Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Voting Rights/The Voting Rights Acts

## The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006[1]

*The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 renewed the central provisions of past Voting Rights Acts, most notably the requirement that covered jurisdictions preclear all changes in electoral processes through the attorney general or federal district courts in the District of Columbia circuit. The law also modified the results in two Supreme Court decisions. First, Congress made clear, contrary to* Reno v. Bossier (2000)*, that the Voting Rights Act outlawed all state electoral laws that had a discriminatory purpose, even when the law did not appear to have a discriminatory impact. Second, Congress made clear, contrary to* Georgia v. Ashcroft *(2003), that the Voting Rights Act required covered jurisdictions when reapportioning to structure electoral districts in ways that enabled racial minorities to elect candidates of their choice and not merely empower racial minorities to influence elections.*

*The Voting Rights reauthorization act had a smoother ride through Congress than might have been anticipated. Democrats were unanimously in favor. Many Republicans also supported the measure. Bill Frist, the Senate majority leader, James Sensenbrenner, the chair of the House Judiciary Committee, and Ken Mehlman, the head of the Republican National Committee were enthusiastic advocates for renewal. The House passed the Bill by a 390–33 vote. The Senate vote was unanimous. Little debate took place on the floor of either house.*[2]

*Consider the success of legislative proponents of the Voting Rights Act in light of greater judicial threats to declare the preclearance provisions unconstitutional? Why are Republicans in Congress more enthusiastic about the preclearance provisions than Republican appointees in federal courts? What have been the successes of the Voting Rights Act? What are the failures? What are the likely consequences of renewal (or of a failure to renew)? Do you think renewal will still be appropriate in twenty-five more years?*



House Committee on the Judiciary, Report on the Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006

The right to vote is the most fundamental right in our democratic system of government because its effective exercise is preservative of all others. Prior to the enactment of the [Voting Rights Act (VRA)], parts of the United States condoned the unequal treatment of certain citizens, including denying the most fundamental right of citizenship—the right to vote. The vestiges of such discrimination continue today. In enacting the VRA in 1965, Congress sought to protect the Nation's most vulnerable citizens' right to vote. In renewing and extending the VRA, Congress sought to ensure that even greater numbers of our citizens were protected, including citizens whose primary language is not English, and to ensure that all aspects of the right to vote are protected, including the right to cast a meaningful ballot.

Substantial progress has been made over the last 40 years. Racial and language minority citizens register to vote, cast ballots, and elect candidates of their choice at levels that well exceed those in 1965 and 1982. The success of the VRA is also reflected in the diversity of our Nation's local, State, and Federal

[1] House Committee on the Judiciary, The Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 109th Cong., 2nd Sess. (2006), H.Rep. 109-478.

[2] For a good discussion of the politics of renewal, see J. Morgan Kousser, "The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007, *Texas Law Review* 86 (2008): 667, 743–60.

Governments. These successes are the direct result of the extraordinary steps that Congress took in 1965 to enact the VRA and in reauthorizing the temporary provisions in 1970, 1975, 1982, and 1992.

Despite these successes, the Committee finds that the temporary provisions of the VRA are still needed. Discrimination today is more subtle than the visible methods used in 1965. However, the effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates of choice. Forty years ago, Congress passed the VRA to help ensure that the rights of citizenship were extended to all its citizens. 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.

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The record reveals that many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated. The Committee finds that the number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982. In some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters.

. . . The Committee finds that the increased number of African-American citizens who are registered to vote and who have cast ballots, together with the protections afforded by the temporary provisions against dilutive techniques . . . have resulted in significant increases in the number of African-Americans serving in elected offices. As of 2000, more than 9,000 African-Americans have been elected to office, an increase from the 1,469 officials who held office in 1970. As of 2004, 43 African-Americans currently serve in the United States Congress, with 42 individuals serving in the United States House of Representatives, and one serving in the United States Senate. At the State level, more than 482 African-Americans serve in State legislatures, with thousands more African-Americans serving in county, township, and other locally elected positions.

