The Association of the Bar of the City of New York
Committee on Civil Rights

Report on the Voting Rights Act Reauthorization and Amendments Act of 2006- H.R. 9/S. 2703

The Association of the Bar of the City of New York ("the Association") expresses its support for the Voting Rights Act Reauthorization and Amendments Act of 2006 (the "VRARA"), reflected in H.R. 9 introduced on May 2, 2006 and S. 2703 introduced on May 3, 2006.

Founded in 1870, the Association has more than 22,000 members residing throughout the United States. Through its standing committees, including its Committee on Civil Rights, the Association has long been involved in efforts to combat unlawful discrimination and to protect the fundamental right of all Americans to participate in the electoral process on an equal basis. The Association has vigorously supported the Voting Rights Act, as vital to the protection of minority voting rights. Among other things, the Act plays an important role in New York City, where three of the City's counties are covered jurisdictions subject to the preclearance provisions of Section 5 of the Act and many of its citizens of Spanish and Asian heritage benefit from the language provisions of Section 203 of the Act.

The VRARA would renew for an additional 25 years the preclearance provisions of Section 5 and the language provisions of Section 203 that otherwise will expire in 2007, restore the original meaning of Section 5 that has been undermined by two Supreme Court decisions, and make additional changes that render the Voting Rights Act more effective.

The VRARA has wide bipartisan support in the House and Senate. It is co-sponsored by more than 152 Representatives and 43 Senators, Republicans and Democrats alike, reflecting a consensus that its provisions are necessary to the protection of minority voting rights and the preservation of gains made until now. We, therefore, urge that the VRARA be enacted in the form in which it was introduced and that you strongly resist efforts, now being reported, to offer amendments the true purpose of which is to prevent renewal of Section 5 and other expiring provisions and to frustrate the purpose of the Voting Rights Act to protect minority voting rights. Congress has before it a full and voluminous record, painstakingly developed, more than justifying the exercise of its powers under the Fourteenth and Fifteenth Amendments to renew Section 5 for the covered jurisdictions and to enact the other provisions of the VRARA. It should do so without delay.

EXECUTIVE SUMMARY

It is essential that key sections of the Voting Rights Act, set to expire in August 2007, be renewed. These provisions have played a pivotal role in the struggle of African-Americans to overcome centuries of exclusion from the voting process, and have enabled black candidates to attain state and federal offices from which they had effectively been barred since the early years of Reconstruction. These provisions similarly have served to protect the rights of other minorities. These strides, however, are far from secure. The detailed evidence recently put before Congress shows that renewal of these provisions is not only justified, but necessary to combat continuing practices in covered jurisdictions, including the three covered counties in New York City, that have the purpose or effect of suppressing minority voting and preventing

minorities from electing candidates of their choice. Other provisions of the VRARA are equally important to the protection of minority voting rights.

Accordingly, the Association strongly supports the VRARA because its provisions would:

(1) Renew the preclearance requirements of Section 5 of the Voting Rights Act, which are still needed to protect and preserve minority voting rights in covered jurisdictions by preventing in advance, changes in voting procedures that would diminish the rights of minorities to vote and select candidates of their choice.

(2) Restore the original intent of Section 5 to assure minorities the right to elect candidates of their choice and to prohibit any voting changes that diminish that right or which have the purpose of denying the right to vote on the basis of race or color, by overruling the Supreme Court's decisions in Georgia v. Ashcroft, 539 U.S. 461 (2003) and Reno v. Bossier Parish School Board, 528 U.S. 320 (2000), which undermined that original intent.

(3) Renew the language assistance requirements of Section 203, which are so essential to the ability of many minority citizens to meaningfully exercise their right to vote.

(4) Facilitate the use of federal observers, which has proved so frequently necessary to the enforcement of minority voting rights.

(5) Allow recovery of expert fees by successful plaintiffs in voting rights suits, which is essential if private parties are to be able to afford the costs of voting rights litigation where experts are almost invariably costly and required.

Each of these points are discussed below.

1. Renewal of Section 5 of the VRA

The Voting Rights Act has two broad provisions, Section 2 and Section 5. The combined force of these sections has been essential to overcome the disenfranchisement of African-Americans and other minorities.

Section 2 precludes every state and subdivision from adopting any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . 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." Section 2 further states that a violation of this prohibition is established when it is shown that racial minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

Section 5, which will expire in August 2007 absent an extension, applies to covered jurisdictions, predominantly but not exclusively in the South, that historically have presented particularly implacable barriers to full minority participation in the electoral process. With respect to the covered jurisdictions, the Act addresses a particular need to ensure that fairness of process is preserved.[1] Section 5 states, in pertinent part, that:

> 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*, . . . and unless and until the court enters such judgment no

[1] Currently covered jurisdictions include the states of Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Texas and portions of Florida, North Carolina, and Virginia. Section 5 also covers Alaska, Arizona, and parts of California (4 counties), Michigan (2 townships), New Hampshire (10 towns), New York (3 counties) and South Dakota (2 counties). The three New York counties are New York, Kings and Bronx.

> 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 . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . .

(emphasis added).

In addition to renewing Section 5, as Congress has done several times in the past, the VRARA includes language that is required to reaffirm the meaning and the mission that was attributed to Section 5 at the time of its enactment, at the time of each prior renewal, and in decades of Supreme Court opinions construing that Act. Throughout this history, Congress and the Court have clearly stated that Section 5 was enacted to assure that the opportunity of minority voters to elect candidates of their choice shall not be diminished and that proposed voting changes having that effect or having the purpose of discriminating against African-American voters shall not be allowed. Because two recent Supreme Court opinions have undermined that principle, the VRARA contains language that affirms Congress's ongoing dedication to this original purpose for which Section 5 was created. To accomplish this, the VRARA would add new subsections stating:

> (b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure . . . 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 . . . to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section . . .
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> (c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.
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> (d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

The Association believes that the adoption of these provisions is required, not to expand the Act, but to preserve the Act and much of what it has achieved.

