

INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

Work Session III Emerging Trends -
Tracking the Hot Button Issues

Title: What Local Government Counsel Needs to Know about the 2006 Amendments to the Voting Rights Act, H.R. 9: Bilingual Interpreters, Foreign Language Ballots & Strengthened Preclearance Requirements

September 18, 2006

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IMLA's 71st Annual Conference
In the Footsteps of Lewis and Clark — Exploring New Frontiers in Local Government Law
Hilton Portland & Executive Tower

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What Local Government Counsel Needs to Know about the 2006 Amendments to the Voting Rights Act, H.R. 9: Bilingual Interpreters, Foreign Language Ballots & Strengthened Preclearance Requirements

by
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"The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men."

-President Lyndon B. Johnson, August 6, 1965

Introduction

The Voting Rights Act of 1965 ("VRA") is to many the "crown jewel" of civil rights legislation, and perhaps is the most effective civil rights law ever enacted by Congress. Until recently, key provisions of the VRA[1], principally Section 5 (preclearance), 6-9 (federal observers) and 203 (accommodations for language minorities), were scheduled to expire in 2007 in the absence of reauthorization by Congress. Reauthorization came in July 2006, in the form the Voting Rights Act Reauthorization Amendments of 2006, formally entitled "Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of

2006," or H.R. 9, as it originated in the U.S. House of Representatives. After widespread lobbying efforts by various citizen groups and non profit organizations, President George Bush signed HR 9 into law on July 31, 2006, extending the above provisions for an additional 25 years.

I. A Brief Overview of the Voting Rights Act

In addition to outlawing poll taxes and literacy tests and providing for federal election observers, the Voting Rights Act of 1965 consists of three dominant provisions: Section 2,[1] Section 5,[2] and Section 203.[3] Section 2 is permanent, while Sections 5 and 203 are designed to either expire or be renewed periodically via Congressional approval.

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[1] *42 U.S.C. § 1973*(a) (2000). As amended in 1982, Section 2 reads: (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which 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 in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that 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 subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to ofªce in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

[2] *42 U.S.C. § 1973*(b) (2000). As amended in 1982, Section 5 reads: Whenever a [covered] State or political subdivision … shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting … such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. …

[3] *42 U.S.C. § 1973aa-1a* (2000). As amended in 1992, Section 203 reads: The Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afford them, resulting in high illiteracy and low voting participation. . . . Before August 6, 2007, no covered State or political subdivision shall provide voting materials only in the English language . . . if the Director of the Census determines, based on census data, that- (i)(I) more than five percent of the citizens of voting age of such State or political subdivision are members of a single language minority and are limited-English proficient; (II) more than 10,000 of the citizens of voting age of such political subdivision are members of a single language minority and are limited-English proficient; or (III) in the case of a political subdivision that contains all or any part of an Indian reservation, more than 5 percent of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are limited-English proficient; and (ii) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.

Section 2 is often referred to as the "sword" of the VRA because it provides a cause of action for the government, or any private individual or organization to challenge election laws and procedures anywhere in the United States that have the purpose or effect of discriminating against a group based on race.[4] As amended in 1982, it prohibits any election law 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."[5] In addition, the report coming out of the Senate Judiciary Committee following its evaluation of Section 2 named eight factors that courts were to use in evaluating whether, under the "totality of the circumstances," a challenged law or procedure violated Section 2.[6]

The Supreme Court issued its first major decision interpreting Section 2 as amended in 1982 via its 1986 opinion in *Thornburg v. Gingles.*[7] In *Gingles,* voters challenged a state-wide legislative districting plan in North Carolina that diluted the power of African American voters to elect their candidate of choice to the state legislature. Most significant was Brennan's opinion, which articulated a three-part test for evaluating the sufficiency of a redistricting claim under Section 2. In order to demonstrate a Section 2 claim under *Gingles*, the minority group challenging the apportionment plan must demonstrate that it is "sufficiently large and geographically compact to constitute a majority in a single-member district" that it is "politically cohesive;" and that "the white majority votes sufficiently as a bloc to enable it to usually to defeat the minority's preferred candidate."[8]

Section 5 of the VRA was designed as "shield," applicable only to prevent areas with a documented history of discriminating against voters of color from enacting further discriminatory procedures or apportionment plans. "Covered" areas, which currently include Alabama, Georgia, Mississippi, Texas, Arizona, and parts of Michigan, New York, and California,[9] are required to submit all election law or procedural changes to the federal government for approval or "preclearance" prior to or immediately following their enactment. In determining whether to approve the submitted changes, either the Civil Rights Division of the United States Justice

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[4] For a comprehensive examination of all Section 2 cases since 1982 see Ellen Katz, "Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982 (Final Report of the Voting Rights Initiative, Univeristy of Michigan Law School)." *Mich. J. L. Reform*. Forthcoming.

[5] 42 U.S.C. § 1973(a). Prior to 1982 Section 2 read, "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437.

[6] The 8 factors are enumerated in S. Rep. No. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177. Taken from the Supreme Court's opinion in *White v. Regester*, 412 U.S. 755 (1973), the factors require courts to evaluate, among other things, the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; the extent to which voting in the elections of the state or political subdivision is racially polarized; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

[7] 478 US 30 (1986).

[8] Id. at 50-51.

[9] *42 U.S.C. § 1973b*(b) (2000).

Department or the United States District Court for the District of Columbia evaluates whether the changes will have a "retrogressive" effect on minority electoral power within the jurisdiction.[10]

Since its enactment in 1965, Section 5 has been renewed on four occasions, most recently in 2006. In the nearly 25 years between the 1982 and 2006 reauthorizations, the U.S. Supreme Court issued multiple opinions that arguably weakened the Section 5 preclearance standard.[11] Famously, in the 1993 decision in *Shaw v. Reno*,[12] the Court held that an apportionment plan that used race as the predominant factor in redistricting decisions – as was often the scenario in jurisdictions covered by Section 5 – would violate the Equal Protection Clause of the Fourteenth Amendment.[13] In 1997 and 1999, the Supreme Court issues two opinions in the case of *Reno v. Bossier Parish School Board*[14] that dramatically altered the court's interpretation of which election law changes violated Section 5. In 1997, the Court held that preclearance may not be denied solely on the basis of a finding by the Justice Department that the election change would violate Section 2 of the VRA. Two years later, when the case returned to the court after the initial remand was appealed, the Court issued an opinion declaring that a redistricting plan that was enacted with a discriminatory purpose would *not* violate Section 5 so long as the plan was neither retrogressive in purpose or effect. This interpretation meant that a proposed voting change that, despite evidence that it was enacted with the intent to discriminate against voters of color, must still be precleared by the federal government so long as it improves or maintain the status quo with respect to the electoral influence of voters of color in the jurisdiction.

A few years after this blockbuster pair of opinions the court issued an additional interpretation of Section 5 in the case of *Georgia v. Ashcroft*.[15] The Court in *Georgia* held that Section 5 did not prohibit covered jurisdictions from reducing the proportions of a minority voting age population in some majority-minority districts "even if it means that in some of those districts, minority voters will face a somewhat reduced opportunity to elect a candidate of their

[10] This retrogression standard originated in a 1976 Supreme Court case, *Beer v. United States*, 425 U.S. 130 (1976), in which the Court evaluated a New Orleans city council districting plan that created one district (out of seven total) where African-Americans were numerically able to elect their candidate of choice in a city where African Americans comprised over half of the voting age population. The Court upheld the plan as non-retrogressive and permissible under Section 5 because it did not reduce the previous (though nil) ability of African-Americans to elect their candidate of choice to the New Orleans City Council. The Court's holding in *Beer* forms the basis for the modern-day preclearance test under Section 5.

[11] Benson, Preparing for 2007 at 133.

[12] 509 U.S. 630 (1993).

[13] See also *Miller v. Johnson*, 515 U.S. 900 (1995) (rejecting a districting plan that was created to comply with Section 5, stating that one or more of the minority districts in it were created primarily with a racial motive). But see *Bush v. Vera*, 517 U.S. 952 (1996) (holding that "so long as [states] do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, [they] may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny.")

[14] *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997) and *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (1999).

[15] 123 S. Ct. 2498 (2003).

choice." Scholars predicted that such an interpretation of Section 5 increases dramatically the types of redistricting changes that are non-retrogressive and permissible under the provision.[16]

Congress reacted to the Supreme Court's opinions by passing a renewed VRA in 2006 that overturned *Georgia v. Ashcroft* and the second decision in *Reno v. Bossier Parish*.

The third primary provision of the VRA is Section 203,[17] which requires localities and states with high concentrations of language minority citizens to provide election materials in the native languages of those citizens.[18] The provision, which was also renewed via HR 9 in 2006, was added to the VRA in 1975 after Congress found that "language minorities have been effectively excluded from participation in the electoral process" as the result of "unequal educational opportunities" that resulted in "high illiteracy and low voting participation." [19] Congress meant the provision to remain in place so long as educational and other inequalities harmed the protected populations,[20] and created Section 203 with a "sunset" provision that requires Congress to reauthorize it periodically in accordance with a continuing need for its protections.[21]

Section 203 requires that a state or smaller political subdivision (such as a county or parish) provide language assistance if over 5 percent *or* more than 10,000 of the voting age citizens in the jurisdiction are members of one of the covered language minority groups *and* have

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[16] Pamela Karlan, *The Retrogression of Retrogression*, Elect. L. J. (2004).

[17] 42 U.S.C. 1973 aa-1a (2000).

[18] Id. in the case of a political subdivision that contains all or any part of an Indian reservation, more than 5 percent of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are limited-English proficient; and (ii) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.

[19] Voting Rights Act Amendments of 1975, Pub. L. No. 94-73 (1975).

[20] S. Rep. No. 295, 94th Cong., 1st Sess. 34 (1975) (explaining that the language protections of Section 203 would be temporary as they were as "necessary to fill that hiatus until genuinely equal educational opportunities are afforded language minorities" through more permanent federal protections for bilingual education).