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The Committee also finds that Sections 4(f) and 203 have been instrumental in fostering progress among language minority citizens. Since 1975 and 1992 (when Section 203 was last reauthorized), the number of language minority citizens who have registered to vote, turned out to vote, and who are casting ballots for preferred candidates of their choice has increased.

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The Committee finds that increased participation levels are directly attributable to the effectiveness of the VRA's temporary provisions. These provisions have protected minority voters, especially over the last 25 years and have helped minority citizens to: (1) register to vote unchallenged; (2) cast ballots unhindered; and (3) cast meaningful votes. The Committee finds this to be a significant achievement for citizens who historically have been prevented from effectively exercising the right to vote.

In particular, the Committee finds 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. Section 5, which requires jurisdictions covered by the temporary provisions to preclear all voting changes before they may be enforced, ensures that such voting changes do not discriminate against minority voters, and has been an effective shield against new efforts employed by covered jurisdictions. The Department of Justice reported that roughly between 4,000 and 6,000 submissions have been received annually from jurisdictions covered by the VRA. Since 1982, the Department objected to more than 700 voting changes that have been determined to be discriminatory, preventing such changes from being enforced by covered jurisdictions. 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 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.

Section 5's effectiveness in addressing efforts to discriminate was reflected in the various experiences that were reported to the Committee. For example, in the case of *Dillard v. City of Foley, Alabama* (M.D. Ala. 1995, 1998), Section 5 was instrumental on two separate occasions (in 1989 and 1993) in preventing the City of Foley from annexing white areas around the City to the detriment of primarily African-American areas, such as Mills Quarter and Beulah Heights, which were also seeking annexation by the City. As part of its effort to enforce Section 5's requirements, the ACLU compelled the City to adopt a non-discriminatory annexation policy, which resulted in annexation of Mills Quarter and Beulah Heights. . . .

Other examples were reported to the Committee. In 1990, the City of Monroe, Louisiana attempted to annex white suburban wards to its city court jurisdiction. The Department of Justice noted in its objection to the City's changes that the wards in question had been eligible for annexation since 1970, but there had been no interest in annexing them until just after the first-ever African-American candidate ran for a seat on the Monroe city court. In 1991, the Concordia Parish Police Jury announced that it would reduce its size from nine seats to seven, with the intended consequence of eliminating one African-American district. The parish made the pretextual claim that the reduction was a cost-saving measure, but the Department of Justice noted in its objection that the parish had seen no need to save money until an influx of African-American residents transformed the district in question—originally drawn as a majority-white district—into a majority-African-American district.

As important as the number of objections that have been interposed to protect minority voters against discriminatory changes, is the number of voting changes that have never gone forward as a result of Section 5. The Committee finds that the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes. The National Commission on the Voting Rights Act reported that "the deterrent effect of Section 5 is substantial. Once officials in covered jurisdictions become aware of the logic of preclearance, they tend to understand that submitting discriminatory changes is a waste of taxpayer time and money and interferes with their own timetables, because the chances are good that an objection will result."

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The progress made by minority voters and the covered jurisdictions that have terminated their coverage over the last 25 years reflects the effectiveness of the VRA's temporary provisions. The Committee finds, however, that instances of discrimination and efforts to discriminate against minority voters continue, thus justifying reauthorization of the VRA's temporary provisions. These efforts directly affect the ability of minority citizens to register to vote and cast meaningful ballots.

The Committee received testimony demonstrating continued registration and turnout disparities between African-American and white citizens in Virginia and South Carolina. . . .

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In addition to the continued disparities between the percentages of whites and African Americans registered to vote and casting ballots, the Committee finds that few African Americans have been elected to positions in State legislatures relative to the total African-American population in certain areas.

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The Committee also finds that the number of language minority officials elected to office has failed to keep pace with population growth among the minority communities. Latinos occupied a mere 0.9 percent of the total number of elected offices in the country, despite being the largest minority group in the country with approximately more than 15 million citizens of Hispanic origin residing in the United States. The number of Asian American elected officials also has not kept pace with the population growth experienced by the Asian American community. For example, the number of Asian-American elected officials has increased from 120 in 1978 to 346 in 2004. However, as of 2004, there were twelve million Asian Americans residing in the United States compared to the 1.2 million Asian Americans who resided in 1970. The candidacies of Asian Americans, Latinos, Native Americans, and Native Alaskans have rarely garnered the support of white voters, resulting in a disparity between the number of white elected officials and the number of language minority officials elected to office, including statewide offices.