A. The Unique Contributions of Section 5

Although Sections 2 and 5 are different tools directed towards the same ends, Section 5 provides essential safeguards that appear nowhere else in the Act. Section 5 requires any covered jurisdiction to obtain clearance from the Department of Justice or a federal court before changing election practices or procedures. Under Section 5, voting changes cannot be pre-cleared if they deny or abridge the rights of minority voters. The preclearance process was designed to ensure that case-by-case adjudication – which had proven ineffective – would not be the sole means of protecting minority voting rights in those places with a substantial history of voting discrimination. Section 2, by contrast, affords an after-the-fact remedy. Minorities who have suffered a violation of Section 2 have the burden of commencing an action, and the substantial economic and evidentiary burden of proving that a change in election procedure "results in a denial or abridgement" of minority voting rights. In other words, Section 5 prevents the erosion of voting rights before it can occur, while Section 2 offers minorities a remedy only after their rights have been denied and if they have the assets or the organizational support to bring a complex suit, or if the Department of Justice has the resources and will to prosecute violations of its provisions on a case-by-case basis.

The Supreme Court recognized the importance of shifting this burden in jurisdictions with a history of abridging voting rights on the basis of race or color. In South Carolina v. Katzenbach, 383 U.S. 301 (1966), the Court unanimously upheld the constitutionality of Section 5 and other provisions of the Voting Rights Act. In that opinion, the Court recognized that "voting suits are usually onerous to prepare, sometimes requiring as many as 6,000 man hours"

and that Congress found "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting because of the inordinate amount of time and energy" required by such lawsuits.[2]

In Beer v. United States, 425 U.S. 130 (1976) the Supreme Court further wrote that:

> "Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. The practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory . . . . Congress therefore decided, as the Supreme Court held it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victim' by 'freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.'" H.R.Rep.No.94-196, pp. 57-58, (Footnotes omitted.)[3]

Today, against a backdrop of actions that continue to be taken to suppress or dilute minority votes in order to alter the outcome of elections, the need for judicial scrutiny of voting changes in covered jurisdictions before they take effect remains particularly acute. The most widely noted actions involve redistricting efforts that have eroded the chances of electing minority candidates. Other actions with adverse consequences for minority voters involve relocation of polling places, imposition of identification requirements that impede minority voters to a greater degree than their white counterparts, and failure to provide adequate polling stations in minority districts. In this age, it is well recognized that questionable changes in voting procedures need not survive scrutiny by the courts in order to be effective, they need only

[2] Id. at 314, 328.

[3] 425 U.S. at 140-4.

survive the next election. By mandating up-front review, Section 5 enables the validity of voting changes to be determined before the validity of an election itself is cast into doubt.

The Supreme Court's Beer opinion also announced a clear standard for reviewing voting changes under Section 5 that flowed directly from a Congressional declaration at the time Congress first extended the life of that section. The Court held:

> When it adopted a 7-year extension of the Voting Rights Act in 1975, Congress explicitly stated that "the standard (under § 5) can only be fully satisfied by determining . . . whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting . . . ." H.R.Rep. No.94-196, p. 60 (emphasis added). In other words the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.

Congress and the Supreme Court both recognized that Section 5: (i) served the important purpose of preserving "the ability of minority groups . . . to elect their choices to office" and (ii) did so by preventing a "retrogression" or retreat from any gains that had been realized toward achieving that goal. That standard was well established when Congress extended Section 5 in 1982 without altering a word.

B. The Continuing Need for Section 5

Recent election controversies, and empirical evidence drawn from covered jurisdictions since the 1982 extension of Section 5, establish that this section continues to be an essential safeguard for the right of minority voters to elect representatives of their choice. The evidence indisputably establishes that the strides toward achieving this goal have been propelled principally by increases in the number of districts, known as majority-minority districts, in which persons of color comprise a majority of the voting age population. High levels of racial

polarization of voters remain a persistent barrier to the election of candidates of the minorities' choice in many districts where they comprise a large portion of the electorate.

Today, however, under the Supreme Court's Georgia v. Ashcroft precedent the slender thread that has given minority voters representation in state houses and the United States Congress could be undermined by some state political organizations that seek to bolster their overall strength by shifting minority voters from majority-minority districts to surrounding districts. Other political organizations have sought to bolster their electoral chances by suppressing voter turnout in districts with large minority populations. Although party politics, and not solely bigotry, may be the driving force behind some of these practices, the result is the same: a dilution of minority voting strength that will inevitably sap the ability of minority voters to elect representatives of their choice.

The importance of preserving Section 5, and the ability to employ that section to prevent dilution of minority voting strength, is further demonstrated by an exhaustive study that was funded by the National Science Foundation's Law and Social Sciences Program, conducted by Rice University, and published in a book entitled Quiet Revolution in the South: the Impact of the Voting Rights Act, 1965-1990 (1994). The authors of that study wrote:

> The Voting Rights Act of 1965 has succeeded in eliminating most of the barriers blacks in the South previously faced in attempting to register and vote. But the act sought to do more than this. It was also designed to bring minority groups and their concerns into the halls of government. . . .
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> Our evidence demonstrates, moreover, that the currently popular argument that the Voting Rights Act has served its purpose and is no longer as necessary as it once was is misguided.[4]

[4] Quiet Revolution at 335.