[21] In addition to Section 203, Section 4(f)4, codified as 42 U.S.C. § 1973b(f)(4) (2000), provides permanent protections for certain language minorities. Section 4(f)(4) states,

> Whenever any State or political subdivision . . . provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominate language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

42 U.S.C. § 1973b(f)(4) (2000). The language minority requirements of Section 4(f)(4) and Section 203(c) are essentially identical; however, unlike Section 4(f)(4), Section 203(c) provides for a changing determination of coverage based on census data whereas protections provided by Section 4(f)(4) are limited language minorities present and recorded prior to the November 1, 1972, election. *See* 28 C.F.R. § 55.8 (discussing the relationship between Sections 4(f)(4) and 203(c)); 28 C.F.R. § 55.5 (discussing the coverage formula pursuant to Section 4(f)(4)).

an illiteracy rate higher than the national average.[22] For purposes of Section 203, illiteracy is measured by the rate of the population over the age of 25 that has failed to complete the fifth grade.[23] Currently, under Section 203(e), the provision only applies to Latinos, Asian American, Native Alaskan, and American Indian citizens. [24] As interpreted by the U.S. Census Bureau, the protections are afforded to voters of the following descents: Hispanic, Chinese, Filipino, Japanese, Korean, Vietnamese, American Indian, and Native Alaskan.[25]

Approximately 505 political subdivisions are now covered by one of both of the language assistance triggers, and in one, Los Angeles County, assistance must be provided in six languages, Spanish, Chinese, Filipino, Japanese, Korean and Vietnamese.[2] Once it is determined that a jurisdiction is covered by Section 203's language assistance provisions, all of the "voting materials" it provides in English have to be provided in the language of all groups that trigger coverage, including ballots, voter registration materials and all election forms, polling place activities and materials, instructions, publicity, assistance and other materials relating to the electoral process.[3] For members of Alaskan Native and American Indian groups whose languages historically have been unwritten, oral instructions, assistance and other information in the covered language is required to be available at every stage of the electoral process.[4] The responsibility of the covered jurisdiction to provide effective assistance to members of the covered minority language groups exists and must be carried out at all stages of the electoral process for any type of election, whether primary, general or special, including not only elections for officials, but bond issues, referenda and constitutional amendments, as well as federal, state and local elections, school district, water district and other special district elections.[5] Of the 505 covered jurisdictions, Spanish is the predominant language triggering coverage, with 425 or about 85% being required to provide Spanish language assistance.[6]

One study presented by Dr. James Tucker to the Congressional leaders in 2006 sought to document the costs associated with language materials and assistance under Section 203. The study also sought to determine public election officials' practices in providing oral and written language assistance. Based on a survey of 411 jurisdictions in 33 states, the study yielded several important findings:

- First, almost 62% reported they did not use bilingual coordinators to act as a liaison between elections offices and voters in the covered language group.

[22] See full text of Section 203, codified as 42 U.S.C. §1973 aa-1a (2000), note 6, *supra*.
[23] 42 U.S.C. § 1973 aa-1a(B)(3)(e) (2000) ("the term "illiteracy" means the failure to complete the 5th primary grade.") see also, 28 CFR §55.6(b) (2000) ("illiteracy means failure to complete the fifth primary grade.").
[24] 42 U.S.C. §1972aa-1a(e) (2000) ("For purposes of this section, the term 'language minorities' or 'language minority group' means persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.").
[25] Id. Two years after the completion of each decennial census, the Director of the Bureau of the Census publishes a revised list of areas covered under Section 203. For the most recent list of covered areas, see Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48871, 48871-77 (July 26, 2002).

- Second, over 2/3 reported they did not confirm the language abilities of part-time election workers who claimed to speak one or more covered languages, nor did they provide any training on assistance in the covered languages, nor did they consult with community organizations about providing language assistance.
- Third, almost 60% reporting oral language assistance expenses incurred no extra costs attributable to that assistance, and 90% indicated those expenses averages 1.5% of their total election costs.
- Fourth, over 70% support reauthorization of the VRA's language assistance provisions, regardless of whether they are covered by Section 5 or not.
- Fifth, many responding jurisdictions minimize the costs of providing language assistance to voters by targeting the assistance to only those areas that need it.[7]

II. The 2006 Effort to Reauthorize the VRA

August 6, 2005 marked the 40th Anniversary of the Voting Rights Act of 1965. The Act, signed into law by President Lyndon B. Johnson, "opened up the political process to those minorities that had previously been limited in their ability to elect representative at the state and local levels."[8] Leading up to the 40th Anniversary date, and in anticipation of the looming 2007 expiration date, a massive effort had begun by nongovernmental organizations, interested citizens and special interest groups to renew and restore the expiring provisions. Specifically, this well organized coalition sought to accomplish three objectives:

(1) generate public awareness and support for reauthorization;
(2) document discrimination in the electoral process and the effectiveness of the temporary provisions in addressing discrimination and demonstrate the continued need for Federal oversight in covered jurisdictions for another 25 years; and
(3) develop the legal justification for legislative overturning of the afore mentioned decisions in *Bossier Parish v. Reno* and *Georgia v. Ashcroft*.

The coalition sought to significantly strengthen the record before the House Judiciary Committee and the Senate Judiciary Committee by presenting evidence of ongoing discrimination in the electoral process and the continued need for Federal oversight in covered jurisdictions over the next 25 years.

The Lawyers Committee for Civil Rights Under Law ("Lawyers Committee"), along with the NAACP Legal Defense Fund and the Mexican American Legal Defense Fund ("MALDEF") oversaw the creation of the non-partisan National Commission on the Voting Rights Act, comprised of a coalition of academics, politicians, advocates and leaders within the civil rights community. The National Commission, chaired by former Assistant Attorney General Bill Lann Lee, conducted hearings across the nation throughout 2005 in an effort to accumulate information relating to voting rights for inclusion in a detailed report that would document the existence and pervasiveness of voter discrimination since 1982, when the VRA last underwent a comprehensive reauthorization.[9]

On February 21, 2006, the Commission issued its report on discrimination in voting, *Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005*,[10] supplemented by *Highlights from the Hearings of the National Commission on the Voting Rights Act, 2005.* In his testimony before the House Subcommittee on the Constitution regarding VRA reauthorization, Commission Chairman Bill Lann Lee stated:

> The voting discrimination Congress intended to eliminate by enacting and reauthorizing the Voting Rights Act has held steady. The temporary provisions of the Act, in fact, have prevented and remedied such discrimination. They continue to do so to this day.[11]

In October 2005, the first of ten hearings was held by the House Judiciary Committee, with particular focus on those "temporary" provisions that were set to expire in 2007. The hearing records comprised over 8000 pages of oral and written testimony from over 40 witnesses, including supporters and opponents of reauthorization.[12] In addition, the Chairman of the House Judiciary Committee, Representative James Sensenbrenner (R-Wis.), included the National Commission's report, *Protecting Minority Voters*, in the Congressional Record. The upshot of this massive effort by Congress and supporters of the reauthorization effort was a thorough, detailed and solid legislative record to justify reauthorization and extension of key provisions of the Voting Rights Act for another 25 years.

Cracks in the Seams of a Unified Effort?

Numerous questions have been raised in previous reauthorization debates in 1970, 1972 and 1982 about the VRA's utility and feasibility. As VRA Reauthorization efforts entered the halls of Congress in mid-2006, civil rights organizations, NGOs, special interest groups and elected representatives moved forward with efforts to highlight key aspects of the debate over renewal of the expiring provisions of the Act. Pointed questions and dissenting voices grew in number and volume, and began to cast a lengthening shadow.[13] What began as a unified effort with a single-minded purpose to pass reauthorization legislation before the summer recess was about to be cross-examined by a well-prepared, quietly organization opposition. On April 7, 2006, The Center for the Study of Race, Ethnicity & Gender in the Social Sciences held a conference at the John Hope Franklin Center on the campus of Duke University. The conference was appropriately entitled "*W(h)ither the Voting Rights Act? Agreements and Contestations in the Debate over its Renewal*." Participants included scholars and litigators actively involved in voting rights and the VRA. Open to anyone interested in the various "issues and controversies surrounding the protection of the right to vote for racial minorities," the conference provided a forum for "discussions that would presage the debates that we will see emerge nationally, highlighting where agreement might exist, and identifying which issues will be the most contentious."

> For example, now that everyone has the right to vote, is the VRA still necessary? Is Section 5 Preclearance still needed? If so, what changes, if any, should be made. Should some jurisdictions be released from Section 5 Preclearance? Is it possible that the expiring

> sections will not be reauthorized? If this were to happen, what would this mean for democracy in general and citizens-of-color in particular? The debate on the reauthorization will be no less contentious than it has been in the past. This conference will explore some of the issues that will most likely generate the most debate. Participants are nationally known scholars and litigators who are actively involved in voting rights and the Voting Rights Act. Discussions at this conference might presage the debates that we will see emerge nationally, highlighting where agreement might exist, and identifying which issues will be the most contentious.[14]

One of the panels, "Haven't They Already Overcome?," dealt with contributions the VRA had made to minority group participation and representation in the political process and the potential consequences of weakened voting rights protections for American democracy. Panelists considered whether the 1965 voting rights legislation that emerged at a time when our society had a de facto caste-like system was still necessary today, with record numbers of minority elected officials, and full integration o f racial and ethnic minorities into all walks of political life.

House Action On H.R. 9[15]

On May 2, 2006, Democrats and Republicans from the House and Senate joined together to announce support for legislation to reauthorize the Voting Rights Act for an additional 25 years. Appropriately, the full name of the legislation bore the names of three women whose contributions to the Civil Rights Movement were legendary Fannie Lou Hamer, Rosa Parks, and Coretta Scott King.

The House Judiciary Committee focused its efforts on establishing a comprehensive record that strongly supported reauthorization of the VRA. Such support is very important to ensure that the resulting legislative action can withstand an almost certain constitutional challenge. Similar legislative records were examined by the Supreme Court when it upheld the use of the extraordinary measures embodied in the temporary provisions in 1965 and again in 1980.