The Committee finds it significant that the ability of racial and language minority citizens to elect their candidates of choice is affected by racially polarized voting. Racially polarized voting occurs when voting blocs within the minority and white communities cast ballots along racial lines and is the clearest and strongest evidence the Committee has before it of the continued resistance within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process. Testimony presented indicated that "the degree of racially polarized voting in the South is increasing, not decreasing . . . [and is] in certain ways re-creating the segregated system of the Old South, albeit a de facto system with minimal violence rather than the de jure system of late." Reports presented by national and State organizations further document that racially polarized voting shapes electoral competition in the covered jurisdictions. For minority voters, there is effectively an election ceiling. In elections characterized by racially polarized voting, minority voters alone are powerless to elect their candidates. Moreover, it is rare that white voters will cross over to elect minority preferred candidates. For example, in 2000, only 8 percent of African Americans were elected from majority white districts. Language minority citizens fared much worse. As of 2000, neither Hispanics nor Native Americans candidates have been elected to office from a majority white district. The only chance minority candidates have to be successful are in districts in which minority voters control the elections.

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Since 1982, the Department of Justice received thousands of proposed voting changes annually from covered jurisdictions. Of the submissions, the Department found more than 700 to be discriminatory against minority voters. The Committee finds that voting changes devised by covered jurisdictions resemble those techniques and methods used in 1965, 1970, 1975, and 1982 including: enacting discriminatory redistricting plans; switching offices from elected to appointed positions; relocating polling places; enacting discriminatory annexations and deannexations; setting numbered posts; and changing elections from single member districts to at large voting and implementing majority vote requirements. The Committee received testimony indicating that these changes were intentionally developed to keep minority voters and candidates from succeeding in the political process. For example, in Kilmichael, Mississippi,

> [D]uring the local elections of 2001, an unprecedented number of African Americans [sic] candidates were running for office. Three weeks before the election, however, the town's mayor and the all white five-member Board of Alderman canceled the election. In objecting to this change under Section 5, the Justice Department found that the cancellation occurred after Census data revealed that African Americans had become a majority in the town. The town did not reschedule the election, and DOJ forced it to hold one in 2003 where upon Kilmichael elected its first African American mayor, along with three African American aldermen.

In addition to the increased number of objections interposed under Section 5, the continued need for additional information related to Section 5 submissions, and the increased number of submissions withdrawn from consideration under Section 5, the Committee finds that covered jurisdictions continue to resist submitting voting changes for preclearance, as required by Section 5. In fact, the Committee received testimony from the National Commission on the Voting Rights Act that the Department of Justice has no "systematic way to monitor all such jurisdictions to ensure that all changes are submitted for preclearance." As a result, many defiant covered jurisdictions and State and local officials continue to enact and enforce changes to voting procedures without the Federal Government's knowledge. The Committee finds that Section 5's enforcement authority played a critical role, enabling the Department of Justice and private citizens to monitor covered jurisdictions to the fullest extent possible to ensure full compliance was achieved.

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The Committee finds that Latinos, Asian Americans, Alaskan Natives, and Native Americans continue to suffer from discrimination in voting. According to some in California, Latinos continue to be victims of discriminatory tactics employed at the local level, such as on school boards and county

governments, where fragmenting and packing tactics continue to prevent Hispanics from electing candidates of their choice. The Committee received testimony disclosing efforts on the part of officials in the City of Seguin, Texas, to prevent Latinos from gaining a majority of seats on the city council by attempting to dismantle a fifth Latino district in its new redistricting plan. Similar testimony was received from language minority citizens in New York, Alaska, Arizona, California, Florida, and South Dakota, all of whom identified similar tactics used to keep Native Alaskans, Native Americans, Asian Americans and Latinos from registering and casting effective ballots. These tactics include providing ineffective language assistance and fragmenting and packing Hispanic and Asian Americans.

