

WITNESS LIST

HOUSE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

HEARING: H.R. 174, Voting Rights Extension Act of 1993

DATE: Thursday, March 18, 1993

TIME: 11:00 a.m.

ROOM: 2237 Rayburn House Office Building

*good background;
national perspective
212-219-1900* → Dayna Cunningham, Esq.
NAACP Legal Defense and Educational Fund, Inc.
New York, New York

Charles Cooper, Esq.
Shaw, Pittman, Potts & Trowbridge
Washington, D.C.

*plaintiff in
Reyes case* → Theresa Gutierrez
School Board Member
Victoria County, Texas

* * * * *

*plaintiff's lawyer in
Dresley case; good
response to opponents
205-322-1100* → James Blacksher, Esq.
Birmingham, Alabama

The Honorable Michael Bowers
Attorney General
State of Georgia

*gives good examples
of Alabama "Presley"
problems* → Jerome A. Gray
Alabama Democratic Conference

OPENING STATEMENT
OF
CHAIRMAN DON EDWARDS
MARCH 18, 1993

Congress intended that the Voting Rights Act of 1965 be used to end voting discrimination in forms known and unknown to it in 1965. Legislators had tired of persistent local and state governments crafting new laws in response to outlawed discriminatory devices. They recognized, and the Supreme Court later affirmed that "unremitting and ingenious defiance" of the Fifteenth Amendment necessitated the passage of a broad and powerful law. Therefore, the Voting Rights Act not only provided plaintiffs with a right of action, but also required certain jurisdictions to obtain approval before altering all voting related laws.

For many years, the Supreme Court interpreted the Voting Rights Act in a manner that maintained its original intent. Thus, it was both alarming and disappointing when the Supreme Court affirmed Rojas v. Victoria Independent School District and later, rendered its decision in Presley v. Etowah County Commission.

Both the Rojas and Presley decisions are evidence of the newest forms of voter discrimination and the Supreme Court's narrow view of the Voting Rights Act. Though these machinations are new and subtle, their ability to deny minorities the right to representation is undeniable. The Voting Rights Act was crafted to address these circumstances. Thus, it is appropriate that we hold this hearing and discuss the problem confronting the nation.

Statement of Dayna L. Cunningham, Assistant Counsel,
NAACP Legal Defense and Educational Fund, Inc.

Submitted to the
Subcommittee on Civil and Constitutional Rights
of the
House Judiciary Committee
in support of

H.R. 174: The Voting Rights Extension Act of 1993

March 18, 1993

On behalf of The NAACP Legal Defense and Educational Fund, Inc. I thank you for this opportunity to speak in support of H.R. 174, the Voting Rights Extension Act of 1993.

The NAACP Legal Defense and Educational Fund, Inc, ("the Fund" or "LDF") provides legal representation to African Americans and other minorities, as well as to other persons in appropriate cases, in litigation to enforce their civil and constitutional rights. The Fund has a long history of involvement in voting rights, particularly in the South. We have litigated numerous cases challenging discriminatory electoral schemes, including registration practices. In 1985, Julius Chambers, Director-Counsel of the Fund, argued in the Supreme Court *Thornburg v. Gingles*, 478 U.S. 30 (1986), the landmark case that set out the standard for violation of §2 of the Voting Rights Act as amended in 1982. The following year, in conjunction with attorney James Blacksher, who is here today, LDF brought the *Dillard* cases, see *Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala 1986), that successfully challenged discriminatory at-large districting schemes throughout the state of Alabama and led to election of Commissioners Presley and Mack, name plaintiffs in *Presley* and its companion case *Mack v. Russell County Commission*, 112 S. Ct. 820 (1992) The Fund has comprehensive practical experience with voting rights issues facing African Americans.

In *Presley v. Etowah County Commission*¹ and *Rojas v. Victoria Independent School District*², the Supreme Court ratified decrees of majority white local governing bodies that changed the authority, or operating rules of government in

¹112 S.Ct. 820 (1992).

²Civ. Act. No. V-87-16 (S.D. TX, Mar. 29, 1988) *aff'd* 490 U.S. 1001 (1989).

a manner that excluded newly elected minority officials from equal participation in the governing process. In *Presley*, the white majority stripped the first African American county commissioner elected since Reconstruction of his authority to allocate and spend the budget. In *Rojas*, the anglo majority imposed a virtual gag rule on the first Latina elected to the school board by changing, from one to two, the number of votes required to get an item on the school board agenda. In both cases, in an unprecedented narrowing of the scope of the Act, the Supreme Court said that these actions were not prohibited by the Voting Rights Act.

Should the Voting Rights Act be amended now to address the *Presley* and *Rojas* decisions? Why not wait to see if the decisions have an adverse impact on minority voting rights? Congress must not wait because the adverse impact of these decisions already is clear. *Presley* and *Rojas* are not isolated incidents. They form a growing pattern of cases in jurisdictions where minority-sponsored officials win public office and recalcitrant local officials change governmental rules to prevent minority elected officials from participating equally in the governing process.

At the outset, let me make clear that seeking to safeguard equal participation in the governing process is not an attempt to ensure substantive outcomes that are favorable to protected minorities. Restoring voting rights law to its state before *Presley* and *Rojas* will not necessarily affect the outcome of any particular budgetary or school board decision. Rather it will provide protection against unfair obstacles to meaningful minority participation in the governing process. Without such protection, there is no way to ensure that decisions made on behalf of the majority have the consent--even if

not the support--of the minority community. The lack of such protection strikes at the very legitimacy of democratic government.

Attempts to thwart minority voter participation in government through their elected representatives are not unexpected or unprecedented in the history of voting discrimination in this country. Congress heard evidence of these attempts by recalcitrant state and local governments as early as 1965 during the initial House hearings on the Act.³ Such attempts are merely the predictable next "generation" of voting discrimination by local officials who can no longer prevent protected minorities from casting their ballots or from electing candidates of their choice. Both the federal courts and the Department of Justice have forbidden local jurisdictions from obstructing minority voters' political participation in this manner since the inception of the Voting Rights Act. Since *Presley* and *Rojas*, however, this blatant voting discrimination is completely without statutory remedy.

The history of voting discrimination in this country has been a history of "ingenious and unremitting defiance of the Constitution."⁴ Supreme Court litigation before the Voting Rights Act demonstrates the variety and persistence of mechanisms used to deprive minorities of the right to vote. For each discriminatory voting

³See Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess, at 60 (Testimony of Attorney General Nicholas Katzenbach).

⁴*South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

mechanism outlawed, a new device was invented to take its place.⁵ These devices have evolved through three "generations": In the "first generation," states and local governments created barriers to ballot access to prevent minorities from even casting a vote.⁶ Removal of many of these barriers after 1965 began the "second generation" in which state and local jurisdictions created unfair political boundaries and other obstacles to ensure that the votes of newly enfranchised minorities would be

⁵Grandfather clauses were invalidated in *Guinn v. United States*, 238 U.S. 347 (1915) and *Myers v. Anderson*, 238 U.S. 368 (1915). Procedural hurdles were invalidated in *Lane v. Wilson*, 307 U.S. 268 (1939). Discriminatory application of voting tests and qualifications was condemned in *Schnell v. Davis*, 336 U.S. 933 (1949). See also, *Alabama v. United States*, 371 U.S. 37 (1962); *Louisiana v. United States*, 380 U.S. 145 (1965). The white primary was outlawed in *Smith v. Allwright*, 321 U.S. 649 (1944). Improper challenges to voting status were nullified in *United States v. Thomas*, 362 U.S. 58 (1960). Racial gerrymandering was forbidden by *Gomillion v. Lightfoot*, 364 U.S. 329 (1960).

⁶Among the "first generation" barriers about which Congress heard in 1970 were the following: 1) Exclusion of and interference with black poll watchers; 2) refusal to provide or allow adequate assistance for illiterate black voters; 3) withholding of necessary information from black candidates regarding voting or running for office; 4) discriminatory purging or failure to purge voter lists; 5) discriminatory selection of election officials; 6) disqualification of black ballots on technical grounds; 7) harassment of black voters, poll watchers, and campaign workers. See 115 Cong. Rec. 38509 (1969)(statement of Rep. Leggett).

In 1975, Congress heard testimony about the following additional "first generation" barriers to voting: (1) omitting the names of registered voters from the lists; (2) maintaining racially segregated voting lists or facilities; (3) allowing improper challenges of black voters; (4) requiring separate registration for different types of elections; (5) failing to provide the same opportunities for absentee ballots to blacks as to whites; (6) moving polling places or establishing them in inconvenient or intimidating locations; (7) setting elections at inconvenient times; (8) failing to provide adequate voting facilities in areas of greatly increased black registration; and (9) causing or taking advantage of election day irregularities. See Extension of the Voting Rights Act, 1975: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong. 1st Sess. 645-648 (1975)(statement of Armand Derfner).

meaningless.⁷ *Presley* and *Rojas* represent this country's "third generation" of voting discrimination.

The Voting Rights Act was passed in 1965 based on an exhaustive record of this history. Section 5's extraordinary preclearance measures, the provisions of the statute addressed in *Presley* and *Rojas*, specifically were directed at local attempts to thwart minority voter participation.⁸ When these provisions came up for renewal in

⁷Among the "second generation" barriers that Congress found in 1970 were the following: 1) gerrymandering of legislative districts; 2) switching from district based to at-large elections; 3) consolidating counties; 4) instituting full-slate voting. See 115 Cong. Rec. 38509 (1969)(statement of Rep. Leggett).

In 1975, the list of "second generation" barriers about which Congress heard testimony grew to include the following: (1) requiring a run-off election between the two highest candidates if no candidate wins a majority in the first election; (2) making at-large elections even more unfair to minorities by superimposing various rules that prevent a minority from concentrating its votes to take advantage of a split among the majority group, for example, (a) numbered place laws, which designate each position by a separate number, require each candidate to qualify for a specific numbered place, and allow each voter to vote for only one candidate in each place; (b) staggered terms, which achieve the same end as numbered places, except that the offices are separated chronologically; (3) splitting the vote for a strong black candidate by nominating additional blacks as "straw" candidates for the same office; (4) imposing stiff formal requirements for qualifying to run in primary or general elections, e.g., high filing fees, numerous nominating petitions, or complex oaths; and (5) withholding certification, on technical grounds, of black candidates' nominating petitions. See Extension of the Voting Rights Act, 1975: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong. 1st Sess. 645-648 (1975)(statement of Armand Derfner).

⁸Under section 5 of the Voting Rights Act, 42 U.S.C. §1973c, jurisdictions that come under the coverage provisions of section 4 of the Voting Rights Act are forbidden from implementing any voting changes until those changes have determined by the United States Department of Justice. (continued...)

1970, lawmakers learned that "resistance to progress in enfranchisement of qualified Americans has been far more subtle and far more effective than we have thought possible."⁹ Volumes of new evidence showed that contempt for the Constitution's voting guarantees was as entrenched as it had been in 1965. It was beginning to take on new forms, however, that focused on diluting or canceling out the votes of newly enfranchised minority voters.¹⁰ Similar findings were made when the Act was extended with broad support in 1975 and 1982.¹¹

As early as 1970, the Civil Rights Commission documented three tactics used by local officials seeking to change the nature of elected offices sought by minority candidates:

⁸(...continued)

States Attorney General not to have the purpose or effect of discriminating against minority voters. Under section 2 of the Act, 42 U.S.C. 1973, as amended in 1982, any voting mechanism that results in protected minorities having less opportunity than whites to participate in the political process and to elect candidates of their choice is forbidden. Section 2 applies nationwide.

⁹115 Cong. Rec. at 38517 (1969) (statement of Rep. Celler).

¹⁰As one lawmaker observed:

The same states that were the most efficient, determined and malicious in their efforts to keep black people off the registration rolls can be expected to be the most efficient, determined and malicious in the efforts to cancel out the growing black vote. Congress was mindful of this responsibility when it put section 5 into the Voting Rights Act. If there were those who felt that the states covered by the Act would repent and turn from their evil discriminatory traditions in five short years, then those people were overly optimistic and sadly mistaken. 116 Cong. Rec. 6359 (1970)(Statement of Sen. Bayh).

¹¹See S. Rep. No. 97-417 at 9 (1982); 128 Cong. Rec. §6943 (June 17, 1982).

1. Attempts to extend the terms of offices held by white incumbents:

Two weeks after the passage of the Voting Rights Act, the Alabama Legislature passed an act to extend for an additional 2 years the terms of office of Bullock County commissioners some of whom were scheduled for reelection. The Negro voting age population in Bullock County is twice that of the white voting age population.

2. Outright abolishment of offices sought by African American candidates:

In February 1966, a Negro farmer in Baker County, Georgia qualified to run for justice of the peace in his district to succeed to a vacancy created by the death of the incumbent. Within a few days thereafter the Baker County Commissioners voted to consolidate all the militia districts into one district. The effect was to abolish the one office for which a Negro had filed.

3. Making local elective offices appointive in predominantly black counties but not in predominantly white counties:

For many years county superintendents of education in Mississippi were elected at the same time and in the same manner as other county officers. In June 1966, the legislature amended the Mississippi statutes requiring that the office of county superintendent of education be appointive only in certain predominantly black counties The appointments were to be made by the county board of education whose members, all white, serve staggered 6-year terms.¹²

In addition, Congress heard testimony about local officials limiting the responsibilities of offices likely to be won by African Americans and about local officials and others imposing barriers to minority officials taking office, for example, bonding companies refusing to bond African Americans who had managed to win elections.¹³

¹²*Id.* at 6357 (statement of Sen. Bayh). See *Bunton v. Patterson*, 393 U.S. 544 (1969).

¹³115 Cong. Rec. 38509 (1969)(statement of Rep. Leggett). See also, *Id.* at 38502 (continued...)

These types of voting changes always have been subject to the Voting Rights Act. For example, the Department of Justice objected to the abolition of an elective office a minimum of five times between 1969 and 1975.¹⁴ Under the Voting Rights Act, the federal courts and the Department of Justice have struck down or objected to a variety of other mechanisms that changed the structure or operations of a local governing body. While the Court in *Presley* acknowledged the discriminatory potential inherent in the abolition of an elective office,¹⁵ it refused to recognize this potential in changes in the authority of elected officials that have the same or nearly the same practical effect. These changes have been numerous enough to group into six general categories that I discuss in more detail below: 1) shifts of authority away from a local body that has significant minority representation; 2) creation of an executive position that is elected at large to oversee the operations of a governing body on which there is minority representation; 3) changes in decision-making authority of elected bodies;

¹³(...continued)
(statement of Rep. Reid); *Id.*, at 38505 (statement of Rep. Tunney); *Id.* at 38495. (statement of Rep. Ryan); *Id.*, at 38517 (statement of Rep. Celler) each discussing various stratagems used by recalcitrant white officials to prevent minority-sponsored candidates from taking office; Extension of the Voting Rights Act, 1975: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong. 1st Sess. 645-648 (1975)(statement of Armand Derfner).

¹⁴The Department of Justice objected to the abolition of the following elective offices from 1969-1973: 1) Superintendent of Education, Clarendon County, South Carolina (Africans Americans comprised 49% of registered voters)(November 12, 1973); 2) City Clerk, Hollendale and Shaw, Mississippi (African Americans comprised 70% of populations)(Jul. 9 and Nov. 21, 1973); Justice of the Peace, State of Alabama (Dec. 26, 1972); School Superintendent, State of Mississippi (May 21, 1969).

¹⁵117 L. Ed. 2d at 64.

4) changes in legislative voting procedures: 5) holding of quasi-official, racially exclusive meetings of white officials to make official decisions and 6) imposition of additional requirements for office-holding. Other examples of *Presley* and *Rojas* type changes do not fit within these categories although they have the effect of obstructing minority participation in government.

Shifts of Authority

One of the most frequent mechanisms used to shift authority away from local governing bodies with minority representation was the adoption of home rule. In many jurisdictions, a county commission elected at-large was more likely to preserve whites' political monopoly than a local legislative delegation subject to the requirements of the Voting Rights Act. The Department of Justice lodged objections to the adoption of home rule in at least the following jurisdictions, citing the risk that at-large county commissions would be less responsive to the minority electorate: Edgefield County, South Carolina;¹⁶ Sumter County, South Carolina;¹⁷ Horry County, South Carolina;¹⁸ Charleston County, South Carolina;¹⁹ and Columbia County, South Carolina;²⁰

¹⁶*McCain v. Lybrand*, 465 U.S. 236 (1984).

¹⁷*County Council of Sumter v. United States*, 555 F. Supp. 694 (D.D.C. 1983)

¹⁸See *Horry County v. United States*, 449 F. Supp. 990 (D.D.C. 1978).

¹⁹Letter from Drew S. Days III, Assistant United States Attorney General, to Ben Scott Whaley, Esq. (June 14, 1977 objection letter)

²⁰Letter from Drew S. Days, Assistant United States Attorney General, to Treva G. Ashworth, South Carolina Assistant Attorney General (February 6, 1978 objection letter).

