VOTING RIGHTS ACT AFTER THE SUPREME COURT'S DECISION IN SHELBY COUNTY

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

JULY 18, 2013

Serial No. 113–35

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE
81–983 PDF WASHINGTON : 2013

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

BOB GOODLATTE, Virginia, *Chairman*

F. JAMES SENSENBRENNER, JR., Wisconsin
HOWARD COBLE, North Carolina
LAMAR SMITH, Texas
STEVE CHABOT, Ohio
SPENCER BACHUS, Alabama
DARRELL E. ISSA, California
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TOM MARINO, Pennsylvania
TREY GOWDY, South Carolina
MARK AMODEI, Nevada
RAÚL LABRADOR, Idaho
BLAKE FARENTHOLD, Texas
GEORGE HOLDING, North Carolina
DOUG COLLINS, Georgia
RON DeSANTIS, Florida
JASON T. SMITH, Missouri

JOHN CONYERS, JR., Michigan
JERROLD NADLER, New York
ROBERT C. "BOBBY" SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
PEDRO R. PIERLUISI, Puerto Rico
JUDY CHU, California
TED DEUTCH, Florida
LUIS V. GUTIERREZ, Illinois
KAREN BASS, California
CEDRIC RICHMOND, Louisiana
SUZAN DelBENE, Washington
JOE GARCIA, Florida
HAKEEM JEFFRIES, New York

SHELLEY HUSBAND, *Chief of Staff & General Counsel*
PERRY APELBAUM, *Minority Staff Director & Chief Counsel*

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

TRENT FRANKS, Arizona, *Chairman*
JIM JORDAN, Ohio, *Vice-Chairman*

STEVE CHABOT, Ohio
J. RANDY FORBES, Virginia
STEVE KING, Iowa
LOUIE GOHMERT, Texas
RON DeSANTIS, Florida
JASON T. SMITH, Missouri

JERROLD NADLER, New York
JOHN CONYERS, JR., Michigan
ROBERT C. "BOBBY" SCOTT, Virginia
STEVE COHEN, Tennessee
TED DEUTCH, Florida

PAUL B. TAYLOR, *Chief Counsel*
DAVID LACHMANN, *Minority Staff Director*

CONTENTS

JULY 18, 2013

VOTING RIGHTS ACT AFTER THE SUPREME COURT'S DECISION IN SHELBY COUNTY

THURSDAY, JULY 18, 2013

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 11:06 a.m., in room 2141, Rayburn Office Building, the Honorable Trent Franks, (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Goodlatte, Sensenbrenner, Chabot, King, Smith of Missouri, Conyers, Nadler, Scott, Watt, Jackson Lee, and Deutch.

Also Present: Representative Lewis.

Staff present: (Majority) Paul Taylor, Majority Counsel; Tricia White, Clerk; (Minority) David Lachmann, Subcommittee Staff Director; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. The Subcommittee on the Constitution and Civil Justice will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

I will now recognize myself for 5 minutes for an opening statement.

In *Shelby County v. Holder*, the Supreme Court this term held that Section 4 of the Voting Rights Act, which sets out the formula that was used to determine which state and local governments must comply with the Voting Rights Act's preclearance requirements, is unconstitutional and can no longer be used. Those preclearance requirements made certain jurisdictions subject to special procedures when they changed their voting laws, such that they had to have their laws approved by the U.S. Attorney General or a three-judge panel of the U. S. District Court for the District of Columbia before those laws could go into effect.

Section 4 set forth a formula for determining if a jurisdiction was covered by the preclearance requirements. That formula, based on data from 1965, applied the preclearance requirements to those states or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1st, 1964, and had less than 50 percent voter registration or turnout in the 1964 presidential election.

In 1970, Congress reauthorized the Act for another 5 years and extended the coverage formula in Section 4 to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1968. In 1975, Congress reauthorized the Act for seven more years and extended its coverage to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1972. In 1982, Congress reauthorized the Act for 25 years, but did not alter its coverage formula. In 2006, Congress again reauthorized the Voting Rights Act for 25 years, again without changing its coverage formula.

The Supreme Court majority in *Shelby County* wrote that, "the Framers of the Constitution intended the States to keep for themselves, as provided in the 10th Amendment, the power to regulate elections," and that states have "broad powers to determine the conditions under which the right of suffrage may be exercised." It held that the Voting Rights Act departed from these basic principles by suspending, once again, "all changes to state election law, however innocuous, until they had been precleared by Federal authorities in Washington, D.C."

As the Court stated, "In 1966, we found these departures from the basic features of our system of government justified. At the time, the coverage formula, the means of linking the exercise of the unprecedented authority with the problem that warranted it, made sense. Nearly 50 years later, things have changed dramatically." The Court noted that in the covered jurisdictions, "voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of Federal decrees are rare, and minority candidates hold office at unprecedented levels. The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years."

While the Court recognized that the 15th Amendment commands that the right to vote shall not be denied or abridged on account of race, and it gives Congress the power to enforce that command, it held that, "The amendment is not designed to punish for the past. Its purpose is to ensure a better future."

To serve that purpose, Congress, if it is to divide the states, must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions.

Finally, the Court made it clear that its decision "in no way" affects the permanent nationwide ban on racial discrimination in voting found in Section 2 of the Voting Rights Act, nor did its decision affect Section 3 of the Voting Rights Act, which allows courts on a case-by-case basis to put states and political subdivisions under preclearance requirements based on current violations that unconstitutionally limit voting rights.

And with that, I am going to yield to the Ranking Member for his opening statement. Thank you.

Mr. NADLER. Thank you, Mr. Chairman.

Today we review the impact of the Supreme Court's decision in *Shelby County v. Holder*. As the Ranking Member of this Subcommittee when we reauthorized the Voting Rights Act in 2006, I had the privilege of working on a bipartisan and bicameral basis with the then-chairman of the full Committee, Mr. Sensenbrenner, the then-chairman of the Subcommittee, Mr. Chabot, our Ranking

Member, Mr. Conyers, and the gentleman from North Carolina, Mr. Watt, in guiding the reauthorization through the Congress.

We spent months reviewing the evidence, gaining a firm grasp of the current state of voting rights and the impediments to the exercise of the franchise as it exists in the present day. We were persuaded, as were an overwhelming majority of the Members of this House and every single Member of the Senate who voted, that the remedies contained in the special provisions were still necessary and were well suited to the challenge of voting rights.

We did consider revising the formula challenged in *Shelby County* but determined that the existing formula still served as a useful and effective method of applying Section 5 where needed. That determination was not based solely on the questions focused on by the Court and identified by Congress in 1965 but by the full weight of the evidence we found in 2006.

The Court, arrogating to itself the quintessentially congressional power to decide what facts are relevant and what constitutes an appropriate remedy, struck down the formula in Section 4, eviscerating and rendering a nearly dead letter the preclearance provisions of Section 5.

Congress long ago made the correct determination that requiring voters to go to court after they had already been disenfranchised rendered voting rights unenforceable and encouraged local political leaders to rig the system to their advantage. To be clear, the Voting Rights Act is not solely about racial animus. It is about political power. It is not a matter of determining whether one part of the country is "more racist" than another but only whether certain jurisdictions engage in conduct requiring special scrutiny to protect the right to vote.

Excluding minorities from effective participation in our democracy renders them something less than full citizens. Here, Justice Scalia was dead wrong. The right to vote in a free and fair election is not a racial entitlement but rather the birthright of every American regardless of race.

As a far more forward-looking and intelligent Supreme Court said in *Reynolds v. Sims* in 1964, "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."

The Voting Rights Act has stood for a half-century as a testament to our commitment that everyone must have an equal share in the governance of our Nation if our democracy is to have any claim to legitimacy. While it is true that we have made substantial progress in our Nation since 1965, much of it attributable to Section 5 of the Voting Rights Act and our other civil rights laws, it is also true that we are not yet free of efforts to manipulate the system in ways that disempower minority groups.

As we stated in the Committee's report to accompany the 2006 reauthorization issued by this Committee, "Despite the substantial progress that has been made, the evidence before the Committee resembles the evidence before Congress in 1965, and the evidence that was present again in 1970, 1975, 1982 and 1992. In 2006, the

Committee finds abundant evidentiary support for reauthorization of the Voting Rights Act's temporary provisions."

We reviewed the extent to which the kinds of first-generation devices have been addressed and found that Section 5 had improved voter participation in covered jurisdictions, just as the Court's majority later noted. We also observed that, "Sections 5 and 8 have been vital prophylactic tools protecting minority voters from devices and schemes that continue to be employed by covered states and jurisdictions." We went on to note, "The Committee received testimony revealing that more Section 5 objections were lodged between 1982 and 2004 than were interposed between 1965 and 1982, that such objections did not encompass minor inadvertent changes. The changes sought by covered jurisdictions were calculated decisions to keep minority voters from fully participating in the political process. This increased activity shows that attempts to discriminate persist and evolve such that Section 5 is still needed to protect minority voters in the future."

So the voluminous evidence we compiled showed clearly that the need in the covered jurisdictions remained. We also showed at that time that the rate of Section 2 reversals of voting rights changes in covered jurisdictions was more than twice the rate in non-covered districts across the country. So the voluminous evidence that we compiled showed clearly that the need in the covered jurisdictions remained and that the special provisions were necessary and effective in protecting voting rights in those jurisdictions.

Rather than proving that the formula in Section 4(b) was obsolete, the statistics cited by the Court demonstrated the continuing need and effectiveness of Section 5. That brings us to today's hearing. I strongly believe that the facts we found in 2006 made a compelling case for retaining Section 5 and applying it to covered jurisdictions, which include, I might add, my own district in New York City.

What we need to do as a first order of business before we start to look at what we might do to address the Court's decision is to determine the impact of that decision. Just as we moved with great care and deliberation in 2006 in a bipartisan manner, I would urge Members not to put the cart before the horse by trying to examine specific cases and possible remedies until we have a better understanding of where we are right now.

I know that not every Member of this Committee supported the reauthorization of the Voting Rights Act, but I hope that we can nonetheless work cooperatively in the same bipartisan spirit that guided our 2006 deliberations to address the Court's decision.

I hope the witnesses can address some of the following questions. What remains of the Voting Rights Act? What is the status of voting changes precleared or denied preclearance since 2006? Are any jurisdictions still covered by Section 5? If so, based on what? What tools does the Justice Department still have to fight voter disenfranchisement?

There are obviously applications of the Voting Rights Act upon which Members of this Committee strongly disagree. I would hope that rather than allowing ourselves to get bogged down with the most controversial cases of the day, we take a step back, look at Section 5 and at what the Court did. Ultimately, as our experience

since 1965 has clearly shown, the specifics change over time, but the need for preclearance has remained constant. The value of Section 5 has been its ability to respond in real time to constantly changing efforts to disenfranchise voters. I hope we can keep our focus where it belongs and lead to some progress.

Thank you, Mr. Chairman.

Mr. FRANKS. And I thank the gentleman.

And I would now yield to the Chairman of the full Committee, Mr. Goodlatte from Virginia.

Mr. GOODLATTE. Thank you, Mr. Chairman. I appreciate your holding this hearing.

Last month, the Supreme Court struck down one part of the Voting Rights Act, namely Section 4, which automatically placed certain states and political subdivisions under the Act's Section 5 "preclearance" requirements. Those preclearance requirements prevented voting procedures in covered states from going into effect until the new procedures had been subjected to review and approval either after an administrative review by the Department of Justice or after a lawsuit before the Federal district dourt for the District of Columbia.

When the Voting Rights Act was first enacted, the jurisdictions automatically subject to these special "preclearance" requirements were identified in Section 4 of the Act by a formula setting out certain criteria for coverage. The first element in the formula was that a state or political subdivision of the state would be covered if it maintained on November 1, 1964, "a test or device" restricting the opportunity to register and vote. The second element of the formula provided that a state or political subdivision would also be covered if the Director of the Census determined that less than 50 percent of persons of voting age were registered to vote on November 1, 1964, or that less than 50 percent of persons of voting age voted in the presidential election of November 1964.

In *Shelby County*, the Supreme Court struck down this method by which jurisdictions were automatically deemed covered by the preclearance provisions, finding that the original coverage formula was, and I quote, "based on decades-old data and eradicated practices . . . In 1965, the states could be divided into two groups: those with a recent history of voting tests and low voter turnout and registration, and those without those characteristics. Congress based its coverage formula on that distinction. Today, the Nation is no longer divided along those lines, Yet the Voting Rights Act continued to treat it as if it were." The Court further criticized Section 4's formula as relying on "decades-old data relevant to decades-old problems rather than current data reflecting current needs."

Now it is important to note that under the Supreme Court's decision in *Shelby County*, other very important provisions of the Voting Rights Act remain in place, including Sections 2 and 3.

Section 2 applies nationwide and prohibits voting practices or procedures that discriminate on the basis of race, color, or the ability to speak English. Section 2 is enforced through Federal lawsuits just like other Federal civil rights laws, and the United States and civil rights organizations have brought many cases to enforce the guarantees of Section 2 in court, and they may do so in the future.

Section 3 of the Voting Rights Act also remains in place. Section 3 authorizes Federal courts to impose preclearance requirements on states and political subdivisions that have enacted intentionally discriminatory voting procedures in violation of the 14th and 15th Amendments. If a state or political subdivision is found by the Federal court to have discriminated in voting, then the court has discretion to retain supervisory jurisdiction and impose preclearance requirements on the state or political subdivision until a future date at the court's discretion. This means that such state or political subdivision would have to submit all future voting rule changes for approval to either the court itself or the Department of Justice before such rule changes could go into effect. Again, Section 3's procedures remain available today to those challenging voting rules as discriminatory.

I think it is absolutely critical that we make sure that the rights of those to register and vote in the United States, regardless of race or gender or national origin or other protected areas, be preserved, and that we encourage all Americans to register and vote, and that we protect those rights.

I look forward to hearing from all of our witnesses today, to hearing their assessment of the ramifications of the Court's decision.

Mr. FRANKS. And I thank the gentleman.

And I would now yield to the Ranking Member of the Committee, Mr. Conyers from Michigan.

Mr. CONYERS. Thank you, Chairman Franks.

What a day. I just left a Nelson Mandela celebration of his life and legacy. He is 95 years old today, and here we are at this very critical juncture in terms of *Shelby County*.

Now, the Voting Rights Act is the crown jewel of our Nation's civil rights laws. Claiming seniority but not age, I was a newly elected Member of Congress in 1965 and was privileged to vote in favor of that act when it passed this Committee in the House. Many Members hold the Act in an almost sacred place, like our colleague John Lewis, who shed his blood and nearly his life in support of its passage.

Without question, the Act has been an unqualified success, helping rid our Nation of legal barriers to voting discrimination, paving the way for the election of the first African-American in our history to the White House.

But these successes do not mean that the work of the Voting Rights Act is complete. And for that reason, my colleague, Jim Sensenbrenner, and I compiled a voluminous record in support of reauthorization of the Act in the year 2006. This record in many respects greatly exceeded previous reauthorization efforts. Most importantly, we carefully followed the parameters set out in the *City of Boerne v. Flores* in updating the Act so that it would pass legal scrutiny and protect voters from well-documented continuing discrimination.

In response to legal challenges to the Act following 2006, we asserted congressional authority to enact voting rights legislation under the 13th, 14th, and 15th Amendments of the Constitution in two separate amicus briefs. We were confident that the United States Supreme Court, following precedents set in *South Carolina v. Katzenbach* and the *City of Rome v. United States*, would uphold

the constitutionality of the Act. This explains why I and many of my colleagues, most legal commentators were deeply disappointed by the Court's 5-4 decision in *Shelby County v. Holder*, which invalidated the coverage formula or trigger in Section 4(b) of the Act as being outdated.

As a result of Shelby, Section 5 of the Act, which requires preclearance for jurisdictions covered by Section 4(b), is effectively suspended. Section 5 is the Act's key provision requiring covered jurisdictions to obtain advance approval from the Department of Justice or a three-judge panel before they can implement voting changes. The suspension of Section 5 immediately enables jurisdictions with a clear and recent history of discrimination to dilute the impact of minority voting through redistricting and to implement procedures that could create barriers to the ballot box.

In addition, the suspension of Section 5 preclearance deprives the Justice Department of a critical tool that has been used to protect the voting rights of minority citizens in jurisdictions with a history of discrimination.

Although the Supreme Court has invited Congress to pass an updated coverage formula, the opinion left unresolved several important questions. The most immediate of these issues pertains to the current state of existing voting rights enforcement law during the interim between this ruling and the enactment of any new coverage formula.

Fortunately, today's hearing provides an important opportunity for us to address this issue and others presented by Shelby. I want to thank again Committee Chairman Goodlatte and Subcommittee Chairman Franks for promptly scheduling this hearing. We must use this opportunity to promptly craft a legislative solution that enables the Justice Department to effectively enforce the rights of minority voters in covered jurisdictions within the contours of the Constitution.

I know every Member of this Committee to be fair individuals of good faith, and I pledge to work with every one of you to respond to the Supreme Court's decision on a bipartisan basis. It is therefore my hope that immediately after this hearing and over the recess we can begin the process of informal discussions with each other in order to protect our citizens' voting rights to the fullest extent possible consistent with our Constitution.

I hold up a record entitled "Department of Justice Objections under Section 5." Between the years 2000 and 2012, there are scores of voting changes that were objected to or withdrawn. It is important to our discussion today as we discuss how Congress will continue to address states and political subdivisions that may still be engaged in voting discrimination.

I thank the Chairman.

Mr. FRANKS. And I thank the gentleman.

And without objection, other Members' opening statements will be made part of the record.

I just want to thank everyone for their presence here today, and I will now introduce our witnesses.

Our first witness is J. Christian Adams, counsel to the Election Law Center. Mr. Adams previously served in the Civil Rights Divi-

sion of the Department of Justice as a career attorney in the voting section.

Our second witness is Robert Kengle, the Acting Co-Director of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law. Mr. Kengle previously served for over 20 years in the Department of Justice voting section.

Our third witness today is Hans von Spakovsky, Senior Legal Fellow at the Heritage Foundation. Mr. von Spakovsky previously served in the Justice Department as counsel to the Assistant Attorney General for Civil Rights, where he worked on enforcing the Voting Rights Act.

Our final witness today is Professor Spencer Overton of the George Washington University Law School. Mr. Overton has also served as the Principal Deputy Assistant Attorney General at the Department of Justice in the Office of Legal Policy.

We are very grateful for all of you being with us today.

Now, each of the witnesses' written statements will be entered into the record in its entirety, and I would ask that each witness summarize his or her testimony in 5 minutes or less. And to help you stay within that time, there is a timing light in front of you. The light switch will turn from green to yellow, indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes have expired.

Before I recognize the witnesses, it is the tradition of the Subcommittee that they be sworn, so if you would please stand to be sworn.

[Witnesses sworn.]

Mr. FRANKS. Let the record reflect that the witnesses answered in the affirmative.

I now recognize our first witness, Mr. Adams, and if you will please turn your microphone on before speaking, sir.

TESTIMONY OF J. CHRISTIAN ADAMS,
ATTORNEY ELECTION LAW CENTER, PLLC

Mr. ADAMS. Thank you, Mr. Chairman, Ranking Member Nadler. Thank you for the opportunity to testify in this important matter.

Separating fact from fiction about the Supreme Court's recent decision in *Shelby County* is essential to chart future effective and constitutionally permissible civil rights enforcement.

Reports of the demise of the Voting Rights Act have been greatly exaggerated. What remains of the Voting Rights Act? Everything else. It is simply hype to suggest that the Supreme Court's decision in Shelby has left voters in America unprotected. Deliberately stoking fears, deliberately targeting certain racial groups for disinformation, deliberately ignoring the multiple protections which remain in the Voting Rights Act does a disservice to the Nation and to civil rights.

In *Shelby County*, the Supreme Court found that in 2013 these half-century-old triggers had become obsolete. Mississippi was captured, but so was New Hampshire. Arkansas, the epicenter of school desegregation in 1957, was not covered, but Michigan was. Some counties in North Carolina were covered, but neighboring counties weren't. Virginia, a state which elected a Black governor and twice voted for President Obama, was captured by Section 4.

When the coverage formula was written in 1965, My Fair Lady had just won the Oscar for Best Picture, My Girl by the Temptations topped the charts, and Bonanza was the most watched show on television.

Our Constitution vests states with the power to run their own elections. This diffusion of power is designed to protect individual liberty. Yet in 1966, the Court properly justified Section 5's intrusion into state sovereignty because some states had engaged in "widespread and persistent discrimination," which the Court characterized as an "insidious and pervasive evil." This language demonstrates the heavy empirical burdens necessary to justify Federal intrusion into state sovereignty.

Does "widespread and persistent discrimination" manifest as an "insidious and pervasive evil" in 2013? Obviously the Supreme Court thinks no, at least as it pertains to the triggers of the invalidated Section 4.

In Shelby, the Supreme Court also rejected the concept of so-called second-generation structural racism to justify continued Federal oversight in 15 states. According to the Supreme Court, genuine, direct, and immediate racial discrimination alone justifies Federal intrusion into state sovereignty, not vague and attenuated so-called second-generational structural discrimination.

The Court made it clear that only certain current conditions could justify a Section 5 coverage formula. Among the touchstones listed in Shelby are: blatantly discriminatory evasion of Federal decrees; lack of minority office holding; tests and devices; voting discrimination on a pervasive scale; flagrant voting discrimination; rampant voting discrimination. Federal intrusion into powers reserved by the Constitution to the states must relate to these empirical circumstances.

The Court in Shelby also concluded that Congress weakened the constitutionality of the Voting Rights Act in 2006 when it altered the Section 5 standards. Beginning in 2006, submitting jurisdictions were forced to prove a negative, thus increasing the constitutional injury to states.

A 2009 objection in Kinston, North Carolina, demonstrates this abusive and legally indefensible position that will be adopted by the Justice Department in that file. Kinston, a majority Black jurisdiction, in a referendum, decided to dump partisan elections and move to non-partisan elections. The DOJ, exploiting the 2006 reauthorization burden shift, objected to the change. The objection was explicitly based on the indefensible and immoral position that Black voters would not know for whom to vote if the word "Democrat" was not next to a candidate's name.

But the Voting Rights Act remains alive and well. Section 2 is the nationwide prohibition on racial discrimination, and it remains in full force and effect. Unfortunately, the Justice Department has failed to bring a single Section 2 case in over 4 years. They have left it to private plaintiffs to sue, such as they did in Fayette County, Georgia.

Section 3 of the Voting Rights Act also remains the law. This is the opt-in provision where oversight under Section 5 can still follow. After Shelby, Section 203 and Section 4(e) of the Voting Rights

Act are still in full force and effect to protect minority language voters.

And finally, Section 11 of the Voting Rights Act, really, in my view, the heart of the Voting Rights Act, remains in full force, protecting against voter intimidation, threats or coercion.

Thank you very much for the opportunity to testify.

[The prepared statement of Mr. Adams follows:]

Testimony of

J. Christian Adams

House Judiciary Committee
Subcommittee on the Constitution and Civil Justice

The Voting Rights Act After the Supreme Court's Decision in *Shelby County*

July 18, 2013

J. Christian Adams
Attorney
Election Law Center, PLLC
300 N. Washington Street
Suite 405
Alexandria, Virginia 22314
703-963-8611
adams@electionlawcenter.com

Subcommittee Chairman Franks, Ranking Member Nadler, and members of the Committee:

Thank you for the opportunity to testify in this important matter. Separating fact from fiction about the Supreme Court's recent decision in *Shelby County* is essential to chart future effective and constitutionally permissible civil rights enforcement. I served for five years as a career attorney in the Voting Section at the United States Department of Justice from 2005 through 2010. There, I investigated and brought a range of cases to protect minority rights under the anti-discrimination and minority language provisions of the Voting Rights Act, and also cases to enforce obligations under National Voter Registration Act/ Help America Vote Act. I reviewed preclearance submissions under Section 5 of the Voting Rights Act.

Reports of the demise of the Voting Rights Act have been greatly exaggerated. Those who say that the Supreme Court decision in *Shelby* means an end to protections in the Voting Rights Act are peddling hype. In fact, they are peddling the most dangerous and disingenuous sort of hype. Deliberately stoking fears, deliberately targeting certain racial groups for disinformation, deliberately ignoring the multiple protections which remain in the Voting Rights Act does a disservice to the nation and to civil rights.

In *Shelby County*, the Supreme Court characterized the Section 4 triggers as "extraordinary and unprecedented." By 2013, these 1965 triggers had stagnated into a scattershot rule to force 16 states to seek federal approval for thousands of small voting changes. Mississippi was captured, but so was New Hampshire. Alabama was subject to Section 5, but so were New York and Alaska. Arkansas, the epicenter of school desegregation in 1957 was not covered, but Michigan was. Some counties in North Carolina were covered, and neighboring counties weren't. Virginia, a state which elected a black governor and twice voted for President Obama was captured by Section 4.

By 2013, the Section 4 triggers appeared obsolete, and the Supreme Court agreed in *Shelby*.

When the coverage formula was written in 1965, My Fair Lady had just won the Oscar for Best Picture, My Girl by the Temptations topped the charts and Bonanza was the most watched show on television. The Supreme Court in *Shelby* recognized what most Americans now recognize and appreciate: elections in 2013 bear no resemblance to elections in 1965.

The Supreme Court's characterization in *Shelby* of the burdens imposed on a covered jurisdiction in 2013 is similar to the Court's characterization in 1966 in *South Carolina v. Katzenbach* of preclearance obligations as "stringent and

complex." The burdens are significant. Our Constitution vests states with the power to run their own elections. This diffusion of power is designed to protect individual liberty. The Founders knew that centralizing control of elections would eventually threaten individual freedom.

High Burden to Justify Federal Oversight

Yet in 1966, the Court properly justified Section 5's intrusion into state sovereignty because some states engaged in "widespread and persistent discrimination," which the Court characterized as an "insidious and pervasive evil." This language from *Katzenbach* demonstrates the heavy empirical burden necessary to justify federal intrusion into state sovereignty. Does "widespread and persistent discrimination" manifest as an "insidious and pervasive evil" in 2013? Obviously the Supreme Court thought the answer is no, at least as it pertains to the scattershot triggers of the invalidated Section 4.

In *Shelby*, the Supreme Court rejected the concept of so-called "second generation" structural racism to justify continued federal oversight of elections in 15 states. Congress should heed the warning. According to the Supreme Court, genuine, direct and immediate racial discrimination alone justifies federal intrusion into state sovereignty, not vague and attenuated so-called "second generational structural" discrimination.

The Court made it clear that only certain current conditions could justify a formula for Section 5 coverage. Among the touchstones listed in *Shelby* are: "blatantly discriminatory evasions of federal decrees," lack of minority office holding, tests and devices, "voting discrimination 'on a pervasive scale,'" "flagrant" voting discrimination, or "rampant" voting discrimination. Again, pay close attention to the Supreme Court. *Federal intrusion into powers reserved by the Constitution to the states must relate to these empirical circumstances.* Triggers built around political or partisan goals cannot withstand Constitutional scrutiny.

These extraordinary conditions in 1965 were what justified the extraordinary remedy of Section 5 oversight in 1965. Without such current extraordinary conditions, Congress may not impose modern extraordinary remedies on certain states.

2006 Reauthorization of Section 5 Weakened Constitutionality

The Court in *Shelby* also concluded that Congress weakened the constitutionality of the Voting Rights Act's preclearance requirements in 2006 when it altered the Section 5 standards. Beginning in 2006, submitting jurisdictions were forced to prove a negative. Congress required them to prove the absence of "any" discriminatory effect by inserting "any" into Section 5. Any

means any. The Justice Department Civil Rights Division has taken the 2006 amendments literally when reviewing submissions like Georgia's proof of citizenship requirement to register to vote, or South Carolina's voter identification law. The DOJ adopted a *de minimis* trigger for interposing an objection despite mitigating facts and objected in multiple instances – including in Georgia and South Carolina.

Stubbornly following the 2006 amendment to require an absence of "any" discriminatory effect also caused the Department to object to voter identification laws. The objection in South Carolina cost state taxpayers $3.5 million and federal taxpayers untold millions, after South Carolina was forced to seek court approval of voter identification laws. The Supreme Court plainly recognized that the extra hurdles Congress imposed in 2006 weakened the constitutionality of the preclearance regime.

DOJ's Abuse of Power Using Section 5

Some groups and activists who disagree with *Shelby* prefer that states run a gauntlet of Washington bureaucrats before they may implement voting changes. Unfortunately, some of those same groups have participated in abuses of power. These abuses tainted Section 5 enforcement before *Shelby*. Simply, the Justice Department has colluded with racial interest groups and behaved inappropriately

while conducting Section 5 reviews. This conduct has cost federal taxpayers millions of dollars in sanctions. Those who supported continued use of Section 5 are either unfamiliar with these abuses, or are comfortable with them.

For example, in *Johnson v. Miller* (864 F. Supp. 1354, 1364 (S.D. Ga. 1994)), the United States District Court sanctioned the Voting Section $594,000 for collusive misconduct by DOJ Voting Section lawyers. A federal court noted that the ACLU was "in constant contact with the DOJ line attorneys." Pronouncing the communications between the DOJ and the ACLU "disturbing," the court declared, "It is obvious from a review of the materials that [the ACLU attorneys'] relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities." After a Voting Section lawyer professed that she could not remember details about the relationship, the court found her "professed amnesia" to be "less than credible."

Abuse of power in the Section 5 process is not confined to *Johnson v. Miller*. As recently as this May, the Justice Department Voting Section used the Section 5 process to extract legally indefensible concessions from states that a federal court would never impose. In places like Rock Hill, South Carolina, the Voting Section permitted blatantly unconstitutional district lines to survive in order to prop up the electoral success of multiple election officials based on their race.