The Committee also received testimony revealing efforts by officials in the covered States of Alabama and Georgia to discriminate against language minority citizens. For example, local Officials in Long County, Georgia attempted to disenfranchise Hispanic voters by challenging their citizenship status solely on the basis of surname. In Alabama, Asian American voters attempting to vote in an election with an Asian American candidate were harassed and threatened by supporters of an opposing candidate in polling locations in Bayou La Batre. It was only with the assistance of the Department of Justice that Asian American and Hispanic voters in these jurisdictions were able to cast ballots without barriers.

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The Committee's findings of continued efforts to discriminate against minority citizens in voting demonstrate that despite substantial improvements, there is a demonstrated and continuing need to reauthorize the temporary provisions. In reauthorizing the temporary provisions for an additional 25 years, the Committee is aware that it is again acting under its broadest power—to remedy continued discrimination. However, the record reveals that without the remedies available from the VRA's temporary provisions, the injury to minority citizens and their right to the electoral franchise will be significant.

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. . . We hold that the sections of the Act which are properly before us are an appropriate means for carrying out Congress' constitutional responsibilities and are consonant with all other provisions of the Constitution.

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. . . The record before the Committee reveals that extending the VRA's temporary provisions is necessary to protect racial and language minority citizens located in covered jurisdictions from discrimination. As a result, the gains achieved by minority voters over the last 40 years are vulnerable without the protections afforded by the temporary provisions. It is in light of this reality that the Committee concludes that the temporary provisions of the VRA must be reauthorized, including Section 4(a)(8) and the provisions it triggers, as well as Section 203, for an additional 25 years.

Forty years has been an insufficient amount of time to address the century during which racial minorities were denied the full rights of citizenship. While substantial strides have been made toward racial equality, the attitudes and actions of some States and political subdivisions continue to fall short. Progress has been made by minority voters, some of which has been significant. However, the Committee's record demonstrates the importance of reauthorizing the VRA's vital provisions.

The Committee believes that if not for the temporary provisions of the VRA the gains made by minorities would not have been made. But as Congress found in 1982, the gains are fragile. The Committee is not willing to jeopardize 40 years of progress made by minority citizens by allowing the temporary provisions to expire, especially in the face of the evidence of discrimination compiled in the record.

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Indeed, the Committee believes that a failure to reauthorize the temporary provisions, given the record established, would leave minority citizens with the inadequate remedy of a Section 2 action. The Committee knows from history that case-by-case enforcement alone is not enough to combat the efforts of certain States and jurisdictions to discriminate against minority citizens in the electoral process. Moreover, the Committee finds that Section 2 would be ineffective to protect the rights of minority voters, especially in light of the increased activity under Sections 5 and 8 over the last 25 years. It is against this

backdrop that the Committee finds it necessary to extend the temporary provisions for an additional 25 years.

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In addition to updating the temporary provisions of the VRA, the Committee found that a series of Supreme Court decisions, beginning in 2000, have significantly weakened Section 5's effectiveness as a tool to protect minority voters. These developments sharply conflict with the intent of Congress. Beginning with the case *Reno v. Bossier Parish (II),* which was followed 3 years later by the decision in *Georgia v. Ashcroft,* the Supreme Court has interpreted Section 5 to allow preclearance of voting changes that would have previously drawn objections. As a matter of statutory construction, the Committee finds that Congress did not intend for the burden of proof to be placed on covered jurisdictions to be weakened in the way that the Supreme Court rulings in these cases permit. The decisions have left covered jurisdictions with discretion under Section 5 to enact and enforce voting changes that may harm minority voters and limit their ability to elect their preferred candidates of choice in a manner never intended by Congress. To ensure that Section 5 remains the vital, prophylactic tool that Congress intends, certain amendments are necessary to: (1) restore the original purpose to Section 5 with respect to intentionally discriminatory voting changes; and (2) clarify the types of conduct that Section 5 was intended to prevent, including those techniques that diminish the ability of the minority group to elect their preferred candidates of choice.

