White v. Weiser*, 412 U.S. 783, 791 (1973). The basis for such a challenge is therefore unclear.

[112]*Hays* (1994), at 122.

Louisiana have a realistic chance to elect candidates of their choice in districts that range from 35 to 45 percent African-American, and also their characterization of District Four as a "packed" district.[113] But the court also said that the legislature had misinterpreted its 1993 decision "as approving a racially gerrymandered district if it contained no more than 55% minority registered voters."[114] The state, the court said, had no compelling interest in basing districts on race. A second majority African-American district was not required, in the court's opinion, by either section 2 or section 5 of the Voting Rights Act.[115] And the state's claim that a second district was needed to remedy past and present discrimination was also rejected. The court stated:

> Without concrete evidence of the lingering effects of past discrimination or continuing legal prejudice in voting laws and procedures, coupled with specific remedies, we cannot agree that the re-segregation of Louisiana by racially configured voting districts is warranted.[116]

The court replaced the state's plan with one of its own that contained only a single majority African-American district. The Second District in the New Orleans area was 60.7 percent African-American in population, 56.1 percent in voting age population, and as of 1994, 60.3 percent in voter registration. Five of the other districts had African-American registration percentages ranging from 22.7 to 27.7, while one was only 9.7 percent. The court said it had "ignore[d] all political considerations" in developing the plan, which split only six parishes and one town of about 3,000 residents.[117] The largest and smallest districts deviated by only 0.01 of a percentage point from the ideal district population. All of the districts except the Second resembled rectangles (Figure 4). Both Congressman Fields and Congressman Baker resided in the Sixth District in this arrangement, a district that was 27.5 percent African-American in voter registration.

The 1994 election did not proceed under the court drawn plan, however. The Supreme Court stayed the lower court's ruling, allowing the election to be held under the state's second plan. All of the incumbents won reelection in the October primary. Fields did not draw a major white opponent in the new Fourth District, which was 55.3 percent African-American in voter registration at the time of the election. Turnout among registered voters in that district was essentially the same for whites and African-Americans, 45.0 percent and 45.4 percent, respectively. Fields is estimated to have received over 99 percent of the votes cast by African-Americans and about 32 percent of those cast by whites, leaving him with just under 70 percent overall. All of the other incumbents won

[113]See Transcript (July 21, 1994, afternoon session), at 18-19.

[114]*Hays* (1994), at 122.

[115]*Id.*, at 123-124.

[116]*Id.*, at 124.

[117]*Id.*, at 125.

with over 70 percent of the vote except Hayes, who was challenged by former congressman Holloway for the Seventh District seat. Hayes received 53 percent of the votes to win in the primary. The state's second plan, however, like its first, was used for only one election. The *Hays* litigation continued, and ultimately resulted in the court's plan being used for the 1996 election.

Hays v. *Louisiana*, Round IV

The Supreme Court heard the state's appeal of the *Hays* ruling in 1995 and, without dissent, vacated the lower court's decision.[118] The gerrymandering and strict scrutiny findings were not addressed in the Court's controlling opinion however. The decision was vacated because the plaintiffs, the Court concluded, did not have standing to sue over the district lines. Continuing to view the concept of gerrymandering as a district-specific phenomenon, the Court held that the plaintiffs lacked standing to sue because none of them lived in the allegedly gerrymandered district. The plaintiffs were not residents of the Fourth District in the 1994 plan, but rather the adjacent Fifth. While the racial composition of the Fifth was of course affected by the design of the Fourth, the Court found nothing in the record to indicate that "the legislature intended District 5 to have any particular racial composition." The spillover effect of the Fourth on the Fifth, by itself, did not constitute a "cognizable injury" under the Fourteenth Amendment.[119]

The same day the Supreme Court handed down its ruling in *Hays* it also decided *Miller* v. *Johnson*, in which a majority African-American congressional district in Georgia was struck down.[120] The Georgia district was in several respects similar to the 1994 version of the Fourth in Louisiana. It traversed much of the state, with most of its African-American population located at the ends of the district and in extensions reaching out to urban concentrations. It also had been adopted in order to satisfy the preclearance requirements of the Department of Justice.

The Supreme Court ruling in *Hays* presented nothing more than a procedural hurdle requiring additional plaintiffs to be added to the lawsuit. Once this was done, another hearing was held by the district court in 1995. This two-day hearing produced, the court concluded, "nothing but essentially redundant, cumulative evidence" because the facts had not changed.[121] The defendant's race-neutral explanations for District Four were dismissed as "frivolous."[122] The court found that "the State considered only race in determining which pockets of voters to pull in and which pockets of voters to push out," and had done so to satisfy the Justice Department's demand for two majority-minority districts.[123] In this respect, the Supreme Court's *Miller* decision provided the district court with what it called "a 'Goose' case", which in Louisiana refers to a "commanding precedent, factually on

[118] *United States* v. *Hays*, 515 U.S. 737 (1995).
[119] *Id.*, sl. op. at 9.
[120] 515 U.S. 900 (1995).
[121] *Hays* v. *State of Louisiana*, 839 F.Supp. 1188 (WD La 1993), (sl. op. at 13).

all fours."[124] The state's compelling interest arguments were again rejected, for the same reasons as before, and "the heavy-handed confection" of District Four was found to fall short of the "narrow tailoring" standard.[125]

The court readopted the districting plan it had created the previous year, and even claimed that its plan, despite dismantling one of the two majority-African-American districts, "empowers more black voters" than the state's plan.[126] This assertion was premised on the rather simplistic notion that any district that is at least 25 percent African-American in voting age population is a minority "influence district."[127] The court noted that none of the majority white districts in the state's plan met this criterion (although one was only 0.6 percentage points below that figure), while three of the districts in the court's plan did. Districts Four, Five, and Six in the court's plan had voting age populations that were, respectively, 29.3, 27.8, and 29.4 percent African-American. African-Americans in these districts would presumably "influence" election outcomes and the subsequent behavior of the people elected to represent these districts. The "influence" that African-Americans would have in these three districts, according to the court, would empower the state's African-Americans more than actually having a second representative in Congress chosen by and accountable to the voters in a majority African-American district.

The notion that African-Americans will influence the outcomes of elections in any districts in which they constitute at least 25 percent of the voting age popu-

[122] *Id.*, at 15. The court repeated its observation that the constitutionality of the "Old Eighth" District had never been challenged (see *supra.*, note 111), and this time offered a reason why this was somehow relevant. The court stated:

> We suspect that if challenged today, that district would meet the same fate as District 4, as it was formed unabashedly with the intention of gathering minority voters into one district to ensure the re-election of longtime Louisiana Congressman Gillis Long.

Id., at 19, n.48.

The state had cited versions of the old Eighth, however, going back to the late 1960s (specifically 1967 and 1969), when the incumbent was Speedy O. Long, not Gillis Long. This was when the departure from compactness began, in the form of the long, relatively narrow extension of the district into the southeastern part of the state. The 1967 version of the district was 32.4 percent nonwhite, while the 1969 version, which went further into the southeast, was 30.7 percent white (according to the 1970 census). The 1972 revision, less elongated that its predecessors, brought the district to 36.2 percent African-American, while the 1982 version brought that percentage up to 38.3. By no stretch of the imagination could any of these versions of the district be said to have been "an effort to segregate voters into separate voting districts because of their race" [*Shaw* v. *Reno*, 504 U.S. 630, 658 (1993).

The *Hays* court's suspicion that the old Eighth would be found unconstitutional today also appears to be in conflict with the rejection of most of the racial gerrymandering allegations in the Texas congressional redistricting case, *Vera* v. *Bush*, 861 F.Supp. 1304 (S.D. Tex. 1994). These allegations concerned the deliberate manipulation of the boundaries of majority white districts in order to increase the number of African-Americans in them and thereby enhance the reelection prospects of the white Democratic incumbents. *Id.*, at 1304, 1326-1328, 1344-1345.

[123] *Hays* (1996), at 16-17.
[124] *Id.*, at 14, n.13.
[125] *Id.*, at 24.
[126] *Id.*, at 7, n.17.
[127] *Id.*

lation is certainly dubious, especially in light of the court's simultaneous acknowledgment that "racial bloc voting is a fact of contemporary Louisiana politics."[128] There was no suggestion that African-Americans will be able to elect the candidates of their choice in these districts if those candidates are African-Americans. Indeed, the court had unequivocally rejected, during the 1994 hearing, the plaintiffs' assertion that African-Americans can elect candidates of their choice in districts that are 35 percent African-American.[129] Nor did the court cite any evidence demonstrating that African-American voters could be expected to determine which of the various white candidates in these districts would be elected. There was no evidence indicating that white voters in these districts are so systematically and predictably divided that the African-Americans would constitute a swing vote, effectively choosing between or among the candidates most preferred by the white voters. Indeed, within one of the court's so-called "minority influence" districts, District Five, a former Grand Wizard of the Ku Klux Klan, David Duke, won a majority of the votes in both the 1990 election for a U.S. Senate seat and the 1991 runoff election for Governor.[130]

Nor was there any evidence indicating that the people chosen to represent districts in which African-Americans constitute 25 percent or more of the voting age population will behave, after elections, in a manner responsive to that portion of their constituency. As noted above, Clyde Holloway had not been responsive to minority interests while serving as the congressman for the Eighth District. That district was 36 percent African-American in voting age, the highest among the seven majority white districts in the state. Expert witnesses for both the plaintiffs and the defendants had testified in 1992 that as a congressman, Holloway had not been responsive to the interests of the African-Americans in the district.[131] Further evidence introduced at the 1994 hearing revealed that, from 1987 through 1990, Holloway had voted in favor of civil rights measures endorsed by the Leadership Conference on Civil Rights only 6 percent of the time. He had opposed, for example, both the House and the conference committee versions of the Civil Rights Act in 1990, and was even one of the few Republicans to oppose the bipartisan compromise that resulted in the Civil Rights Act of 1991.[132] It is not surprising, therefore, that all of the African-Americans witnesses in the *Hays* litigation, including the only African-American among the plaintiffs, expressed a preference for the creation of two majority African-American districts.[133]

The influence district notion was applied in a racially selective manner by the court as well. The majority African-American districts, Districts Two and Four, are both over 40 percent *white* in voting age population (40.7 and 44.7,

[128] *Id.*

[129] Transcript, (July 21, 1994, afternoon session), at 18-19.

[130] See Ronald E. Weber, Report on Liability Issues Related to Louisiana Act 1 Congressional Districts for Hearing in *Hays* vs. *State of Louisiana*, Plaintiffs' Exhibit 8.

[131] See text at *supra*., note 77.

[132] Declaration of Richard L. Engstrom, State Exh. 13.

[133] Testimony of Edward L. Adams, Transcript (August 26, 1992), at 235.

respectively), yet neither of these districts was identified as a white influence district. Indeed, the court specifically found the whites in District Four to be in a situation comparable to the African-Americans in the three districts the court described as "bleached," rather than the African-Americans in the so-called minority influence districts. The three "bleached" districts, One, Three, and Seven, have voting age populations that are only 10.1, 18.4, and 16.5 percent African-American. According to the court, "...office holders and office seekers no longer need to heed the voices of the minority residents of their districts—here, the whites of District 4, the blacks of the other, 'bleached' districts."[134] The basis for this racial distinction in influence districts, especially curious given the court's rather adamant agreement in 1994 that District Four was not a "packed" district, was never articulated by the court.[135]

THE 1996 ELECTIONS

Prior to the 1996 congressional elections, the plan imposed by the court in *Hays* was adopted by the state itself. The 1995 state elections had brought a new governor and legislature to Baton Rouge. The new governor was Mike Foster, a former Democratic state senator who switched to the Republican Party just prior to the gubernatorial primary. Foster won the governor's office by defeating Congressman Fields in a runoff election in which the vote was severely divided along racial lines. (Fields received well over 90 percent of the votes cast by African-Americans in that election, while Foster received close to 90 percent of those cast by whites.) Foster called a special session of the legislature in 1996, one purpose of which was to adopt the *Hays* court's districting plan "in its entirety and without change".[136]

The new House had 22 African-American members, two fewer than it had after the 1991 elections. Two white candidates who had won special elections in majority African-American districts in New Orleans in 1994 and 1995 were reelected in the regular 1995 election.[137] The new Senate had nine African-American members, one more than after the 1991 elections. The new African-American senator won the only majority African-American Senate district that had not been carried by an African-American candidate in 1991. (The white incumbent in this district did not seek reelection after being indicted in a scandal involving the state's video poker industry.) Both legislative chambers were more Republican than previously. The number of Republicans in

[134] Ironically, the African-American incumbent in District Four, Fields, has been identified as an example of a "new style" African-American candidate who reaches out to white voters in an effort to create a moderate biracial coalition. See Canon, Schousen, and Sellers, 1996.

[135] On the issues of whether 55 percent constituted "packing" and whether 35 percent provided African-Americans with a "realistic chance" to elect the candidate of their choice, Judge Shaw stated, from the bench in 1994, "We will not seriously entertain any cross-examination to the contrary on those two points. We are convinced already." Transcript (July 21, 1994, afternoon session), at 19.

[136] Call for Special Session, Item No. 123.

the House increased from 16 following the 1991 elections to 27 after the 1995 elections (including two members who switched their party affiliations). On the Senate side, the number doubled, from seven following the 1991 elections to 14 after the 1995 elections (again including one member who switched to the Republican Party). This new legislature adopted the court's plan by a vote of 61 to 40 in the House and 20 to 19 in the Senate. All 21 of the African-American House members voting on the plan opposed it (the remaining member was absent), as did all nine African-Americans in the Senate. White members of the House voted in favor of the plan, 61 to 19, while white senators favored it by a vote of 20 to 10.[138] Following this change in the status of the plan, the Supreme Court dismissed the state's appeal of the *Hays* decision as moot.[139]

The court's plan, in its new incarnation as the state's plan, had to be submitted to the Justice Department for preclearance under section 5 of the Voting Rights Act. In August, prior to the 1996 elections, preclearance was denied. The department maintained that the state could have adopted a plan with two "reasonably compact" districts that would each provide black voters with a "reasonable opportunity" to elect candidates of their choice. The state's latest plan, in the department's opinion, would therefore "clearly violate" Section 2 of the Voting Rights Act, necessitating that preclearance be withheld. According to the Justice Department:

> ...we have a situation where both the State and the federal court have acknowledged that electoral politics in Louisiana remain polarized by race; where black candidates continue in the main to be the choice of black voters and white candidates of white voters with limited crossover; where a second district can be created in a way that respects Louisiana's districting traditions and provides black citizens a reasonable opportunity to elect candidates of choice; and a redistricting plan...which fails to respond to any of these realities.[140]

[137] A special election was held in state House district 102 in 1994. African-Americans had constituted a plurality of the voter registration in this district in 1991, when it was won by an African-American candidate (see Llorens, Parsons, and Perry, 1996) who was later elected to the New Orleans city council. The 1994 special election to fill this seat drew a field of seven candidates. The district had an African-American majority in voter registration at the time of the special election, 51.2 percent, but African-Americans constituted a minority of those signing in to vote in both the special primary (43.9 percent) and the runoff (44.1 percent). The runoff was a biracial contest in which about 90 percent of the white voters voted for the white candidate and about 90 percent of the African-Americans voters voted for the African-American candidate. This resulted in the white candidate winning 55.5 percent of the votes.

House district 95 was also the subject of a special election after the African-American incumbent won a state Senate seat in a majority African-American district. This House district was 74.6 percent African-American in voter registration at the time of the 1995 special election. The African-American vote in the primary was dispersed across a nine-candidate field, while about two-thirds of the votes cast by the white voters went to a white Democrat. This white candidate lead the primary with 39.5 percent of the votes. His runoff opponent was an African-American Republican who had received only 15.5 percent of the votes, edging an African-American Democrat for the other runoff position by three votes. The white Democrat was subsequently favored over the African-American Republican by both the white and the African-American voters in the runoff. He received about 70 percent of the votes cast by whites and 57 percent of those cast by African-Americans.

[138] White Democrats in the House voted in favor of the plan by a vote of 35 to 18 (with three absent), while House Republicans were almost unanimously in favor, 26 to one. In the Senate, white Democrats split eight to eight over the plan, while Republicans supported it by a vote of 12 to two.

[139] *Louisiana v. Hays*, 114 S. Ct 2731, 512 U.S. 1230 (1994); 115 S Ct. 2431, 515 U.S. 737 (1995).

The 1996 elections were conducted using the court-ordered plan. The result left Louisiana with only one African-American congressman. Mr. Jefferson was reelected without opposition in the Second District. No African-Americans candidates contested any of the six white districts. Mr. Fields, who had been placed in the new Sixth District along with Republican Richard Baker, declined to run for reelection. Conservative Republican incumbents were easily reelected in two of the so-called "influence districts"; Jim McCrery winning 71.4 percent of the vote in the new Fourth District and Baker 69.3 percent in the Sixth. There was no incumbent in the remaining "influence district," the Fifth, which was won by another conservative Republican, John Cooksey. Cooksey won 58.3 percent of the vote in a runoff against Democrat Francis Thompson, who in the primary had edged former Republican congressman Holloway out of the runoff by 1.0 percentage point (27.7 percent to 26.7). White Republican incumbents were unopposed in the First and Third Districts, while a Democrat, Chris Johns, won an open seat in the Seventh District in a runoff with another Democrat. (A Republican candidate failed to make the runoff in the Seventh by only 12 votes.)[141]

CONCLUSION

Redistricting following the 1990 census resulted in significant increases in African-American representation in Louisiana. The number of state House districts in which African-Americans constituted a plurality of the registered voters increased from 15 to 26; the number of such districts for the state senate increased from five to nine. African-Americans have been elected in all but two of these districts, and in no others. On two other statewide governing bodies, the Board of Elementary and Secondary Education and the Public Service Commission, the number of majority African-American districts increased

[140] Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to E. Kay Kirkpatrick, Director, Civil Division, Department of Justice, State of Louisiana, August 12, 1996. The Louisiana Legislative Black Caucus had asked the Supreme Court for a rehearing on the issue of mootness because the state's plan had not been precleared under section 5 at the time the Supreme Court dismissed the appeal in *Hays*. See Petition for Rehearing, Louisiana Legislative Black Caucus, et al., vs. Hays, et al., No. 95-1682 (July 19,1996). Following the Justice Department's denial of preclearance, the Supreme Court invited the plaintiffs in *Hays* to respond to this petition (___ U.S. ___, October 7, 1996).

[141] Billy Tauzin, the incumbent in the Third District, switched his party affiliation to the Republican Party, as did Jimmie Hayes, the incumbent in the Seventh. Hayes did not contest the House seat, however, but ran instead for the U.S. Senate seat vacated by Democrat J. Bennett Johnson. Hayes failed to make the runoff in the Senate election.

from one to two and from zero to one, respectively. African-American candidates were also elected in each of these districts, and only these districts.

The number of majority African-American districts for the U.S. House increased only temporarily, however. There were two such districts, rather than one, in the elections of 1992 and 1994, but the number reverted back to one for the election of 1996. As a consequence of the different district configurations, there were two African-Americans serving in the Louisiana congressional delegation from 1993 through 1996, but only one when the 105th Congress opened in 1997. This tight correspondence between the racial composition of electoral districts in Louisiana and the race of the representatives of those districts reflects the fact that race is the major demographic division in the state's politics. No other demographic variable divides Louisiana voters like race. These increases in African-American representation would not have occurred if Louisiana had not been subject to the preclearance requirement of the Voting Rights Act. The gains in the state legislature and on BESE resulted directly from the Justice Department's refusal to preclear dilutive redistricting plans for these bodies, and the gains on the Public Service Commission and in the U.S. House resulted from the perception that the creation of new majority African-American districts would be necessary to obtain preclearance. These gains, none of which resulted in the underrepresentation of the state's white majority, are now at risk, however, as a result of the Supreme Court's objections to the benign application of racial considerations in the districting process.

The Supreme Court's recent decisions in redistricting cases have elevated the importance of districting criteria such as compactness, respect for preexisting political boundaries, and the recognition of nonracial "communities of interest" above that of racial fairness. This has occurred despite the fact that these criteria have not been well defined, clearly measured, nor rigorously applied in the past. The representational benefits that result from the application of these criteria, moreover, are at best ambiguous (see Engstrom, 1995). Yet these criteria may now be employed as justifications for limiting the ability of African-Americans to elect candidates of their choice.

Louisiana's experience with congressional redistricting highlights this consequence of the recent Supreme Court decisions. One of the most obvious "communities of interest" in the state, its African-American minority, has had its representation reduced in order to accommodate districting criteria that relate far more to a concern for "appearances"[142] than to the "fair and effective representation" of the residents of the state.[143] If this revision in the hierarchy of districting goals is to be permanent (five of the justices currently on

[142]See *Shaw* v. *Reno*, 509 U.S. 630, 647 (1993).

[143]In *Reynolds* v. *Sims*, the Supreme Court declared that "achieving fair and effective representation for all citizens" is the basic aim of apportionment or districting. 377 U.S. 533, 565-566 (1964). See also *Gaffney* v. *Cummings*, 412 U.S, 735 (1973).

the Court support it while the other four are vigorously opposed), then Louisiana should reevaluate its continued reliance on the single member district election system.

Louisiana is a state in which African-Americans suffer from the effects of both past and present discrimination. It is a state in which a majority of the white voters, as recently as 1990 and 1991, have voted for a former Grand Wizard of the Ku Klux Klan and self-identified "racialist", David Duke.[144] It is a state, in short, in which racial fairness needs to be a preeminent representational goal. Without state authorities feeling that the Voting Rights Act requires the benign consideration of race in their redistricting decisions, that goal is not likely to be attained through the medium of single member districts. Racial fairness, to put it bluntly, has never been a "traditional districting principle" in Louisiana.

A federal court in Georgia, while invalidating a majority African-American congressional district in that state, noted that "The time has come to contemplate more innovative means of ensuring minority representation in democratic institutions," and admonished the Georgia legislature to find "new solutions" to the problem of minority underrepresentation.[145] Louisiana's legislature would be well advised to do the same. Other types of election systems, equally if not more democratic than single member districts, could be adopted to elect Louisiana's delegation to the U.S. House, as well as other representative bodies with governing authority in the state. These other systems would be more likely to result in "fair and effective representation" than single member districts drawn under the new constraints imposed by the Supreme Court.

Modified multi-seat election systems, such as limited, cumulative, or preference voting, could be employed to provide opportunities for not just geographically concentrated groups to elect candidates of their choice, but geographically dispersed groups as well.[146] Minority electoral opportunities within these systems are not dependent on, or are at least much less dependent on, where district lines are placed. Race therefore does not have to be "the predominate factor" in the design of districts within these arrangements (see, e.g., Engstrom, 1992). The larger districts associated with these electoral arrangements allow districting criteria-like compactness and respect for political subdivision boundaries to be accommodated without necessarily having an adverse impact on minority electoral opportunities. Indeed, these systems are more likely to provide opportuni-

[144]This occurred in the U.S. Senate election of 1990 and the gubernatorial election of 1991 (see Rose, 1992, and Rose with Esolen, 1992).

[145]*Johnson* v. *Miller*, 864 F.Supp. 1354, 1393 (S.D. Ga. 1994).

[146]A federal statute currently requires the use of single member districts in elections for the U.S. House of Representatives. 2 U.S.C. sec. 2c (1988). Legislation has been introduced, however, to permit the use of multi-member districts, provided they are combined with limited, cumulative, or preference voting systems. See the Voters' Choice Act (H.R. 2545) introduced in the 104th Congress by Rep. Cynthia McKinney of Georgia.

ties for actual "communities of interest," whether geographically concentrated or not, to be directly represented within legislative bodies (Morrill, 1996). The goal of "fair and effective representation" in Louisiana is much more likely to be realized through these types of arrangements than through single member districts drawn under the districting constraints now imposed by the United States Supreme Court.

CONGRESSIONAL REDISTRICTING IN NORTH CAROLINA

Patrick J. Sellers, David T. Canon, and Matthew M. Schousen

CONGRESSIONAL REDISTRICTING IN NORTH CAROLINA was thrown into the center of the national debate over minority redistricting in the summer of 1993 when the Supreme Court severely criticized the state's plan as a racial gerrymander that "bears and uncomfortable resemblance to political apartheid" [*Shaw v. Reno* 1993]. The confluence of forces that produced this controversial plan make it one of the most interesting and instructive case studies of the politics of empowering minority voters through racial redistricting. Ambitious African-American officeholders, self-interested Republican party officials and Democratic House incumbents, Section 5 pre-clearance procedures, computer technology, and white backlash against the new black districts all played important roles in the unfolding drama.

Though it is impossible at this early juncture to assess the long-term effects of redistricting in North Carolina, the most obvious short-run consequence was to redistribute power toward black voters, black community leaders, and black politicians. In a state that had not elected a black to Congress since 1899, two new black-majority districts attracted a very strong field of African-American politicians who gave a new voice to black voters. Some of the black candidates campaigned with the explicit message that "it's our turn." Even the black candidates who attempted to create biracial coalitions, such as Mel Watt in the 12th District and Willie Riddick in the 1st, gave more attention to the concerns of black voters than had been true in previous elections.

The other short-run effect of the redistricting process was confusion and uncertainty. The state legislature debated ten redistricting plans, including one that was passed (plan #6) only to be rejected by the U.S. Justice Department. A second plan (plan #10) was written into law only weeks before the beginning of the filing period for congressional primaries. A lawsuit filed by the North Carolina Republican Party extend the filing period by one week, but a federal judge dismissed the suit ruling that the new plan met federal requirements. The uncertainty affected potential candidates who were deciding whether to run, incumbents who were trying to map out reelection campaigns, and voters who did not know which district they were in. After a series of court cases, including two

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decisions by the Supreme Court, the district lines remain unsettled as lawmakers return to the drawing board to create new districts for the 1998 elections.

Ultimately two African-Americans were elected in 1992 and reelected in 1994 from two newly created black-majority districts. Voters chose Mel Watt in the new 12th District and Eva Clayton from the redesigned 1st District. Both candidates won hotly contested primaries in 1992 (Clayton was forced into a runoff with a white candidate, Walter Jones, Jr., the son of the late incumbent who had represented the district for 26 years), but easily defeated the token Republican opposition in the fall. Both representatives have been prominent in congressional politics, especially Clayton who was elected president of the huge freshman class in the 103rd Congress.

This essay explores the forces that shaped congressional redistricting in North Carolina. We begin by examining the strategic and legal context of redistricting. We then turn to the interplay between the competing groups, individuals, and courts as the various redistricting plans unfolded. We conclude by pointing out the significance of the redistricting process in North Carolina's congressional elections.

SETTING THE STAGE

The Players

The conflicting preferences of individuals and groups involved in redistricting created a protracted process that was heated, confusing, and controversial. Civil rights advocates viewed the addition of one House seat in North Carolina (from 11 to 12) as an opportunity to create one or more minority-controlled districts. Progressively ambitious African-American state lawmakers looked forward to carving out districts that would provide outlets for their ambition. U.S. House incumbents and other state legislators with more static ambition hoped to protect their existing turf, or even make it more secure.

The two major political parties also had a stake in the redistricting process, hoping to strengthen their respective positions in the state. The Democrats held a seven to four advantage in congressional seats in 1990. The party hoped to keep that edge, strengthen their incumbents' seats, or even increase their advantage. Republicans, on the other hand, wanted to use the creation of minority districts to concentrate Democratic voters in a few districts, thereby weakening Democratic incumbents in neighboring districts and increasing Republicans' chances to pick up a few seats.

Other groups such as the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU) urged the creation of a second black district. But as we will discuss below, there was a split within the black community over the wisdom of this strategy. Technical support for redistricting largely came from the state legislature, but some Democratic House incumbents also got involved with the help of a New York-based political action committee. The National Committee for Effective Congress (NCEC), known for supporting Democrats, provided a computer and data base that enabled House members to draw up potential district maps. When asked about the Democrats' reliance on the NCEC, Rep. Tim Valentine (D) responded that North Carolina congressmen were not paying for the services; the national Democratic Party had engaged the NCEC to help "handle redistricting issues." Rep. David Price (D) added that "it helped to have our own resource so if we wanted to suggest something we weren't totally out to lunch" [*News and Observer*, August 25, 1991]. A prominent North Carolina group, the Black Leadership Caucus (BLC), did not get involved in the redistricting process. But, the group played an active role in the recruitment process by trying to ensure that blacks would be elected in the new black-majority districts.

Legal Requirements for Redistricting

The North Carolina General Assembly was keenly aware of the political and legal pressures to create at least one black-majority district. Twenty-two percent of the state's 6.6 million people are black. Consequently, Republicans and some black leaders argued that the state should have two and perhaps even three black-majority districts (.22 times 12 equals 2.64 districts). This view received support from the 1982 Voting Rights Act Amendment, and its subsequent interpretations by the Supreme Court and the Justice Department. The 1986 Supreme Court decision *Thornburg v. Gingles* made it possible for a minority group to claim discrimination if "(i) it is sufficiently large and geographically compact to constitute a majority in a single-member district, (ii) it is politically cohesive, and (iii) its preferred candidates are usually defeated as a result of bloc voting by a white majority" [Research Division, North Carolina General Assembly 1991, 10; also see Chapters 2, 3, and 5 of this volume].

The first condition established in *Gingles*, size and compactness, created some problems for the redistricting committee. Unlike some northern states, such as Illinois or Michigan, or even southern states such as Georgia, North Carolina does not have an African-American population that is concentrated in large urban areas. Instead, the minority population is scattered in smaller urban areas such as Charlotte, Durham, Raleigh, Wilmington, Winston-Salem, and Greensboro and in the rural northeastern part of the state. Only three counties are at least 50 percent black, and when added together they are not nearly large enough to comprise a single congressional district (Figure 1). Therefore, North Carolina lacked the luxury enjoyed by many states of debating the minimum percentage of black voters needed to guarantee the election of an African-American (see Chapter 1 of this volume). Instead, the North Carolina legislature had to use creative cartography to scrape together enough black voters to make a single black-majority district.

The Research Division of the state legislature advised the redistricting committees that they could ignore the compactness standard: "Neither the State nor

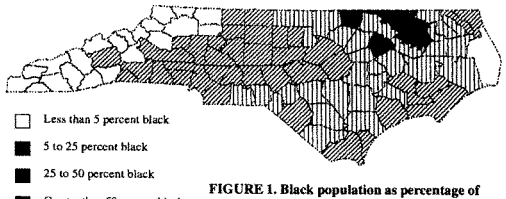

FIGURE 1. Black population as percentage of each county's total population in North Carolina
Sources: North Carolina General Assembly, Legislative Services Office

federal constitution requires districts to be compact. Critics often refer to the lack of compactness of a particular district or group of districts as gerrymandering, but no court has ever struck down a plan merely on the basis that it did not appear to be compact" [Research Division, North Carolina General Assembly 1991, 12]. The legislature certainly followed this advice with impunity![1]

While North Carolina's new districts are not geographically compact, they meet the other two conditions laid out in the *Gingles* decision. The black vote in North Carolina is cohesive; between 90 and 95 percent of black voters cast ballots for Democratic candidates in statewide elections. As noted above, it has also been more than 90 years since a black North Carolinian has served in Congress (George H. White, from 1897-1901). This legacy made it clear to the redistricting committees that any redistricting plan had to include at least one black-majority district.

One final legal question had to be considered by the redistricting committees: the legal status of partisan gerrymanders. The redistricting committees wanted to protect Democratic incumbents, but they were concerned that contorted districts lines would not be viewed favorably by the courts. Historically the Court has been reluctant to enter this "political thicket," acknowledging that redistricting is an inherently partisan process. In *Davis v. Bandemer* [1986], however, the Court recognized the justiciability of partisan gerrymander claims, but they failed to overrule the Indiana redistricting plan. The Court argued that an electoral system is discriminatory only when "it consistently degrades a voter's or group of voters' influence on the political process." Furthermore, the aggrieved party must prove intent to discriminate and actual discriminatory effects over a period of at least two elections [Research Division, North Carolina General Assembly 1991, 11]. The consequences of this vaguely worded decision are unclear. Some argue that the partisan gerrymanders could be struck down if a stronger case is presented than the one used in Indiana. Others say that the discrimination suffered by parties must be comparable to that experienced by minorities in the South [Butler and Cain, 1992, 33-36]. The Court seems to be leaning toward the latter interpretation. In *Badham v. Eu* [1988], the Court refused to strike down the 1981 California redistricting plan, claiming that the standard of unconstitutional discriminatory effect had not been met. Two rulings by the Supreme Court concerning the North Carolina plan affirm this position but raised new doubts concerned racial gerrymanders. We are getting ahead of our story.

[1]For an excellent discussion of different measures of compactness and how different values are traded off in the redistricting process see Butler and Cain [1992, 60-90], Niemi, Grofman, Carlucci, and Hofeller [1990]; and Young [1988]. Neimi et al., argue that compactness will become a more important standard in redistricting cases in the 1990s. This prediction may be coming true as Justice O'Connor noted in *Shaw v. Reno* [1993] that "appearances matter" in the creation of districts. However, in the 1995 decision, *Miller v. Johnson*, the Court did not emphasize the importance of "appearances."

ACT I—THE DRAMA UNFOLDS: PLAN #6

Early in 1991, the North Carolina General Assembly appointed redistricting committees to take up the task of creating the new state legislative and congressional districts. In addition to the legal constraint to create a new black-majority district, the committees were confronted with a political task—to protect as many Democratic incumbents as possible. As the redistricting drama unfolded, one other factor grew increasingly important: unlike many states that have a bipartisan process, North Carolina's redistricting process was completely dominated by the Democrats who firmly controlled the state legislature and thus the redistricting committees (Senate: 19 Democrats to 7 Republicans, House: 19 Democrats to 9 Republicans). Furthermore, the Republican governor, Jim Martin, was the only state executive in the nation without veto power.

Members on the redistricting committees were not motivated solely by broad partisan goals. Some professed altruistic aims of creating fair districts, but others were blunt about their desire to make sure that the redrawing of congressional district lines did not adversely affect their own districts. Still others had their sights on higher office, either in moving from the state House to the state Senate or moving from the state level to the national level. [personal interviews, August, 1991-March, 1992].[2] One important feature of both the House and Senate committees was the prominent role of black lawmakers. Six of the ten black House members and three of the five black senators (all Democrats) sat on the redistricting committees. Thus, 60 percent of the black House and Senate members were on the redistricting committees, compared with only 20

[2]We conducted 37 interviews with 34 people, including newspaper reporters, Democratic Party county chairs, members of the General Assembly, a member of the U.S. Congress, and most of the candidates running in the black-majority districts. The interviews ranged in length from twenty minutes to more than two hours, with an average length of about one hour. All but five of the interviews were face to face. Most of the interviews were conducted from August 1991 to May 1992. These interviews were initially conducted as part of an in-depth case study of the candidate emergence process in North Carolina's 1st congressional district in 1992. [See Canon, Schousen, and Sellers, 1994].

percent of the whites in the House (22 of 110) and 49 percent of the whites in the Senate (23 of 47). Of the nine black lawmakers on the two committees, two actually ran for a U.S. House seat in 1992 (Mickey Michaux and Thomas Hardaway) and three others were often mentioned in the newspapers as strong potential candidates (Toby Fitch, Howard Hunter, and Frank Ballance). We discuss the influence of these black lawmakers on the creation of black congressional districts later in the chapter.

Two initial questions confronted the redistricting committees as they considered how to create at least one minority district: 1) which minority groups should be considered in creating the new district? and 2) where would the district or districts be located? Answering the first question was relatively easy. Unlike states such as California or Texas, North Carolina does not have a large Hispanic population. Since the state is only one percent Hispanic and one percent Native American, it was clear that the focus of minority representation would be on African-Americans. Although Republicans and the NAACP made a brief appeal for three minority districts (two black majority and one black and American Indian majority), their argument fell on deaf ears because most members of the black community rejected the notion that Native American and African-Americans jointly represent a cohesive minority community.[3]

Answering the second question was also relatively straightforward as long as only one black district was created. According to state Rep. Thomas Hardaway (D), a black member of the House redistricting committee, the obvious place to put the district was in northeastern North Carolina because that is the "black belt" of the state (see Figure 1). In July and August of 1991, the state House and Senate worked out the details of redistricting plan #6, which included a single black-majority congressional district in the northeastern part of the state (see Figure 2).

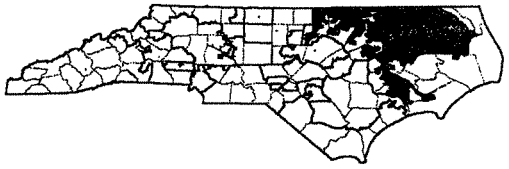

FIGURE 2. Redistricting Plan #6
Proposed by Democrats, June 1991. Approved by General Assembly, September 1991. Rejected by Justice Department, December 1991.

[3]While the North Carolina legislature did have one Native American member (State Rep. Adolph Dial), the Indian community did not have much interest in congressional redistricting. They were active in trying to create more native American Indian majority districts at the state level [personal interview, October 14, 1993].

The contorted shapes of the resulting congressional districts, however, provoked immediate controversy. Political commentators poked fun at the shape of the new minority-majority district, calling it "modern art," "political pornography," "a bug splattered on a windshield," and the work of an "eight month old baby" or a "chimpanzee playing with a felt-tip pen." Underlying the humor were serious concerns about the new district. In what would be an uneasy alliance, the Republican Party, the NAACP, and the ACLU criticized the new plan for serving the interests of congressional incumbents more than the interests of minorities.

Republican legislators argued that the Democrats did not create a second black majority congressional seat because they wanted to preserve as many safe Democratic seats as possible. Under plan #6, the seven districts that were currently controlled by Democrats were likely to remain so. The Republican would also keep their four districts, and the new 12th district would have a majority of Republican voters. Thus, the balance of power would still favor the Democrats, but now the margin would be seven to five instead of seven to four.

As an alternative to the Democratic plan, the Republicans suggested creating a second black-majority district in the southern part of the state running from Charlotte to Wilmington. The obvious motivation behind this concern for minority representation is the partisan advantage gained by concentrating the traditionally strong Democratic black vote in two districts. Under this Republican alternative, called "the Balmer Plan" for its author, state Rep. David Balmer, the GOP would create two strongly Democratic black-majority districts and protect all four Republican incumbents (see Figure 3). In addition, three other districts would be dominated by conservative white voters who have a history of voting for Republicans such as Senator Jesse Helms and Governor James Martin. Consequently, Republicans could have held a seven-to-five majority in the North Carolina congressional delegation under this plan.

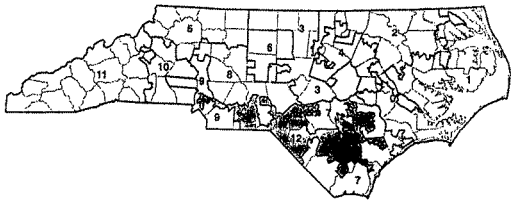

FIGURE 3. The Balmer Plan
Proposed by Republicans, June 1991. Rejected by General Assembly, September 1991.

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While they could not support the Balmer plan, members of the black community were torn between Democratic party loyalty and the desire to create more than one black-majority district. Moderate black state legislators, such as Daniel T. Blue, the first black Speaker of the North Carolina House, argued that a single black-majority district would be the best way to increase power for minorities. He worried that a second black congressional seat could isolate blacks on "political reservations"[4] and "provide major gains for Republicans" [*News and Observer*, December 20, 1991]. Even progressively ambitious black lawmakers such as Mickey Michaux and Toby Fitch, who would probably have benefited from a second minority district, favored the Democratic plan for a single black-majority district. But in an interview with the *Durham Herald-Sun*, Michaux admitted that the single minority district was not popular in the black community, and so most black lawmakers kept a "low profile" in the debate [*Durham Herald-Sun*, January 8, 1992]. Leaders in the black community who were not so closely tied to the Democratic Party, such as Mary L. Peeler, executive director for the North Carolina branch of the NAACP, argued that "...we wanted to see a maximization of the black voting strength in North Carolina" [*News and Observer*, August 18, 1991]. The ACLU joined the NAACP in rejecting the single black majority congressional district plan. For these groups, the question was one of fairness. In a state that was 22 percent black, one of twelve House seats was simply not enough. Despite this resistance, the General Assembly finally approved plan #6 and its single black district in September.

Because the Republican governor of North Carolina lacked veto power, plan #6 became law. Progressively ambitious candidates begin gearing up for the 1992 congressional primaries. Consistent with the expectations of ambition theory and previous work on the candidate-centered nature of congressional campaigns [Jacobson and Kernell, 1983; Canon, 1990], quality challengers emerged in the two new districts that did not appear to have incumbents running. In the newly created 12th congressional district, the absence of an incumbent and the fact that the district had more registered Republicans than Democrats quickly attracted two quality white Republican candidates. N.C. Rep. Coy Privette (R) announced that he would be running in the 12th. His motivation for entering the race stemmed from the fact that the new district included his current state House district (Cabarrus County) and the county in which he was raised (Iredell County). Joining Privette in the Republican primary was Alan Pugh, an aide to Governor Martin. Pugh quit his job, rented a headquarters in the 12th district, hired a campaign manager and a political consultant, and raised over $10,000 over the next several months [*Charlotte Observer*, May 14, 1992].

Activity in the new 1st district was also heavy, but it was mostly on the Democratic side. The newly created black-majority district had one potential problem for progressively ambitious black candidates: a white Democratic incumbent. The new 1st was carved out of parts of four old congressional districts that had produced well-entrenched incumbents who almost never faced major challengers. In 1991, it seemed likely that these incumbents would run for reelection in the following year, with the possible exception of Walter Jones, Sr., the 1st district incumbent. A challenge to Jones was out of the question, so prospective candidates were forced to engage in a high-stakes guessing game. Although Jones, the most senior member of the North Carolina congressional delegation, claimed that he was not retiring, most legislators and political elites in the state believed that he would. At 78 years of age, the incumbent suffered from poor health and had to be wheeled through the halls of Congress by an aide. Furthermore, if Jones retired by 1993, current law allowed him to convert his $300,000 campaign war chest to personal use. Those predicting that Jones *would* retire also reasoned that the redistricting committees would never have included so much of his old district in the new 1st if he *were not* retiring. A fellow U.S. Democratic House member told us that Jones initially accepted the redistricting plan, but he thought that the state redistricting committees should have had more contact with him. This U.S. House member seemed to imply that the state legislature simply assumed that Jones was retiring without consulting him, thus creating a "humiliating" situation for Jones [personal interview, August 8, 1991]. Jones officially announced his retirement on October 5, 1991, citing the new black-majority district as the primary reason for his decision [*News and Observer*, October 5, 1991].

The clearest signal to state lawmakers that Jones would retire, however, was the fact that he took no interest in the redistricting process. Danny Lineberry, a political correspondent covering the redistricting story for the *Durham Herald-Sun*, attended many of the redistricting meetings and saw quite a few congressional staffers, but never saw a staff member from Walter Jones' office. Although Jones publicly indicated his displeasure with his new district and never suggested that he planned to retire, one state lawmaker told the *News and Observer*: "Other congressman were heavily involved in trying to protect their districts, but Mr. Jones made no telephone calls and sent no letters objecting to redistricting proposals" [*News and Observer*, September 25, 1991].

We asked all potential black candidates who were mentioned by newspaper reporters or political leaders in eastern North Carolina whether Jones was a factor in their decision to run in 1992 [See Canon, Schousen, Sellers, 1994]. All of these politicians told us that Jones would have a strong impact on the election if he ran, but none of them believed he would run. For example, Warren County Commissioner Eva Clayton said she thought from the beginning that Jones was going to retire. State Sen. Frank Ballance claimed that Jones' wavering about retirement was merely an attempt to help his son, Walter Jones, Jr., by discouraging others from entering the race [personal interviews, spring and summer 1991].

Although it was too early to file, a number of strong black candidates began

[4]This debate also rages in the black community nationally. Carol Swain echoes Blue's sentiment, "The evidence suggests that the present pattern of drawing district lines to force blacks into overwhelmingly black districts wastes their votes and influence (and)...place(s) them in districts where their policy preferences can become separated from the majority in their states" [1993, 235].

organizing their campaigns in the new 1st district. Included in this list of black candidates were Ballance, Clayton, State Rep. Toby Fitch, State Rep. Thomas Hardaway, State Rep. Howard Hunter, Reverend Staccato Powell, and Willie Riddick, a long time aide to Walter Jones Sr.

ACT II--BACK TO THE DRAWING BOARD: PLAN #10

In compliance with the "preclearance" provision of Section 5 of the Voting Right Act of 1965, the General Assembly sent plan #6 to the Justice Department. Democratic lawmakers and party leaders were confident that the plan would be approved. Republicans and members of the black community, however, filed complaints urging rejection of the plan on the grounds that it violated the rights of minorities.