The study encompassed 11 southern states. It established that increases in the number of African-American office holders on every level of government -- from the near total exclusion that existed prior to the Voting Rights Act -- was almost exclusively due to the growth in the number of districts in which the majority of registered voters are racial minorities. Moreover, those districts were found to provide a realistic opportunity to elect African-American candidates only when the percentage of African Americans within the population is sufficient to overcome the level of polarized voting. The authors wrote:

> First, the increase in the number of blacks elected to office in the South is a product of the increase in the number of majority-black districts and not of blacks winning in majority-white districts. . . .
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> . . . . Majority-white legislative districts were no more likely to elect black legislators in the 1980s than in the previous decade. In the 1970's approximately 1 percent of all state legislative districts that were less than 50 percent black elected black legislators. That did not change in the 1980s. Thus, the need remained for districts with substantial black population percentages if blacks were to have a realistic opportunity to elect their candidates of choice.[5]

The following findings are particularly compelling.

(i) "In the majority of southern states [during the 1980's], not a single majority-white district elected a black legislator."[6]

(ii) "There was not a single majority white district in the South that elected a black representative [to Congress] in the 1980s." Only four African-American representatives served southern congressional districts in 1990. Three of those were elected by majority-black

[5] Quiet Revolution at 335-36.

[6] Quiet Revolution at 338.

congressional districts in and the fourth was elected from a Texas district in which a coalition of Blacks and Hispanics comprised a majority of the population.[7]

(iii) Southern districts in which African-Americans composed a slim majority of 50-54% had only a 30% likelihood of electing African-American candidates to the lower house of the state legislature, and a 27% likelihood of electing black candidates to the upper house of the state legislature. [8]

A 1998 book, entitled Redistricting and Minority Representation, demonstrated a continuation of these patterns through the 1996 congressional election. The 1996 election, at first blush, appeared to break new ground in that three black candidates won elections in newly defined Southern Districts in which white voters were the majority. Deeper analysis, however, reveals that the election of these three representatives, two from Georgia and one from Florida, is more a testament to the power of incumbency than to progress in the struggle for equality. All three of these representatives had initially been sent to Congress by black majority districts that lost that status through redistricting, and all three ran as incumbents in 1996 against "weak challengers who have never held elected office."[9] The study concluded that there was "a perfect relationship between incumbency status and outcome."[10] Apart from these anomalies, the report continued, the election of black representatives to Congress depended, throughout the South and much of the rest of the country, on safeguarding black majority districts from dilution. In its words, experts

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[7] The four Congressmen were Harold Ford from Tennessee, Craig Washington from Texas, John Lewis from Georgia, and Mike Espy from Mississippi. Quiet Revolution at 343.

[8] Quiet Revolution at 344 and Table 11.5.

[9] David A. Bositis, The Future of Majority-Minority Districts and Black and Hispanic Legislative Representation in Redistricting and Minority Representation at 18 (1998) (David A. Bositis, Ed.).

[10] Id. at 17.

> grappling with the under-representation of black officeholders, have argued that "politics in the United States, especially in the South, is characterized by a high level of racially polarized voting. As a consequence, only areas with very substantial black population percentages are likely to elect blacks." By no means is this an exaggeration. The number of blacks elected to Congress, for instance, increased from 26 to 39 in 1992 [following redistricting] and to 41 in 1994. However, were it not for predominantly black electoral districts, fewer blacks would have been sent to Congress. This is especially true in the South. Prior to the 1990 reapportionment, there were a total of four black congresspersons from the states of Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas and Virginia. Following congressional reapportionment in 1991, blacks were elected from Florida for the first time in more than a century. . . . All were sent to Congress from majority-black districts. Chandler Davidson puts the point more exactly: "...blacks.... have had an extremely difficult time electing their candidates to office as a result of white bloc voting and dilutionary election laws...."
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> The remarkable upswing in black officeholding just discussed, then must be attributed primarily to direct federal intervention -- in the form of the Voting Rights Act -- rather than to changing regional or national racial attitudes. Laughlin McDonald, summing-up the prevailing view of voting rights experts, explains: "The increase in minority officeholding can be traced to the operation of the Voting Rights Act as a whole -- to the abolition of discriminatory tests for voting, the expansion of minority registration, and the requirement of pre-clearance of new voting practices under Section 5. Equally critical, however, has been the adoption of effective minority voting districts, many as a result of litigation or the threat of litigation under Section 2."[11]

The tenuous hold that Black voters have on congressional seats from southern states, and the important role that Section 5 plays in maintaining that hold, is further demonstrated by the number of southern states that have only one African-American representative in Congress, and

[11] Id. at 163, 165.

by the composition of the districts that elected those African-American representatives. In the 1996 election, Alabama, Louisiana, Mississippi, South Carolina and Virginia each elected only one African-American representative. In every case, these representatives were elected by districts in which the black voting age population ("BVAP") was above 58%, and in three of the five cases it was above 60%. North Carolina elected two black representatives, from districts with a 53.9% and 53.3% BVAP.

Redistricting plans in covered jurisdictions have already begun to decrease the percentage of minority voters in some districts. Where racially polarized voting is high, reductions in minority voting populations may imperil the election of minority candidates in future elections. Were Section 5 allowed to expire, or to remain only in its judicially eroded form, the trend would undoubtedly continue, and would severely undermine the ability of minority voters to elect candidates of their choice.