Various controversies emerged during the House action. One such controversy involved the issue of Section 5, its perceived "promotion" of race-based districting, and other concerns regarding its constitutionality. In a June 12, 2006 editorial entitled "Incumbent Rights Act," the Wall Street Journal gave a blunt account of "why Congress loves racial gerrymanders." The debate over updating the VRA, the editorial said, would surely sidestep what was really at stake: the power of politicians to pick their votes through gerrymandering. Noting the political reality that an embattled GOP Congress had no interest in allowing Democrats to use opposition to the VRA against Republican candidates in November 2006, the editorial charged that Section 5, the preclearance provision, had accomplished its goals and had served the nation well, measured in terms of voter registration, participation rates and minority candidate success, and that this provision of the VRA was now being abused by political incumbents. The WSJ editorial concluded that this law - intended to protect minority voting rights - had been transformed into a

tool for creating safe seats for Congressmen, "and all the problems that come with entrenched political incumbents who are primarily concerned with the demands of their special interest patrons." Nonetheless, the editorial observed that everyone wanted this off the table asap, including the White House, notwithstanding the fact that some Republicans were "taking comfort" in the belief that Section 5 may ultimately be declared unconstitutional, and despite the fact that reauthorization would continue a societal attitude in which race matters, contrary to the Supreme Court's statement in *Georgia v. Ashcroft* that "the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters." Noting that reauthorization would do the opposite, the editorial concluded:

> Unless Republican backbones stiffen, expect the expiring penalty provisions of the Voting Rights Act to be renewed this year for another quarter-century, and expect it to happen with huge bipartisan majorities pretending that this draconian infringement of federalist principles is still necessary in 2006.

The Battle over Section 203

Some of the loudest challenges to the VRA reauthorization emerged surrounding Section 203. Linda Chavez, President of One Nation Indivisible, testified before both the House and Senate Judiciary Committees concerning the bilingual ballot provisions of the Voting Rights Act. Arguing that Section 203 was “unwise legislation, because it encourages balkanization, facilitates voter fraud, and wastes the taxpayers' money, Chavez pointed out various policy and potential constitutionality problems with Section 203:

> First, it encourages the balkanization of our country. Second, it facilitates voter fraud. And, third, it wastes the taxpayers' money. In addition to these policy problems, in my view Section 203 is unconstitutional because, although Congress asserts it has enacted this law pursuant to its enforcement authority under the Fourteenth and Fifteenth Amendments, in fact this statute actually exceeds that authority.

With regard to Section 203's potential to balkanize the nation, Chavez emphasized the fact that the United States is and always has been a multiethnic, multiracial nation, and that this was a source of national pride and strength. Our nation's motto, E pluribus unum, means that while each of us comes from all over the globe, we are nonetheless united as Americans and hold in common the same democratic values, share the American dream of success through hard work, and value our freedoms, political equality and ability to communicate with each another. Our political order and our economic health demand it. Contrary to these principles, however, Chavez pointed out that the federal government should not discourage people from mastering English, nor should it send any signals that mastering English, our national language, is unimportant. She continued:

> Doing so does recent immigrants no favor, since true participation in American democracy requires knowing English. Inevitably, however, that is what the federal government does when it demands that ballots be printed in foreign languages. It also devalues citizenship

> for those who have mastered English as part of the naturalization process. ...[B]ilingual ballots "impose an unacceptable cost by degrading the very concept of the citizen to that of someone lost in a country whose public discourse is incomprehensible to him." (Internal citations omitted)

Chavez then expressed concerns that Section 203 facilitates voter fraud, noting that most Americans are baffled by the bilingual ballot law and know, with few exceptions, that only citizens can vote and that only those who speak English can become citizens. She questioned why there was a need for ballots to be printed in foreign languages, since as a practical matter, very few citizens need non-English ballots. She stated, however, that many noncitizens can use non-English ballots, and that the problem of noncitizens voting is real:

> The Justice Department has brought numerous criminal prosecutions regarding noncitizen voting in Florida, as documented in a recent official report. Criminal Division, Public Integrity Section, U.S. Department of Justice, Election Fraud Prosecution and Convictions, Ballot Access & Voting Integrity Initiative, October 2002 - September 2005. This problem has also been extensively reported on in the press. See Ishikawa Scott, "Illegal Voters," Honolulu Advertiser, Sept. 9, 2000; Dayton Kevin, "City Steps Up Search for Illegal Voters," Honolulu Advertiser, Sept. 9, 2000; Audrey Hudson, "Ineligible Voters May Have Cast a Number of Florida Ballots," Washington Times, Nov. 29, 2000 ("A sizable number of Florida votes may have been cast by ineligible felons, illegal immigrants and noncitizens, according to election observers. …This would not be the first time votes by illegal immigrants became an issue after Election Day. Former Republican Rep. Robert K. Dornan of California was defeated by Democrat Loretta Sanchez by 984 votes in the 1996 election. State officials found that at least 300 votes were cast illegally by noncitizens."); "14 Illegal Aliens Reportedly Voted," KSL NewsRadio 1160, Aug. 8, 2005; Associated Press, Untitled (first sentence: "Maricopa County Attorney Andrew Thomas has charged 10 legal residents who are not U.S. citizens with fraudulently registering to vote, and more residents are being investigated, he said."), Aug. 12, 2005; Joe Stinebaker, "Loophole Lets Foreigners Illegally Vote," Houston Chronicle, Jan. 17, 2005; Lisa Riley Roche & Deborah Bulkeley, "Senators Target License Abuses," Desert Morning News, Feb. 10, 2005; Teresa Borden, "Scheme To Get Noncitizens on Rolls Alleged," Atlanta Journal-Constitution, Oct. 28, 2004; Associated Press, "Harris County Cracking Down on Voting by Non-U.S. Citizens," Houston Chronicle, Jan. 16, 2005; John Fund's Political Diary, Wall Street Journal, Oct. 23, 2000 (voter fraud a growing problem since "47 states don't require any proof of U.S. residence for enrollment"); Doug Bandow, "Lopez Losing," American Spectator, Oct. 28, 2005 (Nativo Lopez's Hermandad Mexicana Nacional "registered 364 non-citizens to vote in the 1996 congressional race in which Democrat Loretta Sanchez defeated incumbent Republican Bob Dornan").

Chavez lastly argued that Section 203 wastes government resources, in that while there are few citizens who need ballots and other election materials printed for them in languages other than English, the requirement that such materials be printed is wasteful and tantamount to an unfunded mandate. In terms of dollars and cents, the funds for bilingual ballots would be much better spent on improving election equipment and fighting voter fraud:

> On the one hand, the costs of printing the additional materials is high. It is a classic, and substantial, unfunded mandate. For example, Los Angeles County had to spend over $1.1 million in 1996 to provide Spanish, Chinese, Vietnamese, Japanese, and Filipino assistance. .... Six years later, in 2002, it had to spend $3.3 million. ...There are 296 counties in 30 states now that are required to have such materials, and the number is growing rapidly. .... Frequently the cost of multilingual voter assistance is more than half of a jurisdiction's total election costs. ... If corners are cut, the likelihood of translation errors increases. [I]ndeed, the inevitability of some translation errors, no matter how much is spent, is another argument for why all voters need to master English.
>
> On the other hand, the use made of the additional materials is low. According to a 1986 General Accounting Office study, nearly half of the jurisdictions that provided estimates said no one--not a single person--used oral minority-language assistance, and more than half likewise said no one used their written minority-language assistance. Covered jurisdictions said that generally language assistance "was not needed" by a 10-1 margin, and an even larger majority said that providing assistance was either "very costly or a waste of money." General Accounting Office, Bilingual Voting Assistance: Costs of and Use During the November 1984 General Election, Sept. 1986, pages 25, 32, 39. According to Yuba County, California's registrar of voters: "In my 16 years on this job, I have received only one request for Spanish literature from any of my constituents." Yet in 1996 the county had to spend $30,000 on such materials for primary and general elections. The Unmaking of Americans, page 134. (internal citations omitted)

In her final remarks, Chavez suggested that Section 203, if reenacted, may and certainly should be declared unconstitutional. Since only purposeful discrimination, treating people differently based race or ethnicity, violates the Fourteenth and Fifteenth Amendments, and since Congress can use its enforcement authority to ban actions that have only a disparate impact only if those bans have a "congruence and proportionality" to the end of ensuring no disparate treatment, such a limitation is likely to be even stricter when the federal statute in question involves areas usually considered a matter of state authority. She noted that it was unlikely that the practice of printing ballots in English and not in foreign languages would violate the Fourteenth or Fifteenth Amendments. In other words, it would be unlikely that such practice could be shown to be rooted in a desire to deny people the right to vote because of race or ethnicity. On the contrary, Chavez argued, such a practice has legitimate roots: To avoid facilitating fraud, discourage balkanization, and conserve scarce state and local resources. It would thus be implausible for Congress to assert that, to prevent discrimination in voting, it possessed the authority to direct state and local government officials to print ballots in foreign languages.

Additional VRA Hurdles in the House

The VRA Reauthorization process was entering what many thought was the final lap in June 2006 when objections and dissenting voices began to surface. Although the skids had been greased, the legislative history had been packaged neatly, and the stage appeared set for final passage, the process suddenly ground to a halt. On June 21, 2006, in contrast to the amazing

show of unity and bipartisan support exhibited just one month before when H.R. 9 was introduced by Chairman Sensenbrenner, Southern Republican congressmen voiced objections aimed at Section 5 and Section 203, indefinitely delaying the reauthorization process. With the prospect of floor amendments, the realization began to set in that maybe this process was going to be harder than many expected. Most significantly, Representative Charlie Norwood (R-Ga.) proposed an amendment to repeal the coverage formula under Section 5, which would have drastically changed the coverage formula to ignore evidence of ongoing voting discrimination in the currently covered jurisdictions, and focus only on registration and turnout levels. Another amendment, proposed by Representative Steve King (R-Iowa) would have repealed Section 203 and cut off funding for language assistance provisions.