A 2009 objection in Kinston, North Carolina, shows the outrageous, abusive and legally indefensible positions the Voting Section will adopt using Section 5. Kinston, a majority black jurisdiction, in a referendum decided to dump partisan elections for town office and move to nonpartisan elections. The Voting Section, exploiting the burden shift and plain requirement that Kinston prove the absence of a negative, objected to the change. The objection was explicitly based on the morally and legally indefensible position that black voters would not know for whom to vote if the word "Democrat" was not next to a candidate's name.

The legally indefensible abuse of power in the Kinston and Georgia redistricting objections are just a couple of many others. Congress actually relied on some of these abusive and meritless objections when Congress reauthorized Section 5 in 2006. These abusive and meritless objections polluted the record in 2006, but no plaintiff ever challenged them, and Congress took no testimony regarding their merits.

Voting Rights Protections Are Alive and Well Post-*Shelby*

Contrary to the hype surrounding the *Shelby* decision, the Voting Rights Act remains alive and well. Multiple federal protections against discrimination in voting are still on the books. These permanent provisions of the Voting Rights Act

can still be utilized by private parties and the Justice Department to protect voting rights.

Section 2: Nationwide and Permanent Protections Remain in Force

Section 2 is the nationwide prohibition against racial discrimination. It remains in full force and effect.

If witnesses from the Department of Justice ask Congress to reverse the outcome in *Shelby*, Congress should ask them a few simple questions:

First, *why hasn't the Justice Department utilized Section 2 of the Voting Rights Act to initiate and bring a single lawsuit since President Obama was inaugurated?* Indeed, this administration's record of Section 2 enforcement is nonexistent.

Second, *if discrimination in voting is so pervasive and widespread justifying renewed Section 5 coverage,* why hasn't your Justice Department brought a single case to address a single instance of the problem that you purport exists using Section 2?

Third, since taking office, why has your administration effectively switched off Section 2 enforcement – *is it inefficient management, or a policy decision to ignore the law?*

While the Bush administration vigorously enforced Section 2, enforcement under the current administration has been essentially dormant. In fact, the current administration has *failed to initiate a single Section 2 investigation which resulted in an enforcement action since January 20, 2009.* I initiated and brought the very last Section 2 case in March 2009, *United States v. Town of Lake Park, FL*, (S.D. Fl. 2009).[1] This case was started under Attorney General Michael Mukasey in 2008. General Holder only inherited the case in the final stages of preparation for filing. Not a single Section 2 case has been filed by the Justice Department in the subsequent 52 months.

If discrimination in voting remains a problem, you would hardly know based on recent Section 2 enforcement activity. Either discrimination in voting doesn't exist anymore at levels necessary to justify federal oversight under Section 5, or, the Justice Department has decided not to vigorously enforce the law.

General Holder's failure to enforce Section 2 is noteworthy considering the loud (and in hindsight, completely disingenuous) criticism of the Bush administration's civil rights record. Consider Wade Henderson of the Leadership Conference on Civil Rights. On March 22, 2007, he complained to this Committee about the purported lack of Section 2 cases brought by the prior administration, complaining: "the [Civil Rights] Division must deal with and respond to growing

[1] Three other Voting Section lawyers also helped bring the case.

distrust among minority communities who feel increasingly abandoned and marginalized by the Division's litigation choices and priorities."

When Henderson made this complaint, the Division was in the process of litigating two Section 2 cases: *United States v. Osceola County, FL* (M.D. Fla 2005) and *United States v. Village of Port Chester, NY* (S.D.N.Y. 2006). In preparing this testimony, I could find no complaints to the media from Mr. Henderson about the fact the current administration has not brought a single Section 2 case since I filed *United States v. Town of Lake Park, FL* (S.D. Fla. 2009), when I was a lawyer at the DOJ in March of 2009. The investigation of the *Lake Park* case was approved by the prior administration. *Thus, the current administration has not initiated and brought a single Section 2 lawsuit.*

In December 2009, Assistant Attorney General Thomas Perez criticized the prior administration's Voting Section before the American Constitution Society: "Those who had been entrusted with the keys to the division treated it like a buffet line at the cafeteria, cherry-picking which laws to enforce."[2] The enforcement record three years removed from Perez's 2009 bravado at ACS paints a very embarrassing portrait of the Division's voting rights enforcement.

[2] Cited in Serwer, The Battle for Voting Rights, *The American Prospect*, January 8, 2010. http://prospect.org/article/battle-voting-rights-0.

The Holder Justice Department has abandoned the Section 2 field and forced private plaintiffs alone to bring cases.

It's not as if Section 2 cases don't exist. Why did the Justice Department refuse to bring a Section 2 case against Fayette County, Georgia, in 2010 that the NAACP eventually brought and won?[3] Certainly it wasn't for a lack of resources, as the Voting Section had plenty of capacity to add a single case to their docket. If a lack of resources is offered as a reason, then more effective and decisive managers should be installed.

Under Section 5, states had the burden to prove a negative and demonstrate a total absence of discriminatory intent or effect. Naturally, a Section 2 case shifts the burden to the plaintiff to prove a case. Given the fact millions of plaintiffs every year in thousands of courts carry this burden, it should prove neither shocking or insurmountable to Justice Department lawyers.

Finally, I am currently litigating a Section 2 case arising out of Guam. There, my client, a retired Air Force Major, was denied the right to register to vote on a government run political status plebiscite. He has publically stated that he begged the Department of Justice to help him, to no avail. Emails reveal that even

[3] Read the District Court judgment at http://www.naacpldf.org/files/case_issue/GA%20State%20Conference%20NAACP%20v%20Fayette%20County%20BofC%20Opinion.PDF.

an assistant United States Attorney on Guam opined that the challenged law is illegal.[4] Yet the Voting Section has failed to act. If Congress is looking to strengthen voting rights, it might look to Guam as a jurisdiction subject to federal civil rights laws that imposes limitations on the right to vote reminiscent of the racially motivated grandfather clauses from an era before the Voting Rights Act. Congress might also ask the Department of Justice why it has refused to enforce Section 2 and other civil rights laws in Guam.

Section 3 of the Voting Rights Act

Section 3 of the Voting Rights Act remains the law. This is the "opt-in" provision of the Voting Rights Act. A plaintiff, including the Attorney General, can ask a federal court to place a defendant under Section 5 oversight once a violation of the law has been established. What is most useful about Section 3 is that it would seem to satisfy *Shelby*'s mandate that federal oversight of state or local elections be closely matched with the need. In other words, the oversight is congruent and proportional with the problem.

Section 5 preclearance obligations triggered through Section 3 would certainly pass Constitutional muster post-*Shelby*. Oddly, plaintiffs have rarely

[4] The District Court of Guam denied Major Davis standing to sue. The Attorney General has unquestioned standing to sue under 42 U.S.C. Section 1971 (another cause of action) and it is my opinion that had the Voting Section vigorously defended his voting rights, this matter would already be resolved. The case is currently on appeal before the 9th Circuit Court of Appeals.

used this provision even though Voting Rights Act violations are now more common in jurisdictions not covered by the unconstitutional Section 4 triggers – including Osceola County (FL), Euclid (OH) and Blaine County (MT). If racial discrimination is as pervasive as some argue, then surely the Section 3 opt-in triggers will offer a way to resurrect Section 5 coverage for offending jurisdictions.

In *United States v. Ike Brown*, the United States District Court (S.D. Miss.) found that the Noxubee County Democratic Executive Committee, and its Chairman Ike Brown, engaged in conduct constituting voting discrimination in purpose and effect. No relief was sought under Section 3 because Noxubee County was already a Section 5 covered jurisdiction. Unfortunately, this chronology reveals the defects and obsolescence of the old enforcement of Section 5.

In 2010, the Department of Justice was unwilling to conduct a Section 5 review of a county legislative plan in Noxubee County (MS) to ensure that it had neither a discriminatory purpose nor effect. One problem with the plan is that it was written by the defendant in *U.S. v. Ike Brown*. *In any other Section 5 review, a redistricting plan created in part by a defendant who had been found liable for intentional discrimination would have tripped an extensive Section 5 review process. But because the defendant and plan author was black, and the victims of the intentional discrimination were white, the Justice Department Voting Section*

did not review the legislative redistricting plan as it would have if the races been reversed. Why? Because Assistant Attorney General Tom Perez has plainly stated that Section 5 does not protect white voters – even though in Noxubee County, the need for protection was acute.[5]

Congress should ensure that Section 3 opt-in triggers protect all Americans, not just some Americans.

Section 203 and 4(e) Minority Language Protections

After Shelby, Section 203 and Section 4(e) of the Voting Rights Act remain in full force and effect. Section 203 protects the electoral process for those who do not speak English well. Section 4(e) protects any Americans who were educated in Puerto Rico under the American flag, but now live in the United States. Whether or not minority language voters are protected will depend in large part on whether the Justice Department vigorously enforces the law.

During the Bush administration, the DOJ Voting Section brought a record number of cases to enforce Sections 4(e) and 203 of the Voting Rights Act. As with Section 2, enforcement of minority language protections has fallen off significantly in the last four years.

[5] See, http://www.justice.gov/oig/reports/2013/s1303.pdf, at 93.

The Bush administration brought 28 cases under Sections 203 and 4(e), and the Obama administration has, thus far, brought seven. Those concerned with vigorous protection of minority voting rights after *Shelby* should seek more vigorous enforcement of Section 2.

Section 11(b) of the Voting Rights Act

Perhaps the most important provision of the Voting Rights Act is Section 11, and it remains in full force and effect after *Shelby*. Section 11(b) is the provision of the law which prohibits intimidation, threats or coercion directed toward voters, or those aiding voters. The attempt to intimidate, threaten or coerce a voter is also actionable. This provision is the most basic part of the law passed in 1965. Simply, Americans are free to vote without threats of violence. The last Section 11(b) case brought by the Justice Department was filed January 7, 2009. It was *United States v. New Black Panther Party, et al*, (E.D. Pa. 2009).

Thank you for your time and attention.

Date: July 18, 2013

Respectfully submitted,

J. Christian Adams

# # #

Mr. FRANKS. And I thank the witness.

And I will now recognize our second witness, Mr. Kengle. And, sir, if you will please turn on your microphone before speaking. Mr. Kengle.

TESTIMONY OF ROBERT A. KENGLE, CO-DIRECTOR, VOTING RIGHTS PROJECT, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Mr. KENGLE. Good morning, Chairman Franks, Ranking Member Nadler, Members of the Subcommittee. My name is Bob Kengle. I am co-director of the Voting Rights Project at the Lawyers' Committee for Civil Rights Under Law in Washington, D.C. The Lawyers' Committee was formed in 1963 at the request of President John F. Kennedy to bring together the members of the private bar to combat racial discrimination. We are celebrating our 50th anniversary. The job is not yet complete.

I thank you for the opportunity to testify this morning on behalf of the Lawyers' Committee concerning the Supreme Court's decision in the *Shelby County v. Holder* case and its implications.

I had the honor of serving over 20 years in the voting section at the Department of Justice, where I litigated numerous cases under Section 2 and Section 5 of the Voting Rights Act. I also supervised a number of Section 5 submissions and Section 5 objection analyses. I have been a member of the Voting Rights Project at the Lawyers' Committee since 2007, and I have continued to work on a broad range of voting rights matters, including the *Shelby County* case.

In *Shelby County v. Holder*, the Supreme Court held that the coverage formula contained in Section 4(b) of the Voting Rights Act is unconstitutional for purposes of determining the jurisdictions to which the preclearance requirements of Section 5 would apply. As a result, preclearance review under Section 5 is now in suspended animation.

My written testimony today stresses that stopping racially discriminatory voting changes before they are put into effect is what made Section 5 so unique and so successful. Voting is the fundamental preservative right in our country. It endangers all other rights when voting is denied or abridged on account of race.

The existing Federal voting rights laws all have their strong points, but only one screens out discriminatory voting changes before they take hold, Section 5—and Section 5 has been paralyzed by the *Shelby County* decision.

Under Section 2 of the Voting Rights Act, preliminary injunctions are extremely rare, even in the most meritorious cases. Section 2 is a vital and powerful tool. It is constitutional. But as it stands today, Section 2 is not an adequate substitute for Section 5.

Section 3(c) of the Voting Rights Act, which provides a form of preclearance by court order, is an after-the-fact remedy because it requires a Federal court to first find serious constitutional violations before it can order any type of preclearance.

Let me stress, racial voting discrimination needs to be stopped before it takes hold. It would be a political and moral abdication to say that we need not be concerned if discriminatory voting practices can be used for years while lawsuits to stop them wind their

way through the courts. But as the law stands now, that is what you should expect to occur as a result of the *Shelby County* decision.

As you consider today's testimony, I want to stress four important points about the Shelby decision. First, the Supreme Court did not find Section 5 unconstitutional. The case was a direct attack on the constitutionality of Section 5; the Court did not find it unconstitutional.

Second, the Supreme Court did not hold that racial discrimination no longer exists. In fact, the Court's opinion said voting discrimination still exists; no one doubts that. I agree with that part of the decision.

Third, the Supreme Court did not undermine the retrogression principle, which serves as the Section 5 effect standard. The retrogression standard was the product of the Supreme Court's decision in 1976 in the Beer case, and the Supreme Court repeatedly has upheld it in other cases.

Fourth, the Supreme Court did not restrict classes of evidence upon which Congress can rely to target remedial measures. Congress can look at all probative evidence of discrimination.

As I discussed in detail in my testimony, the suspension of Section 5 leaves a critical gap in the Federal protections for the right to vote. The *Shelby County* decision completely upends the traditional process, the traditional standard for dealing with discriminatory voting changes. Now, it falls to the Justice Department and private groups to identify discriminatory changes between the time they are adopted and implemented, gather enough evidence to state a claim, carry the burden of proof, and persuade a court to issue a preliminary injunction. If any of those steps fail, then the discriminatory change can go into effect unstopped.

Despite the best efforts, I think that is what is going to happen. In some cases, we can expect that to occur.

Congress does not intrude on states' rights when it enforces the 15th Amendment by appropriate legislation. States have no reserved right to use racially discriminatory voting laws.

I once again respectfully thank the Chair, the Ranking Member, and the Members of the Subcommittee for the opportunity to testify today. I look forward to answering your questions.

[The prepared statement of Mr. Kengle follows:]

Testimony of Robert A. Kengle
Co-Director, Voting Rights Project
Lawyers' Committee for Civil Rights Under Law

Before the Subcommittee on the Constitution and Civil Justice
of the Committee on the Judiciary
United States House of Representatives

Hearing on "The Voting Rights Act After the
Supreme Court's Decision in *Shelby County*"

July 18, 2013

Chairman Franks, Ranking Member Nadler, and Members of the House Judiciary Subcommittee on the Constitution and Civil Justice:

Thank you for the opportunity to testify today, on behalf of the Lawyers' Committee for Civil Rights Under Law, concerning the Supreme Court's decision in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), and its implications. In that case, the Supreme Court held unconstitutional the coverage formula contained in Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b), for determining the jurisdictions subject to the preclearance requirements of Section 5 of the Act, 42 U.S.C. § 1973c.

My name is Bob Kengle, and I am Co-Director of the Voting Rights Project at the Lawyers' Committee for Civil Rights Under Law, a non-partisan, non-profit organization. The Lawyers' Committee was formed in 1963 at the request of President John F. Kennedy to partner with the private bar to advance the cause of civil rights. We continue to work with law firms around the country litigating cases to combat racial inequities and have been very involved in issues impacting voting rights. The Lawyers' Committee played a major role in the 2006 reauthorization of Sections 4(b) and 5 of the Voting Rights Act by organizing the National Commission on the Voting Rights Act. The Commission conducted several fact-finding hearings and submitted a lengthy report to Congress which became a part of the reauthorization record. We also lead Election Protection, the largest non-partisan voter protection program in the country. Finally, the Lawyers' Committee has an active litigation program, including litigating matters under Sections 5 and 2 of the Voting Rights Act and other federal and state voting laws.

With other attorneys at the Lawyers' Committee, I was actively involved in briefing the *Shelby County* case on behalf of a Shelby County resident, Mr. Bobby Lee Harris, who intervened to defend the constitutionality of Sections 4(b) and 5. The *Shelby County* decision has been criticized from a range of legal perspectives, and the Lawyers' Committee believes the case was wrongly decided.

In short, the Supreme Court put form over function by applying an overly literal reading of Section 4(b) as reauthorized in 2006. The evidence in the massive Congressional record in 2006, to which the Lawyers' Committee substantially contributed, showed a recent and persistent pattern of voting discrimination in the Section 4(b) covered jurisdictions since 1982 (when Sections 4(b) and 5 were last reauthorized by Congress), including numerous and repeated Section 5 objections and Section 2 violations. There was overwhelming bipartisan support for the 2006 reauthorization. In my view the Court provided no good reason for giving less deference to Congress' judgment in 2006 concerning current conditions than the Court had done in each of its previous cases upholding the constitutionality of Congress' 1965 enactment of Section 5, and its 1970, 1975, and 1982 reauthorizations.

That being said, my testimony today is not to persuade you that the Supreme Court made what may prove to be a mistake of historic proportions. Instead, my goal is to put the Supreme Court's decision into context and to provide a perspective on its implications based upon my experience and that of the Lawyers' Committee in enforcing federal voting rights laws.

My experience includes over twenty years of service in the Voting Section of the Civil Rights Division at the U.S. Department of Justice. As a line attorney, special counsel and deputy chief I litigated and supervised a broad range of cases under Section 5 and Section 2 of the Voting Rights Act, the Constitution and other federal voting rights laws, and I supervised the review of numerous Section 5 submissions and objections. I have continued to focus on voting rights cases since joining the Lawyers' Committee in 2007.

Everyone here today would surely agree that one of Congress's most important responsibilities is to enact effective federal laws to prevent and deter racial voting discrimination. As the Supreme Court observed over a century ago, the right to vote is fundamental "because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The majority opinion in *Shelby County* recognized that "voting discrimination still exists; no one doubts that." The immediate issue facing us now is what the *Shelby County* decision means for achieving the objective of eradicating racial discrimination in voting in all its forms.

I will begin by discussing what the *Shelby County* decision held and how it affected the law, then note some important legal issues that the decision did not address, discuss the practical impact of the ruling, and finally discuss the implications of the decision for voting rights enforcement.

In light of the *Shelby County* decision, it is imperative for Congress to conduct a prompt, thorough and bipartisan process to update the 2006 record regarding the nature and extent of current voting discrimination and to assess the legal tools that remain available to combat such discrimination. Based upon our experience and analyses, the Lawyers' Committee submits that this examination will show that the laws on the books will not be effective to stop racially discriminatory voting changes from being implemented and enforced, a task at which Section 5 was singularly successful, and that Congress therefore needs to act to put effective statutory remedies in place. The right to vote free from racial discrimination is protected by two constitutional amendments which Congress has the enumerated power to enforce by appropriate legislation. Congress has ample legal authority – and the moral responsibility – to address the problem.

How the Shelby County decision affected the law

In its *Shelby County* decision the Supreme Court considered a facial challenge to Sections 4(b) and 5 of the Voting Rights Act of 1965, as reauthorized by Congress in 2006. Section 5 requires federal review of changes affecting voting in "covered" jurisdictions before those changes are implemented. Section 4(b) as adopted in 1965, and amended and reauthorized in

1970, 1975, 1982, and 2006, provided a set of formulas to identify which jurisdictions would be "covered". This approach maintained the electoral status quo in covered jurisdictions so that discriminatory voting practices could be screened out through Department of Justice administrative reviews, or less frequently by judicial review in the U.S. District Court for the District of Columbia. While Section 5 was in force, thousands of discriminatory voting changes were blocked by DOJ objections.

The Supreme Court held that the Section 4(b) coverage formula as reauthorized in 2006 cannot constitutionally be used for enforcing the Section 5 "preclearance" remedy. The Supreme Court's holding requires preclearance coverage to correspond closely with current evidence of the types of voting discrimination that Congress seeks to prevent or deter. Considering the array of arguments that were advanced to attack the constitutionality of Section 5, this was a narrow decision in legal terms, albeit one with a wide-ranging impact.

The Court gave perhaps the most literal possible reading to the text of the statute and found that the Section 4(b) formula, as reauthorized in 2006, did not relate to current evidence of discrimination. The Court did not find an adequate link between the coverage formula contained in Section 4(b) and Congress' 2006 findings that an ongoing pattern of voting discrimination has continued in the covered jurisdictions.

The Court highlighted the difference in type between the evidence of depressed voter turnout and voter registration employed for the 1965, 1970 and 1975 coverage determinations, and the more recent evidence in the 2006 record, which primarily concerned minority vote dilution in one form or another.

The Court also stressed the federalism burdens of targeted preclearance coverage in terms of the "sovereignty of the states," and stated that the 2006 Amendments to Section 5 had increased the federalism burden on covered jurisdictions.

What the Shelby County decision did not do

The Supreme Court did not find Section 5 unconstitutional. Despite the vigorous facial attack mounted against Section 5, the Supreme Court did not hold, nor did the majority opinion even suggest, that Congress lacks the power to adopt a preclearance remedy – that is, to suspend all voting changes in particular jurisdictions pending federal review to screen the changes for racial discrimination. Therefore, the Court did not overrule – or bring into question – the Court's prior decisions in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) and *City of Rome v. United States*, 446 U.S. 156 (1980), which strongly upheld the power of Congress to adopt and reauthorize the preclearance remedy.

The Supreme Court did not hold that racial voting discrimination no longer exists. The Court's opinion explicitly stated that racial voting discrimination still exists. Indeed, at the same time the Supreme Court ruled in *Shelby County*, it had before it an appeal from a Section 5

declaratory judgment action in the U.S. District Court for the District of Columbia, in which a three-judge court unanimously found that parts of Texas' Congressional and State Senate redistricting plans were the product of intentional racial discrimination.

The Supreme Court did not restrict the classes of evidence upon which Congress can rely to target remedial measures such as preclearance. The Court did not adopt certain extreme arguments made by Shelby County that Congress could not employ evidence of minority vote dilution as a basis for reauthorizing preclearance coverage. Similarly, the Court did not adopt Shelby County's comparably extreme arguments that only adjudicated violations of intentional voting discrimination – such as the recent Texas redistricting case – could justify the preclearance remedy. For example, in *City of Rome* the Court credited and highlighted evidence of Section 5 objections in upholding Congress' 1975 reauthorization of Section 5, and the Court gave no indication in *Shelby County* that it meant to overrule or in any manner question that aspect of the *Rome* decision. More broadly, the *Shelby County* Court did not disturb the longstanding principle that Congress can appropriately prevent and deter unconstitutional voting discrimination by prohibiting a somewhat broader class of conduct than what is directly prohibited under the Constitution.

The Supreme Court did not undermine the "retrogression" principle – which serves as the Section 5 effect standard. The Supreme Court also did not adopt the argument advanced in some *amicus* briefs that the Section 5 retrogression standard conflicts with the Equal Protection Clause. Retrogression occurs when a voting change places racial minorities in a worse electoral position than under the existing voting practice. In other words, the retrogression standard protects against backsliding. The Supreme Court itself settled upon the retrogression standard in 1976 in its decision in *Beer v. United States*, 425 U.S. 130 – and repeatedly reaffirmed this standard in subsequent cases – as the proper interpretation of the Section 5 prohibition on voting changes that "have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]."

The Supreme Court did not set rules for distinguishing "current" evidence of voting discrimination from outdated evidence. This is puzzling in light of the fact that the *Shelby County* opinion hinges upon the conclusion that Congress failed to employ what the Court would consider "current evidence" in the Section 4(b) coverage formula. Although this is a point upon which reasonable people can differ, I hope that this lack of guidance does not unduly complicate Congress' consideration of potential legislation. On an issue of this gravity, I think it was a serious omission on the Court's part to leave "current" undefined, so long as the Court is reluctant to defer to Congress' judgment on the issue.

The implications of the Court's "equality of states" discussion are unclear. The Court did not indicate what effect, if any, this doctrine would have upon any future coverage formula. However, I do not see the Court's discussion adding very much to the Court's reasoning, apart from serving as a means of emphasizing the need for keeping the coverage

formula in step with the times. Thus, I do not believe that this doctrine adds any unique element to what Congress must consider with respect to any new coverage formula that it might consider based upon current evidence of voting discrimination.

The Court's opinion barely mentioned *City of Boerne v. Flores*, 521 U.S. 507 (1997). This surprised many legal observers. The *Boerne* line of cases had formed the core of Shelby County's legal theory, and was the subject of extensive briefing in the lower courts in this case and in the preceding case, *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009). However, the Court conducted its review under the standard that it had announced in the *Northwest Austin* case: that Section 5 "imposes current burdens and must be justified by current needs." *Id.* at 203. The Court thus left unresolved the question of whether it considered a *Boerne* analysis necessary to the review of Fifteenth Amendment remedial legislation, or more generally, to legislation combatting racial voting discrimination under either the Fourteenth or Fifteenth Amendment.

The Court's decision did not affect the operation of Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c). Under Section 3(c), informally known as the Act's "bail-in" provision, federal courts may order preclearance for jurisdictions not covered by the Section 4(b) formula as a remedy for adjudicated violations of the Fourteenth or Fifteenth Amendment. There are 17 jurisdictions which have been the subject of Section 3(c) orders (including, for example, Arkansas, New Mexico and Los Angeles County). Several parties in the Texas redistricting cases pending in Washington, D.C. and Texas federal courts have recently filed motions seeking to have the courts impose Section 3(c) coverage on Texas, as a result of the D.C. district court's finding of intentional discrimination in Texas's post-2010 statewide redistrictings.

The practical effect of the invalidation of Section 4(b)

The most prominent effect of the *Shelby County* decision is to suspend Section 5 review indefinitely. That is, Section 5 remains on the books, but no jurisdictions – other than those subject to Section 3(c) court orders – are presently required to obtain preclearance before implementing new voting practices. The Department of Justice has issued "no determination" letters to jurisdictions which had Section 5 submissions pending at the time of the decision, and has posted an advisory on the Voting Section web site regarding the *Shelby County* decision. *See* http://www.justice.gov/crt/about/vot/.

Consequently, racially discriminatory voting changes are no longer suspended before they may be enforced. As discussed in in the following section, it now falls to private citizens and the Department of Justice to first identify racially discriminatory voting changes in the Section 4(b) jurisdictions, and then to build an affirmative case against them, based upon other legal provisions, and to do so before those changes are implemented. Congress' longstanding commitment to preventing and deterring racially discriminatory voting changes stems from a

recognition that once such changes are implemented, it is already too late, because they harm a fundamental right that can never be fully restored after implementation has occurred.

One important but less obvious effect of the *Shelby County* ruling will be to cut off the unique and centralized flow of information about changes in voting practices and procedures that had been relied upon by the public and the Department of Justice. In my experience, this centralized flow of information was one of the principal reasons that Section 5 proved to be so remarkably successful in facilitating the enfranchisement of minority citizens in the covered jurisdictions, and in protecting that progress from being subverted by backsliding. I do not believe that the impact of the *Shelby County* decision can truly be understood without discussing this in some detail.

The scope of the Section 5 preclearance requirement was always interpreted broadly by the Supreme Court to encompass any and all "enactment[s] which altered the election law of a covered State in even a minor way." *Allen v. State Board of Elections*, 393 U.S. 544, 566 (1969). As the Supreme Court has repeatedly emphasized, "[t]he [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination." *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). The Department of Justice and the public were able to rely upon Section 5 submissions to accurately catalogue the voting changes actually being made in the covered jurisdictions. There was a powerful incentive for covered jurisdictions to comply with the preclearance requirement, because the failure to obtain preclearance before implementing a covered voting change was grounds for a federal court to enjoin the voting change via a preliminary injunction or temporary restraining order. As a result, Section 5 provided a reliable, comprehensive, and up-to-date inventory of voting changes.

There simply is no fallback source for that basic information. No federal procedure requires states and political subdivisions to identify or report voting changes in advance of their use, and I am not aware of any state with such a requirement. While states today typically provide tools on their legislatures' websites to search and obtain copies of bills and acts, problematic voting changes can be embedded in arcane local legislation or amendments. Since home rule is now the norm in most states, most voting changes are enacted at the local level, and pre-implementation information about voting changes adopted at the local level is hit or miss at best.

Of course, even a comprehensive list of voting changes does not identify which ones might be discriminatory. The Section 5 process was structured to efficiently place the relevant information before the Department of Justice to allow the Department to identify and follow up on potentially discriminatory voting changes, while the great majority of changes were precleared within the initial 60-day review period. Because the submitting jurisdictions had the burden of proof, they were required to provide sufficient information for the Department of Justice to assess the purpose and effect of proposed voting changes. In many cases, relatively

little information was required to preclear, while in other cases (including every objection that I can recall) the Department requested specific and detailed information from the submitting jurisdiction.

The types of information typically needed to conduct a Section 5 review of a potentially discriminatory change varied according to the type of voting change, but frequently a request for additional information would ask for some or all of the following information: population data, maps of political boundaries, election returns, voter registration and turnout data, and precinct boundaries and polling place locations. Information about the voting change's adoption, including minutes, recordings, alternative proposals, and a narrative description, also were requested as needed, especially if the circumstances indicated the possibility of a racially discriminatory purpose. In addition, letters requesting more information typically would formally invite the jurisdiction to explain questionable decisions and to address particular concerns. As a result, neither the Justice Department nor the public was required to race the clock to gather this basic information, while covered jurisdictions had no incentive to stonewall or drag their feet in terms of providing it.