On December 19, 1991, just 17 days before the beginning of the filing period for congressional elections, the Justice Department rejected the North Carolina redistricting plan. The ruling cited the "unusually convoluted" shape of the black-majority district and the fact that the plan created only one such district. Some critics argue that the Justice Department went beyond the intention of the 1982 Amendment [*News and Observer*, 1\19\92, 10A]. Speaker Blue said, "I think that what the Republicans are trying to do is corrupt the Voting Rights Act to the extent they can go beyond what its goal and mission is and use it for their political advantage" [*News and Observer*, 1\5\92, 5A]. Particularly, the Justice Department ignored the "geographic compactness" condition of *Gingles*, thus going beyond the prevention of minority vote dilution to an actual proportional representation test for minority representation in the U.S. House. The possible partisan motivation is clear when one considers that the creation of black-majority districts usually helps the Republican Party by concentrating Democratic voters in a few districts [Brace, Grofman, and Handley, 1987].

Back in North Carolina, the legislature called a special December 30 session to address the Justice Department's decision. Democratic lawmakers knew that a second black-majority district in the southern part of the state could deeply hurt their party, so they scrambled to find a less painful alternative. Some wanted to fight for the current plan in court. John Merrit, an aide to U.S. Rep. Charles Rose (D), proposed plan #10 that created a second minority district by connecting black voters in Charlotte and Durham by a thin line that traveled northeast along Interstate 85 (Figure 4), rather than from Charlotte to Wilmington as the Republicans proposed in the Balmer plan (Figure 3).

Democrats found the Merrit plan appealing because it created a second minority district without diluting Democratic power across the state. In fact, they believed that the new plan might actually increase the number of Democratic seats in the House. In addition to creating another minority district, the plan kept the seven currently Democratic seats in Democrats' hands. Three Republican

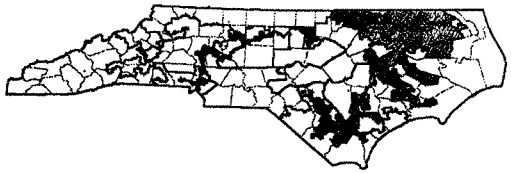

FIGURE 4. Redistricting Plan #10
Proposed by Democrats, January 1992. Approved by General Assembly, January 1992. Approved by Justice Department, February 1992.

incumbents would be placed in even safer Republican strongholds, while the fourth Republican, U.S. Rep. Charles Taylor, would end up in a marginally Democratic district. Thus, under the Merrit plan, Democrats hoped to win nine of the twelve congressional seats in North Carolina. As it turned out, in 1992 the Democrats won only eight seats because Taylor won his reelection bid.

Republicans had been assuming that the second new black district would be in the southern part of the state, and plan #10 left them stunned. They complained bitterly about the new district's odd shape. They had a point; the new "I-85" black-majority district was literally the width of the interstate in some places. In Guilford County, for example, drivers in the southbound lines would be in the Republican-controlled sixth district, while drivers in the northbound lines would be in the new black-majority 12th district. As they traveled down the interstate to Randolph County, the congressional districts actually "changed lanes." Southbound drivers were now in the 12th district, and northbound drivers were in the sixth district [*News and Observer*, January 12, 1992]. The strange "u-turn" on the interstate was necessary to keep the sixth district contiguous (without the lane-change, the 6th would have been cleanly bisected by the 12th district).

Farther south on I-85, drivers traveling either north or south were in the 12th, but the moment they turned onto any exit ramp (on either side of the road) they were in the 9th [*Charlotte Observer*, January 27, 1992]. This strange configuration led Democratic candidate Mickey Michaux to say that in some counties a driver could travel down I-85 with his doors open, and kill everyone in the congressional district. He also joked that it should be an easy district to campaign in because he could meet all the voters by simply stopping at all the rest stops along the interstate.

Plan #10 retained the black-majority district (district 1) in eastern North Carolina. However, the basic outline of the district moved east and south with tentacles extending into Wilmington and Fayetteville. The most significant change for the eastern black-majority district was the exclusion of urban Durham, which accounted for 15.5 percent of the northeastern district under plan #6. The district lines were considerably more contorted than in the earlier plan: the perim-

eter of the new 1st district is 2,039 miles long, and it contains nine whole counties and parts of 19 others!

The primary filing period was due to open on January 5, but lawmakers postponed it until February 10. Top-ranking Democratic state lawmakers held private meetings with the North Carolina Democratic congressional delegation, state black leaders, and representatives from the NAACP and ACLU. The groups agreed that the Merrit plan was acceptable, and after working out the details, the General Assembly approved plan #10 on January 24, 1992.

ACT III—THE FINAL CHALLENGE BEFORE THE PRIMARIES

Democratic leaders were apologetic while Republicans were apoplectic about the plan. House Speaker Blue said, "It is an ugly plan. I will not stand here and tell you these are the most symmetrical, prettiest districts I have ever seen....There are some funny looking districts." But Blue argued that Democrats were forced to make the new plan because of the Justice Department's ruling [*News and Observer*, January 19, 1992]. Republicans called the plan "idiotic" [*News and Observer*, January 29, 1992]. They offered an amendment to add a third black-majority district, but it was rejected in a party-line vote. State Republican Party chairman Jack Hawke said his party would urge the Justice Department to reject plan #10. If they did not, the Republicans would file suit in court. But in spite of this Republican threat, the Justice Department approved the plan on February 7, just three days before the delayed beginning of the filing period. State legislators immediately said that the 1992 primaries would go on as scheduled, with the filing period running from February 10 to March 2.

Hawke made good on his promise to file suit on behalf of the State Republican Party. He argued that a third black majority congressional district should be added and that the General Assembly of North Carolina has created a "government of the Democratic incumbent, by the Democratic incumbent, for the Democratic incumbent." The suit specifically charged that the new plan violated the voters' rights to "freedom of association and to fair and effective representation" [*News and Observer*, February 29, 1992]. When the suit was filed, the court left open the filing deadline for congressional candidates until the case could be heard. At a hearing in Charlotte, North Carolina on March 9, a three-member U.S. District Court dismissed the case and ruled that the filing period would close immediately. Although the Republicans appealed to the Supreme Court to overturn the lower court decision, Chief Justice William Rehnquist rejected the request on March 11. For the moment, the court challenge was over. When the dust settled, the filing period had ended, and the primary campaign was on.

THE NEW 1ST AND 12TH CONGRESSIONAL DISTRICTS

In plan #10, the final redistricting plan, the North Carolina General Assembly pieced together the new 1st congressional district from parts of four old congressional districts. Each of the old districts contained diverse constituencies. The

original 1st, 3rd, and 7th districts included relatively poor farming counties, several sizable military bases, and prosperous coastal counties which relied heavily on tourism for economic growth. The old 2nd district contained both rural counties and the city of Durham, whose urban constituents made up 22.6 percent of the district's population.

The new 1st district is more homogenous than the original four. The plan removed Durham, the coastal areas that rely on tourism, and the military bases from the 1st district. The remaining counties are covered largely by tobacco fields and drying sheds, and their populations rely largely on farming for income. While some businesses have built plants in the new district, many of the available jobs provide low wages. Political leaders from the area frequently devote attention and resources to increasing economic development. In addition, the district clearly meets the Justice Department's requirements for minority representation. In the new 1st district, blacks form a majority of the total population (57.3%) and voting age population (53.4%). Not surprisingly, almost 90 percent of voters in the 1st district are registered Democrats.

The new 12th district is, in several ways, similar to the new 1st. The Democrats have a four to one advantage over Republicans in the 12th, and over 50 percent of its population (56.6%) and voting age citizens (53.3%) are black. Also like the 1st, the 12th was pieced together using bits of several counties and other congressional districts. No single North Carolina country is wholly contained within the snake-line district that winds it way through parts of ten counties and seven of the eleven old congressional districts (the 12th contains parts of districts 2, 4, 5, 6, 8, 9, and 10).

While they do have some similarities, the two black-majority districts also have some fundamental differences. The 1st is primarily a rural district (58% of the people are in rural areas), while the 12th is an urban district made up of voters from Charlotte, Greensboro, Winston-Salem, and Durham (93.2% urban, according to the 1990 U.S. Census). The two districts also differ on a socioeconomic level. The 1st is the poorest district in the state, while 12th tends to be in the middle. For example, in the 1st district only 57.8 percent of those 25 years of age or older hold high school diplomas. In the 12th, the figure is 65.6 percent, which is closer to the 70 percent state average. In median house value and median household income the same holds true. The 1st is last in the state, with a median house value of $46,100 and a household income median of $18,226. The 12th has a median house value of $58,400 (state median $65,800) and household income median of $23,068 (state median $26,647).

The two districts also differ in terms of black political organization. In the 12th, the two largest segments of voters hail from Charlotte and Durham. Both cities have strong black political organizations and each city produced a strong quality black candidate in 1992 (Mel Watt from Charlotte and Mickey Michaux from Durham). In the 1st, as Eva Clayton told us, there are no black political organizations to rally voters or help to get a candidate's message out. Clayton

added that she was sorry to hear that Durham was no longer going to be in the 1st district because at least in Durham voters show up at political events. Clayton said that she was tired of going from small town to small town speaking to only a handful of people at a time. When we asked her whether she would like Durham in the 1st if it meant Mickey Michaux would be in the race, she replied "You're darn right." Part of her strategy had been to use Durham as a place to get name recognition, money, and media exposure.

ASSESSING THE STRATEGIC CONTEXT OF REDISTRICTING

Black state lawmakers played an important role in the redistricting process. As noted above, three of the five black state senators served on the Senate Redistricting Committee, and six of the ten black state House members served on the House Redistricting Committee. Of these nine black lawmakers, five of them either ran for a congressional seat or strongly considered running. All five were considered strong candidates. What is most interesting, however, is that until the Justice Department required a second black-majority district, none of these five potential candidates publicly supported plans that called for the creation of two or three black-controlled congressional districts [personal interviews and *Durham Herald-Sun*, January 8, 1992]. Black lawmakers generally believed that a second minority district would limit the effectiveness of black politicians and increase the power of Republicans across the state.

Nevertheless, the redistricting process was subject to manipulation by both blacks and whites. As with many legislative committees, the redistricting committees performed much of their work in informal, "behind-the-scenes" settings, with limited publicity. Consequently, it is difficult to uncover the potential candidates' efforts to draw the district lines in ways that furthered their electoral interests (especially because candidates do not readily admit to self-serving strategic behavior).

In one case, however, we were told by two sources that a black lawmaker did try to influence the redistricting process. According to a newspaper reporter and a politically active Democrat, Thomas Hardaway created the Merrit plan. As the story goes, Hardaway, presented his idea for the "I-85" district to Merrit. The congressional staffer then refined it and presented it as his own plan. Hardaway denies that he was the source of the plan, but if the story is true, it is an interesting twist to the tale.[5]

Under plan #6, Hardaway would have run against Mickey Michaux in North Carolina's new 1st congressional district. Our interviews in eastern North Carolina revealed that Michaux did not enjoy extensive support in the rural areas of the 1st district; however, he was considered by many political commentators to be the front-runner.

[5]Another version of the source of the Merrit plan came from Glenn Newkirk, a staffer from the redistricting committee, who claims that a Republican intern concocted the plan at a public access terminal. This story was not confirmed by an independent source; furthermore, it does not make sense that a Republican invented the plan because it was the perfect solution to the Democrats' dilemma of having to create a second black district while protecting their incumbents (or if a Republican did think of it, he or she certainly should have not discussed it with anyone!).

Michaux ran unsuccessfully for an open seat in the old second district in 1982, narrowly losing a runoff election to Tim Valentine after defeating Valentine and one other white candidate in the primary (Michaux had 44 percent, Valentine had 33 percent, and James Ramsey won 23 percent of the vote). Therefore, some of the state's black leaders believed that Michaux deserved the seat that he almost won. During the summer of 1991 Michaux expressed active interest in running for the 1st district congressional seat.[6] Under the Merrit plan, Michaux's home town, Durham, was placed in the new 12th district. As a result, Michaux did not run in the 1st, and the path was cleared for Hardaway and other ambitious state representatives in the 1st district. However, even without Michaux to contend with, Hardaway still could not win the Democratic primary in eastern North Carolina.

Walter Jones, Jr., was at the center of several other redistricting machinations. Jones, Jr. believed that he had been punished in the drawing of state House lines because of his "independent" record in the state House.[7] His old district was split in half, making it much more difficult for him to win reelection to his state house seat. Jones Jr.'s plan to run for his father's seat was complicated when his hometown (Farmville) was removed from the 1st congressional district, after being included in the initial versions of the redistricting plans that were debated in January. Immediately before the final committee vote on the plan, Jones introduced an amendment to return Farmville to the 1st district. The amendment passed with the approval of all nine committee Republicans and several blacks on the committee, who, according to Jones, were later criticized by others in the black community. When the redistricting plan reached the House floor, Jones said that a black representative introduced an amendment to take Farmville back out of the 1st district. The amendment was defeated, but the vote had definite racial overtones, according to Jones. Although he had voted against all the redistricting plans up to this point, he felt compelled to vote for this final one. Jones said that the people of Farmville had suffered enough (with their state House district split), and that the General Assembly had treated his people and his father unfairly.

Potential candidates on the redistricting committee were not the only ones trying to influence the district lines for personal electoral gain. The staff of the current congressional incumbents closely monitored the redistricting process and in some cases played an important role. A local reporter saw incumbents' staffers at many redistricting committee hearings, and one member of the North Carolina

[6]We did not find any evidence that Michaux actively resisted the move of his home from the 1st to the 12th district. Michaux may have been aware of his limited rural support and believed that his chances election would be better in a more urban district such as the 12th.

[7]In 1988 Jones, Jr. joined a group of Republicans and independent-leaning Democrats in an overthrow of the established House leadership. Since that time, he has sponsored numerous bills to reform state government and has voted against the House leadership on important legislation.

congressional delegation acknowledged that "we all had people at the redistricting meetings, and we all made suggestions concerning our districts." Private memos that were later made public indicate the extent to which North Carolina Democratic members of Congress were kept informed of the redistricting committee's activities. In one memo, Congressman Price writes that his new district is "satisfactory" so long as East and West Pittsboro are added and parts of Alamance County are removed. In another memo, a staff member from State Senate Redistricting Committee Chairman Dennis Winner's office asks U.S. Rep. Martin Lancaster (D) whether moving several precincts in Duplin and Onslow Counties from the second to the third district would be acceptable. The memo states that the idea is just part of a "draft plan for discussion" and suggests that Lancaster not share the information with others [*News and Observer*, August 25, 1991]. Most significantly, as we pointed out earlier, the staff of U.S. Rep. Rose played an important role in the formulation of the final redistricting plan that the Justice Department approved.

WHITE BACKLASH—*SHAW V. RENO*

After the 1992 election, five white North Carolinians filed a suit [*Shaw v. Reno*, 1993] arguing that the creation of a black majority district violated their 14th Amendment rights to equal protection of the laws. The plaintiffs argued that the North Carolina plan was a racial gerrymander that "violated their constitutional right to participate in a 'color-blind' electoral process" [*New York Times*, June 29, 1993]. The Supreme Court, in a 5-4 ruling, lambasted congressional districts that are based solely on racial composition. Justice Sandra Day O'Connor, writing for the majority, argued that "A reapportionment plan that includes in one district individuals...who may have little in common with one another but the color of their skin bears an uncomfortable resemblance to political apartheid." Unfortunately, the decision created tremendous confusion because it neither ruled in favor of the plaintiffs, nor in favor of the current redistricting plan. O'Connor indicated that the Court was not pleased with the Justice Department's interpretation of the Voting Rights Act (that states must create minority districts whenever physically possible) and remanded the case back to the federal district court. The Court, however, refrained from ruling on the constitutionality of the Voting Rights Act itself.

Shaw v. Reno left open the possibility that the district court could accept the current racially gerrymandered districts, if it can be shown that the districts "further a compelling governmental interest." The district court took up that challenge and upheld the North Carolina districts on August 1, 1994, in *Shaw v. Hunt*. In a rambling decision that is more than one hundred pages long, the district court held that the districts withstand strict scrutiny because they were narrowly tailored to address previous discrimination, and because the Voting Right Act makes the districts necessary. The Court added that the creation of a second district did not constitute a "quota," but rather is a "goal." Part of the reasoning used

in *Shaw v. Hunt* was rejected in the more recent *Miller v. Johnson* decision from Georgia [June 29, 1995]. After the Miller decision, the *Shaw v. Hunt* case was appealed to the Supreme Court, and on December 5, 1995 the Court heard the case for a second time.

In a decision handed down on June 13, 1996 the Supreme Court reversed the lower court's decision by declaring North Carolina's 12th district to be unconstitutional. Although the appellants claimed that both minority-majority districts (the 1st and 12th) were unconstitutional, the Court ruled that none of the appellants lived in the 1st district and thus lacked standing to argue the constitutional merits of that district.

The state of North Carolina argued that although race was a prominent factor in its creation of the 12th congressional district, three "compelling state interests" were the primary driving forces for the creation of the new minority-majority district. The state claimed that they were helping to eradicate the effects of past discrimination and complying with sections 2 and 5 of the Voting Rights Act. In a relatively short majority opinion (19 pages), the Court made it clear that North Carolina needed to show that the creation of the 12th district served a "compelling state interest" and "was narrowly tailored to achieve that interest." In a 5 to 4 decision the Court rejected the state's claims. The ruling, however, did not address the question of whether compliance with the Voting Rights Act, under proper conditions, can be a "compelling state interest." In other words, just as in the *Miller* decision, the Court did not decide whether states can use the Voting Rights Act to justify the creation of minority-majority districts.

The exquisite irony of this case is that the North Carolina state legislature initially got into the mess because the Justice Department (under Republican President George Bush) argued that they had not given race *enough* weight in drawing district lines. The conservative wing of the Court then criticized the legislature for giving race *too much* consideration. The current state of law and its interpretation by the Supreme Court leave state legislatures in the uncomfortable position of being sued by black voters if they do not take race into account when redrawing district lines, and being sued by white voters if they are too aggressive in creating minority-majority districts. The question that North Carolina's state legislation must address once again is, "How aggressive is 'too aggressive'?"

THE IMPACT OF REDISTRICTING

The profound changes in North Carolina's congressional districts created a new strategic context for the black community. David Perlmutt of the *Charlotte Observer* claims that "Never in North Carolina has a state or federal election drawn so many black candidates—and shaped a debate so central to black voters in a number of the state's major cities" [*Charlotte Observer*, April 12, 1992]. For this reason many in the black community considered the redistricting process a great success [*Charlotte Observer*, April 12, 1992].

Samuel Moseley, a political scientist at North Carolina A&T State Univer-

sity, argued that qualified black politicians such as Mickey Michaux of Durham simply could not win before the new black-majority districts were created. "It was clear here, that we had a man (Michaux) who was black and qualified and who could not win. After all these years of frustration to see the tide turn to a level playing field is gratifying" [*Charlotte Observer*, April 12, 1992]. (Moseley is referring to Michaux's unsuccessful bid for a U.S. House seat in 1982).

Black politicians also understood the fundamental change that the redistricting process produced. Thomas Hardaway, a black state Rep. who ran in the 1st district, put it this way:

> What we have here is a situation in which blacks have been excluded because whites have written the laws to exclude black participation. They have dammed up the flow to both candidates and voters. Well, the floodgates are open. There are many people who have been waiting for this opportunity [personal interview, March 8, 1992].

Although the redistricting process provided new opportunities for ambitious black politicians and black voters, it also had some serious short-term costs for other candidates. The two quality white Republicans who decided to run in the Republican leaning 12th district under plan #6 where forced out of the race when plan #6 was rejected by the Justice Department and the 12th became a second black-majority district. Coy Privette ended up in the 8th district running against the strongly entrenched nine-term Democratic incumbent, Bill Hefner. Alan Pugh, who had quit his job to run, decided to bow out completely and vowed to refund prorated shares of all contributions given to him [*Charlotte Observer*, May 14, 1992].

Within the black community the late formation of the districts and the uncertainty surrounding their exact location created several problems. In the 12th, all four Democratic candidates got off to a late start. It became difficult for the candidates to get their message out because they lacked sufficient time to organize fund-raising for purchasing TV and radio spots. This gave the advantage to Mickey Michaux and Mel Watt. Michaux was advantaged because he had already decided to run under plan #6 when Durham was in the black-majority district in the eastern part of the state. Watt was in a relatively strong position because he had managed Harvey Gantt's successful campaign for mayor of Charlotte and unsuccessful campaign for Jesse Helms's Senate seat. Consequently, Watt already had a strong political organization in Charlotte.

The late start also influenced the level of voter interest in and awareness of the campaign. The Democratic candidates in the 12th held a series of debates to get their messages out, but the largest meeting in Charlotte drew only 35 people. In another debate, in Salisbury, only five people who were not directly connected to one of the campaigns showed up. Although the two strongest candidates, Michaux and Watt, were able to air radio ads right before the primary, all four of the candidates claimed that it was an "uphill" battle to get their message out to the voters [*Charlotte Observer*, April 12, 1992]. Similar problems were created by the shortened campaign season in the 1st district.

The 12th district is over 80 percent Democratic, and all four of the Democratic candidates were black. These two facts meant that no matter who won the Democratic primary, a black politician would almost certainly be representing the 12th district. The same could not be said of the 1st, where Walter Jones, Jr., could have taken advantage of a divided black vote and a united white vote to win the new black-majority district. This was especially true because the percentage of vote necessary to win a primary outright had recently been reduced from 50 percent to 40 percent. Ironically, this change was intended to help elect more black candidates, but it nearly ended up putting Walter Jones Jr. in office.

Black leaders in the 1st district recognized the potential collective action problem and acted quickly to try to unify behind a single black candidate (see Chapter 4, this volume). The Black Leadership Caucus (BLC), which is organized by congressional district across North Carolina, met on three occasions. Representatives from each county were to cast weighted votes (one voter per 1,000 black voters) for their preferred candidates. However, the process broke down when one candidate, Willie Riddick, was seen by the other candidates as having unfairly manipulated the meetings to his advantage. Two of the leading candidates did not even attend one of the meetings, and others did not have their supporters there. Thus, the process lacked legitimacy and several of the candidates refused to bow out when they did not receive the BLC endorsement.

Four black candidates, Frank Ballance, Howard Hunter, Paul Jones, and Toby Fitch, dropped out to enhance the probability of electing an African-American. However, while Ballance dropped out before the endorsement vote, Hunter, Jones, and Fitch, were pursuing a mix of altruistic and self-interested strategies. Fitch was most explicit about his motives. As co-chair of the redistricting committee, Fitch led the effort to create a majority black district. He believed that the entrance of several black candidates into the race would split the black vote and threaten the election of a black member of Congress. Thus, he did not want to have a part in undermining the collective goal that he worked for a year to achieve; in an interview he emphasized that this was his only reason for deciding to quit the race. At the same time, though, he recognized that by dropping out, his political standing in the 1st district black community improved dramatically. If Jones, Jr. defeated the current group of black candidates, Fitch believed that the black community would unite behind him in 1994 and turn out the first-term white incumbent. The fact that Eva Clayton, a black, won the election did not temper his desire to run for Congress. A local reporter told us that Fitch was seriously considering challenging Clayton in the 1994 Democratic primary [personal interview, October 14, 1993].

The fears of Fitch and other black leaders were almost realized in the 1992 Democratic primary. The white candidate, Walter Jones, Jr., received the greatest number of votes and was only 2.6 percentage points short of win-

ning the primary outright. In the runoff election, however, with a united black community behind her, Eva Clayton defeated Jones by a 55-45 percent margin.

The 1992 congressional elections sent two African-Americans to the U.S. Congress from a state that had not sent a black representative to Capitol Hill since 1899. The results of the 1994 election suggest that the trend will continue. In 1994 the only substantial reelection challenge to Mel Watt and Eva Clayton occurred in the courts. On March 9, 1994 a federal court ruled, in a 2-to-1 decision, that the congressional elections in the two minority-majority districts could go forward even though those districts were being challenged in federal court. Thus, the May primary went forward with Watt and Clayton running unopposed. The next challenge to the two African-American House members came on August 1, 1994, when a three-member federal court ruled [in *Shaw v. Hunt*] that the new black-majority districts passed constitutional muster. Although Watt and Clayton both faced Republican challengers in November, both incumbents won easily. Watt won 66 percent of the district vote against weak Republican challenger Joseph Martin. Clayton faced Republican challenger Ted Tyler again and won 61 percent of the vote.

Walter Jones, Jr. was also back on the campaign trail in 1994. After his defeat in 1992, Jones changed his strategy. He switched parties and congressional districts to run as a Republican in North Carolina's 3rd district. A large portion of the 3rd was made up of the pre-redistricted 1st, which his father held from 1966 to 1992. Although Jones did not live in the district, he had strong name recognition and ran a shrewd campaign, linking the four-term Democratic incumbent, Martin Lancaster, to President Clinton. Jones flooded the district with television spots showing Clinton and Lancaster jogging together and citing Lancaster's support of Clinton's 1993 budget and tax packages. Jones won the general election with 53 percent of the vote.

Jones' win was one of many Republican victories in 1994. While the party won throughout the country, they fared particularly well in the South. The North Carolina congressional delegation shifted from a nine-three advantage for the Democrats to an eight-four advantage for the Republicans. Not surprisingly, redistricting turned a number of safe Democratic districts into marginal or Republican-leaning districts. The two black-majority districts, however, remained safely in Democratic hands.

For the black community in the 1st and 12th districts in North Carolina, redistricting was a success in many ways. The creation of the two black-majority districts sparked political interest within the black community, created avenues for progressively ambitious black politicians, and elected and reelected two black lawmakers to the U.S. House of Representatives. But for some African-Americans, the victory has been bittersweet. While black representation has increased, the creation of minority-majority districts has helped the Republicans increase their power throughout the South and may have helped them gain control of the

House of Representatives [Lublin, 1995a]. Thus, the question of whether an increase in black representation in a Republican controlled House is preferable to fewer black representatives in a Democratically controlled chamber continues to fester in the African-American community.

LEGISLATIVE AND CONGRESSIONAL DISTRICTING IN SOUTH CAROLINA

Orville Vernon Burton

IN ONE OF THE MANY IRONIES OF HISTORY, in the late nineteenth century the South Carolina Democratic Party constructed black districts to minimize the influence of African-Americans and the Republican vote, just the opposite of what has occurred in late twentieth century South Carolina where the creation of black majority districts has been an initiative of African-Americans and the Republican Party.[1] Redistricting was needed after the 1990 census, but as late as May 1994, while all other states had settled their redistricting plans, South Carolina still had not passed a plan. While North Carolina, Georgia, Florida, Texas, and Louisiana all were being challenged for congressional districts "unfair" to white voters, South Carolina was still attempting to prove its proposed plans were not unfair to African-Americans.[2]

In a bizarre tale, the redistricting that was accomplished in May 1992 in the hands of a federal court was then vacated by the Supreme Court on 12 June 1993. The Supreme Court remanded the case to the lower court for further proceedings,[3] and the case went back to the three-judge panel which had submitted the plan. These three judges, U.S. 4th Circuit Court of Appeals Judge Clyde Hamilton and U.S. District Court Judges G. Ross Anderson and Falcon Hawkins, reconvened on a humid afternoon 13 July 1993 in the Strom Thurmond Federal Court House in the state capital of Columbia. The judges, scarcely concealing their annoyance at having been summarily reversed by the Supreme Court, stated that federal judges such as they should not be making reapportionment decisions, that redistricting was a state issue, and the legislature should do it. They gave South Carolina law makers a deadline: if by 1 April 1994 the state had not enacted, and the Justice Department approved, a new redistricting plan, they would take up the matter again at that time. When asked what would happen with a vacancy if a representative were to die in office, the court replied that there were plenty of lawyers in the legislature and they could

[1]For a discussion of Districting in late nineteenth century South Carolina, see George Brown Tindall, *South Carolina Negroes, 1877-1900* (Columbia: University of South Carolina Press, 1952).

[2]Columbia *State* 23 May 1994, B1.

[3]*Statewide Reapportionment Advisory Committee v. Theodore,* 113 S. Ct. 2954 (1993), and *Campbell v. Theodore,* 113 S. Ct. 2954 (1993).

figure it out. Thus, South Carolina had no legal redistricting plan in effect.

How did South Carolina's redistricting come to such an impasse? Although both the South Carolina Senate (offering 10 black-majority districts) and the House (offering 28 black-majority districts) devised reapportionment plans after the 1990 census, neither approved the plan of the other. A resolution to extend the session to finalize redistricting failed, and the General Assembly adjourned in June 1991 without a plan. Neither did the governor call a special session of the legislature to handle redistricting, although urged by some to do so. A coalition of African-American leaders, known as the Statewide Advisory Reapportionment Committee (SARC), held a news conference with the Legislative Black Caucus and argued that the cost of a special session would be much less than a lawsuit.

Between the 1991 and 1992 sessions, Republican Governor Carroll Campbell, at the request of the state Senate, offered a plan that provided for 14 black-majority Senate districts. According to the *State*, South Carolina's most influential newspaper, the Senate never responded to the Governor's plan. Veteran white Democrat Marshall Williams, President Pro Temp of the Senate, commented that "the Campbell plan was unacceptable." Marshall explained, "We passed out the best bill that could be passed out for the Senate....But the governor kept saying that ours was a protectionist bill and all that kind of junk." Williams concluded, "Let them sue."[4]

They did. Governor Campbell believed that the Republican Party would benefit from a lawsuit. A national Republican strategy of using the federal courts for redistricting recognized that, except for the four years of President Jimmy Carter, the last quarter century of federal judicial appointments had been by Republican administrations, and the last twelve years under Reagan and Bush had seen particularly partisan appointments.[5] The *State* reported: "Republicans, backed up by the U.S. Justice Department, have embraced a strategy nationally of increasing minority districts. That also has the effect of increasing the number of districts the GOP can win." The paper contended that the Republican strategy "could be particularly effective in South Carolina" where "the electorate is increasingly polarized, with white voters more likely to favor Republicans."[6]

House Speaker Robert Sheheen, a Democrat, criticized Campbell's participation in "reapportionment for purely political purposes." Sheheen accused the Governor of trying "to strengthen the Republican Party....That's his only agenda."[7] Republicans and Campbell countered that "white Democrats in the Legislature have effectively abandoned black citizens to protect their seats."[8]

[4]The Columbia *State*, 27 September 1991, 1B and 6B.

[5]"Update on the Republican Strategy of Using the Federal Courts for Redistricting," *Voting Rights Review* (Summer-Fall, 1992) 6. See also Briefing Paper, prepared by Ellen Spears "The Republicans Go to Court: A Review of Republican Legal Strategies on Minority Rights in the Area of the Voting Rights Act" (Atlanta: Southern Regional Council, 1992). See also The Columbia *State*, 24 January 1992, 1B.

[6]The Columbia *State*, 12 January 1992, 12A; see also ibid., 6 February 1992, 1B.

[7]The Columbia *State*, 11 October 1991, 7B.

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In light of this stalemate, on 4 October 1991 Michael Burton, executive director of the South Carolina Republican Party, along with other South Carolina voters (the *Burton* plaintiffs), filed to have a three-judge district court order interim redistricting.[9] The *Burton* plaintiffs alleged that the existing districts violated the United States Constitution's provision for one-person one-vote, as well as the Voting Rights Act's Section 2 prohibition against vote dilution of minorities. In addition, the *Burton* plaintiffs argued that the state would not have time before the 1992 elections to redistrict and submit the new district plans to the Justice Department for preclearance as required by Section 5 of the Voting Rights Act.

On 23 October 1991 U.S. Democratic Congressman Robin A. Tallon joined the Republican *Burton* suit, moving to intervene as a plaintiff. Tallon, whose sixth Congressional District was commonly recognized as the district to be made into a majority African-American congressional district, criticized the Congressional plan passed by the State Senate which split 26 of the state's 46 counties, as "so bad, hell wouldn't have it." The state House Speaker, Democrat Robert Sheheen, retorted that the "main constituency he's protecting is Robin Tallon"; he characterized Tallon's intervention as "a move toward self-preservation."[10] Confusing partisan lines even further, on 28 October Neil A. Vander Linden et al., mostly Republican voters from Dorchester and Berkeley Counties allied with Republican state senator Mike Rose, moved to intervene as defendants, as did the Democratic South Carolina Senate.[11]

African-Americans in South Carolina brought suit on 31 October 1991. The Statewide Advisory Reapportionment Committee (SARC), co-chaired by A.M.E. Bishop Frederick C. James and State Senator Herbert U. Fielding, the chairman of the South Carolina Legislative Black Caucus, included most notably the South Carolina State Conference of the NAACP Branches, the legislative Black Caucus, the Organization of Black County Officials, the Organization of Black Municipal Officials, other African-American elected officials, the Black Baptist Organization, various unincorporated associations of private individuals (some pastors representing their churches), "and other statewide church and civic groups."[12] This coalition represented, in the words of Greenville dentist William Gibson, then national director of the National Association for the Advancement of Colored People (NAACP), "the most united front that we've seen in redistricting since blacks became involved in the 1970s." The lawsuit was filed on behalf of SARC by National NAACP General Counsel Dennis Hayes, Staff Attorney Willie Abrams, and Columbia African-American attorney John Roy Harper II. They were joined by another veteran voting rights attorney, South Carolina native Laughlin McDonald, Director of the American Civil Liberties Union Foundation

[8]The Columbia *State*, 12 January 1992, 12A.

[9]*Burton v. Sheheen*; 793 F.Supp. 1329 (D.S.C. 1992).

[10]Columbia *State*, 27 October 1991, 3B.

[11]3 November 1991 the additional parties were ordered joined.

[12]The Greenville *News*, 3 November 1992, 10A, col. 2; see also "Stand Up and Let Out Voices Be Heard," SARC flyer.

(ACLU) Southern Regional Office, so that the litigation for SARC was a joint venture between the NAACP and ACLU. Throughout all phases of reapportionment, SARC and its attorneys also worked closely with the South Carolina legislative black caucus. Throughout the redistricting process the NAACP was working at state and local government levels. The *State* newspaper commented that "Ten years ago, the state NAACP was not so actively involved in reapportionment." Nelson

Rivers, executive director of the state NAACP, explained that "Last time, they (blacks) got ripped off, because there was nobody on a statewide basis, looking out for them in reapportionment."[13]

The *SARC* complaint was similar to the *Burton* complaint and alleged that South Carolina violated black rights under Section 2 of the Voting Rights Act and the First, Thirteenth, and Fifteenth Amendments and Article I, Section 2 of the United States Constitution, as well as Article III, Section 3 of the South Carolina Constitution.[14] The defendants in the *SARC* case were Republican Governor Carroll A. Campbell, Jr., Lieutenant Governor and president of the State Senate Democrat Nick Theodore, Speaker of the South Carolina House of Representatives Democrat Robert Sheheen, and James Ellisor, the Executive Director of the State Election Commission. On 13 November 1991 the *SARC* case was consolidated with the *Burton* Republican case, and will be referred to here as *SARC/Burton*.[15]

In January of 1992, the week the General Assembly was to reconvene, the *State* newspaper, in an article entitled "Clock is running on remap," conducted a survey of the General Assembly concerning redistricting. One hundred ten of the 165 state legislators responded to the question of whether the legislature should create the maximum number of House and Senate districts in which black candidates are likely to be elected; 68 percent agreed, 19 percent disagreed, and 13 percent did not respond. In the same poll, 73 percent disagreed and 26 percent agreed that the legislature was "hopelessly deadlocked over reapportionment" and that the "federal court needs to step in and finish the job."[16]

The panel of three federal judges originally gave a deadline of 30 January 1992 for the General Assembly to complete reapportionment, then gave an extra two weeks, then postponed to 10 February a hearing to decide if the lawmakers

[13]The Columbia *State*, 25 June 1992, 2B.

[14]*Statewide Reapportionment Advisory Committee et al.*, Appellants, *v. Nick Theodore et al.*, Appellees, in The Supreme Court of the United States, October Term, 1992, Jurisdictional Statement, pp. 2-3.

[15]The Democratic Party of South Carolina and first-year Democratic legislator Kimberly Burch from Chesterfield, the one House member whose district had been eliminated in the House plan, also intervened in the *Burton/SARC* case, but Burch was later dismissed by consent. In addition, on 12 December 1991, Bufort Blanton, et al. alleged that the South Carolina county legislative delegation system was unconstitutional and sued the *Burton/SARC* defendants and certain members of the state General Assembly. This case was consolidated with the redistricting cases on 14 January 1992. However, before trial, the case concerning the constitutionality of the county delegation system was separated from the redistricting cases. *Blanton v. Campbell*, C.A. No. 2:91-3635-1 (D.S.C.).

[16]The Columbia *State*, 12 January 1992, 1A.

were gridlocked. When the General Assembly reconvened on 14 January, state legislators accomplished what they had failed to do in 1991: they adopted a redistricting plan based on the 1990 census for both the South Carolina House and Senate.

Two plans introduced by the House members of the Black Caucus were defeated. Nevertheless, SARC/NAACP lawyers were willing to accept the General Assembly's compromise plans because SARC believed that their best strategy would be to get a plan before the Justice Department for approval where SARC/NAACP could make their case.[17] Black Caucus chairman State Senator Herbert U. Fielding stated: "We feel we have a much better chance legislatively and going through the Justice Department than going through the courts." SARC believed that the Governor's and the Republican's plans packed African-Americans into districts, diluting their influence in nearby majority-white districts which would tend to then vote Republican.[18]

Traditionally in redistricting, the South Carolina General Assembly sent three separate redistricting bills, for the House, Senate, and U.S. Congress, to the Governor for approval. After the 1990 census, however, the Democrats, who controlled the powerful state Senate, insisted on packaging the three into one bill. Since Republican Governor Carroll Campbell was willing to pass the House plan devised under his hometown ally, House Judiciary Chairman Republican David Wilkins, the Democrats hoped this tactic would preclude Campbell from vetoing the Senate plan.[19] It did not.

On 29 January 1992, Governor Campbell vetoed the General Assembly plan. He argued that neither plan created a sufficient number of majority African-American districts as required by Section 2 of the Voting Rights Act.

Nelson Rivers, state executive director for the NAACP, specifically asked Republican House members to help override Campbell's veto. He explained SARC's strategy to take the plans passed by the General Assembly "and let the Justice Department uphold the rights of black people."[20] Campbell, however, made supporting him in a veto fight a supreme test of party loyalty, and the General Assembly sustained the Governor's veto.[21] With Republican Governor Campbell and a Democratic majority in the General Assembly at such complete odds, all parties agreed at the hearing on 10 February 1992 that the situation was deadlocked. The judges set court hearings on reapportionment plans for 19 February 1992. A three week trial began.

All parties to the 1992 redistricting case stipulated that the current South Carolina legislative and congressional districts were malapportioned according to the 1990 census; the population had grown and was continuing its shift from rural

[17] The Columbia *State*, 24 January 1992, 5B.

[18] The Columbia *State*, 11 October 1991, 7B, see also 1B.

[19] The Columbia *State*, 12 January 1992, 12A.

[20] The Columbia *State*, 3 May 1992, 1B.

[21] The Columbia *State*, 16 January 1992, 3B. The Senate had only 11 Republicans of 46 members; the House had 42 Republicans of 124 members.

to urban and suburban areas. South Carolina's black population had increased from 948,623 to 1,039,884. However, South Carolina was one of only four states where the proportion of minority population had not increased. Because of white migration to South Carolina, the actual percentage of the black population had decreased from 30.4 to 29.8 percent, and the black voting age population had decreased from 27.3 to 26.9 percent.

The political problems following the 1990 census resembled those following the 1980 census. After the 1980 census, the General Assembly never enacted a plan for congressional districts, so congressional districts drawn by a three-judge court plan in March 1982 were still in effect.[22] In 1981 the General Assembly had redistricted the South Carolina House. However, the General Assembly had only redistricted the Senate following a court-ordered plan in 1984. Not until a special election to fulfill an unexpired term of a state senator on 25 October 1983 was the first African-American elected to the South Carolina Senate in the twentieth century: I. DeQuincey Newman, a grand old man of the South Carolina Civil Rights Movement. At that time the NAACP and the U.S. Department of Justice sued to move the South Carolina Senate to single-member district elections. In 1984 when the General Assembly did implement a court-ordered plan, South Carolina became the last southern state senate to acquire single-member districts or elect African-Americans in regular elections.[23]

By 1992, however, the districts for all three bodies, drawn under the 1980 census, had unacceptable overall deviations using the 1990 Census. The senate districts displayed a deviation of 63.2 percent, and the house districts a ridiculous total deviation of 113.9 percent; the congressional districts had an 8.3 percent total deviation.

As part of the *SARC/Burton* case, the various parties involved in the redistricting cases proposed plans to the three-judge district court for the congressional, senate, and house districts.[24] Attorneys for *SARC* and *Burton* alleged that plans for redistricting must comply with the Voting Rights Act, both Sections 2 and 5. Section 2 applies nationwide and prohibits the use of voting procedures that "result" in discrimination, i.e., are racially unfair. Section 5 applies only in certain jurisdictions, such as South Carolina, with long histories of discrimination in voting and has been held by the Supreme Court to prohibit use of voting procedures which are retrogressive, i.e., which make minorities worse off than they were before enactment of a new practice. A new voting procedure, such as a

[22] *S.C. State Conference of Branches of the N.A.A.C.P. v. Riley*, 533 F.Supp. 1178, 1183 (D.S.C. 1982).

[23] *Graham v. South Carolina*, Civil Action No: 3:84-1430-15 (D.S.C. July 31, 1984).

[24] The people who drew plans and testified were Dr. John C. Ruoff for SARC/NAACP, Mark Elann, counsel to the Governor, for the Governor and the Republicans, Robert J. Sheheen, Speaker of the House who consulted with legislative delegations from the House and did a lot of the actual drawing himself, for the House, Marva Smalls, Congressman Robin Tallon's chief of staff, for Tallon, George Fowler, who worked for the state demographer, Bobby Bowers, for Lt. Governor Nick Theodore and amended the plans drawn by the Senate. The Senate had no expert testify, but had plans drawn by a professional staff.

redistricting plan, may be non-retrogressive but still result in discrimination. Accordingly, *SARC* presented evidence proving substantial black vote dilution, including expert testimony as to racially polarized voting, to show that all the factors outlined in *Thornburg v. Gingles*[25] and the 1982 Senate Report that came out of the amendment to the Voting Rights Act were present in South Carolina. An expert for the Republicans presented similar and even more recent analysis of South Carolina elections that demonstrated high racial bloc voting and dilution of the African-American vote. The parties in the case stipulated that "since 1984 there is evidence of racially polarized voting in South Carolina."[26]

Issues argued in federal court were the extent to which African-American voters had the equal opportunity under Sections 2 and 5 to elect candidates of their choice and whether redistricting plans complied with the one-person one-vote standard. *SARC* attorneys claimed that retrogression should be determined by comparing the proposed plans to demonstrate if the plans "provided an undiluted level of minority voting strength."[27] The three-judge court rejected SARC's basis for determining retrogression and ruled that SARC's basis "enshrines the notion that the Voting Rights Act insures proportional representation by race."[28] Instead, the judges used a retrogression standard based upon the plans adopted after the 1980 census. The atmosphere of these hearings was hostile; Dr. Theodore S. Arrington, an experienced expert witness for the Republicans, characterized the attorneys for the defendants as "waspish, intemperate, rude, arrogant, and abusive to virtually every witness." This expert noted, "I have never seen such intense partisan and racial bickering."[29]

The three-judge district court argued that since it, rather than the State of South Carolina, devised the plans, they were not subject to Section 5 preclearance. Still, the court claimed to be aware of the Section 5 requirement that redistricting should not abridge "the right to vote on the basis of race."[30] Moreover, the judges decided (erroneously, as the Supreme Court later held) that the hearings proceeded under Section 5 of the Voting Rights Act and therefore ruled that Section 2 did not fully apply to the redistricting plans. The judges also ruled from the bench they would allow no party a Section 2 hearing on any plan the court adopted. The judges neither understood nor considered that a remedy that fully complied with the racial fairness standard of Section 2 of the Voting Rights Act

[25] 478 U.S. 30, 37, 45 (1986).

[26] *Burton v. Sheheen*, 793 F.S. 1329, 1334 (D.S.C. 1992), p. 1334; Solicitor General, Brief for the Untied States as Amicus Curiae, *SARC v. Nick Theodore*, Supreme Court, October 1992, Nos. 92-155 and 92-219, pp. 4, 2. Dr. Theodore S. Arrington was the expert for the Republicans. Dr. John C. Ruoff, James W. Loewen, and Orville Vernon Burton were experts for SARC-NAACP. Nelson B. Rivers III testified for SARC-NAACP about politics in South Carolina.

[27] ibid, p. 10.

[28] SARC Jurisdictional Statement, ibid, p. 10, cites App. 30-31.

[29] Theodore S. Arrington to Dr. Vernon Burton, 5 October 1993, in possession of Burton.

[30] Quoted on p. 9 of the *Statewide Reapportionment Advisory Committee v. Nick Theodore*. In The Supreme Court of the United States, October Term, 1992, Jurisdictional Statement, and cited as in App. 25.

was essential because the *Gingles* conditions prevail in South Carolina.