This is especially the case because Section 5 not only precludes covered jurisdictions from enacting discriminatory voting changes, but "[t]he constant presence of Section 5 scrutiny deters discriminatory voting changes even before they are proposed."[12] As Joseph D. Rich, former Chief of the Department of Justice's Civil Rights Division's Voting Section, observed: "Because of the Department [of Justice] has built a tradition of excellence and meticulousness in its Section 5 review process, jurisdictions will think long and hard before passing laws with discriminatory impact or purpose."[13]

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[12] Theodore M. Shaw, President and Director-Counsel of the NAACP Legal Defense and Educational Fund, Testimony before the Nat'l Comm'n on the Voting Rights Act, June 13, 2005 ("Shaw Testimony"), at 11 (available at http://www.votingrightsact.org/hearings/pdfs/shaw_ted.pdf) (testimony provided with report submitted for the record to the House Judiciary Committee on Mar. 8, 2006).

[13] Statement of Joseph D. Rich before the Nat'l Comm'n on the Voting Rights Act, June 14, 2005, at 2 (available at http://www.votingrightsact.org/hearings/pdfs/rich_joseph.pdf) (testimony provided with report submitted for the record to the House Judiciary Committee on Mar. 8, 2006) .

In addition to redistricting practices, other recent experience shows that other efforts to dilute or suppress minority voting and to prevent minorities from electing candidates of their choice continues in covered jurisdictions. For example, during the 2004 election cycle, almost 100 Hispanic residents of Atkinson County, Georgia—apparently "identified by having a Hispanic surname"—had their registrations challenged on the basis of citizenship and were forced to appear at hearings.[14] In Long County, Georgia, more than 50 of the 72 Hispanic voters living in the county were challenged on the basis of citizenship and had their provisional ballots rejected.[15] Though the challenges were eventually rejected, the discrimination and intimidation had its intended effect of discouraging Hispanic residents from exercising their right to vote.[16]

Here in New York City, as recently as 1999, the Department of Justice denied preclearance to a "limited voting" plan proposed by New York City for use in its school board elections, including, the 3 covered counties. "Limited voting" limits voters to voting for less than the number of seats up for election – for example permitting voters to cast votes for any 2 candidates for a five-seat government board. As the President of the NAACP Legal Defense and Educational Fund testified before the House Judiciary Committee, "limited voting is a classic 'anti-single-shot' strategy used throughout the South to dilute minority voting power by

[14] People for the American Way Foundation, et al., Run-Up to Election Exposes Widespread Barriers to Voting, (available at http://www.house.gov/judiciary_democrats/widebarriersrpt.pdf).

[15] Civilrights.org, "Protect Minority Voting Rights in Nov. 2 Election," Oct. 19, 2004, (available at http://www.civilrights.org/issues/voting/details.cfm?id=25718).

[16] See Russ Bynum, "Complaint questions right to vote of 78 percent of rural Georgia county's Hispanics," S.F. Gate, Oct. 28, 2004. These incidents were presented by Joe Rogers of the National Commission on the Voting Rights Act, in his testimony before the House Judiciary Committee. See Voting Rights Act Renewal Oversight Hearing on Evidence of Continuing Need: Hearing before the Subcomm. On the Constitution of the House Judiciary Committee 109th Cong. 9 (2006) (testimony of Joe Rogers, Commissioner, Nat'l Comm'n on the Voting Rights Act).

preventing minorities from casting their votes in blocks."[17] Consequently, the Department of Justice determined that "the ability of minority voters to elect their candidates of choice will be considerably reduced under the submitted change in voting method."[18] Indeed, the Civil Rights Division determined that the change would have made it three times more difficult for minority voters to elect candidates.

The continuing need for Section 5 in New York City also is shown by numerous "More Information Requests" submitted by the Department of Justice.[19] During the period 1990 to 2005, more than 113 More Information Requests were issued for the three covered counties in New York City.[20] These Requests resulted in 53 proposed election changes either being withdrawn, altered or abandoned.[21] In other words, the Requests alone were sufficient to effectuate the purpose of Section 5.

These and the many other experiences reflected in the extensive testimony and evidence put before Congress during recent hearings dramatically demonstrate the need for renewal of Section 5.[22]

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[17] Shaw Testimony at 9.

[18] Letter from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice to Eric Proshansky, Assistant Corporation Counsel, City of New York (Feb. 4, 1999) (available at http://www.usdoj.gov/crt/voting/sec_5/ltr/l_020499.htm)

[19] A More Information Request is a letter request from the Department of Justice to a political entity that has submitted a preclearance request asking for additional data or information the Civil Rights Division needs before it can provide preclearance. Such requests send a signal that the Department of Justice is closely scrutinizing – and perhaps skeptical of – the proposed change.

[20] See Voting Rights in New York 1982-2006, Juan Cartagena, March 2006 at 12 (located at http://www.civilrights.org/issues/voting/NewYorkVRA.pdf) (report submitted for the record to the House Judiciary Committee in March 2006).

[21] Id.

[22] See, e.g., Voting Rights Act Renewal Oversight Hearing on the Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. On the Constitution of the Judiciary Committee 109th Cong. 9 (2005) (testimony of Theodore M. Shaw, President and Director-Counsel of the NAACP Legal Defense and Educational Fund); Voting Rights Act Renewal Oversight Hearing on The Continuing Need for Section 5: Hearing Before the (…continued)

C. The Need to Restore the Long Standing Interpretation of Section 5 in the Aftermath of Georgia v. Ashcroft

The need to restore the clarity of the Supreme Court and Congressional declarations of the meaning of Section 5 was created, in large measure, by Georgia v. Ashcroft, 539 U.S. 461 (2003). In that decision, a divided Court approved a Georgia redistricting plan under which three state senate districts that had elected black legislators were transformed from districts with black voting age populations of 60.58%, 55.43% and 62.75%, to districts in which the BVAP was only a fraction of a point above the 50% mark. When Georgia sought preclearance for this plan under Section 5, before a three judge panel of the United States District Court in the District of Columbia, the District Court rejected the plan on the grounds that it would "diminish African American voting strength in these districts" – a clear "retrogression" – without any persuasive evidence that this loss would be offset by gains in other areas.