Another benefit of this flow of information was that it permitted the citizens of the covered jurisdictions to learn the full facts about the voting changes that would affect them, and to make informed comments about them. Discriminatory voting changes are frequently enacted by recourse to misinformation, the withholding of relevant information, or a manipulation of the legislative process.

Furthermore, I have no doubt that the knowledge that there would be a federal review process – during which members of the minority community would have the opportunity to learn the details of, and comment upon, proposed voting changes – in fact deterred many discriminatory changes from ever being adopted.

Consequences for voting rights enforcement

Impact on pending appeals. Shortly after the Supreme Court issued the *Shelby County* decision, the Court vacated two Section 5 judgments issued by three-judge courts in the United States District Court for the District of Columbia, one of which denied preclearance to three statewide redistricting plans for the State of Texas (*Texas v. United States*, 887 F. Supp. 2d. 133 (D.D.C. 2012)), the other of which denied Section 5 preclearance to Texas' 2011 photo identification law (*Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012)). Both cases were pending on appeal to the Supreme Court at the time of the *Shelby County* decision.

Impact on post-2006 Section 5 objections. The *Shelby County* decision did not address the status of Section 5 objections issued after the 2006 reauthorization pursuant to the unconstitutional coverage formula. This important issue may be addressed fairly soon by one or more federal courts.

Implications for future voting rights enforcement. The rationale for Section 5 was always, as the Supreme Court explained in *South Carolina v. Katzenbach*, 383 U.S. at 328, to "shift the advantage of time and inertia from the perpetrators of the evil [of discrimination] to its victims" within the covered jurisdictions. The *Shelby County* decision completely reverses that approach. It now falls to private parties and to the Justice Department to identify discriminatory voting changes in the window between their adoption and implementation, gather enough evidence to state a claim for which private parties and the Justice Department will have the burden of proof, and persuade a court to issue an injunction. If any one of those steps should fail, then the discriminatory change will proceed to be implemented and do its damage unimpeded.

There is currently no source that provides a reliable, comprehensive, and up-to-date canvass of voting changes. For private citizens to attempt to track all of the information that Section 5 did – even with the cooperation of election officials – would be a never-ending task. If election officials are not required to report or cooperate, then there is no possibility of reliably knowing what voting changes are being enacted in which jurisdictions. As it now stands, more discriminatory voting changes can be expected to "slip through the cracks" undetected and to take effect, despite the best efforts of the Justice Department and concerned citizens.

Affected citizens generally lack ready access to the substantial basic information needed for voting rights litigation. This information, which is at the disposal of jurisdictions, will generally not be readily available to affected citizens without Section 5 review. Even in states that have sunshine or freedom of information laws, obtaining such information can involve time lags, expenses, and incomplete production requiring follow up or even litigation. In states lacking such laws, the relevant information may be strategically withheld to deter legal challenges. As a consequence, the process of assembling the necessary factual information to bring an affirmative legal challenge can extend far beyond the implementation date of a voting change. Because many voting rights claims require expert testimony, potential plaintiffs also must shoulder the up-front costs of expert witnesses; while expert fees are compensable to prevailing parties under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the road to that recovery can last years. These burdens in obtaining and developing the evidence can be expected to result in more discriminatory voting changes taking effect than would occur if Section 5 were still operational.

Section 2 of the VRA is not an adequate substitute for Section 5. One of the arguments frequently made against Section 5 is the assertion that Section 2 of the Voting Rights Act provides all of the protections necessary to deal with today's voting discrimination. Congress considered this question in 2006 when it considered whether to reauthorize the preclearance remedy and disagreed. Based upon my experience in having litigated and supervised a number of both Section 2 cases and Section 5 cases, I also disagree with that contention both on theoretical and real-world grounds. I am confident that the Lawyers' Committee and other voting rights practitioners can use Section 2 to eventually invalidate some

discriminatory voting changes that would have been blocked from ever taking effect under Section 5. That hardly shows that Section 2 can accomplish all that Section 5 did. The fact is that Section 2 will not do so.

The "results test" under Section 2 of the Voting Rights Act was adopted by Congress in 1982 primarily to address pre-existing vote dilution. The Section 2 "results test" provides a means for the Department of Justice or private plaintiffs to challenge an election practice that has already generated a pattern of racially discriminatory results. It requires a court to ultimately assess the "totality of the circumstances" in order to determine whether "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [Section 2]." The litigation objective in a Section 2 case is to displace the *status quo* and have the federal court order a non-discriminatory procedure into effect.

The Section 2 results test has a somewhat complicated background. It was adopted by Congress in 1982, in the wake of the Supreme Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). In the *Mobile* case the Supreme Court held that a claim of minority vote dilution brought under the Constitution requires a finding of intentional discrimination. As enacted in 1965, Section 2 tracked the language of the Fifteenth Amendment and essentially served to provide the United States and private plaintiffs with a statutory right of action to bring racial discrimination claims. However, the 1982 amendment of Section 2 (enacted at the same time as a 25-year reauthorization of Sections 4(b) and 5 of the VRA) added what is known as the "results test." Congress concluded that constitutional litigation under the *Mobile* standards would not be sufficient to address the extent of voting discrimination. The Section 2 results test incorporates the basic constitutional standards for minority vote dilution applied in the Supreme Court's 1973 decision in *White v. Regester*, 412 U.S. 755 (1973), onto which the Supreme Court engrafted an "intent" element in 1980 in its *Mobile* decision. Many federal courts have upheld the constitutionality of the 1982 amendment to Section 2, although the Supreme Court has not ruled upon the issue.

Section 2 "results" claims can be broken down into two basic categories. One category involves allegations of some form of minority vote dilution, and the other category includes everything else. The great majority of Section 2 litigation has concerned the first category, *i.e.*, one form of vote dilution or another. In particular, dilution claims involving the use of either at-large elections or racially gerrymandered election district boundaries have been the primary targets of attack. The Section 2 legal standards have evolved largely in that context. The 1982 Section 2 amendment had a huge impact in dislodging numerous dilutive at-large election systems in favor of fairly-drawn single-member district election systems. Working in tandem in the covered jurisdictions, Section 2 forced a change in discriminatory election systems, while Section 5 prevented backsliding or evasive tactics from undermining the resulting progress. Much of the electoral success by minority candidates in the covered jurisdictions is due to this interplay between Section 2 and Section 5.

The ability to successfully bring claims not involving minority vote dilution under the Section 2 results test is uncertain. The category of "everything else" (that is, Section 2 results claims not based upon dilution) includes challenges to voter registration procedures, candidate qualifying procedures, voter qualifications and disqualifications, voting methods and locations, poll worker hiring, voter assistance, and prerequisites to voting. These cases under Section 2 have been relatively infrequent and occasionally successful, but the legal standards for them are not nearly so well-developed as for dilution cases. By contrast, a number of Section 5 objections were interposed to these types of voting changes over the years, and the Section 5 retrogression standard showed itself to be well-suited for dealing with these types of problems. I believe that the ability to effectively address discriminatory changes of these types under the current Section 2 results test is uncertain.

Preliminary injunctions under Section 2 will block fewer discriminatory voting changes from going into effect than preclearance reviews under Section 5. While Section 2 can be used to challenge a voting change before it is implemented, for many reasons Section 2 litigation will be unable to consistently block discriminatory changes from going into effect, as Section 5 did so remarkably well.

I have mentioned some of the practical problems with putting together a pre-implementation Section 2 case. One cannot reasonably expect all voting changes to be adequately and timely publicized under current laws. Even for changes that are known, the window between final adoption of a voting change (when a case would become ripe to litigate) and the date on which the change is first to be used will often be quite narrow. Jurisdictions are likely to make that window as narrow as possible if they have concerns about potential litigation. Nor can it reasonably be expected that jurisdictions will make readily available the relevant information to support a motion for a preliminary injunction under Section 2 so as to allow for effective litigation within that window. To the contrary, jurisdictions with concerns about potential litigation have a strong (if not good) motivation to be uncooperative in providing relevant information.

Furthermore, the governing legal standards for Section 2, and the equitable concerns involved in granting preliminary injunctions, make preliminary relief unusual even for the most meritorious cases with well-developed evidentiary records. For example, the Department of Justice was unsuccessful in obtaining a preliminary injunction in its Section 2 vote dilution case against the at-large election system in Charleston County, South Carolina, even though the district court granted summary judgment to the United States with respect to the three *Gingles* preconditions that lie at the heart of a successful Section 2 vote dilution case, and both the district court and the Fourth Circuit eventually found a Section 2 results violation. Similarly, the Department of Justice was unsuccessful in obtaining a preliminary injunction in 1990 in its Section 2 vote dilution case against Los Angeles County's redistricting plan, even though both the district court and the Ninth Circuit eventually found intentional discrimination.

I do not presently have a comprehensive listing of cases in which courts have granted Section 2 preliminary injunctions or temporary restraining orders. My best estimate at this time is that the total number of such cases since 1982 is in the range of 10 to 15 – no more than a tiny fraction of all Section 2 cases.

I litigated two such cases. One case involved a blatant effort to retroactively disqualify two Hispanic candidates for mayor in Cicero, Illinois. Because that case featured a "smoking gun" admission by the incumbent mayor's spokesman that one of the Hispanic candidates had been targeted, it is not typical of current voting discrimination, which usually takes more subtle forms. The other case involved a majority vote requirement for the City of Memphis, Tennessee, which was preliminarily enjoined in 1992 on the basis of two very extensive expert witness reports and numerous declarations and exhibits. The evidence of intentional discrimination was extremely strong in that case, but the majority vote requirement had been enacted by referendum in 1966 when public debate about the law was not very circumspect.

As you know, under Section 2 the burden of proof lies with the plaintiff, at the preliminary injunction stage no less than at trial. This of course is the general rule in civil litigation and for most purposes it is the logical approach. However, this burden works against the objective of blocking discriminatory voting changes before they can harm voters. Section 5, in contrast, by design froze the status quo while all new voting practices could be screened for discrimination with the relevant information in hand. Because the submitting jurisdictions had the burden of proof, in both administrative reviews and Section 5 declaratory judgment actions, stopping discriminatory voting changes was not a game of "catch me if you can." Where a jurisdiction has a current record of voting discrimination, or there otherwise is reason to believe that a voting change is racially discriminatory, it makes sense to shift the burden, at least to some extent, from the citizen to the jurisdiction.

The costs and repercussions of Section 2 litigation are far greater than Section 5 administrative review. In those cases where Section 2 litigation successfully blocks a discriminatory voting change, the cost to all involved – in terms of judicial resources, attorney costs, and expert witness costs – will routinely exceed the costs that Section 5 administrative review would have entailed by a very large margin. In addition, a jurisdiction that loses a Section 2 case will have less discretion in shaping a remedy than a jurisdiction attempting to overcome a Section 5 objection. And, a jurisdiction that loses a Section 2 case on the grounds of discriminatory purpose may well find itself back under preclearance under Section 3(c). While previously covered jurisdictions should be wary of rushing to adopt voting changes that had been deterred by Section 5 if only for these practical reasons, my expectation is that a number of such jurisdictions will take the *Shelby County* decision as a green light to forge ahead with discriminatory voting changes and take their chances in Section 2 litigation.

Constitutional litigation cannot compensate for the suspension of Section 5 review. In addition to Section 2, racial discrimination claims can be brought under the Fourteenth and

Fifteenth Amendments. Such claims require proof of a racially discriminatory purpose. Congress explicitly recognized the difficulties that this requirement poses for addressing problems of minority vote dilution when it passed the Section 2 results test in 1982. Since that time, federal courts have become increasingly open to claims of legislative or deliberative privilege, which pose a major barrier to a plaintiff being able to fully develop a discriminatory purpose case, even after discovery has been completed. In my experience the deposition testimony of decision-makers under oath can play the critical role in getting to the bottom of voting discrimination. On occasion there may be sufficient circumstantial evidence to build a purpose case without such testimony, but there is no doubt that shielding legislators from testifying about discussions and events during the legislative process substantially insulates discriminatory voting changes from the scrutiny they deserve.

For these reasons, Congress must act in keeping with the bipartisan tradition of the Voting Rights Act to weigh the current evidence of voting discrimination, reject the complacent suggestion that inaction will suffice, and enact appropriate legislation to effectively prevent and deter discriminatory voting changes from taking force.

Once again, on behalf of the Lawyers' Committee, I respectfully thank the Chair, the Ranking Member and the Members of the Subcommittee for the opportunity to submit this testimony and to testify today.

Mr. FRANKS. Thank you, Mr. Kengle.

I would now recognize Mr. von Spakovsky for 5 minutes.

TESTIMONY OF HANS A. von SPAKOVSKY, SENIOR LEGAL FELLOW, THE HERITAGE FOUNDATION

Mr. VON SPAKOVSKY. Thank you, Mr. Chairman. After *Shelby County*, the Voting Rights Act remains a powerful statute whose remedies are more than sufficient to stop those rare instances of voting discrimination when they occur. There is no need for Congress to take any action.

Section 5 was a temporary, 5-year emergency provision, but it was renewed four times, including in 2006, for an additional 25 years.

It was an unprecedented, extraordinary intrusion into state sovereignty since it required covered states to get Federal approval for voting changes. No other Federal law presumed that states cannot govern themselves and must have the Federal Government's consent before they act.

Now, the coverage formula of Section 4 was built on the disparity between Black and White participation because of the widespread, official discrimination in 1965 that prevented Black Americans from voting. That is why it was based on registration and turnout of less than 50 percent in the 1964 and then 1968 and 1972 elections when it was renewed. But the coverage formula has never been updated in 40 years to reflect modern turnout.

Now, there is no question Section 5 was needed in 1965, but time has not stood still. In fact, the Census reports, the May 2013 report—I have a copy of it right here—on the November election showed that Blacks voted at a higher rate than Whites nationally by more than 2 percentage points. This same report shows that Black voting rates exceeded those of Whites in Virginia, South Carolina, Georgia, Alabama and Mississippi, which were covered in whole by Section 5; and in North Carolina and Florida, portions of which are covered by Section 5. Louisiana and Texas, which are also covered, showed no statistical disparity between Black and White turnout.

As Judge Steven Williams of the D.C. Circuit Court of Appeals pointed out, jurisdictions covered under Section 4 have higher Black registration and turnout than uncovered jurisdictions. They have far more Black officeholders as a proportion of the Black population than do uncovered ones. And in a study of Section 2 lawsuits, Judge Williams found that the five worst uncovered jurisdictions have much worse records than eight of the covered jurisdictions.

With no evidence of widespread voting disparities between the states, continuing the coverage formula unchanged in 2006 was irrational. It is the same as if, in 1965, Congress had passed Section 5 and said coverage will be based on the 1928 Hoover or 1932 Roosevelt elections.

Section 5 was also unprecedented in violating fundamental American principles of due process since it shifted the burden of proof from the government to the covered jurisdiction. While such a reversal of basic due process may have been constitutional given

the extraordinary circumstances in 1965, it cannot be justified today.

Congress also made a fatal mistake when it expanded the prohibition of Section 5 in 2006. As the Court said, the bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved.

Finally, two other serious problems should be noted. The effects test of Section 5 has led to a virtual apartheid system of redistricting. Rather than helping eliminate racial discrimination in voting, Section 5 has provided a legal excuse for legislators of both parties to manipulate district lines and isolate voters based on their race.

Second, the Civil Rights Division has abused its power on Section 5 on numerous occasions. In the *Johnson v. Miller* case, a Federal court severely criticized the Division for its unprofessional behavior and the Division's implicit commands to the Georgia legislature over how to conduct its redistricting. That cost taxpayers $600,000 awarded to Georgia.

In the 1990's, a Louisiana Federal district court similarly criticized the Division, saying it was using its power "as a sword to implement forcibly its own redistricting policies." That case cost the American public $1.1 million in attorney's fees awarded.

In 2012, the Division sent a legally preposterous letter to Florida claiming that the state government was violating Section 5 because it was not preclearing the removal of non-citizens who had not registered to vote, despite the fact that that is a Federal felony.

The heart of the VRA today is Section 2. It applies nationwide. It won't expire, and it bans racial discrimination in voting.

Section 3 is also there. It can be used to supervise any jurisdiction with a pattern of racial discrimination. A court can appoint Federal examiners and place a jurisdiction in the equivalent of Section 5 preclearance so that all voting changes have to be precleared. Why reinstate Section 4 when Section 3 already provides preclearance for those jurisdictions who have proved to be recalcitrant in this discrimination area?

Section 11 prohibits anyone from intimidating or threatening or coercing voters. Section 203 and 404 protect language minority voters. And none of this discussion even mentions the National Voter Registration Act, the Uniformed and Overseas Citizens Absentee Voting Act, and the Help America Vote Act, which also all have protections for voters.

There is no evidence of widespread, systematic discrimination in the covered states or that they are any different from other states, and there is no reason for Congress to take any action. Thanks.

[The prepared statement of Mr. von Spakovsky follows:]

The Heritage Foundation
LEADERSHIP FOR AMERICA
214 Massachusetts Avenue, NE • Washington DC 20002 • (202) 546-4400 • heritage.org

CONGRESSIONAL TESTIMONY

The Voting Rights Act after the Supreme Court's Decision in *Shelby County*

Testimony before the
Committee on the Judiciary,
Subcommittee on the Constitution
United States House of Representatives

July 18, 2013

Hans A. von Spakovsky
Senior Legal Fellow
The Heritage Foundation

Introduction

My name is Hans A. von Spakovsky.[1] I am a Senior Legal Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation and Manager of the Civil Justice Reform Initiative. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

I appreciate the invitation to be here today to discuss *Shelby County v. Holder*[2] and the enforcement of the Voting Rights Act. The Voting Rights Act is one of the most important statutes ever passed by Congress to guarantee the right to vote free of discrimination. After the U.S. Supreme Court's correct decision in *Shelby County*, the VRA remains a powerful statute whose remedies are more than sufficient to protect all Americans. Both the Justice Department and private parties have the ability to stop those rare instances of voting discrimination when they occur using the various provisions of the VRA that protect individual citizens when they register and vote.

Prior to joining the Heritage Foundation, I was a Commissioner on the Federal Election Commission for two years. Before that I spent four years at the Department of Justice as a career civil service lawyer in the Civil Rights Division. I started as a trial attorney and was promoted to be Counsel to the Assistant Attorney General for Civil

---

[1] The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work. The Heritage Foundation is the most broadly supported think tank in the United States. During 2011, it had nearly 700,000 individual, foundation, and corporate supporters representing every state in the U.S. Its 2011 income came from the following sources:

Individuals	78%
Foundations	17%
Corporations	5%

The top five corporate givers provided The Heritage Foundation with 2% of its 2011 income. The Heritage Foundation's books are audited annually by the national accounting firm of McGladrey & Pullen. A list of major donors is available from The Heritage Foundation upon request. Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed are their own and do not reflect an institutional position for The Heritage Foundation or its board of trustees.

[2] 570 U.S. ___ (2013).

Rights, where I helped coordinate the enforcement of federal voting rights laws, including the Voting Rights Act and the National Voter Registration Act. I was privileged to be involved in dozens of cases on behalf of Americans of all backgrounds to enforce their right to register and vote in our elections.[3]

The Shelby County Decision and Section 5

As the Supreme Court said in its decision, "history did not end in 1965." Section 5 was originally passed as a temporary, emergency provision set to expire after 5 years. It was instead renewed four times, including in 2006 for an additional 25 years

Section 5 was an unprecedented, extraordinary intrusion into state sovereignty since it required covered states to get the approval of the federal government for voting changes made by state and local officials – either the Department of Justice or a three-judge court in the District of Columbia. No other federal law presumes that states cannot govern themselves as their legislatures decide and must have the federal government's consent before they act. As the Supreme Court said, Section 5 "employed extraordinary measures to address an extraordinary problem."

Section 5 was necessary in 1965 because of the widespread, official discrimination that prevented black Americans from registering and voting as well as the constant attempts by local jurisdictions to evade federal court decrees. The disfranchisement rate was so bad that only 27.4 percent of blacks were registered in Georgia in 1964 and only 6.7 percent in Mississippi, compared to white registration of 62.6 percent and 69.9 percent, respectively. That disparity between black and white registration (and turnout) was a direct result of the horrendous discrimination suffered by black residents of those states.

The coverage formula of Section 4 was based on that disparity and Congress specifically designed it to capture those states that were engaging in such blatant discrimination. Thus, coverage under Section 4 was based on a jurisidiction maintaining a test or device as a prerequisite to voting as of Nov. 1, 1964, and registration or turnout of less than 50 percent in the 1964 election. Registration or turnout of less than 50 percent in the 1968 and 1972 elections was added in successive renewals of the law. That was the last time the coverage formula was revised, and Section 4 did not employ

[3] I was also a member of the first Board of Advisors of the U.S. Election Assistance Commission. I spent five years in Atlanta, Georgia, on the Fulton County Board of Registration and Elections, which is responsible for administering elections in the largest county in Georgia, a county that is almost half African-American. In Virginia, I served for three years as the Vice Chairman of the Fairfax County Electoral Board, which administers elections in the largest county in that state. I formerly served on the Virginia Advisory Board to the U.S. Commission on Civil Rights. I have published extensively on elections, voting, and civil rights issues, including the management of the Civil Rights Division and the handling of its enforcement responsibilities. I am a 1984 graduate of the Vanderbilt University School of Law and received a B.S. from the Massachusetts Institute of Technology in 1981.

more current information on registration and turnout when Section 5 was last renewed in 2006.

Section 5 was needed in 1965. But as the Court recognized, time has not stood still and "[n]early 50 year later, things have changed dramatically." The systematic, widespread discrimination against black voters has long since disappeared. As the Court recognized in the *Northwest Austin* case in 2009: "Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."[4]

As an example, in Georgia and Mississippi, which had such high disenfranchisement rates in 1964, black registration actually exceeded white registration in the 2004 election, just two years before Congress was considering the renewal of Section 5. Black registration exceeded white registration by 0.7 percent in Georgia and by 3.8 percent in Mississippi. The Census Bureau's May 2013 report on the 2012 election showed that blacks voted at a higher rate than whites nationally (66.2 percent vs. 64.1 percent).[5]

That same report shows that black voting rates exceeded that of whites in Virginia, South Carolina, Georgia, Alabama, and Mississippi, which were covered in whole by Section 5, and in North Carolina, and Florida, portions of which were covered by Section 5. Louisiana and Texas, which were also covered by Section 5, showed no statistically significant disparity between black and white turnout.[6] Minority registration and turnout are consistently higher in the formerly covered jurisdictions than in the rest of the nation.

No one can rationally claim that there is still widespread, official discrimination in any of the covered states, or that there are any marked differences between states such as Georgia, which was covered, and states such as Massachusetts, which was not covered (except that Massachusetts has worse turnout of its minority citizens). As the Supreme Court approvingly noted and as Judge Stephen F. Williams pointed out in his dissent in the District of Columbia Court of Appeals, jurisdictions covered under Section 4 have "*higher* black registration and turnout" than noncovered jurisdictions.[7] Covered jurisdictions also "have *far more* black officeholders as a proportion of the black population than do uncovered ones."[8] In a study that looked at lawsuits filed under

---

[4] Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009).
[5] *The Diversifying Electorate – Voting Rates by Race and Hispanic Origin in 2012 (and Other Recent Elections*, UNITED STATES CENSUS BUREAU, P20-568 (May 2013).
[6] Figure 5, Non-Hispanic White Voting Rates Compared to Black Voting Rates: 2012.
[7] Shelby County v. Holder, 679 F.3d 848, 891 (D.C. Cir. 2012).
[8] 679 F.3d at 892.

Section 2 of the VRA, Judge Williams found that the "five worst uncovered jurisdictions…have worse records than eight of the covered jurisdictions."[9]

Arizona and Alaska, which were covered under Section 5, had not had a successful Section 2 lawsuit ever filed against them in the 24 years reviewed by the study. The increased number of current black officeholders is additional assurance that official, systemic discriminatory actions are highly unlikely to recur.

Without evidence of widespread voting disparities among the states, continuing the coverage formula unchanged in 2006 was irrational. As the Court said in the *Shelby County* decision, Congress "did not use the record it compiled to shape a coverage formula grounded in current conditions."[10] Instead, it reenacted Section 4 "based on 40-year-old facts having no logical relation to the present day."[11] It was no different than if Congress in 1965 had based the coverage formula not on what had happened in the prior year's election in 1964, but had instead opted to base coverage on registration and turnout from the Hoover era in 1928 or the Roosevelt election in 1932.

Section 5 was also unprecedented in the way it violated fundamental American principles of due process: it shifted the burden of proof of wrongdoing from the government to the covered jurisdiction. Unlike all other federal statutes that require the government to prove a violation of federal law, covered jurisdictions were put in the position of having to prove a negative – that a voting change was not intentionally discriminatory or did not have a discriminatory effect. While such a reversal of basic due process may have been constitutional given the extraordinary circumstances present in 1965, it cannot be justified today.

Congress also made another fatal mistake when it *expanded* the prohibitions in Section 5 in 2006. The Supreme Court had warned Congress that broadening Section 5 coverage would "exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5's constitutionality."[12] As the Court said in *Shelby County*, "the bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved."[13]

Finally, two other serious problems must be noted with how Section 5 was interpreted and enforced. First, the "effects" test of Section 5 has led to a virtual apartheid system of redistricting, causing race to become a predominant factor in redistricting in covered jurisdictions. Jurisdictions are often forced to engage in racial

---

[9] 679 F.3d at 897.
[10] Shelby County, Slip Op. at 21.
[11] Shelby County, Slip Op. at 21.
[12] Reno v. Bossier Parish School Board, 528 U.S. 320, 336 (2000).
[13] Shelby County, Slip Op. at 16-17.

discrimination to meet the Section 5 standard and create majority-minority districts. Rather than helping eliminate racial discrimination in voting, Section 5 has perpetuated it in redistricting and provided a legal excuse for legislators of both parties to engage in such discriminatory behavior when drawing boundary lines, manipulating district lines and isolating particular voters based entirely on their race. This is the exact opposite of the intention of the VRA, which the Supreme Court said was to "encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life."[14]

Second, the Civil Rights Division of the Justice Department has abused its authority and power under Section 5 on numerous occasions. South Carolina was forced to spend $3.5 million in 2012 litigating a specious objection filed by the Division against its voter ID law. A federal court found that there was no basis for the objection.

Similarly, during the Clinton administration, the American taxpayers were forced to pay over $4.1 million in attorneys' fees and costs awarded to defendants falsely accused of discrimination by the Division, including in several Section 5 cases.

For example, in *Johnson v. Miller*, which involved Georgia's 1992 legislative redistricting plan, a federal court severely criticized the Division for its unprofessional relationship with the ACLU, the "professed amnesia" of its lawyers when questioned by the court over their activities (which the court found "less then credible), and the Division's "implicit commands" to the Georgia legislature over how to conduct its redistricting.[15] This case cost American taxpayers almost $600,000 in attorneys' fees and costs awarded to Georgia.

The district court found that the "considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment."[16] The court was surprised that the Justice Department "was so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote."[17] As the U.S. Supreme Court found, instead of basing its decision on Georgia's redistricting plan on whether there was evidence of discrimination as required under Section 5, "it would appear the Government was driven by its policy of maximizing majority-black districts."[18]

In related cases filed in the early 1990s, a federal district court similarly criticized the Division, finding that it was trying to use its power "as a sword to implement forcibly

---

[14] Georgia v. Ashcroft, 539 U.S. 461, 490-491 (2003).
[15] 864 F.Supp. 1354 (S.D. Ga. 1994), aff'd, Miller v. Johnson, 515 U.S. 900 (1995).
[16] Johnson v. Miller, 864 F.Supp. at 1368.
[17] *Id.*
[18] Miller v. Johnson, 515 U.S. at 924-925.

its own redistricting policies."[19] The court found that the Louisiana legislature "succumbed to the illegitimate preclearance demands of the Justice Department" that "impermissibly encouraged – nay, mandated – racial gerrymandering."[20] Those cases cost the American public $1.1 million in attorneys' fees and costs awarded to Louisiana.

In 2012, the Division sent a legally preposterous letter to Florida claiming that the state government was violating Section 5 because it had not precleared the state's removal of noncitizens who had unlawfully registered to vote (five Florida counties are covered under Section 5). This despite the fact that noncitizens commit a federal felony when they illegally register to vote. As the *Federal Prosecution of Election Offenses* manual for federal prosecutors, published by the Criminal Division of the Justice Department, explains on pages 67-69, submitting false citizenship information in order to register to vote violates 18 U.S.C. §§ 1051(f) and 911.

The Supreme Court's decision in *Shelby County* was correct under the facts, the law, and our Constitution. Section 5 was needed in 1965 – it is not needed today and the coverage formula of Section 4 no longer reflects current conditions. Treating different states differently can no longer be justified.

Congressional Action after Shelby County

The question now becomes whether Congress should take any actions as a result of this decision. The answer to that question is "no." The other provisions of the VRA are more than adequate to provide the Justice Department and private parties with the tools they need to go after discrimination on those infrequent occasions when it does still occur.

The "heart" of the VRA today is Section 2, not Section 5. Section 2 applies nationwide, not just in a limited number of states and counties, and it is permanent; it will never expire. It forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority. Discriminatory measures or actions can be stopped before an election through temporary restraining orders and injunctions. Private plaintiffs can have their attorneys' fees and costs reimbursed if they are the prevailing party. Section 2 was not at issue in the *Shelby County* case and the Supreme Court's decision "in no way affects the permanent, nationwide ban on racial discrimination in voting found in §2."