All proposed amendments, however, were rejected soundly on the House Floor. Ultimately, in an overwhelming victory for civil rights advocates, the U.S. House of Representatives voted 390-33, to approve H.R. 9, the "Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006. The legislation contained all the measures sought by voting rights advocates to strengthen the VRA by ensuring that the original intent of Congress was preserved in the renewed statute.

Senate Debate Over S. 2703

While H.R. 9 was nearing passage by the House of Representatives, the Senate Judiciary Committee began hearings on reauthorization of the Voting Rights Act. On April 27, 2006, House Judiciary Committee Chairman F. James Sensenbrenner Jr. (R-Wis.) and Ranking Member John Conyers Jr. (D-Mich.) gave their opening statements to their Senate counterparts. Sensenbrenner captured the sense of the overwhelming majority of the House of Representatives, whose support for this legislation in 2006 matched similar action by the House and Senate when the Voting Rights Act was first passed in 1965 at the height of the civil rights movement, when he stated:

> It has been 40 years since Congress first took steps to remedy our nation's sad history of discrimination in voting. The Committee's record demonstrates that, while progress has been made, vestiges of discrimination are still present in certain parts of the country. As this record also reveals, Congress is clearly justified under Section 2 of the 15th Amendment in using all remedies at its disposal to ensure that the most fundamental right of citizenship -- the right to vote -- is protected for all citizens.

In his remarks in favor of H.R. 9, Sensenbrenner noted that the House had examined the VRA's effectiveness with particular emphasis on provisions set to expire in August 2007, including Section 5, which prevents jurisdictions from changing voting rules without first obtaining pre-clearance from the federal government to ensure that the proposed changes would not have a discriminatory purpose or effect, as well as Section 203, which guarantees language assistance for voters, and Sections 6-9, which authorize federal examiners and observers to monitor elections.

Sensenbrenner also emphasized that the 1982 VRA amendments had been effective in further transforming local, state and federal election systems for the better, but that vestiges of discrimination are still present in certain parts of the country. He called for bipartisan support for this legislative extension of the Voting Rights Act, "to ensure that the right to vote continues to be protected to the full extent of Congress' constitutional authority," stating:

> Over the last 25 years, we've witnessed significant increases in minority voter registration and turnout. We've also seen substantial changes in the makeup of local, State, and Federal elected offices. Today, more and more minority citizens hold elected office in Congress, state legislatures, city councils, and school boards, and our nation has been enriched as a result.

Representative Conyers recognized that the country still has not reached the point where special provisions of the act should be allowed to lapse, noting that “efforts to suppress or dilute minority votes are still all too common.”

On May 3, 2006, Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) and Ranking Member Patrick J. Leahy (D-Vt.) noted the bipartisan and bicameral cooperation that helped pass and reauthorize the original Voting Rights Act and acknowledged their desire for continued cooperation. Specter and Leahy introduced S. 2703, and committee hearings were scheduled for May 9 and 10.

HR 9 was initially placed on a fast track, with bipartisan support and passage anticipated by the end of July. This legislative package encountered several well-orchestrated and significant efforts by Republican leaders in the House, discussed infra, to liberalize the Section 5 bailout process through an expedited declaratory judgment procedure, change key criteria for Section 5 preclearance, shorten the Section 5 reauthorization period to ten years, and eliminate bilingual ballots as one of the available accommodations under Section 203's protective provisions for language minorities. On the final floor vote in the House on July 13, 2006, H.R. 9 was enacted with overwhelming support by the House of Representatives, with a final vote of 390 to 33.

The final vote in the House came only after four Republican-sponsored amendments were defeated. The most significant challenge, rejected by a vote of 185-238, was a proposed amendment that would have eliminated the requirement for bilingual ballots and other assistance in jurisdictions with a significant number of voters with limited English language skills. Another proposed amendment, defeated by a vote of 96-319, would have narrowed significantly the number of state or local voting jurisdictions required to seek Section 5 preclearance from the Justice Department for changes in voting procedures. Yet another proposed amendment, defeated by a vote of 118-302, would have required the Justice Department to compile annual lists of jurisdictions subject to Section 5 preclearance requirements that had met the standards under current law for bailout from the status of covered jurisdictions. A fourth proposed amendment, defeated by vote of 134-288, would have extended the Voting Rights Act’s expiring provisions by 10 years rather than 25 years.[16]

Summary of VRA Reauthorization Act (VRARA)

The eight sections of the VRARA are summarized as follows:

Section 1 is the short title: "Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006."

Section 2 contains the Congressional purpose and findings supporting VRARA.

Section 3 sets forth changes relating to use of examiners and observers. It eliminates federal examiners because examiners have not been appointed to jurisdictions certified for coverage in over twenty years. Under current law, including Section 6 of the VRA, federal observers can only be assigned after a jurisdiction has been certified for federal examiner coverage. This section of VRARA amends the VRA by allowing the assignment of federal observers upon a finding that there is a reasonable belief that a violation of the 14th or 15th Amendment will occur, without having to first certify the use of federal examiners.

Section 4 provides for Congressional reconsideration of Section 4 of the original VRA. Section 4 of the VRA identifies by formula those jurisdictions subject to the federal oversight provisions contained in Sections 5 through 8 of the VRA and sets out the requirements covered jurisdictions must meet to "bailout". This section extends the expiring provisions contained in Sections 4 through 8 of the VRA for an additional 25 years. This section renders the Attorney General's decision to certify federal observers in a covered jurisdiction is non-reviewable.

Section 5 sets forth criteria for declaratory judgment and addresses two Supreme Court decisions that significantly narrowed Section 5's effectiveness. It rejects the Court's holding in Bossier Parish II[17], making clear that a voting rule change motivated by any discriminatory purpose cannot be precleared. It also rejects the Court's decision in *Georgia v. Ashcroft*[18], restoring the retrogression standard to one of protecting the minority community's ability to elect their preferred candidates of choice.

Section 6 provides for recovery of expert fees and other reasonable litigation costs. Section 14 of the VRA currently authorizes prevailing parties (other than the United States) to recover attorney fees. This section authorizes the prevailing party to also recover expert costs as part of the attorney fees.

Section 7 extends the translation requirements of Section 203 of the VRA for a period of twenty-five years.

Section 8 provides for use of the American Community Survey (ACS) Census Data, updating the coverage trigger for Section 203 of the VRA to reflect the fact that the ACS has replaced the long form and will be administered by the Census Bureau annually after 2010. Coverage

determinations under Section 203 will be made based on data compiled by the ACS on a rolling five-year average, as opposed to the ten-year average currently in place.

III. The ABA's policy on the VRA and Role in the Reauthorization

The American Bar Association has traditionally been an active and guiding voice in matters involving the electoral process and has long supported the Voting Rights Act, which has been instrumental in developing and maintaining a political community of interest and awareness in minority communities. The ABA's Standing Committee on Election Law, whose members represent a balance of political party, non-partisan and independent views, is charged with developing and examining ways to improve the electoral process. The Standing Committee also enjoys a liaison relationship with several interested Association entities, including the Sections of Administrative Law and Regulatory Practice, Business Law, and State and Local Government Law as well as the Government and Public Sector Lawyers, Law Student, and Young Lawyers Divisions. As changes in the electorate and the electoral process occur, the Standing Committee continues to make cogent responses to emerging electoral issues on behalf of the Association. In particular, the Standing Committee, on behalf of the ABA, has maintained a strong and historic interest in improving the level of participation and integrity of the electoral process.

As discussed above, Sections 5, 6-9, and 203, the expiring provisions of the Voting Rights Act of 1965, as amended through 1992, were some of the most important and effective in the Act. All three provisions would have expired in 2007 in the absence of Congressional action and reauthorization. Among other things, the Standing Committee recommended a twenty five year extension of all provisions.

The ABA's Recommendation differs from the VRARA specifically in that it (1) broadened the scope and application of Section 203, and (2) called for restoration of standards that prohibit voting changes that would have a dilutive effect or discriminatory purpose or effect resulting in the denial or abridgment of the right to vote on the basis on race, color or membership in a language minority group. That recommendation was approved by the ABA House of Delegates in June 2006, and the ABA's formal position was then transmitted to the Senate and House.

We will now give an overview of the ABA's position with respect to reauthorization of these critical sections of the Voting Rights Act, Sections 5 and 203.

Overview of the ABA Position on Section 5

In connection with the Act's reauthorization, the ABA recommendation urged that Congress amend Section 5 to clarify the proper legal standard for Section 5 preclearance, by restoring the "purpose" prong to the vote dilution standard as it existed prior to *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997)(*Bossier I*) and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000)(*Bossier II*).

As discussed above, in *Bossier I*, the U.S. Supreme Court found that the language of Section 5 did not expressly prohibit preclearance of any voting change enacted with the "discriminatory purpose" of denying or abridging the right to vote on account of race, color or membership in a language minority group. In *Bossier II*, the Court found that the language of Section 5 did not expressly prohibit preclearance of any voting change shown to have a dilutive effect in violation of Section 2. The recommended amendment to Section 5 would make it clear by express language that Section 5 preclearance can be withheld with respect to voting changes enacted with a discriminatory purpose.

The ABA recommended that Section 5 be amended to clarify Congress' intent that the legal standard for retrogression remains the same as in *Beer v. U.S.*, 425 U.S. 130 (1976). The retrogression standard as defined in *Beer* made it clear that Section 5 prohibited voting changes that had a "discriminatory effect" that included retrogression of the political strength of a minority community and the failure to preserve the ability of minority voters to elect candidates of choice, including the elimination of majority - minority districts. In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), a decision grounded on the Supreme Court's interpretation of the statutory language of Section 5, the Court held that preclearance cannot be withheld, and retrogression cannot be established, in the event a covered jurisdiction eliminates majority-minority districts by replacing those districts with "minority influence" districts. This amendment would make it clear that the Beer retrogression standard as it existed prior to *Georgia v. Ashcroft*, 539 U.S. 461 (2003), should apply to Section 5 proceedings, and that the elimination of majority-minority districts, including their replacement with minority influence districts, constitutes a reduction of the political strength of the minority community.