In an opinion that comprehensively reviewed the Supreme Court's Section 5 opinions, the District Court held that the constant thread in this jurisprudence has been a prohibition of changes that decreased the opportunity of minority voters to elect candidates of their choice. The Court wrote:

> In Beer, the Supreme Court held that a reapportionment plan must not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Beer, 425 U.S. at 141 96 S.Ct. 1357. In other words, the new apportionment plan must not have the effect or purpose of providing minority voters with less opportunity to elect candidates of choice than did the previous plan. Id. . . . The Court has clearly held that compliance with Section 5, and avoidance of retrogression,

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(continued…)

Subcomm. on the Constitution of the Judiciary Committee 109th Cong. 9 (2005) (testimony of Laughlin McDonald, Director, Voting Rights Project, American Civil Liberties Union); Voting Rights Act Renewal Oversight Hearing on Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the Judiciary Committee 109th Cong. 9 (2006) (testimony of Bill Lann Lee, Chairman, National Commission on the Voting Rights Act).

> does not require jurisdictions to improve or strengthen the voting power of minorities. Bush v. Vera, 517 U.S. 952, 983, 116 S.Ct. 1941, 135 L.E.2d 248 (1996). Nor does Section 5 require that redistricting plans ensure victory for minority preferred candidates. Rather, it is a mandate that "the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." Bush, 517 U.S. at 983, 116 S.Ct. 1941 (emphasis added) . . . .

Georgia v. Ashcroft, 195 F. Supp. 2d 25, 73-74 (D.D.C. 2002)

The District Court held that redistricting plans that reduce the extent of African-American majorities in certain districts are not per se violations of Section 5, but that proponents of such changes must prove that such redistricting plans leave minority voters with an equal opportunity to elect candidates of their choice. This, the District Court recognized, turns both on the degree to which minority voting strength has been diluted in majority-minority districts, and the degree to which dispersed voters can realistically form coalitions with voters from other racial and ethnic groups to elect minority candidates. The District Court, noting the degree of "racially polarized voting" in the affected districts, found that disbanding black-majority districts to promote coalitions elsewhere sacrificed a proven method of electing minority candidates and replaced it with nothing more than an aspirational goal. The data from Georgia, as in many covered jurisdictions, show that racially polarized voting can determine electoral outcome. Accordingly, certain redistricting plans replace the ability of minorities to elect a candidate of their choice with the far less satisfying ability to support the less objectionable (or, at best, the most sympathetic) candidate nominated by and for a predominantly white electorate.

Nevertheless, the Supreme Court, over four dissents, reversed the District Court and approved the redistricting plan. In so doing, the Supreme Court diminished the protection that Section 5 had provided for nearly 40 years, and gave covered jurisdictions the ability to adopt

plans under which minority voters are "not quite as likely . . . to elect candidates of their choice" as they had been under the system being displaced.

Justice O'Connor wrote for the Court:

> In order to maximize the electoral success of a minority group, a State may choose to create a certain number of "safe" districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice . . . . Alternatively, a State may choose to create a greater number of districts in which it is likely – although perhaps not quite as likely as under the benchmark plan – that minority voters will be able to elect candidates of their choice.

539 U.S. at 480 (emphasis added). Justice O'Connor went on to write that:

> In addition to the comparative ability of a minority group to elect a candidate of its choice . . . a court must examine whether a new plan adds or subtracts "influence districts" – where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process.

Id. at 482 (emphasis added).

There is a fundamental difference, seemingly overlooked in this opinion, between the ability of minority voters to elect a candidate of their choice – which very often but not always will be a minority candidate – and the ability to influence competitions between white candidates.

The Ashcroft opinion is particularly troubling because it not only tolerates a degradation in the ability of minorities to elect candidates of their choice, but because it allowed the state to dilute minority voting strength from levels that historically have been required to elect minority candidates to levels that have all but precluded the election of minority candidates.

In an appearance at hearings conducted by the House Judiciary Committee's Subcommittee on the Constitution, Tyrone Brooks, chairman of the Georgia Association of Black Elected Officials, testified with respect to Ashcroft and the need for renewal of Section 5:

> I can confidently say that if we abolished the majority black districts for the state legislature, we would do away with most of the black legislators. The same would be true of black elected officials at the county and local levels. [Ashcroft] failed to take into account how extensive racial bloc voting is, and that when a district is changed from majority black to majority white it depresses the level of black political activity. The enthusiasm, the spirit, the sense that blacks have a chance are all diminished. A formerly majority black district, particularly one without a black incumbent, would have a different voting pattern after it became majority white. Abolishing majority black districts would cause a significant reduction in the number of black office holders. The state's advocacy of such a position is, alone, a compelling reason for extending Section 5.[23]

There also are substantial reasons to believe that the negative effects of Georgia v. Ashcroft will not be confined to African-American communities. A recent study showed that, for a variety of reasons, Latino communities need even stronger majority-minority districts than African-Americans.[24] As the author pointed out:

> Justice O'Connor made a mistake when she ignored powerful evidence showing that African-American voters still need majority-minority districts to elect their candidates of choice. Her most grievous error, however, was ignoring an entire body of literature that uniformly established that Hispanics are poorly served by coalitional and influence districts, and that they continue to rely on robust majority-minority districts – even more so than their black counter-parts.[25]

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[23] Voting Rights Act Renewal Oversight Hearing on Evidence of Continuing Need: Hearing Before the Subcomm. On the Constitution of the House Judiciary Committee, 109th Cong. of (2005) (Testimony of Tyrone L. Brooks, Georgia House of Representatives, Georgia Ass'n of Black Elected Officials. As of 2002, of the ten blacks elected to the state senate in Georgia, all were elected from majority black districts (54% to 66% black population). Of the 37 blacks elected to the state house, 34 were elected from majority black districts. Of the three who were elected from majority white districts, two were incumbents. The third was elected from a three-seat district. 2003 House of Representatives, Lost & Found Directory.