Local authorities have used other mechanisms to shift authority away from governing bodies with minority representation. In *Hardy v. Wallace*²¹, three months after a redistricting lawsuit that resulted in the election of two African Americans to the county legislative delegation,²² the state transferred the power to appoint the local racing commission from the county legislative delegation to the Governor. African Americans comprised seventy-eight percent of the county. In *Robinson v. Alabama State Department of Education*,²³ following passage of the Voting Rights Act, the Marion City Council transferred control of public schools within the city from the Perry County Board of Education, which was elected at-large from a 65% African American county, to the City Council, elected from a 52% African American City.

In *Jackson v. Town of Lake Providence*,²⁴ after African Americans won a majority on the town's governing body, outgoing white incumbents transferred control of the municipal power plant to a newly-created power commission whose appointed members were all white.

In another case not involving an African American representative, but rather a white elected official who had been responsive to the African American community's interest, a shift in the official's authority was calculated to punish him. In Austin, Texas, (San Patricio County), after the county clerk assisted the Department of Justice in

²¹603 F.Supp. 174 (N.D. Ala. 1985)

²²*Burton v. Hobbie*, 561 F.Supp. 1029 (M.D. Ala. 1983).

²³652 F.Supp. 484 (M.D. Ala. 1987)

²⁴Civil No. 74-599 (W.D. La. July 11, 1974).

investigating a voting change submitted for preclearance under section 5, the county attorney retaliated by removing the clerk's responsibility for voter registration.²⁵

Creation of At-Large Executive

In Colleton County, South Carolina, after two African American candidates were elected to the county school board, which had districts that were identical to those of the county commission, the county created a county supervisor position elected at large from the entire county and shifted all executive authority to this position. In addition, the county expanded the commission to add two additional seats and abolished elections by district. After the Department of Justice's objections were upheld by a federal district court,²⁶ the county refused to submit an alternative form of government for preclearance. Instead, it sought an additional transfer of authority--to levy school taxes--away from the county legislative delegation. The Department also objected to this second transfer of authority.²⁷

After section 2 litigation in Waycross, Georgia (Ware and Pierce Counties), which resulted in the election of the first African American-sponsored city commissioner, the local legislative delegation abolished the practice of electing the mayor by rotation

²⁵Letter from John R. Dunne to Stan Reid, Esq. (May 7, 1990 objection letter).

²⁶*United States v. The Board of Commissioners, Colleton County, South Carolina*, C.A No. 78-903 (March 7, 1979, D. S.C.) See also, Letter from Drew S. Days, Assistant United States Attorney General to Travis G. Ashworth, South Carolina Assistant Attorney General (February 6, 1978 objection letter).

²⁷Letter from Drew S. Days, Assistant United States Attorney General to Travis G. Ashworth, South Carolina Assistant Attorney General (September 4, 1979 objection letter).

among the commissioners, and implemented a system directly to elect the mayor by the city at large subject to a majority vote.

Changes in Decision-making Authority

The *Presley* case is a clear example of an African American elected official being stripped of his authority when the white majority voted to make all governmental decision-making collective. In Mobile, Alabama, exactly the reverse strategy was attempted in an effort to bring about the same result. There, in anticipation of a challenge to the at-large system of electing city commissioners, the city eliminated the collective administrative authority of the commission and designated specific administrative functions to individual commissioners. By giving each commissioner discrete individual authority, the city hoped to lock itself into an at-large system of election on the assumption that it would not be appropriate to permit a particular area of the city to elect a commissioner to perform specific functions for the city as a whole.²⁸

Changes in Legislative Voting Rules

In the *Rojas* case, the school board adopted new rules to ensure that whites would control the school board agenda. In two cases recently filed or about to be filed, local legislative bodies have changed the voting rules by which decisions were made to ensure that African Americans have no say in the substantive outcomes.

²⁸Letter from J. Stanley Pottinger, Assistant United States Attorney General, to C.B. Arendall, Esq. (February 26, 1976 objection letter).

Tennessee's home rule enabling legislation requires a two-thirds majority vote for the enactment of redistricting plans. During the 1992 redistricting, the four African American county commissioners out of ten in Shelby County, Tennessee blocked the two-thirds majority needed to enact the plan preferred by the white majority. Rather than comply with the county charter, which would have required them to seek a compromise with the African American commissioners, the white commissioners passed their preferred redistricting plan by a simple majority, holding the vote among themselves to the complete exclusion of the African American commissioners. This lawsuit is now pending.

In Haywood County, Tennessee, the County Commission changed the decision-making authority of the County Commission to ensure that African Americans would not have a meaningful voice on either of the other two county governing bodies--the County School Board and the County Commission itself.

Among its other duties, the County Commission elects the Haywood County School Board. Traditionally, the school board members had been elected by the Commission from residency districts. The County Commission altered its own decision-making authority by abolishing the district system of electing county school board members, and setting up an at-large system. At the same time it set up the racially dilutive at-large election system for the school board, it reconfigured the County Commission districts to ensure that African Americans would be underrepresented on the County Commission. This pair of changes gave the white commissioners virtually complete control over the election of the school board.

Quasi-official, Racially Exclusive Meetings

In *Major v. Treen*, 574 F.Supp. 325 (1983), during the 1980 state legislative redistricting process in Louisiana, after conflicts arose between African American and white legislators over the creation of a majority black congressional district, white legislators held a closed meeting in the subbasement of the statehouse with labor groups and other "interested persons" to fashion a compromise on the congressional district that excluded African Americans. The African American legislators were barred from the meeting because, according to one legislator, they had no way of forcing their demand for a black district.²⁹

In Altheimer, Arkansas, a small town outside of Pine Bluff, when the second African American alderperson was elected to the city council in 1990, the city council ceased having official meetings. Instead, the white members of the city council gathered at exclusive meetings by invitation only that were held in the back of the mayor's liquor store.³⁰

Additional Requirements For Office-Holding

By imposing additional, unanticipated requirements on minority elected officials, recalcitrant local governments have sought to make it difficult or impossible for

²⁹ [T]he one group, the one contingency that was not going to come out of the session satisfied was going to be the blacks. The reason for this was that with all of the competing interests . . . there was probably going to be virtually no way to satisfy the black members of the Legislature . . . insofar as creating a majority black district [was concerned] . . . they [minority legislators] didn't have enough votes. 574 F. Supp. at 334.

³⁰1990 Interview with Helen Alexander, Alderperson, Altheimer, Arkansas.

minorities to serve. For example, in *Shirley v. Superior Court in and for County of Apache*,³¹ after a Navajo was elected for the first time to the Apache County board of supervisors, local whites required that the official's credentials and fitness to serve be reviewed by the state supreme court before he could be seated.

In Wilcox County, Alabama, the county probate judge, who is charged with issuing commission cards to enable elected constables to perform their duties, refused to issue such cards to newly-elected African American constables.³²

In *Huffman v. Bullock County*,³³ after the first African American was elected probate judge in Bullock County, Alabama, the County Commission, which has always paid the salaries of the probate judge's staff, voted to shift responsibility for paying the salaries to the probate judge himself.

This brief catalogue of documented *Presley*-type changes makes clear the risk to minority voters of unchecked local power to obstruct minority representatives' meaningful participation in government. Moreover, scrutiny of such changes is wholly consistent with the comprehensive regulatory scope of section 5. There is little merit in opponents' well-worn retreat to arguments about an opening of floodgates in the wake of a *Presley* amendment. These arguments are based on two fallacies. First, that the Department of Justice could not process the volume of changes that would be

³¹109 Ariz. 510, 513, P.2d 939 (1973), cert. den. 415 U.S. 917 (1974) .

³²See, United States Commission on Civil Rights, *The Voting Rights Act: Ten Years After* at 169 (1975).

³³528 F. Supp. 703 (M.D. Ala. 1981)

submitted under a *Presley* amendment. Second, that Justice Department scrutiny unnecessarily would intrude on states' autonomy.

In the Department's *amicus curiae* brief and in oral argument before the Supreme Court in *Presley*, the Attorney General indicated that section 5 coverage of potentially discriminatory changes of legislative authority or rules would not present undue administrative burdens.³⁴ In light of his/her experience in enforcing the Voting Rights Act, the Attorney General's view of the Act is due considerably greater deference than are the speculative arguments of those who oppose section 5 protections. Indeed, that opponents' complaints are mere speculation is shown by the fact that prior to the *Presley* and *Rojas* decisions, changes in the authority of elected officials or in legislative rules that had the potential to discriminate were systematically reviewed by the Department of Justice without undue administrative burdens.³⁵

The Department of Justice has a comprehensive administrative mechanism that is well-equipped to carry out its enforcement responsibility under section 5 to review "all changes, no matter how small" that have the potential to discriminate.³⁶ Under this command, the Department capably reviews voluminous changes including every change of polling places from one side of a street to the other,³⁷ every change in candidate

³⁴See *Presley v. Etowah County*, 117 L.Ed. 2d 51, 70, nn.5, 6 (1992) (Stevens, J., dissenting).

³⁵*Id.*

³⁶*Allen v. State Board of Elections*, 393 U.S. 544, 568

³⁷See *Perkins v. Matthews*, 400 U.S. 379 (1971).

filing fees³⁸ and every change from paper ballots to voting machines³⁹ that is submitted from every covered jurisdiction. Surely the Department effectively can process--as it did before 1992--the *Presley*-type changes that may have a discriminatory impact on minority voters.

Moreover, arguments about undue intrusion on state autonomy by section 5's enforcement scheme were resolved 28 years ago when Congress enacted the provision. Congress determined, after finding that other mechanisms to enforce the fifteenth amendment's voting guarantees had been wholly ineffective,⁴⁰ that close monitoring under section 5 of local voting practices was the most effective way of preventing states from enacting new discriminatory voting mechanisms each time an existing voting barrier was removed. Thus it chose to "shift the advantages of time and inertia from the perpetrators of the evil to its victims"⁴¹ by forbidding implementation of voting changes in covered jurisdictions without federal approval.⁴² Section 5 does not cover every

³⁸*Dougherty County Board of Education v. White*, 439 U.S. 32, 40, n.9 (1978)

³⁹See 393 U.S. at 568.

⁴⁰*South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).

⁴¹*United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 121 (1978).

⁴²Covered states are required to submit for preclearance "any state enactment that alter[s] the election law in a covered State in even a minor way." 393 U.S. at 566. However, Congress substantially reduced the burden on the states by requiring all changes to be precleared automatically within 60 days of submission unless the Attorney General specifically interposes an objection. 42 U.S.C. §1973c. In 1992, the Department reviewed 17,000 changes and precleared 99% of them. This percentage has not changed since 1969. 117 L. Ed. 2d 70, n.6.

state. Rather, it covers those states expressly identified by Congress as those with a documented history of egregious race-based voting discrimination.⁴³ As to these states, Congress made the judgment that state autonomy cannot shield practices that have the potential to discriminate against minority voters.

Conclusion

Despite the many enforcement gains of the Voting Rights Act, racial discrimination in voting is still not a thing of the past. *Presley* and *Rojas* create a huge exception to the coverage of the Voting Rights Act precisely at the point where protected minorities are actually in a position to participate in the governing process. The majority of the cases described above were brought under section 5 of the Voting Rights Act. All of the cases also would have been subject to section 2 challenge. Many never required litigation because the Department of Justice intervened before the changes were implemented. *Presley* and *Rojas* send precisely the wrong message to recalcitrant local jurisdictions that continue, whether intentionally or not, to enact discriminatory voting measures. The message is that voting rights enforcement has reached its limits and that barriers to minority political participation are okay as long as they exist within the legislature, rather than at the voting booth. For this reason, I strongly urge that Congress pass H.R. 174 to restore Voting Rights Act protections against minority political exclusion wherever it may occur.

⁴³See *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966).

TESTIMONY OF CHARLES J. COOPER

BEFORE THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL
RIGHTS OF THE COMMITTEE ON THE JUDICIARY
OF THE HOUSE OF REPRESENTATIVES

REGARDING

H.R. 174, THE "VOTING RIGHTS EXTENSION ACT OF 1993"

My name is Charles J. Cooper, and I am a partner in the Washington, D.C. law firm of Shaw, Pittman, Potts & Trowbridge. I welcome this opportunity to present my views on H.R. 174, the "Voting Rights Extension Act of 1993"; in so doing, I speak only for myself.

My experience with respect to the Voting Rights Act dates back to 1981, when I joined the Civil Rights Division of the U.S. Department of Justice as a Special Assistant to the Assistant Attorney General. In that capacity and, later, as a Deputy Assistant Attorney General, I was closely involved in the Justice Department's enforcement activity under the Voting Rights Act, including the review of preclearance submissions by covered jurisdictions under Section 5 of the Act. From 1985 until 1988 I served as the Assistant Attorney General for the Office of Legal Counsel in the Department of Justice and continued to participate in the formulation of the Department's position in Voting Rights Act cases before the Supreme Court. In private practice I have represented both plaintiffs and defendants in litigation brought under various provisions of the Voting Rights Act, and I have represented a number of state and local government bodies and officials both in litigation and administrative preclearance proceedings under Section 5 of the Act.

I shall confine my testimony today to the provision of H.R. 174 that is designed to reverse Presley v. Etowah County Commission, 112 S. Ct. 820, 60 U.S.L.W. 4135 (1992), in which the

Supreme Court held that changes in the decisionmaking authority of elected officials and bodies are not covered by Section 5 of the Voting Rights Act. Section 5 of the Voting Rights Act requires that certain covered jurisdictions must obtain preclearance before implementing any change in a "standard, practice, or procedure with respect to voting." H.R. 174 would amend Section 5 to make clear that the term "procedure with respect to voting" includes "any change of procedural rules, voting practices, or transfers of decision making authority that affect the powers of an elected official or position."

At issue in Presley were changes in the governing structures in two Alabama counties, Etowah County and Russell County.

Russell County. Prior to 1979, the Russell County Commission consisted of five members elected at-large from "residency districts." Two of the commissioners were required to reside in Phenix City, the largest city in the county, while three commissioners were elected from rural residency districts. The three rural commissioners had individual authority over road and bridge repair and construction within their districts and directed the operations of the districts' "road shop," including authorizing expenditures for routine repair and maintenance work. Funding for new construction and major repair projects was subject to a vote by the entire commission. The rural commissioners were assisted by a county engineer, appointed by the commission.

In 1979, following the indictment of a rural commissioner for corruption in his road work activities, the Alabama Legislature enacted a statute transferring all responsibility for road work to the county engineer. A resolution accomplishing the same result had also been passed by the commission. Neither the resolution nor the statute was submitted for preclearance under Section 5 of the Voting Rights Act.

In 1985 a consent decree was entered in federal district court to resolve claims brought against the Russell County commission under Section 2 of the Voting Rights Act. Under the decree, the commission was expanded to seven members, with each member elected from a single-member district. In 1986, two black commissioners were elected.

Etowah County. Prior to 1986, Etowah County was governed by a five-member county commission, four of whom were elected at-large from residency districts; the fifth member, the chairman, was subject only to the requirement that he reside somewhere in the county. Each of the four "road commissioners" individually supervised the maintenance of roads and bridges within his district and directed the operations of the district's "road shop." The commission as a whole allocated funds among the four road districts, but the individual road commissioners controlled spending priorities within the districts. In 1986, the Etowah County Commission entered into a consent decree to resolve claims brought under Section 2 of the Voting Rights Act. Under the

decree, the commission was expanded to six members elected from single-member districts. The initial elections held under the new system involved only the two additional districts. A black commissioner was elected from one of the districts, and both new commissioners joined the four holdover commissioners in January 1987. In August 1987 the Etowah County Commission passed a resolution abolishing the prior practice of allocating funds to the separate districts for disposition by the district's commissioner. Under the "Common Fund Resolution," all funds earmarked for road work were to be expended by the commission as a whole; "in accordance with need." The Common Fund Resolution was not submitted for preclearance under Section 5.

The District Court's Decision. In 1989, an action was filed in federal district court alleging racial discrimination in the conduct of road operations in Etowah and Russell Counties in violation of prior court orders, the Fourteenth and Fifteenth Amendments, Title VI of the Civil Rights Act of 1964, and Section 2 of the Voting Rights Act. The complaint was later amended to allege that the counties had violated Section 5 of the Voting Rights Act by failing to preclear their transfers of authority over the county's road work from the individual commissioners to the county engineer (in Russell County) and the commission as a whole (in Etowah County).

A majority of the three-judge district court, in an opinion authored by Circuit Judge Frank Johnson, held that neither

transfer of road work authority constituted a "covered change" subject to preclearance under Section 5. Appendix to Jurisdiction Statement in No. 90-711, at A1-A41. The district court held that transfers of authority are subject to Section 5 preclearance only when they "effect a significant relative change in the powers exercised by governmental officials elected by, or responsible to, substantially different constituencies of voters." Id. at A13-A14. The district court added that "minor or inconsequential" transfers of authority are not subject to Section 5 preclearance even when the transfers involve officials with different constituencies.