Overview of the ABA position on Section 203

The ABA policy also urged Congress to reauthorize and amend Section 203 of the Act to include the following changes in light of the growing need for minority language assistance for citizens since 1992.

(1) It first urged Congress to lower the numerical trigger for coverage from 10,000 voting age citizens per jurisdiction to 5,000. Section 203, which requires jurisdictions with significant levels of covered language minority citizens to provide translated election materials, currently applies to states with over 5% of a voting age citizen population coming from one covered language minority group, or jurisdictions with over 5% or 10,000 language minority voting age citizens from one of the covered language groups. Reducing the numerical trigger of 10,000 to 5,000 would, for example, extend the number of jurisdictions covered for any particular Asian language from 16 to 21, a net of five entirely new jurisdictions. More significantly, such a change ensures that Asian language minority groups that are currently not covered by the provision - Khmer (Cambodian), Thai, and Bangladeshi would be covered, while also extending coverage to Vietnamese-speaking citizens.

(2) It also recommended that Congress amend Section 203 to change the geographic unit of county to smaller political subdivisions such as cities or school districts of a significant size. See 42 U.S.C. § 1973aa-1a(b) (2004). The definition of "political subdivision" in the Voting Rights Act is "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. § 1973l(c)(2); 28 C.F.R. § 55.1 (2001). An amendment that includes cities and school districts in the definition of a political subdivision may bring in other language minority groups, particularly in the East Coast and Midwest, under Section 203 coverage. It would also ensure that cities and school districts or other political subdivisions that fall within a covered county (such as Los Angeles which has five language minority groups presently, but in which some cities or school districts or other political subdivisions may have no language minority groups) would not be required by law to provide translated materials under the county language minority groups coverage determination.

(3) It urged Congress to clarify that Section 203 applies to materials produced by government entities and not to citizen petitioners, until such petitions have qualified for placement on the ballot. This recommendation was specifically intended to clarify confusion over this issue created by the U.S. Court of Appeals for the Ninth Circuit in *Padilla v. Lever*, 429 F3d 910 (9th Cir. Nov. 23, 2005), en banc appeal granted on April 20, 2006, and a subsequent case, In *re County of Monterey Initiative Matter*, Case No. C 06-01407 JW, C 06-01730 JW (U.S. District Court, Northern District of California, San Jose Division). The *Padilla* case applied Section 203 to recall petitions and the Monterey district court extended the reasoning in *Padilla* to initiative petitions. Thus, citizens wishing to circulate recall and initiative petitions could be required to bear the costs of translation of a petition into as many as 5 or more languages in some jurisdictions, a significant burden on citizens and an arguable departure from the intent of Section 203 to require the state or local government to provide the necessary language accommodations. Congress was thus asked to clarify Section 203 to indicate that such accommodations are required only after any petitions have qualified for placement on the ballot.

(4) It asked Congress to amend Section 203 to require new coverage determinations every 5 years, instead of every 10 years, and to base such determinations on information collected via the American Community Survey (ACS). The Census Bureau has recently created the annually-distributed American Community Survey (ACS). The survey will be sent to approximately 2.5 percent of all U.S. households each year, and is being implemented to provide various organizations and government entities with timely and relevant census data. With data relating to language minority populations thus available on an annual basis, and with language minority populations currently one of the fastest growing segments of our citizenry, Section 203 determinations should be made every five years beginning with the institution of the ACS in the year 2010 to ensure coverage determinations are made in the most accurate and precise manner available.

(5) Finally, it urged Congress, in amending Section 203, to include a provision encouraging the study, perhaps by the Election Assistance Commission, regarding the extension

of language coverage to other language minorities not currently covered by the provision. As our country grows increasingly diverse, it is necessary that any law designed to protect and accommodate growing language minority populations that are not already covered. In particular, Arab and Haitian Americans receive no protections under Section 203, and preliminary research indicates there could be a need for such accommodations in both communities.

Position of Justice Department's Civil Rights Division on Section 203

In this regard, it is helpful to understand the position of the Department of Justice on the language assistance provisions of Section 203. In her statement[19] submitted May 4, 2006 to the Senate Subcommittee on the Constitution and Civil Rights, Rena J. Comisac, Principal Deputy Assistant Attorney General of the Civil Rights Division, United States Department of Justice, reminded the Senators that the President and the Attorney General had directed the Justice Department to "bring all of its resources to bear in enforcing the Voting Rights Act and preserving the integrity of our voting process" and that the President had called upon Congress to renew this landmark legislation. Comisac outlined the Civil Rights Division's vigorous enforcement of the Voting Rights Act's language minority requirements, describing it as "one of its primary missions," and said that these efforts had met with enormous success, but that the work was never complete and that the enforcement program showed the continuing need for the VRA's minority language provisions.

Comisac gave an overview of DOJ's enforcement of the minority language sections of the Voting Rights Act, in effect since 1975, sections 203 and 4(f), which mandate that covered jurisdictions provide.

> any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots" must provide such materials and information "in the language of the applicable minority group as well as in the English language." The determination of which States or political subdivisions are subject to the dictates of the Voting Rights Act's minority language requirements is based on a formula that uses Census Bureau data regarding ethnicity figures, English proficiency rates, and literacy rates. Section 203, for example, is triggered if, in a particular jurisdiction: (i) more than 5% of the citizen voting age population, or 10,000 citizens of voting age, are members of a single language minority, and (ii) the illiteracy rate of the citizens in the language minority group is higher than the national illiteracy rate.2 With respect to section 4(f)(4), a jurisdiction is subject to the translation obligations if: (i) less than 50% of the citizen voting age population was either registered to vote, or actually voted, in the November 1972 presidential election, (ii) the jurisdiction provided certain specified election materials exclusively in English in November 1972, and (iii) more than 5% of the citizen voting age population in November 1972, as determined by the then-latest available Census Bureau figures, were members of a single language minority. The only language minority groups covered under sections 4(f)(4) and 203 are American Indians, Asian Americans, Alaskan Natives, and citizens of Spanish heritage.4 Currently,

there are a total of 496 jurisdictions that are subject to the requirements of either section 203 or section 4(f)(4).

According to Comisac, the Civil Rights Division under the Bush Administration has seen to the most extensive enforcement of Sections 203 and 4(f)(4) in DOJ history. She described the initial notification given to the approximately 496 covered jurisdictions and guidance offered on how best to comply with the mandates of Section 203 and 4)f)(4):

> The Civil Rights Division not only mailed formal notice and detailed information on section 203 compliance to each of the 296 covered section 203 jurisdictions across the United States, but it also initiated face-to-face meetings with State and local election officials and minority community members in the 80 newly covered jurisdictions to explain the law, answer questions, and work to foster the implementation of effective legal compliance programs. That effort has been a continuing one. Division attorneys speak regularly before gatherings of state and local election officials, community and advocacy groups to explain the law, answer questions, and encourage voluntary compliance. In August 2004, the Assistant Attorney General mailed letters to the 496 jurisdictions covered by sections 203 and/or 4(f)(4) reminding them of their obligations to provide minority language assistance in the November 2004 general election, and offering them guidance on how to achieve compliance. The 2004 mailing to the section 4(f)(4) counties was the first blanket mailing to these political subdivisions since shortly after their original designations as covered jurisdictions in 1975. In addition, the Division's Voting Section has been systematically requesting voter registration lists and bilingual poll official assignment data from all covered jurisdictions, beginning with the largest in terms of population. This information is then reviewed in order to identify polling places with a large number of minority language voters, and to ascertain whether the polling places are served by a sufficient number of bilingual poll officials who can provide assistance to voters. We fully recognize that comparing voter registration lists to the Census Bureau's Spanish surname list, place of birth data, or other data are imperfect measures of the language need in a precinct. We use such data as a first cut to simply raise "red flags" for follow-up in our investigations. We also suggest it as a convenient starting point for local election officials in trying to determine how and where best to meet the needs of their voters. We encourage them to further refine their plans from this starting point based on their knowledge of their jurisdiction and on conversations with local minority community members. The registration lists, unlike Census Data, offer local officials information that is current, limited to actual voting citizens, and available in the units the officials themselves use every day – precincts. They are imperfect, but better starter tools than anything else generally available locally. The Division also is systematically looking at the full range of information provided by covered jurisdictions to voters in English –not just the ballot and election pamphlets themselves, but also newspaper notices required by state law, web site information, and other election materials – and determining whether: (i) the same information is being made available to each minority language community in an effective manner, and (ii) necessary translated materials, such as ballots and signage, are

actually provided in polling places. Not surprisingly, the extraordinary efforts undertaken by the Civil Rights Division in this area have borne abundant fruit. Indeed, since 2001, this Administration has filed more minority language cases under sections 4 and 203 than in the entire previous 26 years in which these provisions have been applicable. Each and every case has been successfully resolved with comprehensive relief for affected voters.

Comisac also noted that the pace of the Civil Rights Division's enforcement actions was accelerating and that more cases had been filed and resolved in 2005 under Section 203 that in any previous year, ahead of the previous record set the year before. In 2004 alone, moreover, the lawsuits filed provided comprehensive minority language programs to more citizens than all previous suits under Sections 203 and 4(f) combined. According to the data her office had compiled on litigation activity involving language assistance:

> The enforcement actions include cases in Florida, California, Massachusetts, New York, Pennsylvania, Texas, and Washington. Among these cases were the first suits ever filed under section 203 to protect Filipino and Vietnamese voters. The Civil Rights Division recognizes, of course, that states and local jurisdictions do not have unlimited budgets, and we have thus designed our enforcement strategy to minimize unnecessary costs for local election officials. Election officials are instead encouraged to identify the most effective and efficient channels of communication that are used by private enterprise, service providers, tribal governments, and others to get information effectively to the language minority community at low cost. In a similar vein, the Division encourages the use of fax and e-mail "information trees," whereby bilingual election notices are sent at virtually no cost to a wide array of businesses, unions, social and fraternal organizations, service providers, churches and other organizations with a request that these entities make announcements or otherwise disseminate the information to their membership's language minority voters. And the Division has incorporated "best practices" from around the country into its advice and negotiations to help jurisdictions recruit sufficient numbers of bilingual poll workers. The lawsuits discussed above have significantly narrowed gaps in electoral participation. In Yakima County, Washington, for example, Hispanic voter registration went up over 24% in less than six months after resolution of the Division's section 203 lawsuit. In San Diego County, California, Spanish and Filipino registration were up over 21%, and Vietnamese registration was up over 37%, within six months following the Division's enforcement action. The Division's minority language enforcement efforts likewise have made a tremendous difference in enhancing minority representation in the politically elected ranks. A section 203 lawsuit in Passaic, New Jersey, was so successful for Hispanic voters that a section 2 challenge to the at-large election system was subsequently withdrawn. A Memorandum of Agreement in Harris County, Texas, helped double Vietnamese voter turnout, and the first Vietnamese candidate in history was elected to the Texas legislature – defeating the incumbent chair of the appropriations committee by 16 votes out of over 40,000 cast.