[24] Alvaro Bedoya, *The Unforseen Effects of Georgia v. Ashcroft on the Latino Community*, 115 Yale L.J. 2112, 2137 (2006).

[25] Id. at 2137-38.

In 5,190 Congressional races between 1972 and 1994, Latinos won 29 (0.6%) of those races that took place outside of majority-Latino districts.[26] Thus, if left unchecked Georgia v. Ashcroft would have a serious impact on the ability of Latino voters to select candidates of their choice.

The Ashcroft decision accelerated judicial erosion of Section 5 that began with another 5 to 4 decision in Reno v. Bossier Parish School Board, 528 U.S. 320 (2000). In that case, the majority opinion acknowledged that Bossier Parish, "like every other political subdivision" of Louisiana, was covered by Section 5 "because of its history of discriminatory voting practices." 528 U.S. at 323. Nevertheless, the majority proceeded to hold that Section 5 could not block the implementation of a redistricting plan that was enacted with a discriminatory purpose – to deny office to minority candidates – unless the redistricting plan made matters even worse than the "status quo." The majority reached this conclusion by converting holdings that "retrogressive" measures were illegal under Section 5 into holdings that measures which were not "retrogressive" – in the sense of an immediate reduction in the number of minority voters or office holders – were automatically legal under Section 5.[27] Thus, preclearance would have to be granted to voting changes that were plainly discriminatory in purpose and effect, if the change merely substituted one exclusionary practice for another. Jurisdictions that fell under Section 5 because of the extent of their discriminatory practices could thus shed Section 5 restraints by showing that they discriminated so absolutely that there is no room to worsen the status quo. That holding is inconsistent with the purpose of the Act and with its language precluding

[26] Id. at 2132.

[27] The Court noted that the change could still be challenged under Section 2 of the Voting Rights Act. 528 U.S. at 335. But that would reverse the burden of proof and impose the heavy costs on private parties or the Department of Justice described earlier.

measures that "have the purpose . . . of denying or abridging the right to vote" as well as measures which have that "effect".

Until the day when white Americans are as willing to vote for people of color as they are willing to vote for white candidates, and when state and local legislators have abandoned efforts to promote political or other goals by suppressing minority voting strength, Section 5 remains a vital lifeline for voters and future candidates of color. If that lifeline is pulled back or remains weakened, with a resultant dilution of minority votes, it is a mathematical certainty that future Congresses and state and local legislatures will have fewer members who can directly relate the experiences of minority Americans, and convey to those Americans a sense of full participation in the democratic process.

The VRARA, therefore, properly includes provisions which would overrule Ashcroft v. Georgia and Reno v. Bossier Parish and preserve the original purpose of Section 5.

2. Renewal of Section 203 of the VRA

Equally critical to the goal of full enfranchisement for minorities are the language assistance provisions of Section 203 of the VRA. The VRARA properly would reauthorize Section 203 which would otherwise "sunset" in 2007.

While Section 203 was added to the VRA in 1975 in order to remove obstacles posed by the lack of adequate bilingual language assistance for members of significant minority language groups, New York has been subject to language assistance provisions since the passage of Section 4(e) of the Voting Rights Act in 1965. Section 4(e) was designed to eradicate discriminatory practices against Puerto Ricans who are U.S. citizens by birth, but often lack fluency in English. In New York, litigation brought under Section 4(e) succeeded in creating a

full system of Spanish language assistance. As one New York federal court assessing Section 4(e) recognized:

> It is simply fundamental that voting instructions and ballots, in addition to any other material which forms part of the official communication to registered voters prior to an election, must be in Spanish as well as English, if the vote of Spanish-speaking citizens is not to be seriously impaired. Simple logic also requires that the assistance given to the plaintiff class of voters at the polls on election day by trained representatives of the Board of Elections be in a language they understand, in order that their vote will be more than a mere physical act void of any meaningful choice.[28]

Congress expanded on these principles in 1975 when it added Section 203 to the Voting Rights Act. Specifically, Congress determined 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 afforded them resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the Fourteenth and Fifteenth Amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.[29]

To accomplish these objectives, Section 203 requires certain jurisdictions to provide language assistance to citizens with limited English proficiency. Covered jurisdictions are required to provide language assistance at polling places in addition to translations of any voting materials that are also provided in English. Among other things, voting materials include ballots,

[28] Torres v. Sachs, 381 F. Supp. 309, 312 (S.D.N.Y. 1974)

[29] 42 U.S.C. § 1973aa-1a(a).

instructions, election forms, notices about registration, location of polling places and absentee voting, and publicity materials.[30]

Four language groups are covered by Section 203: persons who are American Indian, Asian American; Alaskan Natives, or people of Spanish heritage.[31] These four groups were selected based on evidence that members of these groups had suffered from discrimination in voting and in other areas that limited their access to the political process, that members of these groups had faced severe language barriers and that each of the four groups had depressed voter registration and turnout.

When initially adopted in 1975, the language provisions were slated to remain in effect for ten years. In 1982, the language assistance provisions were extended for another ten years, and were extended again in 1992 for an additional 15 years. Currently, the provisions of Section 203 will expire on August 6, 2007, unless Congress extends them.