The plaintiffs never articulated a precise standard for the proportion of a district that needed to be black for an African-American candidate to win. They did make the point, however, that no matter where the level for "reasonable opportunity," the plaintiffs' proposed plans were better than the various legislative plans in moving African-Americans toward equal opportunity to participate and elect candidates of their choice. The plaintiffs emphasized "toward" since none of the plans could pretend to provide full equality of participation.[31]

SARC/NAACP expert Dr. John C. Ruoff analyzed a large number of elections to determine the total percentage of African-American population needed for a candidate of the African-American community to have an 85 percent chance of victory (Ruoff did not have available voting age population data for his analysis). Ruoff determined that, in districts at least 57 or 58 percent black in total population, African-American candidates had won election 85 percent of the time (see table 1). Districts that ranged from 50 to 57 percent black in total population did not provide African-Americans with an equal opportunity to elect candidates of their choice. Statewide, black candidates won only about one-third of the time in these districts. Nevertheless, the court decided that a black voting age population of greater than 50 percent constituted an "opportunity" district for black candidates.

TABLE 1. Elections Won by African-American Candidates, 1980-1992 in 1980 Black Majority Districts with Black Percentage Above and Below 57 Percent

Using 1980 Population

	Total Elections	*African-American Wins*	*African-American % of Wins*
>57%	90	77	86%
50-57%	56	18	32%
Total	146	95	65%

Using 1990 Population

	Total Elections	*African-American Wins*	*African-American % of Wins*
>57%	85	72	85%
50-57%	61	23	38%
Total	146	95	65%

Ultimately, however, the three-judge district court rejected all the proposed plans and constructed its own, using the resources of the state. One of these resources was Bobby Bowers, the longtime state demographer, who receives his

[31] Theodore S. Arrington to Dr. Vernon Burton, 5 October 1993, in possession of Burton.

state job by appointment of the South Carolina legislature. An advisor to the court, Bowers was present throughout the hearings. Districts drawn by Bowers, which the court adopted, paid little attention to the plaintiffs' arguments and closely resembled the plans advocated by the state legislature.

All parties, including the court, used computers and mapping software (with the exception of Congressman Tallon, who presented a plan for Congressional districts only). Although some groups had access to larger and faster computers, basically similar computer technology was accessible to all parties because of geographic information systems software available for personal computers.

Until the late 1980s, those who drew redistricting plans had to rely on relatively large census geography (enumeration districts and census tracts) for most of the state. Only in metropolitan areas were data regarding demographic characteristics, such as race or the number of persons of voting age, available at the block level. The only computers available to plan drawers in the 1980s in South Carolina were large and expensive mainframe computers that were owned by government agencies or colleges and universities. Moreover, no geographical information software was readily available for redistricting purposes. As a general matter, redistricting plans had to be drawn by hand on previously published maps.

In the 1990s, however, the redistricting process took place in a new technological environment. Personal computers were widely available and reasonably priced, as were user-friendly redistricting software packages. Moreover, the U.S. Bureau of the Census made census variables available at the block level (and for the existing election precincts) for the entire state in machine readable form. This meant that in the redistricting process, all interested parties could easily draft a variety of alternative districting plans to serve their own interests. As a result, the boundaries of political subdivisions or counties, which had so often served as building blocks for redistricting in the past, were no longer needed, and electoral districts could more accurately conform to the requirements of the one-person one-vote standard and the Voting Rights Act.

The national NAACP provided training to local State Conference members, in particular to State Executive Director Nelson Rivers, so that the South Carolina State Conference could draw maps for its branches within the state. NAACP redistricting expert Sam Walters traveled to South Carolina to aid in designing a computer system.[32] South Carolina Fair Share Executive Director John C. Ruoff worked closely with Rivers and the NAACP, SARC, and the South Carolina legislative black caucus to draw maps and propose various plans.[33]

Although the South Carolina state house and senate, Lt. Governor Theodore, the House, and House Speaker Robert Sheheen objected to creating additional majority African-American seats for their respective legislative bodies, all state policymakers and parties involved in the redistricting suit agreed that a majority African-American congressional district could and should be constructed. Table

[32]Dennis Courtland Hayes, General Counsel NAACP to Vernon Burton, 7 June 1993.

[33]Dr. Ruoff has provided us with many of his computations and tables to use in this paper.

2 shows the black proportion of each congressional district proposed by various parties. Republicans actually drew two majority African-American congressional districts, but offered only a plan containing one. The three-judge panel did not rule on whether under the Voting Rights Act it was "required" to create a majority African-American congressional district, but it did construct Congressional District 6 with a 61.8 percent African-American population and a 57.9 voting age black population.[34] Table 3 gives the congressional districts created by the court. Several plans presented at court provided a higher proportion of black voting age population than that implemented by the court. The court's African-American-majority congressional district included all or part of sixteen of the state's forty-six counties. The court drawn congressional plan provided one opportunity and two influence districts for African-Americans.

TABLE 2: Comparison of U.S. Congressional Plans Percent Black in Population

District	*1992 Court*	*SARC/ NAACP*	*Senate*	*Lt. Gover-nor*	*Gover-nor*	*Repub. Party*	*House*	*Sheheen* 1*	*Sheheen* 2*	*Tallon*
1	20	18	20	20	22	17	25	31	18	24
2	25	21	22	60	24	17	24	36	32	22
3	21	25	24	21	22	50	22	22	21	61
4	20	67	67	20	18	9	20	20	20	19
5	31	19	28	27	26	21	27	32	33	19
6	62	30	18	32	67	65	61	37	55	34
Number of Counties Split to Form a Majority Black District	13	30	25	14	15	NA	11	NA	NA	7

Black majority districts bolded.
*NOT proposed at trial

The bottom row of table 2 shows the number of counties split by the various plans to create a black-majority district. Because the Court argued against splitting counties to increase the number of majority African-American house and senate seats, it is interesting that the court split more counties and precincts in devising a majority African-American congressional district than two of the proposed plans. The majority of these splits increased the African-American population in the majority-black districts. James Clyburn, who handily defeated several

[34]According to the Geography Report in the case, the African-American population was 62.15 percent, and the voting age population was actually 58.29 percent. John C. Ruoff to SARC, 12 May 1992, "A preliminary Analysis of Court Ordered Plans," p. 1.

other black candidates in the Democratic primary, was elected over a white Republican in the sixth District in November 1992, the first African-American elected to Congress from South Carolina in the twentieth century.

TABLE 3: U. S. Congressional Districts Created by Federal Court

	Total Population				*Voting Age Population*		
Dist.	*Total*	*Deviation*	*Black*	*% Black*	*Total*	*Black*	*% Black*
1	581,125	+8	117,022	20.14	427,603	75,536	17.66
2	581,111	-6	147,626	25.40	431,032	98,040	22.75
3	581,104	-13	120,579	20.75	435,406	81,796	18.79
4	581,113	-3	114,332	19.67	437,837	77,739	17.76
5	581,117	0	181,430	31.22	422,294	119,204	28.23
6	*581,133*	+16	*358,895*	61.76	*412,324*	*238,725*	57.90
	3,486,703		1,039,884		2,566,496	691,040	

Table 4 compares the plans for the Senate that were proposed by the various litigators, the plan drawn by the court in 1992 (and the Senate plan finally adopted by the General Assembly in 1995). Both the SARC/NAACP and the Republican Party plans created 13 opportunity districts for African-Americans in the South Carolina Senate. Table 4 presents the number of majority African-American senate districts in total population and voting age population in each proposed plan, the pre-1990 plan, the 1992 court-ordered plan, and the 1995 Senate adopted plan. The court plan provided for 10 majority black voting age population senate districts. Since the existing 1984 district plan with 1980 census data had only seven, and with the 1990 census data only nine, the court found that its plan for 10 districts was not retrogressive. However, plans drawn by others, except that of the Senate and the Senate president, Lt. Governor Theodore, created more black districts than did the court.

Table 5 compares the plans proposed for the House. The court's imposed plan had nine fewer districts with African-American voting age majorities than SARC's and ten fewer than the Governor's and the Republican Party's plans.

In creating the court-ordered districts, the three judges argued that their first precedent was not to violate state policy, which they interpreted as using existing county lines for districts. A careful historical investigation of redistricting in the 1970s and 1980s reveals no such state policy except to comply with the law on one-person one-vote and the Voting Rights Act. Counties had not been used as the basis for redistricting in the House since court ordered redistricting in the 1970s. Furthermore, in 1982 the House plan divided 42 of 46 counties.[35] Astute political and contemporary commentators in the newspapers in the 1970s, 1980s, and 1990s always remarked on the high priority placed on incumbency protection during reapportionment.[36]

[35]Orville Vernon Burton, "Report on Reapportionment of the South Carolina House of Representatives," 15 April 1996, for *Able* v. *Wilkins*, No. CV: 3:96-0003 (D.S.C.) in Justice Department Files.

[36]Orville Vernon Burton, "Report on Reapportionment of the South Carolina House of Representatives," 15 April 1996, for *Able* v. *Wilkins*, No. CV: 3:96-0003 (D.S.C.) in Justice Department Files.

TABLE 4. South Carolina Senate Plans

Category	*% Black*	*1984 Plan Based on 1980 Census*	*1984 Plan Based on 1990 Census*	*NAACP/ SARC*	*Senate*	*Lt. Gov.*	*Gov.*	*Repub. Party*	*1992 Court*	*1995 Final Senate Plan*
*Opport.	57≥	na	na	13	9	7	12	13	8	12
Phantom	50-56	na	na	1	2	5	1	1	3	0
Influence	25-49	na	na	6	13	11	5	2	22	20
Other	<25	na	na	26	22	23	28	30	13	14
≥50% Black Popul.		10	10	14	11	12	13	14	11	12
≥50% Black VAP		7	9	12	9	9	12	13	10	11
Deviation (%)		9.96	63.15	2.74	3.92	3.85	0.01	0.01	1.95	1.9

*Opportunity is 57 percent or elected and African-American from the District to the Senate.

TABLE 5. South Carolina House Plans

Category	*% Black*	*1981 based on 1980 Census*	*1981 based on 1990 Census*	*NAACP/ SARC*	*House*	*Sheheen*	*Gov.*	*Repub. Party*	*1992 Court*	*DOJ Objected to 1994 House Plan*	*Black Caucus Repub. compromise*	*1994 Final House Plan*
*Opport.	58≥	na	na	32	20	18	32	30	19	20	29	29
Phantom	50-57	na	na	0	8	11	3	6	9	7	3	3
Influence	25-49	na	na	23	36	37	15	13	39	38	25	24
Other	<25	na	na	69	60	58	74	75	57	59	67	68
≥ 50% Black Pop.		26	24	32	28	29	35	36	28	27	32	32
≥50% Black VAP		20	21	32	20	21	33	33	23	21	31	31
Deviation (%)		9.87	113.9	1.95	9.99	2.0	0.98	0.18	1.98	1.99	5.20	5.20

*Opportunity is 58 percent or elected an African-American from the District to the House.

Although they claimed to be cognizant of race, the three-judge panel rejected that they had to judge maps "solely on the effect they have on minority voting rights." The court argued that, although other plans provided for more African-American majority districts, "they do so without regard to any interest but race and without the clear necessity which justifies" a Voting Rights Act remedy.[37] The judges condemned the Republicans and Governor Campbell for partisan motives. "The Republican plan draws lines without regard to any factor except skin color and possibly political affiliation." The judges characterized one Republican Senate district as "overtly racist." The judges also accused SARC of wanting "to defeat white incumbents."[38] The panel announced that it attempted to preserve traditional county and precinct lines as well as "broadly defined community interests."[39] The court wrote "The color of one's skin, in and of itself, does not create a community of interest," anticipating Justice Sandra Day O'Connor's language in *Shaw v. Reno*.[40] Although the judges faulted proposed plans for incumbency protection, the court's imposed plan was criticized as basically an incumbency protection plan.

After all the effort and resources that had gone into redistricting, South Carolina's African-American citizens were greatly disappointed. Nelson B. Rivers III lamented, "The result is a status quo plan, grand incumbency protection."[41] State Senator Kay Patterson, a former chair of the Legislative Black Caucus, commented, "The black community didn't get the seats we were entitled to. I don't think we got a fair shake from the three-judge panel." AME Bishop Frederick C. James and Dr. William F. Gibson, then president of the South Carolina NAACP, released a joint statement as co-chairs of SARC, "The court could have drawn many more predominantly black House and Senate Districts than it did, and the black congressional district could have been much stronger."

With the redistricting plan of the three-judge panel, African-Americans increased their representation by one in Congress, one in the state senate, and three in the house. Nevertheless, they remained underrepresented. The Congressional delegation was 16.7 percent, the senate 15.2 percent, and the house 12.7 percent, while the population was 29.8 percent and the voting age population was 26.9 percent. Continued racial bloc voting, noted among political commentators in newspaper stories, caused African-American candidates to be unable to win except in districts that were majority black, especially more than 57 percent black.

Republicans won more. After the 1992 elections with the new court-ordered districts, the Senate lost five Democrats and gained five Republicans; the House lost eight Democrats and gained eight Republicans. This increase in Republican

[37]The Columbia *State*, 3 May 1992, 12 B. 793 Federal Supplement.

[38]The Columbia *State*, 2 May 1992, 5 A.

[39]The Columbia *State*, 3 May 1992, 12 B; see also 2 May 1992, 5A.

[40]Greenville *News*, 3 Nov. 1992, 1A.

[41]"Update on the Republican Strategy of Using the Federal Courts for Redistricting," *Voting Rights Review* (Summer-Fall, 1992) 6.

seats occurred in the context of a continuing movement of whites toward the Republican party in the state of South Carolina irrespective of the creation of majority black districts. Many in the state of South Carolina believe, however, that the Republican gain could have been much larger if more majority African-American districts had been created. (See Table 6)

TABLE 6: Partisan and Racial Comparison of General Assembly, 1991-1996.

	*Democrat**	*Republican*	*Independent*	
	HOUSE			
1991	81*	42	1	15*
1993	73*	50	1	18*
current 9-1996	53*	66 (was 68)**	3	25*
*Black **Two districts as of September 1996 are vacant. Republicans held both districts when they became vacant.				
	SENATE			
1991	35*	11	0	6*
1993	30*	16	0	7*
current 9-1996	24*	21	1	6*
*African-Americans are also included among Democrats.				

Knowledgeable South Carolina commentators recognized that neither the GOP nor African-Americans won much. The *State* newspaper announced the three-judge panel decision under the headline, "Blacks, GOP dealt blow by remap." The paper wrote that "by vetoing the General Assembly's redistricting plans, Gov. Campbell rolled the dice in a gamble that the federal courts would make the Republican Party a big winner. But the roll came up snake eyes."[42] The Greenville *News* also noted, "The court-imposed boundaries...essentially mirror what the Democratic-controlled Legislature favored."[43] More than a year later the *State* reiterated that "The plans approved by the three-judge panel were closer to those adopted by the Democrat-led General Assembly than plans with more blacks districts proposed by the GOP and blacks."[44]

Following the 1 May 1992 announcement of the redistricting, Republicans and the Governor stated that, although disappointed, they probably would not appeal to the Supreme Court. Attorneys for SARC, however, did, and Governor Campbell joined as cross-appellant. SARC argued that the three-judge panel had not properly considered Section 2 arguments. Attorney John Roy Harper II explained, "Our position is that the black voters of the state of South

[42]The Columbia *State*, 3 May 1992, 1B.

[43]Greenville *News*, 3 Nov. 1992, 1A.

[44]The Columbia *State*, 16 June 1993, 10A.

Carolina were shortchanged by the plan that was drawn by the court."[45]

The Supreme Court asked the Justice Department whether the state's court-drawn election plans complied with voting rights law. In the 7 May 1993 Amicus brief, filed by the Solicitor General, the Justice Department basically agreed with SARC's appeal. According to the *State*, "in a strongly worded brief asking the Supreme Court to make the judges do it over," the Justice Department said that the three-judge panel was in error because they failed properly to consider that the Voting Rights Act "prohibits political processes that dilute black votes."[46] The Justice Department brief stated that the court compounded its error by the "misconception that it was not required to grapple fully with the requirements of Section 2." The three-judge panel "misunderstood the nature of the action before it." The brief specifically questioned the use of 50 percent black voting age population as determining an African-American opportunity district. Moreover, the Justice Department argued the judges "have accorded undue deference to 'state policy' in formulating its plans, placing primary emphasis on preserving county and precinct lines."[47]

The Supreme Court relied on the Justice Department's brief and on 14 June 1993 sent the plan back to the three-judge district court for further hearing on the Section 2 claim.[48] The newspapers all saw this as a victory for African-Americans and possibly for the Republican party. Governor Campbell judiciously commented, "I don't think there would have been a case if the court had felt there were enough minority districts."[49] Local papers throughout the state also questioned whether the three-judge panel had complied with the Voting Rights Act. Both the Columbia and Spartanburg papers reported that the redistricting plans were returned to the three-judge panel to "better determine whether minority voting rights were violated" and reported that the Supreme Court believed the "federal judges who drafted the plan had neglected to ensure minority voters' rights are protected."[50] The *State* reported that the judges were being told by the Supreme Court "to try again, taking care this time to assure minority voters' rights are protected." The Justice Department brief maintained that a Supreme Court decision on the merits of the plans was premature and, according to the newspaper, suggested that "the panel of judges should be forced instead to do the job right, concentrating less on county lines and more on the imperatives of the racial equality in the 1965 Voting Rights Act."[51]

[45]The Columbia *State*, 3 November 1992, B1 and The Greenville *News*, 3 November 1992, 1 and 10A.

[46]The Columbia *State*, 18 May 1993, 1B; see also 16 June 1993, 10A.

[47]William C. Bryson, Acting Solicitor General, Brief for the United States as Amicus Curiae, In the Supreme Court of the United States, October Term, 1992, *Statewide Reapportionment v....*, on Appeal, Nos. 92-155 and 92-219, see esp. pp. 6-7, 9, 14, 15, 16, 17, 19.

[48]113 S. Ct. at 2954, 1 and 2.

[49]The Greenville *News*, 15 June 1993, 9A.

[50]The Columbia *State*, 29 June 1993, 1 and 6 A; see also Spartanburg *Herald-Journal*, June 29, 1993, A9.

[51]The Columbia *State*, 15 June 1993, 1A.

Two weeks after the Supreme Court remanded the redistricting case back to the three-judge district court, South Carolina had to grapple with the Supreme Court decision in *Shaw v. Reno* (28 June 1993) and how that might influence the three-judge panel decision. *Shaw v. Reno* held that a district that was as "bizarre" in shape as to be explainable solely in terms of race could be challenged in federal court.

On 6 July 1993, a week before the three-judge panel was to meet again to reconsider their reapportionment plans, the Columbia newspaper wrote an editorial that asked, "Does drawing voting districts to guarantee the election of black officials actually hurt black voters, by resegregating society and diminishing the number of white Democrats who have tended to support their ideas more than Republicans?" To this, white Democrats responded yes and South Carolina African-American leaders no.[52]

The three-judge panel had hoped the Justice Department would be at the hearing in July 1993, but the department, still at that time without an assistant attorney general for civil rights since President William J. Clinton took office, sent no representatives. After asking questions of the assembled parties, the judges left their decision as it was; they decided not to decide.

The judges gave the redistricting decision back to the state legislators. They had until 1 April 1994 to enact plans for the House of Representatives and Congress. The judges did not set a deadline for the Senate, whose members would not stand for reelection until 1996.[53]

In early January 1994 House Speaker Sheheen announced that he intended to pass legislation similar to the 1992 court plan for redistricting the House.[54] (That plan, of course, had been vacated by the Supreme Court.) The Senate decided not to tie its reapportionment plan to the House or Congressional plan and to take advantage of the extra time allowed them to draw districts that reflected the latest judicial directions on reapportionment. Following a newspaper report that the federal courts had decided it was unconstitutional to create districts with the sole purpose of ensuring victory for black candidates, the Senate wanted to reflect that thinking in their plan.[55]

[52]Democrat House Speaker Sheheen was quoted on the North Carolina Congressional decision, "This opinion creates a greater justification for our court's reasoning." The paper stated that the federal judges deciding the South Carolina reapportionment case had "to apply the arguments in the most recent case" and contrasted *Shaw v. Reno* with the Supreme Court decision two weeks earlier which ordered the judges "to justify why there weren't more black-majority districts, or else draw more." The Columbia *State*, 6 July 1993, 14A. A Charleston paper reported that First District U.S. Congressman Republican Arthur Ravenal, Jr. said he was pleased because he had never liked creating a district to ensure the election of a minority; "I'm one of these color-blind people. That Sixth District is an abomination." The Charleston *Post and Courier*, 29 June 1993, 1D and see also 7A.

[53]*State* 17 May 1994, B4.

[54]The day before, according to the newspaper, legislators made clear that they were not going to change the congressional district which had elected James Clyburn as the first African-American from the state since Reconstruction to the U.S. Congress. Columbia *State*, 5 January 1994, 3B. More than half, 76 of the 142 (out of a total of 170) lawmakers who responded to the newspaper's 1994 Legislative Survey would create as many black majority legislative districts as possible. Columbia *State*, 5 January 1994, 3B; ibid, 9 January 1994, 6D.

[55]Columbia *State*, 11 January 1994, 3B.

The General Assembly did agree on the majority black Congressional district, and the 6th Congressional district was left unchanged. Since *Shaw v. Reno* used shape as a factor, legislators felt some uneasiness about the shape of the sixth congressional district. The shape was awkward because three white congressional incumbents insisted on having military bases in their districts instead of in the newly created black majority district. The state submitted the Congressional plan to the Justice Department for preclearance on 8 April 1994, and it was cleared without any problems on 28 April 1994. The first challenge was filed on December 6, 1996 (*Leonard et al.v. Beasley et al.,* USDC, DSC, Columbia Division, Civil No.: 3:96-CV-3640).[56] It was settled on August 6, 1997 with an agreement that the General Assembly would redraw the districts by the end of the session in 1000. If the action is reinstated, everyone stipulates that you can draw a narrowly tailored constitutional majority BVAP district and that the state has a compelling interest in doing that. The parties would also stipulate that traditional districting principles were subordinated to race in drawing the 6th Congressional District, but that the state has a compelling state interest in drawing a 50 percent BVAP district.

The House redistricting, however, was another matter; like Macbeth's lament, it is a "tale told by an idiot, full of sound and fury, signifying nothing." In a letter to all members of the state House of Representatives, Speaker Sheheen briefly outlined what had happened thus far for his colleagues. According to Sheheen, the Court on 13 July 1993 had "stated that no districts now exist" since their "order was vacated by the Supreme Court." Moreover, the judges "made it clear that it deems redistricting as a state legislative matter and one for the federal courts to intervene only as a last resort to ensure timely elections." Sheheen outlined alternatives: start anew, readopt the plan the House had passed in 1992, start from that plan and make changes, adopt the 1992 court plan under which elections had been held, make changes to the court plan, do nothing or "Punt." In a telling penultimate paragraph to the two-page letter Sheheen wrote, "If luck prevails, maybe everyone will write in and say they are well pleased with the district under which they got elected last year and see no need for a change in the court plan."[57]

The white Democrat controlled House basically followed Sheheen's "luck" scheme. The House Judiciary Committee in December, 1993 sent out a notice for a meeting of the Election Laws Subcommittee on 4 January 1995 and on 5 January the Staff of the House Judiciary Committee presented another history of redistricting and attached a copy of *Shaw v. Reno* with the following summary:

[56]An interesting footnote. The local lawyer on the case was John Chase, the Democratic candidate who was unable to defeat Clyburn in 1992. Chase ran a racist television advertisement. The campaign ad resembled the American Express commercials but with African-American candidate James Clyburn's picture in the center of the card (the picture purportedly looked like "buckwheat") with a slogan about Clyburn and a "welfare express card."

[57]Robert J. Sheheen to Members of the South Carolina House, 16 July 1993, in Judiciary Committee, Redistricting Papers, South Carolina State Archives and Department of Justice files.

"...a redistricting plan alleged to be so bizarre on its face as to be unexplainable on grounds other than race demands close scrutiny on equal protection grounds, no matter what that motivation underlying its adoption." The memo also announced that Speaker Sheheen had filed bills "which reflect the court ordered plan."[58]

The House Judiciary Committee's plan was nearly identical to the one the Court had drawn in 1992; 20 districts had changes approved by the incumbents. The House approved the plan with only minor changes to districts from which all representatives were elected in 1992. The Judiciary Committee rejected requests for six new majority black districts that black caucus members requested and gave as their reason that they needed to move quickly to beat the April 1 deadline set by the Court. In addition, they relied on the "court decisions that have called into question the practice of creating districts to ensure black representation for government." The House reduced the number of black majority districts from 28 to 27 and majority voting age population districts from 25 to 22. Even so, African-Americans and Republicans calculated that their best opportunity was to get a plan passed and then to make their objections known to the Justice Department. If the House did not pass a plan, the judges who drew the 1992 plans would be in charge and would probably "keep the same districts in place." Thus, Republicans and African-Americans believed "it makes more sense to let white Democrats pass the plan they want so it'll go to the federal Justice Department." Speaker Sheheen, on the other hand, argued that the districts were fair since "three impartial judges" basically had drawn them.[59]

The Senate exercised legislative courtesy and approved the House plan. The Act became law on 15 February 1994, without the signature of Governor Campbell. Speaker Sheheen submitted the plan for preclearance on 23 March 1994.[60] On 2 May 1994 the Justice Department objected to the plan. (See Table 5, page 301, for comparison of the DOJ-objected-to 1994 House Plan.)

In a detailed ten-page letter, Assistant Attorney General Deval L. Patrick noted that under the 1992 court plan, of the 18 elected African-American representatives, all were elected from majority voting age districts and 14 of 18 were from districts that were over 55 percent voting age population. All but one had a black registration majority and 13 were elected from where African-Americans represented 55 percent or more of registered voters. In 10 black majority districts, African-Americans had not been elected, 7 had black voting age populations, but only one had 55 percent black voting age population and none had a 55 percent black registration. These districts were also in rural areas "where it appears that

[58]James H. Hodges to Joseph H. Wilder, et al., 23 December 1993 and Staff of the House Judiciary Committee to Members of Election Laws Subcommittee, 5 January 1994, South Carolina House Judiciary Committee, Election Laws Subcommittee, SCDAH and Justice Department Files.

[59]Columbia *State*, 19 and 26 January 1994, B1; Deval L. Patrick to Robert J. Sheheen, 2 May 1994, Objection Letter, p. 4, Justice Department files.

[60]Robert J. Sheheen to Chief, Voting Section, Civil Rights Division, 23 March 1994, Submission Letter, Department of Justice Files.

the present day effects of the state's history of discrimination are more substantial, and thus where a higher black voting age population majority may be necessary to allow black voters an opportunity to elect a candidate of their choice." The legislature could have easily drawn nine additional black majority districts. Instead it actually reduced the number of voting age population black majority districts.

Reviewing South Carolina's recent election history, the Justice Department put special emphasis on the 1992 legislative and congressional elections and concluded that South Carolina elections are characterized "by a pattern of racially polarized voting." Furthermore, it found that "black candidates generally are the candidates of choice of black voters in legislative elections."

The Justice Department also questioned the supposed policy on districts that do not cross county lines. The Justice Department review failed to identify "any state redistricting policies" that guided redistricting for the House. Instead, the Justice Department concluded that incumbency protection drove the process, as the existing court-ordered plan was altered only if all the affected representatives agreed. Thus, it was preordained that no change would be made that would increase the number of districts in which black voters would have the opportunity to elect their preferred candidates. The Justice Department wrote that the lawmakers used a "least-change approach" and advanced only one state policy consideration, "incumbency protection and the ease of administering a plan essentially the same as the 1992 plan." The Justice Department concluded "In sum, our analysis reveals that the redistricting process was designed to ensure incumbency protections, not compliance with the Voting Rights Act."[61]

House Speaker Sheheen responded to the Justice Department objection letter. "Your age-old accusation that the plan...was drawn for incumbency protection is easily advanced when incumbents participate in the drawing of the plan." However, in this case, Sheheen argued that the submitted plan "was primarily penned by the three judge panel" and the plan objected to "was their plan with minor adjustments." Moreover, the Speaker argued that the general assembly had followed state policy and those considerations "have remained constant for my years in the General Assembly: keeping identifiable communities of interest intact; splitting as few county lines as possible to minimize voter confusion; compliance with the Voting Rights Act by allowing identifiable black populations with communities of interest to elect a candidate of their choice; completing the process as expeditiously as possible to allow elections to be held on time while giving candidates and voters the opportunity to know their choices."[62]

An editorial in the Columbia *State* chastised state legislators, "Won't S.C. House ever get remapping right?" Quoting the Justice Department's objection letter that incumbency protection had driven reapportionment of the House, the editors were surprised that "once again" legislators had "failed to follow court mandates concerning the voting rights of blacks." The article emphasized that African-Americans were nearly 30 percent of South Carolina's population and yet were less than 15 percent of members of the House.[63]

[61]Deval L. Patrick to Robert J. Sheheen, 2 May 1994, Objection Letter, p. 4, Justice Department files. Orville Vernon Burton, "Report on Reapportionment of the South Carolina House of Representatives," 15 April 1996, for *Able* v. *Wilkins*, No. CV: 3:96-0003 (D.S.C.) in Justice Department Files.

[62]Robert J. Sheheen to Honorable Deval L. Patrick, Asst. Atty Genl., 23 May 1994, Submission of Second Plan. See also statements attributed to Sheheen in Columbia *State*, 26 January 1994.

Other newspaper accounts commented on white Democratic lawmakers' defiance of "the federal government reminiscent of the Civil Rights era." The Democratic legislators objected to the Department of Justice's objections and argued "other factors...are just as significant as race." House Majority Leader Tim Rogers stated, "I'm not willing to turn over the prerogative the Legislature has carte blanch, to a bunch of bureaucrats." He refused to accept the Justice Department's logic. "Just because they have decided one way does not mean what we did was any less valid or appropriate." One legislator was quoted, "I don't think we can buckle under to a complete Justice Department makeover of the entire state."[64]

According to one newspaper, it was "in the face of that defiance" that African-American legislators refused a compromise to work for three or four additional black districts, and instead demanded all nine that the Justice Department had suggested.[65] Black Representative Don Beatty who spearheaded the reapportionment negotiations for the African-American legislative caucus reported that black Democrats would have accepted a plan that spared more white Democrats had the House's Democratic leadership worked with the black caucus.[66]

Obstinately Speaker Sheheen and white Democrats stalled to keep a reapportionment plan from creating new black majority districts. As white Democrats "filibustered into the night to avoid debate over creating new black-majority districts," frustrated African-American legislators voted unanimously on 10 May, ironically Confederate Memorial Day in South Carolina, to cooperate with Republicans. African-American Representative Joe Neal explained: "Increasing our share of black representation in the South Carolina House is a goal that has been important to our people here in South Carolina since the Civil War."[67] When white Democrats urged African-Americans not to align with Republicans, "black Democrats issued some of the harshest accusations uttered on the House floor in recent memory." Charleston Representative Lucille Whipper reported African-American Democrats were tired of being used. "It reminds me of the days in slavery when we wanted to be free, and our benevolent masters said, 'Why do you want freedom?'"[68]

Finally, in the wee hours of 11 May 1994, a coalition of African-American Democrats and white Republicans successfully ended a 13-hour leadership stall

[63]Columbia *State*, 4 May 1994, A12.

[64]Columbia *State*, 4 May B5 and 3 May A1, 1994

[65]Columbia *State*, 4 May 1994, B5.

[66]Columbia *State*, 13 May 1994, A1 and A7.

[67]Columbia *State*, 11 May 1994, A1 and A6.

[68]Columbia *State*, 12 May 1994, A1 and A7.

on reapportionment. They forced House Speaker Robert Sheheen to recall a reapportionment bill from the Judiciary Committee that would allow them to adopt a coalition amendment creating nine additional African-American majority House districts. House Speaker Sheheen had ruled that the House could not, even with a majority vote, go to a section of the calendar, specifically to the motion period, customarily closed to the floor. In an unusual maneuver, African-American representative Don Beatty moved to appeal the ruling of the chair, declaring that it was out of order to invoke such a rule. Rather than have his procedural rule overturned and his authority diminished, Sheheen relented.

On 11 May 1994 the reapportionment plan passed the House 88-22 over quiet objections of white Democrats. The faithful Sons of the Confederacy who on the previous day and evening were outfitted in the traditional Confederate gray and stood sentinel before the monument to their ancestors on the State House grounds were gone when the legislature adjourned. On May 14, the South Carolina Senate passed and the Lieutenant Governor ratified the South Carolina House Reapportionment plan as it came from the House. Quite likely, historians will remember May 11 as a significant political watershed, the end of white Democratic party ascendancy that had held power in the state house of Representatives and Senate since 1876. Democratic Representative Joe Wilder of Barnwell underscored the significance of the moment, "I'm very disturbed by what happened in here, because it dramatically changes the balance of political power we've had in this House up until now in this century." Although some white and black Democrats predicted a permanent alliance of Republicans and African-American legislators, Roger Young, Republican of Charleston, placed the moment in perspective. When African-American legislators come to the Republican Party and suggest "'Let's talk about the Confederate flag', I think you're going to have a problem."[69]

The federal judges had extended the April 1 deadline to give the House the opportunity to pass the new plan. The coalition of Republicans and African-American legislators hurried to get their plan passed knowing that the judges would order elections held in the districts that they had drawn in 1992, and that those districts protected white Democratic incumbents. A special session was called at the cost of $10,300.[70] That week, as districts were redrawn, one member of the House characterized the last minute efforts to negotiate compromises "a zoo."[71] The finalized plan was adopted on May 19. The House plan was fedexed for preclearance on 23 May 1994 and cleared by the Justice Department on 31 May 1994. In his letter of submission, Speaker Sheheen warned, "I do fear that the additional balkanization of certain communities may lead to legitimate challenges on other grounds which probably will not affect preclearance by your department."[72] The next day the *State* newspaper reported that for the second

[69]Columbia *State*, 12 May 1994, A1 and A7.

[70]Columbia *State*, 17 May 1994, B4.

[71]Columbia *State*, 19 May 1994, A10.

time since passage of the 1965 Voting Rights Act, state legislators would be elected from districts drawn by state legislators instead of federal judges.[73]

Republicans gained control of the House after the 1994 election. African-American legislators Sen. John Matthews, Reps. Don Beatty and Gilda Cobb-Hunter believed that "most, if not all, the districts where white Democrats lost to white Republicans were unaffected by redistricting."[74] Between the 1992 and 1994 general elections, two elected Democrats switched parties. Another Democratic district was won by a Republican in a special election. Redistricting in 1994 actually effected a difference of only one in the Democratic-Republican balance. Otherwise, the new or enhanced African-American districts resulted only in Democrats replacing Democrats (although in one district a Republican replaced a Democrat and in another a Democrat replaced a Republican). The other seven districts were simply Republican wins in a Republican year in districts essentially untouched by the 1994 redistricting and in which Democrats won in 1992. After the general election in 1994, eight elected Democrats switched parties, and one black Democrat replaced a white Democrat in a special election. After the 1992 redistricting African-Americans increased in the House from 15 to 18; with the 1994 redistricting they now have 24 of the 124 House seats to make up 19 percent of the members of the House (See Table 6, page 303).

The reapportionment of the Senate is not so dramatic as the House. On 30 March 1994 the South Carolina Senate Judiciary Committee's subcommittee on Reapportionment and Redistricting adopted guidelines for Legislative and Congressional Redistricting. These rules for reapportionment were carefully arranged in a descending order of importance: equality of population, compliance with the Voting Rights Act, contiguity, communities of interest where one-person, one-vote and the Voting Rights Act are not violated, adherence to voting precinct boundary lines, use of only the 1990 census for data, and compactness.[75] According to the *State* newspaper, black and white Democrats in the Senate worked together to create the minimum change to satisfy the Justice Department's demand for more black districts. One of two African-American members of the eight person map-drawing Senate subcommittee, Darrell Jackson, blamed "Democrats' loss of control of the House to a redistricting plan passed last year by a coalition of black Democrats and white Republicans."[76] According to the Charlotte *Observer*, Senate Democrats tried "to create districts where white Democrats depend on both white voters and a solid minority of blacks."[77] Thus, black

[72]Robert J. Sheheen to Honorable Deval L. Patrick, 23 May 1994, letter of submission, Department of Justice files.

[73]Columbia *State*, 1 June 1994, A1.

[74]Charlotte *Observer*, 10 April 1995, 1 and 4 C.

[75]The South Carolina Senate Judiciary Committee's Subcommittee on Reapportionment and Redistricting's Guidelines for Legislative and Congressional Redistricting, 30 March 1994, Files of

[76]Columbia *State*, 29 and 31 March 1995. The paper reported that one white Democratic Senator would be sacrificed to make room for a black Democrat.

and white Democrats rejected a Republican plan that created twice as many black majority districts.[78]

The Senate Judiciary Committee reported out a plan on 30 March 1995 that created two new majority-minority districts and enhanced the existing majority-minority districts.[79] The plan in place for the 1990 elections had 10 black districts; the 1992 plan had 11 black majority districts. The 1995 Senate plan provided one additional black majority district. The only black majority district that was not also a black voting age majority was Greenville District 7, which had been represented by an African-American since 1985, but was vacant at the time the Senate prepared the plan. The Senate had expelled African-American Theo Mitchell after he served time in prison for failing to report cash transactions. The 51.9 percent black population translated into a 47.7 percent voting age black population in District 7, but since an African-American had won the district in the past, it is counted as an opportunity district (although it is unlikely an African-American again will win the district anytime in the near future.).[80] Thus, the 1995 Senate plan provides 12 (as opposed to 8 in the 1992 Court plan) black opportunity districts where either an African-American had won election or the population was 57 percent black.

African-American Senator Kay Patterson explained why he and other black Democrats supported the Senate bill in 1995. Patterson noted that, under the House Republican-Black Caucus compromise plan, the 1994 elections resulted in Republican gains, and, when a number of white Democrats switched parties, Republicans captured the lower chamber. Patterson then converted to "a born-again Democrat" who saw "a hell of a lot of difference between white Democrats and Republicans." Patterson hopes that "Bubba and them may just wake up," as he did, "when they see how the Republicans are looking out for capital gains folks, them big boys, and taking money out of USC and money out of the schools."[81] Senator Darrell Jackson bluntly stated, "We did not want to make the same mistake the House made."[82] Executive Director of the NAACP, James Felder, was quoted "I think we all learned something" from the House redistricting. "You have to avoid the fire next time."[83]

Democrats held a 27 (6 of whom were African-American) to 18 advantage in the Senate when the bill was drawn up and passed. On 4 April 1995 the Senate approved the plan, it was ratified by the House on 11 May 1995 and went into effect without Republican Governor Governor David M. Beasley's signature on

[77]Charlotte *Observer*, 10 April 1995, 1 and 4 (quote) C.

[78]Columbia *State*, 29 September 1995, A9.

[79]Minutes, Reapportionment Subcommittee Meeting, 29 March 1995, part of Submission of Senate Plan to Justice Department, Justice Department Files.

[80]Charlotte *Observer*, 8 March 1995, 1C; Columbia *State*, 31 March 1995, newspaper clipping in Justice Department Submission file.

[81]Columbia *State*, 4 April 1995, B1 and B5, quotes from B5.

[82]Greenville *News*, 31 March 1995; Charlotte *Observer*, 31 March 1995, 5C.

[83]Charlotte *Observer*, 10 April 1995, 1 (quote) and 4 C.

17 May. On 16 May, President Pro Temp of the Senate, Marshall B. Williams, sent the plan to the Justice Department, which precleared the plan on 30 May 1995.

The Senate now has 24 (6 of whom are African-Americans) Democrats, 21 Republicans, and one Independent. A Republican won Greenville District 7 in a special election. One white Democrat became an independent.[84] Another four were party switches after the Republican state and national landslide in 1994. A correspondent who has covered reapportionment reported that Republicans "believe it is only a matter of time before the racial politics that made Democrats the dominant force in South Carolina put the GOP firmly in control." Several newspapers noted that most black South Carolinians vote for Democrats and most whites vote for Republicans. South Carolina House Speaker, Republican David Wilkins, has said, "Republican gains have come and will continue to come regardless of the redistricting plan. It might make a net difference of one or two seats, but on a grand scale it makes little difference. The Republican majority is here to stay." Yet, Democrats, black and white, believe that under the 1995 reapportionment plan they can survive the 1996 elections and control the Senate at least until 2000.[85]

A month after the Senate plan was approved, the Supreme Court announced that congressional redistricting by race was illegal in Georgia. Discussing the issues in that case, South Carolina's most influential newspaper on 30 June 1995 quoted former South Carolina House speaker Sheheen, "I think it would be fairly easy for any plaintiff in South Carolina to attack any of the three plans which have been adopted and prevail."[86] Thus, the powerful and respected Democratic House Representative from Kershaw County, Sheheen practically invited lawsuits challenging the hard-won compromises to get reapportionment completed following the 1990 census. Sure enough, white plaintiffs have challenged both the Senate and the House districting plans—although not the black majority Congressional district. They retained as attorney Lee Parks, who prevailed in the Georgia redistricting trial *Miller v. Johnson*.[87] The fate of the those plans for the South Carolina House of Representatives and the Senate was to be decided by three federal judges after an extremely heated trial in the J. Strom Thurmond federal court house in Columbia that began on 12 August and ended on 27 August 1996. The three-judge panel found six of the nine challenged House districts unconstitutional.

In the Senate case, three districts—two black majority (the one majority white abutted one of the majority black districts; the lead plaintiff was the white

[84]Greg Smith, the lead plaintiff in *Smith v. Beasley*.

[85]Columbia *State*, 4 April B1 and 5 (quotes from both 1 and 5), 30 June 1995, A1, A7, quote on A7.

[86]Columbia *The State*, 30 June 1995, quotation p. A2, story continued on page A7 with brief summary of redistricting in South Carolina in 1990s.

[87]*Smith v. Beasley* 946 F. Supp. 1174 (O.S.C. 1996) challenged the Senate; *Able v. Wilkins* C/A # 3:96-3-0 challenged the House, both cited *Miller v. Johnson*, 1995 WL 382020 (U.S.)

senator from that majority white district which had been redrawn unfavorably)—were challenged. In the 1996 election in the challenged districts, as African-American candidate, DeWitt Williams, won District 37. All three districts were found unconstitutional. In the redraw, District 29 (Darlington, Florence, and Marlboro) was simply conceded and redrawn to a white Democratic district. District 37 was the focus of lots of back and forth. The final district was the result of Senator Williams letting white Senator Yancey McGill talk him into a district conformation that left McGill pretty much alone in his county of Williamsburg. Williams lost the district to a white Republican in the 1997 special election.[88]

[88]One of the most interesting aspects of the 1994 redistricting is tht it appears to have reduced polarizations. Countywide African-American candidates were elected in both Marboro and Georgetown.

THE POLITICS OF RACE: The Virginia Redistricting Experience, 1991-1997

Winnett W. Hagens

RACIAL EMPOWERMENT AND PARTISAN POLITICS IN VIRGINIA HISTORY

IT IS OFTEN MORE REVEALING TO VIEW POLITICAL BEHAVIOR as driven by defensive rather than offensive purposes. Looking at politics as defensive, the dominant and essential wellspring of political action is the conservation and protection of the political actor's existing social and economic realities. Since the power to bestow and revoke protections, privileges, immunities, and penalties reposes in government, the essence of politics is the struggle for control of government. From the perspective of politics as defensive behavior, the question of who rules assumes paramount importance because the answer determines who is best able to protect, preserve and maintain their existing status. People enter politics because politics decides who rules, and those who rule decide who gets what. Looking at politics as defensive, one begins to see that people get involved in politics not so much to pursue their dreams as to hang on to what they have.

In Virginia a single issue, the issue of racial empowerment, has not only shaped but quite nearly defined the partisan struggle for power within the Commonwealth since its inception. As V.O. Key has observed, "in its grand outlines the politics of the South revolves around the position of the Negro....Whatever phase of the southern political process one seeks to understand, sooner or later the trail of inquiry leads to the Negro" (1949, 5). Although the position of Negroes may be the pivotal issue in southern and Virginia politics, Negroes have rarely had much say on what their position would be. Following Reconstruction in the 1870s, as V. O. Key, Jr. noted decades ago, the southern disfranchisement movement "gave the southern states the most impressive systems of obstacles between the voter and the ballot box known to the democratic world" (1949, 555). By the mid 1890s, the vast majority of Virginia's blacks had been disfranchised. "In [the] 1900 [presidential election], 147 votes were cast per thousand of the state's population; in 1904, only 57 votes per thousand were cast. By 1940, aided by the primary election, among other factors, fewer than 10 Virginians per

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thousand were voting" (Wynes, 1971, 66). By the 1940s very substantial numbers of unskilled, propertyless, and illiterate whites had also been disfranchised by the same medley of mechanisms employed to disfranchise blacks in Virginia.

Disfranchisement defused a perilous political situation that had developed for Virginia's ruling elements at the conclusion of the Civil War. The frightening prospect presented to Virginia's privileged ruling elites with the enfranchisement of blacks under reconstruction was the potential development of a viable opposing political party supported by and championing the needs of large numbers of propertyless, exploited, and oppressed voters emerging from slavery. If such an explosive constituency were ever able to join forces with small farmers and a growing urban working class in the formation of a dynamic political organization as they had in the Readjuster movement of the 1870s, the long domination of Virginia politics by an aristocratic elite would be broken forever.