Section 2 is an effective remedy when it is utilized by the Civil Rights Division of the Justice Department. During the eight years of the Bush administration, the Division

[19] Hays v. State of Louisiana, 839 F.Supp. 1188, 1196 (W.D. La. 1993).
[20] Hays. v. State of Louisiana, 936 F.Supp. 360, 369 (W.D. La. 1996).

filed 17 Section 2 lawsuits and obtained one out-of-court settlement. The current administration has barely utilized Section 2, having filed only one lawsuit since it came into office, and that suit was actually the outcome of an investigation started during the Bush administration. A recent report by the Inspector General of the Justice Department concluded that the "statistical evidence did not support" the claim that the Bush administration was hostile to Section 2 cases, particularly in light of the fact that the number of cases brought during the Bush administration far exceeded the number of cases brought during the current administration."[21] The decreasing number of Section 2 cases maybe an indication that discrimination is abating, further demonstrating that enforcement through Section 5 is not essential, or even necessary.

In order to meet the requirements of the Constitution, to justify federal supervision, a new Section 5 would have to identify those jurisdictions for which Section 2, because of systemic racial discrimination, would not be effective. That will not be possible because there is no evidence of systemic racial discrimination in voting in the states formerly covered under Section 4.

The lack of Section 5 enforcement does not mean jurisdictions can never be overseen by federal authorities. Another provision of the VRA, Section 3, can be used to supervise any jurisdictions that have a pattern of racial discrimination in voting. While the Supreme Court struck down the coverage formula of Section 4, Section 3 was not an issue in *Shelby County*. Section 3 has rarely been used, but it allows both for federal examiners and prior approval of voting changes.

If a jurisdiction has engaged in repeated discrimination and a court finds it is necessary to prevent future discrimination, Section 3 provides that that the court can essentially place the jurisdiction into the equivalent of Section 5 coverage. Under a Section 3 finding, "no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless" the court or the Attorney General has precleared the change and found that it "does not have the purpose and will not have the effect of denying or abridging the right to vote." This preclearance thus becomes a tool to remedy discrimination that has been proven in court, rather than Section 5's blanket burden on all jurisdictions, regardless of their actual history and actions.

The point here is that the Supreme Court in *Shelby County* found that the general conditions in covered states today do not justify their continued exception from general constitutional principles and strictures. However, a court can still appoint federal examiners and place a particular jurisdiction into the equivalent of Section 5 preclearance if it finds sufficient evidence of current discrimination under Section 3's requirements.

---

[21] A Review of the Operations of the Voting Section of the Civil Rights Division, Office of Inspector General, U.S. Department of Justice (March 2013), page 32.

Also, unlike the due process problems inherent in Section 5, Section 3 does not shift the burden of proof for preclearance to covered jurisdictions *until* the government or a private plaintiff has *proven* that the jurisdiction has engaged in discrimination.

The VRA has other provisions that also remain in force to protect voters. This includes Section 11, which prohibits anyone from intimidating, threatening, or coercing any person for voting or attempting to vote. Sections 203 and 4(f)(4) require certain jurisdictions to provide bilingual registration and voting materials, including ballots, as well as interpreters and translators.

Conclusion

The Supreme Court correctly found that the coverage formula of Section 4 does not reflect current conditions and is therefore unconstitutional. As the Court concluded, "there is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago."[22] If Congress had first considered it in 2006, "it plainly could not have enacted the present coverage formula" because it "would have been irrational for Congress to distinguish between State in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story."[23]

The other provisions of the VRA such as Section 2 and Section 3 provide strong federal provisions to remedy voting discrimination if and when it occurs. My discussion of the robust provisions of the VRA that guarantee the right to vote does not even include the many other protections for voters that exist outside of the VRA in the National Voter Registration Act, the Uniformed and Overseas Citizens Absentee Voting Act, and the Help America Voting Act.

There is no reason for Congress to take any action to reinstate the coverage formula of Section 4. There is, in fact, no evidence that particular states are engaged in systematic discrimination that would justify treating them differently from other states.

[22] Shelby County, Slip Op. at 23.
[23] Shelby County, Slip Op. at 23-24.

Mr. FRANKS. Thank you, Mr. von Spakovsky.
Now I would recognize Mr. Overton for 5 minutes.

TESTIMONY OF SPENCER OVERTON, PROFESSOR OF LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. OVERTON. Thank you, Chairman Franks, Ranking Member Nadler, and Members of the Subcommittee. As a native Detroiter and as a graduate of Hampton University, it is a special privilege to have an opportunity to testify before Mr. Conyers, Mr. Scott, and Mr. Goodlatte.

Our country was founded on the principle that we are all created equal. We have made amazing progress in this country in the last 50 years. Our progress is one reason that we are viewed as the world's leading democracy.

Unfortunately, even today, evidence shows that too many political operatives still maintain power by unfairly manipulating election rules based on how voters look or speak.

For example, in 2011, in Nueces County, Texas, the rapidly growing Latino community surpassed 56 percent of the county's population. And in response, county officials gerrymandered local election districts to weaken votes by Latinos and make sure Latino voters would not control a majority of the county commission seats.

In 2006, in the City of Calera, Alabama, Ernest Montgomery was the only African American on the 5-member Calera City Council. City officials redrew district lines to drop Mr. Montgomery's district from 70 percent African American down to 30 percent African American. And as a result, African American voters in the district were not able to elect the candidate of their choice, and the city council lost its sole African American member.

Unfortunately, without Section 5 to block this type of racial manipulation, Americans in many areas like Nueces County won't have the thousands and sometimes millions of dollars needed to bring a lawsuit to stop these unfair changes.

This local manipulation, local manipulation, is a real problem. Over 85 percent of the changes rejected as unfair under preclearance were at the local level. I am talking about city councils, county commissions, other positions. Many of these are nonpartisan. And note that the discrimination in many of these cases is not related to turnout or registration at all. Indeed, high turnout, high registration may prompt, may trigger the discriminatory acts.

Now, some may say that the solution to this problem is more lawsuits. I disagree. Lawsuits can cost thousands and sometimes millions of dollars. Lawsuits require massive discovery and fishing expeditions through boxes of paperwork, hiring expensive experts to interpret and piece together data, and this expense is not just on the victims of discrimination, but these are expenses borne by the Department of Justice, by the jurisdictions that implemented the change, and eventually by all of us through our tax dollars.

Another problem is that lawsuits can take years. Too often, lawsuits don't stop unfair voting rules before they are used in elections and harm voters. In contrast, preclearance was relatively quick, efficient, inexpensive. Preclearance also generally prevented discriminatory practices before they became effective.

Perhaps the most important point is that preclearance was comprehensive. Preclearance deterred jurisdictions from adopting many unfair election rules because officials knew each and every decision would be reviewed. With litigation, political operatives know that many voters won't have the information or the money to bring a lawsuit.

Political operatives know that it is very likely that this under-the-radar discrimination will never be challenged.

Fortunately, Congress can solve these problems by updating the Voting Rights Act. The U.S. Supreme Court's decision focused on the coverage formula in the 1960's and '70's. The Court did not find that the preclearance process itself was unconstitutional. Indeed, it explicitly acknowledged that Congress has the power under the 15th Amendment to prevent voting discrimination.

Another important point is that the Voting Rights Act is not a partisan issue. There have been other times in the past when we as Americans have seemed divided in our politics. The 1960's were turbulent. But Republicans and Democrats came together to pass the Voting Rights Act, and every reauthorization since that time, Republicans and Democrats worked together, as you know, despite so many politically divisive issues. In 2006, Congress came together under the leadership of Mr. Conyers and Mr. Sensenbrenner and renewed the Voting Rights Act with an overwhelmingly bipartisan commitment.

So we should be proud of our significant progress, but we still have work to do. We all agree that voting rights violations are wrong, that discrimination is wrong. We should all work together to update the Voting Rights Act and to ensure that voting is free, fair, and accessible for all Americans. Thank you.

[The prepared statement of Mr. Overton follows:]

United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice

Hearing on
The Voting Rights Act
After the Supreme Court's Decision
in *Shelby County*

Testimony of Spencer Overton
Professor of Law
The George Washington University Law School

July 18, 2013

Chairman Franks, Ranking Member Nadler, and Members of the House Judiciary Subcommittee on the Constitution and Civil Justice:

I appreciate the opportunity to testify today regarding the Voting Rights Act after the U.S. Supreme Court's decision in *Shelby County v. Holder*.[1] I am a tenured Professor of Law at The George Washington University Law School. I regularly teach a voting law course, and in previous years I have taught courses on civil rights and the law of democracy generally. My scholarship focuses on voting rights and other election law issues. I am also a Senior Fellow at Demos. From 2009-2010, I served as Principal Deputy Assistant Attorney General for Legal Policy at the U.S. Department of Justice, where I worked on various policy issues, including policies related to the Voting Rights Act, the Military and Overseas Voter Empowerment Act, and the National Voter Registration Act.

Shelby County Invalidated Coverage Formula Referencing 1960s and 1970s Data

In *Shelby County*, the Court held unconstitutional the Section 4(b) coverage formula that determined which jurisdictions must comply with the preclearance requirements of Section 5 of the Voting Rights Act.

Section 5 requires federal preclearance of changes affecting voting in "covered" jurisdictions before the changes are implemented. Section 4(b) as originally adopted and updated provided formulas that identified as "covered" jurisdictions with a voting test or device and less than 50 percent voter registration or turnout in the 1964, 1968, or 1972 general Presidential elections.[2]

In *Shelby County*, the Court stated "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets," and that "current burdens...must be justified by current needs."

The Court believed that *in the past* the 4(b) coverage formula based on tests and low turnout from 1964, 1968, and 1972 elections was "sufficiently related to the problem,"—that it was "rational in both practice and theory," "reflected those jurisdictions uniquely characterized by voting discrimination," and "link[ed] coverage to the devices used to effectuate discrimination." The Court observed that "[t]he formula looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both."

In contrast, the Court believed that the coverage formula based on 1964, 1968, and 1972 turnout and tests was not tailored to address discrimination *today*. The Court noted that Congress altered the coverage formula in 1970 (adding counties in California, New Hampshire, and New York), and 1975 (adding the States of Alaska, Arizona, and Texas, and several counties in six other states), but not in 1982 or 2006. Specifically, the Court stated:

[1] 133 S.Ct. 2612 (2013).

[2] In 1975 "test or device" was amended to include areas that provided English-only voting materials where at least five percent of voting-age citizens were members of a single language minority group.

> Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. And voter registration and turnout numbers in the covered States have risen dramatically in the years since.

The Court did not believe that the record Congress amassed in 2006 establishing vote dilution and other discriminatory practices was tied to text of a coverage formula based on turnout, registration rates, and tests from the 1960s and 1970s. Specifically, the Court reasoned:

> Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40–year–old facts having no logical relation to the present day. The dissent relies on "second-generation barriers," which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem. Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution.... [W]e are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.

The Court explicitly limited its holding to the 4(b) coverage formula based on election data from the 1960s and 70s, and stated that "Congress may draft another formula based on current conditions."

While the Court observed that states generally regulate state and local elections and that federal preclearance is "extraordinary," the Court did not find the Section 5 preclearance process unconstitutional. Instead, it explicitly recognized that "voting discrimination still exists," that "any racial discrimination in voting is too much," and that Congress has the power to enforce the Fifteenth Amendment to prevent voting discrimination. Further, the Court's decision did not affect Section 3(c) of the Voting Rights Act, which allows federal courts to order preclearance as a remedy for violations of the Fourteenth or Fifteenth Amendment (commonly known as "bail in").

Section 2 Litigation Inadequate Substitute for Loss of Preclearance

While the holding in *Shelby County* was limited to invalidating the coverage formula, the decision has a significant impact. It effectively suspends Section 5 preclearance in all jurisdictions other than the handful currently subject to a Section 3(c) "bail in" court order. Absent Congressional action that updates the Act, it will be more difficult to prevent and deter political operatives from manipulating voting rules based on race.

Some have asserted that Section 5 is unnecessary because the Department of Justice or private parties can bring a lawsuit under Section 2 of the Voting Rights Act. This is wrong. While Section 2 is important, litigation is an inadequate substitute for the Section 5 preclearance process.

Litigation Not Comprehensive: Preclearance was comprehensive—it *deterred* jurisdictions from adopting many unfair election rules because officials knew every decision would be reviewed. In contrast, litigation requires that plaintiffs have the information and resources to bring a claim, and therefore litigation misses a lot of under-the-radar manipulation. Even states and localities that post new bills online or are subject to freedom-of-information laws generally do not disclose the unfair aspects of their voting changes.

Litigation More Expensive: Preclearance also put the burden to show a change was fair on jurisdictions—which enhanced efficiencies because jurisdictions generally have better access to information about the purpose and effect of their proposed election law changes. Litigation shifts the burden to affected citizens—who must employ experts and lawyers who fish for information during drawn-out discovery processes. This drives up the cost of compliance to the Department of Justice, to affected citizens, and to jurisdictions.

Litigation Not Tailored to Non-Dilution Claims: Section 2 has well-developed standards to challenge unfair minority vote dilution in the context of at-large elections and racially-gerrymandered election district boundaries. The litigation standards, however, are not sufficiently developed to address non-dilution claims such as challenges to voting locations and candidate qualification procedures. In contrast, the Section 5 retrogression standard was well-suited to address non-dilution claims.

Preclearance Protects Voting Rights in Local Elections: The preclearance process was particularly valuable in local elections, which are often nonpartisan. While national media outlets and political pundits may focus on voting rules that affect federal and state offices, the unfair manipulation of local election rules is a significant problem. At least 86.4% of all unfair election changes blocked by preclearance since 2000 *would not* have affected federal elections. That's because even when federal, state, and local elections are conducted at the same time, many important changes are confined to the local level, including local redistricting, annexations, and changes to candidate qualifications, the method of elections, and the structure of government.

In Nueces County, Texas, for example, the rapidly-growing Latino community surpassed 56% of the county's population, and in response county officials gerrymandered local election districts to dilute the votes by Latinos.

Without Section 5 protections to block this type of racial manipulation, Americans in many areas like Nueces County will not have the thousands and sometimes millions of dollars needed to bring a lawsuit to stop these unfair changes. Further, much of this local manipulation will not attract significant national media attention and will go unchallenged.

Bail-In Currently Inadequate: The Section 3(c) bail-in process is insufficient to address the problems above because it currently requires a finding of intentional discrimination. Courts often find voting rights violations based on effects without explicitly finding that a jurisdiction engaged in intentional discrimination. Evidentiary problems with proving intentional discrimination drive up litigation costs for the Department of Justice, aggrieved voters, and jurisdictions. Bail-in is often a good solutions-oriented remedy for all parties, but

currently bail-in consent decrees generally require that a jurisdiction sign a decree that acknowledges it engaged in unconstitutional activity (intentional discrimination), and the stigma of intentional discrimination can sometimes deter otherwise constructive agreements.

Significant Voting Discrimination Persists: Too many political operatives in previously covered jurisdictions continue to maintain power by unfairly manipulating voting rules based on how voters look or speak. Congress determined as much during the last reauthorization, and such discrimination has occurred since that time in various jurisdictions like Nueces County, Texas. While the Court in *Shelby County* invalidated the coverage formula because it was based on data from the 1960s and 1970s, the Court acknowledged that "voting discrimination still exists" and that "any racial discrimination in voting is too much."

Conclusion

In the last 50 years we have made significant progress on voting rights. Unfortunately, after *Shelby County v. Holder* political operatives have more opportunity to unfairly manipulate election rules based on race. The Court in *Shelby County* stated that the purpose of the Fifteenth Amendment is "to ensure a better future," but the future will be worse if Congress fails to act.

Fortunately, Congress has the power to prevent discrimination and update the Voting Rights Act. An updated Voting Rights Act will help not just voters of color, but our nation as a whole. Protecting voting rights provides legitimacy to our nation's efforts to promote democracy and prevent corruption around the world. We all agree that racial discrimination in voting is wrong, and Congress should update the Voting Rights Act to ensure voting is free, fair, and accessible for all Americans.

Mr. FRANKS. And I thank the gentleman.

And we will now proceed under the 5-minute rule with questions, and I will begin by recognizing the Chairman of the full Committee, Mr. Goodlatte, for 5 minutes.

Mr. GOODLATTE. Mr. Chairman, thank you very much.

I want to thank all four of our witnesses. This has been a very good exposition of the *Shelby County* case and the current status of the Voting Rights Act. As I said in my opening remarks, it is absolutely critical that we protect the rights of all Americans to be protected in their rights to register and to vote, and it is important to recognize the many provisions in the Voting Rights Act that have been upheld, including the opportunity to have preclearance in circumstances where a court finds that a jurisdiction has engaged in a discriminatory action that results in barring people from having the opportunity to register or to vote, and it is important that this Committee makes sure that we continue to protect that right.

I had intended to yield my time to former Chairman Sensenbrenner, who is not a Member of this Subcommittee but who, as Chairman of the full Committee, was presiding at the time the Voting Rights Act was last extended, and I am now advised that he is not able to return because of a scheduling conflict.

I am going to have to leave myself, and so I know there are some other Members of the full Committee who are not Members of the Subcommittee, including, I believe, Ms. Jackson Lee and Mr. Watt. I understand Mr. Watt does not desire time. So, Mr. Chairman, I will yield the balance of my time to the gentlewoman from Texas and allow her to ask questions of the panel.

Again, my apologies to the panel for having to leave, but also my thanks to each of you. I think this has been a very good exposition of the status of the law, and at this time I yield to Ms. Jackson Lee.

Ms. JACKSON LEE. Let me thank the Chairman for his courtesies, and to the Members as well, to their courtesies, and I want to go right to Mr. Overton because he directly commented on two points that were raised in the majority opinion, and that was the extensive registration of African Americans and the turnout of African Americans.

Let me pose two questions. Turnout is like a roller coaster. It is up and down, and there may be some thrills. The registration itself likewise goes in spurts depending really on the candidate, maybe the issue. Off-year elections may be lesser than elections that are not.

Is it not the barriers—when you think of the 13th and 14th Amendment, one giving the vote, one giving citizenship, it was an unfettered vote, except as guided by what was then the law. Can you speak to that point? Is it not the discriminatory barriers that the Court should look at and have chronicled from 2006 on, as opposed to registration and turnout, which is, in essence, in cycles?

Mr. OVERTON. Well, thank you very much for your question, and you are right in terms of the 14th and 15th Amendment are not focused simply on this just formal right to vote in terms of the right to cast a ballot, but also to cast a meaningful ballot.

You will remember that the purpose of Section 5 in terms of preclearance was to recognize that there may be devices that we don't understand that will undermine minority voting rights, and as a result we need a tool that is flexible that can adapt to new devices that suppress minority votes or dilute minority voting——

Ms. JACKSON LEE. So in essence, if I might, preclearance is to get rid of the barriers so that your vote can be unfettered when you go to the polls, as opposed to doing it after the fact.

Mr. OVERTON. That is correct, but that would also include, for example, Nueces County, where you have 56 percent Latino, a large Latino turnout. So that may be a high registration, high turnout rate, but one draws districts in a way to ensure that Latinos will not control three of the five commission seats but are only confined to two of the commission seats.

Ms. JACKSON LEE. That is why the preclearance is vital.

Mr. OVERTON. Correct.

Ms. JACKSON LEE. And the enforcement section or an enforcement section such as what Section 4(b) was is vital as well, and a Section 2 claim does not equal the preclearance authority.

Mr. OVERTON. That is absolutely right, in large part because it is just a different administrative tool. You know, litigation has its place in some situations. But when we talk about an administrative tool—we have it in many other areas like antitrust, et cetera, where we have a tool that efficiently prevents, deters discrimination, and does it in a way that is not high cost in the way litigation is, is comprehensive. Section 5 was an important tool.

Ms. JACKSON LEE. I thank the Chairman, and the I thank the Committee for their kindness.

Mr. CONYERS. Mr. Chairman?

Mr. FRANKS. If I could, before we move on here, I just noticed that Congressman John Lewis was in the room, and I wanted to recognize and express our honor that you are among us here today, sir, and we appreciate it. You are an icon in this movement, and we are very grateful that you have joined us.

Mr. CONYERS. All I wanted to do was to add on to your statement an invitation, if you would permit, for him to sit on the dais.

Mr. FRANKS. Absolutely. Yes, sir.

Mr. CONYERS. Thank you.

Ms. JACKSON LEE. And I yielded back, but I just want to add my appreciation for the leadership of Mr. John Lewis and the statement of the Edmund Pettis Bridge, and he lives that statement every day. I thank him for his courage.

Mr. FRANKS. And I would now recognize the Ranking Member of the Committee for 5 minutes for questions.

Mr. NADLER. Thank you, Mr. Chairman.

Let me ask Mr. Kengle. We know that Section 5 was judged necessary, and Section 4 to determine who is under Section 5, because without preclearance the Federal Government was always playing a whack-a-mole game with local jurisdictions. You would knock down one discriminatory practice, they would come up with three others. By the time you knocked them down, they came up with two more, and you never caught up, and people were always discriminated against.

Given the effective dismemberment of Section 5 by Section 4 being held unconstitutional, two things. Is Section 3 enough to protect against voting discrimination, as we have witnessed it post-2006 reauthorization? And why are there such a few number of cases in which jurisdictions have been bailed into the preclearance regime under Section 3?

Mr. KENGLE. I don't think Section 3 is going to be enough. One of the points that I noted earlier was that Section 3 is a two-step process. In other words, a plaintiff, or DOJ for that matter, cannot just go to a court and say we think that there is reason to have this jurisdiction subject to the preclearance process, so please give us an order to that effect.

What has to occur is that the district court has to find that there have been violations of the racial discrimination protections of the 14th or 15th Amendment. And so that means that in practical terms the plaintiff seeking 3(c) coverage has to prove that there was intentional discrimination within the jurisdiction.

In my written testimony, I identified some of the burdens that are associated with proving intentional discrimination. This was a subject that was extensively debated in 1982 when Congress amended Section 2 to include what is now known as the results——

Mr. NADLER. Why didn't we at that time add the results to Section 3 also?

Mr. KENGLE. I'm sorry?

Mr. NADLER. When we added the results or effects test to Section 2, why didn't we add it to Section 3 at the same time? Or was that just——

Mr. KENGLE. Well, I think that—I don't know the answer to that. I think that the answer to that is that Section 3 was seen as an analog to Section 5. Section 5 was not being amended. At that time it was reauthorized, but it was not otherwise amended. And so I think that Section 3 was not changed in that way because it was seen as providing a judicially-based counterpart to Section 5.

Mr. NADLER. Okay. Now, let me ask you one further question. Then I have a question for Mr. Overton.

Every time we have felt the need to reauthorize the Voting Rights Act, we developed and carefully studied a massive record before we did so. In 2006, we had over 15,000 pages documenting ongoing and persistent election-related discrimination, and documenting the utility of preclearance.

Now, given the broad powers conferred upon Congress under the 15th Amendment, and given the exhaustive record of voting discrimination compiled by the Congress, can you explain the problems around the Court's departure from their traditional deference to Congress as justified in *Katzenbach v. South Carolina* and *City of Rome v. United States*? In other words, how did they get around their traditional deference to Congress, our massive documentation of the current need, and still declare it unconstitutional?

Mr. KENGLE. Did you want Mr. Overton to respond first?

Mr. NADLER. Either one of you. Mr. Overton, go ahead.

Mr. OVERTON. Well, you know, the Court in *Shelby County* was focused on this text in terms of these election years of '64, '68, and '72. I think Congress came at this from the standpoint of amassing

an incredibly significant record, 15,000 pages, over 90 witnesses, 20 hearings, that was just massive but maybe not tied to that language in '64, '68, and '72. So I really read the Court as not even looking at that massive record because it said, hey, it is not tied to this formal language that is in the statute of '64, '68, and '72.

Mr. NADLER. So you don't think, then, that it flowed from a *Boerne* analysis that we have to have congruent and proportional——

Mr. OVERTON. Well, I definitely think Congress was very aware of the standards and went out of its way to build a very strong record that would pass muster in terms of a *Boerne* analysis or a *Katzenbach* analysis. But I just think that there was a bit of a mismatch between Congress and the Court in terms of Chief Justice Roberts really focused on the text of those 3 years.

Mr. NADLER. Can I just ask Mr. Kengle to comment on the same, last question?

Mr. KENGLE. Yes. I didn't spend a lot of time in my written testimony going into the details about the Court's opinion in the case because I wanted to address the practical significance. But in terms of the Court's application of the standard, the *Boerne* doctrine was curiously absent from the Court's discussion, and it is not clear to me to what extent the Court would apply some additional type of *Boerne* gloss to a future case as opposed to simply following the standard that the Court set out in North West Austin, which is what it followed in this case, that current burdens have to be justified by current needs.

The thing about the Court's textual approach and really laser-like focus on the text of Section 4(b) is that in other contexts the Supreme Court has looked at the actual function and the harmonious operation of the provisions of the statute and what Congress logically meant to intend when it interpreted other portions of the Act. I am thinking in particular of the Sheffield case, and even the North West Austin case, because in looking at the bailout provision in North West Austin, the Court did not really take the literal reading of the statute. It took a result that it felt was necessary.

So in other cases, the Court has departed from the strict text of the Act. In this case, it chose not to. But my view is that is water under the bridge and we need to now move on to address the current evidence and take the appropriate next steps.

Mr. NADLER. Thank you. My time is expired.

Mr. FRANKS. I thank the gentleman.

And I will now recognize myself for 5 minutes for questions. If it is all right, I will start with you, Mr. Adams. I wondered if you could just generally describe for us the process by which lawsuits under Section 3 of Voting Rights Act are filed. And this section, of course, is still intact; correct?

Mr. ADAMS. Yes. Section 2—Section 3 coverage, of course, can be triggered by finding that there is intentional discrimination under Section 2, and the Supreme Court has laid out a rather complex but predictable roadmap. Under Section 2, you have to satisfy something called the Gingles preconditions, and then you have to go through the Senate factors, of which there are seven. I should note that that is for a vote dilution claim, a redistricting claim, if you will. I have brought non-vote dilution Section 2 cases. I

brought two of them, and you have a slightly different analysis, but it is still applicable.

There has been testimony and commentary that you can't bring it in a non-vote dilution legislative redistricting context. That is just not true.

So you have to prove these Gingle preconditions, and then you have to march through the Senate factors. I want to point out two of these issues.

One, Gingles 3. Gingles 3 is a causality requirement that racial polarization is causing minorities to lose elections. Senate factor 1 is a history of official discrimination. So you can still have effective enforcement of civil rights if you simply show there is discrimination and that minorities are losing elections because of being minorities.

Mr. FRANKS. Mr. von Spakovsky, would you add anything to that? On Section 2 and 3.

Mr. VON SPAKOVSKY. Yes. It is very interesting hearing people say that we need this administrative process. Like I said, it violates fundamental due process. The government is supposed to prove its case, not the other way around. I am sure it would be very easy if we allowed the government to simply jail individuals when they were accused of crimes, and then force them to prove that they were innocent. That is basically what Section 5 did.

I don't deny that discrimination still occurs, but Section 2 and Section 3 are powerful weapons to do that, and particularly Section 3. Look, what the Supreme Court said was you can't put this blanket Section 5 preclearance requirement on all these states based on 40-year-old data, particularly given the most recent evidence of how that kind of discrimination has disappeared. You can't do a blanket imposition of this.

But Section 3 allows you to put in a preclearance requirement for specific jurisdictions if the government goes to court and actually proves they engage in racially discriminatory behavior and they are going to do it in the future. That is something you can do. You can win those cases, and it is not just the government that can bring these. The ACLU has a huge voting rights project that brings many cases. I just checked their assets. Their assets as of 2012 were $360 million. They have the ability to bring cases like this if the Justice Department is not, but the Justice Department in the past has brought Section 2 cases when it was required.

Mr. FRANKS. Let me ask a general question to all of you, and anyone that feels inclined to respond, we can start down here and just go down the line.

But looking at modern voter registration and voter turnout rates in the several states, what do you think they tell us about racial progress in America since 1965? Mr. Adams?

Mr. ADAMS. Well, as I say in my written testimony, America bears absolutely no resemblance in 2013 to 1965, and that is exactly what the Supreme Court recognized when it found these triggers to be out of date. So we simply don't have the America where whack-a-mole was necessary because we don't have jurisdictions throughout the South who are going to play whack-a-mole anymore like they did in 1964. In some places it is worse than the South in the North, and that is what was so upside-down about the trig-

gers, is you saw more voting discrimination cases in places like Euclid, Ohio and Osceola County, Florida, which is a non-covered place, and Blaine County, Montana then you did in the South.

Mr. FRANKS. Mr. Kengle, do you have any thoughts there?

Mr. KENGLE. Yes. What I would want to say about that is that in the South, looking at the situation today, I think what you see in the South in the covered states is that Section 5 and Section 2 have wrought an historic transformation in the political process, that compared to where we were in 1965, there has been tremendous progress in terms of voter participation and voter turnout. There is no question about that. It is one of the great achievements of the Voting Rights Act. It has taken a lot of work. It didn't happen automatically. But it has been a great achievement.

But voter registration and voter turnout are not all of the story. When you look at the story, and I saw this when I worked in the DOJ because there were a lot of Section 5 submissions that came in in the 1980's when I began of voting changes that had been enacted in the 1970's, and what you saw was that as time went on, the increases in voter registration and turnout among minority voters had prompted discriminatory changes to election systems; in other words, adding a majority vote requirement or going to at-large elections, abandoning single-member district elections, changes that were diluted in nature.

So Section 2 addressed that problem in 1982. There is an excellent book called Quiet Revolution in the South that chronicles how both Section 2 and Section 5 brought about this change. But the fact that that success has occurred does not indicate that that success is permanent or that that success cannot be jeopardized. It can be jeopardized. I am very concerned that it will be jeopardized if jurisdictions believe that they have the green light to engage in voting discrimination and that they can sit back and wait to be sued, and then just drag the process out through years of litigation and the courts.