With respect to Etowah County, the district court held that "the reallocation of authority embodied in the common fund resolution was, in practical terms, insignificant" since the commission as a whole had the authority, "both before and after the disputed change," to "allocate funds among the various districts, and thus to effectively authorize or refuse to authorize major road projects on the basis of a county-wide assessment of need." Id. at A19. Similarly, Russell County's transfer of road work authority from the individual rural commissioners to the county engineer was not subject to Section 5 preclearance because both the commissioners and the engineer were answerable ultimately to the same constituency -- the voters of Russell County. Id. at A16-A18. The county engineer is appointed by and thus

responsible to the commission, which in turn is responsible to all county voters. Id. at A16-A17.^{1/}

When the case reached the Supreme Court, the Department of Justice, as amicus curie supporting appellants, attempted for the first time to articulate a standard for distinguishing a change in the authority of an elected official or body that is covered by Section 5 from one that is not. Prior to the Presley case, the Justice Department had taken the cryptic position that some, but not all, changes in the authority of an elected official or body must be precleared under Section 5, but it had refused to provide any guidance on how to determine which changes were covered and which changes were not. Covered jurisdictions were simply forced to guess at where the Justice Department would draw the line. Indeed, as recently as 1987, when the Department promulgated regulations under Section 5, it consciously decided not to provide guidance on the issue to covered jurisdictions. As the Department explained: "While we agree that some reallocations of authority are covered by Section 5 (e.g., implementation of 'home rule'), we do not believe that a sufficiently clear principle has yet emerged distinguishing covered from noncovered

^{1/} District Judge Thompson dissented from the majority's conclusion that transfers of authority are covered by Section 5 only when they occur between officials with different constituencies. Id. at A35-A36. Judge Thompson concluded that preclearance is required when "there has been a significant and fundamental change in the nature of the duties traditionally exercised by elected officials." Id. at A38 (emphasis in original).

reallocations to enable us to expand our list of illustrative examples in a helpful way." 52 Fed. Reg. 486, 488 (1987). Not until the Supreme Court took up the issue in Presley was the Department, after 27 years of administering the statute, able or willing to identify "a sufficiently clear principle . . . distinguishing covered from noncovered reallocations" of authority between elected officials.^{2/}

And the principle finally offered by the Justice Department to the Supreme Court in Presley was sweeping indeed. According to the Department, any change "that implicate[s] an elected official's decisionmaking authority," no matter how seemingly "minor or inconsequential," is covered by Section 5. U.S. Brief at 18, 10 (emphasis in original). Preclearance is required, in other

^{2/} The Department's case-by-case application of Section 5 in this area has been inconsistent. Indeed, in one case the Department has changed its position no fewer than three times. In Hardy v. Wallace, 603 F. Supp. 174 (N.D. Ala. 1985) (3-judge court), authority to appoint members of a county racing commission was transferred by statute from the county's state legislative delegation to the governor. The Justice Department initially took the position that the statute was subject to Section 5 preclearance. On reconsideration, however, the Department determined that the change was not covered by Section 5. While "it would be wrong to conclude," according to the Department on reconsideration, "that no reallocation of governmental power can ever be considered a change 'with respect to voting,'" the transfer of appointment authority "neither remove[d] the vote from residents of [the] County, nor otherwise impede[d] or in any respect infringe[d] on resident voting rights." Id. at 181 (Appendix B to the court's opinion). Now, the Justice Department has changed its position yet again, stating in its amicus brief to the Supreme Court in Presley that "[f]urther experience with Section 5 has led us to the view that we were right the first time" U.S. Brief at 15 n.5.

words, for "[c]hanges that affect an elected official's authority to make decisions -- to legislate, tax, spend, set school curricula, approve road and bridge projects, and so forth" Id. at 18. Under the Justice Department's test, therefore, any structural or substantive change relating in any way to governance would be subjected to federal oversight before it could be implemented.^{3/}

The Justice Department's position in Presley rested more on policy than on law. Its principle legal argument was based not on Section 5's language or legislative history, but on the Supreme Court's statement in Allen v. State Bd. of Elections, 393 U.S. 544, 566 (1969), that in enacting Section 5, "Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." Because the Court in Allen rejected a de minimus exception to Section 5's coverage, the Justice Department argued, any transfer of decisionmaking authority among the elected officials must be subject to preclearance. As the Supreme Court noted, the Department's argument simply "assumes the answer to the principle question in the case: whether the changes at issue are changes in voting, or as

^{3/} As examples of "[c]hanges that do not affect an official's power to make decisions," the Justice Department cited (1) a school board's rule change requiring that items be placed on the board's agenda at the request of two, rather than one, board members and (2) a transfer of authority from a legislative body to a committee to make recommendations concerning proposed legislation. U.S. Brief at 18 & n.7.

[the Court] phrased it in Allen, 'election law.'" 60 U.S.L.W. 4138.

The Department's policy argument was more persuasive: "If transfers of authority were not subject to preclearance, a jurisdiction could negate the election of a minority candidate to a governing body by taking away the official's authority and re-locating it to other officials over whom minority voters have less influence." U.S. Brief at 14. Nowhere in its brief, however, did the Justice Department acknowledge the policy drawbacks of its argument; namely, that subjecting all legislative changes that affect an elected official's decisionmaking authority to Section 5 preclearance not only would work a breathtaking expansion of the preclearance burden on covered jurisdictions and the Justice Department, but also would operate to freeze existing government structures and allocations of authority in many jurisdictions, no matter how compelling the need for change may be.

Recognizing the "all but limitless minor changes in the allocation of power among officials and constant adjustments required for the efficient governance of every covered State," a majority of the Supreme Court rejected the Justice Department's position as "an unconstrained expansion of [Section 5's] coverage." 60 U.S.L.W. 4139. In rejecting the test proffered by the Justice Department, the Presley majority stated:

Innumerable state and local enactments having nothing to do with voting affect the power of elected officials. When a state or local body adopts a new governmental program or modifies an existing one it will

often be the case that it changes the powers of elected officials. So too, when a state or local body alters its internal operating procedures, for example by modifying its subcommittee assignment system, it "implicate[s] an elected official's decisionmaking authority." Brief for United States as Amicus Curie, 17-18 (emphasis in original).

* * *

A simple example shows the inadequacy of the line proffered by the appellants and the United States. Under the appellants' view, every time a covered jurisdiction passed a budget that differed from the previous year's budget it would be required to obtain preclearance. The amount of funds available to an elected official has a profound effect on the power exercised.

60 U.S.L.W. 4139.^{4/}

With specific reference to the transfer of road work authority from individual Russell County commissioners to the county engineer, the Presley majority noted that while the "making or unmaking of an appointive post often will result in the erosion or accretion of the powers of some official responsible to the electorate," Section 5 was not intended "to subject such routine matters of governance to federal supervision." Id. "Were the rule otherwise" the Court concluded, "neither state nor local governments could exercise power in a responsible manner within a federal system." Id.

In light of the enormity of the preclearance burden that adoption of the government's position would place on covered

^{4/} The Presley majority rejected as unprincipled the Justice Department's suggestion at oral argument that the Court "draw an arbitrary line distinguishing between budget changes and other changes." 60 U.S.L.W. 4139.

jurisdictions, the Presley majority felt compelled to "formulate workable rules to confine the coverage of Section 5 to its legitimate sphere: voting." And because changes in the distribution of power among elected officials have no direct relation to, or impact on, voting, the Court concluded that such changes are not covered under Section 5.

I believe that the Presley majority correctly perceived the dimension of the expansion in Section 5's scope that adoption of the standard advanced by the Justice Department would bring about. I also believe that the points made by the Presley majority in rejecting the Justice Department's position are equally compelling reasons to reject H.R. 174, which appears to have been carefully drawn to codify the standard advanced by the Justice Department in Presley.

Indeed, the Justice Department itself appears to be having second thoughts about its position in light of the Presley majority's decision. The members of the Subcommittee will no doubt recall the testimony last April of John Dunne, then the Assistant Attorney General for the Civil Rights Division of the Department of Justice. While expressing "disappointment" in the outcome of Presley, Assistant Attorney General Dunne was not prepared to endorse legislation overturning Presley unless statutory language could be fashioned that would not entail the consequences foreseen by the Presley majority. He emphasized his "conviction that it would be very difficult to draw statutory language which would

be sufficiently comprehensive but not go far into that world that the [Presley] majority was very concerned about, nit-picking, if you will, or second-guessing virtually every decision that some legislative or other governmental body made." Transcript of Testimony of Assistant Attorney General John Dunne at 30 (April 8, 1992). The Justice Department "could not endorse changing the decision in the Etowah case," according to Assistant Attorney General Dunne, until it was satisfied "that there is a statute which . . . is sufficiently limited and clearly drawn." Id. at 30-31.

Quite apart from the sheer weight of the preclearance burden that H.R. 174 would place upon covered jurisdictions, the measure is objectionable in my opinion because it would operate to freeze existing government structures and allocations of power in many covered jurisdictions, no matter how pressing the need for change. A covered jurisdiction is entitled to preclearance under Section 5 only if it can demonstrate that the proposed change "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." 42 U.S.C. § 1973(c). The discriminatory "effect" prohibited by Section 5 has been defined by the Supreme Court in terms of "retrogression": "[T]he 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 franchise." Beer v. United States, 425 U.S. 130, 141 (1976).

Under standard retrogression analysis, any measure reducing the authority of an elected official or body controlled by a racial minority constituency would have a discriminatory effect prohibited by Section 5. For example, a state statute withdrawing, say, a particular taxing authority (or spending authority, or program administration authority, or any other conceivable official authority) from the county commission of a majority-black county would clearly be retrogressive. If the change were subject to Section 5's preclearance requirement, therefore, it would be objectionable and could not be implemented. The measure would be barred regardless of its importance to the public good, and regardless of the strength of its public support. Indeed, even if the measure enjoyed widespread support among the county's black population, it would nonetheless violate Section 5's "effects" test. Nor would it matter that the measure applied uniformly to every county in the state. It could not be implemented in any county with a majority-black electorate (although it could be implemented elsewhere, for in a majority-white county it would not constitute "retrogression in the position of racial minorities with respect to their effective exercise of the franchise." Beer, 425 U.S. at 141.).

The same analysis would apply at the county and municipal levels. Thus, county and municipal elected officials with

constituencies controlled by a racial minority could not, consistent with Section 5's effects test, have their decisionmaking authority reduced or otherwise adversely affected.

The retrogression analysis outlined above would not be limited to allocations of decisionmaking authority among elected officials acting in an executive or legislative capacity. The Supreme Court has made clear that Section 5 covers changes in electoral laws relating to judges no less than to other elected officials. Thus, the provision of H.R. 174 subjecting to Section 5 preclearance "transfers of decisionmaking authority that affect the powers of an elected official or position" presumably would apply to elected judges no less than other elected officials. Accordingly, a state statute that, for example, eliminated or restricted the preexisting jurisdiction of the state's trial level judges would be retrogressive, and thus barred under Section 5, in any judicial district with a majority-black electorate. Indeed, one can readily imagine state supreme court decisions that would be embraced by Section 5 if a H.R. 174 is enacted. For example, a state supreme court decision overruling an earlier decision finding jurisdiction to adjudicate certain disputes in the elected judges of a particular state court would presumably constitute a "transfer of decisionmaking authority that affect[s] the powers of an elected official." The state supreme court's decision, therefore, would have to be submitted to the Department of Justice for preclearance under Section 5,

and its implementation would no doubt be barred with respect to judges with majority-black constituencies.

Finally, contrary to the Justice Department's assertion in its amicus brief in Presley, subjecting countless changes in the governing authority of elected officials to Section 5 preclearance review is not necessary to ensure that covered jurisdictions do not "negate the election of a minority candidate to a governing body by taking away the official's authority and reallocating it to other officials over whom minority voters have less influence." U.S. Brief at 14. If such racially motivated conduct occurred in a jurisdiction that is not covered by Section 5's preclearance requirement, its victims would obviously not be without a remedy. Rather, the transfer of decisionmaking authority based on the race of an elected official or his constituents, whether or not the jurisdiction was covered under Section 5, would obviously violate the Fourteenth Amendment and would be promptly enjoined in an appropriate judicial action.^{5/}

In sum, then, I believe that amending Section 5 to cover changes in the authority of elected officials in covered jurisdictions is not necessary to reach and proscribe the type of

^{5/} In addition to the Presley case, the report of the House Judiciary Committee on H.R. 5236, an identically worded predecessor to H.R. 174, cites four other cases in which jurisdictions "attempted to divest duly-elected, minority-sponsored officials of their power." H.R. 102-656 at 4-5. Each of the cited cases clearly appears to have involved racially motivated transfers of official authority. No other cases were cited by the Judiciary Committee as justifying congressional action in this area.

racially discriminatory conduct apparently engaged in by the Etowah County Commission. And amending Section 5 as proposed in H.R. 174 would entail enormous costs, both because it would place massive additional preclearance burdens on covered jurisdictions and because its application, specifically the "effects" test, would prevent the implementation of entirely race neutral measures that would serve the interests of all the electorate, whether black or white.

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TESTIMONY OF THERESA A. GUTIERREZ
BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY

WASHINGTON, D.C.

MARCH 18, 1993

Good morning, and thank you for inviting me to testify before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary on the proposed Presley/Rojas Amendment to the Voting Rights Act, previously filed as H.R. 174.

My name is Theresa Ann Gutierrez. I am from Victoria, Texas, a town of about 55,000, with an 8% African American population and a 38% Mexican American population. Victoria is the county seat of Victoria County, and the largest town in the 225 mile stretch of the coastal bend between Corpus Christi and Houston. Victoria is situated on the Guadalupe River, some 70 miles from the Gulf of Mexico. The economic base in Victoria County is oil and gas (or the petrochemical industry) and agribusiness (primarily cattle ranching.) There is a lot of money in Victoria, primarily in the hands of the few, rich, old white families of the area.

I am a member of the Victoria Independent School Board, and have held that office for eight years. I am before this committee as the school board member affected in the decision in the Rojas v.

Victoria Independent School District case, one of the two cases cited as giving rise to the need for the amendment to the Voting Rights Act contained in the bill previously filed as H.B. 174. I am also the mother of six children, ranging in ages from seven (7) to twenty-two (22). They, and my concern and passion for them and other minority children in Victoria and their need for preparation for adulthood, are what have indirectly led me to this opportunity to testify before this committee. Through much of the past seventeen years, I have been increasingly more involved with the schools in Victoria and, thus, the school district in Victoria, first through the Parent Teachers Associations at the schools my children attended and now as a school board member. For your information, the student population of Victoria Independent School District is 52% minority, but only 24% of the teaching staff is minority.

In late 1984, Victoria Independent School District, moved on its own motion, to change from an at-large system of electing its seven members to the Board of Trustees to one under which five members would be elected from single member districts and two would be elected at-large. The action of the Board was taken under a newly legislated Education Code provision, passed in 1983 in response to the 1982 amendment of the Voting Rights Act, that allowed school boards to choose to elect under one of three systems incorporating at least 70% single member district representation rather than the at-large, numbered place systems used throughout the state.

I ran for election to the Board in one of the new single-member districts in 1985 under the new plan for election. At the time I ran, my district had a minority population of 31% Hispanic and 14% African American. I was the first Hispanic female elected to serve on the Board of Trustees. At the time I was elected, I naively hoped that my election would serve to bring the issues and agenda of the minority community of Victoria to the forefront of the school district's business and concerns so that those issues and that agenda could be fairly dealt with by the Board of Trustees, as the governing body of the school district. Within a matter of months, I learned not only was the Board unwilling to fairly deal with the issues and agenda of the minority community, but the Board also did not want to even hear about the issues and agenda of the minority community.

My first five months on the Board were without event as I concentrated on learning the processes and the business of governing the school district. However, soon after my election to the Board of Trustees, Victoria school district received an ultimatum from the United States Department of Education concerning the racial imbalance or segregation of five of the elementary schools in the district. The school district responded to the ultimatum by determining to close, rather than integrate, three of the district's targeted five elementary schools, all of them neighborhood schools in the minority area of Victoria. The district also voted to call a bond election to construct facilities and additions to schools in non-minority neighborhoods in Victoria

to accommodate the children who would be displaced by the closing of those neighborhood schools and bussed to these other facilities. The district never considered the upgrading of the neighborhood schools and the potential of bussing children in. It only considered their closing, and taking minority children out.

My community, my constituents, were up in arms over the decision of the Board. For seven months, my community organized and fought the issuance of the bonds, blocking preclearance of the bond election at the Department of Justice long enough to delay the issuance of the bonds and the availability of construction funds until after the end of the 1985-86 school year. I was intimately involved in the organizing and vocal in opposition to the bond election. At Board meetings, I was the sole dissent to the board's actions and the lone voice of the minority community. In May of 1986, the Board voted to only close one minority neighborhood elementary school, the one my children attended.