By virtually abolishing the political rights of a propertyless underclass, disfranchisement also dissolved the potential for two-party government in the Commonwealth. It was no accident that one-party government in Virginia also offered the only effective strategy to thwart federal intervention in Commonwealth politics. A one-party state would assure that Virginia's Congressional delegations would be solidly Democratic, segregationist, and economically conservative. Allied with similar delegations from sister states of the former Confederacy in a unified state's rights front, a Congressional minority sufficient to perpetually stifle federal interference in southern politics could be maintained in Washington. Alarmed and, in some cases, terrified by the specter of democracy in the form of Negro suffrage producing some species of Negro rule, Virginians, prodded by an aristocratic leadership with everything to lose, simply abolished democracy in the Commonwealth.[1] As Key would later say, "the simple fact is that a government founded on democratic doctrines becomes some other sort of regime when large proportions of its citizens refrain from voting" (1949, 508). Given Virginia's tradition of aristocratic government, after disfranchisement the ruling regime that remained was what it had always been in Virginia—"a well-disciplined and ably managed oligarchy, of not many more that a thousand professional politicians, which enjoys the enthusiastic and almost undivided support of the business community and of the well-to-do generally...." (Key, 1949, 26).

The disfranchisement of blacks occurred not because of any real threat of "bayonet-negro rule" as the white nightmare of black political domination was sometimes called (Morto,n 1918, 131). No such threat ever existed in Virginia

[1]Charles Wynes provided a telling commentary on this point when he observed that "following the class movement of Readjusterism, the Democratic party and the Democratic press succeeded in convincing white Virginians that the white race, regardless of economic class, must stand together against the Negroes. Economic and social issues had to take second-place to the Negro question. The cry was raised that white men could not divide politically so long as the Negro voted, and a small group of independent Democrats set out to disfranchise the Negro. In the end, Democratic conservatives headed off division of the white vote by rigid machine control of the state and by disfranchisement of the lower class of whites as well as Negroes" (Wynes, 1971, 146).

because the Virginia Negro, trapped in abject poverty and widely scorned by white society, emerged from the Civil War virtually powerless. Even during short intervals during Reconstruction and Readjusterism in localities where they were the majority and they voted the "Negroes and Republicans were placing white men, not black, in county offices—and often white Conservatives" (Wynes, 1971, 27). Three hundred years of slavery had done its work.

Yet, powerless is not useless. The real power of the blacks in Virginia has never been in their political strength. The real power of the blacks derives from the simple reality of their presence in Virginia society because it is a presence that, properly manipulated, can evoke fear in the minds of many southern whites. The haunting white fear of black empowerment has been the primary political resource, the indispensable political asset, employed by Virginia's ruling elite to perpetuate and entrench—defend—their rule. Indeed, for 100 years, from the end of the Civil War to the mid 1960s, the principal importance of blacks to the politics of Virginia has been their usefulness as a powerful illusion artfully crafted to strike fear in the hearts of Virginia's white citizens and justifying a one-party, elitist rule by a coalition of landed gentry and corporate commercial interests. As Charles Wynes pointed out in 1971:

> As a political issue, the Negro was too tempting to leave alone. When the issue of the Negro promised to suit their ends, they used it. When a reduced electorate appeared to be advantageous, they disfranchised him. The Virginia legislators who disfranchised the Negro and segregated him by statute *were not* [sic] led by representatives of that class of white people who competed directly with the Negro economically and who were more likely to be thrown with him socially. Instead, men of good family and social prestige led the fight (1971, 149).

In the end, the race issue in Virginia is and always has been a proxy issue propagated by a narrow ruling elite that knows well how to effectively defend its interests. Were it not for the race question, by all the rules of political behavior post-bellum Virginia would offer receptive ground for a more progressive if not radical political agenda. "A poor, agrarian area, pressed down by the colonial policies of the financial and industrial North and Northeast, it offers fertile ground for political agitation" (Key, 1949, 44). Carefully nurtured racial fear cast Virginia politics into the mold of one-party, elitist politics. Were it not for the race issue, the Democratic Party of Virginia might well have evolved into the progressive liberal force it became in other parts of the nation. Instead, the Democratic Party of Virginia, detached by disfranchisement from its historic national footing among the working class, evolved into an instrument of narrow elitist interests that was Republican in every politically relevant sense but name. In my view, there is no reality more crucial to understanding Virginia politics than the fact that its dominant political party, although Democratic in name, is Republican in the sentiments, ideology, and purposes of its membership. In Virginia it has been Democrats who have restrained labor organization with right-to-work statutes that depress wages while the costs of living rise. In Virginia, pay-as-you-go state

financing that starves expenditures for public services like education, public health, environmental protection, and public welfare have been standard planks in the Democratic platform since the 1890s. Virginia ranks twelfth in population among the states of the Union; but in 1996 it led the nation in criminal executions. Clearly, the raw materials for a more liberal politics exist in contemporary Virginia. Yet no such movement is in sight today any more than it was 100 years ago. A single issue—the issue of race—an issue historically promoted and inflamed by ruling elements within Virginia culture, largely explains Virginia's intransigent political conservatism.

Ironically, it has been the success of black struggle for civil rights and ballot access in the 1960s that marked the end of a century of political obscurity for the Republican Party of Virginia. Feeling betrayed by President Johnson's realignment of the Democratic Party behind an agenda of civil rights, voting rights and liberal, "Great Society' economics, Virginia Democrats began abandoning intergenerational loyalties to the Democratic Party and migrated by the thousands into the ranks of Republicanism. To be sure, the civil rights agenda of the Democratic Party has earned it the loyalty of black voters, but the flood of black voters into Democratic ranks has not removed control of the party's institutional machinery or its public agenda from the coalition of commercial and property interests that has always ruled party affairs. By the 1980s Virginia would have a two-party system; but, with the exception of the civil rights issue, the center of effort of both parties is conservative economics, limited social programs, and right-to-work labor policy. In truth, the development of two-party competition in the state has been a boon principally for commercial interests in the Commonwealth who find themselves not only without serious challenge to their prerogatives, but also often find themselves in the enviable position of having both major parties in the state aggressively competing for their support.

Minority Ballot Access

Whatever gains African-Americans have achieved in political representation over the last 30 years in Virginia have come only through contentious federal intervention that has invariably been stridently resisted (Davidson and Grofman, 1994). Although Virginia may cling to an "image of moderation in race relations" as Thomas Morris suggests (Davidson and Grofman, 1994), and despite some cosmetic gains in black empowerment, deep divisions between the races persist. Virginia has come a long way since 1960 and the days of "massive resistance" to school desegregation. L. Douglas Wilder, an African-American, was elected Governor in 1989. Nevertheless, in 1991, Virginia, a state with a substantial African-American population, had the smallest proportion of African-American representatives in its legislature of any Southern state (Morris, 1994). By the eve of the 1991 Virginia General Assembly redistricting sessions, the Commonwealth had not elected a single black person to Congress since 1890.

Currently, in some areas Virginia clearly lags behind other states in democratizing its institutions of government. A thorough evaluation of the basic fairness of the Commonwealth's representational system requires at least a look at African-American representation in local government. In Virginia today, the most common mode of minority vote dilution occurs through the operation of at-large election systems in local governments that often submerge substantial black populations in a majority of white voters. Thirty-two of the state's 41 cities and 181 of the state's 188 towns employ the at-large method of electing their governing bodies. In 1991, the Virginia affiliate of the American Civil Liberties Union (ACLU) identified some 64 Virginia towns with black populations of 15 percent or better holding allegedly discriminatory elections under at-large election systems (American Civil Liberties Union, 1991). As Thomas Morris has ably demonstrated, "the continuing under representation of blacks in the many at-large county and city governments...[and] the virtual absence of blacks from the state's town councils indicates a continuing racial polarization at the grass-roots level...." (Morris, 1990).

Because all Commonwealth judges are appointed rather than elected, Virginia citizens of all races are denied direct electoral influence in the selection of the judiciary. Fewer than 5 percent of Virginia's judges were black in 1990 in a state with a black population of nearly 19 percent (Morris, 1990). Virginia was the last state in the nation to adopt enabling legislation permitting localities to establish elective school boards. Even access to the ballot in Virginia is a good deal less than what it could be by today's national standards. In August 1992, the Voter Registrars Association of Virginia noted in a news release that the League of Women Voters cited Virginia as one of 13 states with "the worst systems for voter registration."[2] In 1991 only 64.4 percent of eligible voters in Virginia were registered and Virginia ranked 42nd in voting age population registered to vote.

Taken as a whole, facts like these are not convenient for those arguing that representational entitlements under the *Voting Rights Act* are remedies for "past injuries." Clearly, in 1991 on the eve of redistricting sessions in the General Assembly, Virginia still had a long way to go to achieve political equality for all of its citizens.

1991 REDISTRICTING SESSIONS—NEW REALITIES

New Voting Rights Law

As they approached the April 1991 redistricting session, more than a few legislators were astonished by dramatic changes in the redistricting playing field which had occurred over the 1980s. First and foremost among striking changes was a sea change in voting law. By 1990 well defined case law had made it clear that minority voters prevented from electing candidates of choice by racial gerrymanders could find almost certain redress in federal courts under Section 2 and, in covered jurisdictions like Virginia, under Section 5 of the *Voting Rights Act*.

[2]Voter Registrars Association of Virginia, "News Release—Update," 10 February, 1993, 3.

Henceforth, if majority-minority districts could be created and organized communities of injured voters demanded it, federal courts seemed likely to enjoin state and local jurisdictions to do so.

African-Americans: New Players at the Redistricting Table

A second fundamental change in the Virginia redistricting landscape in 1991 was the presence of African-Americans throughout the highest recesses of Virginia government. The Black Caucus of the Virginia General Assembly had grown to ten in number (seven in the House and three in the Senate) all of whom were Democrats. If compliance with preclearance is likely an offensive but unavoidable duty for many white, conservative Virginia legislators, it is quite another matter to face black legislative colleagues across computers throughout the redistricting process. Perhaps more importantly, an African-American Governor, L. Douglas Wilder, carrying both veto power and an impressive personal record of minority empowerment achievements, would preside over the entire redistricting process (Parker, 1982).

Accessible Redistricting Technology and Interest Group Participation in Redistricting Politics

Over the decade of the 1980s the Bureau of the Census had completed a coast-to-coast digital map data base called TIGER/Line in CD rom format.[3] The Census PL 94-171 data base containing population and population attribute data (race data) aggregated at the block level of geography as required for redistricting was linked (georeferenced) to this digital base map. By 1991 various software development firms were offering competitive software that utilized Geographic Information Systems (GIS) technology to permit users to automate districting plan creation and publish maps and reports defining a districting proposal. For the first time in Virginia's redistricting history, interest groups like the NAACP and the ACLU were not frozen out of direct influence on the redistricting process for lack of simple technical ability to quickly construct and evaluate plans. With grants from the Ford and Rockefeller Foundations in 1991, Dr. Rudolph Wilson and I were able to establish a Redistricting Research Project, later called the Voting Rights Project, at Norfolk State University (NSU, Norfolk, Virginia). The NSU Voting Rights Project subsequently provided an independent plan creation and evaluation capability to the Virginia Conference of the NAACP and other community groups in Virginia and across the south. By 1991, the ACLU had also established a comparable facility in Richmond, Virginia. At long last the legislature's monopoly on the technical capability to create districting plans ended. No longer could the legislature claim, as it had in past decades, that alternatives to its redistricting plans were technically impractical. Both NSU and the ACLU were

[3]"TIGER" is an acronym standing for "Topologically Integrated Geographically Encoded Referencing" system.

able to publish plans for the minority that demonstrated the feasibility of alternative redistricting proposals that increased minority representation above levels proposed by the General Assembly. When legislative plans diluted minority representation as they initially did for both the Virginia House of Delegates and the Senate in 1991, alternative third-party proposals entered into the public record by voting rights advocates would establish a trail of evidence highly relevant to the DOJ preclearance process.

Another rarely mentioned technical development emerging from the 1991 redistricting session in Virginia was the development of a partisan preference data base describing the Virginia electorate. This data set of voter preferences was linked (georeferenced) to the digitized TIGER/Line base map of Virginia and was available exclusively to General Assembly members through the Assembly's Legislative Services facility. Using precinct election histories, algorithms were developed that assigned partisan preference values to census blocks. Since any representational district is basically a collection of census blocks, it became possible to roughly estimate the partisan preference of any district drawn at the Legislative Services facility by aggregating the partisan preference values of its constituent blocks. Among other things, the 1990s redistricting cycle and its attendant technical GIS wizardry may well have ushered in something of a revolution in election campaign management technology (Hagens and Fairfax, 1996).

Unprecedented Partisanship

Unquestionably, one of the most consequential changes in the redistricting battlefield in 1991 was the presence of century high levels of partisan competition within the Virginia General Assembly, especially within the House of Delegates. By 1991 the partisan playing field in the General Assembly had profoundly changed. For the first time in the twentieth century, Democratic legislators embarked on redistricting facing the cumulative results of a quarter century of steady growth in Republican voters driven in part by liberal Democratic racial policies. In 1989, 39 percent of the House and 25 percent of the Senate was Republican. The November 1989 House election had produced "the GOP's best showing of the century, and the Democrats' worst" (Sabato, 1989). Republicans scored a net gain of four seats increasing its House contingent to a century high total of 39 in a 100-member body. More importantly, "the Republicans captured a stunningly large share of the legislative votes: 44.8 percent in all districts and 49.3 percent in party-contested districts" (Sabato, 1989). In the 1991 redistricting session, a popular Republican chant in the House of Delegates—"51 in 1991"—provocatively asserted that control of the House was within Republican reach.

Rising local competition, especially in the House, was the central reality facing Democrats entering a redistricting session offering irresistible opportunities for handicapping opponents. As subsequent developments would reveal, the clearly dominant theme of 1991 Commonwealth redistricting would be historically unparalleled levels of partisan conflict. And, unlike redistricting rounds in

the 1970s and 1980s, Republicans would be without the protection of a Republican Governor's veto in the 1990s.

Partisan Redistricting Strategies

Although politics may often masquerade as a conflict of principles, the rhetoric is invariably driven by an underlying conflict of interests. Beneath the surface rhetoric of racial politics that characterized redistricting debates in 1991, a bitter struggle for partisan control of the legislature, especially the House of Delegates, raged. In truth, the conflict over minority seats in the legislature was essentially a substitute or proxy theme masking a more fundamental battle for partisan control of Commonwealth government across the decade of the 1990s. The press seized upon this new race-based redistricting theme and dramatized it throughout the Commonwealth as the dominant reality of the redistricting sessions. The real story, however, was that both parties were exploiting their own versions of new voting law in pursuit of their strategies to wrest control of the General Assembly. Once again in Virginia the issue of race would be manipulated for partisan advantage.

Republican Strategy

To this day the Central Committee of the Republican Party of Virginia remains philosophically opposed in principle to any policies that seek to resolve social ills by racially based reapportionments of economic or political advantages. On the eve of the 1991 redistricting session, decrying the legitimacy of the Voting Rights Act itself, the Central Committee of the Republican Party of Virginia adopted a resolution prohibiting use of its name or application of its "resources to any effort designed to create legislative districts based on race".[4]

In 1991, many Virginia Republican voters and their Republican representatives in the General Assembly were on a collision course when it came to the question of minority entitlements to representation. The Republican Party of Virginia offers growing numbers of Virginians a home in large part because of its adamant hostility to racial preferences of any sort. Indeed, a dramatic turnaround in the appeal of the Republican candidates to Virginia voters coincides almost exactly with the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. For General Assembly Republicans, as distinct from Republican voters, new voting law offered tantalizing opportunities to increase their numbers and, thereby, their power in both the General Assembly and Congress. In open contravention to party principles, Republican legislators, especially Republican Delegates, sought to capitalize on new voting law and demand the creation of the maximum number of black districts achievable. Given lower black registration, turnout, roll-on rates and age cohort disparities between black and white voters, the construction of black districts in Virginia typically requires increasing the

[4] *The Virginian-Pilot*, 11 July, 1991, p. D-6.

proportion of total minority voters beyond 55 percent of the voting age population (VAP) (Byrd-Harden, testimony, 1991). Redistricting under new voting law would require Virginia Democrats to do something they would never willingly do to themselves—pack Democratic voters into Democratic districts in numbers exceeding those required to produce Democratic victories but essential to produce victories for African-American candidates. The Democratic districts that remained would be stripped of core black voters and be vulnerable to Republican assault as resident Democratic incumbents eventually retired.

One of the best ways to understand Republican strategy on this score is with the concept of the "influence district." Although during the redistricting sessions there was no consensus on precisely what an "influence district" was or its political significance, the voting rights advocates in the NAACP clung to their impressions that legislators in districts with below 30 percent black VAP could not be relied upon to be responsive to minority concerns (Byrd-Harden, informal interview, 11 May, 1991). This subjective NAACP definition of an 'influence district' as one with less than 50 percent black VAP but more than 30 percent black VAP is adopted here only for the purposes of analysis. Maximizing black population districts would minimize black influence districts. Minimizing black influence districts would maximize Republican electoral opportunities. Insofar as Democratic districts serve black voters even marginally better than Republican districts, minimizing black "influence districts" is simply a special case of squandering the black vote by "packing" black voters into overcrowded black districts. In subsequent pages, I will refer to this strategy as "smart Republican redistricting strategy." Long after the redistricting sessions were over, at least one Virginia Republican would gloat that "for every member of a racial minority elected to state legislatures or Congress as a result of redistricting [in 1991]—two or more Republicans were voted into office" (Goolrick, 1996).

Democratic Redistricting Strategy

In Virginia, the black vote is the bedrock upon which the statewide Democratic plurality is anchored. No one has put this point more forcefully than Governor L. Douglas Wilder when he commented that if they [the Republicans] ever sought the minority vote with open arms, Democrats would be lost forever". Democrats controlled the General Assembly in 1991 and as long as they retained party discipline they had the power to defend their interests. Democratic leaders typically insisted that voting law provided some flexibility to legislatures in meeting Section 5 requirements which they argued did not require maximization of black representation to achieve preclearance. It was true that in the spring of 1991 when the Commonwealth's redistricting sessions got under way the ardor of DOJ voting rights enforcement had yet to be tested. With General Assembly elections scheduled for November of 1991, Virginia competed with Louisiana for first place among the states seeking preclearance for their legislative redistricting plans under new voting law. In outward appearances the Democratic leadership

was clearly discomfited by the clamor for optimum black representation voiced by community groups like the NAACP and the ACLU. The source of the Democratic leadership's anxiety was the gathering momentum of a Republican redistricting strategy that, if successful, promised to ultimately dislodge Democratic control of the General Assembly.

The Democratic leadership responded with a two-pronged strategy. First, willing to test DOJ enforcement mettle if need be, the leadership introduced redistricting plans in both chambers that fell far short of maximizing black representation but offered some modest improvements in existing black representation. The second prong of Democratic strategy surfaced in the House of Delegates, where the Democratic leadership pursued a blatant partisan gerrymander designed to handicap Republican resurgency across the decade of the 1990s.

In both these strategies the Democratic leadership enjoyed the sometimes public and sometimes private support of some members of the Black Caucus. African-American voters in Virginia, in contrast to their black representatives in the legislature, are, as a whole, considerably less than enthusiastic about the advantages of Democratic ascendancy in the General Assembly. Black voters and community groups probably understand the true character of the Democratic Party of Virginia better than any other segment of the Virginia electorate. In Virginia black voters are allowed to pick between two parties bearing different names but pursuing essentially the same public policies. Among the politically alert element within black Virginia culture, one often finds the opinion that the Democrats and Republicans are simply two factions of one party—the party of wealth and privilege. For many black voters, voting for white Democratic candidates in Virginia seems to be not so much a matter of supporting the candidate of choice as it is a matter of choosing the lesser of two evils. The Republicans, with their arch-conservative economics, anti-labor politics, reactionary views on government, and strident resistance to affirmative action of any sort, constitute the first evil. The Virginia Democrats, no less conservative in economic policy than their Republican cohorts, the architects of right-to-work statues in the state, and lackluster exponents of racial justice constitute the other evil. Although black voters in the Commonwealth have consistently and overwhelmingly supported Democratic candidates across the state since they gained access to the ballot in the 1960s, they have few tangible benefits to show for over three decades of loyalty.

Like their Republican counterparts during the 1991 redistricting sessions, black legislators would find themselves frequently at cross purposes with their constituents and community organizations like the NAACP and the ACLU who sought to maximize black representation. Black legislators and Governor Wilder, on the other hand, observed first hand the crippling handicaps burdening a minority party within a legislature. What, after all, was the point of increasing black representation only to tip control of the legislature to an opposing party openly hostile to almost any remedy to past or present discrimination? Among black elected officials already seated in the General Assembly, considerations such as

these moved them into a course of moderation that balanced partisan considerations with racial empowerment when it came to the question of which redistricting plan satisfied new voting law.

1991— REDISTRICTING THE HOUSE OF DELEGATES

Since I have already presented a narrative of the 1991 redistricting session for the General Assembly elsewhere (Persons, 1997), a broad summary outline should suffice here. In April 1990, concentrated distributions of African-Americans constituted 18.8 percent (University of Virginia 1991, 2) of the Virginia population. At the same time the Virginia House of Delegates in 1990 also had the lowest black representation (7 percent) of any southern state—seven Delegates in nine majority-minority population districts (Shaw, Pittman, et. al. 1991, 5). Debate in the House centered on the question of which plan, Democratic or Republican, provided black voters with the best remedy to a patent racial gerrymander in the Virginia House of Delegates. The Democratic plan, which one reporter called the "brainchild of the Black Caucus in the House," also delivered 11 black "influence" districts in which black population exceeded 25 percent.[5] According to a Republican spokesman the plan also delivered "the most vicious statewide gerrymander in the history of America."[6] Thirty-nine percent of all Republican House incumbents were paired with each other, or, in the case of one, with the Independent representative in the House who generally supports Republican initiatives (Republican Party of Virginia, 1991). Steve Haner, Executive Director of the Joint Republican Caucus, had a light-hearted but prescient comment about the redistricting outcome for Republicans in the House saying: "We will have all these unemployed delegates wanting to move to the Senate. The real effect of the plan is to recruit the best crop of Republican Senate candidates ever."[7]

The Virginia Conference of the National Association for the Advancement of Colored People (NAACP), the ACLU and Republicans all challenged the Democratic proposal on grounds of minority vote dilution. All these dissenting groups presented the House Privileges & Elections Committee with alternative proposals or plans demonstrating or alleging that 13 districts with majority black populations, two more than the Democratic plan, could be built. The ACLU and Republicans both introduced plans showing that another viable majority-minority district (57.73 percent black VAP in the Republican plan) could be drawn in the Richmond-Henrico-Charles City area. A weaker district (56 percent VAP in the NAACP plan and 55 percent VA in the ACLU plan) could also be built in the Danville-South Boston-Halifax-Pittsylvania area.

Passage of the Democratic plan was, in the end, little more than an exercise in majority rule. With members of both parties, including the Black Caucus, voting along strictly partisan lines the Democratic redistricting bill sailed through

[5] *The Richmond Times Dispatch*, 5, April, 1991.
[6] *The Richmond News Leader*, 5, April, 1991, p 5.
[7] *The Winchester Star*, 6, April, 1991, p A6.

the General Assembly. Despite rigorous pleas from the NAACP and the ACLU, Governor Wilder, who well appreciated the ominous trend of growing Republican strength in the House, signed off on the Democratic bill.

In the view of the NAACP, by failing to establish two additional majority-minority districts and two additional minority influence districts the Democratic plan diluted minority voting strength for the purpose of incumbent protection .[8] Attached to the NAACP's Comment Letter to the DOJ was the NAACP plan for the Danville area containing an additional 56 percent black VAP district. The ACLU and Republicans also submitted cogent Comment Letters corroborating NAACP claims.

Department of Justice Objections to the House Plan

At the statewide redistricting conference held at Norfolk State University on December 7, 1990, J. Gerald Hebert, Acting Chief of the Voting Section, doffed his coat, rolled up his sleeves, and told all in attendance that "redistricting plans which contain districts which dilute minority voting strength can never be justified and will not be tolerated" (Hebert, remarks, 1990). Among African-Americans attending the conference, such rhetoric fired expectations of bold DOJ voting law enforcement. "Optimization" and "maximization" became buzz words in the vernacular of voting rights advocates in Virginia as they began to draw new black legislative districts.

It was not to be. From the perspective of voting rights advocates including the NAACP, the limited scope of DOJ objections to the House plan were plainly disappointing. The single objection to the House plan was a very narrowly drawn complaint that focused entirely on the submergence of 4,000 black voters in Charles City County in a majority white district while rejecting available alternatives (Dunne, 1991, letter, July 16, p 2). Not a word was written regarding the other potential black majority district in the Danville area or the two additional putative influence districts drawn by voting rights advocates.

With lawmakers on both sides of the aisle voting along clearly partisan lines, House amendments answering DOJ objections with the construction of a single additional black House district sailed through both chambers of the General Assembly, were endorsed by the Governor, and survived DOJ scrutiny.

Allegedly injured by a partisan gerrymander, Republicans had no choice but to turn to the courts for redress. In August 1991, Republicans entered a motion in federal court seeking injunctive relief to forestall legislative elections under an alleged gerrymander plan which promised grievous injury to Republican rights protected under the First and Fourteenth Amendments. True to the ideological doctrine of Virginia Republicans, race-based Voting Rights Act issues were conspicuously absent from the complaint. Ultimately, adroit career moves into Senate contests by several paired Republican delegates considerably mitigated injuries. The 4th Circuit Court of Appeals finally denied the Republican motion.

[8]Byrd-Harden, Comment Letter, 8, July, 1991, pp 1-11.

1991—REDISTRICTING THE VIRGINIA SENATE

Throughout the 1991 redistricting sessions the Virginia Senate was eminently less partisan than the House. With a three-to-one majority, Senate Democrats savored an almost unassailable advantage over Republicans. Unlike their counterparts in the House, Republican Senators followed their historic redistricting strategy of accommodation and compromise, which could protect their numbers without provoking partisan reprisals. Where partisan incumbent protection was the clearly dominant theme of House redistricting, the controlling theme of Senate redistricting was unambiguously bipartisan incumbent protection.

African-Americans entered the Senate redistricting session with two solid majority-minority districts, one in Richmond and another in Norfolk. A third minority Senator, Bobby Scott (D-Newport News), represented a district that was 65 percent white. The voting rights question confronting the chamber was how many additional black districts would Virginia Senators, left to their own devices, create?

Consistent with their strategy, the Democratic leadership's redistricting bill offered a single additional (53.6 percent) black Senate district. Both the NAACP and the ACLU had published plans demonstrating that five winnable black Senate districts could be built. Voting rights advocates were clearly indignant with the arrogance of a legislative chamber openly contravening established law. Nevertheless the leadership's bill, with some minor amendments, cleared both chambers of the General Assembly only to be vetoed by Governor Wilder. The governor returned the bill to the Senate with message that "the Senate should have the opportunity to demonstrate that it can and will adhere to the law and will not turn back the clock on the commendable progress that has been made in the Commonwealth."[9] On the same day, Lt. Gov. Donald S. Beyer Jr. commented to the press that "it's going to be a very painful process for a lot of people who spent a long time building safe seats for themselves...."[10] The Senate P & E Committee amended their original plan and delivered a new version bearing five black districts which kept "most incumbents in separate districts" but drew a Wilder ally into a black district.[11]

A coalition of disgruntled Democratic senators in collaboration with most Republican Senators submitted an alternative bill which spared the governor's ally but drew "two of the administration's sternest critics—both holdovers from the segregationist Byrd machine" into predominantly black districts.[12] By offer-

[9]*The Virginian-Pilot*, 20, April, 1991, p A1.
[10]*The Virginian-Pilot*, 20, April, 1991, p A1.
[11]*The Virginian-Pilot*, 24, April, 1991, p A1.
[12]*The Richmond Times Dispatch*, 1, May, 1991.

ing concessions in the form of a few stronger Republican districts, the insurgents' plan clearly induced Republican support by explicitly weakening Democratic districts.[13] In a historic departure from tradition, the insurgents' bill, with the support of 9 of 10 Republicans and all black Senators, passed on a 21-18 vote. The plan subsequently cleared the House and was signed by Governor Wilder. Since the plan created the maximum number of achievable black Senate districts, DOJ preclearance quickly followed. For the first time in the post-reconstruction redistricting history of Virginia, insurgent Democratic senators had defeated the leadership's redistricting plan and prevailed with an alternative enthusiastically endorsed by Republicans. Much to the alarm of the Senate Democratic leadership, the 1991 Virginia Senate redistricting bill would in a very real sense be a Republican plan.

A Compactness Challenge

A prophetic court challenge to the Senate plan surfaced in Halifax County Circuit Court shortly after the plan's adoption. A group of elected officials from eight Southside counties challenged the predominantly black 18th Senatorial District on the grounds that it violated Virginia Constitutional requirements for a "compact and contiguous district."[14] As proposed, the 18th Senatorial District, which is 57.39 percent black (1990 VAP), stretches 178 miles across 12 localities in Southside Virginia. Although prescient in 1991, the lawsuit apparently failed to gather sufficient support for appeals after its initial rejection.

CONGRESSIONAL REDISTRICTING

Population growth in the Commonwealth over the 1980s increased Virginia's Congressional apportionment from 10 to 11 seats. By the time Congressional redistricting got under way in November 1991, it was a foregone conclusion that the additional seat would sustain Virginia's first black Congressional district since 1890. The issue was where would the district be built and which incumbent(s), if any, would be injured by Democrats in control of the process. The Assembly's initial plan created a 61.5 percent black population majority district (the 3rd Congressional District) in a sprawling geography connecting Norfolk, Richmond and the Northern Neck. Owing to some very vigorous "arm-twisting" by the state's largest single employer—Newport News Shipbuilding—Republican Herbert Bateman's 1st District was carefully contoured to avoid excessive black population, thus preserving a Republican incumbency and the interests, including a sizable number of black jobs, it allegedly protected.[15]

Both the NAACP and the ACLU appealed to Governor Wilder to oppose

[13] *The Richmond Times Dispatch*, 1, May, 1991.

[14] *The Richmond News Leader*, 18, July, 1991, p 1.

the plan on the grounds that the minority population was insufficient to insure the election of a minority candidate.[16] Wilder subsequently offered amendments increasing the black population in the 3rd District to 63.9 percent and the Assembly concurred. DOJ approval quickly followed almost guaranteeing the election of Virginia's first black congressman in 102 years.

SUMMARY—1991 GENERAL ASSEMBLY GAINS IN BLACK POPULATION MAJORITY DISTRICTS FOR AFRICAN-AMERICANS

Tables 1 and 2 summarizing majority-black and black influence districts in 1990 (Table 1) and 1991 (Table 2) provide a basis for summarizing overall gains in majority-minority population districts for African-Americans during the 1991 redistricting session. In the House, majority-black population districts increased from 9 (nine percent of House seats) to 12 (twelve percent of House seats), a gain of three seats. In the Senate, majority-black population districts increased from 2 (five percent of Senate seats) to 5 (over twelve percent of Senate seats), a gain of three seats. Overall, then, majority-black population districts in the General Assembly (House and Senate combined) increased from 11 (slightly over seven percent) to 17 (twelve percent).

As the tables show, the cost of African-American increases in majority black population General Assembly districts was a substantial decrease in black influence districts. By Ms. Byrd-Harden's "influence district" definition (greater than 30 percent black VAP, but less than 50 percent VAP) overall thirteen black influence districts (seven in the House and six in the Senate) were sacrificed to gain six additional majority-black population General Assembly districts. The dissolution of thirteen black influence districts no doubt gave Republicans some cause for celebration because it was in these weakened Democratic districts that Republicans placed their hopes of eventually capturing the General Assembly.

In Congressional redistricting I have adopted a slightly less demanding threshold—20 percent black VAP—as a definition for a black influence district. As Table 3 illustrates, using a 20 percent minimum minority population standard reveals that the creation of the single black Congressional district also had its price in the loss of three black influence districts. This will become important later when we examine the question of whether or not Republican "smart redistricting strategy" succeeded.

[15] Bateman serves on two Congressional committees which oversee the defense procurement upon which Newport News Shipbuilding is almost entirely dependent. As a lobbyist for the shipyard put it: "replacing Bateman could (threaten) our position in Congress and ultimately (contribute) to putting many minority workers on the street without a job." *The Virginian-Pilot*, 20, November, 1991, p A1.

[16] *The Virginian-Pilot*, 22, November, 1991, p. D5.

TABLE 1. Majority Black and Black Influence Districts, VA, 1990

HOUSE OF DELEGATES		SENATE	
***Majority Black Population Districts** (equal to or greater than 50% Black VAP)*			
District Number	*% Black (VAP)*	*District Number*	*% Black (VAP)*
62nd	54	5th	50
63rd	61	9th	77
70th	85	Sum = 2	Average % = 64%
71st	70		
80th	64		
89th	67		
90th	66		
92nd	62		
95th	60		
Sum = 9	Average % = 65%		
***Black Influence Districts** (greater than 30%, less than 50% Black VAP)*			
20th	35	1st	36
23rd	31	2nd	35
59th	33	10th	31
60th	39	13th	49
61st	39	15th	42
64th	31	16th	42
69th	44	18th	33
74th	47	Sum = 7	Average % = 38%
75th	41		
76th	42		
77th	36		
79th	33		
100th	36		
Sum = 13	Average % = 37%		

Shading reveals districts with non-black incumbents. All percentages are rounded.
Source: Commonwealth of Virginia, Division of Legislative Services, *Drawing the Line, 1991 Redistricting in Virginia,* No. 3 (January), 1991.

TABLE 2. Majority Black and Black Influence Districts, VA, 1991

HOUSE OF DELEGATES		SENATE	
***Majority Black Population Districts** (equal to or greater than 50% Black VAP)*			
District Number	*% Black (VAP)*	*District Number*	*% Black (VAP)*
63rd	60	2nd	56
69th	61	5th	62
70th	60	9th	64
71st	59	16th	60
74th	60	18th	60
75th	57	Sum = 5	Average % = 60%
77th	58		
80th	62		
89th	64		
90th	57		
92nd	62		
95th	59		
Sum = 12	Average % = 60%		
***Black Influence Districts** (greater than 30%, less than 50% Black VAP)*			
20th	34	15th	35
59th	31	Sum = 1	Average % = 35%
60th	36		
61st	39		
62nd	31		
100th	36		
Sum = 6	Average % = 35%		

Shading reveals districts with non-black incumbents. All percentages are rounded.
Sources: Commonwealth of Virginia, Division of Legislative Services, *Drawing the Line, 1991 Redistricting in Virginia,* Nos. 5 & 6 (May and July), 1991.

TABLE 3. Congressional Black Influence Districts, 1981 and 1991*

1981		1991	
District Number	*% Back (VAP)*	*District Number*	*% Black (VAP)*
1st	30	4th	32
2nd	24	5th	25
3rd	29		
4th	39		
5th	24		
Sum = 5	Average % = 29	Sum = 2	Average % =28

* The influence district definition used here is any district with over 20% black VAP but less than 50% VAP.
Sources: Commonwealth of Virginia, Division of Legislative Services, News Release, Public Hearing - Congressional Redistricting, October 1991, 2; and Drawing the Line, December 2, 1991, 1-2.

1991, 1993, AND 1995 ELECTION OUTCOMES FOR AFRICAN-AMERICANS

Building majority-black population districts and electing African-American candidates to those districts are two vastly different things. In Virginia elections are often won or lost at the nomination stage. Indeed, for African-American candidates without the advantages of incumbency, the 1991 Democratic primaries and conventions repeatedly proved to be insurmountable obstacles. Although the African-American community fielded minority candidates at the nomination stage in every predominantly black district, despite a preponderance of black voting age population in these districts no minority candidate was able to defeat a white incumbent in a primary contest. Since white incumbents occupied 5 of 12 majority-minority House seats, blacks were unable to advance to the general election as Democratic candidates in any of the three newly created black House districts. In the end, the only black candidates able to win House seats were the seven African-Americans who already had them. A central reality of the 1991 House elections for African-Americans was that blacks gained no additional seats in the House of Delegates.

Assuming all majority-minority House districts created in the 1990s round of redistricting elude or survive newly accessible court challenges occasioned by yet another upheaval in voting law, representational gains for blacks in the Virginia House of Delegates over the 1990s will be a protracted, incremental struggle. The first success in this process was scored by Lionel Spruill Sr. (D, Chesapeake) who advanced to occupy the 77th House District (58 percent black VAP) in 1993 elections after the white incumbent accepted a local District Court appointment. A second conversion occurred in 1995 when Donald McEachin, an African-American attorney from Henrico, was finally able to dislodge the powerful Robert B. Ball, Sr. from the 74th House District (56 percent black VAP) in an uphill primary battle (Sabato, 1995).

African-American gains in the Virginia Senate were a different matter. Unlike the House, the Senate, created a plan maximizing black Senate representation with three new majority-minority districts. White incumbents retired in two of the new black Senate districts permitting black candidates to run and win in contests for open seats. Senator Bobby Scott retained the third new district which was reshaped from a majority-white to a majority-black district.

Congress

As widely predicted, African-American Senator Bobby Scott (D-Newport News), who represented a Virginia Senate constituency which was 65 percent white in 1990, walked away from competitors in both the 1992 primary and general elections. Scott, a graduate of Harvard College and Boston College Law School, is now Virginia's first black congressman since reconstruction.

1991, 1993, 1995 ELECTIONS—THE PARTISAN OUTCOME

House of Delegates

As House elections in 1991, 1993 and 1995 have shown, the Democratic gerrymander was prescient. In 1991, despite the pairings of 15 Republicans in redistricting, Republicans picked up two additional House seats capturing 41 of 100 seats with 51.0 percent of total vote for all contested House races. The Republican statewide vote share for all House seats (contested and uncontested) was less impressive at 43 percent in 1991.

In the 1993 House elections, for the first time in this century, the GOP received a majority of all votes cast (contested and uncontested) in House elections. Republicans picked up an additional six seats bringing their total to 47. The Republican proportion of the statewide House vote share had increased a full 8.2 percent from 43 percent in 1991 to 51.2 percent in 1993. In the 1995 legislative elections, the Republican vote share rose to an all-time high of 53 percent. Despite the GOP's majority status in the House electorate, the Democratic gerrymander and vigorous Democratic campaigning continued to deny Republicans control of the chamber. In fact, the Republican seats-votes ratio (calculated as the GOP percent of House seats divided by the percent of voters statewide endorsing GOP House candidates) diminished slightly from .95 in 1991 to .91 in 1993. Republicans would very likely control the Virginia House of Delegates today (1997) were it not for the Democratic redistricting gerrymander. House Democrats in high places well pleased with the result may, however, live to regret their handiwork. Given Republican gains in the electorate, the 2001 redistricting round could well provide the GOP with both a precedent and an opportunity to even the score.

Senate

Elections in 1991 delivered startling consequences for Senate Democrats. Reaching their high-water mark for the century, the GOP gained eight Senate seats

overall increasing their numbers from 10 to 18 in a 40 member chamber. A fascinating aspect of this landslide is revealed by the seats-votes ratios for the GOP's Senate contingent. With only 41.3 percent of the statewide Senate vote total Republicans captured 45 percent of Senate seats yielding a seats-votes ration of 1.08. By contrast, the Democratic share of the statewide Senate vote total was 54.4 percent and their share of Senate seats was 55 percent (22 of 40) yielding a seats-votes ratio of 1.01. Actually, both Democrats and Republicans enjoyed some over-representation at the expense of Independents who are substantially underrepresented in their seat-votes ration. The 1991 elections confirmed the worst fears of the Democratic Senate leadership—the Senate redistricting plan had apparently tilted the playing field to Republican advantage. In the 1995 Senate elections, with Democrats failing to contest 12 Republican incumbents, Republicans garnered two additional Senate seats and scored their best Republican performance of the century while quite nearly capturing control of the Virginia Senate.

BLACK EMPOWERMENT IN PERSPECTIVE

How does one evaluate the overall gains African-Americans in Virginia scored in the 1991 redistricting sessions and subsequent elections through 1995? Following elections in 1995, three predominantly black population districts were retained by white incumbents so that African-Americans occupied only 14 of 17 black majority General Assembly Seats. Between 1990 and 1995 the African-American share of General Assembly seats had increased from 7.1 percent to 10 percent.[17] African-Americans also gained their first predominantly black population Congressional District in 1991. There is no question that these are notable accomplishments for a state that historically had the lowest levels of black representation in the South (Morris, 1994).

Yet, this gain in political empowerment for black Virginians bears a number of critical qualifications. To begin with, a 102 year wait for a single Congressional seat can hardly be viewed as swift justice. As the Virginia Conference of the NAACP insists, it is also by no means certain that every potential black district was in fact legislated. Even if African-Americans eventually capture every legislated majority black population district they will remain underrepresented because they will hold 12 percent of the seats of the governing body in a state where they are 18.8 percent of the population. Furthermore, as observers universally agree, none of these gains were graciously volunteered by Virginia lawmakers in search of more equitable representation for minorities. On the contrary, the new black districts in Virginia were wrenched as concessions from a body legislating under the duress of well defined federal voting law that protected minorities from vote diluting districting schemes.

[17] African-American Senator Bobby Scott (D, Newport News) achieved office in a 65 percent white district bringing the African-American seat total to 10 seats, or 7.1 percent of the General Assembly in 1990.

All in all, the struggle in the 1991 General Assembly redistricting sessions for minority voting rights in the Commonwealth has produced a very mixed bag of results. Those who seek to maintain an image of moderation in race relations in Virginia can point to important African-American gains in the General Assembly and Congress. Others will doubtless argue that beneath the veneer of these cosmetic gains little has changed for blacks in the Commonwealth. In any event, a troubling reality of minority voting rights advances over the last three decades in Virginia is that virtually every increase in black representation depended on federal intervention for its success. A reversal in federal policy could have a potentially devastating impact on the cause of minority empowerment in Virginia. As recent events suggest, such a turnaround in federal policy is now clearly under way.

Did "Smart" Republican Redistricting Strategy Work?

Did the GOP strategy to use voting law to pack Democrats into black districts produce legislative gains for Republicans? In Virginia there is no simple answer to this question and in one sense it's still too soon to venture a complete assessment. Republicans in this context are employing a long-term redistricting strategy that contemplates assaulting currently Democratic districts as their occupants retire. Since Virginia legislators do not, as a rule, retire quickly, it will take several more years before the strategy can be completely evaluated. African-Americans sacrificed 13 General Assembly 'influence districts' in the 1991 round of redistricting. Clearly many black voters were indeed stripped from previously racially mixed districts leaving behind 13 General Assembly seats (seven in the House and six in the Senate) with swollen margins of white voters presumably less committed to the Democratic agenda than black voters. Accompanying this redistricting outcome which weakened Democratic districts has been a pronounced increase in Republican voter appeal to whites across the South. Merle Black, a political scientist at Emery University, has documented a rather striking recent upsurge in Southern white Republican voters noting that "whites voting Republican shot up from the low 50s in 1992 to 65 percent in 1994" (Edsall and Yang, 1996). In 1991, 1993, and 1995, Republican General Assembly strength reached century high levels. Redistricting, however, could only create the potential for Republican gains not, the reality.

The reality was that 1991 and 1993 were not good years for the "in party"—Democrats—in Virginia. A national recession was underway and the Virginia economy was anemic. Elections in 1991 and 1993 offered Virginia voters opportunities to vent their dissatisfaction with the status quo in general and the administration of Democratic Governor L. Douglas Wilder in particular. In 1991, Governor Wilder had the least favorable approval rating of any governor since opinion surveys were started in the state (Sabato, 1991, 1993). The other titular head of the Virginia Democratic Party—Senator Charles Robb—was plagued by womanizing and alleged drug abuse scandals. All of which is to say that Republi-

can gains in the General Assembly are probably strongly linked to both changes in the mood of the electorate and changes in election geographies effected by redistricting. The 1995 elections tend to confirm this conclusion. With Governor Wilder and Senator Robb offstage and the Virginia economy beginning to revive, Democrats were able to capture a slight majority (51.4 percent) of votes in contested General Assembly elections (Sabato, 1995).

Congressional elections since redistricting also contradict the proposition that 'smart redistricting strategy' actually worked to Republican benefit. Despite the loss of three black congressional influence districts in redistricting (see Table 3, page 332), Democrats were able to actually increase their share of the congressional delegation to its highest proportion since 1964—7 of the 11 House seats. And, unlike other southern states, in the 1994 congressional elections there was no Republican Revolution in Virginia. Democrats did, however, lose a seat as Republicans won in the Eleventh District in an extraordinarily rare election in which the challenger out spent the incumbent (Sabato, 1995).

If the GOP redistricting strategy worked anywhere in Virginia, one might be able to say it worked in the Virginia Senate. In the Senate, GOP strategy succeeded only because of the unprecedented failure of a complacent and fractured Democratic majority to pursue partisan election advantages available in redistricting. Yet, given the tidal shift of the Virginia electorate in a Republican direction, it would be inaccurate to say that Republican Senate gains were the sole product of smart redistricting strategy.