Section 5 has been and continues to be one of the VRA's most effective tools. Its strength lies, in part, in its burden-shifting remedy that requires covered jurisdictions to prove to the Federal Government or United States District Court for the District of Columbia that a voting change "does not have the purpose and will not have the effect of denying or abridging the right to vote" before such voting change can be enforced. The two-pronged shield afforded by Section 5 has enabled the Federal Government and court to stay one step ahead of covered jurisdictions that have a documented history of denying minorities the protections guaranteed by the Constitution. By requiring covered jurisdictions to establish that neither a discriminatory purpose nor effect exists with respect to a proposed voting change, Section 5 has prevented those voting changes that have a measurable negative impact on minorities, as well as voting changes that are enacted with a racial animus, from being enforced. The impact of Section 5's two-pronged requirement is reflected in the gains minorities have achieved and sustained, despite the efforts of State and local Officials determined to see otherwise.

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Congress intended Section 5 to impinge on traditional State functions in certain States and jurisdictions, for a reason. Some of the States and jurisdictions covered by the temporary provisions of the VRA have a long and documented history of discriminating against certain citizens and preventing their exercise of the most fundamental right in our system of government. . . .

Through the "purpose" requirement, Congress sought to prevent covered jurisdictions from enacting and enforcing voting changes made with a clear racial animus, regardless of the measurable impact of such discriminatory changes.

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Since *Reno v. Bossier II* (2000), the Committee finds that less than 1 percent of the objections that have been interposed have been on the basis of the purpose prong alone, supporting the perception that only an "incompetent retrogressor" can be caught and denied preclearance under Section 5. Moreover, the Committee heard testimony that if the *Bossier II* standard is left unaddressed "all of the places where [we] did not have Black representation where the number of seats, members on the commission or county school board or city council were increased, we would stand to lose representation, all of those governing bodies, if the *Bossier II* standard is applied." . . .

Thus, by clarifying that any voting change motivated bany discriminatory purpose is prohibited under Section 5, the Committee seeks to ensure that the "purpose" prong remains a vital element to ensuring that Section 5 remains effective.

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. . .The preclearance provisions in Section 5 were and are intended to put the burden of proof on covered jurisdictions to demonstrate they are not enacting voting changes that diminish the ability of

minorities to elect their preferred candidates of choice. Directly contrary to that proposition, *Georgia v. Ashcroft* appears to hold that courts should defer to the political decisions of States rather than the genuine choice of minority voters regarding who is or is not their candidate of choice.

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. . . [T]he Committee heard testimony confirming that minority-preferred elected officials fight for issues that are of importance to minority communities, and received evidence that "[o]fficials elected because of the equal voting opportunities afforded minority citizens were more attuned to the needs of the minority communities." These "tangible benefits were the direct result of the success of the Voting Rights Act." The Committee finds these results to be the types of successes that Congress sought to achieve through Section 5. These outcomes are achieved most often when a geographically compact minority group is able to control the outcome of an election, such that minority-preferred candidates are elected to office—on terms similar to other communities.

The Committee believes that the gains made by minority communities in districts represented by elected officials of the minority communities' choice would be jeopardized if the retrogression standard, as altered by the Supreme Court in *Georgia,* remains uncorrected by Congress. Indeed, the Committee was persuaded by testimony revealing that the current interpretation "permits a jurisdiction to choose among different theories of representation, introduces a substantial uncertainty for minority communities into a statute that was specifically intended to block persistent and shifting efforts to limit the effectiveness of minority political participation."

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Testimony presented to the Committee further suggested that, if left unaddressed, the *Georgia* standard threatens "the Nation's commitment to representative democracy. . . ." The Committee agrees. Section 5 was intended to prevent covered jurisdictions from making decisions that shut minority voters out of the political process. The Committee is convinced that Congress should not allow covered jurisdictions the discretion to make decisions on behalf of minority voters on the record it has before it. To leave the present retrogression standard enunciated in *Georgia* uncorrected would effectively diminish the significance of Section 5's remedy and would make Federal scrutiny a wasteful formality.

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