IV. Voting Rights Litigation Before the New Supreme Court: Racial and Political Gerrymandering and the Case of LULAC v. Perry

Drawing lines to determine congressional districts has been described as "one of the most significant acts a State can perform to ensure citizen participation in republican self-governance." Political reality tells us something else. On June 28, 2006, the United States Supreme Court decided the long-awaited Texas Redistricting case, *LULAC v. Perry*[20]. Significantly, this was the first voting rights opinion issued by the Roberts Court, in the absence of Justice Sandra Day O'Conner and with the votes of new Justices Roberts and Alito. At center stage was the Republican-led Texas Legislature's mid-decade congressional redistricting plan that, inter alia, dismantled a Congressional district that had previously had an Hispanic.

The action of the state legislature was alleged to have deprived Hispanics of the ability to elect the candidate of their choice. With much political credit to then House Majority Speaker Tom DeLay, the redistricting plan replaced a judicially created plan crafted just a few years before[21] with one that shifted over 8 million Texans into new districts. As described by Justice Stevens in a stinging dissent, *32, 36, many of the districts in their new form were less compact, communities of interest were fragmented, and, motivated by a predominantly partisan purpose, a majority African-American district was cracked without offsetting the loss in black voters' ability to elect preferred candidates elsewhere." *49.

Plaintiffs alleged violations of equal protection and Sections 2 and 5 of the Voting Rights Act. A three-judge panel of the district court rejected plaintiffs' claims. On appeal, the Supreme Court affirmed in part, reversed in part, vacated in part, and remanded, for the most part upholding the plan in a 132-page decision consisting of six separate opinions. The assortment of plurality, concurring and dissenting opinions may not have achieved Chief Justice Roberts' goal of promoting clarity and guidance to the bench and bar by deciding cases on the narrowest possible ground, and indeed made that goal seem but a distant aspiration by the end of the term.[22]

The four key holdings of the case, patching together the fractured opinions in a *Bakke*-reminiscent process, were

(1) the Texas state legislature's decision to override a valid, court-drawn redistricting plan mid-decade was not an unconstitutional political gerrymander;
(2) sufficient evidence demonstrated minority cohesion and majority bloc voting among Latino voters in the redrawn congressional district 23;
(3) a newly-drawn congressional district in which Latinos were barely a majority did not offset the loss of a potential Latino opportunity district as result of redistricting; and
(4) under the totality of the circumstances, the redistricting plan for district 23 constituted vote dilution in violation of Section 2 of the Voting Rights Act.

Politics Driving the Redistricting Process?

The redistricting plan was attacked by plaintiffs as a partisan power grab. The media frenzy leading up to the crafting of the new plan included reports of a mid-air drama as a planeload of House Democrats fled Texas to prevent the formation of a quorum, allegedly under the watchful GPS-eye of Republican leaders. Following its plurality decision in *Vieth*[23] in 2003, and the evident inability to muster a majority that would hold partisan gerrymandering challenges were nonjusticiable political questions, however, the Supreme Court was still unable to determine a reliable measure of impermissible partisan effect in *LULAC v. Perry*. Its reaction in 2006 to cries of political gerrymandering was the judicial equivalent of a yawn. One example suffices. During oral argument, when counsel for one of the appellants complained that the only reason the redistricting plan as issue was passed "was to help one political party gain more seats in the Congress at the expense of the other," Justice Scalia replied: "Wow. That's a surprise."[24]

Rejiggering District Lines and Divvying Up By Race

Of greater interest to the Justices was District 23. This district was the focal point of charges that Republican legislators had voted to remove Hispanic Democrats from an Anglo Republican incumbent's district to protect him "from a constituency that was increasingly voting against him," *28, and from "the growing dissatisfaction of the cohesive and politically active Latino community in the district," *28, and to ensure his re-election under what was changed into a "barely" majority Hispanic district. That district was created along with an "offsetting [Latino] opportunity district" that was not geographically compact and grouped two clusters of Hispanic voters in different communities of interest hundreds of miles apart. This manipulation led Justice Kennedy to conclude that the creation of the new district did not remedy the vote dilution that was evident in the new District 23. He said:

> The practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals.

Chief Justice Roberts, writing in a separate opinion, echoed concern over the consequences of VRA-driven race-based districting and how such a race-drenched process has supplanted and indeed become the equivalent to minority electoral opportunity. Of such racial sorting, the Chief Justice objected to giving the courts any further role in "rejiggering the district lines under §2."

> I do not believe it is our role to make judgments about which mixes of minority voters should count for purposes of forming a majority in an electoral district, in the face of factual findings that the district is an effective majority-minority district. It's a sordid business, this divvying us up by race." *69

Voting Rights Litigation in the Next Decade

The Court's ruling in *LULAC v. Perry*, and the widely divergent views of the nine Justices expressed in six different opinions, give us a window of opportunity to evaluate how the Voting Rights Act and its pending reauthorization will fare during the next decade. They also give us some insight into how the Court - following the second decennial census scheduled for April 2010 - will interpret and apply concepts of geographical compactness, minority electoral opportunity, minority-influence districts, candidates of choice, communities of interest, and other key elements of the Act. These are but a few of those potential interpretations guided by precedent:

Geographical Compactness: The §2 compactness inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries, *23; the compactness inquiry under §2 embraces different considerations from the compactness inquiry in the equal protection context, the latter referring to the compactness of the contested district rather than the compactness of the minority population, with evaluation of the contours and relative smoothness of district lines to determine whether race was the predominant factor in drawing those lines, *23; a district is rendered noncompact for §2 purposes if it combines two communities of interest that are separated by enormous geographical distance and contain populations with disparate needs and interests, with differences in socioeconomic status, education, employment, health and other characteristics." *23-24. A district that reaches out to grab small and isolated minority communities is not reasonably compact, and a district that combines two far-flung segments of a racial group with disparate interests does not provide the opportunity that §2 requires or that the first *Gingles*[25] precondition of geographical compactness contemplates." *23; "The mathematical possibility of a racial bloc does not make a district compact." *24. Justices Souter and Ginsburg would hold that the *Gingles* precondition of compactness is satisfied by showing that minority voters in a reconstituted or putative district constitute a majority of those voting in the primary of the dominant party, defined as the party tending to win in the general election, *53.

Minority Electoral Opportunity: Ensuring minority groups an equal opportunity to participate in the political process and to elect representatives of their choice is critical to advancing the ultimate purposes of §2, *24; Justices Scalia, Thomas, Alito and Chief Justice Roberts rejected the claim that the state intended to minimize Latino voting power. They would sanction as constitutional the state legislature's political gerrymandering by removing voters from a district because they voted for Democrats and against the Republican incumbent, even if it so happened that the most loyal Democrats were black Democrats and the state was conscious of that fact. They would also uphold the state legislature's political and nonracial objective, finding no prohibited racial classification if district lines merely correlated with race because they were drawn on the basis of political affiliation, which corresponds with race. *71

Minority Influence Districts: It is possible to state a §2 claim for a racial group that makes up less than 50% of the population, provided it can be shown that voters in that group constitute a sufficiently large minority to elect their candidate of choice with the assistance of crossover votes,

*30; the mere fact that African-Americans have influence in a district does not suffice to state a §2 claim, *31; the opportunity to elect representatives of their choice requires more than the ability of minority voters to influence the outcome between some candidates, none of whom is their candidate of choice, *31; the presence of influence districts where minority voters may not be able to elect a candidate of choice but can play a substantial role in the electoral process relevant to a §5 analysis and a relevant consideration under §5 of the Voting Rights Act, but the failure to create an influence district does not run afoul of §2 , *31; Justices Souter and Ginsburg would hold that a §2 vote dilution claim can prevail without the possibility of a district percentage of minority voters above 50%, that replacing a majority-minority district with a coalition district with minority voters making up fewer than half constitutes impermissible retrogression under §5, that protection of the minority voting population in a coalition district should be protected much as a majority-minority bloc would be, *53

Candidates of Choice: The fact that African-Americans voted for an Anglo Democrat candidate in primary and general elections could signify he is their candidate of choice, *30; without a contested primary, such a fact, assuming the presence of racial bloc voting, could also be interpreted to show that Anglos and Latinos would vote in the Democratic primary in greater numbers if an African-American candidate of choice were to run, especially in an open primary system, *30; the fact that African-American voters preferred an Anglo Democrat to Republicans who opposed him does not make him their candidate of choice, *31; the ability of African-American voters to aid in an Anglo Democrat's election in a district does not make that district an African-American opportunity district for purposes of §2, and §2 does not protect that kind of influence, *31

Communities of Interest: The recognition of nonracial communities of interest reflects the principle that a State many not assume from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls, *23; legitimate yet differing communities of interest should not be disregarded in the interest of race, *24; "[t]he practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals." *24; in some cases members of a racial group in different areas that are in close proximity, such as rural and urban communities, can share similar interests and form a compact district, but cannot be made a remedy for a §2 violation elsewhere "if the only common index is race and the result will be to cause internal friction."*24