AN UPHEAVAL IN VOTING LAW: IMPLICATIONS FOR VIRGINIA

It has been argued that it is easier to unring a bell than withdraw liberties once granted. Yet, in voting rights, recent Supreme Court decisions (*Shaw* v. *Reno, Miller v. Johnson, Shaw v. Hunt,* and *Bush v. Vera*) have accomplished the political equivalent of unringing a bell. What the Court majority seems to be saying is that districting plans shown to be based predominantly on race at the Congressional level will not survive Court scrutiny unless they satisfy "strict scrutiny, our most rigorous and exacting standard of constitutional review" (Kennedy, 1995). Compactness, although undefined, can be one of several indices used to detect the presence of districting that is predominantly race-based. With one exception the Supreme Court has now sustained every challenge to a race-based congressional district it has heard since 1993. The exception was a challenge to North Carolina's 1st Congressional District (*Shaw v. Hunt*) which the Court dismissed because none of the white plaintiffs actually lived in the district (Greenhouse, L., 1996).

Although I have presented my interpretation of these decisions elsewhere (Persons, 1997), a summary is pertinent here. In every case since 1993 where the Court has sustained a challenge to race-based redistricting, the evidence established that the predominant motive for and justification of race-based redistricting plans was compliance with DOJ enforcement of Section 5 of the Voting

Rights Act. As I reread the opinions of Kennedy, O'Connor, and Rehnquist in these cases, I am struck by their rebuke of voting rights enforcement policy within the DOJ. Conservatives see a fundamental difference between a case specific remedy for well proven instances of vote dilution and the "optimization" or "maximization" enforcement strategies pursued at DOJ under Section 5 of the Voting Rights Act. A case specific approach implies the relentless regimen of jurisdiction-by-jurisdiction litigation in an adversarial context to deliver narrowly tailored relief to discrete victims of proven vote dilution injuries. "Optimization" and "maximization" standards for minority representation, on the other hand, offer blanket protection to a class of putatively injured minorities without the rigors of case-by-case litigation. In my view, the cement holding a tenuous conservative majority together in this reversal of voting law is a common distrust of the motives or justifications driving race-based redistricting and not race-based redistricting per se. Yet, in these new rulings the Court has certainly not invalidated race-based districting remedies resulting from Sec. 2 proceedings.

In the often acrimonious debates trailing in the wake of *Shaw, Miller* and *Bush* the critical distinction between Section 5 preclearance protections and Section 2 judicial relief has, in my view, sometimes been overlooked even by seasoned scholars. It is worth remembering, as the DOJ argued in *Miller*, that "Congress enacted Section 5 of the Voting Rights Act in 1965, and extended its coverage—because it found that 'case by case litigation was inadequate to combat widespread and consistent discrimination in voting' and that it was necessary to 'shift the advantages of time and inertia from the perpetrators of evil to its victims' " (Carter, 1996). The essence of the difference between Section 5 and Section 2 of the Voting Right Act is, in the end, a matter of expediency. It's the difference between wholesale minority empowerment under DOJ enforcement of Section 5—and case specific or retail vote dilution remedies under Section 2. In light of this critical distinction it is simply inaccurate and dangerously misleading to argue that recent Supreme Court decisions abolish all remedies available to voters victimized by vote diluting practices. I say "dangerously misleading" because such arguments conceal the availability of Section 2 remedies as a still powerful tool in the arsenal of voting rights advocates. Although it is true that there may be members of the conservative Court majority propelling this new racial jurisprudence who might be willing to invalidate Section 2 of the Voting Rights Act, until Section 2 is overturned it is simply self-defeating for voting rights advocates to argue that minority voters are without remedy to vote dilution practices. Yet and still, the invalidation of districting plans enacted under the influence of DOJ Section 5 enforcement may well undermine African-American representational gains in Virginia.

In 1995, at about the same time as the *Miller* decision was announced, Bobby Scott's 3rd Congressional District was challenged in Federal District Court in a suit remarkably similar to the plaintiffs' arguments in *Shaw, Miller*, and *Bush*. The plaintiffs in this case, *Moon v. Meadows*, argued that by assigning citi-

zens on the basis of classification by race to certain congressional districts the districting plan adopted by General Assembly constitutes an unconstitutional racial gerrymander in violation of the Equal Protection clause of the Fourteenth Amendment. The plaintiffs, assisted in their suit by the Campaign for a Colorblind America, did not assert or allege that a tangible or demonstrable injury resulted from adoption of the districting plan apart from the alleged violation of their 14th Amendment protections.

The defense in the case was ably provided by the Commonwealth's Office of the Attorney General. "Smart Republican redistricting strategy" had apparently not lost its appeal to George Allen, a Republican, who replaced L. Douglas Wilder as Governor. Arguments in the case followed what has come to be a familiar course in this new jurisprudence of racial redistricting. Plaintiffs proffered an assortment of evidence and experts (the record of legislative intent, shape, and racial characteristics) supporting their contention that race dominated considerations in the configuration of the 3rd Congressional District. They also argued that traditional districting principles including locality integrity, respect for regional identities, and compactness were all subordinated to racial considerations.

The defense tendered evidence and expert testimony that incumbency protection and the economic vitality of the Commonwealth that incumbents served, not race, was the preeminent consideration shaping the contours of the 3rd Congressional District. Further, the defense argued that the district was not bizarre; and, was, in fact, more compact than the least compact districts from the 1980s plan. Indeed, as the defense noted, a plan advanced by Senator Hunter Andrews for a majority black district that was extremely regular in shape by the "eyeball" test was rejected in behalf of competing political and economic interests. The defense went on to insist that as single-member General Assembly districts and equal population standards were established in past years, the tradition of respect for political subdivisions or communities of interests had diminished in Virginia redistricting practice. Nevertheless, in the eyes of the defense, Virginia did not neglect traditional districting practices.

Post-trial briefs filed by the litigants revealed that both sides perceived that the center of the controversy rested in large measure on the question of whether or not Virginia had a compelling state interest in avoiding liability under Section 2 of the Voting Rights Act sufficient to satisfy a strict scrutiny inquiry. The Commonwealth argued almost stridently that **"Even if strict scrutiny is applied to the third congressional district, the state had a strong basis in evidence for creating a majority black district to avoid potential liability under section 2 of the voting rights act** [sic]."[18] In subsequent argument the Attorney General laid out compelling evidence establishing a vote dilution case against his own state had it failed to create a majority-minority district in the 1991 redistricting

[18]Joint Post-Trial Brief Of Defendant Bruce Meadows and Defendant-Intervenors Curtis Harris, et al, C.A. No. 3:95cv942, 11.

session. Point by point, attorneys for the Commonwealth sought to demonstrate that it satisfied all three criteria of Section 2 liability established in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). To make this case the Commonwealth went on to provide convincing evidence on the three preconditions of a Section 2 liability—(1) that the minority is sufficiently large and geographically compact to constitute a majority single-member district; (2) that the majority was politically cohesive; and (3) that racially polarized voting was such that white voters usually prevented black voters from electing their candidates of choice. The plaintiffs, although conceding the second precondition (political cohesion within the minority community), vigorously contended the Commonwealth's arguments on the first and third preconditions.

On February 7, 1997 a three-judge federal panel delivered its decision. Writing for the unanimous panel, Judge Robert R. Merhige Jr., a jurist historically sympathetic to minority rights, opined that "the evidence, in our view, is overwhelming that the creation of a safe black district predominated in the drawing of the boundaries of the Third Congressional District."[19] "In other words," Merhige wrote, quoting from an earlier Supreme Court ruling, "race was the criterion that, in the State's view, could not be compromised."[20] Virginia became the sixth state to have a congressional district overturned since the 1995 upheaval in voting law.

The outcome in *Moon v. Meadows* raises, in my mind, a fascinating question. Accepting for the purposes of argument the Attorney General's compelling case that Virginia was indeed liable to a Section 2 lawsuit, would the outcome have been different had the Commonwealth failed to draw a majority-minority district in 1991 and the minority sought redress in a Section 2 claim? In other words, would a majority black 3rd Congressional District created in a successful Section 2 proceeding succeed even though an equivalent geography erected under Section 5 compulsion failed? We will, of course, never have the answer to this question. Yet, in my view, for reasons elaborated above, I suspect that such a Section 2 district might well have succeeded.

Under this new racial jurisprudence, every General Assembly majority-minority district fashioned in the 1991 redistricting session, six seats in all, could face constitutional challenge. I say "could" because whether or not black representational gains in Virginia are vulnerable to court challenge hinges in part on the question of what representational benchmark is used to define an unlawful representational retrogression prohibited by Court precedent in *Beer v. United States* (1976). In *Miller*, The Georgia District Court ruled that "the proper benchmark, in our view, is the 1982 plan, which is the last legislative plan in effect before the unconstitutional 1992 plan was enacted" (Carter 1996). If such reasoning is followed in potential Virginia litigation, none of the majority-minority population districts (3 in the House of Delegates, 3 in the Senate and the 3rd Congressional District) created in 1991 will be immune from legal challenge.

[19]*The Virginian-Pilot*, 12, February, 1997, p. A18.
[20]*Ibid.*

Yet, even if Rep. Bobby Scott ultimately loses the advantage of a black population majority in the 3rd, it seems highly unlikely to me that he will also lose his career in Congress. Scott is a very capable politician with proven appeal to white voters that will serve him well even if the 3rd is redrawn. The same observation can be made regarding the new African-American seats in the Virginia General Assembly. It is by no means a foregone conclusion that incumbent African-Americans in the General Assembly will necessarily lose them should their districts succumb to constitutional challenge.

The turnaround in voting law may well have profound consequences for the partisan balance in Virginia government as it will simply outlaw what I have referred to as "smart Republican redistricting strategy." Another redistricting session precipitated by a successful court challenge to the current districting plan must be a frightening prospect for Republican legislators. Reducing black population in the six new black General Assembly districts and the single black Congressional district will very likely achieve its judicial purpose of reducing the proportion of black voters in black districts to levels below those essential to insure the election of black candidates. The resulting districts, especially if they are drawn by a legislature controlled by a thin majority of embattled Democrats, would be drawn to retain proportions of black voters too high to elect Republicans but ideal for maximizing Democratic representation. At least one alarmed Virginia Republican activist has appealed publicly to the "purists" within his party to abandon their challenges to minority-majority districts (Goolrick, 1996). It turns out that author of this public appeal to Republicans to forsake their hostility to race-based districting is an aide to Virginia Republican Congressman Herbert Bateman. A flood of minority voters into Bateman's 1st Congressional District would almost certainly foreshorten his political career.

New voting law is also already impacting local governments in Virginia. On June 29, 1995 the Supreme Court released its ruling in *Miller v. Johnson*. On August 28, 1995 the Office of the Attorney General in a highly unusual move withdrew its outstanding objection to the adoption of an at-large School Board election method in Chesapeake, Virginia. Chesapeake, Virginia's fastest growing city, had requested reconsideration of the DOJ Section 5 objection interposed on June 20, 1994. Correspondence from the City's retained attorneys, Hunton & Williams (Richmond, Virginia), clearly identified decisive changes in court rulings as the pivotal factor in the withdrawal of the objection (Greever, A. G., 1995, August 31). On September 14, 1995, the City Council of a contiguous sister city—Portsmouth, Virginia—followed suit and announced its intention to adopt an at-large method of election for its School Board. I had direct knowledge of Portsmouth's intention to consider single-member districting alternatives prior to the Chesapeake reversal because my consulting services had been sought in the matter.

Local redistricting in Virginia is, however, a much different animal than General Assembly or congressional redistricting. Local redistricting has most often been precipitated by lawsuits mounted by an organized group of aggrieved minority voters challenging an at-large method of election. In the course of such litigation the painful local history of vote diluting practices and patterns of racial block voting are thoroughly documented. When minority plaintiffs succeed in such challenges, the judicially supervised, race-based remedial districting plans which emerge are justified by a record of discrimination that has withstood adversarial scrutiny. This, of course, stands in marked contrast to redistricting bills legislated under the threat or existence of DOJ objections during the 1991 General Assembly redistricting sessions. Consequently, in my opinion, minority voters in Virginia communities injured by vote diluting practices should not abandon the courts in their struggle against discrimination in the voting place unless and until the Court invalidates race-based districting altogether. Indeed, it is not inconceivable that Virginia cities, counties and towns with significant black populations employing at-large methods of elections could prove to be fertile grounds for Section 2 lawsuits in the years immediately ahead.

CONCLUSIONS

Overall, then, it seems fair to say that as districting cases move through the courts in the years ahead, the recent turnaround in voting law is more likely to incrementally erode gains in African-American empowerment than to reverse them. Yet, an erosion in African-American empowerment will have at least one potentially volatile consequence. For decades African-Americans in Virginia and elsewhere have been told that if they were patient, if they played by the rules, eventually they would realize a coequal status in American society. In 1993, at the very moment when empowerment seemed finally within reach, an upheaval in voting law has shattered the dream. For many African-Americans recent reversals in civil rights law will constitute an embittering betrayal of a social compact. I fear that in the end these current decisions of the Court will only heap another grievance onto the tinderbox of racial tension now building in our republic.

I began this analysis with a discussion of the disfranchisement of the blacks in Virginia in the 1890s following reconstruction. In the 1890s the policy of disfranchisement was invented by an alliance of landed gentry and commercial interests to preserve their privileged advantages in Commonwealth rule. Today, African-Americans have access to the ballot in Virginia; but, given this new jurisprudence of race, candidates preferred by black voters—black candidates—are no longer assured of political geographies that will support their election. No matter how one turns these new precedents in voting law, the political result is the same—majority black population districts created under the compulsion of Section 5 enforcement to remedy current or past discrimination will not survive strict scrutiny in federal courts. Predominantly white districts, on the other hand, suffer no such legal prejudice. From the perspective of black voters, when all is said and done and the smokescreen of litigation lifts, the net result is that whites have the vote and their candidates but blacks have only the vote. The disfranchisement this

new law sustains doesn't deny blacks the ballot, it denies them choice. It is virtual disfranchisement. Like the disfranchisement of the 1890s, the disfranchisement of the 1990s also preserves and defends the advantages, prerogatives and conservative policies of the aristocratic tradition that has always ruled in Virginia.

PART IV

Districting Commissions and Minority Empowerment

IS THERE A BETTER WAY TO REDISTRICT?[1]

Donald E. Stokes

THIS CHAPTER IS A REPORT ON NEW JERSEY'S EXPERIMENT IN REDISTRICTING. The experiment is, in effect, designed to see whether a way can be found that allows the practical political wisdom of the parties to flow into the redistricting process while contraining the process to meet clear tests of the public interest. Such a method of redistricting would lie somewhere between the British and Commonwealth practice of assigning the task to neutral commissioners who are notably short on practical wisdom and the American practice of leaving the drawing of boundaries to the ordinary political process, with results that are notably short on public interest. The two most important tests of public interest have to do with fairness between the parties and the fair representation of minorities, *desiderata* of current redistricting that are conceptually linked. I will sketch here the background of New Jersey's experiment, summarize the results thus far, and draw conclusions of general importance for the redistricting process.

THE ORIGIN OF NEW JERSEY'S EXPERIMENT

When the U. S. Supreme Court was remaking American representation in the wake of *Baker v. Carr*, it came upon an upper house in New Jersey's legislature composed of one senator from each county. The Court was unimpressed by claims that such an arrangement might be appropriate for the state that had once sold the rest of the country on the idea of the equal representation of states in the United States Senate. It declared this "little New Jersey Plan" to be a violation of

[1]This a revision of a paper prepared for delivery at the Western Political Science Association, San Francisco, March 21, 1992. It is a pleasure to acknowledge the research assistance of Frank Hoke and the skilled help I received as a public member of several redistricting commissions from Joseph A. Irenas, Mark M. Murphy, Ernest C. Reock, and David M. Satz, Jr.

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the U.S. Constitution and mandated the state legislature to call a limited constitutional convention to fix it. Since the legislature was then divided, with the General Assembly in the hands of the Democrats and the Senate strongly tilted toward the Republicans, it summoned a finely balanced convention, and the two sides worked out a redistricting procedure that was itself finely balanced between the parties.

Under this procedure, redistricting begins in a census year with the appointment of a highly partisan but balanced Apportionment Commission of ten members, five chosen by each of the two state party chairmen. These party delegations have a month to agree on the boundaries of the state's forty legislative districts.[2] If they do reach agreement, these boundaries hold for the next decade unless they are overturned by the courts. But if the ten party commissioners are unable to reach agreement, the Chief Justice of the State Supreme Court chooses an eleventh, public member, and the expanded Commission has another month to finish the job. The constitution does not say what will happen if it fails to do so, but no public member worth her or his salt will let the second month run out.

This procedure differs from the ordinary political process first of all by taking redistricting out of the hands of the legislature. Yet it is easy to exaggerate this difference. There is no bar to the appointment of Senators or Assembly members, and the Commission has included members of the legislature on each of the four occasions—after the 1966 constitutional convention and after the 1970, 1980, and 1990 censuses—when the procedure has been used. There is also a dense flow of (accurate and inaccurate) information to and from the legislature as the Commission does its work. In practical terms, the Commission may not be more removed from the legislature than would be a special committee selected from the Senate and Assembly to draw the new boundaries, although the legislature does not vote on the Commission's plan after the boundaries are fixed.

What *does* set the Commission's work fundamentally apart from the ordinary political process is the equal weighting of the parties and the procedure for moving a deadlocked Commission to an agreement without tilting it toward one party or the other. The appointment of ten members by the party chairmen guarantees that the Commission will be exquisitely political, in keeping with the character of New Jersey as a strongly partisan state. It has been more than twenty years since a party delegation split on a Commission vote, and the Commission is awash with the practical wisdom of its partisan members. But neither delegation can dominate the other on a straight party vote, unlike the situation in the legislature when both houses (and the governor's office) are controlled by the same party. And if this balanced, ten-member Commission is deadlocked at the end of a month of working on its own, the neutral public member supplied by the Chief Justice will not simply deliver control into the hands of one party or the other.

[2]The ten party members of the Apportionment Commission are appointed by the party chairmen by November 15 of the census year. The Commission has until February 1 or until one month after the census data are delivered to the state, whichever is later, to reach an agreement on the new boundaries.

I should underscore this last point, since it is so easy to suppose that a public member inserted into a deadlocked Commission will break the tie simply by choosing one or the other of two partisan plans. The "tiebreaker" phrase is a staple of newspaper comment, and it easily slipped into the assignment I was given by the organizer of our panel, who has observed New Jersey from a distance. But a public member who broke a tie by choosing one or the other of two biased plans would reduce fairness between the parties to the very limited terms either of a lottery between the parties or of choosing the marginally less biased of two partisan plans. Either way, the tiebreaker would give one party an advantage for the next ten years, unless the courts intervened. The positive promotion of the public interest requires a more activist role by a public member who has a clear idea of what fairness between the parties *means*.

Moreover, limiting tiebreakers to choosing one or the other of two biased plans could easily undercut the neutrality of the Chief Justice, who appoints the eleventh member, since confining the tiebreaker to such a role would create powerful incentives for governors and senators to nominate and confirm a Chief Justice likely to pick a tiebreaker who would vote right. We had a glimpse of such a future when the current Chief Justice was renominated in 1986.[3] Conservative senators who opposed him on other grounds charged that he had appointed a registered Democrat to produce a 6 to 5 Democratic vote in 1981 and urged the Republican governor to nominate a Chief Justice who could be relied on to produce a 6 to 5 Republican vote in the Apportionment Commission to be appointed in 1991. This argument might have been more influential if the tiebreaker had not played a far more activist role in moving both party delegations toward a fair agreement, in a manner I will now describe.

BREAKING THE TIE IN 1981

The Census Bureau delivered New Jersey's 1980 census data to the governor's office on the last day of February in 1981, only six weeks before the statutory date on which the secretary of state must notify the county clerks of the boundaries of the legislative districts so that prospective candidates will know where they can run.[4] The ten party commissioners appointed by the two party chairmen hammered out the framework of an agreement during March, the month allotted

[3]Justices of New Jersey's Supreme Court are initially appointed by the Governor and confirmed by the State Senate for a term of years. If renominated and reconfirmed at the end of this term, they serve until retirement.

[4]New Jersey is divided into forty legislative districts, each of which sends to the legislature a Senator and two members of the General Assembly elected at large. All 80 members of the Assembly are elected to two-year terms in each of the odd-numbered years of the decade. All 40 Senators are elected to two-year terms in the odd-numbered year at the beginning of the decade and to four-year terms in the second and fourth odd-numbered years of the decade. Hence, the year after the census is always a major election year, and New Jersey has a brisker timetable for redistricting than states where a major election does not occur until the second year after the census.

them. By agreement, the Democrats were given a free hand in drawing boundaries in Hudson County and Newark; the most urban part of the state, the Republicans a free hand in drawing boundaries in the suburban and rural northwestern part of the state. The Republicans also accepted their rivals' objective of creating a new Democratic district in New Jersey's rapidly expanding waist, although they expected something in return. On this and a series of other issues the party delegations were genuinely deadlocked when the month ran out.

Toward the end of March the Chief Justice contacted me about becoming the public member if the Commission deadlocked, and I joined the Commission at the beginning of April, with the starting date of the state's electoral timetable only two weeks away. After becoming acquainted with my new colleagues and the issues dividing them, I proposed that we move to an agreement by three stages:

- that we first of all go through the outstanding issues and see whether some could be resolved on their merits, knowing that others would be resolved only in the context of an overall agreement;
- that I then set out a plan I believed to be fair between the parties (and that also met the equal-population, compactness, and contiguity requirements) and see if it had six votes;
- that if it did not, I would then ask each party to submit an alternative plan and would support whichever was closer to mine.

These steps moved the expanded commission to an agreement within the two weeks before the secretary of state's notice to the county clerks was due. Several particular issues were disposed of on their merits. Although the plan I then proposed enjoyed support in both party delegations, neither voted for it, and I then asked each party to offer me an alternative plan, on the understanding that I would give my vote to the alternative closer to mine if it met the required tests. The result was a pair of alternatives that were virtual photocopies of my own. Although both of the other plans met my test of fairness between the parties, the Democrats' was marginally closer than the Republicans' to mine. I therefore supported the slight modification of my own plan offered by the Democrats.

This agreement enjoyed substantial support in both of the party delegations, and this consensus is reflected by the fact that the counsel for the two parties filed a common brief and successfully defended the plan when it was later confronted by a minor challenge in the courts. But at the late-evening hour when the agreement was reached I knew that its Republican support would melt away before the Commission formally voted the new boundaries the following day.

With the public member and Democratic commissioners guaranteeing the state the plan everyone knew was needed if we were not to make a mess of the electoral timetable of the state, the Republicans were free to vote against the plan and ward off the brickbats of those who objected to particular provisions. Despite the appearance of conflict created by the 6 to 5 vote on the final plan, the fact is that it would have made not a particle of difference to any of the major issues on which the parties were previously deadlocked *which* of the three virtually identical final plans was chosen. Yet it was essential to the goal of fairness between the parties that we chose one of *these* plans, rather than one of the two conspicuously biased plans on which the parties were deadlocked when I joined the Commission, for reasons I will explain after I describe the operation of this constitutional procedure following the 1990 census.

BREAKING THE TIE IN 1991

The Census Bureau delivered New Jersey's data to the state on the first day of February in 1991, four weeks ahead of its 1981 delivery, indeed early enough for the expanded commission also to have a month for its work without missing the start of the state's election timetable, if a deadlock forced the procedure to this further stage. But the context of the commission's work was drastically changed by the collapse of the Democrats' prospects after their newly elected governor, Jim Florio, put through the largest tax increase in the history of the state in his early weeks in office. Both of the party delegations named to the Apportionment Commission in November of 1990 saw a Republican avalanche coming. As a result, the Democrats had no stomach for negotiating from what they thought was a position of extreme weakness. They went not into the committee room but into the courts, where they challenged the census figures as seriously undercounting blacks and Hispanics. The U.S. government had responded to this same challenge from the City of New York by promising a federal district court in Brooklyn that the Secretary of Commerce would announce July 1 whether the Department would release revised data. In view of this promise, the Democratic members of the Apportionment Commission asked New Jersey's courts to sanction the view that the data released by the Census Bureau were merely "preliminary" and that redistricting should be deferred until the "official" data were released during the summer. This position appealed to a number of Democrats in the legislature because it would put over from the spring until the fall the primary election in which Democratic incumbents would need to explain to challengers within their own party why they had voted for the Florio tax increases.

With the weeks in which the Republican and Democratic Commissioners would ordinarily have fashioned the framework of an agreement running out, this legal challenge reached New Jersey's Supreme Court. On the last day of February the Court unanimously ruled, with the Chief Justice absenting himself, that the data released by the Census Bureau were sufficient for New Jersey's redistricting process. Since the month allowed the unexpanded Commission had elapsed, the Chief Justice appointed the public member, and the expanded Commission had the month of March to get the job done.

If I thought anything was clear when the process triggered by the census ten years earlier came to an end, it was that no one would ever ask me to do the job again. But I was wrong, and on the first of March a year ago I accepted the Chief Justice's call and entered a totally changed situation. Far from hammering out the

framework of an agreement, the parties had not even met. Each of the delegations and their staffs, with coaching from Washington, had done a good deal of preliminary work. But the *tabula* of principles agreed to between the two parties was simply *rasa*, and I started talking with the parties separately to find out how they saw the world and where the goals they wanted to achieve might overlap. I was again helped by the legal counsel and chief analyst I had used ten years before, and from the day I came on board we began to draw maps of our own.

Since I believed in the logic of direct negotiation between the parties, I told the two delegations that I would keep out of their way for the first of the four weeks that remained to see if they could make headway on their own, in a mini first phase of the process envisaged by New Jersey's constitution. But the looming Republican avalanche and cleavages within the Democratic ranks so impaired the bargaining between the parties that this week produced as little as the prior month had. If there was to be an agreement, it would need to emerge from the parallel bargaining of the public member with the two party delegations.

This created a different channel by which the parties' practical wisdom flowed into the bargaining process, but I believed in this wisdom's again playing a role. I needed in particular to have the parties' view of the value of the members of the Senate and Assembly whose fortunes could be affected by changes in the legislative districts. Given the population shifts in New Jersey during the 1980s, no one could have drawn the boundaries of a new set of compact, contiguous, and equally populous districts without pitting some incumbents against others or separating some incumbents from most of their constituents. The redistricting procedure written into New Jersey's constitution clearly intended these decisions to reflect the views of the parties and not to be left only to the wisdom of the public member.

Although this required an intensive effort, the work could have been completed well before the end of the month allotted us. Little change was needed in a band of districts across New Jersey's waist. But, the population north of this mid-section was down by the equivalent of one legislative district, and the population south of this mid-section was up by an equal amount. Hence, a district would need to disappear above this waist and reappear below it, with the additional changes this would entail in the surrounding districts. As the constitutional deadline approached, I set out a plan I thought was fair between the parties and met the other legal requirements, including those on the representation of minorities, but also reflected the practical wisdom of the parties on a swarm of particular points. In this case, the plan had six votes—the public member's and the five Republicans'—although I was unclear until the last moment which party would supply the additional votes to carry a plan.

Hence, the role played by the public member in the extraordinary circumstances of 1991 was very far removed from the idea of breaking a tie by choosing one of the other of two partisan plans. The 1991 experience demonstrated the resiliency of New Jersey's constitutional procedure under a complete breakdown

of negotiations between the parties. Since the public member played a role akin to that of a court-appointed master working with the counsel of leaders from each party, it is all the more important to know whether such a master can be guided by principles that genuinely serve the public interest—or whether this constitutional procedure is simply an occasion for politics in a different form. We should ask whether the idea of fairness between the parties can be given objective meaning rather than being in the end a subjective judgment call. I will answer strongly in the affirmative and outline the objective criteria I have twice put into practice, before turning to minority representation and the other tests a plan should meet.

FAIRNESS BETWEEN THE PARTIES

When I joined the 1981 Apportionment Commission I was struck by how difficult it was for my fellow commissioners to say in general terms what the idea of fairness between the parties meant. Although an agreement they reached on their own would probably have been fair by a process akin to the "unseen hand" of competitive markets, they were unable to give conceptual meaning to this idea. We can make a start toward clarifying the idea of fairness between the parties if we see that it involves a *relationship*, between popular votes received and legislative seats won. A set of district boundaries will be fair between the parties if the party that wins a majority of votes ends up with a majority of seats. This idea implies two essential tests of fairness:

- *lack of bias:* if there is a dead heat in popular votes, there should not be a built-in reason for expecting one of the parties, rather than the other, to control a majority of seats
- *responsiveness*: if a political tide moves the electorate away from a dead heat, the party toward which the tide is moving should build up a majority of seats

Each of these tests has to do with the functional form of the relationship between popular votes and legislative seats sketched in Figure 1. If one of the major parties had virtually no support in a particular election, we would expect it to win virtually no seats in the legislature; and if it had overwhelming support, we would expect it to win virtually all of the seats. In between, the party's proportion of seats should increase with its share of votes cast, according to the sort of relationship sketched by the figure.

No single curve of this sort describes the relationship of votes to seats. On the contrary, the shape and location of the curve depend on how the boundaries of the legislative districts are drawn and on how those who are predisposed to vote for one party or the other are distributed across the districts. Since accidental factors will affect the number of seats produced by a particular share of statewide votes in a particular election, it makes more sense to regard the vertical axis of Figure I as the share of seats a party would, in the statistician's sense, *expect* to have on the basis of a given share of the statewide vote in a given election.

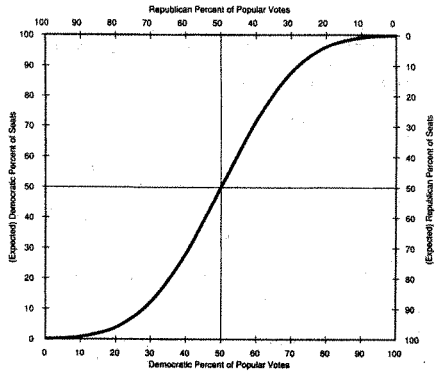

FIGURE 1

It is important to see that a party's expected share of seats would not increase in direct proportion to its share of votes, as a straight line from the lower left to the upper right corner of Figure 1. If the party had virtually no popular support and held no seats, its first increases in votes would win it very few seats. Similarly, if the party had overwhelming support and already held almost all of the seats, its last increases in votes would win it very few additional seats. In between, in the more competitive range, a given percentage increase in the party's share of votes will typically bring a greater percentage increase in its expected share of seats. These facts together give the curve describing this relationship in Figure 1 its "S" shape and a slope greater than one in the competitive, central range—properties noted by those who first saw that a "cube law" governs this relationship under widely different sets of boundaries. This slope in the central range describes how responsive the division of seats in the legislature is to the electoral tides that may move toward one or the other of two fairly evenly matched parties.

The aspect of this relationship of votes to seats that bears on the first of the tests articulated above *(lack of bias)* is the question of whether a party's expected

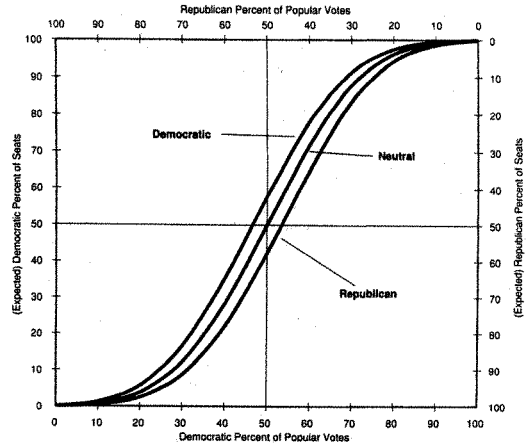

FIGURE 2

share of seats is at 50 percent—or is above or below 50 percent—when its share of the statewide vote is at 50 percent; that is, whether neither party can *expect* to have more than half the seats when there is a dead heat in the popular vote. Figure 2 shows three alternative relationships between votes and seats. The first of these, the curve to the left, is biased toward the Democrats, since the expected Democratic share of seats passes 50 percent before the party polls 50 percent of the statewide vote. The second, the middle curve, is fair between the parties, since neither party expects to have a majority of seats when the statewide vote is a dead heat. The third, the curve to the right, is biased toward the Republicans, since the expected Republican share of seats passes 50 percent without the party having polled 50 percent of the statewide vote. In an intensely partisan redistricting, the goal of the Democrats will be to draw the boundaries of the legislative districts so that a left-biased curve, such as the one labeled "Democratic" in Figure 2, describes the relationship between votes and seats. The goal of the Republicans will be to draw the boundaries so that a right-biased curve, such as the one labeled "Republican" in Figure 2, describes this relationship. The goal of the pub-

lic member will be to draw the boundaries so that the curve is unbiased and passes through the joint 50 percent point of Figure 2, as the one labeled "Neutral" does.

Each of the curves in Figure 2 gives an idealized account of the relationship between votes and seats. Since there are few legislative elections from which we might chart this relationship empirically, we need some added assumptions to apply these tests to a set of proposed boundaries. The steps by which I have proceeded are these:

- First, we have aggregated the vote in the most recent legislative election (or other past elections) within a set of proposed boundaries to reconstruct how these proposed districts would have voted if these new boundaries had been in force at the time of the election in question.
- Second, we reduced the share of votes the party that won statewide would have polled in each of these proposed districts by the proportion by which its statewide share of the vote exceeded 50 percent in order to simulate, within the proposed districts, an election in which there was a dead heat in the statewide vote.
- Third, we calculated the share of the proposed seats each of the parties would have captured in this simulated dead heat.

The proposed boundaries are fair between the parties if, under this simulation of a dead heat in the popular vote, each of the parties would expect to win half of the seats.

The relationship of votes to seats is, however, complicated by the fact that a higher fraction of the total population goes to the polls in legislative districts won by the Republicans than in legislative districts won by the Democrats. For example, in the 1985 legislative elections in New Jersey, the average turnout was 25.6 percent as a proportion of the total population in Assembly districts won by the Republicans and only 20.3 percent in Assembly districts won by the Democrats, a difference of more than 5 percent. Several reasons explain this difference. One has to do with the proportion of the population that is of voting age; since those living in Democratic districts have more children than do those living in Republican districts, a greater proportion of the population in Democratic districts is below voting age. But the reasons for this difference also have to do with rates of participation; those of voting age who live in Democratic districts are less likely to register and to go to the polls than are those of voting age who live in Republican districts. These factors together account for the considerable spread between the fraction of the total population that votes in Republican and Democratic seats.

This difference needs to be taken into account as we describe the relationship of popular support to legislative seats under a fair plan of representation. If the preferences of those who go to the polls reflect the interests and preferences of everyone who lives in their districts, the lower turnout in the Democratic seats produces a leftward shift of the curve that describes the relationship between

popular support and seats. This shift is illustrated by Figure 3. As the figure suggests, the different rates of turnout between Democratic and Republican seats could produce a Democratic advantage in the relationship of seats to actual support even if there were a potential Republican advantage in the relationship of seats to potential support.

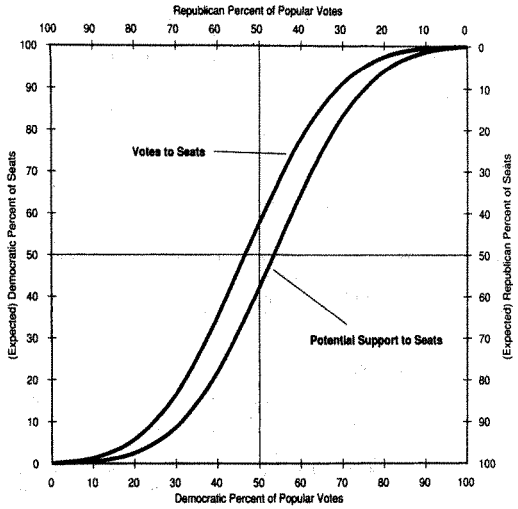

FIGURE 3

It is far from clear what allowance should be made for this difference in turnout in redrawing the legislative boundaries of the state. On the one hand, it could be argued that a system of representation should take account only of those who are willing to register and vote. On the other hand, the courts have long since made clear that representation is about whole populations, and not only about those who vote or those who are registered or those who are qualified to register. It is about everyone, including children and illegal aliens. From this perspective,

a set of boundaries will be fair between the parties if the Democrats and Republicans have a 50-50 chance of winning control of the legislature when they are evenly divided among *potential* supporters across the state. Hence, a set of boundaries could still be judged fair if the Democrats have a majority of seats before they have half of the actual votes cast for the legislature. Under the assumption that those who do vote represent the interests and preferences of those who don't, this complication can be removed from the relationship of votes to seats by redefining the horizontal axis of Figure 3 as the average of the parties' share of the popular vote calculated district by district across the state, rather than the parties' share of the vote pooled across all districts of the state. If my assumption holds, such a redefinition removes the effects of the differences in demography and participation between Democratic and Republican districts, and the graph of the relationship between votes and seats will pass through the 50-50 point under a fair plan.

Hence, there is a clear answer to the question of what fairness between the parties means, and a clear algorithm a public member can use to test the fairness of particular plans. I applied this test to alternative plans in the 1981 redistricting. The plan I proposed met this test, as did both of the virtual photocopies submitted as alternatives by the parties. As the 1991 redistricting neared, I published this test and the associated algorithm in a report to the Fund for New Jersey that circulated widely in the parties. Hence, the party commissioners and their staffs understood in this latter year that there is an objective criterion of fairness and a means of saying whether a particular plan was fair. This was a genuine resource in bargaining with the party delegations, and the plan that in the end won six votes met this test of fairness between the parties.

HOW FAIR HAVE THE RESULTS BEEN?

However clear this standard of fairness may be, a public member who rallies his fellow commissioners to such a standard is all too aware that subsequent elections will be an unsparing test of how correctly this standard and its associated algorithm were applied. There have now been ten legislative elections since this standard was first applied in 1981—six for the Assembly and four for the State Senate. How well have the results in these elections upheld the belief that the boundaries of the legislative districts have been fair?

Lack of bias. From the plot of the parties' share of popular votes and seats for these elections in Figure 4 we can see that the party winning a statewide majority of popular votes also won a majority of seats in the Assembly and State Senate in each of the legislative elections from 1981 to 1991, except for the 1981 election for the General Assembly. And this exception vanishes when the horizontal dimension of the chart is redefined as the average of the parties' share of the vote calculated district by district across the state. The fairness of boundaries drawn by this test was most severely pressed by the results of the legislative elections of 1987, when one party, the Republicans, received a statewide majority of votes for

the Assembly and the opposite party, the Democrats, received a statewide majority of votes for the Senate. When these votes were translated into seats, each of the parties controlled the house for which it polled a statewide majority, as it should have under a fair plan.

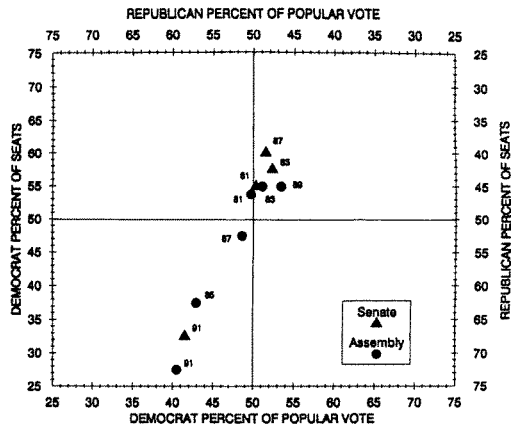

FIGURE 4

Responsiveness. The tides of popular support that moved back and forth between the parties in these legislative elections were translated into substantial changes in their shares of seats in the Senate and Assembly. This was notably clear as the electoral tide moved toward the Republicans in 1985 and 1991. In the first of these years, a 14 percent spread in the parties' share of votes cast for the Assembly was translated into a 25 percent spread in the Republican and Democratic shares of Assembly seats. In the latter year, a 17 percent spread in the parties' share of votes for the Senate and 19 percent spread in the parties' share of votes for the Assembly were translated into a spread in shares of seats of 35 percent in the Senate and of 45 percent in the Assembly. Over this central competitive range, the redistricting plans adopted in 1981 and 1991 were found to translate a one percent swing in the division of votes received into more than a

two percent swing in the division of seats won when this relationship was estimated by appropriate regression methods for the ten legislative elections from 1981 to 1991. And when the abscissa is redefined as the average of the parties' share of the vote calculated district by district the regression line lies still closer to the 50-50 point of the figure. These results confirm the conclusion that a public member, working in the context of a mixed redistricting commission, can use objective standards to draw boundaries that are responsive to electoral tides and unbiased between the parties.

These are not, however, the sole tests of the acceptability of a set of district boundaries. Four others have become a standard part of the redistricting repertory —equality of population, compactness, the contiguousness of a district's territory, and the representation of minorities. I will say a word about the first three before turning to minority representation, which seems to me the most important and difficult of the requirements now imposed by constitutional law and by statute.

OTHER REQUIREMENTS

The U.S. Supreme Court has pursued the equality of population to a precision far beyond the capacity of the Census Bureau to say what the true population of districts is.[5] Mercifully, the Court has been more relaxed about equality of population in redistricting state legislatures, out of respect for the desire of the states to keep their civil divisions whole as they sort these into legislative districts. A 10 percent variation between the largest and smallest legislative district is still countenanced for the states -- and for their counties and municipalities. The legislative districts drawn by New Jersey's 1981 and 1991 Apportionment Commissions varied by less than half this difference. The Court has so emphasized the standard of one person/one vote in its congressional decisions that the boundaries emerging from the current redistricting of state legislatures are likely to partition civil divisions more often and to keep more closely to population equality than the courts would in fact require.

The requirement of contiguous territory is nowadays under pressure less from partisan gerrymanderers than it is from those who are trying to sort out racial and ethnic communities. Contiguous territory presented no difficulty to New Jersey's Apportionment Commissions in 1981 and 1991, although their experience highlights anomalies in the definition of contiguity. Historically the courts have said that a district can be contiguous across water as well as land, an interpretation that accepts such anomalies as a river boundary's wandering inland to remove a bit of territory from the district on one side of the river to the district on the other. However odd it may have seemed on other grounds, the agreement among the partisan members of the 1981 Apportionment Commission to remove

[5]In *Karcher* v. *Daggett*, 1983, a case New Jersey had the doubtful honor of presenting, the Court set aside a Democratic map for New Jersey's congressional districts as failing to be a good faith effort to meet the requirement of reasonable population equality between districts even though the most populous exceeded the least populous of the new districts by less than 0.7 percent of the statewide average.

a potential candidate from a district on one side of the Toms River to a district on the other side of the river was consistent with the legal doctrine that water as well as land can keep a district whole.

The criterion of compactness will increasingly be subjected to automated tests in a computerized world. One formula, for example, calculates the ratio of the actual area of a district to the area of the smallest circle that could be circumscribed around the district. In fact, however, the naked eye needs no assistance to see whether districts are reasonably compact, as it needed none to spot Elbridge Gerry's "Gerrymander" for what it was. The Senate and Assembly districts laid out by New Jersey's Apportionment Commissions in 1981 and 1991 were conspicuously compact—and vastly closer to this ideal than were the congressional districts drawn by the ordinary legislative process in 1982.

REPRESENTING MINORITIES

Although minority representation became a central concern of redistricting with the enactment of the 1982 amendments of the Civil Rights Act of 1965 and court decisions involving the 14th and 15th amendments to the U.S. Constitution, the tests in this area remain elusive and difficult to apply. The efforts to enfranchise minorities launched by the 1965 act had as their initial target racial gerrymandering in the southern states, especially efforts to disfranchise blacks by excessively concentrating their voting strength in a few districts (*packing*) or excessively diluting their voting strength among several districts (*cracking*), as well as submerging black voters in larger electorates that chose all of their representatives at large. The goal of this intervention was therefore the *initializing* one of completing the admission of newly enfranchised black voters to the political process. The courts and the Justice Department intervened in the redistricting process to prevent racial gerrymanders from keeping newly enfranchised black voters from electing representatives of their choice—in many cases black representatives—in accord with the experience of other groups that have gained access to the political process. The principal means of achieving this goal was believed to be the creation of heavily minority (*majority* minority) districts, and this belief gave rise to the working rule that districts needed to be 65% minority to achieve this result in view of past discrimination against blacks, the polarization of voting by race, and the limited influence of blacks on the nominating process.[6]

In time, the attention of the law and of the Department of Justice shifted from *negative* racial gerrymandering in the South to *positive* racial gerrymandering elsewhere in the country. With this shift the initializing goal of empowering

[6]Commentaries on this controversial rule are almost a growth industry within the literature of redistricting. The Justice Department never intended it to be an absolute guide, and the fraction of the population that needs to be minority to permit such a local majority to elect a representatives of their own choosing turns on such factors as the fraction of the minority and non-minority populations that are of voting age, their relative rates of participation, and the degree to which the vote is polarized along racial lines.

concentrations of minority voters was transformed into the goal of *maximizing* the number of minority representatives. It is here that the problem of minority representation is linked to the problem of fairness between the parties. A geographic system of representation places racial and ethnic minorities under the same disadvantage in translating votes into seats that is faced by a small political party, even if its supporters are fairly concentrated. The shape of the curves in Figures 1 to 3 suggest how difficult it is for a minority element of the population to claim a share of seats proportional to its share of votes, since the functional relationship between votes and seats is by no means the proportional one represented by a straight line running from 0-0 to 100-100. This home truth is reflected by the fact that, whereas African-Americans constituted 13.4% of New Jersey's population and Hispanics 9.6% in 1990, [7] the last elections prior to the census gave blacks 7.5% of the seats in the Assembly and 5% of the seats in the Senate and gave Latinos 1.5% of the seats in the Assembly and no seats at all in the Senate. Therefore, both minorities fell short in these terms, with the somewhat greater success of blacks reflecting their greater numbers, residential concentration, and influence within local party organizations.