New York City's experience demonstrates the continuing importance of these provisions. During the time Section 203 has been in effect, the language assistance provisions have been shown to increase voter registration amongst Hispanic and Asian-American voters residing in the covered counties in New York.[32] In addition, thanks in part to the language assistance provisions contained in Section 203, in 2001, John Liu was elected councilman for the 20th District of New York City, becoming the first Asian-American to be elected to citywide office in New York.

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[30] See 42 U.S.C. 1973aa-1a(c) ("Whenever any State or political subdivision subject to the prohibition of subsection (b) of this section 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 minority group as well as in the English language."); see also 28 C.F.R. §§ 55.15, 55.18.

[31] See 42 U.S.C. 1973(c)(3).

[32] See Voting Rights in New York 1982-2006, Juan Cartagena, March 2006 at 14 (located at http://www.civilrights.org/issues/voting/NewYorkVRA.pdf) (report submitted for the record to the House Judiciary Committee in March 2006).

Nevertheless, inadequate language assistance remains a barrier to many in New York. In the Asian-American Community, the extent of this problem is made clear in a series of reports issued by the Asian American Legal Defense & Education Fund ("AALDEF"), which in 1998 began publishing the results of an election-monitoring program it had operated since 1988.[33] Problems found with the language assistance programs included:

- Ineffective and incorrect translation of voting documents. During the 2000 general election, candidates for Congress, the State Senate and State Assembly and other offices were listed under the incorrect party headings, so that Republicans were identified as Democrats and vice-versa. Despite the fact that the Board of Elections was notified of this mistake before 10:00 A.M. no official arrived to remedy the problem before 4:00 P.M.

- The use of racial epithets and other hostile remarks at polling places. In 2002, the AALDEF documented numerous incidents of hostility, including polling workers calling South Asian voters "terrorists," talking about the "chinky eyes" of Asian voters and complaining that Asian-Americans "should learn to speak English."

- Insufficient access to foreign language materials. During the 2003 elections, the AALDEF reported that in some polling places, Chinese voters were denied access to ballot translations, in other locations, translated voter registration forms and affidavit ballot envelopes were unavailable and later found unopened in their envelopes.

- Insufficient oral language assistance at polling places. In both the 2002 and 2003 elections, there were widespread reports that there were not enough interpreters to meet the demands of voters. Indeed the AALDEF survey revealed that during the 2003 elections, one in three interpreters assigned to polling stations did not show up.

Language assistance problems were not, however, confined to the Asian-American community. Despite more than 40 years of language assistance to Spanish speaking voters, the Hispanic community continues to face challenges in obtaining fair access to the ballot. Following the 2000 general election, the New York State Attorney General announced it had

[33] A summary of the reports, including the examples listed below, can be found in Voting Rights in New York 1982-2006, Juan Cartagena, March 2006, Appendix A (report submitted for the record to the House Judiciary Committee in March 2006).

received "serious" allegations that boards of election "failed to provide appropriate translation services to many non-English speaking citizens" and that Hispanic voters were "harassed, intimidated, and intentionally misinformed about voter registration laws in New York City and other parts of the State."[34] In 2001, the New York City Board of Elections was missing one-third of the Spanish language interpreters it needed for that election.[35] Moreover, since 2001 New York has required federal election observers specifically because of concerns regarding language assistance to Hispanic voters on four separate occasions: In New York and Kings counties in September 2001, in Bronx County in October 2001 and in Queens County in September 2004.[36]

Moreover, Section 203 compliance issues persist outside New York City, both in New York State and elsewhere in the nation. In New York, three suburban counties are required to provide language assistance to Latino voters, but on-site compliance monitoring in 2005 revealed failures to provide Spanish-language materials in at least two of those counties.[37] In addition, in 2004 and 2005, the Department of Justice filed lawsuits against Suffolk and Westchester counties arising from Section 203 compliance problems.[38] Both actions were settled with consent decrees that improved the language assistance programs in those counties.

Nationwide, the Department of Justice continues to litigate Section 203 cases, identifying them as one of their highest civil rights priorities. For example, on July 26, 2002 the Assistant

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[34] Office of Attorney General Eliot Spitzer, Voting Matters in New York: Participation, Choice, Action, Integrity, February 12, 2001 at 35.

[35] Ron Hayduk, Gatekeepers to the Franchise: Shaping Election Administration in New York, Northern Illinois University Press. Dekalb, 2005. at 198.

[36] See Voting Rights in New York 1982-2006, Juan Cartagena, March 2006 at 13 (located at http://www.civilrights.org/issues/voting/NewYorkVRA.pdf) (report submitted for the record to the House Judiciary Committee in March 2006).

[37] See id at 17.

[38] *United States v. Suffolk County*, No. 04-2698 (E.D.N.Y. 2004); *United States v. Westchester County, New York*, No. 05-0650 (S.D.N.Y. 2005).

Attorney General for the Civil Rights Division, announced that the Justice Department expected that "jurisdictions will be able to provide bilingual assistance to limited English speaking voters at this fall's elections," and noted that the "Department of Justice is now engaged in an aggressive campaign to make sure citizens who require language assistance to vote receive the assistance they need." Indeed, since 2002, the Department of Justice has filed more language assistance cases than in the entire previous history of the Voting Rights Act. During this time period, the Civil Rights Division has brought successful Section 203 suits across the country, with cases in California, Florida, Massachusetts, New York, Pennsylvania, Texas, and Washington.[39]

In New York and elsewhere, language continues to be a critical barrier to the full participation of many voters in the democratic process. While the provisions of Section 203 have led to great strides, a great deal of work remains. Nevertheless, some in Congress have suggested that Section 203 should not be renewed because the language assistance provisions "divide our country, increase the risk of voter error and fraud, and burden local taxpayers." Nothing could be further from the truth. Language assistance at the polls strengthens our democracy. This assistance brings more citizens into the electoral process, increasing their ties to the community and gives everyone a voice in our government. Moreover, by providing accurate, timely and fair assistance at the polls, Section 203 has ensured that citizens can vote for the candidates of their choice without fear of intimidation or harassment. An inclusive, non-discriminatory and fair election process is worth the small cost associated with language

[39] See Department of Justice Press Release, "Justice Department Settles Voting Rights Lawsuit with Hale County, Texas," dated Feb. 6, 2006 (available at http://www.usdoj.gov/opa/pr/2006/February/06_crt_102.html).

assistance. The promises contained in the Fourteenth and Fifteenth Amendments require nothing less.