During the controversy over the bond elections, the school district was notified by the Department of Justice that its implementation of the numbered post provision for the election of the two at-large members of the Board of Trustees had not been precleared by the Department of Justice under section 5 of the Voting Rights Act. When the Board refused to submit the numbered post provision for preclearance review to the Department of Justice, the United States filed a Section 5 enforcement action against the district on April 4, 1986, just days before the school board election. A group of minority residents, including close

associates of mine and my husband, sought intervenor status and were allowed to participate in an amici capacity in the litigation. The district ultimately lost the litigation and was forced to abandon the numbered post provision on November 14, 1986.

It was following this activity that the then Board president circulated a memo recommending changes in school district Policy, BE (LOCAL), that would require, at the discretion of the president, two Board members request an item be placed on the agenda for discussion and action at board meetings. The policy had previously allowed any school board member to request an item be placed on the agenda for discussion and action by the Board. Additionally, changes to Policy BED (LOCAL), were recommended. The changes included moving the time for scheduled board meetings to convene from 7:00 p.m. to 5:00 p.m. The effect was to change the open forum section of the meeting, that portion wherein the public is allowed to bring issues of concern before the Board, to a time period immediately following the convening of the meetings at 5:00 p.m., when the working public would be unavailable to attend meetings.

The same day that the memo concerning the need for changes in Policy BE (LOCAL) was circulated by President Johnny Wilson, an interview with Mr. Wilson was published in the local paper in which he discussed the increase in animosity and levels of frustration among Board members since the change to a system of election incorporating single-member districts, some eighteen months before, or basically since the minority community was able to elect a

representative to the Board. A week later, the day of the first reading of Policy BE (LOCAL), Wilson circulated another memo among board members specifically addressing the "controversy" among board members as a problem. Later, in deposition, Wilson defined the source of the controversy referred to in his correspondence as the 1985 proposed closing of the minority schools. Put in other words, the President of the Board had identified action of the Board giving the minority community a voice on the Board as a mistake, and was recommending a way to fix that mistake through his proposed changes in Policy BE (LOCAL).

On November 12, 1986, the board had the second reading of the proposed policy. Members of the public, who were minorities and had participated in the lawsuit filed by the United States against the district, spoke in opposition to the proposed policy. The Board President stated on the record of the public hearing that those three speakers did not represent the people of the city and that the Board would like to hear from some other members of the public rather than the three who had spoken.

On November 14, 1986, the United States district court hearing the Section 5 action filed by the United States against the school district issued its decision finding that the school district had implemented numbered positions for the election of the at-large positions on the school board without the requisite preclearance, and enjoined the board from further implementation of the numbered positions until and unless the change was precleared.

Six days later, the Board passed Policy BE (LOCAL), as

proposed by the President of the Board. My vote was the only dissenting vote. Subsequently, on February 24 and then February 27, 1987, the school district's superintendent sent two memos to me asking that I submit to him in writing any objections I might have to any agenda item prior to the board meetings. No other member of the Board was ever asked to follow such a procedure.

On February 27, 1987, the Department of Justice asked that the school district submit its agenda preparation policy to the department for preclearance review. The Rojas litigation was filed one month later on behalf of Mexican American voters of Victoria school district.

There is no question in my mind or the minds of those people I have represented in Victoria Independent School District that the intent and purpose of the 1986 change in the policy for agenda preparation, along with other changes made to Board policy at the same time, were punishment of the minority community for taking positions contrary to that of the majority members of the Board and their constituents and an effort to silence the lone recent voice of that community on the Board. The school board did not mean to give the minority community access to the process of governance of the school district when it changed the system of election under duress and the threat of litigation. When the majority of the board learned that the minority community would not sit quietly out of gratitude during deliberations, it took measures to cut the community off.

We lost the lawsuit at the district court level because the

district court determined the only effect of the measure was to advance the timing of a second for agenda items, and that such changes were not intended to be covered by the Voting Rights Act. The district court refused to see the real practical effect of the change, that of completely squelching the voice of the minority community. In the appeal before the Supreme Court, the Reynold's Department of Justice changed its position, despite the clear intent of the Board, and took the position that although similar changes might be covered, this particular change was not. As a result, we also lost before the Supreme Court who affirmed the district court's decision.

On the bright side, the litigation resulted in some very broad adverse publicity for the school district. The case was covered on the front page of the New York Times, as well as local Texas papers. The result was that the district backed off full enforcement of the policy for a while. However, the policy remains in place.

Most recently, the policy has been used to block my attempt to request approval of travel expenditures to the April 1992, meeting of the national convention of the National Association of School Boards and the meeting of the National Caucus of Hispanic School Board Members. The Caucus is an affiliate of the National Association of School Board Members, and meets at the same time as the annual convention of the National Association of School Boards. The 1992 meeting was one at which I was to be sworn in as President of the National Association of Hispanic School Board Members, after

recent election.

The National Association of Hispanic School Board Members is an organization that offers networking for representatives of Hispanic constituencies throughout the United States. Its purpose is to promote a consciousness of the specific and inherent problems faced by Hispanic students in public education and to advance the educational opportunities of students, particularly Hispanic students. The organization was formed because Hispanics were unable to break into leadership roles in the parent organization, or to have our issues addressed.

It was necessary to secure school board approval because I had attended a meeting of another organization for which the district had paid. Additional travel expenses, beyond the two pro forma approvals, must be approved by the Board before incurred. I approached another school board member seeking a second to place the item of the payment of my expenses for the trip on the agenda. The member I asked to help me have the item placed on the agenda declined to do so, telling me that Mexican Americans are a special interest group and he would not help me secure funding to advance the interests of a special interest group or to attend their meetings. Again, the specter of racism that underlies the governance of our school district and is ever present in the actions of the Board with regard to the minority community and to me as the representative of that community, raised its ugly head. The refusal of any Board member to help me get the item on the agenda because of the "special interest" nature of my request

became an issue before the Board, with the public again incensed over the actions of the Board in labeling the majority of students in the district, their needs and interests as "special interest" because the children are not white.

I did not ever get the item on the agenda. I found a separate funding source for the trip. The issue of the payment of my travel expenses became incentive for the election of an additional minority representative on the Board. In May of 1992, a second representative of the minority community was elected to the Board, and the problems I have faced since 1986 with getting a second to place items on the agenda that are of concern to my constituents for even discussion, has been resolved. My community is no longer completely shut out of the governance process because issues important to them could not even be brought up in Board meetings for discussion. But for eight years I have endured a special kind of hell that is the result of living in a community so divided on racial and ethnic lines that even after election of a minority representative to the governing body, special efforts continue to disenfranchise that community because the majority refuses to share power with or allow the minority community any kind of equality in government, at the expense of our future and our children. 1

I am not alone in this experience. I am aware of other kinds of so-called "third generation" efforts of other jurisdictions to

As an aside, the attorney representing the school district throughout the Rojas litigation had as decorations in his office a confederate flag, a portrait of Jefferson Davis, and an old print of a scene from a slave sale.

continue the disenfranchisement of the minority community, after those jurisdictions have been forced through litigation or the threat of litigation, to provide the opportunity for election of representation to the minority community.

For instance, the Texas Education Association, the appointed agency overseeing education in the state of Texas, and its appointed head, the Commissioner of Education, have now determined that they have the authority to appoint special masters to take over governance of a school district where they find "controversy" among board members. The master, under the agency's regulations, has the power to override or veto actions of a school board that has been selected for a required level of monitoring. The concept has some appeal, but the reality of application has yielded discriminatory results with school districts overwhelmingly targeted for monitoring that have some or a number of minority members elected to the body. The request for the assignment of a master usually comes from a superintendent or the majority members of the board. As a general rule, superintendent positions in Texas are held by Anglos, usually male. The purpose of the monitoring is usually to get board members in line so that the superintendent can maintain control of the board and the district.

Monitors came to Victoria in 1986 and 1987, during the period of the Rojas case. The world was told that I was the reason the district was at risk of losing its accreditation and might be taken over by a master. I am aware that monitors were sent to Dallas Independent School District when African American members of the

Board were loudly protesting actions of the majority white members of the Board about four years ago. South San Antonio Independent School District, with a governing body made up entirely of Mexican Americans, and Isleta Independent School District, also with an entirely Mexican American school board, have been taken over entirely by masters appointed by the Texas Education Agency and the appointed Commissioner of Education in the last two years.

In the county neighboring Victoria, Calhoun County, I have a friend who sits on the city council of Port Lavaca. Port Lavaca, Texas, changed to a six single-member district election system in 1987 as a result of litigation under Section 2 of the Voting Rights Act. Port Lavaca has a 52% minority population, but only elects two minority council representatives.

Elvira Martinez and the other Hispanic council person, Rudy Ramirez, have been sitting on the city council for a number of years now, dealing as I have with a majority community unwilling to share power with the minority community despite the presence of elected representatives on the city council. Recently, an issue arose that required both members challenge the structure of authority within city government. It graphically illustrates the efforts a majority community will undertake to prevent elected minority representatives from effectively representing their constituencies and from participating in the governance process.

The City Secretary, the person who records all city council meetings, maintains city records, and runs city elections, went to inspect a city owned building that had been rented to a Spanish

language radio station for the purpose of sponsoring a promotional dance for a Tejano band to which tickets were sold. The attending crowd, a record breaker for this community of 3,000 people, was primarily Mexican American. The City Secretary refused to refund the station's deposit on the building allegedly because of the "condition" of the grounds and the building. It was not the refusal for refund that created the problem, however. It was the reference of the City Secretary to the crowd that attended the dance as "undomesticated animals."

Both Ms. Martinez and Mr. Ramirez took strong positions calling for an immediate public apology by the City Secretary, and attempted to schedule the matter for a public hearing before city council. Their efforts were met with complete frustration by the Anglo city manager and city attorney. The efforts of Ms. Martinez and Mr. Ramirez to call a special meeting of the city council was completely rebuffed by the city manager and city attorney, who informed the two council members that they could not call such a meeting. The city charter specifically provides that two or more council members can call a special city council meeting. The previous week, a single Anglo city council member had on his own called a special city council meeting.

After several frustrating weeks of attempting to have the matter addressed by the council in either a public meeting or an executive session, the council finally agreed to address the matter in executive session. The city secretary then elected to take the meeting the issue to a public meeting at that point. The city

attorney and the city manager, however, cautioned both minority council members that they could not address the issue in the public meeting because the city would be subject to liability to the city secretary if they did. Texas Open Meetings Act provides that once the election is made by an employee to have such a meeting held in public, the council is no longer restricted by the rules that apply to an executive session.

At the public hearing, the city attorney and the city manager informed the public that the city secretary position, a position exempt from all personnel rules that govern other non-exempt employees, had to be treated like all other employees under the rules governing city personnel, and again publicly cautioned the minority members of the council with regard to libelous statements.

In the context of the meetings leading to the final public hearing, both Ms. Martinez and Mr. Ramirez have been told to shut up and sit down when attempting to address comments made in the public forum portion of the meeting and have been refused the opportunity to speak regarding agenda items before the council by the city attorney and other members of the council.

Ms. Martinez, in her capacity as a city council member, has attempted to access, among other information, EEO-1 reports for the city, bills paid by the city to the law firm contracted to represent the city, and information with regard to the demotion of the Mexican American who was chief of police and the hiring of his Anglo replacement. Recently, Ms. Martinez was told by the city manager that her access to public records of the city would require

a deposit for and eventual full payment of the personnel time required to search for and copy, if copying was sought, and any copying costs for any further requests made by her.

In short, the powers of these minority city council members have been totally obliterated by the city manager and city attorney, with the acquiescence of the Anglo members of the city council. An amendment to the Voting Rights Act, as proposed in H.B. 174, would provide an avenue for the voters who elected these representatives to counter the almost complete disenfranchisement they have suffered as a result of the actions of the Anglo majority of the council.

In San Patricio County, Texas, a year after the Rojas case was filed, the County Commissioners' Court, the governing body of the county, determined to cut the budget for three of the six justices of the peace in the county, as well as to consolidate the justice of the peace positions. County Commissioners courts in Texas has five members, four elected from single member districts and one elected at-large. In San Patricio County, two members were Mexican American, and three were Anglo. San Patricio County has a 53% minority population. Likewise, Justices of the Peace are elected from single member "like" districts of which there are six in San Patricio County.

The proposal of the County Commissioners followed on the heels of the election of a third Mexican American to a Justice of the Peace position in the county. The three budgets proposed for reduction were those of the Hispanic justices. The consolidation

proposed would pair two of the precincts that elected Mexican American justices of the peace creating one precinct to elect one justice of the peace, and the remaining precinct that elected a Mexican American justice of the peace was proposed to be consolidated with a precinct electing an Anglo justice of the peace.

The County Commissioners asserted as their justification for cutting the budgets of the Mexican American Justices of the Peace the need to cut unnecessary expenditures by the county, despite the fact that all three justice of the peace offices produced revenue far exceeding the expense of maintaining their offices, and in fact included three of the top four revenue producing justice offices in the county. The effect of the reduction of the budgets for those offices was to effectively eliminate all work handled by those offices, except the processing of state highway patrol citations. Each justice was required to handle his or her own clerical work as well as the other duties of the office. Based on new standards of measuring productivity also instituted by the county in this budget reduction process, the justices of the peace were required to maintain or exceed the level of revenue and cases handled by their offices prior to the proposed budget reduction. The budget reduction created a level of stress for each of the affected justices that caused weight loss and physical disorders, reduced their overall productivity and hours of operation, and significantly reduced their accessibility to their constituents.

A lawsuit was filed asserting both changes in the number of

the justice of the peace positions and the budget reductions were changes under Section 5 of the Voting Rights Act. The reduction in the number of precincts was objected to by the Department of Justice. The remaining issue in the case, the budget reduction, was fully briefed and presented to the three judge court in 1987. The judges, all Reagan appointees, sat on the case until early last year after the Presley decision was issued by the Supreme Court. Then they dismissed the action. Again, the third generation voting rights violations presented by this case would have been covered under the proposed amendment to the Voting Rights Act, and the voters and elected officials of San Patricio County would have been protected. ²

Since I was asked to testify before this committee, I have learned of several other situations in the state where the creativity of the jurisdiction has imposed a burden on the recently elected minority representatives diminishing their ability to represent their constituents or has diminished the power and authority of the offices to which minorities, after complete exclusion, have finally succeeded in gaining access to representation. The examples I have cited are by no means

² An aside in this case, the county judge, the presiding member of the county commissioners' court, created a position in the county of loss control manager for a buddy of his to be hired into. That position was responsible for curbing worker's compensation claims by county personnel. That position later evolved into personnel manager. As personnel manager, this employee decorated his office with a framed Ku Klux Klan hood. The county judge testified in deposition that he saw no problem with the display of a historical artifact like that in his personnel manager's office.

exhaustive; they are simply representative of the struggle that continues for minority voters to achieve equal access to the electoral process and representation, even after achieving the right to elect people to office.

While these cases are not as rampant as the cases where minorities have been completely excluded from office because of the use of discriminatory electoral systems, there simply must be some provision in the law to allow for redress where those instances occur. From my own personal experience, I can relate to you the absolute debilitation these kinds of situations have on the elected representative as well as on the community those officials allegedly represent. I can not imagine that Congress passed the Voting Rights Act to provide the opportunity to minority communities only the right to have a face in office or on a board. I think Congress meant for the Voting Rights Act to provide full access to representation and the political process to minority members of society, including having representatives function wholly and completely in the offices to which their constituents have elected them, without diminution, harassment, or burdens beyond those that their Anglo counterparts experience.

My eight years on the Victoria School board have been very hard, for me, for my family, for my constituents, as issue after issue has been rebuffed, ridiculed, or dismissed, by the Anglo majority. Fortunately, we have survived and become stronger inspite of the obstructions and efforts to kill our political will, and I have learned how to function in an atmosphere of complete

hostility. For some communities, this kind of prolonged experience would most assuredly kill any political will, and the new era of equality of representation envisioned by Congress in 1965 when it initially passed the Voting Rights Act to once and for all rid the country of overt discrimination in voting processes would be for naught. I urge you; I implore you to pass this very important amendment to the Voting Rights Act.

Summary of Written Statement of James U. Blacksher
to the House Subcommittee on Civil and Constitutional Rights
March 18, 1993

I am a voting rights lawyer from Alabama, one of the attorneys for black citizens in the *Presley* case. Just as Congress had to correct the voting rights enforcement problems caused by *City of Mobile v. Bolden*, so it must act again, this time to prevent the *Presley* decision from affording covered jurisdictions at last a way of limiting the electoral influence of blacks and Latinos without obtaining preclearance under Section 5 of the Voting Rights Act.

Changes aimed at excluding representatives of majority black districts from effective influence on local governing bodies are a chronic problem we encounter in Alabama, particularly in the many jurisdictions that only recently have been ordered by federal courts to change from at-large elections to single-member districts. My statement describes some of those problems.