Under our system of geographical representation, no minor party is assured a share of seats equal to its share of votes. If anything, this lack of proportionality is thought to be a virtue, since it limits the legislative presence of splinter parties until they have a substantial hold on the electorate. But the tendency of a geographic system to limit the legislative presence of minorities evokes a quite different response. Constitutional and statute law and the American ethos of inclusion create a sense of obligation to bring the proportion of seats held by these minorities as close as possible to the proportion they are of the population.[8] Hence, an appropriate goal of redistricting in New Jersey is sending more black and Latino representatives to Trenton.

The 1982 amendments to the Voting Rights Act of 1965 made the issue of minority representation far more central in legislative redistricting after the 1990 census than it was ten years before. In view of New Jersey's need to be quick off the mark to be ready for a major election in the first year after a census, the national parties treated the state as an early testing ground for their emerging strategies on redistricting, especially for the Republican effort to create majority minority districts as a means of packing Democratic votes. Staff representatives of

[7]Although the Department of Commerce did not release figures corrected for the undercount, informal conversations with the Census Bureau suggest that the undercount could be corrected by multiplying the black and Hispanic population by 1.06 and everyone else by 1.02. Such a correction would raise the estimate of the African-American proportion of New Jersey's population to 13.9%, of the Hispanic proportion to 10%.

[8]Neither Congress nor the Supreme Court has equated this commitment with the representation of African-Americans by blacks or of Hispanics by Latinos. They instead have required district boundaries to be drawn to give these minorities a chance to elect representatives (of any race or ethnicity) of their own choosing. But the classic pattern of American politics is for a rising minority to establish its claims on the political system by electing its own to public office.

the Republican National Committee recruited part of the state's NAACP leadership to the idea that a district should be at least 65 percent black to guarantee the conversion of African-American votes into actual representation in the legislature.

This issue was most directly joined in Essex County (Newark and its northern and western suburbs), where the Republicans wanted two heavily black and Hispanic districts, and the Democrats wanted three less tightly packed minority districts. Both the Republicans and Democrats argued that their plans would send more black legislators to Trenton. The Republicans gave great weight to the Justice Department's guidelines, which were said to require at least 65 percent minority districts. The Democrats countered that these guidelines were developed to cope with discriminatory districting in the South, that the Republicans wanted to pack largely Democratic minority voters into two districts, which would be overwhelmingly majority-minority when Hispanics were also counted, and that a greater number of African-American legislators would be elected if the blacks in Newark and its suburbs were spread over three less heavily majority-minority districts.

As this clash of views suggests, the translation of minority voting strength into seats is conditioned by the realities of local politics, especially those of the nominating process. In this respect the politics of Newark and Essex County are dramatically unlike those of the areas of the South for which the Justice Department's guidelines were orginally drawn. Although the blacks of Essex County are economically less prosperous than the whites, their political empowerment in Newark and its near-suburbs is well advanced. This power ensures the nomination of black candidates for the Assembly and Senate from the legislative districts where they are in the majority, except for cases where a white incumbent is for a period able to retain office in a district in which blacks have become the majority. Such survivors are sometimes replaced by minority representatives when district boundaries are changed.

In view of these realities, I believed that three black-dominated Essex districts were likely to produce a greater number of minority representatives than the two overwhelmingly minority districts proposed by the Republicans, which could produce a maximum of six black legislators. It seemed likely that three moderately majority-minority districts would send seven minority representatives to Trenton after the 1991 election and might send as many as nine by the end of the decade. Accordingly, I worked out with the Democrats the boundaries of three such districts that would also replace a surviving white incumbent by a black representative in 1991 and made clear to the Republicans that I could not vote for a plan that packed an excessive number of black and Hispanic voters into two districts. The Republicans accepted this decision readily enough, since their main interest lay in clearing the way for the statewide election they expected to win handsomely. But this outcome led to the irony that the final 1991 plan, which was carried by an alignment of the five Republicans commissioners with the public member, was one on which the Republicans had lost on the most difficult issue

we faced, while the Democrats voted against a plan on which they had won on our most difficult issue. This irony underscores the fact that much more than a simple tiebreaker's role was required to reach a fair agreement.

DIFFUSION TO OTHER LEVELS OF GOVERNMENT

The success of New Jersey's experiment has progressively persuaded the state's political activists, journalists, and citizen groups that the mixed model of redistricting written into the state's constitution is a better way of redrawing constituency boundaries and should be extended to other levels of government. But as is so often true, this "better idea" spread to other levels when it suited the interests of those who effected the transfer. The lame duck Democratic legislative leadership that was swept from power by the 1991 elections canceled the control of congressional redistricting by the incoming, veto-proof Republican legislature and assigned this task to a balanced partisan commission instead. The statute passed by the outgoing Democratic legislature provided that in each party each of three leaders—the state chairman and the leader in the Assembly and the Senate—would name two members of this 12-person commission, which would be presided over by a neutral chairman playing the tiebreaker's role.

Although this extension of the Commission idea reflected the success of the constitutional procedure for redistricting the legislature, the holdover Democratic legislature prescribed a somewhat different role for the neutral chairman of the commission redistricting the congressional seats. It is not difficult to read into these provisions the mixed feelings of the Democratic leadership about their experience with a strongly activist public member in the commission redistricting the legislature. As a result, their statute provided for the neutral chairman to be chosen not by the Chief Justice but by the party commissioners themselves, who would be turned out of office if they failed to reach a choice within a specified time of their own appointment. Moreover, the neutral chairman would have no vote unless the Commission was deadlocked as it neared the end of the month allotted it. In this case, the chairman could vote only on the two plans with the widest support, playing a "tiebreaker's" role in the strictest sense. Indeed, the statute creating the congressional redistricting commission took the remarkable additional step of also seeking to constrain the State Supreme Court to the most limited tiebreaker's role by requiring the Court, if it became involved, to pick only one or the other of the two plans with the largest number of votes in the Commission. It is by no means clear that the Court could be bound by such a constraint.

Meanwhile, it served the political interests of the incoming, veto-proof Republican legislature to extend the better idea of a balanced commission to yet another level of government. In early March of this year the governor signed into law a statute creating such commissions to redraw the boundaries of the districts from which county freeholders are chosen in the three counties of the state that elect at least some of their freeholders from districts, rather than at large. The existing law had placed the drawing of freeholder districts in the hands of county

election boards, to which each of the county party chairmen appointed two members, with the deciding vote cast by the county clerk. Since the county clerk was a Democrat in each of the counties—Atlantic, Essex, and Hudson—with freeholder districts, the new law in effect canceled Democratic control of the process in these counties. Indeed, in Essex County it canceled a new set of boundaries sponsored by the Democrats that almost certainly would have reduced the Republicans on a nine-member board of freeholders from two seats to one, and very possibly to none at all.

Reflecting the success of New Jersey's experiment with a "mixed" model of redistricting, the new statute declared that "fairness can be strengthened by adopting a method of selecting district commissioners based on the provisions in the New Jersey Constitution for the selection of members of the Apportionment Commission, which establishes legislative districts after each decennial Federal census." The act thereupon reproduced the main features of the experimental model, including the designation of a public commissioner by the Chief Justice of the Supreme Court of New Jersey if the party commissioners are deadlocked at the end of a first stage. In accord with the prior norms for the size of the county election boards, each of the county chairmen would appoint two, rather than five, commissioners. Hence, each of these commissions would have five members when they were joined by their public commissioners.

Because Atlantic County was preparing to elect district freeholders this year, candidates entering the April primary in that county needed to know the district boundaries by early April. In view of this, the legislature prescribed a crash timetable for this year's redistricting in all three counties if the governor signed the act by March 9. Under this timetable, the county chairmen were to name the party commissioners, the Chief Justice and the public commissioner within three days of the date the act took effect, and the commissions were to complete their work within ten days of their appointment—not only in Atlantic County, where there would be a freeholder election this year, but also in Hudson and Essex Counties, where the earliest freeholder elections were a year off. Assisted by the staff who helped the public member of the 1991 legislative redistricting, the public commissioners got the job done within deadline in all three counties.

This time my assignment from the Chief Justice was to return to Essex County, where the issue of minority representation had sharply divided the commission redistricting the state legislature and where a Democratic-controlled election board had recently marched through the northern and western suburbs of the county laying waste to previously Republican districts. The public commissioner was therefore called upon to promote the public interest in terms both of fairness between the parties and of the fair representation of minorities. Detailing what then happened will again make clear how I view the "tiebreaker's" role in New Jersey's mixed model of redistricting.

I felt that my responsibility to assure fairness between the parties extended only to the five district freeholders and not to the four elected at large; the dis-

tinction between these two kinds of seats was a charter issue for the county rather than an issue for the redistricting commission and its public member. My analysis of party registrations and the returns from prior elections for the board of freeholders and for the Assembly and State Senate suggested that the Democrats enjoyed something like a three-to-two edge over the Republicans in potential electoral support countywide. It was also clear that a three-to-two split in district freeholders better matched this latent strength than did a four-to-one or five-to-zero split, even allowing for the greater shifts of seats than of votes in the mid-range of party competitiveness. I therefore made it plain that I could not support the boundaries recently drawn by the Democrats, and the commission readily enough agreed that the Republicans should have two winnable seats.

We then turned to the question of minority representation. Although the blacks in Newark and its near suburbs were economically much worse off than the suburban whites in the north and west of Essex County, they were equally empowered in a political sense. But this was not yet true of the county's growing Hispanic element, the Puerto Ricans in Newark's north and central wards and the Portuguese in Newark's east ward; the politics of inclusion had yet to reach these groups, where the county's legislative body was concerned. It was clear that a district could be created from Newark's north and east wards and parts of its central ward in which Hispanics would be the largest population group, although they would not constitute a majority. Seeing that I had the Republican votes to create this district if the Democrats failed to support it, the key Democratic commissioner, the leader of Newark's east ward, moved with astonishing speed to lead the parade.

In twenty-four hours he won the blessing of the county Democratic leadership for moving the incumbent freeholder, an Italian-American in the east ward, from this district to an at-large seat and asked the leadership of the Hispanic community in the north ward to find a candidate to run as a Democrat for the district seat. As a result, the plan adopted within the statute's very tight deadline made headway on the issues both of fairness between the parties and the fair representation of minorities.

EVALUATING NEW JERSEY'S EXPERIMENT

The results of the state's redistricting experiment thus far show that New Jersey has had substantial success in finding a way between the practice in Britain and the older Commonwealth countries of leaving the redrawing of constituency boundaries to neutral commissioners, who have little of the practical wisdom of those who operate the representative institutions in these countries, and the typical American practice of leaving the redrawing of boundaries to the ordinary legislative process, with results that have blackened the reputations of legislatures since the days of Elbridge Gerry. It is hard to give legitimacy to a party's exploiting its control of the legislative process in the redistricting season to

strengthen its hold on the state legislature or the state's congressional delegation for the next decade—and perhaps beyond—since its skill in doing so will increase its chances of controlling the next redistricting, a decade hence. An inherent conflict of interest is involved when a majority party draws boundaries that increase its likelihood of retaining control. And this conflict of interest is even more troubling when individual legislators use their influence on the redistricting process to advance their particular interests—for example, by having the boundaries of their constituency redrawn to exclude the home of a potential opponent. We have a multiple form of this conflict when a legislature redraws the boundaries of its constituencies to protect incumbents from both parties.

Apart from the reluctance of those who are for the moment in control to give up their influence on the political process, the main barrier to reform is the difficulty of devising an alternative. Unlike Britain and the older Commonwealth countries, the U.S. has almost no tradition of neutral commissioners performing such politically sensitive tasks, although the courts have increasingly played this role, ignoring Justice Frankfurter's admonition to stay out of this "political thicket." But the courts also lack the practical wisdom of those who make our representative institutions work and are a cumbersome source of neutral judgment on redistricting plans. Boundary issues reach the courts only when an original plan is challenged on constitutional or statutory grounds, and the courts are often limited to the unhappy choice between two or more plans that serve the interests of the parties proposing them.

The success of New Jersey's experiment with a mixed procedure for redistricting its legislature is underscored by the biased results of leaving the redistricting of its congressional seats to the ordinary political process. This contrast ten years ago was telling. After the state Apportionment Commission redrew the boundaries of the legislative districts in 1981, the Democratic legislature and governor drew a set of boundaries for New Jersey's congressional districts that *Congressional Quarterly* called "a four-star gerrymander [that] twisted crazily through counties and townships all over the state to create a Democratic advantage." Their handiwork was soon overturned by the courts, which supplanted the Democratic boundaries with an alternative plan drawn by the Republicans, to further their own party's advantage. After comparing these parallel reapportionments triggered by the 1980 census, any fair observer would say that the framers of New Jersey's constitutional amendments had found a better way of redrawing constituency boundaries.

This observation is given greater force by the fact that a version of the "mixed" commission model has been extended by statute to the redrawing of congressional districts after the 1990 census—and has also been extended by statute to the redrawing of freeholder districts. We can learn more about the essential requirements of the mixed commission model by studying the variations introduced by these statutory extensions, especially the restrictions on the role of the

neutral chairman written into the statute creating the commission redistricting New Jersey's congressional seats after the 1990 census. We can also learn more by studying the repeated use of the mixed commission model, under the very different conditions of 1981 and 1991, for redrawing the boundaries of the state's legislative districts.

NEW YORK CITY REDISTRICTING: A View from Inside

Alan Gartner

REDISTRICTING IS ABOUT POWER, ITS ALLOCATION AND REALLOCATION. Laswell's definition of politics—"Who gets what, when, and how"—provides a useful framework within which to reflect upon recent experience in New York.[1]

BACKGROUND

WHILE THE DECENNIAL CENSUS RESULTS REQUIRED a realignment of the City Council districts to reflect population shifts, a new City Charter required more substantial changes. In *New York City Board of Estimate v. Morris* (1989), the Supreme Court of the United States held that the voting structure of the city's Board of Estimate violated the "one person, one vote" standard. (The five Borough Presidents each had one vote, although Brooklyn had nearly seven times the population of Staten Island. Furthermore, according to the 1990 census, Brooklyn's population was 60 percent non-white, while that of Staten Island was 20 percent non-white.) In response to this decision, a Charter[2] Revision Commission was appointed by Mayor Edward I. Koch. The revised Charter, adopted by the voters in November 1989 (the same election at which David N. Dinkins was elected Mayor), abolished the Board of Estimate and transferred the bulk of its legislative authority to the City Council. Key was the authority to adopt the budget, as well as power concerning land use and contracts.

An additional change implemented under the revised Charter was expanding the City Council from 35 to 51 members. The purpose of this expansion was two-

[1]The basis of this discussion is the author's work first as Executive Director, New York City Districting Commission, 1990-91, and then as a court-appointed expert in the development of the lines for New York's congressional delegation, 1992. For a fuller treatment of these topics, see Gartner, 1993.

[2]The Charter of the City of New York is the city's primary guiding document, or essentially its constitution.

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fold: First, to enhance the representativeness of the council members by reducing the number of their constituents; and second, to increase the opportunity for members of racial and language minorities to elect representatives of their choice. While the size of the Council had varied over time, from 25 to 78 members, the 45 percent increase from 35 to 51 members is unique in the city's history. Combined with the enhancement of the Council's authority, the change represented an unprecedented shift in the city's political geography.

In order to implement the expansion of the City Council, the Charter established a Districting[3] Commission, set the procedure for appointing its members, established the criteria the Commission was to use in conducting its work, set a schedule to assure that the new City Council would take office in January, 1992, set the basis for adoption of its plan, and adjusted the term of office for the new Council members to two years (1992-1994) for those elected in 1991 and then returning to the four-year term for those elected in 1993.

Three of the Commission's 15 members were appointed by the minority party of the City Council (that is the then one Republican Council member appointed three Commission members), five by its majority party, and the remaining seven by the Mayor. The Commission was to have at least one member from each borough, not have a majority from any one political party, and overall reflect the population of the city, including members of those groups protected by the Voting Rights Act.[4] The Commission included four African-Americans, three Hispanic members, one Asian-American member, and seven non-Hispanic white members.

In crafting the districts, the Districting Commission heard testimony in 27 hearings it conducted, gained information presented at more than 400 community meetings its staff organized or attended, and from scores of meetings with advocacy organizations and groups.

In addition to this extensive program of community outreach activities, the Commission recognized that real access for the community required access to the computer technology. Toward that end, the Commission staff conducted "map drawing" training programs for community members, as well as developed a dis-

[3]Members of the Commission took the name "Districting Commission," as opposed to the more common "redistricting", as meaning that the work of the Commission was to start with a blank slate, that is to craft 51 *new* seats not to build upon the existing 35. Thus, for example, among the myriad of "levels" of maps that the Commission developed in its data base, it did not include the lines of the 35 districts. The City Council did hire a consultant who developed a data base for them that included these lines. And, of course, incumbents frequently talked about how "their" district was to be reshaped!

[4]This requirement was challenged as a "quota". The suit, *Ravitch et al. v. City of New York*, was decided on August 3, 1992. District Court (S.D.N.Y.) Judge Mary Johnson Lowe, while finding the race-conscious measure justified by a compelling governmental interest to remedy past discrimination, deemed it unconstitutional because it was not narrowly tailored to achieve its goals; i.e., was too rigid, contained no expiration date, and had the potential to harm innocent people who might be precluded by race from serving on the Districting Commission. The plaintiffs asserted they were engaged in an act of principle and that they did not wish to thwart the work of the Commission; to this end, they stipulated that a decision in this case would not take effect until after the election (1991) pursuant to the work of the Districting Commission.

tricting "game" for high school students. Most importantly, and uniquely, the Commission established a "public access" terminal, loaded with all the data the Commission used, that was available to members of the public to draw their own maps. Commission staff members were available to assist (but not to interfere) in this process. More than 200 members of the public used the "public access" terminal, and many alternative plans so developed were presented to the Commission. The "public access" terminal was housed in mid-Manhattan at The Graduate School and University Center, The City University of New York.[5,6]

Of the 51 districts in the plan adopted by the Commission,[7] twelve had an African-American population in excess of 50 percent, nine an Hispanic population in excess of 50 percent, and six had a combined "minority" population in excess of 50 percent. Following rejection by the Department of Justice of the Commission's initial submission, minor revisions were made in three areas, and a week later the plan was approved. In the November 1991 election, twelve African-Americans were elected, along with nine Hispanics. As a percentage of the City Council, "minority" members grew from 25 percent in the 35-member Council to 41 percent of the new 51-member body.

"When"

Nationally, as in New York, the broad population trends are that while the numbers of Hispanics and Asian-Americans are sharply increasing, those of African-Americans (and non-Hispanic whites) are growing at a lesser rate. A consequence of this played itself out in the districting process in New York, with Hispanics generally arguing for districts with smaller population concentrations, in the expectation that they would "grow into" the districts. Additional factors were involved as well. They included belief in the greater likelihood of white crossover votes for Hispanic (and Asian-American candidates), as well as the far greater racial segregation of the African-American population.

While the city's African-American and Hispanic populations are nearly the same (1.847 million and 1.783 million, respectively), their population concentrations across the city sharply differ. For example, 41 percent of the city's African-American population live in Voter Tabulation Districts (VTDs) that are 80 percent or greater black; only 10 percent of the city's Hispanic population live in such VTDs. This is true at the 50 percent population concentration level as well: 68 percent of the African-American population live in such areas, while only 47 percent of the Hispanic population do so.[8] As districting is a matter of both geography *and*

[5]When picket lines closed The Graduate School as a result of a strike, an exception was made to allow use of the "public access" terminal.

[6]After the Commission finished its work, the terminal was turned over to the CUNY Data Bank, where it continues to be used by community organizations.

[7]The plan was supported by all four of the Commission's African-American members, one of the three Hispanic members, the one Asian-American member, and five of the seven non-Hispanic white members.

[8]The non-Hispanic white population is the most segregated with 53 percent living in 80 percent white VTDs and 84 percent living in 50 percent white VTDs.

demography, even with essentially equivalent populations, it is not possible to create districts with Hispanic population concentrations at the same level as it is for African-Americans. As districting is about voting, two further factors affect these efforts. First, the Hispanic population is younger than the African-American population, and second, the Hispanic population includes a higher percentage of non-citizens than does the African-American population.[9] These factors further conduce toward differences in approach between the African-American and Hispanic communities encouraging the latter's "growing into" strategy.[10]

"What"

At its simplest level, what is being allocated are legislative seats. And per *Baker v. Carr*, these are to be based upon people, not land area or political sub-units. However, land areas are involved. While never explicitly stated as a matter of policy, in practice the City Districting Commission chose to place important unpopulated areas in "minority" districts. This included such assets as the city's major parks and waterfront areas. Underlying the design of this process was the understanding that "control" over such assets was an important aspect of gaining political power.

[9]While historically the city's Hispanic population was predominantly Puerto Rican (i.e., citizens), increasingly growth has been among non-Puerto Rican groups, especially Dominicans.

[10]Contemporary Geographic Information Systems (GIS) permit achievement of zero population deviation. To do so, as now is the practice for congressional districting is, I believe, a mindless quest.

First it is time and resource consuming. With current computer capacity, population equality within reasonable deviations of several percentage points is fairly easy to achieve. Driving to zero population deviation requires a qualitative increase in time (and resources) expended. A further consequence of this is to make it harder for citizen organizations effectively to participate.

Second, there is something anomalous in the requirement of zero population deviation among the congressional districts within a state at the same time as there are huge interstate differences in the number of individuals in a congressional district. For example, the single district in Wyoming has an official count of 455,975 persons, but the average congressional district is several hundred times larger.

Third, even in equal population districts there is a substantial disparity in the number of persons who are citizens, as well as in the ratio between the district with the largest number of voters and the smallest.

Fourth, it is at the least peculiar to insist upon honoring the "one person, one vote" standard at zero population deviation in light of the acknowledged inaccuracy of the census, both overall and specifically among poor people and people of color.

Fifth, with congressional districts in the range of a half million persons, there can be no credible argument that deviations among districts within a state of as many as several thousand persons would have substantial statistical or political consequence for the equal weight given to each individual's vote.

Sixth, driving to zero population deviation not only results in peculiarly shaped districts, it requires a near absolute disregard for any semblance of community.

None of this is to quarrel with the requirement of equally weighted votes nor is it an argument to return to the pre-*Baker* era. However, the standards applied to legislative and local districting, as per the Charter is true for the City Council, would suffice, such as accepting deviations of plus or minus a small statistically insignificant percent from the mean when (1) uniformly applied, (2) done without implicating the protection guaranteed by the Voting Rights Act, and (3) done for the purpose of maintaining communities. The governing case, *Karcher v. Dagget* (1982), would seem to permit application of these principles. However, rather than be subjected to challenge for a deviation of a percentage point (or less), those who do redistricting find it prudent to go to zero population deviation, regardless of its consequences, costs, and foolishness. The courts would do well to send a more sensible message.

"Who"

Incumbents versus the Protected Classes They Represent

The voting Rights Act protects the rights of communities of persons from the "protected classes." Too often, however, this has come to mean protecting the rights of incumbents from these communities. While there is an argument to be made as to the importance of selecting candidates from among the members of these communities,[11] it is not the intent of the Act. Indeed, in too many cases the interest of incumbents has been a factor impeding communities gaining enhanced opportunities. For example, the political leaders of the Hispanic community in the Bronx supported creating three safer (for them) Hispanic seats, while the City Districting Commission plan adopted four. While unsuccessful with the Commission, they were able to convince their legislative colleagues to craft five (rather than the possible six) Assembly seats in the Bronx. And in Manhattan, an incumbent Council member sought to maximize the percentage of African-Americans in "her" district, at the consequence of reducing the possibility of crafting a second African-American majority district in the borough. Of course, incumbent protection is not limited to "minority" communities; and, in fact, after honoring the strictures of the Voting Rights Act, attention to issues of incumbency is not precluded.

Conflict Among Protected Classes

New York is unique it its inclusion of sizable populations of three "protected classes": per the 1990 census, non-Hispanic Blacks represent 25.2 percent of the population, Hispanics 24.4 percent, and non-Hispanic Asians 6.7 percent (The Voting Age Population (VAP) figures are 23.4 percent, 22.0 percent, and 6.7 percent, respectively.) While non-Hispanic whites have become a minority of the population by 1990, they remained a majority of the city's electorate, representing an estimated 56 percent of those who voted in the 1989 elections.[12]

Given these demographic facts and the facts of geography noted earlier, the work of the Commission involved less issues of "minority" vs. "majority" than divisions between and among "minority" groups.[13] As noted earlier, while African-Americans and Hispanics constitute about the same number of people, the greater dispersal of the latter made it impossible to craft as many Hispanic majority districts as African-American. So long as redistricting is understood as a zero sum game the tension between the two groups will continue. In a paper prepared for a Harvard University conference on African-American-Hispanic relations, Charles Kamaski, vice-president for research at La Raza, wrote:

> [W]e assumed for a long time that because African-Americans have gone through the

[11]See, for example, Reed (1992).

[12]Mollenkopf (1992), Table 4.1.

[13]The Bronx Democratic machine and its appointee to the Commission argued for dividing the six districts in the county evenly, with "whites" keeping three districts despite the fact that they constituted less than a third of the population. This claim was dismissed, if not without some political turmoil and the loss of that member's vote for the Commission's plan.

> kind of searing discrimination—some would argue worse, some would argue not as bad as what Latinos have gone through—that they naturally would be more sympathetic and receptive to the kinds of concerns and grievances Latinos have. That was an assumption we've found was not true.

In his paper for the same conference, Milton Morris, director of research for the Joint Center for Political and Economic Studies, wrote:

> The Hispanic community is, compared to blacks, a relative newcomer to this whole effort. So it is logical that there should be greater representation in our case than in theirs. It's just the reality of our history.

And, perhaps appropriately, the last word (here) on this should be left to a New Yorker. Ruben Franco, then president, Puerto Rican Legal Defense and Education Fund (PRLDEF) and later an unsuccessful candidate in the new tri-county congressional district, wrote, "When we were going for the crumbs, we were bickering. Now we're for the big stuff and we're fighting".[14]

OTHER GROUPS

Considering issues that go beyond the Voting Rights Act raises whether other population groups should be given attention when crafting legislative lines. In New York, members of the gay and lesbian community argued that they were a community, similar to those protected by the Voting Rights Act, who suffered discrimination and deserved representation. This was an argument that the Commission accepted and after addressing the areas of "minority" population concentrations, the Commission crafted a district which elected an openly gay candidate.[15] Other groups sought representation as well: some argued for class-based districts, and others for attention to gender.

CONCLUSION

If this "big stuff" is power for individuals, whether people of color or not, then not only is it a zero sum game, it is politics as usual. The community benefits which the Voting Rights Act seeks to guarantee are matters of more substance. Those, such as Thernstrom[16], who challenge the post-1982 implementation of the Voting Rights as race-based, ignore that the Act is remedy to the consequences of housing segregation and racial bloc voting not their cause. On the other hand, Guinier is correct in noting that, "[V]oting rights case law…[has] accepted as its premise the fact that people of different races often lived and

[14]These excerpts are from Morris (1991).

[15]As census data do not identify gays and lesbians, the community marshaled an impressive array of ancillary data to make their case. These included maps showing the electoral success of previous gay and lesbian candidates, the location of community "institutions" (e.g., book stores, social service agencies, bars and bath houses), and the residences (by zip code) of contributors to gay and lesbian causes

[16]Thernstrom (1987).

voted differently from each other. Rather than insisting that such separateness and difference be eradicated…the Voting Rights Act model of racial justice recognized racial difference."[17]

A concern expressed by many critics, both nationally and in the city, of the current stage of implementation of the Voting Rights Act is that the race-conscious basis of crafting districts would lead to "Balkanization" of the polity. While the current City Council has been in office for only a few years, to date this seems not to be the case. Perhaps in only a single instance was race the fracture line in a divided vote. More important, it seems, has been geography. For example, in a decision as to the siting of a major recycling facility, all but one of the votes against were cast by those members (African-American, Hispanic, and white) whose districts were closest to the proposed plant, while all the votes for it were cast by those members (African-American, Hispanic, and white) whose districts were farthest away. This is not to say that the expanded "minority" presence on the City Council has had no effect. It seems clear, for example, that the majority support for a Civilian Review Board (of police misconduct) had much to do with the increase in "minority" members of the Council.[18]

John Lewis, now a congressman from Georgia, whose heroism at Selma and elsewhere in the civil rights movement gives him unique standing, once again offers a vision for the future:

> The goal of the struggle for the right to vote was to create an interracial democracy in America. It was not to create separate enclaves or townships. The Voting Rights Act should lead to a climate in which people of color will have an opportunity to represent not only African-Americans, but also Hispanic Americans and all Americans.[19]

[17]Guinier (1991a).

[18]Beyond the scope of what we can discuss here are those "third stage" issues that Guinier has so cogently addressed. In a sense, it is an achievement of note that we must now address issues beyond access to the polling booth (stage 1) and equality *of votes (stage 2).* (Guinier, 1991a, b, 1992)

[19]Cited in R. Pear (1992)

VOTING RIGHTS ACT OF 1965

(as amended through 1992)

AN ACT To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be known as the "Voting Rights Act of 1965".

TITLE I—VOTING RIGHTS

SEC. 2. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b). 42 U.S.C. 1973

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

SEC. 3. (a) Whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal examiners by the Director of the Office of Personnel Management in accordance with section 6 to serve for such period of time for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such examiners is necessary to enforce such voting guarantees or (2) as part of any final judgment if the court finds that violations of the fourteenth or fifteenth amend- 42 U.S.C. 1973a

ment justifying equitable relief have occurred in such State or subdivision: *Provided*, That the court need not authorize the appointment of examiners if any incidents of denial or abridgement of the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(b) If in a proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), it shall suspend the use of tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary.

(c) If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2): *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

SEC. 4. (a)(1) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action—

42 U.S.C. 1973b

(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2);

(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice

challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

(C) no Federal examiners under this Act have been assigned to such State or political subdivision;

(D) such State or political subdivision and all governmental units within its territory have complied with section 5 of this Act, including compliance with the requirement that no change covered by section 5 has been enforced without preclearance under section 5, and have repealed all changes covered by section 5 to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 5, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 5, and no such submissions or declaratory judgment actions are pending; and

(F) such State or political subdivision and all governmental units within its territory—

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

(ii) have engaged in other constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under this Act; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may as of right intervene at any stage in such action.

(5) An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision, or if, after the issuance of such declaratory judgment, a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds.

(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing in such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of title 28 of the United States Code.

(7) The Congress shall reconsider the provisions of this section at the end of the fifteen-year period following the effective date of the amendments made by the Voting Rights Act Amendments of 1982.

(8) The provisions of this section shall expire at the end of the twenty-five year period following the effective date of the amendments made by the Voting Rights Act Amendments of 1982.

(9) Nothing in this section shall prohibit the Attorney General from consenting to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of section 4(a)(1). Any aggrieved party may as of right intervene at any stage in such action.

(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous sentence, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e)(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

(f)(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens

are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guartantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under section 4(c), the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to section 4(b), the term "test or device", as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of section 4(a) provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

42 U.S.C. 1973c

SEC. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall

enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

42 U.S.C. 1973d

SEC. 6. Whenever (a) a court has authorized the appointment of examiners pursuant to the provisions of section 3(a), or (b) unless a declaratory judgment has been rendered under section 4(a), the

Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 4(b) that (1) he has received complaints in writing from twenty or more residents of such political subdivision alleging that they have been denied the right to vote under color of law on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and that he believes such complaints to be meritorious, or (2) that in his judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to him to be reasonably attributable to violations of the fourteenth or fifteenth amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the fourteenth or fifteenth amendment), the appointment of examiners is otherwise necessary to enforce the guarantees of the fourteenth or fifteenth amendment, the Director of the Office of Personnel Management shall appoint as many examiners for such subdivision as the Director may deem appropriate to prepare and maintain lists of persons eligible to vote in Federal, State, and local elections. Such examiners, hearing officers provided for in section 9(a), and other persons deemed necessary by the Director of the Office of Personnel Management to carry out the provisions and purposes of this Act shall be appointed, compensated, and separated without regard to the provisions of any statute administered by the Director of the Office of Personnel Management, and service under this Act shall not be considered employment for the purposes of any statute administered by the Director of the Office of Personnel Management, except the provisions of section 9 of the Act of August 2, 1939, as amended (5 U.S.C. 7324), prohibiting partisan political activity: *Provided*, That the Director of the Office of Personnel Management is authorized, after consulting the head of the appropriate department or agency, to designate suitable persons in the official service of the United States, with their consent, to serve in these positions. Examiners and hearing officers shall have the power to administer oaths.

42 U.S.C. 1973e

SEC. 7. (a) The examiners for each political subdivision shall, at such places as theDirector of the Office of Personnel Management shall by regulation designate, examine applicants concerning their qualifications for voting. An application to an examiner shall be in such form as the Director of the Office of Personnel Management may require and shall contain allegations that the applicant is not otherwise registered to vote.

(b) Any person whom the examiner finds, in accordance with instructions received under section 9(b), to have the qualifications prescribed by State law not inconsistent with the Constitution and laws of the United States shall promptly be placed on a list of eligible voters. A challenge to such listing may be made in accordance with section 9(a) and shall not be the basis for a prosecution under section 12 of this Act. The examiner shall certify and transmit such list, and any supplements as appropriate, at least once a month, to the offices of the appropriate election officials, with copies to the Attorney General and the attorney general of the State, and any such lists and supplements thereto transmitted during the month shall be available for public inspection on the last business day of the month and in any event not later than the forty-fifth day prior to any election. The appropriate State or local election official shall place such names on the official voting list. Any person whose name appears on the examiner's list shall be entitled and allowed to vote in the election district of his residence unless and until the appropriate election officials shall have been notified that such person has been removed from such list in accordance with subsection (d): *Provided*, That no person shall be entitled to vote in any election by virtue of this Act unless his name shall have been certified and transmitted on such a list to the offices of the appropriate election officials at least forty-five days prior to such election.

(c) The examiner shall issue to each person whose name appears on such a list a certificate evidencing his eligibility to vote.

(d) A person whose name appears on such a list shall be removed therefrom by an examiner if (1) such person has been successfully challenged in accordance with the procedure prescribed in section 9, or (2) he has been determined by an examiner to have lost his eligibility to vote under State law not inconsistent with the Constitution and the laws of the United States.

42 U.S.C. 1973f

SEC. 8. Whenever an examiner is serving under this Act in any political subdivision, the Director of the Office of Personnel Management may assign, at the request of the Attorney General, one or more persons, who may be officers of the United States, (1) to enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote, and (2) to enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated. Such persons so assigned shall report to an examiner appointed for such political subdivision, to the Attorney General, and if the appointement of examiners has been authorized pursuant to section 3(a), to the court.

42 U.S.C. 1973g

SEC. 9. (a) Any challenge to a listing on an eligibility list prepared by an examiner shall be heard and determined by a hearing officer appointed by and responsible to the Director of the Office of Personnel Management and under such rules as the Director of the Office of Personnel Management shall by regulation prescribe.

Such challenge shall be entertained only if filed at such office within the State as the Director of the Office of Personnel Management shall by regulation designate, and within ten days after the listing of the challenged person is made available for public inspection, and if supported by (1) the affidavits of at least two persons having personal knowledge of the facts constituting grounds for the challenge, and (2) a certification that a copy of the challenge and affidavits have been served by mail or in person upon the person challenged at his place of residence set out in the application. Such challenge shall be determined within fifteen days after it has been filed. A petition for review of the decision of the hearing office may be filed in the United States court of appeals for the circuit in which the person challenged resides within fifteen days after service of such decision by mail on the person petitioning for review but no decision of a hearing officer shall be reversed unless clearly erroneous. Any person listed shall be entitled and allowed to vote pending final determination by the hearing officer and by the court.

(b) The times, places, procedures, and form for application and listing pursuant to this Act and removals from the eligibility lists shall be prescribed by regulations promulgated by the Director of the Office of Personnel Management and the Director of the Office of Personnel Management shall, after consultation with the Attorney General, instruct examiners concerning applicable State law not inconsistent with the Constitution and laws of the United States with respect to (1) the qualifications required for listing, and (2) loss of eligibility to vote.

(c) Upon the request of the applicant or the challenger or on the Director's own motion the Director of the Office of Personnel Management shall have the power to require by subpoena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter pending before it under the authority of this section. In case of contumacy or refusal to obey a subpoena, any district court of the United States or the United States court of any territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or is domiciled or transacts business, or has appointed an agent for receipt of service of process, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Director of the Office of Personnel Management or a hearing officer, there to produce pertinent, relevant, and nonpriviledged documentary evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such

order of the court may be punished by said court as a contempt thereof.

SEC. 10. (a) The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting. 42 U.S.C. 1973h

(b) In the exercise of the powers of Congress under section 5 of the fourteenth amendment, section 2 of the fifteenth amendment and section 2 of the twenty-fourth amendment, the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) and the purpose of this section.

(c) The district courts of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

SEC. 11. (a) No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this Act or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote. 42 U.S.C. 1973i

(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e).

(c) Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for

the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(e)(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(3) As used in this subsection, the term "votes more than once" does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 202 of this Act, to the extent two ballots are not cast for an election to the same candidacy or office.

42 U.S.C. 1973j

SEC. 12. (a) Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, 7, or 10 or shall violate section 11(a), shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) Whoever, within a year following an election in a political subdivision in which an examiner has been appointed (1) destroys, defaces, mutilates, or otherwise alters the marking of a paper ballot which has been cast in such election, or (2) alters any official

record of voting in such election tabulated from a voting machine or otherwise, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(c) Whoever conspires to violate the provisions of subsection (a) or (b) of this section, or interferes with any right secured by section 2, 3, 4, 5, 7, 10, or 11(a) shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(d) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes.

(e) Whenever in any political subdivision in which there are examiners appointed pursuant to this Act any persons allege to such an examiner within forty-eight hours after the closing of the polls that notwithstanding (1) their listing under this Act or registration by an appropriate election official and (2) their eligibility to vote, they have not been permitted to vote in such election, the examiner shall forthwith notify the Attorney General if such allegations in his opinion appear to be well founded. Upon receipt of such notification the Attorney General may forthwith file with the district court an application for an order providing for the marking, casting, and counting of the ballots of such persons and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto. The district court shall hear and determine such matters immediately after the filing of such application. The remedy provided in this subsection shall not preclude any remedy available under State or Federal law.

(f) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.

SEC. 13. Listing procedures shall be terminated in any political subdivision of any State (a) with respect to examiners appointed pursuant to clause (b) of section 6 whenever the Attorney General notifies the Director of the Office of Personnel Management, or whenever the District Court for the District of Columbia determines in an action for declaratory judgment brought by any political subdi- 42 U.S.C. 1973k

vision with respect to which the Director of the Census has determined that more than 50 per centum of the nonwhite persons of voting age residing therein are registered to vote, (1) that all persons listed by an examiner for such subdivision have been placed on the appropriate voting registration roll, and (2) that there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) in such subdivision, and (b), with respect to examiners appointed pursuant to section 3(a), upon order of the authorizing court. A political subdivision may petition the Attorney General for the termination of listing procedures under clause (a) of this section, and may petition the Attorney General to request the Director of the Census to take such survey or census as may be appropriate for the making of the determination provided for in this section. The District Court for the District of Columbia shall have jurisdiction to require such survey or census to be made by the Director of the Census and it shall require him to do so if it deems the Attorney General's refusal to request such survey or census to be arbitrary or unreasonable.

42 U.S.C. 1973l

SEC. 14. (a) All cases of criminal contempt arising under the provisions of this Act shall be governed by section 151 of the Civil Rights Act of 1957 (42 U.S.C. 1995).

(b) No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.

(c)(1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(3) The term "language minorities" or "language minority group" means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

(d) In any action for a declaratory judgment brought pursuant to section 4 or section 5 or this Act, subpoenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: *Provided*, That no writ of subpoena shall issue for witnesses without the District of Columbia at a greater distance than one hundred miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

(e) In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

SEC. 15. Section 2004 of the Revised Statutes (42 U.S.C. 1971), as amended by section 131 of the Civil Rights Act of 1957 (71 Stat. 637), and amended by section 601 of the Civil Rights Act of 1960 (74 Stat. 90), and as further amended by section 101 of the Civil Rights Act of 1964 (78 Stat. 241), is further amended as follows:

(a) Delete the word "Federal" wherever it appears in subsections (a) and (c);

(b) Repeal subsection (f) and designate the present subsections (g) and (h) as (f) and (g), respectively.

SEC. 16. The Attorney General and the Secretary of Defense, jointly, shall make a full and complete study to determine whether, under the laws or practices of any State or States, there are preconditions to voting, which might tend to result in discrimination against citizens serving in the Armed Forces of the United States seeking to vote. Such officials shall, jointly, make a report to the Congress not later than June 30, 1966, containing the results of such study, together with a list of any States in which such preconditions exist, and shall include in such report such recommendations for legislation as they deem advisable to prevent discrimination in voting against citizens serving in the Armed Forces of the United States.

SEC. 17. Nothing in this Act shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision. 42 U.S.C. 1973n

SEC. 18. There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act. 42 U.S.C. 1973o

SEC. 19. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby. 42 U.S.C. 1973p

TITLE II—SUPPLEMENTAL PROVISIONS

APPLICATION OF PROHIBITION TO OTHER STATES

42 U.S.C. 1973aa

SEC. 201. (a) No citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.

(b) As used in this section, the term "test or device" means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

RESIDENCE REQUIREMENTS FOR VOTING

42 U.S.C. 1973aa-1

SEC. 202. (a) The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—

(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;

(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

(3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution;

(4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;

(5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and

(6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidental elections.

(b) Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

(c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or political subdivision at the time of such election, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice president, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

(e) If any citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any election for President and Vice President has begun residence in such State or political subdivision after the thirtieth day next preceding such election and, for that reason, does not satisfy the registration requirements of such State or political subdivision he shall be allowed to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election, (1) in person in the State or political subdivision in which he resided immediately prior to his removal if he has satisfied, as of the date of his change of residence, the requirements to vote in that State or political subdivision, or (2) by absentee ballot in the State or political subdivision in which he resided immediately prior to his removal if he satisfies, but for his nonresident status and the reason for his absence,

the requirements for absentee voting in that State or political subdivision.

(f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of registration that does not include a provision for absentee registration.

(g) Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein.

(h) The term "State" as used in this section includes each of the several States and the District of Columbia.

(i) The provisions of section 11(c) shall apply to false registration, and other fraudulent acts and conspiracies, committed under this section.

BILINGUAL ELECTION REQUIREMENTS

42 U.S.C. 1973aa-1a

SEC. 203. (a) The Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.

(b) BILINGUAL VOTING MATERIALS REQUIREMENTS—

(1) GENERALLY.—Before August 6, 2007, no covered State or political subdivision shall provide voting materials only in the English language.

(2) COVERED STATES AND POLITICAL SUBDIVISIONS.—

(A) GENERALLY.—A State or political subdivision is a covered State or political subdivision for the purposes of this subsection if the Director of the Census determines, based on census data, that—

(i)(I) more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and are limited-English proficient;

(II) more than 10,000 of the citizens of voting age of such political subdivision are members of a single language minority and are limited-English proficient; or

(III) in the case of a political subdivision that contains all or any part of an Indian reservation, more than 5 percent of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are limited-English proficient; and

(ii) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.

(B) EXCEPTION.—The prohibitions of this subsection do not apply in any political subdivision that has less than 5 percent voting age limited-English proficient citizens of each language minority which comprises over 5 percent of the statewide limited-English proficient population of voting age citizens, unless the political subdivision is a covered political subdivision independently from its State.

(3) DEFINITIONS.—As used in this section—

(A) the term "voting materials" means registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots;

(B) the term "limited-English proficient" means unable to speak or understand English adequately enough to participate in the electoral process;

(C) the term "Indian reservation" means any area that is an American Indian or Alaska Native area, as defined by the Census Bureau for the purposes of the 1990 decennial census;

(D) the term "citizens" means citizens of the United States; and

(E) the term "illiteracy" means the failure to complete the 5th primary grade.

(4) SPECIAL RULE.—The determinations of the Director of the Census under this subsection shall be effective upon publication in the Federal Register and shall not be subject to review in any court.