The number of Section 2 cases in which a court has issued a preliminary injunction is very, very small. I don't have a whole list. It is a small fraction of all Section 2 cases. It is not a ready remedy.

Mr. FRANKS. All right. Thank you, Mr. Kengle.

And with that, my time has expired, and I would now recognize the distinguished Ranking Member of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

I wanted to come back to the head of the Lawyers' Committee for Civil Rights Under Law, which incidentally has done a very superb job of keeping us on track. I have been to a number of the sessions. Let me just raise a concern about the structure of the new enforcement regime that might replace the one disabled by the *Shelby County* decision.

What impact does the opinion have on the status of preclearance matters currently under review or pending prior to the Court's ruling?

Mr. KENGLE. Well, the immediate—we saw one impact right away, Mr. Conyers. There were two appeals pending in the Supreme Court from the District Court for the District of Columbia.

One was a case involving—well, both cases involved the State of Texas. One concerned redistricting and one concerned voter ID. The Supreme Court vacated the District Court judgments in both of those cases and remanded the cases back down, presumably for dismissal. There have been some motions filed in those cases, so they may not be fully over yet. But the Court vacating the judgment I think is an indication that the Court considers the judgments in those cases that were issued by the D.C. court to now be moot because they were done pursuant to an unconstitutional targeting formula.

Because the impact on Section 5 objection letters I think is going to be the subject of some litigation in the Federal courts pretty soon, I am a little wary of predicting exactly what the outcome is going to be, but I think there is going to be a very vigorous argument that any objection issued from 2006 onward has now been invalidated. There may be some arguments against that, but I think there is going to be a very strong push to have all of those found to be invalid, and that would mean that the jurisdictions would then be free to go about implementing those objectionable changes unless they have been repealed or superseded by other legislation.

Mr. CONYERS. So we should be worried or hopeful?

Mr. KENGLE. I think it is ground for concern. I think that the Committee and Subcommittee need to look closely at the record of what has occurred after 2006. That is one of the things that we had not attempted to do today, is provide a sort of comprehensive assessment of what has occurred after 2006. I feel strongly that that should be the subject of future hearings where it can be concentrated on in detail and that it can be put in the context of the other recent and current evidence of voting discrimination.

Mr. CONYERS. Professor Spencer Overton, in the 1997 case of *City of Boerne v. Flores*, the Supreme Court stated that Congress must develop a complete record before acting legislatively, and to tailor its legislative response to that record to ensure that its legislation was "congruent and proportional."

Now, what kind of problems perhaps has the Court created for Congress as it chooses to legislate voting rights enforcement in the future?

Mr. OVERTON. Thank you, Mr. Conyers. Well, one significant problem is that there is one less tool in terms of preventing racial discrimination in voting, and it is a significant issue. It has certainly been documented. In terms of the Court making that move, essentially the Court focused on—as opposed to focusing on Congress' record, it focused on the terms of the statute and got into this notion of sufficiently related and current burdens being justified by current needs in terms of those years '64, '68, and '72.

I do want to just kind of add, Mr. Conyers, when I came into this building today, I went through a metal detector, and that wasn't a due process violation. It was not sending me to jail. There are not metal detectors everywhere. When I go to McDonald's, there are not metal detectors. It is just where there might be a problem here. The metal detector is less expensive than some other security devices. It prevents problems before they occur, right?

Preclearance is a reasonable device when targeted at particular areas to deal with problems.

Mr. CONYERS. Thank you so much.

My time has expired. I thank the Chair.

Mr. FRANKS. And I would now recognize the distinguished gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I appreciate the hearing we are holding here today, and I am listening to our witnesses and thinking back at that reauthorization time of the Voting Rights Act back in 2006. I would first remark on Mr. Overton's comment that preclearance is a reasonable device. I would think also that voter ID would be a reasonable device. And when I look across the country and try to accumulate problems we might have with elections, I don't know where to go look, and I wouldn't deny that it likely exists in places in the country, and probably in smaller areas, much smaller areas than when this act was first passed. But I wouldn't know where to go look to find real voter intimidation and real discrimination. The first place that comes to mind to me when I utter those words is Philadelphia.

So I think there is more damage to the integrity of our election system that comes from lack of voter ID than might come from voter intimidation. And when I think about the discussion about bringing up the Voting Rights Act and perhaps rewriting it, that would mean that the authorization would be also subject, and I question the wisdom of an authorization that would last for more than a generation, 25 years. Thomas Jefferson declared a generation to be 19, in case anybody is quibbling.

So the 25-year reauthorization in 2006 I thought was imprudent. It is one of the reasons I voted against it. I think we need to have a lot more improvement in the integrity of the individual ballot, and I think we know that, but there is a political barrier in the way. I think if we bring up the Voting Rights Act and we have an opportunity then to open it up, I think multilingual ballots become a question. There is no logical reason that ballots should be in anything other than in English. If you take a citizenship test, you have to demonstrate proficiency in English.

I would turn first to Mr. Adams and ask if the Voting Rights Act were either allowed to expire or be repealed, is there a constitutional protection there for the issues that are covered in the VRA, and how would you expect that might be worked?

Mr. ADAMS. Well, obviously somebody can bring a 1983 action under the 15th Amendment, which guarantees the right to vote free of racial discrimination. But, of course, Section 2 also incorporates those concepts.

You mentioned voter intimidation. Just last week, a state judge in Mississippi determined in a ruling, threw out the results of an election because of voter intimidation by a political operative working for somebody named Rodriguez Brown. This is a proven case of voter intimidation. Will anybody do anything about it? Will there be a Federal case brought? Somehow, I suspect not.

Mr. KING. Thank you, Mr. Adams.

Also, if I remember Mr. von Spakovsky's statement, to the extent that African American voter turnout is actually higher in the noncovered districts than in the covered districts, did I hear that correctly? Could you elaborate a little bit?

Mr. VON SPAKOVSKY. Black turnout is better in covered, what were covered jurisdictions than non-covered jurisdictions around the country; in fact, consistently so. Table 5, which is a map from the Census report in May, is really dramatic. I mean, it shows Blacks out-voting Whites largely in the covered states.

Mr. KING. Can you explain why that is?

Mr. VON SPAKOVSKY. I'm sorry?

Mr. KING. Can you explain why that is?

Mr. VON SPAKOVSKY. Well, one of the reasons, I think, is because of Section 5 and the Voting Rights Act, and because the kind of systematic discrimination you had in 1965 has virtually disappeared.

And if I could make a point here, people keep saying, well, with this gone, these jurisdictions are going to return to acting that way. Well, that ignores a very important point. In 1965, there were no Black elected officials in the covered states. That is not true today. In fact, all the statistics and the court findings show that those covered states have a much larger number of Black elected officials than other parts of the country. That is true in states like Georgia and Mississippi. And the idea that those officials are themselves going to start to discriminate or put up with that kind of discrimination, that is just not a reality.

Mr. KING. Okay. But what you have said, I think, is that the Voting Rights Act has worked in these covered districts and has brought the Black turnout up a little higher than it is in the non-covered districts. So does that imply that there is discrimination in the non-covered districts, or how would you explain the statistical variance?

Mr. VON SPAKOVSKY. Well, we know there is discrimination in uncovered jurisdictions because there are Section 2 lawsuits that are filed, as Mr. Adams pointed out, in places like Euclid, Ohio and other areas. Disparity in turnout between different races isn't always due to discrimination. It is sometimes just people not being interested in particular candidates. I think Ms. Lee talked about the cyclical nature of elections.

But the point is, if Congress is going to have Section 5 coverage based on the Section 4 formula of low turnout, then there are many other places in the country that have never been covered under Section 5 that ought to be covered in any new version of this law.

Mr. KING. I thank you.

I would just ask unanimous consent to ask an additional question, if the Chair would indulge me?

Mr. FRANKS. Without objection.

Mr. KING. Thank you, and I thank the Members of the Committee for allowing it. I was very interested when I heard Mr. von Spakovsky say about apartheid redistricting, and I don't know that that is going to be revisited in this hearing if I don't bring it up. I come from a state that has anything but that. We have a statutory directive that, without going through the definitions in the language, it essentially prohibits the gerrymandering by race or by party. We end up with, I think, logical districts that are compact and contiguous. From that perspective, I see the gerrymandering that Mr. von Spakovsky has brought up in this hearing, and myself, I would recommend looking at other states drawing districts

like that without regard to race, ethnicity, the residency of any incumbency, and logical, compact, contiguous.

So I would ask Hans if he would speak to that and just elaborate a little bit more for the benefit of the Committee, please?

Mr. VON SPAKOVSKY. Look, I don't think it is a good idea when you take cities, for example, where the residents, no matter what the race, have similar interests, similar public policy problems, and you divide them up into differing districts just based on race so that particular individuals or particular races can get elected. I mean, that leads to many different problems. It does not help integration. It does not help bring us together, which is what the Voting Rights Act was intended to do.

But, to be quite frank, politicians like it because it produces very safe districts for them where they don't get competition. I don't think that is a good thing. Some of the witnesses here may agree with me that they don't think that is a good thing, and that is a direct result of Section 5 and the way it is administered by the U.S. Justice Department.

Mr. KING. Thank you very much. I thank all the witnesses and yield back the balance of my time, Mr. Chairman.

Mr. FRANKS. I thank the gentleman.

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

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Overton, I just wanted to comment on that last one. Are overly safe, over-packed districts oftentimes violations of Section 5?

Mr. OVERTON. Often they are not violations of Section 5, but I think it is important to recognize——

Mr. SCOTT. An over-packed district where——

Mr. OVERTON. Well, certainly an over-packed district would be a problem and would be retrogressive here, right?

Mr. SCOTT. Thank you.

Mr. OVERTON. But I just want to also note that in a place like Nueces County, Section 5 prevented the discrimination that occurred in Nueces County in terms of the racial districting that discriminated against Latinos. So, it is important.

Mr. SCOTT. I just wanted to point out that when you get these overly safe, over-packed districts, they can violate Section 5 on their own.

One of the concerns I have is not the statewide problems but the little problems that can occur in small counties, school board elections, town councils, when nobody is looking. And we know that all voting changes are not discriminatory. They can be unpopular. They can have political effects, but not discriminatory. You could have one group wanting more taxes, less growth, more education. There could be a lot of reasons why a plan may be unpopular, but who would do the initial threshold analysis to ascertain whether or not it is discriminatory under Section 5 or if you don't have Section 5, Mr. Overton?

Mr. OVERTON. Well, the benefit of Section 5 is that jurisdictions generally have access to information, and they provide that basic information to either the Department of Justice or to a Federal court to obtain preclearance. So we don't have a situation where

voters, who may not have a lot of resources, have to hire experts and lawyers and go through discovery and that kind of thing.

Mr. SCOTT. So the threshold analysis to ascertain whether or not there is a discriminatory effect is done by the jurisdiction, and if you do not have Section 5, that burden is on the potential victims of that discrimination who may not have the money.

Mr. OVERTON. That is correct, and that drives up costs not just to the plaintiff, these victims of discrimination, but it also drives up costs in terms of expert fees and lawyers' fees to the jurisdictions, as well as to the Department of Justice.

Mr. SCOTT. And if the victims do not have the resources to do the analysis, without Section 5, what happens?

Mr. OVERTON. Discrimination persists.

Mr. SCOTT. Now, what happens to the officials who are the perpetrators of the discrimination?

Mr. OVERTON. They go unchecked. They win elections. They are entrenched, and they benefit from racial discrimination.

Mr. SCOTT. Now, Mr. Kengle, you mentioned the vulnerability of any preclearance that was denied since 2006 because of the Shelby case?

Mr. KENGLE. There is the potential that that will occur, yes.

Mr. SCOTT. Why would you not at least go back to 2009? Because the Austin utility case had the opportunity to find the formula unconstitutional and did not.

Mr. KENGLE. I'm sorry, I did not——

Mr. SCOTT. Well, in 2009, you have the Austin utility case where the formula, Section 5, was reviewed but it was not found unconstitutional.

Mr. KENGLE. The North West Austin case, you mean?

Mr. SCOTT. Right.

Mr. KENGLE. Yes.

Mr. SCOTT. Why would you go all the way back to 2006 and not 2009 for that debate?

Mr. KENGLE. I suppose there could be an argument that you would not go back. I think that probably the argument against upholding those objections would be based on the idea that from 2006 on, the Section 4(b) formula was unconstitutional, and therefore it couldn't legally be the basis for denying preclearance. The argument would be that it would be retroactive.

Mr. SCOTT. Okay. I have another question I am trying to get in real quickly to Mr. Adams.

You mentioned the bailout and the bail-in. If the original formula was constitutional in the late '60's, why have not the bail-in and bailout provisions kept the list up-to-date and modern? What needs to be done to the bail-in and bailout provisions?

Mr. ADAMS. I am perplexed why nobody used the bail-in provisions, Justice or private plaintiffs. One of the things that needs to be fixed in the bail-in provisions is an inconsistency that exists in the current statute. It says the Attorney General may seek in a case brought with the Attorney General involved. But yet, the Attorney General does not have standing to assert a 15th Amendment claim, an intentional discrimination claim on behalf of somebody else. They can only assert a statutory claim.

So Section 3 has an inherent defect in its language now that ought to be fixed, to either add results or effects tests or to clarify that the Attorney General can pursue a 15th Amendment claim.

Mr. SCOTT. Mr. Chairman, could I ask one additional question?

Mr. FRANKS. Without objection.

Mr. SCOTT. Thank you.

Mr. Overton, a great deal has been talked about registration and turnout numbers. You alluded to the idea that perhaps when turnout becomes proportional, you are even more vulnerable to little schemes and devices. Can you talk about that?

Mr. OVERTON. Yes, sir. A point here is that it is not consistent in terms of turnout levels among covered and uncovered states. There are many counties where minority turnout is much lower if you look at the precinct and county level. And also, if you just look at Latinos and Asian Americans who are citizens and voting age population, that trails Whites and African Americans. Obviously, Latinos and Asian Americans are protected in terms of Section 5.

But your broader point was it is not just turnout. This notion that once a group can actually challenge the status quo from a political standpoint, political operatives then have the incentive to sometimes manipulate rules to maintain power, and they are not reflecting the will of the people.

So there may be some racially polarized voting, and people may vote in terms of racial lines. I am not trying to make any judgment on that. The problem is when politicians, as opposed to reaching out to those voters and including them and mobilizing them and trying to win over their vote, win elections by manipulating rules that dilutes the votes of those communities or suppresses the votes of those communities.

Mr. FRANKS. And I thank the gentleman.

And I now recognize Mr. Deutch for 5 minutes.

Mr. DEUTCH. Thank you, Mr. Chairman.

Mr. Chairman, writing the majority opinion in *Shelby County*, Chief Justice Roberts wrote that the Voting Rights Act employed extraordinary measures to address an extraordinary problem of pervasive discrimination in suppressing the right to vote. The Chief Justice pointed out that in 1965, Section 4's preclearance formula was the kind of strong medicine needed to address racial discrimination in voting, an insidious and pervasive evil which had been perpetuated in defiance of the Constitution.

Today we begin the task of updating the preclearance formula to reflect today's America, and I thank the Chairman and Ranking Member for holding this hearing.

In the '60's, we could rely on overtly racist laws to trigger preclearance in the Voting Rights Act. For example, the use of literacy tests to establish if "someone has the moral character" worthy of the right to vote. These are the laws that John Lewis and so many other brave Americans fought to dismantle, and it is an honor to have you here today, Mr. Lewis.

And while there may be fewer overtly racist laws on our books today, when pundits and commentators and TV hosts say that racism is behind us, we are avoiding an important discussion that has got to take place, and I, frankly, think that this is a good place for it to start.

Racism is still here in this country. It just takes a different form. Jim Crow, I would suggest, has been replaced with a far more subversive and far-reaching system of institutionalized racism. So as this Congress works on a new preclearance formula, I humbly suggest that we look beyond the scope of laws passed by states that directly impact minorities at the polls and begin looking at the racially biased application of state laws more generally.

For how healthy is the democratic process in any state if we see institutional racism enshrined in our laws or the application of those laws that limit minority access to the polls, as well as their basic equal protection under the law, laws that too often prevent minority communities from having a true and full voice in local, state, and Federal elections?

Three examples. There has been much discussion about Stand Your Ground laws in connection with the recently concluded Zimmerman trial. There are 23 states with self-defense laws in which there is no duty for a person to retreat from an attacker. Nine of these states, including my state of Florida, permit a person to stand your ground and use lethal force when being attacked. Unfortunately, studies show that Stand Your Ground laws mainly protect White people who shoot a Black person.

How healthy is our democracy when, according to an Urban Institute analysis of FBI data, White people who kill Black people in Stand Your Ground states are 354 percent more likely to be cleared of murder charges? Can anyone argue that Stand Your Ground laws and the use of such laws reflect modern racial bias in state laws and should be considered here in this context as we modernize our preclearance for the Voting Rights Act?

The second example. We see institutional racism in the application of our drug laws. Blacks and Whites may use marijuana at similar rates, but Black Americans are nearly four times more likely to be arrested than Whites, according to the ACLU. State and local governments have aggressively enforced marijuana laws selectively against minority communities, placing hundreds of thousands of people into the criminal justice system. Shouldn't we ensure that states who throw young Black Americans in jail at a disproportionately higher rate than White Americans for the same offense are also not passing laws to further disenfranchise minority voters?

And then the third example is this, and it is more pertinent and specific to this discussion. We see institutional racism in the flood of new voter ID laws. Studies show that as many as 11 percent of eligible voters do not have government-issued photo ID's. Why do many minority voters lack IDs? Often they don't need them. Minorities are less likely to have a driver's license because they are more likely to live in urban areas and often more likely to be poor.

Shouldn't we recognize that voter ID laws seek to disenfranchise certain eligible voters not blatantly based on race but based on requirements that have significantly and intentionally racial ramifications? Isn't that evidence of institutionalized racism, and shouldn't that merit extra Federal scrutiny and preclearance in those states that have passed those laws?

Racism has grown more insidious, more subversive, and more subtle in the 50 years since the Voting Rights Act, but it has not

gone away. We have too much yet to do. It is no wonder why African Americans in Florida and across America so often feel like their voices, if not their lives, are being devalued by our laws. It may be harder for us to pinpoint racism, but that does not mean it has been abolished. We in the United States Congress have a constitutional duty to ensure that we are doing everything in our power to protect every voter.

So as we go through this process, shouldn't we be brave enough to acknowledge that if any state law reflects institutional racism, that preclearance of laws affecting the right to vote in those states should be required? And shouldn't the concept of voter suppression be broadened to include the more subversive, the frankly much more sophisticated ways that institutionalized racism has reared its head?

These are difficult questions, and we are not going to have time to discuss them here today, but I hope as we go forward with this discussion of the Voting Rights Act we are willing to have the brave conversation that I think will help us immensely here on this Committee, and ultimately will serve our country well.

I yield back.

Mr. FRANKS. And I thank all of the participants——

Ms. JACKSON LEE. Mr. Chairman?

Mr. FRANKS. The gentle lady is recognized.

Ms. JACKSON LEE. Out of courtesy, might I just acknowledge as well Barbara Arnwine, who is in the audience, who is the President and CEO of the Lawyers' Committee, a decades-long advocate, Mr. Chairman.

So I thank you very much for allowing me to do so, and I conclude by wishing for continued hearings of this Committee in light of what we have heard today, Mr. Chairman.

Thank you. I yield back.

Mr. FRANKS. I thank the gentle lady.

I want to thank all of those who have attended here today, and I hope this hearing and others hastens the dream of the Founding Fathers to recognize that we are all created equal and that one day that recognition of the human dignity of every last one of God's children will be recognized equally and forthrightly.

I do want to note that all Members will have 5 legislative days with which to submit materials for the hearing record.

I would thank the witnesses and thank the Members in the audience, and this hearing is adjourned.

[Whereupon, at 12:40 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Ranking Member, Subcommittee on the Constitution and Civil Justice

Thank you, Mr. Chairman.

Today, we review the impact of the Supreme Court's decision in *Shelby County v. Holder*. As the Ranking Member of this Subcommittee when we reauthorized the Voting Rights Act in 2006, I had the privilege of working on a bipartisan and bicameral basis with the then-Chairman of the full Committee, Mr. Sensenbrenner, the then-Chairman of the Subcommittee, Mr. Chabot, our Ranking Member, Mr. Conyers, and the Gentleman from North Carolina, Mr. Watt, in guiding the reauthorization though the Congress.

We spent months reviewing the evidence, gaining a firm grasp of the current state of voting rights—and impediments to the exercise of the franchise—as it exists in the present day. We were persuaded, as were an overwhelming majority of the members of this House, and every single member of the Senate who cast a vote, that the remedies contained in the special provisions were still necessary, and were well-suited to the challenge of voting rights.

We did consider revising the formula challenged in *Shelby County,* and determined that the existing formula still served as a useful and effective method of applying section 5 where needed. That determination was not based solely on the questions focused on by the Court and identified by Congress in 1965, but by the full weight of the evidence we found in 2006.

The Court, arrogating to itself the quintessentially congressional power to decide what facts are relevant, and what constitutes an appropriate remedy, struck down the formula in section 4, eviscerating, and rendering a nearly dead letter, the preclearance provisions of section 5.

Congress long ago made the correct determination that requiring voters to go to court after they had already been disenfranchised, rendered voting rights unenforceable, and encouraged local political leaders to rig the system to their advantage.

To be clear, the Voting Rights Act is not solely about racial animus; it is about political power. It is not a matter of determining whether one part of the country is "more racist" than another, but only whether certain jurisdictions engage in conduct requiring special scrutiny to protect the right to vote.

Excluding minorities from effective participation in our democracy renders them something less than full citizens. Here, Justice Scalia was dead wrong: the right to vote in a free and fair election is not a "racial entitlement," but rather the birthright of every American, regardless of race.

As a far more forward-looking Supreme Court said in Reynolds v. Sims in 1964, "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."

The Voting Rights Act has stood for a half-century as a testament to our commitment that everyone must have an equal share in the governance of our nation if our democracy is to have any claim to legitimacy.

While it is true that we have made substantial progress in our nation since 1965, much of it attributable to the Voting Rights Act and our other civil rights laws, it is also true that we are not yet free of efforts to manipulate the system in ways that disempower minority groups.

As we stated in the Committee's report to accompany the 2006 reauthorization,

Despite the substantial progress that has been made, the evidence before the Committee resembles the evidence before Congress in 1965 and the evidence that was present again in 1970, 1975, 1982, and 1992. In 2006, the Committee finds abundant evidentiary support for reauthorization of VRA's temporary provisions.

We reviewed the extent to which the kinds of "first generation" devices have been addressed, and found that section 5 had improved voter participation in covered jurisdictions, just as the Court's majority noted. We also observed that "Sections 5 and 8 have been vital prophylactic tools, protecting minority voters from devices and schemes that continue to be employed by covered States and jurisdictions"

We went on to note,

The Committee received testimony revealing that more Section 5 objections were lodged between 1982 and 2004 than were interposed between 1965 and 1982 and that such objections did not encompass minor inadvertent changes. The changes sought by covered jurisdiction were calculated decisions to keep minority voters from fully participating in the political process. This increased activity shows that attempts to discriminate persist and evolve, such that Section 5 is still needed to protect minority voters in the future.

So the voluminous evidence that we compiled showed clearly that the need in the covered jurisdictions remained, and that the special provisions were necessary and effective to protecting voting rights in those jurisdictions. Rather than proving that the formula in section 4(b) was obsolete, the statistics cited by the Court demonstrated the continuing need and effectiveness of Section 5.

That brings us to today's hearing. I strongly believe that the facts we found in 2006 made a compelling case for retaining Section 5, and applying it to covered jurisdictions which include—I might add—my own New York City district.

What we need to do, as a first order of business, before we start to look at what we might do to address the Court's decision, is to determine the impact of that decision. Just as we moved with great care and deliberation in 2006, and in a bipartisan manner, I would urge members not to put the cart before the horse by trying to examine specific cases and possible remedies until we have a better understanding of where we are right now.

I know that not every member of this Committee supported the reauthorization of the Voting Rights Act, but I hope that we can nonetheless work cooperatively, in the same bipartisan spirit that guided our 2006 deliberations, to address the Court's decision.

I hope the witnesses can address some of the following questions:

- What remains of the Voting Rights Act?
- What is the status of voting changes pre-cleared or denied preclearance since 2006?
- Are any jurisdictions still covered by Section 5? If so, based on what?
- What tools does the Justice Department still have to fight voter disenfranchisement?

There are obviously applications of the Voting Rights Act on which members of this Committee strongly disagree. I would hope that, rather than allowing ourselves to get bogged down with the most controversial cases of the day, we take a step back, look at Section 5, and at what the Court did. Ultimately, as our experience since 1965 has clearly shown, the specifics change over time, but the need for preclearance has remained constant. The value of Section 5 has been its ability to respond in real time to efforts to disenfranchise voters. I hope we can keep our focus where it belongs.

Thank you, Mr. Chairman.

Statement of

Sherrilyn Ifill
President & Director-Counsel

&

Ryan P. Haygood
Director, Political Participation Group

&

Leslie M. Proll
Director, Washington Office

NAACP Legal Defense and Educational Fund, Inc.

United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice

Hearing on
"The Voting Rights Act After the
Supreme Court's Decision in
Shelby County"

Rayburn House Office Building, Room 2141
July 18, 2013
11:00 a.m.

LDF
DEFEND EDUCATE EMPOWER

On behalf of the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), we are pleased to submit this statement to the Subcommittee on the Constitution and Civil Justice, House Judiciary Committee, in connection with the hearing, "The Voting Rights Act After the Supreme Court's Decision in Shelby County." We are grateful to Chairman Trent Franks, Ranking Member Jerrold Nadler and Members of the Subcommittee for holding this important hearing in response to the United States Supreme Court's devastating ruling last month in *Shelby County, Alabama v. Holder*, and we welcome this essential dialogue about the value and imperative of political inclusion and equality, principles that the Voting Rights Act was enacted to protect. Passed at the height of the Civil Rights Movement, the Voting Rights Act is widely regarded as one of the greatest pieces of civil rights legislation in our nation's history. It continues to be of critical importance to LDF's clients, and to voters of color more broadly, as an essential protection in defending and expanding the right to vote for voters of color, as well as language minorities.[1]

Notwithstanding the Voting Rights Act's essential role as our democracy's discrimination checkpoint, and our continuing need for its critical protections, on June 25, 2013, the United States Supreme Court in *Shelby County, Alabama v. Holder*

[1] Founded under the direction of Thurgood Marshall, LDF has been a pioneer in the efforts to secure, protect, and advance the voting rights of people of color in this nation, particularly those of Black Americans. LDF has been involved in nearly all of the precedent-setting litigation relating to the voting rights of people of color since its founding in 1940. LDF also has played a significant advocacy role in the enactment of the Voting Rights Act of 1965 and its subsequent reauthorizations in 1970, 1975, 1982, and 2006. LDF defended the Voting Rights Act before the Supreme Court most recently in *Shelby County, Alabama v. Holder*.

LDF
DEFEND EDUCATE EMPOWER

("*Shelby County*"), in a radical act of judicial overreach, struck down a key provision—Section 4(b) (also known as the "coverage provision")—of the Voting Rights Act.[2] In so doing, the Supreme Court effectively rendered Section 5 of the Voting Rights Act, the "preclearance provision," inapplicable.[3]

By invalidating Section 4(b)'s coverage provision, the Supreme Court disregarded Congress's authority under the 14th and 15th Amendments to enact legislation to defend those amendments' guarantees—an authority appropriately invoked by Congress in its 2006 reauthorization of the Voting Rights Act. Congress, in reauthorizing the Voting Rights Act, undertook an extensive examination, based on many months of hearings, to identify the places that exhibited the kind of persistent racial discrimination in voting that required the specific prophylaxis offered by Section 5's preclearance structure. The Supreme Court's decision in *Shelby County* has left millions of minority voters without a key protection to stop discrimination in voting *before* it occurs, in places that require strong medicine to address the effects of both the history and ongoing reality of racial discrimination in voting.

Responding to the Supreme Court's *Shelby County* decision must be a top priority for Congress. In the hours following the decision, a number of officials from jurisdictions formerly covered by Section 5, including Texas, Mississippi, and North

[2] 570 U.S. ____ (2013) (slip op., at 24).

[3] Section 4(b) identified 15 places that Section 5 protected including: Alabama, Texas, Mississippi, Louisiana, Arizona, North Carolina, South Carolina, Georgia, Florida, Alaska, South Dakota, Virginia, Michigan, New York, and California because of the longstanding and ongoing nature of racial discrimination in voting in these areas.

Carolina, made clear their intentions to move forward with voting changes that will adversely affect access to political participation among communities of color.[4] It is, therefore, imperative that Congress respond aggressively and expeditiously to safeguard the rights of Black, Latino, Asian American, American Indian, and Alaska Native voters in those situations in which they are the most vulnerable to discrimination in voting.

This statement will address three topics that are central to Congress's response to the Supreme Court's *Shelby County* decision: (1) the expansive 2006 Congressional record that reflects the need for strong protections for voters of color from discrimination in those places formerly covered by Section 5 of the Voting Rights Act; (2) the problem that, left without Section 5's protections, communities of color in formerly covered jurisdictions are vulnerable to the myriad of discriminatory voting changes, particularly at the local level, that will arise in jurisdictions now emboldened by the Supreme Court's *Shelby County* decision; and, (3) Congress's ability to address the *Shelby County* decision and to protect vulnerable communities from racial discrimination in voting.