I also respond to some of the previous criticisms of the pending voting rights bill. Equal access to the process of governance is the fundamental objective of American voting rights. Systematic isolation of the representatives of protected minorities impairs their right to vote just as much as do registration barriers and at-large election schemes. At bottom, the bill's opponents seek to preserve the power of white majorities always to defeat minority interests, and in this respect their arguments run directly contrary to the fundamental principle of American democracy that majority rule should never be abused to oppress minorities.

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Written Statement of James U. Blacksher
to the Subcommittee on Civil and Constitutional Rights
of the House Committee on the Judiciary
March 18, 1993

Thank you for allowing me to testify in favor of passage of the Voting Rights Extension Act of 1993. I am a (white) private attorney from Alabama who has been actively engaged in voting rights litigation since 1975. I have participated in cases that resulted in court orders striking down racially discriminatory at-large elections in over 200 jurisdictions in Alabama and Florida and increased black representation on many existing single-member district bodies, including the Alabama Legislature.

A. *Recurring Judicial Attempts To Limit the Effectiveness of the Voting Rights Act*

This is like *déjà vu* all over again, and I can't really say I'm happy to be here. My colleague Ed Still and I represented black voters in *Presley v. Etowah County*, 112 S.Ct. 820 (1992),¹ where for the first time the Supreme Court limited the scope of Section 5 of the Voting Rights Act. We were also counsel for plaintiffs in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), when the Supreme Court restricted the reach of Section 2 of the Voting Rights Act. I testified before this subcommittee on June 24,

¹ I wish to pay homage to our client, the representative plaintiff, Commissioner Lawrence C. "Coach" Presley, who died unexpectedly earlier this year. Coach Presley was a vigorous champion of equal rights, and I wish he were here today to speak for himself and for the African-American citizens of Etowah County he did his best to represent.

1981,² in support of the bill that became the Voting Rights Amendments of 1982.³ With amended Section 2's results test, Congress corrected the voting rights enforcement problems created by *City of Mobile v. Bolden*. Now, if progress toward the fundamental objective of the Voting Rights Act, equal political participation of blacks and language minorities, is to continue, Congress must act again.

There is sad irony in the *Presley* decision. The Supreme Court, which led this country's post-World War II movement toward equal rights and equal political participation for black Americans, now has positioned itself as an obstacle to realization of that goal. The Court did not have to pick this fight. The question in *Presley* was one of statutory interpretation; it did not present new constitutional issues. Congress had defined the term "voting" as broadly as possible to include "all action necessary to make a vote effective," 42 U.S.C. §19731(c), and my clients had convinced the Bush Administration that these particular changes in the institutional powers of elected officials have the potential to abridge the voting rights of protected minorities. Congress designed Section 5 of the Voting Rights Act to be enforced without any judicial intervention; the Attorney General's preclearance decisions are

² Hearings on Extension of the Voting Rights Act Before the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, 97th Cong., 1st Sess., Serial No. 24, Part 3, p. 2036 (1982).

³ 96 Stat. 131, 42 U.S.C. §1973 et seq.

reviewable only by the District Court for the District of Columbia. The limited role of the Alabama federal court in the *Presley* case was simply to order Etowah County to comply with Section 5's requirement of review by the federal executive department, not to decide whether or not the disputed changes were discriminatory.⁴ Congress delegated to the Attorney General authority to work out the particulars of Section 5 enforcement, including identification of the kinds of practices that implicate voting. Federal courts have recognized the great deference they must give the Attorney General's determinations about particular facts.⁵ So, after persuading the legislative and executive branches of the United States government that their democratic rights were threatened, Etowah County's black citizens have had their path to freedom blocked by a judicial branch that was, as we say in Alabama, just meddling.

The *Presley* decision jeopardizes the future viability of what may be the most successful civil rights provision ever enacted, Section 5 of the Voting Rights Act. In important respects, Section 5 has been self-implementing; it was designed by Congress to be enforced with little or no judicial involvement. Until now, Section 5 had inspired a new ethic of fairness for historically oppressed minorities that influenced

⁴ *E.g.*, *Presley v. Etowah County Commission*, 112 S.Ct. 820, 833 n.4, 838 n.22 (1992) (J. Stevens dissenting).

⁵ *Presley*, *supra*, 112 S.Ct. at 831, citing *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178-79 (1985); *United States v. Sheffield Bd. of Comm'rs*, 435 U.S. 110, 131 (1978).

most state and local political processes. In contrast with the patterns of evasion that prevailed two decades ago, today most Southern politicians know they cannot legally enforce changes that affect the electoral strength of African-American voters without first obtaining preclearance under the Voting Rights Act. The Department of Justice has streamlined its procedures sufficiently to screen tens of thousands of Section 5 submissions each year. But, more importantly, I can testify from personal experience that Section 5 has effectively forestalled countless plans to dilute black voting strength by discouraging their authors from even attempting such changes and by encouraging them instead to design new procedures that will not provoke Section 5 challenges.

Now, however, in the wake of Presley, an open invitation has been extended to those who would minimize blacks' voting power by fencing out their representatives from effective governmental participation. By placing new limits on Section 5, the Supreme Court has sent a message to majority white governments that here at last is a way legally to block the march of African Americans toward genuine political equality. Simply put, that message is this: So long as you perpetuate the regime of white supremacy in the name of white majoritarianism, the Government of the United State will not interfere. Coming from the Supreme Court, that message ties the hands of the executive branch and will promote oppression in the name of Congress as well -- unless Congress acts promptly and decisively to reaffirm its original intention

that the Voting Rights Act be construed as broadly as necessary to open fully state and local political process to previously excluded racial and ethnic minorities.

B. New Uses of White Majoritarianism To Preserve Old Patterns of White Supremacy

White majoritarianism was the principal justification for the popularity of at-large election schemes in the post-World War II South: the same white majority could choose all the members of governing bodies; black minorities could elect no candidates of their choice. At-large elections were the principal target of second generation voting rights battles. After first generation legal actions had removed most of the barriers that had effectively disfranchised the entire black community for seventy years, fairly drawn single-member districts enabled African Americans to elect their own representatives to state and local governments. Now third generation legal initiatives are challenging structural barriers to black representatives' ability to exercise equal influence in the governing process.

One must keep in mind that all three generations of voting rights enforcement, at one level or another, have been trying to break down a central tenet of the historical regime of white supremacy: the doctrine that no black person -- nor even a white person beholdng to black voters -- should ever exercise genuine authority over public affairs, and especially not the affairs of white people. Thus, third generation voting rights problems are not concerned simply with how often black representatives win or

lose votes on the council, commission or board, but with decisional rules and restructured executive powers that deny officials representing black constituencies the chance ever to influence government policy and practice. These structural changes, while race-neutral on their face, actually institutionalize the tradition that the white majority will always vote as a solid bloc to defeat the political initiatives of the black community.

C. *Examples of Pervasive Presley Problems in Alabama*

The post-Voting Rights Act changes in Etowah County and Russell County, Alabama, that safeguarded white monopolies over road and bridge operations are only symptomatic of the much broader white majoritarian project of keeping the hands of black voters off the levers of genuine governmental authority. This is a chronic problem we encounter in jurisdictions that only recently began electing candidates favored by black voters.

For example, the Escambia County, Alabama, Commission was also in the original *Presley* suit. Its sole black representative (appropriately named William America), shortly after he was elected, discovered that the prior informal practice of deferring to each county commissioner's hiring decisions had been modified, allegedly due to new fiscal restraints and the need for "good government" reforms. We ended up dismissing the Escambia County aspect of *Presley* before trial, after certain concessions were made to Mr. America's power over a share of the county budget.

At the other end of the state, in Colbert County, the single African American on a six-member county commission has encountered a whole bevy of changes that threw up roadblocks to his participation in governmental power. The written statement of Colbert County Commissioner Emmitt Jimmar is attached to my statement, and I ask that it be made a part of the record in these hearings. It summarizes ways in which the white commission majority continues prior practices of deferring to the representatives of affected districts, except in the case of the black representative. Mr. Jimmar has encountered a "stone wall" of 5-1 votes and even more refusals to second his motions. The informal rules were changed to deny the black representative a veto over adding emergency items to the meeting agenda, and the white chairman threatened to cut off services to Mr. Jimmar's constituents if he continued to criticize the white commissioners' private meetings.

In Barbour County (George Wallace's home county in the Eastern Black Belt), only one black commissioner, Ross Dunn, was elected in the first single-member district election in 1988. He experienced the same problems as Emmitt Jimmar in Colbert County: secret meetings of the white commissioners and motions by the sole black representative dying for lack of a second. Thanks to the addition of a second black commissioner, due to redistricting, and the institution of standing committees, the representatives of the majority black Barbour County districts have improved ability to influence governmental decisions.

In Alabama municipalities, one of the powers of city councils is to appoint the members of city school boards (by contrast, county boards of education are popularly elected). When a court-ordered change from at-large elections to single-member districts enabled African-American voters in Talladega to elect two of the five city council members, the white majority on the council voted as a bloc to perpetuate the custom of limiting black representation on the Talladega City Board of Education to only one of five. Repeated demands for additional representation from the black community were repudiated. Finally, black citizens brought suit when the school board decided to abandon its traditional practice of promoting the assistant superintendent to superintendent, just when Dr. T.Y. Lawrence was in line to become the first black superintendent ever. Indeed, consistent with the central tenet of white supremacy, never in history has there been a black superintendent of a majority white city or county school board in Alabama. The lawsuit, *Lawrence and Patterson v. City of Talladega*, CA No. 91-C-1340-M (N.D. Ala., June 26, 1992), resulted in a consent decree⁶ requiring, for the first time in Alabama, that a municipal school board be popularly elected. Using the same single-member districts as those employed in city council elections, African-American

⁶ I should point out that this settlement was facilitated by the assignment of this case to the sole African-American member of the federal bench in Birmingham, Hon. U.W. Clemon. For us in the white community, another vestige of white supremacy is our fear and loathing at the prospect of having black people sit in judgment of our affairs.

citizens of Talladega in February 1993 elected two members of the board of education, one of whom was Dr. Lawrence. This immediately provoked another third generation vote dilution scheme. In a move aimed squarely at Dr. Lawrence, who is a longtime member of the appointed city water board, the white city council majority adopted a rule change that prohibits any person from serving on more than one city "board."

Another change in road and bridge practices took place last year in rural Butler County, Alabama, during the pendency of a federal lawsuit that was about to increase black representation on the five-member county commission from one to two and eliminate the at-large elected county executive officer. Butler County's population is 40% black. Where before each commissioner had limited autonomy in his road district, with a road crew, equipment and some contracting authority, on the eve of increased African-American representation the outgoing commission adopted a unit system, delegating all road and bridge executive authority to the appointed county engineer. The able attorney for Butler County correctly advised his clients that the Supreme Court's *Presley* ruling left them free to implement this change without first submitting it for preclearance under Section 5 of the Voting Rights Act. We were able to conclude the lawsuit with a negotiated settlement,⁷ which leaves the unit system in place

⁷ As in the *Lawrence v. City of Talladega* case, this settlement was facilitated by the prospect of trial before the other African-American federal judge in Alabama, Hon. Myron Thompson, who sits in Montgomery.

but modifies decisional rules to provide the black community some protection from a white majoritarian monopoly. *Myles v. Butler County*, CA No. 92-T-243-N (M.D. Ala.) (final approval pending). The consent decree requires that, during the decade-long term of the decree, all county commission actions adopting or modifying the county budget must obtain four votes -- a "supermajority." On these crucial matters, the white commissioners will not be able to use their simple majority systematically to count out black community interests.

In the board of education aspect of the Butler County case, however, the 3-2 white majority agreed to use a four-vote supermajority to elect the board president, but refused to extend supermajority voting to selection of the superintendent and top school administrators. The white school board president said he was ideologically opposed to "artificial" constraints on simple majority rules. But the lawyer for the board told an assembly of black citizens quite frankly that he feared massive white flight from the public schools in Butler County if white school patrons knew that the superintendent had to be acceptable to the black community as well as to whites. Because the single-member district system was too young to have developed a track record, my clients agreed to a consent decree that leaves open for the next decade the possibility that Judge Thompson may order extension of the supermajority procedures if the wishes of black representatives are systematically submerged by the white majority.

In *Dillard v. Calhoun County Commission*, 831 F.2d 246 (11th Cir. 1987), Judge Thompson was affirmed by the Eleventh Circuit Court of Appeals when he found that at-large election of the county commission chairman diluted black voting strength and ordered that the position be rotated among the commissioners elected from single-member districts. Subsequently, a rotating chair has been included in most of the consent decrees we negotiated with county commissions, school boards and city councils in the statewide *Dillard* case.

Supermajority voting rules have been used elsewhere in Alabama to require representatives of the white and black communities to pursue consensus -- or near consensus -- on important issues. Perhaps the best example is in the state law creating the new city council for the City of Mobile. As you know, after the 1980 Supreme Court reversal, on remand the district court accepted plaintiffs' proof of historical intent and reissued its order striking down at-large election of the three Mobile City Commissioners. *Bolden v. City of Mobile*, 542 F.Supp. 1050 (S.D. Ala. 1982). See also S.Rep. 94-417, 97th Cong., 2d sess., pp. 26-27 (1982). A broad consensus developed among Mobilians that a mayor-council system would be preferable to the existing commission system, if single-member districts were required to afford black citizens representation. Thanks to the age-old anti-majoritarian informal rule of "local courtesy" in the Alabama Legislature, the local legislative delegation for Mobile County had a free hand to write the new mayor-council

statute for the City of Mobile. Thanks to court-ordered reapportionment of the Alabama Legislature, four of the twelve members of the Mobile County delegation were African Americans, and thanks to another anti-majoritarian legislative custom, the local law had to be adopted by consensus. The local black legislative caucus, led by my former law partner,⁸ Senator Michael Figures, negotiated terms in the Mobile City Council statute that to this day require that important business be adopted by five votes on the seven-member council.⁹ Since three of the seven districts have black voting majorities, the government of Mobile, a city with 200,000 residents, has operated just fine under semi-consensus principles.

Russell County, the other county before the Supreme Court in the *Presley* case, now has the same 4-3 white majority on its county commission that Mobile has on its city council. But, emboldened by the Supreme Court's narrow reading of the Voting Rights Act, the white majority on the Russell County Commission has rejected our proposals to ameliorate the oppressive effects of its road and bridge unit system by adopting supermajority voting procedures. We are still negotiating, however, this time over another structural change that could help break the hammerlock of white majoritarianism and promote consensus government. Jerome Gray, State Field Director for the Alabama

⁸ We discontinued our partnership in 1979, before these events occurred.

⁹ Ala. Code §11-44C-28 (1989).

Democratic Conference, who is testifying with me here today, has asked Russell County to consider adopting a standing committee system, along the lines of one he successfully negotiated with the Shelby County Commission, which has only one black member out of nine. Under Jerome's scheme, the commission would divide itself up into several standing committees, e.g., a road and bridge committee, a personnel committee, a finance committee, etc. Each commissioner would serve on at least two committees, would have a chance to chair one committee, and in some cases (not in Shelby) would serve on a majority black committee. Even though standing committees can only make recommendations to the whole commission, internal rules of deference would give the African-American minority representatives a realistic chance to break patterns of white bloc voting and to exert effective influence on the governing process.

The use of potentially powerful standing committees as a protection for minority interests is a familiar device to the Congress of the United States. It can work in some local governments as well. In fact, consensus government is an old tradition among (all-white) Southern county commissions. Studies show that county commissioners everywhere try to work out their differences informally before public meetings, so they can vote unanimously on agenda items. Voting against your fellow commissioners often is considered a breach of etiquette.¹⁰

¹⁰ E.g., Vincent L. Marando and Robert D. Thomas, *The Forgotten Governments: County Commissioners as Policy Makers* 99-101 (Gainesville, FL: The University Presses of Florida, 1977).

I do not wish to leave the impression that black representatives are shut out of effective governmental influence everywhere in Alabama. For example, in the urban counties, Jefferson (Birmingham), Madison (Huntsville), Montgomery and Mobile, the black county commissioners either exercise important executive functions, sit on powerful standing committees or operate under assorted formal or informal decisional rules that encourage consensus. As a result, there is a much more collegial (if not always harmonious) atmosphere among white and black elected officials, none of whom can afford to disregard the other without taking unacceptable political risks. Similarly, in suburban Baldwin and Shelby Counties, standing committee structures have empowered the single African-American representative to engage in effective coalition politics. These counties provide examples of how things could be done differently in Etowah, Russell, Colbert, etc. to enable officials elected by majority-black constituencies to provide equal and effective representation.

D. The Need for Passage of H.R. 174.

Section 2 of H.R. 174 would go far toward relieving the crippling effects of the *Presley* Court's narrow reading of the Voting Rights Act. By specifying that "the term 'procedure with respect to voting' includes any change of procedural rules, voting practices, or transfers of decision making authority that affect the powers of an elected official or position," the bill reaffirms that the Act's provisions should be construed as

broadly as necessary to guarantee equal political participation for protected minorities.¹¹ Without such an amendment, the Voting Rights Act will cease to be the most effective legal instrument of progressive change we have ever seen for historically oppressed African Americans, Latinos and Native Americans.