(c) Whenever any State or political subdivision subject to the prohibition of subsection (b) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

(d) Any State or political subdivision subject to the prohibition of subsection (b) of this section, which seeks to provide English-only registration or voting materials or information, including ballots, may file an action against the United States in the United States District Court for a declaratory judgment permitting such provision. The court shall grant the requested relief if it determines that the illiteracy rate of the applicable language minority group within the State or political subdivision is equal to or less than the national illiteracy rate.

(e) For purposes of this section, the term "language minorities" or "language minority group" means persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.

JUDICIAL RELIEF

42 U.S.C. 1973aa-2 SEC. 204. Whenever the Attorney General has reason to believe that a State or political subdivision (a) has enacted or is seeking to administer any test or device as a prerequisite to voting in violation of the prohibition contained in section 201, or (b) undertakes to deny the right to vote in any election in violation of section 202, or 203, he may institute for the United States, or in the name of the United States, an action in a district court of the United States, in accordance with sections 1391 through 1393 of title 28, United States Code, for a restraining order, a preliminary or permanent injunction, or such other order as he deems appropriate. An action under this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall be to the Supreme Court.

PENALTY

42 U.S.C. 1973aa-3 SEC. 205. Whoever shall deprive or attempt to deprive any person of any right secured by section 201, 202, or 203 of this title shall be fined not more than $5,000, or imprisoned not more than five years, or both.

SEPARABILITY

42 U.S.C. 1973aa-4 SEC. 206. If any provision of this Act or the application of any provision thereof to any person or circumstance is judicially determined to be invalid, the remainder of this Act or the application of such provision to other persons or circumstances shall not be affected by such determination.

42 U.S.C. 1973aa-5 SEC. 207. (a) Congress hereby directs the Director of the Census forthwith to conduct a survey to compile registration and voting statistics: (i) in every State or political subdivision with respect to which the prohibitions of section 4(a) of the Voting Rights Act of 1965 are in effect, for every statewide general election for Members of the United States House of Representatives after January 1, 1974; and (ii) in every State or political subdivision for any election designated by the United States Commission on Civil Rights. Such surveys shall only include a count of citizens of voting age, race or color, and national origin, and a determination of the extent to which such persons are registered to vote and have voted in the elections surveyed.

(b) In any survey under subsection (a) of this section no person shall be compelled to disclose his race, color, national origin, political party affiliation, or how he voted (or the reasons therefor), nor shall any penalty be imposed for his failure or refusal to make such disclosures. Every person interrogated orally, by written survey or questionnaire, or by any other means with respect to such information shall be fully advised of his right to fail or refuse to furnish such information.

(c) The Director of the Census shall, at the earliest practicable time, report to the Congress the results of every survey conducted pursuant to the provisions of subsection (a) of this section.

(d) The provisions of section 9 and chapter 7 of title 13 of the United States Code shall apply to any survey, collection, or compilation of registration and voting statistics carried out under subsection (a) of this section.

VOTING ASSISTANCE

SEC. 208. Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union. 42 U.S.C. 1973aa-6

TITLE III—EIGHTEEN-YEAR-OLD VOTING AGE

ENFORCEMENT OF TWENTY-SIXTH AMENDMENT

SEC. 301. (a)(1) The Attorney General is directed to institute, in the name of the United States, such actions against States or political subdivisions, including actions for injunctive relief, as he may determine to be necessary to implement the twenty-sixth article of amendment to the Constitution of the United States. 42 U.S.C. 1973bb

(2) The district courts of the United States shall have jurisdiction of proceedings instituted under this title, which shall be heard and determined by a court of three judges in accordance with section 2284 of title 28 of the United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

(b) Whoever shall deny or attempt to deny any person of any right secured by the twenty-sixth article of amendment to the Constitution of the United States shall be fined not more than $5,000 or imprisoned not more than five years, or both.

DEFINITION

SEC. 302. As used in this title, the term "State" includes the District of Columbia. 42 U.S.C. 1973bb-1

[Note: As enacted, the Voting Rights Act, in Sections 3, 6, 7, 8, 9, and 13, contains references to the United States Civil Service Commission. Because the functions of the Civil Service Commission have been transferred to the Director of the Office of Personnel Management, references in the Act to the Commission have been changed to references to the Director.]

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PART 51—PROCEDURES FOR THE ADMINISTRATION OF SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED

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AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510; and 42 U.S.C. 1973c.

SOURCE: 52 FR 490, Jan. 6, 1987, unless otherwise noted.

Subpart A—General Provisions

§51.1 Purpose.

(a) Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, prohibits the enforcement in any jurisdiction covered by section 4(b) of the Act, 42 U.S.C. 1973b(b), of any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date used to determine coverage, until either:

(1) A declaratory judgment is obtained from the U.S. District Court for the District of Columbia that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, or

(2) It has been submitted to the Attorney General and the Attorney General has interposed no objection within a 60-day period following submission.

(b) In order to make clear the responsibilities of the Attorney General under section 5 and the interpretation of the Attorney General of the responsibility imposed on others under this section, the procedures in this part have been established to govern the administration of section 5.

§51.2 Definitions.

As used in this part—

Act means the Voting Rights Act of 1965, 79 Stat. 437, as amended by the Civil Rights Act of 1968, 82 Stat. 73, the Voting Rights Act Amendments of 1970, 84 Stat. 314, the District of Columbia Delegate Act, 84 Stat. 853, the Voting Rights Act Amendments of 1975, 89 Stat. 400, and the Voting Rights Act Amendments of 1982, 96 Stat. 131, 42 U.S.C. 1973 *et seq.* Section numbers, such as "section 14(c)(3)," refer to sections of the Act.

Attorney General means the Attorney General of the United States or the delegate of the Attorney General.

Change affecting voting means any voting qualification, prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date used to determine coverage under section 4(b) and includes, *inter alia*, the examples given in §51.13.

Covered jurisdiction is used to refer to a State, where the determination referred to in §51.4 has been made on a statewide basis, and to a political subdivision, where the determination has not been made on a statewide basis.

Language minorities or *language minority group* is used, as defined in the Act, to refer to persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage. (Sections 14(c)(3) and 203(e)). See 28 CFR part 55, Interpretative Guidelines: Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups.

Political subdivision is used, as defined in the Act, to refer to "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." (Section 14(c)(2)).

Preclearance is used to refer to the obtaining of the declaratory judgment described in section 5, to the failure of the Attorney General to interpose an objection pursuant to section 5, or to the withdrawal of an objection by the Attorney General pursuant to §51.48(b).

Submission is used to refer to the written presentation to the Attorney General by an appropriate official of any change affecting voting.

Submitting authority means the jurisdiction on whose behalf a submission is made.

Vote and *voting* are used, as defined in the Act, to include "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." (Section 14(c)(1)).

§51.3 Delegation of authority.

The responsibility and authority for determinations under section 5 have been delegated by the Attorney General to the Assistant Attorney General, Civil Rights Division. With the exception of objections and decisions following the reconsideration of objections, the Chief of the Voting Section is authorized to act on behalf of the Assistant Attorney General.

§51.4 Date used to determine coverage; list of covered jurisdictions.

(a) The requirement of section 5 takes effect upon publication in the FEDERAL REGISTER of the requisite determinations of the Director of the Census and the Attorney General under section 4(b). These determinations are not reviewable in any court. (Section 4(b)).

(b) Section 5 requires the preclearance of changes affecting voting made since the date used for the determination of coverage. For each covered jurisdiction that date is one of the following: November 1, 1964; November 1, 1968; or November 1, 1972.

(c) The appendix to this part contains a list of covered jurisdictions, together with the applicable date used to determine coverage and the FEDERAL REGISTER citation for the determination of coverage.

§ 51.5 Termination of coverage (bail-out).

A covered jurisdiction or a political subdivision of a covered State may terminate the application of section 5 (or bail out) by obtaining the declaratory judgment described in section 4(a) of the Act.

§ 51.6 Political subunits.

All political subunits within a covered jurisdiction (e.g., counties, cities, school districts) are subject to the requirement of section 5.

§ 51.7 Political parties.

Certain activities of political parties are subject to the preclearance requirement of section 5. A change affecting voting effected by a political party is subject to the preclearance requirement:

(a) If the change relates to a public electoral function of the party and

(b) If the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5.

For example, changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to the preclearance requirement. Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of section 5. Where appropriate the term "jurisdiction" (but not "covered jurisdiction") includes political parties.

§ 51.8 Section 3 coverage.

Under section 3(c) of the Act, a court in voting rights litigation can order as relief that a jurisdiction not subject to the preclearance requirement of section 5 preclear its voting changes by submitting them either to the court or to the Attorney General. Where a jurisdiction is required under section 3(c) to preclear its voting changes, and it elects to submit the proposed changes to the Attorney General for preclearance, the procedures in this part will apply.

§ 51.9 Computation of time.

(a) The Attorney General shall have 60 days in which to interpose an objection to a submitted change affecting voting.

(b) Except as specified in §§ 51.37, 51.39, and 51.42 the 60-day period shall commence upon receipt by the Department of Justice of a submission.

(c) The 60-day period shall mean 60 calendar days, with the day of receipt of the submission not counted. If the final day of the period should fall on a Saturday, Sunday, any day designated as a holiday by the President or Congress of the United States, or any other day that is not a day of regular business for the Department of Justice, the Attorney General shall have until the close of the next full business day in which to interpose an objection. The date of the Attorney General's response shall be the date on which it is mailed to the submitting authority.

§ 51.10 Requirement of action for declaratory judgment or submission to the Attorney General.

Section 5 requires that, prior to enforcement of any change affecting voting, the jurisdiction that has enacted or seeks to administer the change must either:

(a) Obtain a judicial determination from the U.S. District Court for the District of Columbia that denial or abridgment of the right to vote on account of race, color, or membership in a language minority group is not the purpose and will not be the effect of the change or

(b) Make to the Attorney General a proper submission of the change to which no objection is interposed.

It is unlawful to enforce a change affecting voting without obtaining preclearance under section 5. The obligation to obtain such preclearance is not relieved by unlawful enforcement.

[52 FR 490, Jan. 6, 1987; 52 FR 2648, Jan. 23, 1987]

§ 51.11 Right to bring suit.

Submission to the Attorney General does not affect the right of the submitting authority to bring an action in the U.S. District Court for the District of Columbia for a declaratory judgment

that the change affecting voting does not have the prohibited discriminatory purpose or effect.

§ 51.12 Scope of requirement.

Any change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the section 5 preclearance requirement.

§ 51.13 Examples of changes.

Changes affecting voting include, but are not limited to, the following examples:

(a) Any change in qualifications or eligibility for voting.

(b) Any change concerning registration, balloting, and the counting of votes and any change concerning publicity for or assistance in registration or voting.

(c) Any change with respect to the use of a language other than English in any aspect of the electoral process.

(d) Any change in the boundaries of voting precincts or in the location of polling places.

(e) Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections).

(f) Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system).

(g) Any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices.

(h) Any change in the eligibility and qualification procedures for independent candidates.

(i) Any change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment or staggering the terms of offices).

(j) Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum.

(k) Any change affecting the right or ability of persons to participate in political campaigns which is effected by a jurisdiction subject to the requirement of section 5.

§ 51.14 Recurrent practices.

Where a jurisdiction implements a practice or procedure periodically or upon certain established contingencies, a change occurs:

(a) The first time such a practice or procedure is implemented by the jurisdiction,

(b) When the manner in which such a practice or procedure is implemented by the jurisdiction is changed, or

(c) When the rules for determining when such a practice or procedure will be implemented are changed.

The failure of the Attorney General to object to a recurrent practice or procedure constitutes preclearance of the future use of the practice or procedure if its recurrent nature is clearly stated or described in the submission or is expressly recognized in the final response of the Attorney General on the merits of the submission.

§ 51.15 Enabling legislation and contingent or nonuniform requirements.

(a) With respect to legislation (1) that enables or permits the State or its political subunits to institute a voting change or (2) that requires or enables the State or its political sub-units to institute a voting change upon some future event or if they satisfy certain criteria, the failure of the Attorney General to interpose an objection does not exempt from the preclearance requirement the implementation of the particular voting change that is enabled, permitted, or required, unless that implementation is explicitly included and described in the submission of such parent legislation.

(b) For example, such legislation includes—

(1) Legislation authorizing counties, cities, school districts, or agencies or

officials of the State to institute any of the changes described in § 51.13.

(2) Legislation requiring a political subunit that chooses a certain form of government to follow specified election procedures;

(3) Legislation requiring or authorizing political subunits of a certain size or a certain location to institute specified changes;

(4) Legislation requiring a political subunit to follow certain practices or procedures unless the subunit's charter or ordinances specify to the contrary.

§ 51.16 Distinction between changes in procedure and changes in substance.

The failure of the Attorney General to interpose an objection to a procedure for instituting a change affecting voting does not exempt the substantive change from the preclearance requirement. For example, if the procedure for the approval of an annexation is changed from city council approval to approval in a referendum, the preclearance of the new procedure does not exempt an annexation accomplished under the new procedure from the preclearance requirement.

§ 51.17 Special elections.

(a) The conduct of a special election (e.g., an election to fill a vacancy; an initiative, referendum, or recall election; or a bond issue election) is subject to the preclearance requirement to the extent that the jurisdiction makes changes in the practices or procedures to be followed.

(b) Any discretionary setting of the date for a special election or scheduling of events leading up to or following a special election is subject to the preclearance requirement.

(c) A jurisdiction conducting a referendum election to ratify a change in a practice or procedure that affects voting may submit the change to be voted on at the same time that it submits any changes involved in the conduct of the referendum election. A jurisdiction wishing to receive preclearance for the change to be ratified should state clearly that such preclearance is being requested. See § 51.22 of this part.

§ 51.18 Court-ordered changes.

(a) *In general.* Changes affecting voting that are ordered by a Federal court are subject to the preclearance requirement of section 5 to the extent that they reflect the policy choices of the submitting authority.

(b) *Subsequent changes.* Where a court-ordered change is not itself subject to the preclearance requirement, subsequent changes necessitated by the court order but decided upon by the jurisdiction remain subject to preclearance. For example, voting precinct and polling place changes made necessary by a court-ordered redistricting plan are subject to section 5 review.

(c) *In emergencies.* A Federal court's authorization of the emergency interim use without preclearance of a voting change does not exempt from section 5 review any use of the practice not explicitly authorized by the court.

§ 51.19 Request for notification concerning voting litigation.

A jurisdiction subject to the preclearance requirement of section 5 that becomes involved in any litigation concerning voting is requested promptly to notify the Chief, Voting Section, Civil Rights Division, Department of Justice, P.O. Box 66128, Washington, DC 20035-6128. Such notification will not be considered a submission under section 5.

[52 FR 490, Jan. 6, 1987, as amended by Order 1214-87, 52 FR 33409, Sept. 3, 1987]

Subpart B—Procedures for Submission to the Attorney General

§ 51.20 Form of submissions.

(a) Submissions may be made in letter or any other written form.

(b) The Attorney General will accept certain machine readable data in the following forms of magnetic media: 3½" 1.4 megabyte MS-DOS formatted diskettes; 5¼" 1.2 megabyte MS-DOS formatted floppy disks; nine-track tape (1600/6250 BPI). Unless requested by the Attorney General, data provided on magnetic media need not be provided in hard copy.

(c) All magnetic media shall be clearly labelled with the following information:

(1) Submitting authority.

(2) Name, address, title, and telephone number of contact person.

(3) Date of submission cover letter.

(4) Statement identifying the voting change(s) involved in the submission.

The label shall be affixed to each magnetic medium, and the information included on the label shall also be contained in a documentation file on the magnetic medium. If the information identified above is provided as a disk operating system (DOS) file, it shall be formatted in a standard American Standard Code for Information Interchange (ASCII) character code, with a line feed or carriage return control character starting in position 80. If the information identified above is provided other than as DOS files, it shall be formatted as ASCII text (or Extended Binary Coded Decimal Interchange Code (EBCDIC) if IBM standard labels are used), 80 byte fixed record length, blocked in a multiple of 80 with a blocksize no larger than 32 kilobytes, and with no carriage return or line feed.

(d) Each magnetic medium (floppy disk or tape) provided must be accompanied by a printed description of its contents, including an identification by name and/or location of each data file that is contained on the medium, a detailed record layout for each such file, a record count for each such file, and a full description of the magnetic medium format.

(e) All data files shall be provided in a fixed record-length format using alphanumeric ASCII values. The first 50 records of each such file shall be printed on hard copy and shall be attached to the printed description of the file. Proprietary and/or commercial software system data files (e.g. SAS, SPSS, dBase, Lotus 1-2-3) and data files containing compressed data or binary data fields will not be accepted. Nine-track tapes shall be clearly marked with printed labels to indicate their density, and manner of labelling (ANSI, IBM, or unlabelled). The printed label shall also include the record count, the record length, the blocksize, the dataset name (DSN) if it is a labelled tape, and the file number of each file on the tape.

[52 FR 490, Jan. 6, 1987, as amended by Order No. 1536-91, 56 FR 51836, Oct. 16, 1991]

§ 51.21 Time of submissions.

Changes affecting voting should be submitted as soon as possible after they become final.

§ 51.22 Premature submissions.

The Attorney General will not consider on the merits:

(a) Any proposal for a change affecting voting submitted prior to final enactment or administrative decision or

(b) Any proposed change which has a direct bearing on another change affecting voting which has not received section 5 preclearance.

However, with respect to a change for which approval by referendum, a State or Federal court or a Federal agency is required, the Attorney General may make a determination concerning the change prior to such approval if the change is not subject to alteration in the final approving action and if all other action necessary for approval has been taken.

§ 51.23 Party and jurisdiction responsible for making submissions.

(a) Changes affecting voting shall be submitted by the chief legal officer or other appropriate official of the submitting authority or by any other authorized person on behalf of the submitting authority. When one or more counties or other political subunits within a State will be affected, the State may make a submission on their behalf. Where a State is covered as a whole, State legislation (except legislation of local applicability) or other changes undertaken or required by the State shall be submitted by the State.

(b) A change effected by a political party (see § 51.7) may be submitted by an appropriate official of the political party.

§ 51.24 Address for submissions.

(a) *Delivery by U.S. Postal Service.* Submissions sent to the Attorney General via the U.S. Postal Service shall be addressed to the Chief, Voting Section, Civil Rights Division, Department

of Justice, P.O. Box 66128, Washington, DC 20035-6128.

(b) *Delivery by other means.* Submissions sent to the Attorney General by carriers *other than* the U.S. Postal Service should be addressed or may be delivered to the Chief, Voting Section, Civil Rights Division, Department of Justice, 320 First Street, NW., room 818A, Washington, DC 20001.

(c) *Special marking.* The envelope and first page of the submission shall be clearly marked: Submission under section 5 of the Voting Rights Act.

[Order 1214-87, 52 FR 33409, Sept. 3, 1987, as amended by Order No. 1793-93, 58 FR 51225, Oct. 1, 1993]

§51.25 Withdrawal of submissions.

(a) A jurisdiction may withdraw a submission at any time prior to a final decision by the Attorney General. Notice of the withdrawal of a submission must be made in writing, addressed to the Chief, Voting Section, as specified in §51.24 of this part. The submission shall be deemed withdrawn upon receipt of the notice.

(b) Notice of withdrawals will be given to interested parties registered under §51.32.

[52 FR 490, Jan. 6, 1987, as amended by Order 1214-87, 52 FR 33409, Sept. 3, 1987]

Subpart C—Contents of Submissions

§51.26 General.

(a) The source of any information contained in a submission should be identified.

(b) Where an estimate is provided in lieu of more reliable statistics, the submission should identify the name, position, and qualifications of the person responsible for the estimate and should briefly describe the basis for the estimate.

(c) Submissions should be no longer than is necessary for the presentation of the appropriate information and materials.

(d) The Attorney General will not accept for review any submission that fails to describe the subject change in sufficient particularity to satisfy the minimum requirements of §51.27(c).

(e) A submitting authority that desires the Attorney General to consider any information supplied as part of an earlier submission may incorporate such information by reference by stating the date and subject matter of the earlier submission and identifying the relevant information.

(f) Where information requested by this subpart is relevant but not known or available, or is not applicable, the submission should so state.

(g) The following Office of Management and Budget control number under the Paperwork Reduction Act applies to the collection of information requirements contained in these Procedures: OMB No. 1190-0001 (expires February 28, 1994). See 5 CFR 1320.13.

[52 FR 490, Jan. 6, 1987, as amended by Order No. 1294-88, 53 FR 25327, July 6, 1988; Order No. 1498-91, 56 FR 26032, June 6, 1991]

§51.27 Required contents.

Each submission should contain the following information or documents to enable the Attorney General to make the required determination pursuant to section 5 with respect to the submitted change affecting voting:

(a) A copy of any ordinance, enactment, order, or regulation embodying a change affecting voting.

(b) A copy of any ordinance, enactment, order, or regulation embodying the voting practice that is proposed to be repealed, amended, or otherwise changed.

(c) If the change affecting voting either is not readily apparent on the face of the documents provided under paragraphs (a) and (b) of this section or is not embodied in a document, a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting.

(d) The name, title, address, and telephone number of the person making the submission.

(e) The name of the submitting authority and the name of the jurisdiction responsible for the change, if different.

(f) If the submission is not from a State or county, the name of the county and State in which the submitting authority is located.

(g) Identification of the person or body responsible for making the change and the mode of decision (e.g., act of State legislature, ordinance of city council, administrative decision by registrar).

(h) A statement identifying the statutory or other authority under which the jurisdiction undertakes the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change.

(i) The date of adoption of the change affecting voting.

(j) The date on which the change is to take effect.

(k) A statement that the change has not yet been enforced or administered, or an explanation of why such a statement cannot be made.

(l) Where the change will affect less than the entire jurisdiction, an explanation of the scope of the change.

(m) A statement of the reasons for the change.

(n) A statement of the anticipated effect of the change on members of racial or language minority groups.

(o) A statement identifying any past or pending litigation concerning the change or related voting practices.

(p) A statement that the prior practice has been precleared (with the date) or is not subject to the preclearance requirement and a statement that the procedure for the adoption of the change has been precleared (with the date) or is not subject to the preclearance requirement, or an explanation of why such statements cannot be made.

(q) For redistrictings and annexations: the items listed under §51.28 (a)(1) and (b)(1); for annexations only: the items listed under §51.28(c)(3).

(r) Other information that the Attorney General determines is required for an evaluation of the purpose or effect of the change. Such information may include items listed in §51.28 and is most likely to be needed with respect to redistrictings, annexations, and other complex changes. In the interest of time such information should be furnished with the initial submission relating to voting changes of this type. When such information is required, but not provided, the Attorney General shall notify the submitting authority in the manner provided in §51.37.

§51.28 Supplemental contents.

Review by the Attorney General will be facilitated if the following information, where pertinent, is provided in addition to that required by §51.27.

(a) *Demographic information.* (1) Total and voting age population of the affected area before and after the change, by race and language group. If such information is contained in publications of the U.S. Bureau of the Census, reference to the appropriate volume and table is sufficient.

(2) The number of registered voters for the affected area by voting precinct before and after the change, by race and language group.

(3) Any estimates of population, by race and language group, made in connection with the adoption of the change.

(4) Demographic data provided on magnetic media shall be based upon the Bureau of the Census Public Law 94-171 file unique block identity code of state, county, tract, and block.

(5) Demographic data on magnetic media that are provided in conjunction with a redistricting shall be contained in a table of equivalencies giving the census block to district assignments in the following format:

(i) Each census block record (including those with zero population) will be followed by one or more additional fields indicating the district assignment for the census block in one or more plans.

(ii) All district assignments in the plan fields shall be right justified and blank filled if the assignment is less than four characters.

(iii) The file structure shall be as follows:

Field	PL 94-171 reference name	Length	Data type
State	STATEFP	2	Numeric.
County	CNTY	3	Numeric.
Tract	TRACT/BNA	6	Alpha/Numeric.
Block	BLCK	4	Alpha/Numeric.

Field	PL 94-171 reference name	Length	Data type
Plan 1 District	User supplied	4	Alpha/Numeric.
Plan 2 District	User supplied	4	Alpha/Numeric.
Plan 3 District, etc.	.....	.....	
Plan n District	User supplied	4	Alpha/Numeric.

(iv) State and county shall be identified using the Federal Information Processing Standards (FIPS-55) code.

(v) Census tracts shall be left justified, and census blocks shall be left justified and blank filled if less than four characters.

(vi) Unused plan fields shall be blank filled.

(vii) In addition to the information identified in §51.20 (c) through (e), the documentation file accompanying the block level equivalency file shall contain the following information:

(A) The file structure.

(B) The total number of plans.

(C) For each plan field, an identification of the plan (e.g., state senate, congressional, county board, city council, school board) and its status or nature (e.g., plan currently in effect, adopted plan, alternative plan and sponsors).

(D) The number of districts in each plan field.

(E) Whether the plan field contains a complete or partial plan.

(F) Any additional information the jurisdiction deems relevant such as bill number, date of adoption, etc., and a listing of any modifications the submitting authority has made that alter the structure of the TIGER/line geographic file.

(b) *Maps.* Where any change is made that revises the constituency that elects any office or affects the boundaries of any geographic unit or units defined or employed for voting purposes (e.g., redistricting, annexation, change from district to at-large elections) or that changes voting precinct boundaries, polling place locations, or voter registration sites, maps in duplicate of the area to be affected, containing the following information:

(1) The prior and new boundaries of the voting unit or units.

(2) The prior and new boundaries of voting precincts.

(3) The location of racial and language minority groups.

(4) Any natural boundaries or geographical features that influenced the selection of boundaries of the prior or new units.

(5) The location of prior and new polling places.

(6) The location of prior and new voter registration sites.

(c) *Annexations.* For annexations, in addition to that information specified elsewhere, the following information:

(1) The present and expected future use of the annexed land (e.g., garden apartments, industrial park).

(2) An estimate of the expected population, by race and language group, when anticipated development, if any, is completed.

(3) A statement that all prior annexations subject to the preclearance requirement have been submitted for review, or a statement that identifies all annexations subject to the preclearance requirement that have not been submitted for review. See §51.61(b).

(d) *Election returns.* Where a change may affect the electoral influence of a racial or language minority group, returns of primary and general elections conducted by or in the jurisdiction, containing the following information:

(1) The name of each candidate.

(2) The race or language group of each candidate, if known.

(3) The position sought by each candidate.

(4) The number of votes received by each candidate, by voting precinct.

(5) The outcome of each contest.

(6) The number of registered voters, by race and language group, for each voting precinct for which election returns are furnished. Information with respect to elections held during the last ten years will normally be sufficient.

(7) Election related data containing any of the information described above that are provided on magnetic media shall conform to the requirements of §51.20 (b) through (e). Election related data that cannot be accurately presented in terms of census blocks may be identified by county and by precinct.

(e) *Language usage.* Where a change is made affecting the use of the language of a language minority group in the electoral process, information that will enable the Attorney General to determine whether the change is consistent with the minority language requirements of the Act. The Attorney General's interpretation of the minority language requirements of the Act is contained in Interpretative Guidelines: Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 CFR part 55.

(f) *Publicity and participation.* For submissions involving controversial or potentially controversial changes, evidence of public notice, of the opportunity for the public to be heard, and of the opportunity for interested parties to participate in the decision to adopt the proposed change and an account of the extent to which such participation, especially by minority group members, in fact took place. Examples of materials demonstrating public notice or participation include:

(1) Copies of newspaper articles discussing the proposed change.

(2) Copies of public notices that describe the proposed change and invite public comment or participation in hearings and statements regarding where such public notices appeared (e.g., newspaper, radio, or television, posted in public buildings, sent to identified individuals or groups).

(3) Minutes or accounts of public hearings concerning the proposed change.

(4) Statements, speeches, and other public communications concerning the proposed change.

(5) Copies of comments from the general public.

(6) Excerpts from legislative journals containing discussion of a submitted enactment, or other materials revealing its legislative purpose.

(g) *Availability of the submission.* (1) Copies of public notices that announce the submission to the Attorney General, inform the public that a complete duplicate copy of the submission is available for public inspection (e.g., at the county courthouse) and invite comments for the consideration of the Attorney General and statements regarding where such public notices appeared.

(2) Information demonstrating that the submitting authority, where a submission contains magnetic media, made the magnetic media available to be copied or, if so requested, made a hard copy of the data contained on the magnetic media available to be copied.

(h) *Minority group contacts.* For submissions from jurisdictions having a significant minority population, the names, addresses, telephone numbers, and organizational affiliation (if any) of racial or language minority group members residing in the jurisdiction who can be expected to be familiar with the proposed change or who have been active in the political process.

[52 FR 490, Jan. 6, 1987, as amended by Order No. 1536-91, 56 FR 51836, Oct. 16, 1991]

Subpart D—Communications From Individuals and Groups

§51.29 Communications concerning voting changes.

Any individual or group may send to the Attorney General information concerning a change affecting voting in a jurisdiction to which section 5 applies.

(a) Communications may be in the form of a letter stating the name, address, and telephone number of the individual or group, describing the alleged change affecting voting and setting forth evidence regarding whether the change has or does not have a discriminatory purpose or effect, or simply bringing to the attention of the Attorney General the fact that a voting change has occurred.

(b) The communications should be mailed to the Chief, Voting Section, Civil Rights Division, Department of Justice, P.O. Box 66128, Washington, DC 20035-6128. The envelope and first page should be marked: Comment under section 5 of the Voting Rights Act.

(c) Comments by individuals or groups concerning any change affecting voting may be sent at any time; however, individuals and groups are encouraged to comment as soon as they learn of the change.

(d) Department of Justice officials and employees shall comply with the request of any individual that his or her identity not be disclosed to any person outside the Department, to the

extent permitted by the Freedom of Information Act, 5 U.S.C. 552. In addition, whenever it appears to the Attorney General that disclosure of the identity of an individual who provided information regarding a change affecting voting "would constitute a clearly unwarranted invasion of personal privacy" under 5 U.S.C. 552(b)(6), the identity of the individual shall not be disclosed to any person outside the Department.

(e) When an individual or group desires the Attorney General to consider information that was supplied in connection with an earlier submission, it is not necessary to resubmit the information but merely to identify the earlier submission and the relevant information.

[52 FR 490, Jan. 6, 1987, as amended by Order 1214–87, 52 FR 33409, Sept. 3, 1987]

§ 51.30 Action on communications from individuals or groups.

(a) If there has already been a submission received of the change affecting voting brought to the attention of the Attorney General by an individual or group, any evidence from the individual or group shall be considered along with the materials submitted and materials resulting from any investigation.

(b) If such a submission has not been received, the Attorney General shall advise the appropriate jurisdiction of the requirement of section 5 with respect to the change in question.

§ 51.31 Communications concerning voting suits.

Individuals and groups are urged to notify the Chief, Voting Section, Civil Rights Division, of litigation concerning voting in jurisdictions subject to the requirement of section 5.

§ 51.32 Establishment and maintenance of registry of interested individuals and groups.

The Attorney General shall establish and maintain a Registry of Interested Individuals and Groups, which shall contain the name and address of any individual or group that wishes to receive notice of section 5 submissions. Information relating to this registry and to the requirements of the Privacy Act of 1974, 5 U.S.C. 552a *et seq.*, is contained in JUSTICE/CRT–004. 48 FR 5334 (Feb. 4, 1983).

Subpart E—Processing of Submissions

§ 51.33 Notice to registrants concerning submissions.

Weekly notice of submissions that have been received will be given to the individuals and groups who have registered for this purpose under § 51.32. Such notice will also be given when section 5 declaratory judgment actions are filed or decided.

§ 51.34 Expedited consideration.

(a) When a submitting authority is required under State law or local ordinance or otherwise finds it necessary to implement a change within the 60-day period following submission, it may request that the submission be given expedited consideration. The submission should explain why such consideration is needed and provide the date by which a determination is required.

(b) Jurisdictions should endeavor to plan for changes in advance so that expedited consideration will not be required and should not routinely request such consideration. When a submitting authority demonstrates good cause for expedited consideration the Attorney General will attempt to make a decision by the date requested. However, the Attorney General cannot guarantee that such consideration can be given.

(c) Notice of the request for expedited consideration will be given to interested parties registered under § 51.32.

§ 51.35 Disposition of inappropriate submissions.

The Attorney General will make no response on the merits with respect to an inappropriate submission but will notify the submitting authority of the inappropriateness of the submission. Such notification will be made as promptly as possible and no later than the 60th day following receipt and will

include an explanation of the inappropriateness of the submission. Inappropriate submissions include the submission of changes that do not affect voting (see, e.g., § 51.13), the submission of standards, practices, or procedures that have not been changed (see, e.g., §§ 51.4, 51.14), the submission of changes that affect voting but are not subject to the requirement of section 5 (see, e.g., § 51.18), premature submissions (see §§ 51.22, 51.61(b)), submissions by jurisdictions not subject to the preclearance requirement (see §§ 51.4, 51.5), and deficient submissions (see § 51.26(d)).

§ 51.36 Release of information concerning submissions.

The Attorney General shall have the discretion to call to the attention of the submitting authority or any interested individual or group information or comments related to a submission.

§ 51.37 Obtaining information from the submitting authority.

(a) If a submission does not satisfy the requirements of § 51.27, the Attorney General may request from the submitting authority any omitted information considered necessary for the evaluation of the submission. The request shall be made by letter and shall be made within the 60-day period and as promptly as possible after receipt of the original submission. See also § 51.26(d).

(b) A copy of the request shall be sent to any party who has commented on the submission or has requested notice of the Attorney General's action thereon.

(c) The Attorney General shall notify the submitting authority that a new 60-day period in which the Attorney General may interpose an objection shall commence upon the receipt of a response from the submitting authority that provides the information requested or states that the information is unavailable. The Attorney General can request further information within the new 60-day period, but such a further request shall not suspend the running of the 60-day period, nor shall the receipt of a response to such a request operate to begin a new 60-day period.

(d) The receipt of a response from the submitting authority that neither provides the information requested nor states that such information is unavailable shall not commence a new 60-day period. It is the practice of the Attorney General to notify the submitting authority that its response is inadequate and to provide such notification as soon as possible after the receipt of the inadequate response.

(e) If, after a request for further information is made pursuant to this section, the information requested becomes available to the Attorney General from a source other than the submitting authority, the Attorney General shall promptly notify the submitting authority by letter, and the 60-day period will commence upon the date of such notification.

(f) Notice of the request for and receipt of further information will be given to interested parties registered under § 51.32.

§ 51.38 Obtaining information from others.

(a) The Attorney General may at any time request relevant information from governmental jurisdictions and from interested groups and individuals and may conduct any investigation or other inquiry that is deemed appropriate in making a determination.

(b) If a submission does not contain evidence of adequate notice to the public, and the Attorney General believes that such notice is essential to a determination, steps will be taken by the Attorney General to provide public notice sufficent to invite interested or affected persons to provide evidence as to the presence or absence of a discriminatory purpose or effect. The submitting authority shall be advised when any such steps are taken.

§ 51.39 Supplementary submissions.

(a) When a submitting authority provides documents and written information materially supplementing a submission (or a request for reconsideration of an objection) for evaluation as if part of its original submission, or, before the expiration of the 60-day period, makes a second submission such that the two submissions cannot be independently considered, the 60-day

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period for the original submission will be calculated from the receipt of the supplementary information or from the second submission.

(b) The Attorney General will notify the submitting authority when the 60-day period for a submission is recalculated from the receipt of supplementary information or from the receipt of a second related submission.

(c) Notice of the receipt of supplementary information will be given to interested parties registered under § 51.32.

§ 51.40 Failure to complete submissions.

If after 60 days the submitting authority has not provided further information in response to a request made pursuant to § 51.37(a), the Attorney General, absent extenuating circumstances and consistent with the burden of proof under section 5 described in § 51.52 (a) and (c), may object to the change, giving notice as specified in § 51.44.

§ 51.41 Notification of decision not to object.

(a) The Attorney General shall within the 60-day period allowed notify the submitting authority of a decision to interpose no objection to a submitted change affecting voting.

(b) The notification shall state that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change.

(c) A copy of the notification shall be sent to any party who has commented on the submission or has requested notice of the Attorney General's action thereon.

§ 51.42 Failure of the Attorney General to respond.

It is the practice and intention of the Attorney General to respond to each submission within the 60-day period. However, the failure of the Attorney General to make a written response within the 60-day period constitutes preclearance of the submitted change, provided the submission is addressed as specified in § 51.24 and is appropriate for a response on the merits as described in § 51.35.

§ 51.43 Reexamination of decision not to object.

After notification to the submitting authority of a decision to interpose no objection to a submitted change affecting voting has been given, the Attorney General may reexamine the submission if, prior to the expiration of the 60-day period, information indicating the possibility of the prohibited discriminatory purpose or effect is received. In this event, the Attorney General may interpose an objection provisionally and advise the submitting authority that examination of the change in light of the newly raised issues will continue and that a final decision will be rendered as soon as possible.

§ 51.44 Notification of decision to object.

(a) The Attorney General shall within the 60-day period allowed notify the submitting authority of a decision to interpose an objection. The reasons for the decision shall be stated.

(b) The submitting authority shall be advised that the Attorney General will reconsider an objection upon a request by the submitting authority.

(c) The submitting authority shall be advised further that notwithstanding the objecton it may institute an action in the U.S. District Court for the District of Columbia for a declaratory judgment that the change objected to by the Attorney General does not have the prohibited discriminatory purpose or effect.

(d) A copy of the notification shall be sent to any party who has commented on the submission or has requested notice of the Attorney General's action thereon.

(e) Notice of the decision to interpose an objection will be given to interested parties registered under § 51.32.

§ 51.45 Request for reconsideration.

(a) The submitting authority may at any time request the Attorney General to reconsider an objection.

(b) Requests may be in letter or any other written form and should contain relevant information or legal argument.

(c) Notice of the request will be given to any party who commented on the

submission or requested notice of the Attorney General's action thereon and to interested parties registered under § 51.32. In appropriate cases the Attorney General may request the submitting authority to give local public notice of the request.

§ 51.46 Reconsideration of objection at the instance of the Attorney General.

(a) Where there appears to have been a substantial change in operative fact or relevant law, an objection may be reconsidered, if it is deemed appropriate, at the instance of the Attorney General.

(b) Notice of such a decision to reconsider shall be given to the submitting authority, to any party who commented on the submission or requested notice of the Attorney General's action thereon, and to interested parties registered under § 51.32, and the Attorney General shall decide whether to withdraw or to continue the objection only after such persons have had a reasonable opportunity to comment.

§ 51.47 Conference.

(a) A submitting authority that has requested reconsideration of an objection pursuant to § 51.45 may request a conference to produce information or legal argument in support of reconsideration.

(b) Such a conference shall be held at a location determined by the Attorney General and shall be conducted in an informal manner.

(c) When a submitting authority requests such a conference, individuals or groups that commented on the change prior to the Attorney General's objection or that seek to participate in response to any notice of a request for reconsideration shall be notified and given the opportunity to confer.

(d) The Attorney General shall have the discretion to hold separate meetings to confer with the submitting authority and other interested groups or individuals.

(e) Such conferences will be open to the public or to the press only at the discretion of the Attorney General and with the agreement of the participating parties.

§ 51.48 Decision after reconsideration.

(a) The Attorney General shall within the 60-day period following the receipt of a reconsideration request or following notice given under § 51.46(b) notify the submitting authority of the decision to continue or withdraw the objection, provided that the Attorney General shall have at least 15 days following any conference that is held in which to decide. (See also § 51.39(a).) The reasons for the decision shall be stated.

(b) The objection shall be withdrawn if the Attorney General is satisfied that the change does not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group.

(c) If the objection is not withdrawn, the submitting authority shall be advised that notwithstanding the objection it may institute an action in the U.S. District Court for the District of Columbia for a declaratory judgment that the change objected to by the Attorney General does not have the prohibited purpose or effect.

(d) An objection remains in effect until either it is withdrawn by the Attorney General or a declaratory judgment with respect to the change in question is entered by the U.S. District Court for the District of Columbia.

(e) A copy of the notification shall be sent to any party who has commented on the submission or reconsideration or has requested notice of the Attorney General's action thereon.

(f) Notice of the decision after reconsideration will be given to interested parties registered under § 51.32.

§ 51.49 Absence of judicial review.

The decision of the Attorney General not to object to a submitted change or to withdraw an objection is not reviewable. The preclearance by the Attorney General of a voting change does not constitute the certification that the voting change satisfies any other requirement of the law beyond that of section 5, and, as stated in section 5, "(n)either an affirmative indication by the Attorney General that no objection

will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure."

§ 51.50 Records concerning submissions.

(a) Section 5 files: The Attorney General shall maintain a section 5 file for each submission, containing the submission, related written materials, correspondence, memoranda, investigative reports, data provided on magnetic media, notations concerning conferences with the submitting authority or any interested individual or group, and copies of letters from the Attorney General concerning the submission.

(b) Objection files: Brief summaries regarding each submission and the general findings of the Department of Justice investigation and decision concerning it will be prepared when a decision to interpose, continue, or withdraw an objection is made. Files of these summaries, arranged by jurisdiction and by the date upon which such decision is made, will be maintained.

(c) Computer file: Records of all submissions and of their dispositions by the Attorney General shall be electronically stored and periodically retrieved in the form of computer printouts.

(d) The contents of the files in paper or microfiche form described in paragraphs (a) through (c) of this section shall be available for inspection and copying by the public during normal business hours at the Voting Section, Civil Rights Division, Department of Justice, Washington, DC. Those who desire to inspect information that has been provided on magnetic media will be provided a copy of that information in the same form as it was received. Materials that are exempt from inspection under the Freedom of Information Act, 5 U.S.C. 552(b), may be withheld at the discretion of the Attorney Gereral. Communications from individuals who have requested confidentiality or with respect to whom the Attorney General has determined that confidentiality is appropriate under §51.29(d) shall be available only as provided by §51.29(d). Applicable fees, if any, for the copying of the contents of these files are contained in the Department of Justice regulations implementing the Freedom of Information Act, 28 CFR 16.10.

[52 FR 490, Jan. 6, 1987; 52 FR 2649, Jan. 23, 1987, as amended by Order No. 1536-91, 56 FR 51837, Oct. 16, 1991]

Subpart F—Determinations by the Attorney General

§ 51.51 Purpose of the subpart.

The purpose of this subpart is to inform submitting authorities and other interested parties of the factors that the Attorney General considers relevant and of the standards by which the Attorney General will be guided in making substantive determinations under section 5 and in defending section 5 declaratory judgment actions.

§ 51.52 Basic standard.

(a) *Surrogate for the court.* Section 5 provides for submission of a voting change to the Attorney General as an alternative to the seeking of a declaratory judgment from the U.S. District Court for the District of Columbia. Therefore, the Attorney General shall make the same determination that would be made by the court in an action for a declaratory judgment under section 5: Whether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The burden of proof is on a submitting authority when it submits a change to the Attorney General for preclearance, as it would be if the proposed change were the subject of a declaratory judgment action in the U.S. District Court for the District of Columbia. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328, 335 (1966).

(b) *No objection.* If the Attorney General determines that the submitted change does not have the prohibited purpose or effect, no objection shall be interposed to the change.

(c) *Objection.* An objection shall be interposed to a submitted change if the Attorney General is unable to determine that the change is free of discriminatory purpose and effect. This includes those situations where the evidence as to the purpose or effect of the change is conflicting and the Attorney General is unable to determine that the change is free of discriminatory purpose and effect.

§ 51.53 Information considered.

The Attorney General shall base a determination on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice.

§ 51.54 Discriminatory effect.

(a) *Retrogression.* A change affecting voting is considered to have a discriminatory effect under section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively. See *Beer* v. *United States*, 425 U.S. 130, 140–42 (1976).

(b) *Benchmark.* (1) In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure in effect at the time of the submission. If the existing practice or procedure upon submission was not in effect on the jurisdiction's applicable date for coverage (specified in the appendix) and is not otherwise legally enforceable under section 5, it cannot serve as a benchmark, and, except as provided in paragraph (b)(4) of this section, the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction.

(2) The Attorney General will make the comparison based on the conditions existing at the time of the submission.

(3) The implementation and use of an unprecleared voting change subject to section 5 review under §51.18(a) does not operate to make that unprecleared change a benchmark for any subsequent change submitted by the jurisdiction. See §51.18(c).

(4) Where at the time of submission of a change for section 5 review there exists no other lawful practice or procedure for use as a benchmark (e.g., where a newly incorporated college district selects a method of election) the Attorney General's preclearance determination will necessarily center on whether the submitted change was designed or adopted for the purpose of discriminating against members of racial or language minority groups.

§ 51.55 Consistency with constitutional and statutory requirements.

(a) *Consideration in general.* In making a determination the Attorney General will consider whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution, 42 U.S.C. 1971(a) and (b), sections 2, 4(a), 4(f)(2), 4(f)(4), 201, 203(c), and 208 of the Act, and other constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgment on account of race, color, or membership in a language minority group.

(b) *Section 2.* Preclearance under section 5 of a voting change will not preclude any legal action under section 2 by the Attorney General if implementation of the change demonstrates that such action is appropriate.