---

[4] *See, e.g.*, Ryan K. Reilly, *Harsh Texas Voter ID Law 'Immediately' Takes Effect After Voting Rights Act Ruling*, THE HUFFINGTON POST, June 25, 2013, http://www.huffingtonpost.com/2013/06/25/texas-voter-id-law_n_3497724.html (Texas Attorney General announcing, within hours of the Shelby decision, that "the state's voter ID law will take effect immediately," as may redistricting maps); Geoff Pender, *Next June, Miss. Voters must have ID: Secretary of State reveals time for implementation*, THE CLARION LEDGER, June 25, 2013, http://www.clarionledger.com/article/20130626/NEWS01/306260018/Next-June-Miss-voters-must-ID (Mississippi Secretary of State expressing his intention to move forward to implement Mississippi's voter ID law in June 2014); *Statement from Attorney General Roy Cooper on U.S. Supreme Court Decision on Voting Rights Act*, June 25, 2013, http://www.ncdoj.gov/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/Statement-from-Attorney-General-Roy-Cooper-on-U-S.aspx (North Carolina Attorney General expressing that the State General Assembly is "now considering legislation that . . . would limit early voting and require voter I.D.").

LDF
DEFEND EDUCATE EMPOWER

The 2006 Congressional record reflects the need for strong protections for voters of color in those places formerly covered by Section 5 of the Voting Rights Act.

In 2006, during the last reauthorization period, Congress received more testimony and information about the voting experience of citizens of color, both in and outside the jurisdictions covered by Section 5, than it had during any prior reauthorization. Over a ten-month period, the House and Senate Judiciary Committees held 21 hearings, received testimony both in support of and against reauthorization from over 90 witnesses—including state and federal officials, litigators, scholars, and private citizens—and amassed more than 15,000 pages of record evidence. A bipartisan Congress ultimately determined—by the overwhelming vote of 390-33 in the House and 98-0 in the Senate[5]—that persistent and adaptive voting discrimination remained a pervasive problem in the now formerly-covered jurisdictions, and that without Section 5 "minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years."[6] As Representative James Sensenbrenner, then-Chair of the House Judiciary Committee, observed, the 2006 reauthorization of the Voting Rights Act was based on "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 1/2 years that I have been honored to serve as a Member of this

5 *See* 152 Cong. Rec. 14,303-304, 15,325 (2006).
6 Pub. L. No. 109-246, 120 Stat. 578, § 2(b)(9) (2006).

body."[7] The expansive record before Congress demonstrated that, while voters of color have made undeniable progress, unconstitutional discrimination remained common, persistent, and adaptive in the then-covered jurisdictions. Between 1982 and 2006, the Department of Justice blocked over 600 voting changes under Section 5 after determining that the changes were discriminatory.[8] Evidence in the Congressional record revealed that a majority of these objections were based, at least in part, on purposeful discrimination.[9]

Without Section 5's protections, voters of color are vulnerable to the myriad discriminatory voting changes that will arise in formerly covered jurisdictions now emboldened by the Supreme Court's *Shelby County* decision.

Notwithstanding Congress's carefully-considered judgment in reauthorizing Section 5 of the Voting Rights Act in 2006, the Supreme Court's *Shelby County* decision has deprived voters of color of a vital tool necessary to prevent racial discrimination in voting. Even as our country has made significant progress in combating racial discrimination in our political system—in great measure because of the protections afforded under the Voting Rights Act—the ongoing record of racial discrimination makes plain that there are continuing efforts in many places to deny voters of color the opportunity to participate equally in our shared democracy. These efforts require an aggressive response. Within hours of the *Shelby County* decision, for example, Texas Attorney General Greg Abbott announced that the State planned to "immediately"

7 152 Cong. Rec. 14,230 (2006).
8 H. R. Rep. No. 109–478, at 21.
9 November 1, 2005 Hearing, at 180-81.

implement a 2011 voter-identification law which had previously been blocked by a Section 5 federal court as the most discriminatory measure of its kind in the country.[10] Abbott likewise announced that the State may implement redistricting maps.[11] Mississippi and North Carolina quickly followed suit, announcing that they also planned to adopt discriminatory voting changes that Section 5 may have blocked.[12] These changes threaten to undermine hard-fought gains to expand democracy for people of color.

These are not isolated post-2006 efforts to discriminate in formerly covered jurisdictions. In 2008 in Alaska, Section 5 rejected plans to eliminate precincts in several Native villages, which would have required voters to travel by air or sea to cast a ballot.[13] In 2008 in Calera, Alabama, the county in which the *Shelby County* case originated, Section 5 reinstated the city's only African American city council member after he lost his seat when the Black voting-age population was inexplicably reduced from 79% to just 29%.[14] Attempts to dilute or deny voters of color full access to the political process threaten to take root in an accelerated basis across the country, and particularly in

---

10 *See supra* n. 4.

11 *Id.*

12 *Id.*

13 Br. of Alaska Federation of Natives, *et al.* as Amici Curiae in Supp. of Resp'ts, at App. 32-36, *available at* http://www.naacpldf.org/files/case_issue/Shelby-Brief%20of%20Amici%20Curiae%20the%20Navajo%20Nation.pdf.

14 Br. of Resp't.-Intervenors Earl Cunningham, *et al.*, at 19-20, *available at* http://www.naacpldf.org/files/case_issue/12-96%20bs%20Earl%20Cunningham%20et%20al..pdf.

formerly-covered jurisdictions, now emboldened by the *Shelby County* decision, which do not have Section 5 to operate as an initial check on discriminatory voting changes.

In particular, in the wake of the *Shelby County* decision, two of the gravest risks to voters of color in formerly-covered places arise from the fact that, without the prophylactic protections of Section 5, (1) officials in formerly covered jurisdictions will now make changes to voting laws without providing notice to voters, and (2) discriminatory voting measures will now have to be challenged *after*, rather than *before*, such changes take effect. The challenges are likely to be particularly pronounced for voters of color at the local level, where Section 5 blocked more than 85% of proposed voting changes between 1982 and 2006, rather than at the state-level.[15] For example, in Kilmichael, Mississippi, in 2001, the white mayor and all-white Board of Alderman attempted to take the extraordinary step of cancelling elections to prevent Black citizens from electing the candidate of their choice after the 2000 Census showed that Blacks had become a majority of the City and were poised, for the very first time, to elect their candidates of choice to the city counsel.[16] Voters of color in places like Kilmichael, and scores of local communities in the previously covered jurisdictions across the United States more broadly, are vulnerable to future attempts to dilute or deny their right to vote. It is precisely in those local communities where Section 5 has been so transformative by giving voters of color opportunities to robustly participate in the political process.

[15] Justin Levitt, *Section 5 as Simulacrum*, YALE L.J. ONLINE 151 (2013), http://yalelawjournal.org/2013/06/07/levitt.html.
[16] October 25, 2005 (History) Hearing, at 1616-19.

At the same time, in the absence of Section 5's application anywhere because of the *Shelby County* decision, discriminatory voting measures now will have to be challenged through litigation *after* they take effect, through case-by-case litigation under Section 2 of the Voting Rights Act (and perhaps state law) that is time-consuming, costly, and permits racial discrimination to take root in the electoral process *before* it can be remedied. Congress made clear during the 2006 reauthorization that Section 2 litigation by itself is an inadequate response to the persistent and adaptive problem of racial discrimination in voting in certain parts of our country.[17]

Congress can and must protect vulnerable communities from racial discrimination in voting in the wake of the *Shelby County* decision

Congress can and must respond aggressively to protect voters of color from racial discrimination following the Supreme Court's ruling in *Shelby County*. Representative John Lewis, who was severely beaten during the Selma to Montgomery March that led to the passage of the Voting Rights Act, has described the Supreme Court's decision in *Shelby County* "as a dagger to the heart of the Voting Rights Act."[18] Congress, however, has the power to respond, as it did in 2006, to protect voters of color from the material harm resulting from the Supreme Court's *Shelby County* decision.

17 H. R. Rep. No. 109–478, at 57.

18 Press Release, *Rep. John Lewis Calls Court Decision 'a Dagger' in the Heart of Voting Access*, June 25, 2013, http://johnlewis.house.gov/press-release/rep-john-lewis-calls-court-decision-%E2%80%9C-dagger%E2%80%9D-heart-voting-access.

National Urban League | *Empowering Communities. Changing Lives.*

Statement for the Hearing Record

Before the

House Subcommittee on the Constitution and Civil Justice
House Committee on the Judiciary

"The Voting Rights Act after the Supreme Court's Decision in Shelby County"

July 18, 2013

Chairman Franks, Ranking Member Nadler, members of the Committee, thank you for the opportunity to present our views on what must be the highest priority for this Congress and our nation - preserving our democratic process by restoring the protections of the Voting Rights Act. Vital protections that were stripped by the U.S. Supreme Court in its devastating 5-4 decision on June 25, 2013, in *Shelby County, Alabama v. Holder*. ***The National Urban League has one unequivocal message to both houses of Congress – suspend gridlock, come together as in the past, and fix the Voting Rights Act NOW!***

The Supreme Court's decision in *Shelby* is, quite frankly, ominous for our democracy, and yes, for African Americans who know all too well the high and often tragic price that was paid to secure their right to vote. It is beyond irony that as we commemorate the 50th anniversary of the Great March on Washington - at the height of the Civil Rights Movement – we still find ourselves fighting to ensure that every U. S. citizen can exercise this most fundamental right.

The Voting Rights Act was necessary in 1965 and remains so in 2013. If the voter suppression tactics employed by numerous states in the 2012 elections aren't evidence enough, consider that in the first four months of this year alone, restrictive voting bills have been introduced in more than half the states. In fact within two hours of the Supreme Court's decision, the state of Texas declared it would now implement the voter ID law that had previously been ruled the most discriminatory law of its kind in the country. The State is also considering implementing a 2011 redistricting plan that was found to be discriminatory against the state's minority voters.

According to the NAACP Legal Defense Fund, which is closely monitoring how states subject to the Section 4 formula are responding to the Shelby decision, a still growing list of states indicate they do intend to implement new discriminatory voting changes. The states include Florida, Georgia, Mississippi, North Carolina, South Carolina and Texas.[1]

The Supreme Court's decision is a direct blow to 50 years of progress towards voter equality and to the dream that Dr. Martin Luther King so passionately and purposefully shared with us in 1963. As Georgia Congressman John Lewis, who was brutally beaten during the Selma to Montgomery march that led to the passage of the Voting Rights Act of 1965 put it, "the Supreme Court put a dagger in the heart of the law."

Some point to the reelection of President Obama and the record voter turnout as a reason to say "All's well" without acknowledging that these achievements have occurred ***because of the VRA***, which is all the more reason to immediately restore its protections. Moreover, with 16 months to go until the 2014 midterm elections and with states--including Texas and others -- rushing to enact voter suppression measures, we cannot afford business as usual with our political system at continuous logger heads.

In the majority opinion, Chief Justice Roberts wrote that the coverage formula today is based on decades-old data and racist practices. Yet, Judge Roberts ignored thousands of pages of evidence presented over the course of 20 hearings that resulted in a bipartisan Congress overwhelmingly re-authorizing the Voting Rights Act in 2006. Justice Roberts also passed over new evidence in the 2012 election: the long lines at the polls, onerous voter ID requirements and registration procedures, and other measures clearly designed to make voting more difficult for certain communities that proved that discrimination and racism are still threats to democracy and efforts to protect the right to vote are still sorely needed.

The National Urban League is acutely aware of the importance of the voting franchise. In response to the unprecedented campaign in dozens of states to make it more difficult to vote through restrictive ID requirements, onerous registration procedures, cut-backs in poll hours, early voting and other measures, the Urban League launched its Occupy the Vote effort, which reached more than 150,000 citizens around the country.

The National Urban League will remain as diligent as ever in defending and protecting the rights that were so hard fought - and died - for during the Civil Rights Movement of the 1950's and 1960's. We will mobilize our communities to push Congress to abandon party lines and partisanship and act immediately in the best interest of our nation and our democracy by enacting a new and

---

[1] "How Formerly Covered States Are Responding To The Supreme Court's Voting Rights Act Decision," NAACP Legal Defense Fund, July 1, 2013.

responsible 21st Century formula for Section 4. We cannot focus on a celebration of progress until we ensure a continuation of the very equality and opportunity that are at the core of the country.

Established in 1910, the National Urban League is the nation's oldest and largest civil rights and direct services organization serving over 2 million people each year in urban communities in 35 states and the District of Columbia.

Joint Statement of
Asian Americans Advancing Justice and
Asian American Legal Defense and Education Fund

Before the
Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
United States House of Representatives

Hearing
"The Voting Rights Act after the Supreme Court's Decision in Shelby County"

July 18, 2013

Introduction

Enforcement of the Voting Rights Act of 1965 (VRA) has been critical in preventing actual and threatened discrimination aimed at Asian Americans in national and local elections. Continuing discrimination in voting and more generally against Asian Americans remain, especially in areas of new growth such as the South and is likely to worsen as a result of the decision in *Shelby v. Holder*. Asian American voters have been left more vulnerable to wrong-doers and have suffered a serious roll-back in their right to vote. Asian Americans Advancing Justice ("Advancing Justice") and the Asian American Legal Defense and Education Fund ("AALDEF") submit this testimony to elucidate the precarious landscape of Asian American voting rights in wake of the Supreme Court's decision in *Shelby v. Holder* and respectfully ask that it be entered into the record.

Organizational Information

Advancing Justice and AALDEF are organizations that promote the constitutional and civil rights of Asian Americans, including the right of Asian Americans to participate in the United States' political process.

Advancing Justice is a national affiliation of four civil rights nonprofit organizations that joined together in 2013 to promote a fair and equitable society for all by working for civil and human rights and empowering Asian Americans and Pacific Islanders and other underserved communities. Our member organizations are: Asian Americans Advancing Justice | Chicago (formerly Asian American Institute - the leading pan-Asian organization in the Midwest dedicated to empowering the Asian American community through advocacy, research, education, leadership development, and coalition-building); Asian Americans Advancing Justice | AAJC (formerly Asian American Justice Center - a national organization that advances the civil and human rights of Asian Americans and builds and promotes a fair and equitable society for all

through public education, policy analysis and research, policy advocacy, litigation, and community capacity and coalition building); Asian Americans Advancing Justice | Asian Law Caucus (formerly Asian Law Caucus - the nation's oldest legal organization defending the civil rights of Asians and Pacific Islanders, particularly low-income, immigrant, and underserved communities); and Asian Americans Advancing Justice | Los Angeles (formerly Asian Pacific American Legal Center - the nation's largest legal organization serving Asians and Pacific Islanders, through direct legal services, impact litigation, policy advocacy, and leadership development). Advancing Justice was a key player in collaborating with other civil rights groups to reauthorize the Voting Rights Act in 2006. In the 2012 election, Advancing Justice conducted poll monitoring and voter protection efforts across the country, including in California, Florida, Georgia, Illinois, Texas, and Virginia.

AALDEF is a 39-year-old national civil rights organization based in New York City that promotes and protects the civil rights of Asian Americans through litigation, legal advocacy, and community education. AALDEF has monitored elections through annual multilingual exit poll surveys since 1988. Consequently, AALDEF has collected valuable data that documents both the use of, and the continued need for, protection under the VRA. In 2012, AALDEF dispatched over 800 attorneys, law students, and community volunteers to 127 poll sites in 14 states to document voter problems on Election Day. The survey polled 9,298 Asian American voters.

Advancing Justice-AAJC and AALDEF filed an amicus brief with the U.S. Supreme Court in *Shelby County, Alabama v. Holder* on behalf of 28 Asian American groups. The brief urged the Court to uphold Section 5 of the VRA, demonstrating that Section 5 was necessary to protect the voting rights of Asian Americans in areas such as political representation and discriminatory voting changes in light of the ongoing discrimination experienced by Asian Americans. This testimony draws heavily on the examples documented in our amicus brief.

Voting Discrimination Against Asian Americans Continues to Exists

Asian Americans[1] continue to face pervasive and current discrimination in voting, particularly in jurisdictions that were previously covered for Section 5 preclearance.

For example, in the 2004 primary elections in Bayou La Batre, Alabama, supporters of a white incumbent running against Phuong Tan Huynh, a Vietnamese American candidate, made a concerted effort to intimidate Asian American voters. They challenged Asian Americans at the polls, falsely accusing them of not being U.S. citizens or city residents, or of having felony convictions.[2] The challenged voters were forced to complete a paper ballot and have that ballot vouched for by a registered voter. In explaining his and his supporters' actions, the losing incumbent stated, "We figured if they couldn't speak good English, they possibly weren't

[1] The notion of "Asian American" encompasses a broad diversity of ethnicities, many of which have historically suffered their own unique forms of discrimination. Discrimination against Asian Americans as discussed here addresses both discrimination aimed at specific ethnic groups along with the discrimination directed at Asian Americans generally.

[2] *See* H.R. Rep. No. 109-478, at 45; *see also Challenged Asian ballots in council race stir discrimination concern*, Associated Press State & Local Wire, Aug. 29, 2004, *available at* http://news.google.com/newspapers?nid=1817&dat=20040830&id=cc4dAAAAIBAJ&sjid=w6cEAAAAIBAJ&pg=6668,5046184.

American citizens."[3] The Department of Justice (DOJ) investigated the allegations and found them to be racially motivated.[4] As a result, the challengers were prohibited from interfering in the general election, and Bayou La Batre, for the first time, elected an Asian American to the City Council.[5]

In another example, from the 2004 Texas House of Representatives race, Hubert Vo's victory over a white incumbent prompted two recounts, both of which affirmed Vo's victory over the incumbent's request that the Texas House of Representatives investigate the legality of the votes cast in the election. The implication was that Vo's Vietnamese American supporters voted in the wrong district or were not U.S. citizens. Vo's campaign voiced concern that such an investigation could intimidate Asian Americans from political participation altogether.[6] Vo's election was particularly significant for the Asian American community because he is the first Vietnamese American state representative in Texas history.[7]

Also in 2004, New York poll workers required Asian American voters to provide naturalization certificates before they could vote.[8] At an additional poll site, a police officer demanded that all Asian American voters show photo identification, even though photo identification is not required to vote in New York elections. If voters could not produce such identification, the officer turned them away and told them to go home.[9]

Asian American Voters Lose Protection Against Discrimination Due to *Shelby* Decision

Overt racism and discrimination against Asian Americans at the polls persist to the present day and will worsen without Section 5 to combat such behavior. Prior to the Supreme Court's *Shelby* decision, voting rights advocates used Section 5 to protect Asian American voters in redistricting, changes to voting systems, and changes to polling sites. The following are current examples of harmful actions against Asian American voters that were stopped by Section 5, but now that the coverage formula has been struck, and most jurisdictions are no longer covered by

[3] *See* DeWayne Wickham, *Why renew Voting Rights Act? Ala. Town provides answer*, USA Today, Feb 22, 2006, *available at* http://www.usatoday.com/news/opinion/editorials/ 2006-02-22-forum-voting-act_x.htm.

[4] *See* H.R. Rep. No. 109-478, at 45; *see also* Press Release, U.S. Dep't of Justice, *Justice Department to Monitor Elections in New York, Washington, and Alabama*, Sept. 13, 2004, *available at* http://www.justice.gov/opa/pr/2004/ September/04_crt_615.htm ("In Bayou La Batre, Alabama, the Department will monitor the treatment of Vietnamese-American voters.").

[5] *See* Wickham, *supra.*

[6] *See* Thao L. Ha, *The Vietnamese Texans*, in *Asian Texas* 284-85 (Irwin A. Tang ed. 2007).

[7] *See* Test. of Ed Martin, Trial Tr. at 350:15-23, *Perez v. Perry*, 835 F. Supp. 2d 209 (W.D. Tex. 2011) (hereinafter "Martin Test."); Test. of Rogene Calvert, Trial Tr. at 420:2-421:13, *Perez*, 835 F. Supp. 2d 209; Test. of Sarah Winkler, Trial Tr. at 425:18-426:10, *Perez*, 835 F. Supp. 2d at 209.

[8] New York City has the nation's largest Asian American population for places. Elizabeth M. Hoeffel, Sonya Rastogi, Myoung Ouk Kim & Hasan Shahid, U.S. Census Bureau, *The Asian Population: 2010*, at 12 tbl.3 (2012), *available at* www.census.gov/prod/cen2010/briefs/c2010br-11.pdf. Most of the examples of Section 5's success in this brief draw from the Asian American experience in New York City because of its sizeable Asian American population and because it is one of the few places in the country covered under both Section 5 and Section 203.

[9] *See* Continuing Need for Section 203's Provisions for Limited English Proficient Voters, Hearing Before the S. Judiciary Comm., 109th Cong. 37 (2006) (testimony of Margaret Fung, AALDEF, Exec. Dir.); Letter from G. Magpantay, AALDEF Staff Attorney, to J. Ravitz, Exec. Dir., New York City Bd. of Elections (June 16, 2005) (submitted to Congress).

Section 5, Asian Americans are once again vulnerable to nefarious discriminatory actions such as these that will weaken their voting rights and power.

For example, discriminatory redistricting plans continue to be drafted in states with large Asian American communities. As shown in *Perry v. Perez*, 132 S. Ct. 934 (2012), the Texas Legislature drafted a redistricting plan, Plan H283, that would have had significant negative effects on the ability of minorities, and Asian Americans in particular, to exercise their right to vote.

Since 2004, the Asian American community in Texas State House District 149 has voted as a bloc with Hispanic and African American voters to elect Hubert Vo, a Vietnamese American, as their state representative. District 149 has a combined minority citizen voting-age population of 62 percent.[10] Texas is home to the third-largest Asian American community in the United States, growing 72 percent between 2000 and 2010.[11]

In 2011, the Texas Legislature sought to eliminate Vo's State House seat and redistribute the coalition of minority voters to the surrounding three districts. Plan H283, if implemented, would have redistributed the Asian American population in certain State House voting districts, including District 149 (Vo's district), to districts with larger non-minority populations.[12] Plan H283 would have thus abridged the Asian American community's right to vote in Texas by diluting the large Asian American populations across the state.[13]

In addition to discrimination in redistricting, Asian American voters have also endured voting system changes that impair their ability to elect candidates of choice. For example, before 2001 in New York City, the only electoral success for Asian Americans was on local community school boards. In each election – in 1993, 1996, and 1999 – Asian American candidates ran for the school board and won.[14] These victories were due, in part, to the alternative voting system

---

[10] *See* United States and Defendant-Intervenors Identification of Issues 6, *Texas v. United States*, C.A. No. 11-1303 (D.D.C.), Sept. 29, 2011, Dkt. No. 53.

[11] Asian American Center for Advancing Justice, *A Community of Contrasts: Asian Americans in the United States 2011*, App. B, at 60 (2011), *available at* http://www.advancingjustice.org/pdf/Community_of_Contrast.pdf. (hereinafter "*Community of Contrasts*").

[12] *See* Martin Test. at 350:25-352:25. District 149 would have been relocated to a county on the other side of the State, where there are few minority voters. *See* http://gis1.tlc.state.tx.us/download/House/PLANH283.pdf.

[13] In fact, it was only due to Section 5 that the Texas Legislature was not able to dilute the Asian American community's right to vote. Advancing Justice-AAJC's partner, the Texas Asian-American Redistricting Initiative (TAARI), working with a coalition of Asian American and other civil rights organizations, participated in the Texas redistricting process and advocated on the District 149 issue. Despite the community's best efforts, the Texas Legislature pushed through this problematic redistricting plan. However, because of Section 5's preclearance procedures, Asian Americans and other minorities had an avenue to object to the Texas Legislature's retrogressive plan, and Plan H283 was ultimately rejected as not complying with Section 5. See Texas v. United States, C.A. No. 11-1303 (D.D.C.), Sept. 19, 2011, Dkt. No. 45, ¶ 3. Indeed, AALDEF submitted an amicus brief to the D.C. District Court illustrating how the Texas plan retrogressed the ability of Asian Americans to elect a candidate of their choice and violated Section 5. However, the U.S. Supreme Court vacated the District Court of the District of Columbia's ruling suspending Texas' redistricting map as moot in light of their decision in *Shelby*.

[14] *See* Lynette Holloway, *This Just In: May 18 School Board Election Results*, N.Y. Times, June 13, 1999, *available at* http://www.nytimes.com/1999/ 06/13/nyregion/making-it-work-this-just-in-may-18-school-board-election-results.html; Jacques Steinberg, *School Board Election Results*, N.Y. Times, June 23, 1996, *available at* http://www.nytimes.com/1996/06/23/nyregion/neighborhood-report-new-york-up-close-school-board-election-

known as "single transferable voting" or "preference voting." Instead of selecting one representative from single-member districts, voters ranked candidates in order of preference, from "1" to "9."[15] In 1998, New York attempted to switch from a "preference voting" system, where voters ranked their choices, to a "limited voting" system, where voters could select only four candidates for the nine-member board, and the nine candidates with the highest number of votes were elected.[16] This change would have put Asian American voters in a worse position to elect candidates of their choice.[17]

Furthermore, the ability of Asian Americans to vote is also frustrated by sudden changes to poll sites without informing voters. For example, ever since AALDEF began monitoring elections in New York City, there have been numerous instances of sudden poll site closures in Asian American neighborhoods where the Board has failed to take reasonable steps to ensure that Asian American voters are informed of their correct poll sites. Voters have been misinformed about their poll sites before the elections or have been misdirected by poll workers on Election Day, thus creating confusion for Asian American voters and disrupting their ability to vote.

In 2001, primary elections in New York City were rescheduled due to the attacks on the World Trade Center. The week before the rescheduled primaries, AALDEF discovered that a certain poll site, I.S. 131, a school located in the heart of Chinatown and within the restricted zone in lower Manhattan, was being used by the Federal Emergency Management Agency for services related to the World Trade Center attacks. The Board chose to close down the poll site and no notice was given to voters. The Board provided no media announcement to the Asian language newspapers, made no attempts to send out a mailing to voters, and failed to arrange for the placement of signs or poll workers at the site to redirect voters to other sites. In fact, no consideration at all was made for the fact that the majority of voters at this site were limited English proficient, and that the site had been targeted for Asian language assistance under Section 203.[18] With Section 5 no longer applicable in most jurisdictions, disruptive changes to polling sites, voting systems, and redistricting plans can now occur unfettered, wreaking havoc on Asian American voters' ability to cast an effective ballot.

---

results.html; Sam Dillon, *Ethnic Shifts Are Revealed in Voting for Schools*, N.Y. Times, May 20, 1993, *available at* http://www.nytimes.com/1993/05/ 20/nyregion/ethnic-shifts-are-revealed-in-voting-for-schools.html.

[15] *See* Thomas T. Mackie & Richard Rose, The International Almanac of Electoral History 508 (3d ed. 1991).

[16] *See* 1998 N. Y. Sess. Laws 569-70 (McKinney).

[17] AALDEF utilized Section 5 to protect Asian American voters in NY by providing comments urging DOJ to oppose the change and deny preclearance as the proposed change would make Asian Americans worse off. DOJ interposed an objection and prevented the voting change from taking effect. *See* Letter from M. Fung, AALDEF Exec. Dir., and T. Sinha, AALDEF Staff Attorney, to E. Johnson, U.S. Dep't of Justice (Oct. 8, 1998) (submitted to Congress with AALDEF Report and on file with counsel). *See also,* Voting Rights Act: Section 5 of the Act-History, Scope, and Purpose, Hearing Before the H. Subcomm. on the Const., H. Judiciary Comm., 109th Cong. 1664-66 (2005) (appendix to statement of the Honorable Bradley J. Schlozman, U.S. Dep't. of Justice) (providing Section 5 objection letter to Board and summarizing changes made to the voting methods, along with overall objections to the changes).

[18] The voters were only protected from this sudden change that would have caused significant confusion and lost votes because DOJ issued an objection under Section 5 and informed the Board that the change could not take effect. The elections subsequently took place as originally planned at I.S. 131, and hundreds of votes were cast on September 25. *See* AALDEF Report at 41.

Discrimination Against Asian Americans Creates a Barrier to Voting

Discrimination against Asian American populations is of particular concern given the perception of Asian Americans as "outsiders," "aliens," and "foreigners."[19] Based on this perception, at various points in history, Asian Americans were denied rights held by U.S. citizens. Remnants of the sentiment that evoked these denials persist today and continue to harm Asian Americans.

This shameful history of extensive discrimination against the Asian American community in the United States is well known. Until 1943, federal policy barred immigrants of Asian descent from even becoming United States citizens, and it was not until 1952 that racial criteria for naturalization were removed altogether.[20] Indeed, history is replete with examples of anti-immigrant sentiment directed towards Asian Americans, manifesting in legislative efforts to prevent Asian immigrants from entering the United States and becoming citizens.[21]

Legally identified as aliens "ineligible for citizenship," Asian immigrants were prohibited from voting and owning land.[22] Both immigrant and native-born Asians also experienced

---

[19] *See, e.g.*, Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 Pol. & Soc'y 105, 108-16 (1999) (describing history of whites perceiving Asian Americans as foreign and therefore politically ostracizing them). In 2001, a comprehensive survey revealed that 71% of adult respondents held either decisively negative or partially negative attitudes toward Asian Americans. Committee of 100, *American Attitudes Toward Chinese Americans and Asians* 56 (2001), *available at* http://www.committee100.org/publications/ survey/C100survey.pdf. Racial representations and stereotyping of Asian Americans, particularly in well-publicized instances where public figures or the mass media express such attitudes, reflect and reinforce an image of Asian Americans as "different," "foreign," and the "enemy," thus stigmatizing Asian Americans, heightening racial tension, and instigating discrimination. Cynthia Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 Hastings Women's L.J. 165, 181 (1995); Spencer K. Turnbull, Comment, *Wen Ho Lee and the Consequences of Enduring Asian American Stereotypes*, 7 UCLA Asian Pac. Am. L.J. 72, 74-75 (2001); Terri Yuh-lin Chen, Comment, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 Asian L.J. 69, 72, 74-75 (2000); Jerry Kang, Note, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926, 1930-32 (1993); Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. Personality & Soc. Psychol. 447 (2005) (documenting empirical evidence of implicit beliefs that Asian Americans are not "American").