E. Responding To Opposition Arguments

In my opinion the arguments that were advanced in opposition to last year's version of H.R. 174 pervert both the purpose of the Voting Rights Act and founding principles of American democracy. They can only be understood as expressions of alarm that the Act really is changing the status quo by helping Americans of color to advance toward genuine political equality.

(1) Voting and Governance

The opponents praise the *Presley* majority's conclusion that Congress, when it defined voting broadly to include "all action necessary to make a vote effective," 42 U.S.C. §19731(c), could not have intended that the equal opportunity to vote include the equal opportunity to participate in governance.¹² First of all,

¹¹ I also support §3 of the bill, which assures that reasonable expert expenses will be recoverable in voting rights cases, as they are in other civil rights actions. Given the standards of proof for establishing entitlement to judicial relief for voting practices that impermissibly minimize the electoral power of protected minorities, e.g., *Grove v. Emison*, 61 U.S.L.W. 4163, 4168 (Feb. 23, 1993), expert testimony is indispensable in virtually every voting rights case.

¹² H.Rep. No. 102-656, p. 16 (1992).

this stands voting rights principles on their head. The fundamental purpose of the right to vote is to provide citizens the opportunity to participate in representative government. Voting is "a fundamental political right, because preservative of all rights."¹³ Impairing the ability of African Americans to participate in "the elective process that determines who shall rule and govern in the county ... is to do precisely that which the Fifteenth Amendment forbids -- strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens."¹⁴

The opponents trivialize the right to vote when they contend that the "internal decision making processes" of state and local governments can have nothing to do with voting.¹⁵ Isn't it obvious that this proposition, like any other, has critical limits? To use some extreme hypothetical examples, would the opponents insist that no Voting Rights Act issue was presented if the white majority on the Etowah County Commission had adopted a resolution dividing all executive duties among themselves and totally excluding the person elected from the majority black district? Or designating representatives of the majority white districts road commissioners and the representative of the

¹³ *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

¹⁴ *Terry v. Adams*, 345 U.S. 461, 470 (1953).

¹⁵ H.Rep. No. 102-656, p. 16 (1992).

majority black district dog catcher? Or specifying that the vote of the black commissioner be counted at half the weight of the others? At some point, the majority's marginalization of the black commissioner takes away the ability of voters in the majority black district to elect their representative on the governing body on an equal basis with all other voters. As the Assistant Solicitor General pointed out during the *Presley* argument, we used to associate the popular election of mere tokens, officials who will exercise no real governmental power, with totalitarian regimes.

(2) *The Right To Vote: Consent To Self-Government, Not a Demand for Equal Outcomes*

Perhaps opponents of the *Presley* amendment would renew their argument that in such extreme situations the white majority could be sued for intentional racial discrimination under 42 U.S.C. §1983.¹⁶ But this point is true of many voting claims (in fact, that's how we finally won the *Bolden* case), and it does not change the fact that the injury suffered by black citizens concerns their voting rights. To use another extreme hypothetical, if the white commissioners took away the black commissioner's road duties because he simply refused to repair his constituents' roads, they would not be guilty of intentional discrimination, but the move would just as much affect black citizens' voting rights.

¹⁶ H.Rep. No. 102-656, p. 16.

The historical discrimination Congress sought to remedy with the Voting Rights Act is the systematic exclusion of black Americans from democratic self-government. This discrimination involves much more than denying black citizens their fair share of government services; its primary injury is the denial of human dignity and freedom that only comes with full-fledged citizenship. As John Adams said during the American Revolution, "There are but two sorts of men in the world, freemen and slaves." He went on to explain that "[t]he very definition of a freeman, is one who is bound by no law to which he has not consented."¹⁷ I often tell judges in my voting rights cases that our main complaint is not that Southern white folks don't govern fairly (frequently we do, contrary to popular belief), but that black folks aren't allowed to govern at all.

African Americans, Latinos and other minorities protected by the Voting Rights Act do not demand an equal opportunity to influence the outcomes of governmental decisions, as opponents of the Presley amendment charge; rather, what they demand is an equal opportunity to participate in the process of self-government promised by the American democratic tradition of a representative republic. It is not equal outcomes blacks, Latinos and Native Americans seek, but their consent to the governmental processes which decide those outcomes. The founding

¹⁷ Joyce Appleby, *Liberalism and Republicanism in the Historical Imagination* 158 (Cambridge, MA: Harvard Univ. Press, 1992), quoting *Tracts of the American Revolution: 1763-1776*, ed. Merrill Jensen (Indianapolis, 1967), 315-16.

principle of representative democracy in the United States is the consent of the governed, not the power of a legislative majority. When white majorities, acting in the very particular context of this country's legacy of slavery and anglo supremacy, consistently vote systematically to deny representatives of minority communities the same powers of office enjoyed by representatives of white citizens, the processes of democratic government are corrupted in an oppressive way that Americans of color have never consented to and never will consent to.

(3) *The Latest Floodgates Arguments:
The Role of the Attorney General*

But, the opponents have said, where will all this lead? Won't every legislative decision of state and local governments be reviewable under §5 of the Voting Rights Act? Adoption of budgets? The appointment of coffee committees? "Floodgates" arguments like these have confronted every stage of Voting Rights Act development; as before, common sense and experience show they are groundless. With respect to circumstances like those in *Presley*, governmental actions implicate voting only if they affect in some systematic, structural, institutional way the power or influence minority representatives can hope to exert over ordinary decisions.

The key here, as always, is the Attorney General's continued adjustment of section 5 regulations and enforcement procedures as new circumstances require. From the Act's beginning, Congress has understood that, once it undertakes the project of

guaranteeing political justice for disadvantaged racial and ethnic minorities, there will be no simple formulas that can corral fundamental unfairness in political processes. So Congress wisely commissioned the Attorney General to confront the emerging varieties of particular situations and to work out procedures that advance, but do not overreach, the Act's remedial purposes.

That is precisely what the Attorney General did in the *Presley* case. The last amendment of the section 5 regulations explicitly left open for further factual development the extent to which reallocations of official authority require Voting Rights Act preclearance.¹⁸ When confronted with the particular facts from Etowah and Russell Counties, the Attorney General issued a determination that the changes in question, because they made crucial structural changes in the powers of elected officials, clearly affected voting. He explained his reasoning to the local governments and asked them to submit the changes for preclearance. When the county governments refused to comply, the Attorney General carefully laid out the rationale for voting

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While we agree that some reallocations of authority are covered by Section 5 (e.g., implementation of "home rule"), we do not believe that a sufficiently clear principle has yet emerged distinguishing covered from noncovered reallocations to enable us to expand our list of illustrative examples in a helpful way.

Office of the Attorney General, Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965; Final Rule, 28 CFR Part 51, 52 Fed. Reg., No. 3, p. 488 (Jan. 6, 1987).

rights enforcement to the federal judiciary. In refusing to give their usual deference to the Attorney General's application of Voting Rights Act principles to particular facts, the white majority of the three-judge Alabama court and the Supreme Court frustrated the enforcement scheme Congress had established.

(4) *American Democracy: Majority Rule
But Not Majority Oppression*

After hearing all the arguments about governance and interference with local government and workability, it is clear that the real basis of the opponents' objection to the proposed amendment of the Voting Rights Act is an ideologically rigid defense of majority rule, even if it means perpetuating white supremacy. According to this narrow ideology, any interference with the ability of legislative majorities always to outvote minorities "misconstrue[s] the nature of legislative power in a representative democracy."¹⁹ Absolute majority rule must be safeguarded even in "deplorable" situations where "black or hispanic candidates, once elected to office, might be relatively powerless to shape legislative decisionmaking because they are consistently outvoted by antagonistic white majorities."²⁰

But it is the opponents of the *Presley* amendment, not its proponents, who misconstrue the founding principles of American democracy. We too believe in majority rule, but not in an absolutist fashion, and never when it is abused, not just

¹⁹ H.Rep. No. 102-656, p. 17.

²⁰ *Id.*, pp. 17-18.

occasionally to defeat, but systematically to oppress racial and ethnic minorities.

The spirit of the Great Compromise that made possible the Constitution of 1787 was constraint of majority rule to avoid oppression of minorities. Thus the legislative branch of the Government of the United States has one house apportioned by population and another equally divided among the states, and all the branches of government operate within a complex system of checks and balances designed specifically to restrain the whims and passions of simple majorities. The morality of balancing majority and minority interests was exhaustively discussed in the constitutional debates.

James Madison wrote the often cited Federalist Paper No. 10 to explain how and why the Constitution's scheme was designed "to break and control the violence of faction."²¹ He used the term faction in its broadest sense.

By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.²²

²¹ The Federalist No. 10, reprinted in Garry Willis (ed.), *The Federalist Papers* by Alexander Hamilton, James Madison and John Jay 42 (New York: Bantam Books, 1988). Because he was an architect of the "Virginia Plan" on which the Constitution is based, and because he personally instructed the first President and the first Chief Justice on the grand scheme of the Constitution, "[n]o man's ideas had more effect on our republic." Garry Willis, Introduction to *The Federalist Papers*, *supra*, at xi.

²² Willis, *supra*, 43 (emphasis added).

Madison thought that minority factions would eventually be controlled by the power of the people, and he explained why the drafters' central concern was majority factions:

When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, *is then the great object to which our inquiries are directed....*²³

He distinguished the American "republic, by which I mean a government in which the scheme of representation takes place," from "a pure democracy" by the "advantage which a republic has over a democracy, in controlling the effects of faction."²⁴ The federal system, a bicameral Congress, checks and balances between a variety of government departments, and many other features of the Constitution were designed specifically to prevent majorities and minorities from oppressing each other.

Again, in Federalist No. 51, Madison reiterated this central point. "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."²⁵ Using the most forceful possible language, Madison explained why curbing the abuses of majority rule is a fundamental principle of American democracy:

²³ *Id.* at 45 (emphasis added).

²⁴ *Id.* at 46, 48.

²⁵ Federalist No. 51, Willis, *supra*, at 264.

Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature....²⁶

Consequently, one searches in vain for any constitutional endorsement of the principle of strict majority rule. Instead, the Constitution of the United States guarantees that each state shall have "a republican form of government."²⁷ Where the Constitution does prescribe legislative rules of decision, it is never an unqualified simple majority. For example, although the President must be elected by majority vote, it is by a majority of electors, who are apportioned among the states based on their combined numbers of senators and representatives.²⁸ If the House of Representatives must choose the President, it is by a majority vote in which each state has only one vote.²⁹ Most decisional rules specified by the Constitution require supermajorities; either a two-thirds majority³⁰ or a three-

²⁶ *Id.* at 265.

²⁷ U.S. Const. Art. IV, §4.

²⁸ *Id.*, Art. II, §1; Amend. XII. In his famous essay, *Common Sense*, Thomas Paine had gone much farther in the anti-majoritarian direction, proposing that the Presidency be rotated among the colonies.

²⁹ *Id.*, Amend. XII.

³⁰ *Id.*, Art. I, §3 (Senate vote of impeachment); Art. I, §5 (vote of either house to expel a member); Art. I, §7 (override of Presidential veto); Art. II, §2 (Senate vote to ratify treaties); Art. V (vote of both house to propose constitutional amendment); Amend. XIV, §3 (vote of each house to remove civil disabilities of U.S. officials who engage in insurrection).

fourths majority.³¹ Not even a constitutional amendment can deprive a nonconsenting state of its "equal suffrage in the Senate."³²

Of course, in ordinary circumstances we would expect governmental bodies to operate through simple majorities. It is only in matters of fundamental importance, which implicate the organic consent of various segments of the people to representative government, and in circumstances where it is necessary to safeguard minorities from majoritarian abuses, that supermajorities and other forms of consensus or near-consensus decision making must be employed.

From Madison and Tocqueville³³ to Bickel,³⁴ Dahl³⁵ and Levinson,³⁶ the literature on American democracy reveals our

³¹ Art. V (number of state legislatures needed to ratify constitutional amendment).

³² *Id.*, Art V.

³³ Tocqueville, Alexis de. *Democracy in America*, Trans. Henry Reeve, Ed. Henry Steele Commager (London: Oxford University Press, 1971), Chap XIV.

³⁴ Alexander M. Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975).

³⁵ E.g., Robert A. Dahl, *Democracy and Its Critics* (New Haven and London: Yale University Press, 1989), Chap 18. Dahl, of course, is much better known for his unmasking of majority rule as actually rule by powerful, elite minorities.

³⁶ Sanford Levinson, *Constitutional Faith* (Princeton, NJ: Princeton University Press, 1988).

Majority rule is simply not the same thing as constitutionalism, as that concept was classically defined. One cannot understand the notion of a constitution, at least prior to twentieth-century thought, without including its role of placing limits on the ability of majorities (or other rulers) to do

"[t]raditional concern with protecting minority rights in the face of majority rule...."³⁷ Neither simple majority rules, supermajority rules, plurality rules nor any other kind of decisional rules or governmental structures are absolute; none always assures justice and always advances democratic government in every circumstance. We should recall that John C. Calhoun invoked the anti-majoritarian device of concurrent majorities for the purpose of defending the states' right to maintain slavery;³⁸ Lincoln defended the Union in the name of (a qualified) majority rule;³⁹ Karl Marx cited majority rule to

whatever they wish in regard to minorities who lose out in political struggles.
Id. at 70.

³⁷ Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 Va. L. Rev. 1413, 1477-78 and nn.227-230 (1991) (citing some of these authorities).

³⁸ See generally, Ross M. Lence (ed.), *Union and Liberty: The Political Philosophy of John C. Calhoun* (Indianapolis: Liberty Classics, 1992).

³⁹

Plainly, the central idea of secession is the essence of anarchy. A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it does, of necessity, fly to anarchy or to despotism. Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left.

First Inaugural Address of President Abraham Lincoln, March 4, 1861, reprinted in Carl Sandburg, *Abraham Lincoln: The War Years*, Vol. I, p. 132 (New York: Harcourt, Brace & Co., 1939).

justify communism.⁴⁰ In the first half of this century, Southern congressmen and senators used the many anti-majoritarian decisional rules available in Congress, such as seniority, standing committee assignments and the filibuster, to defend the numerous majoritarian devices employed back home to subordinate black people through segregation and white supremacy.⁴¹ The white Democratic primary and runoff elections were invented in the South to secure the white majority's exclusive power. Meanwhile, once all-white rule was assured, local governments frequently adopted districting systems, county road shop schemes, informal consensus decisional rules, and other anti-majoritarian decisional devices to guarantee the autonomy of different minority groups within the white community.

Indeed, protection of the minority against oppressive majorities is a hallowed tradition of white-only Southern culture.⁴² The Alabama Constitution of 1901, in addition to

⁴⁰ "All previous historical movements were movements of minorities, or in the interest of minorities. The proletarian movement is the self-conscious, independent movement of the immense majority, in the interest of the immense majority." Karl Marx and Friedreich Engels, *The Communist Manifesto*, Chap. 1.

⁴¹ E.g., Robert A. Dahl, *Democracy and Its Critics*, supra, at 260.

⁴² Suspicion of majorities is deeply rooted in American culture generally. Some familiar quotations about the definition of a majority are:

"The will of a rabble." John C. Calhoun

"One with the law is a majority." Calvin Coolidge

"One man with courage makes a majority." Andrew Jackson

"One of God's side is a majority." Wendell Phillips

"Any man more right than his neighbor." Henry David Thoreau

"All the fools in town." Mark Twain

provisions designed to disfranchise black citizens,⁴³ contains a variety of restraints on the power of simple legislative majorities to trample (white) minority interests.⁴⁴ In addition, most Alabama taxes are earmarked, so state and local legislative majorities must spend the revenues in designated ways, and by established custom, passage of local laws is subject to the unfettered discretion of local legislative delegations, so long as there is unanimous consent by delegation members.

Segregation eventually was defeated by the majoritarian efforts of an activist national government constitutionally legitimated by the New Deal⁴⁵ and by a post-World War II Supreme Court who condemned racial oppression in the name of liberal, individualistic rights. Voting rights law grew out of the one-person, one-vote cases, and now its majoritarian tilt toward headcount democracy is being turned against the political empowerment of oppressed minorities by neo-white supremacists in

But see: "The forgotten American, the man who pays his taxes, prays, behaves himself, stays out of trouble and works for his government." Barry Goldwater

⁴³ *E.g.*, *Hunter v. Underwood*, 471 U.S. 222 (1985).

⁴⁴ *E.g.*, 1901 Ala. Const. §§44, 63 (bicameral legislature and concurrent majorities), §125 (gubernatorial veto and pocket veto), §116 and Amend. 282 (term limits for governor), §200 (senate districts may not divide counties), §284 (requiring 3/5 vote of both houses plus a majority of voters to amend constitution).