Proportionality: Proportionality, whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area, is a relevant factor in the totality of circumstances, *19, 25; when a vote dilution claim is framed in statewide terms, as where racially polarized voting and possible submergence of minority votes throughout a state, proportionality should be looked at and decided on a statewide basis, *25; proportionality is always relevant evidence in determining vote dilution, but never itself dispositive, *25; placing undue emphasis on proportionality risks defeating the goals underlying the Voting Rights Act, *25; the role of proportionality is not to displace an intensely local appraisal of a challenged district or to allow a state to trade off the rights of some against the rights of others, *26;

proportionality provides some evidence of whether the political processes leading to nomination or election in the state or political subdivision are not equally open to participation. *26; there is no magic parameter for determining proportionality, and "rough proportionality" must allow for some deviations, *26; Chief Justice Roberts and Justice Alito would adhere to the standard announced in *DeGrandy* that a finding of proportionality can defeat §2 liability even if a clear Gingles violation has been made out. *67.[26]

Conclusion

The Voting Rights Act Reauthorization Amendments of 2006 includes important modifications to Sections 5, 6-9 and 203 as a means of ensuring the participation of all citizens in our nation's electoral process. As Congress took up this matter, the need for reauthorization of these expiring provisions of the VRA was urgent, but the legislative process had to run its bumpy course. These were some of the most important and effective provisions of the Act as originally enacted and up for reauthorization. That process has led to Congress' reauthorization of these expiring provisions, maintaining important safeguards that make available the right to vote to all segments of our population. Indeed, reauthorization through the enactment of H.R. 9 allows hard-earned progress to continue. While significant challenges to the constitutionality of the new Act await, the renewed provisions provide a significantly upgraded vehicle for the effective promotion of political awareness, participation and empowerment by and within minority communities.

1.VRA refers to the Voting Rights Act of 1965, VRARA refers to the bill amending VRA
2.*Minority Language Assistance Practices*, *infra* n.8 at 7.
3.42 USC §1973aa-1a (c); 28 CFR §§55.15, 55.18.
4. 42 USC §1973aa-1a (c)
5. 28 CFR §§55.2 (c), 55.10.
6. *Minority Language Assistance Practices*, *supra* n.8 at 8.
7. *Id*. at 22-24.
8.*National Commission on the Voting Rights Act Launches Report*, Call to Justice, Newsletter of the Lawyers Committee for Civil Rights Under Law, vol. 7, #1 (2006), at 6.
9.In a well-coordinated process, the National Commission held ten regional and state meetings in Montgomery, Phoenix, New York, Minneapolis, Orlando, Los Angeles, Washington, D.C., Americus, GA, Rapid City, SD and Jackson, MS, and received testimony from approximately 100 witnesses, including elected officials, local community leaders and voting rights attorneys.
10.available online at Hwww.votingrightsact.orgH
11.*National Commission*, supra n. 2, at 6.
12. "The hearings examined the effectiveness of each of the expiring provisions in remedying discrimination and protecting minority voters over the last 25 years, as well as their continued need over the next 25 years. In some cases, the Committee held multiple hearings on certain provisions to ensure that all of the relevant issues were fully examined.

In particular, the Committee examined the continued effectiveness of Section 4(b)'s trigger formula in identifying those jurisdictions covered by the extraordinary remedies; the feasibility of the bailout process, as demonstrated by the successful bailout of eleven counties in the covered Commonwealth of Virginia; the increased use and continued need for Section 5's preclearance requirements; the continued need for Federal observers in covered jurisdictions to protect minority voters; and the impact Section 203 has had on facilitating the participation of language minority citizens in the political process.

The Committee also carefully examined the impact certain Supreme Court decisions have had on Section 5's ability to protect minorities from discriminatory voting changes enacted by covered jurisdictions, particularly in state and Congressional redistricting initiatives.

In addition to the testimony received during the hearings, the Committee received and incorporated into its hearing record written testimony from the Department of Justice, non- governmental organizations, and other interested citizens, including several comprehensive national and state reports. This information significantly strengthened the Committee's record by documenting discrimination in the electoral process, the temporary provisions' effectiveness in addressing discrimination, and the continued need for Federal oversight in covered jurisdictions over the next 25 years."

Hhttp://www.usnewswire.com/GetRelease.asp?id=64742.H

13. Lynn Westmoreland, *Modernize Voting Rights Act* May 3, 2006, available online at Hhttp://westmoreland.house.gov/News/DocumentPrint.aspx?DocumentID=42996H

14. Available online at Hhttp://www.ssri.duke.edu/documents/2006/vra.pdf.H

15. The full text of H.R. 9 as originally introduced and passed by the House is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006''.

SEC. 2. CONGRESSIONAL PURPOSE AND FINDINGS.

(a) PURPOSE.—The purpose of this Act is to ensure that the right of all citizens to vote, including the right to register to vote and cast meaningful votes, is preserved and protected as guaranteed by the Constitution.

(b) FINDINGS.—The Congress finds the following:

(1) Significant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965.

(2) However, vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process.

(3) The continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language

minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965.
(4) Evidence of continued discrimination includes—
(A) the hundreds of objections interposed, requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by the Voting Rights Act of 1965, and section 5 enforcement actions undertaken by the Department of Justice in covered jurisdictions since 1982 that prevented election practices, such as annexation, at-large voting, and the use of multimember districts, from being enacted to dilute minority voting strength;
(B) the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia;
(C) the continued filing of section 2 cases that originated in covered jurisdictions; and
(D) the litigation pursued by the Department of Justice since 1982 to enforce sections 4(e), 4(f)(4), and 203 of such Act to ensure that all language minority citizens have full access to the political process.
(5) The evidence clearly shows the continued need for Federal oversight in jurisdictions covered by the Voting Rights Act of 1965 since 1982, as demonstrated in the counties certified by the Attorney General for Federal examiner and observer coverage and the tens of thousands of Federal observers that have been dispatched to observe elections in covered jurisdictions.
(6) The effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decisions in *Reno v. Bossier Parish II* and *Georgia v. Ashcroft*, which have misconstrued Congress' original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by section 5 of such Act.
(7) Despite the progress made by minorities under the Voting Rights Act of 1965, the evidence before Congress reveals that 40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution.
(8) Present day discrimination experienced by racial and language minority voters is contained in evidence, including the objections interposed by the Department of Justice in covered jurisdictions; the section 2 litigation filed to prevent dilutive techniques from adversely affecting minority voters; the enforcement actions filed to protect language minorities; and the tens of thousands of Federal observers dispatched to monitor polls in jurisdictions covered by the Voting Rights Act of 1965.
(9) The record compiled by Congress demonstrates that, without the continuation of the Voting Rights Act of 1965 protections, racial and language 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.
SEC. 3. CHANGES RELATING TO USE OF EXAMINERS AND OBSERVERS.
(a) USE OF OBSERVERS.—Section 8 of the Voting Rights Act of 1965 (42 U.S.C. 1973f) is amended to read as follows:
''SEC. 8. (a) Whenever—
''(1) a court has authorized the appointment of observers under section 3(a) for a political subdivision; or

‘‘(2) the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 4(b), unless a declaratory judgment has been rendered under section 4(a), that—
‘‘(A) the Attorney General has received written meritorious complaints from residents, elected officials, or civic participation organizations that efforts to deny or abridge the right to vote under the color of law on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) are likely to occur; or
‘‘(B) in the Attorney General’s judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to the Attorney General to be reasonably attributable to violations of the 14th or 15th amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the 14th or 15th amendment), the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th amendment; the Director of the Office of Personnel Management shall assign as many observers for such subdivision as the Director may deem appropriate.
‘‘(a) Except as provided in subsection (b), such observers shall be assigned, compensated, and separated without regard to the provisions of any statute administered by the Director of the Office of Personnel Management, and their service under this Act shall not be considered employment for the purposes of any statute administered by the Director of the Office of Personnel Management, except the provisions of section 7324 of title 5, United States Code, prohibiting partisan political activity.
‘‘(c) The Director of the Office of Personnel Management is authorized to, after consulting the head of the appropriate department or agency, designate suitable persons in the official service of the United States, with their consent, to serve in these positions.
‘‘(d) Observers shall be authorized to—
‘‘(1) enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote; and
‘‘(2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated.
‘‘(e) Observers shall investigate and report to the Attorney General, and if the appointment of observers has been authorized pursuant to section 3(a), to the court.’’..
(b) MODIFICATION OF SECTION 13.—Section 13 of the Voting Rights Act of 1965 (42 U.S.C. 1973k) is amended to read as follows:
‘‘SEC. 13. (a) The assignment of observers shall terminate in any political subdivision of any State—
‘‘(1) with respect to observers appointed pursuant to section 8 or with respect to examiners certified under this Act before the date of the enactment of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, whenever the Attorney General notifies the Director of the Office of Personnel Management, or whenever the District Court for the District of Columbia determines in an action for declaratory judgment brought by any political subdivision described in subsection (b), that there is no longer reasonable cause to

believe that persons will be deprived of or denied the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) in such
subdivision; and
''(2) with respect to observers appointed pursuant to section 3(a), upon order of the authorizing court.
(b) MODIFICATION OF SECTION 13.—Section 13 of the Voting Rights Act of 1965 (42 U.S.C. 1973k) is amended to read as follows:
''SEC. 13. (a) The assignment of observers shall terminate in any political subdivision of any State—
''(1) with respect to observers appointed pursuant to section 8 or with respect to examiners certified under this Act before the date of the enactment of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, whenever the Attorney General notifies the Director of the Office of Personnel Management, or whenever the District Court for the District of Columbia determines in an action for declaratory judgment brought by any political subdivision described in subsection (b), that there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) in such
subdivision; and
''(2) with respect to observers appointed pursuant to section 3(a), upon order of the authorizing court.
(b) MODIFICATION OF SECTION 13.—Section 13 of the Voting Rights Act of 1965 (42 U.S.C. 1973k) is amended to read as follows:
''SEC. 13. (a) The assignment of observers shall terminate in any political subdivision of any State—
''(1) with respect to observers appointed pursuant to section 8 or with respect to examiners certified under this Act before the date of the enactment of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, whenever the Attorney General notifies the Director of the Office of Personnel Management, or whenever the District Court for the District of Columbia determines in an action for declaratory judgment brought by any political subdivision described in subsection (b), that there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) in such
subdivision; and
''(2) with respect to observers appointed pursuant to section 3(a), upon order of the authorizing court.
''(b) A political subdivision referred to in subsection (a)(1) is one with respect to which the Director of the Census has determined that more than 50 per centum of the nonwhite persons of voting age residing therein are registered to vote.
''(c) A political subdivision may petition the Attorney General for a termination under subsection (a)(1).''.
(c) REPEAL OF SECTIONS RELATING TO EXAMINERS.—Sections 6, 7, and 9 of the Voting Rights Act of 1965 (42 U.S.C. 1973d,1973e and 1973g) are repealed.