[20] *See* Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58-61 (prohibiting immigration of Chinese laborers; repealed 1943); Immigration Act of 1917, ch. 29, 39 Stat. 874, 874-98, and Immigration Act of 1924, ch. 190, 43 Stat. 153 (banning immigration from almost all countries in the Asia-Pacific region; repealed 1952); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. Rev. 405, 415 (2005).

[21] *See, e.g.*, Philippines Independence Act of 1934, ch. 84, 48 Stat. 456, 462 (imposing annual quota of fifty Filipino immigrants; amended 1946); Immigration Act of 1924, ch. 190, 43 Stat. 153 (denying entry to virtually all Asians; repealed 1952); Scott Act of 1888, ch. 1064, 1, 25 Stat. 504, 504 (rendering 20,000 Chinese re-entry certificates null and void); Naturalization Act of 1790, ch. 3, 1 Stat. 103 (providing one of the first laws to limit naturalization to aliens who were "free white persons" and thus, in effect, excluding African-Americans, and later, Asian Americans; repealed 1795).

[22] *See Ozawa v. United States*, 260 U.S. 178, 198 (1922); *see, e.g.*, Cal. Const. art. II, § 1 (1879) ("no native of China . . . shall ever exercise the privileges of an elector in this State"); *Oyama v. California*, 332 U.S. 633, 662 (1948) (Murphy, J., concurring) (noting that California's Alien Land Law "was designed to effectuate a purely racial discrimination, to prohibit a Japanese alien from owning or using agricultural land solely because he is a Japanese alien").

pervasive discrimination in everyday life.[23] Perhaps the most egregious example of discrimination was the incarceration of 120,000 Americans of Japanese ancestry during World War II without due process.[24] White immigrant groups whose home countries were also at war with the United States were not similarly detained and no assumptions regarding their loyalty, trustworthiness and character were similarly made.[25]

Racist sentiment towards Asian Americans is not a passing adversity but a continuing reality, fueled in recent years by reactionary post-9/11 prejudice and a growing backlash against immigrants.[26] Numerous hate crimes have been directed against Asian Americans either because of their minority group status or because they are perceived as unwanted immigrants.[27] In 2010, the nation's law enforcement agencies reported 150 incidents and 190 offenses motivated by anti-Asian/Pacific Islander bias.[28]

Discriminatory attitudes towards Asian Americans manifest themselves in the political process as well. For example, during a 2009 Texas House of Representatives hearing, legislator Betty Brown suggested that Asian American voters adopt names that are "easier for Americans to deal with" in order to avoid difficulties imposed on them by voter identification laws.[29] Although this statement did not physically obstruct any voters from reaching the polls, it made clear that the Asian American community's voice was unwelcome in American politics and notably cast Asian Americans apart from other "Americans." At a campaign rally during the 2004 U.S. Senate race in Virginia, incumbent George Allen repeatedly called a South Asian

---

[23] *People v. Brady*, 40 Cal. 198, 207 (1870) (upholding law providing that "No Indian. . . or Mongolian or Chinese, shall be permitted to give evidence in favor of, or against, any white man" against Fourteenth Amendment challenge); *see also Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding segregation of Asian schoolchildren).

[24] *See* Exec. Order 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (authorizing the internment); *see also Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment under strict scrutiny review).

[25] *See Korematsu*, 323 U.S. at 233, 240-42 (Murphy, J., dissenting) (noting that similarly situated American citizens of German and Italian ancestry were not subjected to the "ugly abyss of racism" of forced detention based on racist assumptions that they were disloyal, "subversive," and of "an enemy race," as Japanese Americans were); Natsu Taylor Saito, *Internments, Then and Now: Constitutional Accountability in Post-9/11 America*, 72 Duke F. for L. & Soc. Change 71, 75 (2009) (noting "the presumption made by the military and sanctioned by the Supreme Court that Japanese Americans, unlike German or Italian Americans, could be presumed disloyal by virtue of their national origin").

[26] *See* U.S. Dep't of Justice, *Confronting Discrimination in the Post-9/11 Era: Challenges and Opportunities Ten Years Later*, at 4 (Oct. 19, 2011) (noting that the FBI reported a 1,600 percent increase in anti-Muslim hate crime incidents in 2001), *available at* http://www.justice.gov/crt/ publications/post911/post911summit_report_2012-04.pdf.

[27] *See, e.g., id.*, at 7-9 (discussing numerous incidents of post-9/11 hate crimes prosecuted by the DOJ).

[28] Fed. Bureau of Investigation, *Hate Crime Statistics* (2010), *available at* http://www.fbi.gov/ about-us/cjis/ucr/hate-crime/2010/tables/table-1-incidents-offenses-victims-and-known-offenders-by-bias-motivation-2010.xls.

[29] R.G. Ratcliffe, *Texas Lawmaker Suggests Asians Adopt Easier Names*, Houston Chron., Apr. 8, 2009, *available at* http://www.chron.com/news/houston-texas/article/ Texas-lawmaker-suggests-Asians-adopt-easier-names-1550512.php.

volunteer for his opponent a "macaca" – a racial epithet used to describe Arabs or North Africans that literally means "monkey" – and then began talking about the "war on terror."[30]

Incidents of discrimination and racism like these perpetuate the misperception that Asian American citizens are foreigners, and have the real effect of denying Asian Americans the right to fully participate in the electoral process. These barriers will only increase as the Asian American population continues to grow. Asian Americans have become the fastest growing minority group in the United States. While the total population in the United States rose 10 percent between 2000 and 2010, the Asian American population increased 43 percent during that same time span.[31]

The fastest population growth occurred in the South, where the Asian American population increased by 69 percent.[32] With the coverage formula struck and no current Section 5 coverage for these states, Asian Americans are susceptible to extensive discrimination, both in voting and other arenas. When groups of minorities move into or outpace general population growth in an area, reactions to the influx of outsiders can result in racial tension.[33] Thus, as Asian American populations continue to increase rapidly, particularly in the South, levels of racial tension and discrimination against racial minorities can be expected to increase.[34]

---

[30] *See* Tim Craig & Michael D. Shear, *Allen Quip Provokes Outrage, Apology; Name Insults Webb Volunteer*, Wash. Post, Aug. 15, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/08/14/AR2006081400589.html.

[31] *See* Hoeffel *et al.*, *supra* note 5, at 1, 3. The U.S. Census Bureau data in this brief reflects figures for Asian Americans who reported themselves as "Asian alone." Counting the Asian American community's rapidly growing multiracial population, who reported as "Asian alone or in combination," this growth rate is 46 percent. *Community of Contrasts*, *supra*, at 15.

[32] *Id.* at 6.

[33] *See* Gillian Gaynair, *Demographic shifts helped fuel anti-immigration policy in Va.*, The Capital (Feb. 26, 2009), *available at* http://www.hometownannapolis.com/ news/gov/2009/02/26-10/Demographic-shifts-helped-fuel-anti-immigration-policy-in-Va.html (noting that longtime residents of Prince William County, Virginia, perceived that their quality of life was diminishing as Latinos and other minorities settled in their neighborhoods); James Angelos, *The Great Divide*, N.Y. Times, Feb. 22, 2009 (describing ethnic tensions in Bellerose, Queens, New York, where the South Asian population is growing), *available at* http://www.nytimes.com/2009/02/22/nyregion/thecity/22froz.html?_r=3&pagewanted=1; Ramona E. Romero and Cristóbal Joshua Alex, *Immigrants becoming targets of attacks*, The Philadelphia Inquirer, Jan. 25, 2009 (describing the rise in anti-Latino violence where the immigration debate is heated in New York, Pennsylvania, Texas, and Virginia); Sara Lin, *An Ethnic Shift is in Store*, L.A. Times, Apr. 12, 2007, at B1 (describing protest of Chino Hill residents to Asian market opening in their community where 39% of residents were Asian), *available at* http://articles.latimes.com/2007/apr/12/ local/me-chinohills12.

[34] In 2011, the growth of immigrant communities and rising anti-immigrant sentiment in Alabama led to the passage of H.B. 56, the toughest immigration enforcement law in the country. Also in 2011, state lawmakers in other southern states, including Georgia and South Carolina, launched efforts to deny the automatic right of citizenship to the U.S.-born children of undocumented immigrants. *See* Shankar Vedantam, State Lawmakers Taking Aim at Amendment Granting Birthright Citizenship, Wash. Post, Jan. 5, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/01/05/AR2011010503134.html; *see also United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (holding Fourteenth Amendment grants U.S. citizenship to native-born children of alien parents). At the federal level, Alabama members of the U.S. House of Representatives co-sponsored legislation to enact this restriction. Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. (2011). This bill was reintroduced in 2013 and co-sponsored again by Alabama Representatives, as well as legislators from Arizona, Georgia, and Texas. Birthright Citizenship Act of 2013, H.R. 140, 113th Cong., (2013).

Such discrimination creates an environment of fear and resentment towards Asian Americans, many of whom are perceived as foreigners based on their physical attributes. This perception, coupled with the growing sentiment that foreigners are destroying or injuring the country, jeopardizes Asian Americans' ability to exercise their right to vote free of harassment and discrimination. Given the discrimination against Asian Americans and immigrants that persists as these populations continue to grow, the lack of Section 5 protections will be problematic for these communities.

Conclusion

American citizens of Asian ancestry have long been targeted as foreigners and unwanted immigrants, and racism and discrimination against them persists to this day. These negative perceptions have real consequences for the ability of Asian Americans to fully participate in the electoral and political process. Section 5 of the VRA was an effective tool in protecting Asian American voters against a host of actions that threaten to curtail their voting rights. However, the Supreme Court's recent decision dismantling the coverage formula has left a large gap in protections for Asian American voters that requires Congressional action. We look to Congress to work in a bipartisan fashion to respond to the Court's ruling and strengthen the VRA as it did during the 2006 reauthorizations and each previous reauthorization. We respectfully offer our assistance in such a process.

ADL 100

Imagine a World Without Hate™

July 18, 2013

The Honorable Trent Franks
Chair, Constitution and Civil Justice Subcommittee
House Judiciary Committee
United States House of Representatives
Washington, D.C. 20515

The Honorable Jerrold Nadler
Ranking Member, Constitution and Civil Justice Subcommittee
House Judiciary Committee
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Franks and Ranking Member Nadler,

We strongly welcome the House Judiciary Subcommittee on the Constitution and Civil Justice hearings on the aftermath of the Supreme Court's June 25 *Shelby County v. Holder* decision, which we believe is a major setback to the progress we have made in civil rights over the last 50 years. We appreciate the opportunity to provide the views of the Anti-Defamation League (ADL), and would ask that this statement be included as part of the hearings record.

ADL is a leading civil rights organization that has been working to secure justice and fair treatment for all since its founding 100 years ago. Recognizing the Voting Rights Act of 1965 (VRA) as one of the most important and most effective pieces of civil rights legislation ever passed, ADL has strongly supported the VRA and its extensions since its passage almost 50 years ago.

The success of the VRA is undeniable. It has helped to eliminate discriminatory barriers to full civic participation for millions of Americans, and has sparked significant advances for equal political participation at all levels of government. In the years immediately after passage of the VRA, African American voter registration increased dramatically, and the number of African Americans elected to public office increased fivefold in five years.[1] Today there are more than 9,000 African American elected officials,[2] including the first African American president. Many of these elected officials are from jurisdictions that were protected by the preclearance provisions of Section 5 of the VRA.[3] Surely, the United States would not have made such progress without the VRA.

The success of the VRA in improving minority voter participation and increasing the number of African American elected officials is not a demonstration that the protections of the VRA are no longer necessary. To the contrary, extensive Congressional testimony from 2006 before passage of the Act's latest extension and subsequent evidence show that Section 5's preclearance requirements continue to serve as a crucial safeguard for the right to vote for millions of citizens. In 2006

[1] See H.R. Rep. No. 109-478, at 18, 130 (2006), reprinted in 2006 U.S.C.C.A.N. 618.
[2] *Id.* at 18.
[3] *See* Chandler Davidson & Bernard Grofman, The Voting Rights Act and the Second Reconstruction, in Quiet
Revolution in the South 378, 381-86 (Chandler Davidson & Bernard Grofman eds., 1993).

Anti-Defamation League, 605 Third Avenue, New York, NY 10158-3560, T 212.885.7700 F 212.867.0779 www.adl.org

Congress found that "the hundreds of objections interposed [and] requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by [Section 5]" evidenced continued discrimination,[4] and that many of the laws blocked by the Department of Justice pursuant to Section 5 closely resembled attempts to disenfranchise voters before passage of the VRA. Proposed laws blocked by Section 5 have included discriminatory redistricting plans, polling place relocations, biased annexations and de-annexations, and changing offices from elected to appointed positions.[5] After extensive hearings and very thorough consideration, the House concluded that these proposed voting changes, successfully prevented by Section 5 of the VRA, were "calculated decisions to keep minority voters from fully participating in the political process," showing that "attempts to discriminate persist and evolve, such that Section 5 is still needed to protect minority voters in the future."[6]

Seven years later, the protections of Section 5 continue to be just as necessary. Actions by a number of covered states in the hours and days immediately following the *Shelby County* decision striking down the formula in Section 4 of the VRA, effectively gutting Section 5, demonstrate how crucial Section 5's preclearance provision continues to be in protecting minority voting rights. Shortly after the decision, Texas Attorney General Gregg Abbott announced that the state's voter ID law and a redistricting plan, both of which had been previously blocked by Section 5, would go into effect immediately. The three judge panel that had reviewed the Texas voter ID law and denied preclearance in 2012 found that "based on the record evidence before us, it is virtually certain that these burdens will disproportionately affect racial minorities. Simply put, many Hispanics and African Americans who voted in the last election will, because of the burdens imposed by SB 14, likely be unable to vote."[7] Without Section 5 safeguards, that discriminatory voter ID bill is now in effect. Similarly, unnecessarily restrictive voter ID laws in North Carolina, South Carolina, Alabama, Mississippi and Virginia are all moving forward, despite scant evidence of in-person voter fraud and the great potential to disparately impact minority voters. Another pending bill in North Carolina threatens to reduce college age voting by preventing students' parents from claiming them as dependents on their tax returns if the student registers to vote at his school address. In less than one month since the Supreme Court struck down the preclearance formula -- effectively ending preclearance unless and until Congress creates a new formula -- laws that threaten to reverse the progress made by the VRA are moving forward.

History provides important, sobering lessons about what can happen when protections for minority voting rights are rolled back. After the Civil War, Congress moved swiftly and decisively to enfranchise African American men. Under the supervision of federal troops, more than 700,000 African American men were registered to vote in the South by 1868, a 75 to 95% registration rate. The 15th Amendment was ratified in 1870, and the Enforcement Act of 1870 prohibited discrimination in voter registration and created criminal penalties for interfering with voting rights. These combined efforts and federal protections led to unprecedented rates of African American participation in elected government. By the end of Reconstruction, 18 African Americans had served in statewide office in Southern states, there were eight African Americans in Congress from six different states, and more than 600 African Americans served in state legislatures.[8] When Reconstruction ended in 1877 and the Supreme Court struck down key portions of the Enforcement Act, progress quickly reversed. Southern states began implementing racial gerrymandering, followed by more brazen efforts to disenfranchise African American voters, including poll taxes, literacy tests, whites-only primaries, and grandfather clauses. By the early 1900's, 90 percent

---

[4] Pub. L. No. 109-246, § 2(b)(4)(A).
[5] H.R. REP. NO. 109-478, at 36.
[6] *Id.* at 21.
[7] No. 12-cv-128, 2012 U.S. Dist LEXIS 127119, at *86 (D.D.C. Aug. 30, 2012).
[8] Eric Foner, Reconstruction: America's Unfinished Revolution 1863-1877, at 353, 355, 538 (1988).

of African Americans in the Deep South had been disenfranchised by these schemes. The widespread, insidious disenfranchisement of African American voters only ended in 1965, with passage of the VRA.

To be sure, the United States is very different today than it was after Reconstruction. Yet the possibility of repeating history by reversing decades of progress on improving minority voting rights looms large. The Supreme Court majority in *Shelby County* ignored extensive congressional findings of ongoing election discrimination – instead substituting its own view that a muscular VRA is no longer needed. We certainly hope that one day the protections of the Voting Rights Act will no longer be necessary and that all eligible voters will be able to vote, free from discriminatory barriers. Unfortunately, that day has not yet come. Congress must act to create a new formula, restoring the safeguards of Section 5 preclearance and protecting minority voting rights.

In his speech proposing the VRA, President Lyndon Johnson said, "Many of the issues of civil rights are very complex and most difficult. But about this there can and should be no argument. Every American citizen can and must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs on us more heavily than the duty we have to ensure that right."[9]

Almost 50 years later, President Johnson's words ring true today. We urge Congress to work swiftly and decisively to enact a new formula for Section 4 of the VRA, restoring the Act's crucial voting rights protections and ensuring to every American citizen an equal right to vote.

Sincerely,

Barry Curtiss Lusher
National Chair

Abraham H. Foxman
National Director

[9] President Lyndon B. Johnson, Special Message to the Congress: The American Promise, 1 Pub. Papers 281, 282 (March 15, 1965), available at http://lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise.

American Civil Liberties Union
Statement Submission For

"The Voting Rights Act after the Supreme Court's Decision in *Shelby County*"

Hearing Before the U.S. House of Representatives Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice

Submitted by

Laura W. Murphy
Director
ACLU Washington Legislative Office

and

Deborah J. Vagins
Senior Legislative Counsel
ACLU Washington Legislative Office

July 18, 2013

Introduction

The American Civil Liberties Union (ACLU), on behalf of its over half a million members, countless additional supporters and activists, and fifty-three affiliates nationwide, is pleased to submit this statement for the hearing, *The Voting Rights Act after the Supreme Court's Decision in Shelby County.* We thank the Subcommittee for this hearing and urge a bipartisan response to ensure key protections in the Voting Rights Act are restored following the Supreme Court's decision in *Shelby County v. Holder.*[1]

[1] Shelby County v. Holder, 133 S. Ct. 2612 (2013).

The ACLU is a nationwide, non-partisan organization working daily in courts, Congress, state legislatures, and communities across the country to defend and preserve the civil rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. The ACLU works at the federal, state, and local level to lobby, litigate, and conduct public education in order to both expand opportunities and to prevent barriers to the ballot box.

With one of the largest voting rights dockets in the nation, the ACLU's Voting Rights Project, established in 1965, has filed more than 300 lawsuits to enforce the provisions of the Voting Rights Act and the U.S. Constitution. The current docket has over a dozen active voting rights cases from all parts of the United States, including Alaska, California, Florida, Georgia, Iowa, Kentucky, Montana, Pennsylvania, Virginia, Washington, Wisconsin, and Wyoming. The ACLU is also engaged in state-level advocacy on voting and election reform all across the country.

The ACLU was co-counsel in both of the recent Supreme Court cases *Shelby County v. Holder* and *Arizona v. Inter Tribal Council of Arizona* (ITCA), and in *Shelby County,* represented among other clients, the Alabama State Conference of the NAACP, to defend key provisions of the Voting Rights Act.

In addition, the ACLU's Washington Legislative Office is engaged in federal advocacy before Congress and the executive branch on a variety of federal voting matters and was one of the leading organizations advocating for the Voting Rights Act extensions of 1982 and 2006. We issued reports on the continued need for the Act[2] and provided expert testimony on racial discrimination in the then-covered jurisdictions.[3]

The Voting Rights Act of 1965 has proven to be one of the most effective civil rights statutes in eliminating racial discrimination in voting. For almost half a century, the Act has been utilized to ensure equal access to the ballot box by blocking and preventing numerous forms of voting discrimination. Unfortunately, the recent decision in *Shelby County v. Holder* invalidated the coverage formula of Section 4(b), which determines which jurisdictions are subject to preclearance. With the loss of Section 4(b), Section 5 has been rendered virtually obsolete, resulting in the loss of the most innovative and incisive tools against racial discrimination in voting, including preclearance and notice to DOJ of voting changes. The overwhelming evidence of the continued need for the Voting Right Act means that Congress must restore the ability for enforcement of Section 5 through

---

[2] Laughlin McDonald and Daniel Levitas, *The Case for Extending and Amending the Voting Rights Act. Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union,* (March 2006), *available at* http://www.aclu.org/voting-rights/case-extending-and-amending-voting-rights-act.; Caroline Fredrickson and Deborah J. Vagins, *Promises to Keep: The Impact of the Voting Rights Act in 2006*, ACLU (March 2006), *available at* http://www.aclu.org/voting-rights/promises-keep-impact-voting-rights-act-2006.

[3] *See An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before Senate Judiciary Committee*, 109th Cong. (2006) (testimony of Laughlin McDonald, Director, ACLU Voting Rights Project), *available at* http://www.aclu.org/voting-rights/testimony-laughlin-mcdonald-director-aclus-voting-rights-project-house-judiciary-subco; *The Voting Rights Act: Evidence of Continued Need*; *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong (2006) (testimony of Nadine Strossen, President, ACLU), *available at* http://www.aclu.org/voting-rights/statement-aclu-president-nadine-strossen-submitted-subcommittee-constitution-regarding.

the creation of a new coverage formula that appropriately captures recent racially discriminatory voting practices.

Following the decision in *Shelby County*, the ACLU will continue to devote substantial energy and resources to defending the right to vote for all. We look forward to working with this Subcommittee in restoring the critical rights we have lost in ensuring all voters have access to the ballot free from discrimination.

I. Bipartisan History of the Voting Rights Act

Congress passed the Voting Rights Act of 1965 to enforce rights guaranteed to minority voters nearly a century before by the Fourteenth and Fifteenth Amendments. Although these amendments prohibited states from denying equal protection on the basis of race or color and from discriminating in voting on account of race or color, African Americans and other minorities continued to face disfranchisement in many states. Poll taxes, literacy tests, and grandfather clauses were used to deny African American citizens the right to register to vote, while all-white primaries, gerrymandering, annexation, and at-large voting were used widely to dilute the effectiveness of minority voting strength.[4]

The passage of the Act represented the most aggressive steps ever taken to protect minority voting rights. The impact was immediate and dramatic. In Mississippi, African American registration went from less than 10% in 1964 to almost 60% in 1968; in Alabama, registration rose from 24% to 57%. In the South as a whole, African American registration rose to a record 62% within a few years of the Act's passage.[5] The Department of Justice (DOJ) has therefore called the Act the "most successful piece of civil rights legislation ever adopted."[6] But the promise of the Act has not yet been fully realized. Progress has been made, but despite the Supreme Court's recent decision, the full gamut of the Act's protections is still needed today.

In the 48 years since its passage, the Voting Rights Act has guaranteed millions of minority voters a chance to have their voices heard in federal, state, and local governments across the country. These increases in representation translate to vital and tangible benefits such as much-needed education, healthcare, and economic development for previously underserved communities. Prior to the Act's passage, African American communities had been denied resources and opportunities for many years; their issues were often ignored and discounted. Officials elected when equal voting opportunities are afforded to minority citizens have been more responsive to the needs of minority communities.[7]

---

[4] Fredrickson & Vagins, *supra* note 2.
[5] *See* Victor Rodriguez, *Section 5 of the Voting Rights Act of 1965 after Boerne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769, 782 (2003).
[6] U.S. Department of Justice, Civil Rights Division, Voting Section, *Introduction to Federal Voting Rights Laws*, http://www.usdoj.gov/crt/voting/intro/intro.htm.
[7] Fredrickson & Vagins, *supra* note 2, at 2.

As President Ronald Reagan noted upon signing the 1982 reauthorization of the Voting Rights Act, the right to vote is "crown jewel of American liberties."[8] Recognizing this importance, Congress has passed every Voting Rights Act reauthorization and extension by overwhelmingly bipartisan votes. The 1965 Act passed the Senate 77-19, and the House 333-85.[9] The 1970 extension passed the Senate 64-12, and the House 234-179.[10] The reauthorization in 1982 garnered similar support passing 85-8 in the Senate[11] and 389-24 in the House.[12] Congress last extended the Act in 2006, 98-0 in the Senate and 390-33 in the House, concluding that the coverage formula enforced by Section 5 was needed for at least another 25 years. Including the 2006 reauthorization, the last three extensions have been signed by Republican presidents.

In 2006, the congressional fact-finding effort built a strong case for the continuing need to maintain the Voting Rights Act's protections. The resulting record included more than 750 Section 5 objections by DOJ that blocked the implementation of some 2,400 discriminatory voting changes; the withdrawal or modification of over 800 potentially discriminatory voting changes after DOJ requested more information; 105 successful actions to require covered jurisdictions to comply with Section 5; 25 denials of Section 5 preclearance by federal courts; high degrees of racially polarized voting in the jurisdictions covered by Section 5; and reports from tens of thousands of federal observers dispatched to monitor elections in covered jurisdictions.[13] In total, the record included over 15,000 pages of testimony and reports and statements from over 90 witnesses in over a dozen hearings.[14]

Although significant progress has been made as a result of the passage of the Voting Rights Act, equal opportunity in voting still does not exist in many places. Discrimination on the basis of race and language still deny many Americans their basic democratic rights. Although such discrimination today is often more subtle than it used to be, it is still current and must still be remedied.

II. *Shelby County v. Holder*

Unfortunately, on June 25, 2013, the Supreme Court, in *Shelby County v. Holder*, invalidated the coverage formula in Section 4(b), which defines who is subject to Section 5 pre-clearance.

---

[8] Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982), *available at* http://www.presidency.ucsb.edu/ws/?pid=42688.

[9] *See Senate Roll Call Vote No. 78* (May 26, 1965); *House Roll Call Vote No. 32* (Feb. 10, 1964), *available at* http://docsteach.org/documents/5637787/detail; *House Roll Call Vote No. 87* (July 9, 1965), *available at* http://www.govtrack.us/congress/votes/89-1965/h87.

[10] *See Senate Roll Call Vote No. 342* (Mar. 13, 1970); *House Roll Call Vote No. 151* (Dec. 11, 1969), *available at* http://docsteach.org/documents/5637787/detail.

[11] *See Senate Roll Call Vote No. 190* (June 18, 1982).

[12] *See House Roll Call Vote No. 242* (Oct. 5, 1981).

[13] Laughlin McDonald, *Don't Strike Down Section 5*, http://www.aclu.org/blog/voting-rights/dont-strike-down-section-5 (Mar. 6, 2013); *see also* H. R. Rep. No. 109-478 (2006); S. Rep. No. 109-295 (2006).

[14] Deborah J. Vagins & Laughlin McDonald, *Supreme Court Put a Dagger in the Heart of the Voting Rights Act*, http://www.aclu.org/blog/voting-rights/supreme-court-put-dagger-heart-voting-rights-act (July 2, 2013).

In 2008, the City of Calera, a subsidiary of Shelby County, Alabama, sought to make over 170 annexations, in conjunction with changes to its redistricting plan. Together, these changes would eliminate the city's sole majority African American district, which had elected an African American candidate – who was the City's lone African American councilperson – for the previous 20 years.[15]

In its submission to DOJ, Calera admitted that it had already adopted the annexations without receiving preclearance. DOJ objected to both the unprecleared annexations, as well as the redistricting plan. Notwithstanding this denial, Calera went on to conduct City Council elections with both the annexations and the rejected plan in place, causing the city's sole African American councilmember to lose his seat. DOJ was then compelled to bring an enforcement action under Section 5 to enjoin certification of the results of the illegal election. After a consent decree was reached with a new precleared plan, the city's lone majority African American district was restored, and black voters in Calera succeeded in electing their candidate of choice. Shelby County subsequently challenged Sections 4(b) and 5 of the Voting Rights Act as facially unconstitutional.

The Supreme Court invalidated the coverage formula in Section 4(b), which defines which jurisdictions are subject to Section 5 preclearance. The Court found that while "voting discrimination still exists," Section 4(b) of the Voting Rights Act was unconstitutional, on the basis that the coverage formula had not been updated recently and no longer reflected current conditions of discrimination. Therefore, the formula can no longer be used as a basis for subjecting jurisdictions to preclearance.[16] Section 5's continued operation thus depends on establishing new or expanded coverage, which complies with the Court's decision. As the Court noted: "[w]e issue no holding on section 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions."[17] Without congressional action through the creation or expansion of a coverage formula, the kind of discrimination occurring in Calera, Alabama and elsewhere cannot be subject to the preclearance mechanism that stops discriminatory voting changes before they take effect and U.S. citizens lose their right to vote.

III. Recent Examples of the Impact of Section 5

Section 5 has been particularly effective in stopping discriminatory state and local voting changes from going into effect. It is important that the safeguards of Section 5 continue to apply in those jurisdictions with recent and egregious examples of discrimination. The elimination of precincts, changes in polling locations, methods of electing school board or city council members, moving to at-large districts, annexations, and other changes can have the purpose or effect of denying or abridging the right to vote on the basis of race, color, or membership in a language minority group. Recent examples, since the 2006 reauthorization of the Voting Rights Act, of such discriminatory voting measures blocked by Section 5 are numerous. As the Court acknowledged, "voting discrimination still exists; no one doubts that."[18] In those areas where voting discrimination continues to exist, Section 5 must be enforced, and a coverage formula is needed to achieve this.