⁴⁵ See Bruce Ackerman, *We the People: Foundations* (Cambridge, MA, Harvard Univ. Press, 1991).

the courts⁴⁶ and by the opponents of the pending amendment of the Voting Rights Act. Now that African-Americans, Latinos and Native Americans are being elected to federal, state and local governing bodies in increasing numbers, voting rights progress must shift away from the centralizing tendencies of the bureaucratic state and its judicially supervised civil rights agenda⁴⁷ and rediscover the even older American traditions of republican autonomy that enable minority groups to share real political influence. If we are to avoid the corruption of majoritarianism that produces the kinds of ethnic turf wars now erupting all over the world, and that is fueling "white flight" to balkanized suburbs now surrounding Birmingham and most other cities in this country, we must reinvigorate for a modern, multiethnic America our founding ethic of minority empowerment, even if that ethic of political justice originally was designed to guard against factional oppression only within a society of

⁴⁶ E.g., *Smith v. Brunswick County Bd. of Sup'vrs*, ___ F.2d ___ (4th Cir., Feb. 1, 1993) (reversing a district court judgment striking down a redistricting plan under which an all-white county commission was elected in a majority black Virginia County; the court of appeals ruled that black citizens have no voting rights claim if they have headcount majorities in some districts, even though 98% of whites vote solidly against black candidates).

⁴⁷ I am convinced that Judge Frank Johnson was defending his good government reasons for favoring the county unit system over the old district patronage system when he wrote the majority opinion for the three-judge court in *Presley*. The sole African-American member of the three-judge court, Myron Thompson, dissented on the ground that the suppression of black electoral influence, which is the primary if not the sole concern of the Voting Rights Act, outweighed the claimed fairness and efficiency of unitized road and bridge operations.

free English Americans.⁴⁸

The Madisonian vision, which balances both concepts of majority rule and minority empowerment, is the view handed down to us by the Federalist Constitution. The question is never simply whether majority or plurality or consensus rule is better, but whether in particular contexts one facilitates oppression and the other justice. This is the approach of the Voting Rights Act: it seeks not to prescribe or regulate the particular forms of state and local governments, but to ensure that whatever democratic forms may be used do not oppress racial and ethnic minorities by denying or abridging their right to vote. In this context, even majoritarian procedures, like county road and bridge unit systems, common road funds, and rules of decision that require only simple majorities, must operate with racial fairness or give way to practices that more nearly provide genuine voting equality.

⁴⁸ "In the second number of *The Federalist Papers*, for example, John Jay declared his satisfaction that Providence has been pleased to give this one connected country, to one united people; a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs.

Providence had acted with convenient and characteristic discrimination. Dislodged native Americans and displaced Africans were obviously excluded from this united community of white, Anglo-Saxon Protestants." Michael Levin, *The Spectre of Democracy* 158 (New York: New York University Press, 1992) (footnote omitted).



MICHAEL J. BOWERS
ATTORNEY GENERAL

Department of Law
State of Georgia

40 CAPITOL SQUARE SW
ATLANTA, GA 30334-1300

REMARKS OF MICHAEL J. BOWERS
ATTORNEY GENERAL FOR THE STATE OF GEORGIA
ON H.R. 174

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CIVIL AND
CONSTITUTIONAL RIGHTS
MARCH 18, 1993

**REMARKS OF MICHAEL J. BOWERS
ATTORNEY GENERAL FOR THE STATE OF GEORGIA
ON H.R. 174**

**UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY**

**SUBCOMMITTEE ON CIVIL AND
CONSTITUTIONAL RIGHTS**

MARCH 18, 1993

Mr. Chairman, and members of the Subcommittee:

I appreciate the opportunity to speak to you today on H.R. 174, which proposes amendments to the Voting Rights Act of 1965. My remarks will be addressed solely to Sec. 2 of the bill, which is intended to reverse the decision in Presley v. Etowah County Commission, ___ U.S. ___, 117 L.Ed.2d. 51 (1992). In my opinion, if H.R. 174 is adopted, it will interfere significantly with the ability of state and local officials to fulfill the duties placed upon them by the people who elected them to office. I would like to make three brief points with regard to this legislation: (1) the bill is of questionable constitutionality; (2) the bill represents an extreme intrusion into state and local governmental affairs; and (3) the bill would require an incredible increase in the administrative workload of state and local governments.

H.R. 174 IS OF QUESTIONABLE CONSTITUTIONALITY

As you know, the Voting Rights Act of 1965 was intended to enforce the Fifteenth Amendment to the United States Constitution, which provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." (Emphasis supplied). Section 5 of the Voting Rights Act requires covered jurisdictions such as Georgia to obtain "preclearance" of any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c.

States must obtain this "preclearance" in one of two ways: either by filing an action in the United States District Court for the District of Columbia seeking a declaratory judgment that the statute or other provision has neither the purpose nor effect of discrimination; or, by choosing what was originally intended to be the more "expeditious" route of submitting each provision to the Department of Justice for a similar ruling. Although the Supreme Court recognized that this requirement of preclearance was an "uncommon exercise of congressional power," it was nevertheless upheld as within the grant of power to Congress in the Fifteenth Amendment. South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966).

The first major problem with H.R. 174 is that it would drastically expand the scope of Section 5 of the Voting Rights Act by requiring Georgia and other covered jurisdictions to preclear "any change of procedural rules, voting practices, or transfers of decision-making authority that effect the powers of an elected official or position." (Emphasis supplied). This language goes even beyond the broad construction given to Section 5 in Allen v. State Board of Elections, 393 U.S. 544, 566, where the Court stated that "Congress intended to reach any state enactment which altered the election law over covered State even in a minor way." (Emphasis supplied).

If adopted, the language in H.R. 174 would do far more than merely "alter[] the election law" of covered jurisdictions. I agree with the United States Supreme Court in Presley, supra, that this language would reach even the internal operations of state legislatures or local school boards which wish to do nothing more than modify their subcommittee assignment system. (117 L.Ed.2d at 64-65). Equally as disturbing are the conclusions of the Presley Court that the position of the United States as amicus in that case, now reflected by the language contained in the H.R. 174, that "every time a covered jurisdiction passed a budget that differed from the previous year's budget it would be required to obtain preclearance" (Id., at 65); that "every time a state legislature acts to diminish or increase the power of local officials, preclearance

would be required" (Id.,); and that "changes in the routine organization and function of government" would be covered (Id., at 64); as would the creation, alteration, elimination of a whole host of appointive posts. (Id., at 66) (emphasis supplied).

As the Presley Court emphasized, such "[c]hanges which affect only the distribution of power among officials are not subject to §5 because such changes have no direct relation to, or impact on, voting." (Slip Opinion at 14; emphasis supplied.) This fact will not change regardless of whether H.R. 174 is passed. Congress can amend the Voting Rights Act, but it cannot amend the Fifteenth Amendment to the Constitution. Since the Fifteenth Amendment only pertains to the "right of the citizens of the United States to vote," I respectfully would submit that if H.R. 174 in its present breadth is adopted, it will ultimately be struck down as unconstitutional because it encompasses matters "not comprehended by the Fifteenth Amendment." South Carolina v. Katzenbach, supra, at 326.

**H.R. 174 REPRESENTS AN EXTREME INTRUSION
INTO THE AFFAIRS OF STATE GOVERNMENT**

Virtually all acts of the Georgia General Assembly and ordinances of the various county and city commissions, councils and other governing bodies implicate changes of decision-making authority that affect the "powers of an elected official or position." If H.R. 174 is passed, this means that those acts, which form the very essence of self government, will be subject to the prior approval under Section 5 of the Voting Rights Act. I do not believe that either the Fifteenth Amendment or the Voting Rights Act itself was ever intended to go so far. These two volumes I have before me on the table contain all laws passed during the 1992 session of the Georgia General Assembly. There were 973 statutes passed during that session and of those laws, 725, or 74.5 percent, would arguably fit within the broad language of H.R. 174, and have to be precleared. H.R. 174 would thus be an enormous intrusion into the government of the State of Georgia by its people.

Nor would the reach of H.R. 174 be limited to the statutes included in volumes such as these. For example, prior to the Presley decision, the United States Department of Justice notified members of my staff the Department had learned that a county in the metro Atlanta area, DeKalb County, had deeded real property which comprised DeKalb Junior College to the

State Board of Regents for operation as a state institution. The Justice Department took the position that since this was a "change" which diminished the authority of the elected governing body in DeKalb County, it should have been submitted for preclearance under Section 5 of the Voting Rights Act. However, because this was a mere transfer of property from one unit of government to the other, we notified the Justice Department that a Section 5 submission was not appropriate. Only after the Presley decision did the Justice Department abandon its position that the transfer required preclearance.

This situation presents a typical scenario which will occur if H.R. 174 is enacted. The intent of the Voting Rights Act is to ensure that the right to vote is not denied or abridged on account of race, not to require federal review of any state or local action whereby a government body enters into some contract affecting its authority or which somehow implicates the powers of an elected position.

Since H.R. 174 also would cover "procedural rules," its reach might well encompass the host of rules and regulations that are promulgated by the various executive branch departments, agencies and commissions. The subject matter of these regulations can range from the duties of the county Departments of Family and Children Services insofar as they might diminish the authority of the county governing body, to increasing the duties of the state-level professional licensing

boards, under the supervision of an elected official, the Secretary of State. All such non-emergency regulations are currently promulgated by the Georgia Secretary of State's office pursuant to our Administrative Procedure Act, which provides for notice and public hearings before they become effective. If, in addition, these rules and regulations have to be precleared by the Justice Department, you can readily see that state government will simply become too unwieldy to work on anything other than any emergency basis.

Finally, I am concerned that H.R. 174 would also cover legal advice issued by my office as Opinions of the Attorney General. As in many other states, I am authorized, as the chief legal officer for the state, to render legal opinions when so requested by the Governor and other department heads, legislators, judges, etc. Many times these requests will describe a certain practice now in effect and ask me to give my official opinion as to its legality. I will then have to say, for example, "no, that practice is not proper -- the law requires that you change to another practice." Now would that opinion be one which should be precleared under Section 5? Arguably so. Other requests will ask me to interpret ambiguous statutes, rules, etc., and I will have to issue an opinion which says, for example, "under the statute being examined, certain authority has been delegated to one local official and not another." Again, must this opinion be precleared? And if

it must, what about all the court rulings and opinions that address the very same issues? If all these opinions must be precleared, then I would respectfully submit that H.R. 174 would effectively destroy our system of federalism.

H.R. 174 WOULD RESULT IN AN INCREDIBLE INCREASE IN THE ADMINISTRATIVE WORKLOAD OF STATE AND LOCAL GOVERNMENTS

For the past five years, the members of my staff have submitted an average of approximately 43 state statutes per year to the Justice Department for Section 5 preclearance. In addition, for 1992, the only year for which we have records, there were at least 306 submissions from local jurisdictions, 269 made by county attorneys, and 37 by city attorneys. Conservatively, I would estimate 15 to 20 hours of personnel time involved in getting out an average submission. This would include (1) the Secretary of State's office screening legislation to send to us, (2) their providing to us two copies of the enrolled bills, (3) review of the bills and assigning them to particular attorneys (and the paper work involved with that), (4) the attorney reviewing and comparing the new and old legislation, (5) the attorney preparing the draft of the submission (which may require getting maps, statistical data, reviewing prior submissions and obtaining the

names of local minority contacts), (6) the secretary typing the admission, (7) the attorney reviewing the typed draft and making corrections, (8) review of the draft and making corrections, (9) the secretary doing the corrections and printing it, (10) putting the submission physically together along with the exhibits, (11) having the Attorney General review and sign the submission, (12) copying it and mailing it out.

Making this conservative estimate of 20 hours of work per submission, this means that personnel in my office have spent approximately 860 hours per year for the past five years making submissions to the Justice Department. Applying the same hours estimate to the submissions from the local jurisdictions would mean that they required approximately 6,720 hours to complete. This estimated time, of course, does not take into account the additional time required to handle the numerous questions, correspondence, telephone conversations, etc. which occur between our office and the Justice Department.

Nor does the estimate set out above include the decennial requirement that all redistricting legislation be submitted for preclearance. In 1990, one of the senior attorneys in my office spent approximately 481 hours, or approximately 85% of his time over a three-month period, working on, and submitting, redistricting plans for the State House of Representatives, State Senate, and the United States Congressional districts.

Other attorneys assisting him probably put in an additional 50 hours.

If, instead of an average of 43 acts per year that we have been submitting, our office also had to participate in submitting the 725 acts from these 2 volumes of the 1992 Georgia Laws, which would be covered by H.R. 174, you can see that the workload of not only my staff, but that of the county and city attorneys throughout the state, would be increased exponentially.

An added complication of the requirement to preclear state statutes is the time involved in waiting for the Justice Department to tell us whether they plan to object to our legislation. Although the Voting Rights Act and the federal regulations now indicate that, unless the Justice Department objects to a State's submission within 60 days, it will stand approved, 42 U.S.C. § 1973c; 28 C.F.R. § 51.9, this does not tell the whole story. In practice, what happens more often than not is that, prior to the expiration of the 60 days (and sometimes by fax on the 60th day), our office will be informed that the Justice Department requires additional information relative to a particular submission. Such requests are authorized by 28 C.F.R. § 51.37, but the problem is that they effectively toll the requirement that the Justice Department object within 60 days or have the submission be deemed approved. According to the regulations, the 60-day response

time for the Justice Department does not start running again until the state completes sending in the requested information. 45 C.F.R. § 51.37. By this device, the Justice Department can extend its response for four (4) months or longer.

Additionally, we are required to submit for preclearance the holding of special elections. Under O.C.G.A. § 21-2-540, we are required to have at least 29 days notice between the call and holding of a special primary or general election. Routinely in these circumstances, there is no preclearance back from the Justice Department prior to the holding of the special election, which should be held as soon as possible so that the public representative's office does not go vacant for too long.

What this delay means in practical effect, is that if, for example, the Georgia General Assembly passes a budget which is signed into law on April 15, as was the FY '93 Appropriations Act contained on pages 1701-1785 of this volume before me, members of my staff would have to forward this budget to the Justice Department for preclearance, and it could not be enforced for at least 60 or 120 days thereafter, and possibly much much longer, as explained a few minutes ago. This could mean that state and local governments might have to function for a quarter of their fiscal year without any funds. Without the appropriations authorized in the budget act, state and

local governments would effectively come to a halt. Neither the Voting Rights Act, nor the Fifteenth Amendment itself, was intended to have such an effect. This would be tantamount to destroying the concept of federalism as we know it today.

If this were to happen, then the warning by Mr. Justice Black in South Carolina v. Katzenbach would finally have come true:

I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces. And if one law concerning voting can make the States plead for this approval by a distant federal court or the United States Attorney General, other laws on different subjects can force the States to seek the advance approval not only of the Attorney General but of the President himself or any other chosen members of his staff. It is inconceivable to me that such a radical degradation of state power was intended in any of the provisions of our Constitution or its Amendments.

383 U.S. at 359-360.

Therefore, I urge the members of the committee not to adopt the language of H.R. 174. Thank you.

Written Statement of Jerome A. Gray
to the Subcommittee on Civil and Constitutional Rights
of the House Committee on Judiciary
March 18, 1993

Thank you for giving me an opportunity to testify before this committee and to speak in favor of the need for Congress to pass the Voting Rights Extension Act of 1993. I am state field director of the Alabama Democratic Conference (the Black Political Caucus of Alabama), commonly referred to in our state as ADC. Founded in 1960, ADC is the largest membership-based grassroots black political organization in the state with active county units or affiliates in 64 of the 67 counties.

I would like to begin my remarks with a baseball story I heard at a political meeting shortly after I began working for the Alabama Democratic Conference in 1977. The setting of the story was in the early 1940's during World War II, in a segregated Southern city. At that time blacks were not allowed inside the ballpark to watch the game. Nevertheless, several black boys who wanted to see a ballgame went to the ballpark and found a knothole in the center field wall of the wooden stadium. Stooping and squinting with one eye they proceeded to watch the game. From this vantage point, the most they could see was the occasional center fielder running by their limited field of vision, a second baseman, a pitcher, the batter, the catcher, and the umpire.

At first, being able to see this much of the game excited and thrilled the black boys. But as the game advanced inning by inning, a batter finally hit a home run over the centerfield fence. One of the boys at the knothole caught the ball. He was jubilant, because in those segregated days, if a black boy caught a home run ball, he would be allowed to bring the ball back into the park by the stadium managers.

Well, when the young lad brought the home run ball back into the ballpark, he was astonished by what he saw. For the first time, he saw all the bases. He saw all the players in the infield as well as the outfield. He saw the bullpen, the dugouts, and the scoreboard. By being inside the park, his awareness of the playing field suddenly grew.

Prior to the passage of the 1965 Voting Rights Act, the awareness of many black citizens in Alabama and throughout the South regarding the game of politics would have been similar to the experience of those young boys watching a baseball game through a knothole in the 1940's. But when Congress made it possible for black citizens to enter the ballpark of politics through the passage of the 1965 Voting Rights Act and made it possible for us to begin to play the game either as elected or appointed officials, some teams began to change the rules of play and fair competition. They developed new policies, practices and procedures restricting the ability of black elected officials to participate fully in all aspects of the political game. Let me give you some examples.