3. Changes Relating to the Use of Examiners and Observers

Sections 6 through 9 of the Voting Rights Act provide for the Attorney General to send examiners and observers to protect voter's civil rights on Election Day.[40] The proposed changes in the VRARA would make it easier to deploy observers and would eliminate examiners because they have not been appointed to certified jurisdictions in some 20 years. Most importantly, a court, in addition to the Attorney General, would have the ability to deploy observers. Since 1965, the Justice Department has routinely sent observers, including its own personnel, around the country to protect election-related civil rights. Through 2003, almost 25,000 observers had been deployed in approximately 1,000 elections.[41] During 2004, the Department of Justice sent approximately 840 federal observers and more than 250 Civil Rights Division personnel to 86 jurisdictions in 25 states to monitor general election activities. During the period November 1985 through November 2004, New York County alone had more than 350 observers and monitors dispatched from the Department of Justice.[42] Only this week the Department of Justice dispatched observers to California to monitor primary elections, to make sure that officials adequately served voters who did not speak English, in light of recent issues in this regard during the 2004 election.[43]

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[40] 42 U.S.C. § 1973d-g.

[41] See Voting Rights Act Renewal Oversight Hearing to Examine the Impact and Effectiveness of the Act: Hearing before the Subcomm. On the Constitution of the House Judiciary Committee 109th Cong. 9 (2005) at 2 (testimony of Joe Rogers, Commissioner, Nat'l Comm'n on the Voting Rights Act).

[42] See Voting Rights in New York 1982-2006, Juan Cartagena, March 2006 at 12 (available at http://www.civilrights.org/issues/voting/NewYorkVRA.pdf) (report submitted for the record to the House Judiciary Committee in March 2006).

[43] *National Briefing, N.Y. Times*, A-17 (June 6, 2006).

The Department of Justice's continuing resort to observers is an obvious testament to their need. The VRARA would make it less difficult to appoint and dispatch observers when needed. Section 3(a) of the VRARA would authorize the Attorney General or a court to assign observers upon a finding that there is a reasonable belief that a 14th or 15th Amendment violation will occur. Monitoring by observers ensures that poll workers and election officials are on notice that their actions are being recorded and that any inappropriate or discriminatory actions will be reported. Observers can also provide evidence for future actions. As but one example, in United States v. Burks County, observers reported "substantial evidence of hostile and unequal treatment of Hispanic and Spanish-speaking voters by poll officials."[44] Evidence obtained from observers led the court to enter a permanent injunction on behalf of the United States. The observer and monitor provisions remain as important to the goals of the Voting Rights Act as the substantive terms of the Act.

4. Allowing for Recovery of Expert Fees by Successful Plaintiffs

In addition to maintaining these critical statutory protections, the VRARA also wisely includes a provision that helps ensure that private parties are able to fully litigate claims under the Voting Rights Act. To encourage and support private actions to enforce voting rights and other civil rights, the law has long provided for recovery by prevailing parties of reasonable attorneys' fees which are often essential to proper prosecution of voting rights and other civil rights claims.[45] But in 1991, the Supreme Court held that prevailing parties in civil right actions were not entitled to recover expert witness fees as part of their attorney fee awards.[46] While

[44] 277 F. Supp. 2d 570, 574 (E.D. Pa. 2003).

[45] See 42 U.S.C. § 1988.

[46] See West Virginia Univ. Hospitals, Inc. v. Casey, 499 U.S. 83 (1991).

expert witnesses are needed in many civil rights cases, they are a virtual necessity in cases brought under the Voting Rights Act. Without experts, it is virtually impossible to document the extent of legally significant racial bloc voting, analyze and present statistical evidence, and testify about the "totality of circumstances" surrounding racial discrimination in the state or local jurisdiction directly impacted by the lawsuit. These costs can be prohibitive, requiring private attorneys and public interest organizations to advance thousands of dollars that they can never recover, regardless of the merits of their case. As Justice Marshall noted in his dissent in the Casey case, refusing to award expert fees serves "to deny victims of discrimination a means for redress by creating an economic market in which attorneys cannot afford to represent them and take their cases to court." Id. at 90 (internal quotes and citations omitted). To ensure that the protections put into place by the Voting Rights Act are effective and to make sure that the Act's goals are realized, the VRARA would make clear that successful plaintiffs can recover expert fees.

Conclusion

The right to vote is fundamental to our democracy. For too long that right was denied to certain Americans on the basis of their race or color. Due to the Voting Rights Act, great strides have been made in remedying that terrible wrong. Nevertheless, as shown by the comprehensive testimony and other evidence presented to Congress, that task is far from complete. For the reasons discussed above enactment of the provisions of the VRARA set forth in H.R. 9 and S. 2703, as introduced, is essential if the goals of the Voting Rights Act and our quest for a more perfect democracy that offers its benefits to all citizens regardless of race or color is to be achieved.

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