---

[15] Letter from Grace Chung Baker, Acting Assistant Attorney General, to Dan Head (Aug. 25, 2008), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_082508.pdf.
[16] Shelby County v. Holder, 679 F. 3d 848 (2012).
[17] *Shelby County*, 133 S. Ct. at 2612.
[18] *Id.*

Without this important function, millions would be disfranchised. What remains of our legal avenues after *Shelby County* is not enough. The following are a few very recent examples:

- In 2006, Randolph County, Georgia, attempted to reassign the African American Board of Education Chair's voter registration district from a seventy percent African American voting population to a seventy percent white voting population.[19] These changes were done in a special closed door meeting the sole purpose of which was to change the voter registration district of the Chair. In a unanimous vote, the all-white members of the Board of Registrars voted for the district change. Section 5 prevented this blatantly discriminatory change from taking place.

- In 2007, Mobile County, Alabama attempted to change the method of selection for filling vacancies on the county commission from a special election to a gubernatorial appointment.[20] After carefully considering information provided by the county, census data, public comments, and information from interested parties, DOJ found that the change would have a retrogressive effect, diminishing the opportunity of minority voters to elect a representative of their choice to the commission. Following the DOJ objection, Mobile County withdrew its request for the voting change.

- In 2007, Buena Vista Township in Allegan County, Michigan attempted to close a voter registration center located at a Secretary of State branch office.[21] The branch offices constituted 79.13% of total voter registrations for the Township, and the specific branch closure would have closed the only branch in a majority-minority township, resulting in the nearest branch being a one hour and forty minute round trip on public transportation with no other viable branch alternative for registering to vote.

- In May 2008, Alaska attempted to eliminate precincts in several Native villages, which would force many Native Alaskans to travel to precincts 33 to 77 miles away, unconnected by roads, and accessible only by air or water.[22] Two weeks after DOJ asked for additional information on why these changes were necessary, the State decided against moving forward with these precinct consolidations.

- In 2009, Georgia implemented an error-filled voter registration verification system that matched voter registration lists with other government databases.[23] Individuals who were identified as failing to match were flagged and required to appear on a specific date and time at the county courthouse with only three days' notice to prove their voter registration. The

---

[19] Letter from Wan J. Kim, Assistant Attorney General, to Tommy Coleman (Sept. 12, 2006), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_091206.pdf.
[20] Letter from Wan J. Kim, Assistant Attorney General, to John J. Park, Jr. (Jan. 8, 2007), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_010807.pdf.
[21] Letter from Grace Chung Becker, Acting Assistant Attorney General, to Brian DeBano and Christopher Thomas (Dec. 26, 2007), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_122607.pdf.
[22] Suzanna Caldwell, *Voting Rights Act: What does ruling mean for Alaskans?*, Alaska Dispatch, June 25, 2013, http://www.alaskadispatch.com/article/20130625/voting-rights-act-what-does-ruling-mean-alaskans.
[23] Letter from Loretta King, Acting Assistant Attorney General, to Thurbert E. Baker (May 29, 2009), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_052909.pdf.

verification systems errors disproportionately impacted minority voters. Although representing equal shares of new voter registrants, more than 60% more African American voters were flagged for additional inquiry then white voters. In addition Hispanic and Asian registrants were more than twice as likely to be flagged for further verification as white voter registration applicants. Section 5 stopped this retrogressive voter registration provision from continuing. The objection was later withdrawn on the mistaken premise that the state had significantly changed the database matching system.[24]

- A locality in Texas sought to reduce the number of polling places for local and school board elections in 2006 from 84 polling places to 12.[25] Moreover, the assignment of voters to each polling place was incredibly unbalanced. The polling place with the smallest proportion of minority voters would have served 6,500 voters while the site with the largest proportion of minority voters would have served over 67,000. Following a DOJ complaint, a three judge court entered a consent decree prohibiting the locality from implementing the change without first obtaining preclearance.[26] Section 5 prohibited this change due to the retrogressive effect.

- In Charles Mix County, South Dakota, after the first Native American candidate was poised to become a county commissioner, the county increased the number of county commissioners from three to five.[27] Native Americans would only have been able to elect the candidate of their choice in one of the five new districts as opposed to one of the three original districts. This racially discriminatory impact in addition to comments admitting discriminatory purpose led DOJ to object to the proposed plan.

- Between 2009 and 2012, three Georgia counties proposed redistricting changes to their county commissions and board of education, which would have altered the division of African American populations in the counties, resulting in a retrogression effect on their ability to elect minority members and diluting the current minority representation on the commissions and board.[28] Through Section 5, plans that would have reduced the level of African American voting strength and reduced their ability to elect their candidates of choice were prevented.

---

[24] *See generally* Kathy Lohr, *Georgia Allowed to Continue Voter Verification*, NPR, Sept. 14, 2010, http://www.npr.org/templates/story/story.php?storyId=129855592.

[25] Letter from Wan J. Kim, Assistant Attorney General, to Renee Smith Byas (May 5, 2006), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_050506.pdf.

[26] United States v. N. Harris Montgomery Cmty. Coll. Dist., Civil Action No. H 06-2488 (S.D. Tex. Aug. 4, 2006) (consent decree judgment).

[27] Letter from Grace Chung Baker, Acting Assistant Attorney General, to Sara Frankenstein (Feb. 11, 2008), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_021108.pdf.

[28] Letter fromThomas E. Perez, Assistant Attorney General, to Walter G. Elliott (Nov. 30, 2009), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_113009.pdf; Letter from Thomas E. Perez, Assistant Attorney General, to Michael S. Green, Patrick O. Dollar, and Cory O. Kirby (Apr. 13, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_041312.pdf; Letter from Thomas E. Perez, Assistant Attorney General, to Andrew S. Johnson and B. Jay Swindell (Aug. 27, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_082712.pdf .

- Also in 2012, Galveston County, Texas submitted a redistricting plan for its commissioners court reducing the number of districts for electing justices of the peace and constables.[29] DOJ found that the process leading up to the proposed plan involved the deliberate exclusion from meaningful involvement in key deliberations of the only member of the commissioners court elected from a minority ability-to-elect precinct. Following changes to the redistricting plan made by the county, DOJ approved the revised plan.[30]

IV. Section 5 Provides Necessary Protections Unavailable In Other Laws

The protections that exist in Section 5, and enforced through Section 4, provide a powerful tool for deterring state and local governments from adopting discriminatory election procedures and preventing discriminatory practices that have been adopted from being enforced.[31] This preclearance requirement is a fundamental element of the Voting Rights Act that does not exist elsewhere, and has been rendered largely useless by the *Shelby County* decision.

There are several unique elements of Section 5 that are particularly valuable in defeating discrimination in voting. First, Section 5 requires those jurisdictions included in a coverage formula to submit all proposed election changes to DOJ or the federal District Court of the District of Columbia prior to implementation.[32] This functions as a notice mechanism giving DOJ a level of knowledge regarding voting changes superior to relying on communities and watchdog groups to identify voting changes as they are proposed. As the examples previously discussed demonstrate, the majority of discriminatory changes take place at the local level where they may be difficult to identify if the reporting onus is removed from the jurisdiction and placed on groups or individual voters.

Second, in evaluating the intent or effect of the change, Section 5 places the burden of proof on the jurisdiction requesting the election change to show that the change does not have a "retrogressive" effect on minority voters.[33] Unlike Section 2, which places the burden on the voter to prove discrimination, Section 5's burden of proof makes it more effective in preventing discrimination by requiring the jurisdiction show any change will not have a discriminatory impact prior to the law taking effect. The purpose of Section 5 is to "shift the advantage of time and inertia from the perpetrators" of discrimination in voting to the voters.[34]

Third, Section 5 targets ongoing discrimination in a relatively low-cost way through an administrative process. By largely avoiding long and drawn out legal battles, Section 5 avoids the

---

[29] Letter from Thomas E. Perez, Assistant Attorney General, to James E. Trainor III (Mar. 5, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_030512.pdf.
[30] T.J. Aulds, *Galveston County: DOJ gives green light to county redistricting map*, KHOU, Mar. 24, 2012, *available at* http://www.khou.com/news/neighborhood-news/Galveston-County--DOJ-gives-green-light-to-county-redistricting-map-144092286.html.
[31] *Shelby County, 133 S. Ct. at 2639 (2013) (Ginsburg, J., dissenting) (citing The Continuing Need for Section 5 Pre-Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., 2d Sess., pp. 53–54 (2006)).*
[32] 42 U.S.C. § 1973c.
[33] Beer v. United States, 425 U.S. 130 (1976).
[34] South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

high costs of case-by-case litigation associated with Section 2 claims.[35] Through the simple administrative process covered jurisdictions submit proposed changes in writing to DOJ. Within sixty days, the Attorney General can decide whether to object to the change. If there is no objection, the jurisdiction may implement the change. If an objection is filed, the jurisdiction may submit the changes directly to a three-judge panel of the District Court for the District of Columbia for preclearance without deference to the findings from DOJ.[36] This method allows for instances of discrimination to be identified in real-time, as the change is proposed and before going into effect.

Although Section 2 is a valuable tool in stopping discriminatory voting practices after they occur, it lacks the hallmarks of Section 5 that prevents discrimination from occurring in the first place. Section 2 does not provide notice of the proposed change, nor can it freeze a change and prevent it from going into effect. Section 2 allows victims of discrimination in voting to seek remedies in court, but often only after the discrimination occurs, violating the individual's right to vote. Moreover, no state[37] or federal constitutional claim is an adequate substitute for Section 5 because no other law provides advance notice of the change and uses preclearance to stop the discriminatory practice from going into effect.

Only when the powerful tools of Section 5 can operate under a new regime, can the goals of the Voting Rights Act be accomplished.

Conclusion

The ACLU thanks the House Judiciary Subcommittee on the Constitution and Civil Justice for holding this important hearing to address the Voting Rights Act following the *Shelby County* decision. The Voting Rights Act's long bipartisan history of protecting the right to vote and rooting out racially discriminatory changes through Section 5 must continue. Therefore, it is crucial that Congress work together to restore and redesign its protections and allow the Voting Rights Act to continue to be the crown jewel of civil rights laws. All the other rights we enjoy as citizens depend on our ability to vote; it is necessary that we safeguard access to the ballot for every citizen. We look forward to working with the Subcommittee on new legislative proposals.

[35] Justin Levitt, *Shadowboxing and Unintended Consequences*, SCOTUSBlog (June 25, 2013, 10:39 PM), http://www.scotusblog.com/2013/06/shadowboxing-and-unintended-consequences/.
[36] 42 U.S.C. § 1973c.
[37] *See, e.g.*, Joshua A. Douglas, The Right to Vote Under State Constitutions, 67 VAND. L. REV. (forthcoming 2014).

coalición RURAL coalition

1029 Vermont Ave NW Suite 601
Washington, DC 20005
phone 202/628-7160, fax 202/393-1816
http://ruralco.org
www.facebook.com/RuralCoalition
Twitter: @RuralCo

Statement of

Gary R. Redding, Legal Fellow

On behalf

of the Rural Coalition

for

The United States House Judiciary Subcommittee on the Constitution and Civil Justice

For inclusion in the record for the Hearing Entitled, "The Voting Rights Act after the Supreme Court's Decision in Shelby County"

Washington, D.C.
July 25, 2013

Assuring Voting Rights for Rural and Farm Communities

For forty-eight years, the Voting Rights Act has been a historic law benefitting the masses of U.S. citizens in their quest to participate equally in America's democratic political process. The current and potential threats to citizens' voting rights inform us that the Act is necessary even today. We must now modernize the Act to reflect the realities of today's political landscape. This statement provides a brief overview of past and present voting conditions and limitations in rural and farm communities, the implications of Section 2 of the Voting Rights Act in the wake of the *Shelby County, Alabama v. Holder* U.S. Supreme Court decision, and provides conclusions and recommendations for updating Section 4 of the Voting Rights Act and making the process for reporting voting rights violations more straightforward and practical.

The Voting Rights Act, a codification of the Fifteenth Amendment to the U.S. Constitution, prohibits states from requiring any "voting qualification or prerequisite to voting, or standard, practice, or procedure ... to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Prior to the Act's passage, non-white citizens and some poor whites in rural America had to satisfy certain preconditions before voting, such as paying a poll tax or passing an oral or written literacy test that required they demonstrate fluency in English, interpret or read the U.S. Constitution to the satisfaction of the registrar, name local or national elected officials, and more. Thanks to workers in the Civil Rights Movement and citizens particularly in rural communities, many of whom are still active in the Rural Coalition, the Voting Rights Act was enacted in 1965 and has been continually reauthorized, most recently in 2006.

Yet in 2013, many residents in rural and farm communities across America continue to face many of the voting challenges in local, state, and national elections that people in 1965 faced when the Voting Rights Act was passed. Even today, a high percentage of people remain who have difficulty acquiring information about the candidates and the issues. Factors that impede their participation include poor and oftentimes still segregated education systems that have left them unable to fully read and comprehend information about candidates and issues. Lack of access to electricity, computers, and the Internet in their homes and communities also limits their ability to follow news, watch political debates, and otherwise acquire critical information. Senior citizens, especially, still struggle to find transportation to and from voting precincts, which can sometimes be thirty or more miles away from their rural homes. Furthermore, the political process that is supposed to promote voter turnout often discourages or prevents people from voting.

In 1993, the U.S. Congress enacted the National Voter Registration Act (NVRA) to make voting more convenient and accessible by providing a NVRA form for prospective voters to register to vote, update their registration information, or register with a particular political party. In order to establish residency in a state, voting applicants are required to swear and affirm that they are a U.S. citizen.

Despite these federal provisions and protections, proponents of restrictive voting requirements at the state level have in recent times proposed numerous laws to make voting even more difficult. Though each state differs in the particulars, the overall effect reduces voter participation. Opponents of these restrictive voting requirements and others also argue that they disproportionately target communities of color, the elderly, and youth.

Beginning on January 1, 2013, the Kansas Secure and Fair Elections (SAFE) Act required Kansas citizens registering to vote for the first time to prove their U.S. citizenship. This law poses a challenge for rural residents without a car or a ride to a certified location, like a post office, to get a government or state issued ID or the funds to pay for one. In Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, Virginia, and Wyoming, former incarcerated citizens with certain felony convictions may be permanently deprived of the right to vote, even after they have been successfully paroled. In Florida, Hawaii, Idaho, Louisiana, Michigan, South Dakota and New Hampshire, all residents must produce a photo ID to cast a ballot. The hurdles here are similar to those who have to provide proof of citizenship to register.

In 2004, the Arizona legislature passed Proposition 200, the Arizona Taxpayer and Citizen Protection Act, to require prospective voters to present documentary proof of citizenship to register to vote and a photo identification before receiving a ballot at a precinct. In *Arizona v. The Inter Tribal Council of Arizona, Inc.*, the Supreme Court invalidated Proposition 200. The majority reasoned that it violated the NVRA, which mandates that States "accept and use" the standard federal voter registration form, and that the additional requirements would-be voters in Arizona had to satisfy were not included in the federal form. *Arizona v. The Inter Tribal Council of Arizona*, 133 S.Ct. 2247, 2252 (2013). However, the Supreme Court suggested that Arizona and other states could propose that Congress enact additional requirements for the NVRA form. *The Inter Tribal Council*, 133 S.Ct. at 2261.

In addition to such widespread attempts to weaken federal voting rights protections with new or excessive requirements and restrictions, some states are trying to nullify it altogether. *Shelby County, Alabama v. Holder* is the most recent case to come before the Supreme Court. Shelby County, a mostly white suburb of Birmingham, sought to invalidate Sections 4 and 5 of the 1965 Voting Rights Act by claiming they were being punished unfairly for decades old discrimination. Section 5 requires all or parts of sixteen states with a history of racial discrimination in voting to get federal approval before implementing changes to their voting laws. It applied to all or part of the following: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia; forty counties in North Carolina, five in Florida, four in California, three in New York, two in South Dakota, as well as ten towns in New Hampshire, and two townships in Michigan. Congress chose all or parts of these sixteen states using a formula in Section 4 to identify where racially discriminatory voting practices had been more prevalent. In 2006, Congress reauthorized Sections 4 and 5 of the Voting Rights Act for another twenty-five years.

Shelby County argued that Sections 4 and 5 should be discontinued because its current political conditions are no longer racially discriminatory. The Supreme Court voted 5-4 to strike down Section 4 of the Voting Rights Act as unconstitutional. Its formula can no longer be used as a basis for requiring certain jurisdictions to "preclear" changes to their voting laws with the federal government. Supreme Court Chief Justice John Roberts, writing for the majority, explained that Section 4's "coverage [formula] today is based on decades-old data and eradicated practices," and "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions." *Shelby Cnty., Alabama v. Holder*, 133 S.Ct. 2612, 2628, 2619 (2013). Furthermore, no holding was issued "on [Section] 5 itself, only on the coverage formula." *Id* at 2632. Conversely, Supreme Court Justice Ruth Bader Ginsburg wrote in her dissent that "the record for the 2006 reauthorization makes abundantly clear [that] second-generation barriers to minority voting rights have emerged in the covered jurisdictions as attempted substitutes for the first-generation barriers that originally triggered preclearance in those jurisdictions." *Id* at 2652. Since the decision, numerous proposals have been made to replace Section 4, the most popular probably being to rely solely on Section 2 of the Voting Rights Act.

Advocates for Section 2 point out that it applies nationally, whereas Section 5 (and 4) only applies to certain covered jurisdictions. Chief Justice John Roberts writes in *Shelby*,

> Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in [Section] 2. The current version forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Both the Federal Government and individuals have sued to enforce § 2, see, *e.g., Johnson v. De Grandy,* 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) , and injunctive relief is available in appropriate cases to block voting laws from going into effect, see 42 U.S.C. § 1973j(d). Section 2 is permanent, applies nationwide, and is not at issue in this case.

Id at 2632, 2620.

Thus, in order to protest a voting rights violation, a person has the right to injunctive relief under Section 2. However, this can only be done by filing a lawsuit through the courts, whereas under Section 4 and 5 action is taken through an administrative process through the U.S. Department of Justice.

These same advocates against revitalizing Section 4 believe that Section 2 is underutilized and provides enough protection to prevent racial discrimination in voting. Former career attorney in the Voting Section at the United States Department of Justice and House Judiciary Committee Voting Rights Act hearing witness J. Christian Adams believes "if discrimination in voting remains a problem, you would hardly know based on recent Section 2 enforcement activity. Either discrimination in voting doesn't exist anymore at levels necessary to justify federal oversight under Section 5, or the Justice Department has decided not to vigorously enforce the law." *The Voting Rights Act after the Supreme Court's Decision in Shelby County* before the U.S. House Judiciary Committee's Subcommittee on the Constitution and Civil Justice, 113th Cong. 10 (2013).

Constitutional attorney and Senate Judiciary Committee Voting Rights Act hearing witness Michael Carvin contends that Section 2 "broadly and effectively precludes all actions with a discriminatory 'result'." *From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act* before the U.S. Senate Judiciary Comm., 113th Cong. 6 (2013). These testimonies fail to acknowledge that litigation under Section 2 of the VRA is untimely, incredibly expensive, and lengthy.

In 2006, Justice Ginsburg explains in her dissent, "Congress received evidence that litigation under §2 of the VRA was an inadequate substitute for preclearance in the covered jurisdictions. Litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency. An illegal scheme might be in place for several election cycles before a §2 plaintiff can gather sufficient evidence to challenge it." *Holder*, 133 S. Ct. at 2640. In addition, Justice Kennedy has pointed out that "Section 2 cases are very expensive. They are very long. They are very inefficient. I think this section 5 preclearance device has – has shown – has been shown to be very very [sic] successful." *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S.Ct. 2504, 2509 (2009). Thus, we need to stop voting rights violations before they occur.

Reporting on voting rights violations poses special challenges for the estimated "46.2 million people, or 15 percent of the U.S. population, [who] reside in rural counties." Hope Yen and Hannah Dreier, *Census: Rural US loses population for the first time*, Yahoo News (June 13, 2013), http://news.yahoo.com/census-rural-us-loses-population-first-time-040425697.html.

The following hypothetical situation is based on a composite of actual experience encountered by our members in rural communities. It features Larry and is used to illustrate the barriers and challenges to voting faced by people who live in rural communities, and the impact on someone who is denied his rightful chance to vote.

Larry, 38 years old, married, father of ten-year-old twin boys, and a minimum wage factory worker, drives with his family twenty-five miles from his rural community to his polling place to vote. On the way, Larry stops for gas and pays $3.67 a gallon for regular unleaded gas, the current national gas average. After purchasing $25 for gas for only 6.81 gallons, the family proceeds to the polling place.

It is now 10:00 AM. Larry and his wife decide to each take a child into their respective voting booths. His wife goes into hers but before Larry can make it to his, a poll worker stops him. The poll worker tells Larry that his name is not on the voter roll. Unbeknownst to him, his name had been removed because his voter identification card was returned as undeliverable (as happened and was ruled unconstitutional in *U.S. Student Ass'n Found. et al. v. Land et al.*). Larry and his wife registered to vote last year during a door-to-door registration drive in their rural community.

Unable to vote or convince the poll worker that he is eligible to vote even though his wife was able to, Larry and his family return home, having driven fifty miles round-trip, only to have one of two votes counted for the family.

Larry and his wife sit at the kitchen table and ponder what to do. They are unaware that a Section 2 complaint is filed with the United States Department of Justice. The United States Department of Justice's website instructs people to "contact the Voting Section at Voting.Section@usdoj.gov to make a complaint concerning a voting matter." The "Voting.Section@usdoj.gov" link is an email address. Even if they were aware, they could not send the email from their home.

The rural area Larry's family lives in does not have Internet access. Why?

National private cable providers are either refusing to provide Internet service to rural areas or planning to install it one or two roads a year. Bruce Hall, the owner of Freedom Wireless Broadband, explains, "The problem is that many people live away from cable lines which could provide broadband (internet access). Comcast and Verizon can offer to build a line in order to provide broadband, but the cost to build the line to provide the service is astronomical. The broadband company would likely never recoup the costs. It costs whatever it does to build that network and (broadband providers are) not ever going to make it back in that monthly charge." Kelcie Pegher, *Rural areas struggle to find internet providers*, The Daily Record (Feb. 26, 2013), http://thedailyrecord.com/2013/02/26/rural-areas-struggle-to-find-internet-providers/. Some communities have attempted to establish their own public Internet companies and have seen their efforts thwarted or complicated by cable companies working in tandem with state legislatures.

In May 2011, the North Carolina General Assembly, heavily influenced by Time Warner Cable, passed its bill entitled "An Act to Protect Jobs and Investment by Regulating Local Government Competition with Private Business" that will allow "Time Warner Cable [to] build networks anywhere in the state but the public sector is limited to its political boundaries or very close to them. A public network must to [sic] price its communication services based on the cost of capital available to private providers. This means that if a city can borrow at a lower rate it cannot use this lower cost to offer a lower price." David Morris, *Why is Mighty Time Warner So Scared of Tiny Salisbury, NC?*, Huffington Post (June 24, 2011), http://www.huffingtonpost.com/david-morris/time-warner-public-competition_b_883223.html. So, Time Warner Cable can refuse to expand its internet service to rural communities in North Carolina and these same rural communities who want to build an infrastructure themselves cannot or will be hindered by the law's geographical or rate restrictions.

A few hours later, Larry and his wife try to recall a local community citizen's organization that could possibly help but one does not exist in their community. It is now 2 PM and both have to work in the morning at the local factory, so they scratch the idea of driving to an organization in a neighboring county. Besides, it would require more gas to drive the sixty miles to reach the organization's office.

His wife suggests they call a neighbor who lives two miles away and has dial-up Internet or travel twenty-five miles to the closest library. They decide to call the neighbor and Larry is invited over. Larry sits down at the computer and the dial-up connection fails to connect. The neighbor tells Larry to give it five or so minutes and the connection is slow. Once online, Larry doesn't know where to go.

If Larry did, he would have to go to http://www.justice.gov/ or use a search engine to find the site. Once there, he would have to first find on the homepage where the link to "submit a complaint" is under the "Department of Justice Action Center" section. Second, he would have to know to click on the link. Third, he would have to scroll down to find the "voting rights discrimination" link and know to click on it. Fourth, he would come to a page titled "How To File A Complaint" and either click on the "Voting Section" link at the top of the page or have to scroll down to the very bottom to find the "Voting" section. Fifth, Larry would read that he "can register a complaint [by sending] an email message to the Voting Section at Voting.Section@usdoj.gov." Even for a computer savvy person, successfully completing all these steps might prove to be daunting.

Let's say that Larry completed all the aforementioned steps. Larry may see the word "complaint" and believe he is unprepared to compose a formal email explaining why he was denied the right to vote. Furthermore, he may not have an email address because it hasn't made sense to have one since he does not have Internet access at home and therefore no computer.

So, Larry heads back home. It is now 5:00 PM.

Larry decides to call a local attorney to ask for assistance in filing a complaint. The attorney's office is thirty-five miles away and his law firm specializes in local civil and criminal law, not civil rights law. Despite this fact, the attorney invites Larry to his office but informs him that he will be charged $75.00 an hour for the consultation and drafting of the complaint.

Larry gives up. He also decided not to vote in the local school board election that occurred ten days later.

These are typical situations faced by our diverse rural, farm member communities in rural areas around the country.

Although Chief Justice Roberts acknowledged in *Shelby* that "voting discrimination still exists; no one doubts that," some members of Congress appear to be against working in a bipartisan effort to update the Voting Rights Act. *Holder*, 133 S. Ct. at 2620. Senate Minority Leader Mitch McConnell (R-KY) called the Voting Rights Act "an important bill that passed back in the '60s at a time when we had a very different America than we have today." Susan Davis, *Congress Unlikely to act on voting rights ruling*, USA Today (June 25, 2013), http://www.usatoday.com/story/news/politics/2013/06/25/congress-

reacts-voting-rights-rulling/2456477/. Rep. Goodlatte (R-VA), chairman of the U.S. House Judiciary Committee, said that even though Section 4 has been ruled unconstitutional, "it's important to note that under the Supreme Court's decision in *Shelby County (v. Holder)* other very important provisions of the Voting Rights Act remain in place, including Sections 2 and 3." Tom Curry, *Conservatives not keen on effort to revise key section of Voting Rights Act*, NBCNews (July 18, 2013), http://nbcpolitics.nbcnews.com/_news/2013/07/18/19540938-conservatives-not-keen-on-effort-to-revise-key-section-of-voting-rights-act?lite. Section 3 also requires judicial intervention to impose preclearance requirements on a jurisdiction that enacts discriminatory voting procedures or laws. What Sen. McConnell, Rep. Goodlatte, and others fail to consider, however, are the geographical distinctions that create different challenges for voters in urban and rural areas.

Participation in the voting process is especially critical for rural and farm communities because the lack of resources in these areas often correlates directly with lower engagement in the voting process and voter turnout. Not only do our votes need to be counted, but our children need to see us vote in person.

Conclusions and Recommendations

While Section 2 may provide tools to remedy discrimination for those with the resources to access legal assistance and the courts, it is not sufficient to prevent discrimination and other tools must be provided to assist communities such as those mentioned here.

Renewing preclearance and other administrative options that can be used in a proactive matter is essential to the protection of voting rights. Section 4 needs to be reviewed, and expanded to more areas and situations. Below are some of our recommendations and we urge the committee to seek additional input and work quickly to renew this important section of the law.

(1) **A new preclearance formula for Section 4 of the Voting Rights Act should be created by the U.S. Congress.** Chief Justice Roberts noted in *Shelby*, "Congress may draft another formula based on current conditions." We believe this formula should include new factors, including data on changes in election participation rates as compared to population by race, gender, age and ethnicity data from 2006 to the present. Review factors should include all or parts of U.S. States that have been previously required to have preclearance, or which have a persistent record of racial discrimination at the polling places. Whether rural communities have real access, including Internet access, to the voter registration system in place in a particular locality should also be a factor.

(2) **The section should mandate that citizens who believe their voting rights have been violated based on race, age or other factors, may file a petition either on paper or online, and the U.S. Department of Justice should be required to invoke preclearance based on the receipt of such petition.** This option would allow citizens to report voting rights violations and to mobilize others to sign-on

so voting rights violations can be addressed immediately through an administrative process.

(3) **The U.S. Department of Justice should create an ombudsman position to solely investigate and address complaints of maladministration or voting rights violations.** A voter who believes their rights have been violated should be able to immediately call the ombudsman on election day on a toll-free number with access to a fully staffed office that is open 24-hours a day to submit voting rights complaints. This office should also be open throughout the year.

(4) **A "Voter Bill of Rights" should be created and posted in all registrars' offices and in each polling place that includes what a citizen can do if he or she is denied the right to vote.** These options should include clear information on what to do to submit provisional ballots, and on using the U.S. Department of Justice's website to file a complaint or having a phone number that can be called immediately to file a complaint. Furthermore, the U.S Department of Justice should provide a more user-friendly way for people to report voting rights violations on its website. The link to the "Voting Section" should be placed in a more prominent location and the "Voting Section" should have its own webpage within the site. On that page, it should be explained that people without Internet access can submit a complaint by calling the department.

(5) The U.S. Department of Justice should keep records of the locations from which all complaints, whether by phone, mail or electronically, and be mandated to investigate and invoke preclearance in areas where complaints exceed a set level that should be specified in the revision of the law.

The Rural Coalition, born of the civil rights and anti-poverty rural movements, has worked for 35 years to assure that diverse organizations from all regions, ethnic and racial groups and gender have the opportunity to work together on the issues that affect them all. The foundation of this work is strong local, regional and national organizations that work to assure the representation and involvement of every sector of this diverse fabric of rural peoples and communities.

○