* In Huntsville, Alabama, shortly after Dr. James I. Dawson, a member of the Alabama A&M University faculty, was elected to the city school board there, he asked the superintendent to provide him with a copy of the resumes' of the individuals she was recommending to the board for jobs in the system. The superintendent refused to provide him with that information, buttressed by the advice of the boards's attorney. Dr. Dawson was told that he was not privy to review the personnel information of job applicants. He protested publicly. He held a press conference. He threatened to file a lawsuit. Still no change. He called me seeking advice on the matter. We requested and got an Attorney General's opinion for him which clearly stated that Dr. Dawson was entitled to review the job applications. The superintendent and school board remained intractable. As a last resort Dr. Dawson filed a lawsuit charging the superintendent with discrimination against him. It took two-and-a-half years before the matter was heard in circuit court in Madison County. But the court ruled in Dawson's favor.

Here was a clear cut case of a majority white school board and superintendent flagrantly violating a written board policy which stated that school board members "are entitled to any and all information they deemed necessary" to determine whether they wanted to vote for or against the superintendent's recommendation in

personnel matters. Incidentally, when Dr. Dawson went to court, his lawyer subpoenaed all present and former board members. Under oath, they all admitted that the superintendent had never denied them any request they'd made to review job applications. By the way, Dr. Dawson is back in court protesting the payment of attorney fees. Although he sued the board for violating its own policy--and won, the school board has refused to pay Dawson's attorney fees. On the other hand, the school has agreed to pay the attorney fees for the superintendent who lost.

* In 1975 when the City of Montgomery adopted a mayor-council form of government and held an election under a new nine single-member district system, four black candidates were elected to the city council. Their election was sometimes described as "the surprise of '75." However, once the black councilmembers got on board, they were surprised to learn that they could not get blacks appointed to some municipal boards. In time, they discovered that an unwritten council rule gave the majority-white districts a disproportionate higher number of slots in filling vacancies on certain important city boards. In practice, if a white councilmember in the past had made certain board appointments, that same district would continue to be given deference in filling those positions when new vacancies occurred. This issue has been in the news, off-and-on, for several years. The

local newspapers have written editorials condemning this practice. However, the majority-white council has been slow to change in making the present system more equitable. A legislative bill has been proposed to change the appointment system. However, black councilman Leu Hammonds told me that there is still some resistance on the part of some white officials to give each black councilmember the authority to appoint a member to the water board and the airport authority board.

* Or lets's take the Washington County Commission. When we were negotiating to get a majority-black district there for the first time in 1992, the four white incumbent commissioners spent considerable time discussing the difficulty they would have in financing a new majority-black fifth district operation. While we advocated for a unit system which we felt would be more cost efficient, the white commissioners were wrangling over who would give the newly-elected black commissioner some of their hand-me-down equipment. Little concern was given to the black commissioner being able to participate in the discussions. Well, black Commissioner Willie Dixon was elected last November. And here are some things that have happened to him since he entered the ballpark. He did get an equal share of the road and bridge money in the budget. All five Commissioners received \$241,000 each. On its face, the deal sounds fair. But here's the

catch. Willie Dixon had to use some of his R&B money to buy new equipment. He had to buy a new truck and a new grader. Unfortunately, he could not afford to buy a front-end loader because the cost was prohibitive. It will take Dixon three years to save up enough money to do that. Anyway, being neighborly, he asked two of his fellow Commissioners to give him "one of the three loaders" they had in their districts. However, when the vote was taken in a commission meeting to transfer a grader from one of the white districts to the majority black district, the vote was 2 for, 2 against, and one abstention. Willie Dixon didn't get that grader. By the way, Dixon asked me to be sure to mention that he did not get any of the money which the district Commissioners brought forward from the previous fiscal year. Also, the way he got his working crew was unusual. Once Dixon got elected, the county disbanded a road and bridge crew which had been working throughout the county. That crew of men along with some old equipment, was given to the black commissioner. The only person Dixon was able to hire was his foreman.

* In Dallas County, with a black population of 57.81%, and where Selma, Alabama is the county seat, the two black members on the five-member school board are having a rough time. Black board member William Minor told me recently that the board adopted a new travel policy in February 1993, placing a limit of \$1,500.00 per year, for members to travel to professional meetings. Minor

believes the reason the new policy was adopted was due to the superintendent not wanting the black board members attending out-of-state meetings. According to Bill Minor, there were no restrictions placed on travel before the black members came on board. Incidentally, Minor stated that his requests to get the board to establish a board personnel committee to review hirings, firings, and promotions have not met much favor. Minor said that the superintendent did appoint him to a two-member personnel committee. But the committee, though sanctioned on paper, has never functioned. Minor says he has never been afforded an opportunity to participate in an on-site interview with a prospective job applicant in the majority black Dallas County.

* A brief word about Charles Satchel, a black school board member in Lawrence County. Charles is beginning his second six-year term as a board member. In talking with him, he is disturbed over the practice of the superintendent who always polls the board members on Friday before the meeting on Monday to see if he can get at least three board members to agree on all proposed action items before the agenda is set. Satchel says the superintendent will refuse to put an action item on the agenda if he doesn't have the three votes to adopt it. As a result of this practice, Satchel stated that he usually is outvoted 4 to 1. As a board member Satchel told me that he has never been allowed to review any job

applications. And that when the superintendent makes a recommendation to fill a vacancy, he presents only one name for the position. In reference to the closing of a school in the black community, Satchel opposed the move. However, Satchel believes his wife was appointed principal at the new school, probably as an overture to get him to shut his mouth, he says. When the vote was taken on closing the school in the black community, Satchel observed that only one white board member voted with him to keep the school open. The white member told Satchel: " I fooled you, didn't I, Charles?" Of course, Satchel believes that token vote had been pre-arranged.

* In my hometown of Evergreen, Alabama it has been customary for white councilmembers to be given deference when they recommend residents in their districts for various board appointments. Recently, however, when a black councilmember, Elizabeth Stevens, recommended a black resident of her district to be considered for a board appointment, she was not given deference. Instead, a white member of the council was successful in getting a white resident in the majority-black district appointed to the board in question.

This scenario of not giving political deference to black elected officials is fairly common throughout Alabama, especially in municipalities that have their own school systems and where blacks have been successful in getting elected to the city councils

from majority-black districts. Since most city school boards in Alabama are appointed by the elected council members, the wishes of black councilmembers often are frustrated when their recommendations for school board seats are ignored or when they get outvoted by a white majority council. Attorney James Blacksher, who is here with me today from Alabama, has cited in his testimony what happened in the City of Talladega when the process for hiring a new school superintendent seemed flawed and discriminatory.

Without question, the net effect of these rules changes, practices, policies, or procedures affecting the aforementioned black elected officials as well as countless others, is akin to black ball-players being allowed inside the park in their uniforms, but being denied the opportunity to play a good game at their designated positions after the umpire yells, "Play Ball." Indeed, many black elected officials have come to their "field of dreams" only to watch their dreams fade because they aren't allowed to play. In my opinion, something is wrong with a system that encourages a black citizen to try out and make the political team, and then treats that individual as though he is on the injury reserved list. Also, if black political players are forced to sit in the dugouts or the bullpens and watch their white teammates play ball and score all around them, in time they will lose interest in the game--and so will their fans.

In June, 1981, this subcommittee composed of Congressmen Don Edwards, Henry J. Hyde, and the late Harold Washington came to Alabama and held a field hearing in Montgomery, to receive

testimony from witnesses in the South regarding the importance of extending and amending the 1965 Voting Rights Act. That was a great day for many of us for several reasons. First, you brought Washington to Alabama. Second, you listened well. Third, you heard the cries of injustice and denial of voting rights. And fourth, you responded promptly and positively by giving our nation and our state a stronger amended version of the Voting Rights Act in 1982. Although I was not a witness in 1981, I was an integral part of that field hearing--working with the subcommittee's staff and the NAACP's Washington Bureau Chief, Mrs. Althea T. L. Simmons, in helping several Alabama witnesses to prepare their testimony. Without sounding boastful, somehow I knew that once the subcommittee heard the testimony of the Alabama witnesses, the members would come back to Washington and convince a majority of their colleagues to support the 1965 Voting Rights Act Extension in 1982. That happened.

Because this subcommittee did its work so well more than a decade ago, you are responsible for black people having the opportunity to play ball in many political ballparks throughout Alabama today. In 1981, Alabama had only 247 black elected officials. In 1993, our state has more than 700 black elected officials. Indeed, we're proud of the fact that our state is first in the nation in the number of black elected officials as reported in the last National Roster of Black Elected Officials, published by the Joint Center for Political Studies. The gains we've made since 1982 have been dramatic. The Alabama Democratic Conference

teamed up with an outstanding Birmingham legal duo, namely Attorneys James U. Blacksher and Edward Still, and mapped out a statewide, comprehensive legal strategy whereby at-large elections were challenged in approximately 180 jurisdictions. What is most remarkable about the gains is to see how closely the black electoral successes mirror the black voting age population in the state. The summary which I've listed below illustrates my point.

<u>22.73%</u>	Blacks as a Percent of voting age population
<u>22.79%</u>	Percent Black Commissioners Statewide
<u>23.32%</u>	Percent Black School Board Members Statewide
<u>20.59%</u>	Percent Black Councilmembers
<u>17.14%</u>	Percent Black Legislators
<u>16.36%</u>	Percent Black among all Elected Officials

In closing, I'm reminded of a question raised by Congressman Henry J. Hyde, in a wonderful op-ed piece which he wrote that was published in the Sunday, July 26, 1981 issue of The Washington Post. The Hyde editorial, titled "Why I Changed My Mind on the Voting Rights Act," came on the heels of the Alabama hearings. Congressman Hyde admitted that he came to Alabama with the conviction that 17 years was long enough to keep jurisdictions covered by Section 5 in the "political penalty box." Moreover, it was Hyde's view that the federal courts and not an administrative arm of government should be the proper vehicle for citizens' redress if voting rights abuses continued. But fortunately, once the Alabama hearings began and the witnesses had their say, Hyde

realized that what ought not to be compared to what often is the true state of affairs, he changed his mind and became a supporter of extending the 1965 Voting Rights Act. Hyde's concern for the issue of federal intrusion into the affairs of state faded when he compared that to the importance of the political and voting process being accessible to all.

Therefore, his question: "What good is all the political rhetoric," Hyde asks, "if you can't express your ideas and values at the polls?" Finally, if I might paraphrase Congressman Hyde and challenge this subcommittee to persuade Congress to pass the 1993 Voting Rights Act Extension, I finally ask: "What good are all the black political players in Bo Jackson's Alabama or President Bill Clinton's Arkansas if these talented players can't express their ideas and values on the field--indeed, if they can't perform well for the fans they represent?" Thank you very much.

Off Course on Voting Rights

When the Supreme Court questioned the shape of a North Carolina Congressional district last year, it set in motion far-reaching — and far-fetched — challenges to the way many states have tried to comply with the Federal Voting Rights Act. Now a case from Louisiana gives the Court a chance to correct its own erratic course and preserve hard-won gains for minority voters.

The North Carolina decision was a stunning departure from the Court's earlier, more generous interpretations of the act. It suggested that district lines drawn to give North Carolina its first black Congressional representatives since Reconstruction represented a form of segregation, an American version of apartheid. That ruling, in turn, has since prompted lower courts to argue that race-conscious line-drawing that helps to integrate Congress is wrong because, in effect, it assigns voters to districts on a racial basis.

That kind of topsy-turvy logic could start a second post-Reconstruction movement in American politics, strangling fledgling efforts to secure a more integrated national legislature. There is no shortage of people who want to block minority progress; their perverse argument is that whites are the real victims of racial redistricting, and some courts are buying it.

The 1965 Voting Rights Act, designed to restore the vote to disfranchised minorities, not only safeguards the right to vote but also guards against state reapportionments that could make that vote count for little or nothing. To comply, states like Louisiana have been choosing district boundaries that increase or maintain minority voting strength.

A three-judge Federal court in Shreveport struck down the state's Fourth Congressional District, saying that while its shape was not as bizarre

as the disputed district in North Carolina, it re-segregated Louisiana by embracing a specially created black majority. In fact, the new district replicated a geographic area once carved out along the Red River Valley to preserve the seat of a white incumbent who happened to be popular with blacks. Now that the district has a black majority — only the second such district in a state with seven seats and a 30 percent black population — the lower court finds an impermissible racial preference.

Having misapplied the law and the Constitution, the Louisiana judges also felt the need to deliver a lecture on civil rights. They accused the state's legislature, which was only trying to give blacks a fair shake in the Congressional delegation, of betraying the civil rights leaders who sought only non-racial equal treatment.

"To say now: 'Separate!' 'Divide!' 'Segregate!' is to negate their sacrifice, mock their dream, deny that self-evident truth that all men are created equal and that no government may deny them the equal protection of the laws," intoned the judges.

This is upside-down history that uses the rhetoric of the civil rights movement to deny real progress spurred by the voting rights law. Similar sentiments, and similar misapplications of equality principles, have issued from Federal judges in Texas and Georgia in cases the Supreme Court may also choose to hear. In Texas, the legislature drew some weird districts that look like inkblot tests, yet the lower court questioned only those districts that were drawn to benefit blacks and Hispanics, not those that favored white voters.

The Supreme Court inspired this retrograde line of argument. Only it can reset the course of racial justice.

CALIFORNIA COMMENTARY

Fraud Is Bigger Than One Vote



Dead people and dogs are on the voter rolls. An investigation and reform are imperative to restore confidence in our system.

By **MIKE HUFFINGTON**

Nothing would be simpler than for me to concede defeat in the recent Senate race. And if it were only one Senate seat at stake, I might have taken the easy way out. After all, one of the main reasons I entered this race—the goal of a GOP Senate majority—has been achieved. But I believe that there is more than one Senate seat in the balance. At stake is the future of free elections in California.

In the final weeks before the election, I received a trickle of calls from voters expressing concern about fraud and other voting irregularities; after Nov. 8, the trickle turned into a flood. In conversations with investigators and citizen-action groups, I have become convinced that the management and supervision of our elections is fundamentally flawed.

Examples of registration irregularities and fraud range from the alarming to the bizarre. There were the 133 people registered to vote at one apartment building in Burbank—some were illegal aliens, some had not signed the registration card and some were nonexistent. Who signed them up? Activists paid by the Assembly Democratic Caucus, under the leadership of Assemblyman Phil Isenberg. In another example, 31 widows

in Hawthorne received post-cards from the registrar's office informing them that their deceased husbands had been recently registered to vote. And in still another case, Kenji Kawamura of Hawthorne discovered when he went to the polls that his dog, Sam, had been registered to vote.

Cynics, or those who have an investment in the status quo, would like to dismiss this evidence as anecdotal. But they cannot dismiss the report, based on computer searches of the absentee-voter rolls, which I plan to present the first week in January. This will be an interim report; the investigation will need to continue.

Meanwhile, the voter fraud task force has uncovered widespread instances of ballot counting that were lax and riddled with error—tally sheets where the numbers of ballots issued and votes counted didn't add up, precinct forms that went unsigned, provisional ballots unaccounted for.

Why does such apparent fraud exist? Because the system invites it. In California, a person may register to vote without showing any proof of citizenship, state residency or identification. Unbelievably, there is no safeguard, no deterrent, against registering many times, under many different names. There is no method of purging rolls to remove "ghost" voters—people who have moved away or died but whose registrations can be fraudulently used. And so we end up with the situation in Los Angeles, where there are 75,000 possible duplicate registrations.

If the federally mandated Motor Voter Act is implemented Jan. 1, these problems will become irreversible. Without uncovering the extent of voting irregularities, without real reform, Motor Voter would freeze the problems we have in place, making it more difficult to remove deceased voters and double registrations from the rolls and allowing fraud to further erode the foundations of the democratic process.

Some may ask, "If there was so much voting irregularity and fraud, then why didn't it affect Gov. Wilson's victory? Why didn't it affect the success of the Proposition 187?" The answer is that it probably did. Wilson won with a big margin; without fraud he would have won with a bigger one. The same could be true for 187. The bottom line is that voting irregularities and fraud have an effect only at the margins. They tip the close races like mine, not the landslides.

Voter fraud is not a static problem. Like a tumor, it does not cure itself if ignored. It can only get worse and spread. The only remedy is radical surgery—in this case, honest inquiry and bold reform.

Whether voting irregularities and fraud affect the outcome of the Senate race, a thorough investigation will benefit everyone by leading to reform of a system that badly needs it. Whether you voted for Mike Huffington or Dianne Feinstein or someone else, we all have an interest in preserving the integrity of our free elections, the sacred trust upon which our democracy depends.

Rep. Mike Huffington (R-Santa Barbara) ran against Sen. Dianne Feinstein for the U.S. Senate in November.