[52 FR 490, Jan. 6, 1987, as amended at 63 FR 24109, May 1, 1998]

§ 51.56 Guidance from the courts.

In making determinations the Attorney General will be guided by the relevant decisions of the Supreme Court of the United States and of other Federal courts.

§ 51.57 Relevant factors.

Among the factors the Attorney General will consider in making determinations with respect to the submitted changes affecting voting are the following:

(a) The extent to which a reasonable and legitimate justification for the change exists.

(b) The extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change.

(c) The extent to which the jurisdiction afforded members of racial and

language minority groups an opportunity to participate in the decision to make the change.

(d) The extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change.

§ 51.58 Representation.

(a) *Introduction.* This section and the sections that follow set forth factors—in addition to those set forth above—that the Attorney General considers in reviewing redistrictings (see § 51.59), changes in electoral systems (see § 51.60), and annexations (see § 51.61).

(b) *Background factors.* In making determinations with respect to these changes involving voting practices and procedures, the Attorney General will consider as important background information the following factors:

(1) The extent to which minorities have been denied an equal opportunity to participate meaningfully in the political process in the jurisdiction.

(2) The extent to which minorities have been denied an equal opportunity to influence elections and the decision-making of elected officials in the jurisdiction.

(3) The extent to which voting in the jurisdiction is racially polarized and political activities are racially segregated.

(4) The extent to which the voter registration and election participation of minority voters have been adversely affected by present or past discrimination.

§ 51.59 Redistrictings.

In determining whether a submitted redistricting plan has the prohibited purpose or effect the Attorney General, in addition to the factors described above, will consider the following factors (among others):

(a) The extent to which malapportioned districts deny or abridge the right to vote of minority citizens.

(b) The extent to which minority voting strength is reduced by the proposed redistricting.

(c) The extent to which minority concentrations are fragmented among different districts.

(d) The extent to which minorities are overconcentrated in one or more districts.

(e) The extent to which available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered.

(f) The extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries.

(g) The extent to which the plan is inconsistent with the jurisdiction's stated redistricting standards.

§ 51.60 Changes in electoral systems.

In making determinations with respect to changes in electoral systems (e.g., changes to or from the use of at-large elections, changes in the size of elected bodies) the Attorney General, in addition to the factors described above, will consider the following factors (among others):

(a) The extent to which minority voting strength is reduced by the proposed change.

(b) The extent to which minority concentrations are submerged into larger electoral units.

(c) The extent to which available alternative systems satisfying the jurisdiction's legitimate governmental interests were considered.

§ 51.61 Annexations.

(a) *Coverage.* Annexations, even of uninhabited land, are subject to section 5 preclearance to the extent that they alter or are calculated to alter the composition of a jurisdiction's electorate. In analyzing annexations under section 5, the Attorney General only considers the purpose and effect of the annexation as it pertains to voting.

(b) *Section 5 review.* It is the practice of the Attorney General to review all of a jurisdiction's unprecleared annexations together. See *City of Pleasant Grove* v. *United States*, C.A. No. 80-2589 (D.D.C. Oct. 7, 1981).

(c) *Relevant factors.* In making determinations with respect to annexations, the Attorney General, in addition to the factors described above, will consider the following factors (among others):

(1) The extent to which a jurisdiction's annexations reflect the purpose or have the effect of excluding minorities while including other similarly situated persons.

(2) The extent to which the annexations reduce a jurisdiction's minority population percentage, either at the time of the submission or, in view of the intended use, for the reasonably foreseeable future.

(3) Whether the electoral system to be used in the jurisdiction fails fairly to reflect minority voting strength as it exists in the post-annexation jurisdiction. See *City of Richmond* v. *United States*, 422 U.S. 358, 367-72 (1975).

[52 FR 490, Jan. 6, 1987; 52 FR 2648, Jan. 23, 1987]

Subpart G—Sanctions

§ 51.62 Enforcement by the Attorney General.

(a) The Attorney General is authorized to bring civil actions for appropriate relief against violations of the Act's provisions, including section 5. See section 12(d).

(b) Certain violations of section 5 may be subject to criminal sanctions. See section 12(a) and (c).

§ 51.63 Enforcement by private parties.

Private parties have standing to enforce section 5.

§ 51.64 Bar to termination of coverage (bailout).

(a) Section 4(a) of the Act sets out the requirements for the termination of coverage (bailout) under section 5. See § 51.5. Among the requirements for bailout is compliance with section 5, as described in section 4(a), during the ten years preceding the filing of the bailout action and during its pendency.

(b) In defending bailout actions, the Attorney General will not consider as a bar to bailout under section 4(a)(1)(E) a section 5 objection to a submitted voting standard, practice, or procedure if the objection was subsequently withdrawn on the basis of a determination by the Attorney General that it had originally been interposed as a result of the Attorney General's misinterpretation of fact or mistake in the law, or if the unmodified voting standard, practice, or procedure that was the subject of the objection received section 5 preclearance by means of a declaratory judgment from the U.S. District Court for the District of Columbia.

(c) Notice will be given to interested parties registered under § 51.32 when bailout actions are filed or decided.

Subpart H—Petition To Change Procedures

§ 51.65 Who may petition.

Any jurisdiction or interested individual or group may petition to have these procedural guidelines amended.

§ 51.66 Form of petition.

A petition under this subpart may be made by informal letter and shall state the name, address, and telephone number of the petitioner, the change requested, and the reasons for the change.

§ 51.67 Disposition of petition.

The Attorney General shall promptly consider and dispose of a petition under this subpart and give notice of the disposition, accompanied by a simple statement of the reasons, to the petitioner.

APPENDIX TO PART 51—JURISDICTIONS COVERED UNDER SECTION 4(b) OF THE VOTING RIGHTS ACT, AS AMENDED

The preclearance requirement of section 5 of the Voting Rights Act, as amended, applies in the following jurisdictions. The applicable date is the date that was used to determine coverage and the date after which changes affecting voting are subject to the preclearance requirement.

Some jurisdictions, for example, Yuba County, California, are included more than once because they have been determined on more than one occasion to be covered under section 4(b).

Jurisdiction	Applicable Date	Federal Register citation	
		Volume and page	Date
Alabama	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Alaska	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975.
Arizona	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
California:			
Kings County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Merced County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Monterey County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Yuba County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Yuba County	Nov. 1, 1972	41 FR 784	Jan. 5, 1976.
Florida:			
Collier County	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976.
Hardee County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Hendry County	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976.
Hillsborough County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Monroe County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Georgia	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Louisiana	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Michigan:			
Allegan County:			
Clyde Township	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976.
Saginaw County:			
Buena Vista Township	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976.
Mississippi	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
New Hampshire:			
Cheshire County:			
Rindge Town	Nov. 1, 1968	39 FR 16912	May 10, 1974.
Coos County:			
Millsfield Township	Nov. 1, 1968	39 FR 16912	May 10, 1974.
Pinkhams Grant	Nov. 1, 1968	39 FR 16912	May 10, 1974.
Stewartstown Town	Nov. 1, 1968	39 FR 16912	May 10, 1974.
Stratford Town	Nov. 1, 1968	39 FR 16912	May 10, 1974.
Grafton County:			
Benton Town	Nov. 1, 1968	39 FR 16912	May 10, 1974.
Hillsborough County:			
Antrim Town	Nov. 1, 1968	39 FR 16912	May 10, 1974.
Merrimack County:			
Boscawen Town	Nov. 1, 1968	39 FR 16912	May 10, 1974.
Rockingham County:			
Newington Town	Nov. 1, 1968	39 FR 16912	May 10, 1974.
Sullivan County:			
Unity Town	Nov. 1, 1968	39 FR 16912	May 10, 1974.
New York:			
Bronx County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Bronx County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Kings County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Kings County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
New York County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
North Carolina:			
Anson County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Beaufort County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Bertie County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Bladen County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Camden County	Nov. 1, 1964	31 FR 3317	Mar. 2, 1966.
Caswell County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Chowan County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Cleveland County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Craven County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Cumberland County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Edgecombe County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Franklin County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Gaston County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Gates County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Granville County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Greene County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Guilford County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Halifax County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Harnett County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Hertford County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Hoke County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Jackson County	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975.
Lee County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Lenoir County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.

Jurisdiction	Applicable Date	Federal Register citation	
		Volume and page	Date
Martin County	Nov. 1, 1964	31 FR 19	Jan. 4, 1966.
Nash County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Northampton County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Onslow County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Pasquotank County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Perquimans County	Nov. 1, 1964	31 FR 3317	Mar. 2, 1966.
Person County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Pitt County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Robeson County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Rockingham County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Scotland County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Union County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Vance County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Washington County	Nov. 1, 1964	31 FR 19	Jan. 4, 1966.
Wayne County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Wilson County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
South Carolina	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
South Dakota:			
Shannon County	Nov. 1, 1972	41 FR 784	Jan. 5, 1976.
Todd County	Nov. 1, 1972	41 FR 784	Jan. 5, 1976.
Texas	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Virginia	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.

The following political subdivisions in States subject to statewide coverage are also covered individually:

Jurisdiction	Applicable date	Federal Register citation	
		Volume and page	Date
Arizona:			
Apache County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Apache County	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975
Cochise County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Coconino County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Coconino County	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975.
Mohave County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Navajo County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Navajo County	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975.
Pima County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Pinal County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Pinal County	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975.
Santa Cruz County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Yuma County	Nov. 1, 1964	31 FR 982	Jan. 26, 1966.

PART 55—IMPLEMENTATION OF THE PROVISIONS OF THE VOTING RIGHTS ACT REGARDING LANGUAGE MINORITY GROUPS

Subpart A—General Provisions

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Subpart B—Nature of Coverage

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Subpart G—Comment on This Part

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APPENDIX TO PART 55—JURISDICTIONS COVERED UNDER SECTIONS 4(f)(4) AND 203(c) OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED

AUTHORITY 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 1973b, 1973j(d), 1973aa-1a, 1973aa-2.

SOURCE: Order No. 655-76, 41 FR 29998, July 20, 1976, unless otherwise noted.

Subpart A—General Provisions

§55.1 Definitions.

As used in this part—

Act means the Voting Rights Act of 1965, 79 Stat. 437, as amended by the Civil Rights Act of 1968, 82 Stat. 73, the Voting Rights Act Amendments of 1970, 84 Stat. 314, the District of Columbia Delegate Act, 84 Stat. 853, the Voting Rights Act Amendments of 1975, 89

Stat. 400, the Voting Rights Act Amendments of 1982, 96 Stat. 131, and the Voting Rights Language Assistance Act of 1992, Public Law 102-344, 106 Stat. 921, 42 U.S.C. 1973 *et seq.* Section numbers, such as "section 14(c)(3)," refer to sections of the Act.

Attorney General means the Attorney General of the United States.

Language minorities or *language minority group* is used, as defined in the Act, to refer to persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage. (Sections 14(c)(3) and 203(e)).

Political subdivision is used, as defined in the Act, to refer to "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." (Section 14(c)(2)).

[Order 1246-87, 53 FR 736, Jan. 12, 1988, as amended by Order No. 1752-92, 58 FR 35372, July 1, 1993]

§ 55.3 Purpose; standards for measuring compliance.

(a) The purpose of this part is to set forth the Attorney General's interpretation of the provisions of the Voting Rights Act which require certain States and political subdivisions to conduct elections in the language of certain "language minority groups" in addition to English.

(b) In the Attorney General's view the objective of the Act's provisions is to enable members of applicable language minority groups to participate effectively in the electoral process. This part establishes two basic standards by which the Attorney General will measure compliance:

(1) That materials and assistance should be provided in a way designed to allow members of applicable language minority groups to be effectively informed of and participate effectively in voting-connected activities; and

(2) That an affected jurisdiction should take all reasonable steps to achieve that goal.

(c) The determination of what is required for compliance with section 4(f)(4) and section 203(c) is the responsibility of the affected jurisdiction. These guidelines should not be used as a substitute for analysis and decision by the affected jurisdiction.

(d) Jurisdictions covered under section 4(f)(4) of the Act are subject to the preclearance requirements of section 5. See part 51 of this chapter. Such jurisdictions have the burden of establishing to the satisfaction of the Attorney General or to the U.S. District Court for the District of Columbia that changes made in their election laws and procedures in order to comply with the requirements of section 4(f)(4) are not discriminatory under the terms of section 5. However, section 5 expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of the changes.

(e) Jurisdictions covered solely under section 203(c) of the Act are not subject to the preclearance requirements of section 5, nor is there a Federal apparatus available for preclearance of section 203(c) compliance activities. The Attorney General will not preclear jurisdictions' proposals for compliance with section 203(c).

(f) Consideration by the Attorney General of a jurisdiction's compliance with the requirements of section 4(f)(4) occurs in the review pursuant to section 5 of the Act of changes with respect to voting, in the consideration of the need for litigation to enforce the requirements of section 4(f)(4), and in the defense of suits for termination of coverage under section 4(f)(4). Consideration by the Attorney General of a jurisdiction's compliance with the requirements of section 203(c) occurs in the consideration of the need for litigation to enforce the requirements of section 203(c).

(g) In enforcing the Act—through the section 5 preclearance review process, through litigation, and through defense of suits for termination of coverage under section 4(f)(4)—the Attorney General will follow the general policies set forth in this part.

(h) This part is not intended to preclude affected jurisdictions from taking additional steps to further the policy of the Act. By virtue of the Supremacy Clause of Art. VI of the Constitution, the provisions of the Act override any inconsistent State law.

[Order 655-76, 41 FR 29998, July 20, 1976, as amended by Order 1246-87, 53 FR 736, Jan. 12, 1988]

§ 55.3 Statutory requirements.

The Act's requirements concerning the conduct of elections in languages in addition to English are contained in section 4(f)(4) and section 203(c). These sections state that whenever a jurisdiction subject to their terms "provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in * * * English. * * *"

Subpart B—Nature of Coverage

§ 55.4 Effective date; list of covered jurisdictions.

(a) The minority language provisions of the Voting Rights Act were added by the Voting Rights Act Amendments of 1975.

(1) The requirements of section 4(f)(4) take effect upon publication in the FEDERAL REGISTER of the requisite determinations of the Director of the Census and the Attorney General. Such determinations are not reviewable in any court.

(2) The requirements of section 203(c) take effect upon publication in the FEDERAL REGISTER of the requisite determinations of the Director of the Census. Such determinations are not reviewable in any court.

(b) Jurisdictions determined to be covered under section 4(f)(4) or section 203(c) are listed, together with the language minority group with respect to which coverage was determined, in the appendix to this part. Any additional determinations of coverage under either section 4(f)(4) or section 203(c) will be published in the FEDERAL REGISTER.

[Order 655-76, 41 FR 29998, July 20, 1976, as amended by Order 1246-87, 53 FR 736, Jan. 12, 1988]

§ 55.5 Coverage under section 4(f)(4).

(a) *Coverage formula.* Section 4(f)(4) applies to any State or political subdivision in which

(1) Over five percent of the voting-age citizens were, on November 1, 1972, members of a single language minority group,

(2) Registration and election materials were provided only in English on November 1, 1972, and

(3) Fewer than 50 percent of the voting-age citizens were registered to vote or voted in the 1972 Presidential election.

All three conditions must be satisfied before coverage exists under section 4(f)(4).[1]

(b) Coverage may be determined with regard to section 4(f)(4) on a statewide or political subdivision basis.

(1) Whenever the determination is made that the bilingual requirements of section 4(f)(4) are applicable to an entire State, these requirements apply to each of the State's political subdivisions as well as to the State. In other words, each political subdivision within a covered State is subject to the same requirements as the State.

(2) Where an entire State is not covered under section 4(f)(4), individual political subdivisions may be covered.

§ 55.6 Coverage under section 203(c).

(a) *Coverage formula.* There are four ways in which a political subdivision can become subject to section 203(c).[2]

(1) *Political subdivision approach.* A political subdivision is covered if—

(i) More than 5 percent of its voting age citizens are members of a single language minority group and are limited-English proficient; and

(ii) The illiteracy rate of such language minority citizens in the political subdivision is higher than the national illiteracy rate.

[1]Coverage is based on sections 4(b) (third sentence), 4(c), and 4(f)(3).

[2]The criteria for coverage are contained in section 203(b).

(2) *State approach.* A political subdivision is covered if—

(i) It is located in a state in which more than 5 percent of the voting age citizens are members of a single language minority and are limited-English proficient;

(ii) The illiteracy rate of such language minority citizens in the state is higher than the national illiteracy rate; and

(iii) Five percent or more of the voting age citizens of the political subdivision are members of such language minority group and are limited-English proficient.

(3) *Numerical approach.* A political subdivision is covered if—

(i) More than 10,000 of its voting age citizens are members of a single language minority group and are limited-English proficient; and

(ii) The illiteracy rate of such language minority citizens in the political subdivision is higher than the national illiteracy rate.

(4) *Indian reservation approach.* A political subdivision is covered if there is located within its borders all or any part of an Indian reservation—

(i) In which more than 5 percent of the voting age American Indian or Alaska Native citizens are members of a single language minority group and are limited-English proficient; and

(ii) The illiteracy rate of such language minority citizens is higher than the national illiteracy rate.

(b) *Definitions.* For the purpose of determinations of coverage under section 203(c), *limited-English proficient* means unable to speak or understand English adequately enough to participate in the electoral process; *Indian reservation* means any area that is an American Indian or Alaska Native area, as defined by the Census Bureau for the purposes of the 1990 decennial census; and *illiteracy* means the failure to complete the fifth primary grade.

(c) *Determinations.* Determinations of coverage under section 203(c) are made with regard to specific language groups of the language minorities listed in section 203(e).

[Order No. 1752–93, 58 FR 35372, July 1, 1993]

§ 55.7 Termination of coverage.

(a) *Section 4(f)(4).* A covered State, a political subdivision of a covered State, or a separately covered political subdivision may terminate the application of section 4(f)(4) by obtaining the declaratory judgment described in section 4(a) of the Act.

(b) *Section 203(c).* The requirements of section 203(c) apply until August 6, 2007. A covered jurisdiction may terminate such coverage earlier if it can prove in a declaratory judgment action in a United States district court, that the illiteracy rate of the applicable language minority group is equal to or less than the national illiteracy rate.

[Order 655–76, 41 FR 29998, July 20, 1976, as amended by Order 1246–87, 53 FR 736, Jan. 12, 1988; Order No. 1752–93, 58 FR 35373, July 1, 1993]

§ 55.8 Relationship between section 4(f)(4) and section 203(c).

(a) The statutory requirements of section 4(f)(4) and section 203(c) regarding minority language material and assistance are essentially identical.

(b) Jurisdictions subject to the requirements of section 4(f)(4)—but not jurisdictions subject only to the requirements of section 203(c)—are also subject to the Act's special provisions, such as section 5 (regarding preclearance of changes in voting laws) and section 6 (regarding Federal examiners).[3] See part 51 of this chapter.

(c) Although the coverage formulas applicable to section 4(f)(4) and section 203(c) are different, a political subdivision may be included within both of the coverage formulas. Under these circumstances, a judgment terminating coverage of the jurisdiction under one provision would not have the effect of terminating coverage under the other provision.

§ 55.9 Coverage of political units within a county.

Where a political subdivision (e.g., a county) is determined to be subject to section 4(f)(4) or section 203(c), all political units that hold elections within that political subdivision (e.g., cities, school districts) are subject to the same requirements as the political subdivision.

[3] In addition, a jurisdiction covered under section 203(c) but not under section 4(f)(4) is subject to the Act's special provisions if it was covered under section 4(b) prior to the 1975 Amendments to the Act.

§ 55.10 Types of elections covered.

(a) *General.* The language provisions of the Act apply to registration for and voting in any type of election, whether it is a primary, general or special election. Section 14(c)(1). This includes elections of officers as well as elections regarding such matters as bond issues, constitutional amendments and referendums. Federal, State and local elections are covered as are elections of special districts, such as school districts and water districts.

(b) *Elections for statewide office.* If an election conducted by a county relates to Federal or State offices or issues as well as county offices or issues, a county subject to the bilingual requirements must insure compliance with those requirements with respect to all aspects of the election, i.e., the minority language material and assistance must deal with the Federal and State offices or issues as well as county offices or issues.

(c) *Multi-county districts.* Regarding elections for an office representing more than one county, e.g., State legislative districts and special districts that include portions of two or more counties, the bilingual requirements are applicable on a county-by-county basis. Thus, minority language material and assistance need not be provided by the government in counties not subject to the bilingual requirements of the Act.

Subpart C—Determining the Exact Language

§ 55.11 General.

The requirements of section 4(f)(4) or section 203(c) apply with respect to the languages of language minority groups. The applicable groups are indicated in the determinations of the Attorney General or the Director of the Census. This subpart relates to the view of the Attorney General concerning the determination by covered jurisdictions of precisely the language to be employed. In enforcing the Act, the Attorney General will consider whether the languages, forms of languages, or dialects chosen by covered jurisdictions for use in the electoral process enable members of applicable language minority groups to participate effectively in the electoral process. It is the responsibility of covered jurisdictions to determine what languages, forms of languages, or dialects will be effective. For those jurisdictions covered under section 203(c), the coverage determination (indicated in the appendix) specifies the particular language for which the jurisdiction was covered and which thus, under section 203(c), is required to be used.

[Order 655–76, 41 FR 29998, July 20, 1976, as amended by Order 1246–87, 53 FR 736, Jan. 12, 1988]

§ 55.12 Language used for written material.

(a) *Language minority groups having more than one language.* Some language minority groups, for example; Filipino Americans, have more than one language other than English. A jurisdiction required to provide election materials in the language of such a group need not provide materials in more than one language other than English. The Attorney General will consider whether the language that is used for election materials is the one most widely used by the jurisdiction's voting-age citizens who are members of the language minority group.

(b) *Languages with more than one written form.* Some languages, for example, Japanese, have more than one written form. A jurisdiction required to provide election materials in such a language need not provide more than one version. The Attorney General will consider whether the particular version of the language that is used for election materials is the one most widely used by the jurisdiction's voting-age citizens who are members of the language minority group.

(c) *Unwritten languages.* Many of the languages used by language minority groups, for example, by some American

Indians and Alaskan Natives, are unwritten. With respect to any such language, only oral assistance and publicity are required. Even though a written form for a language may exist, a language may be considered unwritten if it is not commonly used in a written form. It is the responsibility of the covered jurisdiction to determine whether a language should be considered written or unwritten.

§ 55.13 Language used for oral assistance and publicity.

(a) *Languages with more than one dialect.* Some languages, for example, Chinese, have several dialects. Where a jurisdiction is obligated to provide oral assistance in such a language, the jurisdiction's obligation is to ascertain the dialects that are commonly used by members of the applicable language minority group in the jurisdiction and to provide oral assistance in such dialects. (See § 55.20.)

(b) *Language minority groups having more than one language.* In some jurisdictions members of an applicable language minority group speak more than one language other than English. Where a jurisdiction is obligated to provide oral assistance in the language of such a group, the jurisdiction's obligation is to ascertain the languages that are commonly used by members of that group in the jurisdiction and to provide oral assistance in such languages. (See § 55.20)

[Order 655-76, 41 FR 29998, July 20, 1976, as amended by Order 1246-87, 53 FR 736, Jan. 12, 1988; Order No. 1752-93, 58 FR 35373, July 1, 1993]

Subpart D—Minority Language Materials and Assistance

§ 55.14 General.

(a) This subpart sets forth the views of the Attorney General with respect to the requirements of section 4(f)(4) and section 203(c) concerning the provision of minority language materials and assistance and some of the factors that the Attorney General will consider in carrying out his responsibilities to enforce section 4(f)(4) and section 203(c). Through the use of his authority under section 5 and his authority to bring suits to enforce section 4(f)(4) and section 203(c), the Attorney General will seek to prevent or remedy discrimination against members of language minority groups based on the failure to use the applicable minority language in the electoral process. The Attorney General also has the responsibility to defend against suits brought for the termination of coverage under section 4(f)(4) and section 203(c).

(b) In discharging these responsibilities the Attorney General will respond to complaints received, conduct on his own initiative inquiries and surveys concerning compliance, and undertake other enforcement activities.

(c) It is the responsibility of the jurisdiction to determine what actions by it are required for compliance with the requirements of section 4(f)(4) and section 203(c) and to carry out these actions.

§ 55.15 Affected activities.

The requirements of sections 4(f)(4) and 203(c) apply with regard to the provision of "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots." The basic purpose of these requirements is to allow members of applicable language minority groups to be effectively informed of and participate effectively in voting-connected activities. Accordingly, the quoted language should be broadly construed to apply to all stages of the electoral process, from voter registration through activities related to conducting elections, including, for example the issuance, at any time during the year, of notifications, announcements, or other informational materials concerning the opportunity to register, the deadline for voter registration, the time, places and subject matters of elections, and the absentee voting process.

§ 55.16 Standards and proof of compliance.

Compliance with the requirements of section 4(f)(4) and section 203(c) is best measured by results. A jurisdiction is more likely to achieve compliance with these requirements if it has worked with the cooperation of and to the satisfaction of organizations representing members of the applicable language minority group. In planning its compliance with section 4(f)(4) or section 203(c), a jurisdiction may, where alternative methods of compliance are available, use less costly methods if they are equivalent to more costly methods in their effectiveness.

§ 55.17 Targeting.

The term "targeting" is commonly used in discussions of the requirements of section 4(f)(4) and section 203(c). "Targeting" refers to a system in which the minority language materials or assistance required by the Act are provided to fewer than all persons or registered voters. It is the view of the Attorney General that a targeting system will normally fulfill the Act's minority language requirements if it is designed and implemented in such a way that language minority group members who need minority language materials and assistance receive them.

[Order No. 655-76, 41 FR 29998, July 20, 1976, as amended by Order No. 1752-93, 58 FR 35373, July 1, 1993]

§ 55.18 Provision of minority language materials and assistance.

(a) *Materials provided by mail.* If materials provided by mail (or by some comparable form of distribution) generally to residents or registered voters are not all provided in the applicable minority language, the Attorney General will consider whether an effective targeting system has been developed. For example, a separate mailing of materials in the minority language to persons who are likely to need them or to residents of neighborhoods in which such a need is likely to exist, supplemented by a notice of the availability of minority language materials in the general mailing (in English and in the applicable minority language) and by other publicity regarding the availability of such materials may be sufficient.

(b) *Public notices.* The Attorney General will consider whether public notices and announcements of electoral activities are handled in a manner that provides members of the applicable language minority group an effective opportunity to be informed about electoral activities.

(c) *Registration.* The Attorney General will consider whether the registration system is conducted in such a way that members of the applicable language minority group have an effective opportunity to register. One method of accomplishing this is to provide, in the applicable minority language, all notices, forms and other materials provided to potential registrants and to have only bilingual persons as registrars. Effective results may also be obtained, for example, through the use of deputy registrars who are members of the applicable language minority group and the use of decentralized places of registration, with minority language materials available at places where persons who need them are most likely to come to register.

(d) *Polling place activities.* The Attorney General will consider whether polling place activities are conducted in such a way that members of the applicable language minority group have an effective opportunity to vote. One method of accomplishing this is to provide all notices, instructions, ballots, and other pertinent materials and oral assistance in the applicable minority language. If very few of the registered voters scheduled to vote at a particular polling place need minority language materials or assistance, the Attorney General will consider whether an alternative system enabling those few to cast effective ballots is available.

(e) *Publicity.* The Attorney General will consider whether a covered jurisdiction has taken appropriate steps to publicize the availability of materials and assistance in the minority language. Such steps may include the display of appropriate notices, in the minority language, at voter registration offices, polling places, etc., the making of announcements over minority language radio or television stations, the publication of notices in minority language newspapers, and direct contact with language minority group organizations.

[Order No. 655-76, 41 FR 29998, July 20, 1976, as amended by Order No. 733-77, 42 FR 35970, July 13, 1977]

§ 55.19 Written materials.

(a) *Types of materials.* It is the obligation of the jurisdiction to decide what

materials must be provided in a minority language. A jurisdiction required to provide minority language materials is only required to publish in the language of the applicable language minority group materials distributed to or provided for the use of the electorate generally. Such materials include, for example, ballots, sample ballots, informational materials, and petitions.

(b) *Accuracy, completeness.* It is essential that material provided in the language of a language minority group be clear, complete and accurate. In examining whether a jurisdiction has achieved compliance with this requirement, the Attorney General will consider whether the jurisdiction has consulted with members of the applicable language minority group with respect to the translation of materials.

(c) *Ballots.* The Attorney General will consider whether a jurisdiction provides the English and minority language versions on the same document. Lack of such bilingual preparation of ballots may give rise to the possibility, or to the appearance, that the secrecy of the ballot will be lost if a separate minority language ballot or voting machine is used.

(d) *Voting machines.* Where voting machines that cannot mechanically accommodate a ballot in English and in the applicable minority language are used, the Attorney General will consider whether the jurisdiction provides sample ballots for use in the polling booths. Where such sample ballots are used the Attorney General will consider whether they contain a complete and accurate translation of the English ballots, and whether they contain or are accompanied by instructions in the minority language explaining the operation of the voting machine. The Attorney General will also consider whether the sample ballots are displayed so that they are clearly visible and at the same level as the machine ballot on the inside of the polling booth, whether the sample ballots are identical in layout to the machine ballots, and whether their size and typeface are the same as that appearing on the machine ballots. Where space limitations preclude affixing the translated sample ballots to the inside of polling booths, the Attorney General will consider whether language minority group voters are allowed to take the sample ballots into the voting booths.

§ 55.20 Oral assistance and publicity.

(a) *General.* Announcements, publicity, and assistance should be given in oral form to the extent needed to enable members of the applicable language minority group to participate effectively in the electoral process.

(b) *Assistance.* The Attorney General will consider whether a jurisdiction has given sufficient attention to the needs of language minority group members who cannot effectively read either English or the applicable minority language and to the needs of members of language minority groups whose languages are unwritten.

(c) *Helpers.* With respect to the conduct of elections, the jurisdiction will need to determine the number of helpers (i.e., persons to provide oral assistance in the minority language) that must be provided. In evaluating the provision of assistance, the Attorney General will consider such facts as the number of a precinct's registered voters who are members of the applicable language minority group, the number of such persons who are not proficient in English, and the ability of a voter to be assisted by a person of his or her own choice. The basic standard is one of effectiveness.

[Order No. 655–76, 41 FR 29998, July 20, 1976, as amended by Order No. 1752–93, 58 FR 35373, July 1, 1993]

§ 55.21 Record keeping.

The Attorney General's implementation of the Act's provisions concerng language minority groups would be facilitated if each covered jurisdiction would maintain such records and data as will document its actions under those provisions, including, for example, records on such matters as alternatives considered prior to taking such actions, and the reasons for choosing the actions finally taken.

Subpart E—Preclearance

§ 55.22 Requirements of section 5 of the Act.

For many jurisdictions, changes in voting laws and practices will be necessary in order to comply with section 4(f)(4) or section 203(c). If a jurisdiction is subject to the preclearance requirements of section 5 (see § 55.8(b)), such changes must either be submitted to the Attorney General or be made the subject of a declaratory judgment action in the U.S. District Court for the District of Columbia. Procedures for the administration of section 5 are set forth in part 51 of this chapter.

Subpart F—Sanctions

§ 55.23 Enforcement by the Attorney General.

(a) The Attorney General is authorized to bring civil actions for appropriate relief against violations of the Act's provisions, including section 4 and section 203. See sections 12(d) and 204.

(b) Also, certain violations may be subject to criminal sanctions. See sections 11(a)–(c) and 205.

Subpart G—Comment on This Part

§ 55.24 Procedure.

These guidelines may be modified from time to time on the basis of experience under the Act and comments received from interested parties. The Attorney General therefore invites public comments and suggestions on these guidelines. Any party who wishes to make such suggestions or comments may do so by sending them to: Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, DC 20530.

APPENDIX TO PART 55—JURISDICTIONS COVERED UNDER SECTIONS 4(f)(4) AND 203(c) OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED

[Applicable language minority group(s)]

Jurisdiction[1]	Coverage under sec. 4(f)(4)[1]	Coverage under sec. 203(c)[2]
Alaska:	Alaskan Natives (statewide)	
Aleutians East Borough		Alaskan Natives (Eskimo).
Aleutians West Census Area		Alaskan Natives (Aleut).
Bethel Census Area		American Indian (Athapascan, Tanaina), Alaskan Natives (Eskimo).
Bristol Bay Borough		Alaskan Natives (Eskimo).
Dillingham Census Area		Alaskan Natives (Eskimo).
Kenai Peninsula Borough		Alaskan Natives (Eskimo).
Kodiak Island Borough		Alaskan Natives (Aleut, Eskimo).
Lake and Peninsula Borough		American Indian (Athapascan), Alaskan Natives (Aleut, Eskimo).
Nome Census Area		Alaskan Natives (Eskimo).
North Slope Borough		Alaskan Natives (Eskimo).
Northwest Arctic Borough		Alaskan Natives (Eskimo).
Skagway-Yakutat-Angoon Census Area.		American Indian (Tlingit).
Southeast Fairbanks Census Area		American Indian (Athapascan).
Valdez-Cordova Census Area		American Indian (Athapascan).
Wade Hampton Census Area		Alaskan Natives (Eskimo).
Yukon-Koyukuk Census Area		American Indian (Athapascan, Kuchin), Alaskan Natives (Eskimo).
Arizona:	Spanish heritage (statewide)	
Apache County	American Indian	American Indian (Apache, Navajo, Zuni).
Coconino County	American Indian	American Indian (Havasupai, Hopi, Navajo).
Gila County		American Indian (Apache).
Graham County		American Indian (Apache).
Greenlee County		Spanish heritage.
Maricopa County		American Indian (Pima, Yavapai), Spanish heritage.
Navajo County	American Indian	American Indian (Apache, Hopi, Navajo).
Pima County		American Indian (Pima), Spanish heritage.
Pinal County	American Indian	American Indian (Apache, Pima).
Santa Cruz County		Spanish heritage.
Yuma County		American Indian (Delta River Yuma, Yuma), Spanish heritage.

[Applicable language minority group(s)]

Jurisdiction	Coverage under sec. 4(f)(4)[1]	Coverage under sec. 203(c)[2]
California:		
Alameda County		Asian American (Chinese), Spanish heritage.
Colusa County		American Indian (Wintun).
Fresno County		Spanish heritage.
Imperial County		Spanish heritage.
Inyo County		American Indian (Spanish).
Kern County		Spanish heritage.
Kings County	Spanish heritage	Spanish heritage.
Lake County		American Indian (Spanish).
Los Angeles County		Asian American (Chinese, Filipino, Japanese, Vietnamese), Spanish heritage.
Merced County	Spanish heritage	
Monterey County		Spanish heritage.
Orange County		Asian American (Vietnamese), Spanish heritage.
Riverside County		Spanish heritage.
San Benito County		Spanish heritage
San Bernardino County		Spanish heritage.
San Diego County		Spanish heritage.
San Francisco County		Asian American (Chinese).
Santa Clara County		Spanish heritage.
Tulare County		Spanish heritage.
Ventura County		Spanish heritage.
Yuba County	Spanish heritage	
Colorado:		
Alamosa County		Spanish heritage.
Archuleta County		Spanish heritage.
Bent County		Spanish heritage.
Conejos County		Spanish heritage.
Costilla County		Spanish heritage.
La Plata County		American Indian (Ute).
Las Animas County		Spanish heritage.
Montezuma County		American Indian (Ute).
Otero County		Spanish heritage.
Rio Grande County		Spanish heritage.
Saguache County		Spanish heritage.
Connecticut:		
Fairfield County: Bridgeport Town		Spanish heritage.
Hartford County:		
Hartford Town		Spanish heritage.
New Britain Town		Spanish heritage.
Windham County: Windham Town		Spanish heritage.
Florida:		
Broward County		American Indian (Miksauki, Muskogee), Spanish heritage.
Collier County	Spanish heritage	American Indian (Miksauki).
Dade County		American Indian (Miksauki), Spanish heritage.
Glades County		American Indian (Muskogee).
Hardee County	Spanish heritage	Spanish heritage.
Hendry County	Spanish heritage	American Indian (Miksauki, Muskogee).
Hillsborough County	Spanish heritage	Spanish heritage.
Orange County		Spanish heritage.
Monroe County	Spanish heritage	
Hawaii:		
Honolulu County		Asian American (Filipino, Japanese).
Kauai County		Asian American (Filipino).
Maui County		Asian American (Filipino).
Idaho:		
Bannock County		American Indian (Shoshoni).
Bingham County		American Indian (Shoshoni).
Owyhee County		American Indian (Shoshoni).
Power County		American Indian (Shoshoni).
Illinois: Cook County		Spanish heritage.
Iowa: Tama County		American Indian (Fox).
Louisiana: Avoyelles Parish		American Indian (French).
Massachusetts:		
Essex County: Lawrence City		Spanish heritage.
Hampden County:		
Holyoke City		Spanish heritage.
Springfield City		Spanish heritage.

[Applicable language minority group(s)]

Jurisdiction	Coverage under sec. 4(f)(4)[1]	Coverage under sec. 203(c)[2]
Suffolk County:		
Boston City		Spanish heritage.
Chelsea City		Spanish heritage.
Michigan:		
Allegan County: Clyde Township	Spanish heritage	Spanish heritage.
Oceana County: Colfax Township		Spanish heritage.
Saginaw County:		
Buena Vista Township	Spanish heritage	
Zilwaukee Township		Spanish heritage.
Mississippi:		
Jones County		American Indian (Choctaw).
Kemper County		American Indian (Choctaw).
Leake County		American Indian (Choctaw).
Neshoba County		American Indian (Choctaw).
Newton County		American Indian (Choctaw).
Winston County		American Indian (Choctaw).
Nevada:		
Elko County		American Indian (Shoshoni).
Humboldt County		American Indian (Paiute).
New Jersey:		
Essex County		Spanish heritage.
Hudson County		Spanish heritage.
Middlesex County		Spanish heritage.
Passaic County		Spanish heritage.
Union County		Spanish heritage.
New Mexico:		
Bernalillo County		American Indian (Keres, Navajo, Tiwa), Spanish heritage.
Chaves County		Spanish heritage.
Cibola County		American Indian (Keres, Navajo, Zuni), Spanish heritage.
Colfax County		Spanish heritage.
Dona Anna County		Spanish heritage.
Eddy County		Spanish heritage.
Grant County		Spanish heritage.
Guadalupe County		Spanish heritage.
Harding County		Spanish heritage.
Hidalgo County		Spanish heritage.
Lea County		Spanish heritage.
Luna County		Spanish heritage.
McKinley County		American Indian (Navajo, Zuni).
Mora County		Spanish heritage.
Quay County		Spanish heritage.
Rio Arriba County		American Indian (Jicarilla, Navajo), Spanish heritage.
Roosevelt County		Spanish heritage.
San Juan County		American Indian (Navajo).
San Miguel County		Spanish heritage.
Sandoval County		American Indian (Jicarilla, Keres, Navajo, Towa).
Santa Fe County		Spanish heritage.
Socorro County		American Indian (Navajo), Spanish heritage.
Taos County		American Indian (Tiwa), Spanish heritage.
Torrance County		Spanish heritage.
Union County		Spanish heritage.
Valencia County		American Indian (Keres, Tiwa), Spanish heritage.
New York:		
Bronx County	Spanish heritage	Spanish heritage.
Franklin County		American Indian (Mohawk).
Kings County	Spanish heritage	Asian American (Chinese), Spanish heritage.
New York County		Asian American (Chinese), Spanish heritage.
Queens County		Asian American (Chinese), Spanish heritage.
Suffolk County		Spanish heritage.
Westchester County		Spanish heritage.
North Carolina: Jackson County	American Indian	
North Dakota:		
Benson County		American Indian (Dakota).

[Applicable language minority group(s)]

Jurisdiction	Coverage under sec. 4(f)(4)[1]	Coverage under sec. 203(c)[2]
Eddy County		American Indian (Dakota).
Ramsey County		American Indian (Dakota).
Oklahoma: Adair County		American Indian (Cherokee).
Oregon: Malheur County		American Indian (Paiute).
Pennsylvania: Philadelphia County		Spanish heritage.
Rhode Island:		
Providence County: Central Falls City		Spanish heritage.
South Dakota:		
Dewey County		American Indian (Dakota).
Gregory County		American Indian (Dakota).
Lyman County		American Indian (Dakota).
Mellette County		American Indian (Dakota).
Shannon County	American Indian	
Todd County	American Indian	
Tripp County		American Indian (Dakota).
Ziebach County		American Indian (Dakota).
Texas	Spanish heritage (statewide)	
Andrews County		Spanish heritage.
Atascosa County		Spanish heritage.
Bailey County		Spanish heritage.
Bee County		Spanish heritage.
Bexar County		Spanish heritage.
Brewster County		Spanish heritage.
Brooks County		Spanish heritage.
Caldwell County		Spanish heritage.
Calhoun County		Spanish heritage.
Cameron County		Spanish heritage.
Castro County		Spanish heritage.
Cochran County		Spanish heritage.
Comal County		Spanish heritage.
Concho County		Spanish heritage.
Crockett County		Spanish heritage.
Crosby County		Spanish heritage.
Culberson County		Spanish heritage.
Dallas County		Spanish heritage.
Dawson County		Spanish heritage.
Deaf Smith County		Spanish heritage.
Dewitt County		Spanish heritage.
Dickens County		Spanish heritage.
Dimmit County		Spanish heritage.
Duval County		Spanish heritage.
Ector County		Spanish heritage.
Edwards County		Spanish heritage.
El Paso County		American Indian (Spanish), Spanish heritage.
Floyd County		Spanish heritage.
Frio County		Spanish heritage.
Gaines County		Spanish heritage.
Garza County		Spanish heritage.
Glasscock County		Spanish heritage.
Goliad County		Spanish heritage.
Gonzales County		Spanish heritage.
Guadalupe County		Spanish heritage.
Hale County		Spanish heritage.
Harris County		Spanish heritage.
Hays County		Spanish heritage.
Hidalgo County		Spanish heritage.
Hockley County		Spanish heritage.
Howard County		Spanish heritage.
Hudspeth County		Spanish heritage.
Irion County		Spanish heritage.
Jeff Davis County		Spanish heritage.
Jim Hogg County		Spanish heritage.
Jim Wells County		Spanish heritage.
Karnes County		Spanish heritage.
Kenedy County		Spanish heritage.
Kent County		Spanish heritage.
Kinney County		Spanish heritage.
Kleberg County		Spanish heritage.
La Salle County		Spanish heritage.
Lamb County		Spanish heritage.
Live Oak County		Spanish heritage.

[Applicable language minority group(s)]

Jurisdiction	Coverage under sec. 4(f)(4)[1]	Coverage under sec. 203(c)[2]
Lubbock County		Spanish heritage.
Lynn County		Spanish heritage.
Martin County		Spanish heritage.
Maverick County		Spanish heritage.
McCulloch County		Spanish heritage.
McMullen County		Spanish heritage.
Medina County		Spanish heritage.
Menard County		Spanish heritage.
Midland County		Spanish heritage.
Mitchell County		Spanish heritage.
Moore County		Spanish heritage.
Nolan County		Spanish heritage.
Nueces County		Spanish heritage.
Parmer County		Spanish heritage.
Pecos County		Spanish heritage.
Polk County		American Indian (Alabama).
Presidio County		Spanish heritage.
Reagan County		Spanish heritage.
Reeves County		Spanish heritage.
Refugio County		Spanish heritage.
Runnels County		Spanish heritage.
San Patricio County		Spanish heritage.
Schleicher County		Spanish heritage.
Scurry County		Spanish heritage.
Starr County		Spanish heritage.
Sutton County		Spanish heritage.
Swisher County		Spanish heritage.
Tarrant County		Spanish heritage.
Terrell County		Spanish heritage.
Terry County		Spanish heritage.
Tom Green County		Spanish heritage.
Travis County		Spanish heritage.
Upton County		Spanish heritage.
Uvalde County		Spanish heritage.
Val Verde County		Spanish heritage.
Victoria County		Spanish heritage.
Ward County		Spanish heritage.
Webb County		Spanish heritage.
Wharton County		Spanish heritage.
Willacy County		Spanish heritage.
Wilson County		Spanish heritage.
Winkler County		Spanish heritage.
Yoakum County		Spanish heritage.
Zapata County		Spanish heritage.
Zavala County		Spanish heritage.
Utah: San Juan County		American Indian (Navajo, Ute).
Wisconsin:		
Clark County: Curtiss Village		Spanish heritage.

[1] Coverage determinations were published at 40 FR 43746 (Sept. 23, 1975), 40 FR 49422 (Oct. 22, 1975), 41 FR 784 (Jan. 5, 1976) (corrected at 41 FR 1503 (Jan. 8, 1976)), and 41 FR 34329 (Aug. 13, 1976). Covered counties in Colorado, New Mexico, and Oklahoma have bailed out pursuant to section 4(a). See § 55.7(a) of this part.

[2] Coverage determinations were published at 57 FR 43213 (Sept. 18, 1992).

[Order No. 1752–93, 58 FR 35373, July 1, 1993; 58 FR 36516, July 7, 1993]