(d) SUBSTITUTION OF REFERENCES TO ‘‘OBSERVERS’’ FOR REFERENCES TO ‘‘EXAMINERS’’.—
(1) Section 3(a) of the Voting Rights Act of 1965 (42 U.S.C. 1973a(a)) is amended by striking ‘‘examiners’’ each place it appears and inserting ‘‘observers’’.
(2) Section 4(a)(1)(C) of the Voting Rights Act of 1965 (42 U.S.C. 1973b(a)(1)(C)) is amended by inserting ‘‘or observers’’ after ‘‘examiners’’.
(3) Section 12(b) of the Voting Rights Act of 1965 (42 U.S.C. 1973j(b)) is amended by striking ‘‘an examiner has been appointed’’ and inserting ‘‘an observer has been assigned’’.
(4) Section 12(e) of the Voting Rights Act of 1965 (42 U.S.C. 1973j(e)) is amended—
(A) by striking ‘‘examiners’’ and inserting ‘‘observers’’; and
(B) by striking ‘‘examiner’’ each place it appears and inserting ‘‘observer’’.
(e) CONFORMING CHANGES RELATING TO SECTION REFERENCES.—
(1) Section 4(b) of the Voting Rights Act of 1965 (42 U.S.C. 1973b(b)) is amended by striking ‘‘section 6’’ and inserting ‘‘section 8’’.
(2) Subsections (a) and (c) of section 12 of the Voting Rights Act of 1965 (42 U.S.C. 1973j(a) and 1973j(c)) are each amended by striking ‘‘7,’’.
(3) Section 14(b) of the Voting Rights Act of 1965 (42 U.S.C. 1973l(b)) is amended by striking ‘‘or a court of appeals in any proceeding under section 9’’.
SEC. 4. RECONSIDERATION OF SECTION 4 BY CONGRESS.
Paragraphs (7) and (8) of section 4(a) of the Voting Rights Act of 1965 (42 U.S.C. 1973b(a)) are each amended by striking ‘‘Voting Rights Act Amendments of 1982’’ and inserting ‘‘Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006’’.
SEC. 5. CRITERIA FOR DECLARATORY JUDGMENT.
Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c) is amended—
(1) by inserting ‘‘(a)’’ before ‘‘Whenever’’;
(2) by striking ‘‘does not have the purpose and will not have the effect’’ and inserting ‘‘neither has the purpose nor will have the effect’’; and
(3) by adding at the end the following:
‘‘(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.
‘‘(c) The term ‘purpose’ in subsections (a) and (b) of this section shall include any discriminatory purpose.
‘‘(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.’’.
SEC. 6. EXPERT FEES AND OTHER REASONABLE COSTS OF LITIGATION.
Section 14(e) of the Voting Rights Act of 1965 (42 U.S.C. §1973l(e)) is amended by inserting ‘‘, reasonable ex pert fees, and other reasonable litigation expenses’’ after ‘‘reasonable attorney’s fee’’.

SEC. 7. EXTENSION OF BILINGUAL ELECTION REQUIREMENTS.
Section 203(b)(1) of the Voting Rights Act of 1965 (42 U.S.C. 1973aa-1a(b)(1)) is amended by striking ‘‘2007’’ and inserting ‘‘2032’’.
SEC. 8. USE OF AMERICAN COMMUNITY SURVEY CENSUS DATA.
Section 203(b)(2)(A) of the Voting Rights Act of 1965 (42 U.S.C. 1973aa-1a(b)(2)(A)) is amended by striking ‘‘census data’’ and inserting ‘‘the 2010 American Community Survey census data and subsequent American Community Survey data in 5-year increments, or comparable census data’’.
16. Congressional Quarterly, June 13, 2006,
17. In *Reno v. Bossier Parish School Board*, 520 U.S.471 (1997)(*Bossier I*), the Court held that Section 5 did prohibit preclearance of any voting change enacted with the discriminatory purpose of denying or abridging the right to vote on account of race, color or membership in a language minority group. In *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000)(*Bossier II*), the Court held that Section 5 does not prohibit preclearance of any voting change shown to have a dilutive effect in violation of Section 2.
18. In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the Court held that preclearance cannot be withheld, and retrogression cannot be established, in the event a covered jurisdiction eliminates majority-minority districts by replacing those districts with "minority influence" districts.
19. Available online at Hhttp://www.usdoj.gov/crt/voting/comisac203_testimony.htmH
20.2006 U.S. LEXIS 5178, 2006 WL 1749637 (U.S. June 28, 2006)
21. As Justice Kennedy pointed out, the earlier versions of the congressional redistricting plan were reportedly designed to favor Democratic candidates, earning the moniker “shrewdest gerrymander of the 1990's”, and featured carefully constructed democratic districts with incredibly convoluted lines and packed heavily Republican suburban areas into a few districts, but efforts to invalidate it as an unfair and unconstitutional partisan gerrymander failed. *9.
22. “*Getting to Yes,”* The Wall Street Journal, July 1, 2006, p. A 11(“If it’s not necessary to decide more to dispose of a case, in my view it is necessary *not* to decide more.”)
23. *Vieth v. Jubelirer*, 541 U.S. 267 (2003).
24. “*Divvying Up,*” The Wall Street Journal, June 29, 2006, p. A 14 (In her analysis of *LULAC v. Perry* the day after it was announced, Abigail Thernstrom, Vice-Chair of the U.S. Commission on Civil Rights and senior fellow at the Manhattan Institute, noted tongue-in-cheek that the most interesting part of the opinion was Justice Kennedy’s identification of the political goals protected by the Voting Rights Act, specifically his views on compactness and “the novel, break-through notion that not all Hispanics are alike. Who knows, maybe down the road, the court will come to believe that blacks aren’t all alike either. And if so, much of the structure of Voting Rights Act enforcement - enforcement that has badly distorted the act - is likely to come tumbling down.”)
25.The Court in *Thornburgh v. Gingles*, 478 U.S. 30, 50-51, 106 S. Ct. 2752, 92 L.Ed 2d 25 (1986), identified three threshold conditions - referred to as the *Gingles* preconditions - for establishing a §3 violation: (1) the racial group must be sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the racial group must be politically cohesive; and (3) the majority must vote sufficiently as a bloc to enable it usually to defeat the minority’s preferred candidate.

26. In *Johnson v. DeGrandy*, 512 U.S.997, at 1008-09, 1014-15, 114 S. Ct. 2647, 129 L. Ed 2d 775 (1994), the Court found that "substantial proportionality" defeated a claim that district lines diluted votes cast by Hispanic voters, even assuming the plaintiffs could show it was possible to create "more than the existing number of reasonably compact districts with sufficiently large minority population to elect candidates of their choice."

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Ben Griffith is a partner in the Cleveland, MS law firm of Griffith & Griffith, Attorneys. He served as county board attorney for 21 years and continues to serve as board attorney for a 17-county water management district, a position held since 1989. His federal and state civil litigation practice focuses on representation of state and local governments and their official policymakers in the areas of election law, voting rights, civil rights, public sector insurance coverage and environmental law. He is a member of the World Jurist Association, serving as National President, and has participated as a speaker in WJA conferences in Dublin, Kiev, Beijing and Edinburgh, as well as continuing legal education programs for municipal and county attorneys in Guadalajara, Mexico; Salzburg, Austria; and Edmonton, Alberta. Beginning in 2001 he served a term on the ABA Standing Committee on Election Law and was recently reappointed for a second term beginning in August 2006. He is Chair-Elect of the American Bar Association Section of State and Local Government Law and served as President of the National Association of County Civil Attorneys, President of the Mississippi Association of County Board Attorneys, Chair of the International Municipal Lawyers Association's Counties& Special Municipal Districts Department, and IMLA State Chair. He is a member of IMLA's International Committee, the Europe Committee of the ABA Section of International Law, a Fellow of the International Order of Barristers, and an IMLA Local Government Fellow. Since 1994 he has held board certification by the ABA-accredited National Board of Trial Advocacy in Civil Trial Advocacy and since 1982 has served as lead counsel and consultant in voting rights and election-related litigation on behalf of cities and counties in his home state and in Maryland, South Carolina, Florida and Texas. He has participated in Voting Rights Act symposia and authored numerous articles on election law and voting rights litigation published in Catholic University Law Review, Stetson Law Review, Urban Lawyer and Mississippi Law Journal, participated in seminars throughout the nation on Voting Rights Act litigation before the National Conference of State Legislatures, the National Association of Counties, the International Municipal Lawyers Association, the American Bar Association, Mississippi Association of County Board Attorneys, and Mississippi Trial Lawyers Association, testified on voting rights issues before the House Committee on the Constitution and Civil Rights and the U.S. Commission on Civil Rights, and was author and editor of numerous publications in his field of practice, including Census 2000: Considerations and Strategies for State and Local Governments (ABA 2000), Handbook for County Board Attorneys (Center for Governmental Technology 2000 and 2004), and Sexual Harassment in the Public Workplace (ABA 2001). He earned his Juris Doctor in 1975 from the University of Mississippi Law Center, after receiving a

B.A. in English and German. He and his wife, Kathy, are the parents of two children, Clark, age 25, and Julie, age 23.

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