



**American Civil Liberties Union
Statement Submission For**

“The Voting Rights Amendment Act, S.1945: Updating the Voting Rights Act in Response to
Shelby County v. Holder”

Hearing Before the U.S. Senate Judiciary Committee

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Introduction

The American Civil Liberties Union (ACLU) is pleased to submit this statement for the hearing, “The Voting Rights Amendment Act, S.1945: Updating the Voting Rights Act in Response to *Shelby County v. Holder*.” We thank the Senate Judiciary Committee for this hearing and urge a bipartisan response to ensure key protections of the Voting Rights Act are updated and modernized following the Supreme Court’s decision in *Shelby County v. Holder*.¹

For nearly 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual’s rights must be protected equally under the law, regardless of race, religion, gender, gender identity, sexual orientation, or national origin.

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

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

In addition, the ACLU’s Washington Legislative Office is engaged in federal advocacy before Congress and the executive branch on a variety of federal voting matters and was one of the leading organizations advocating for the Voting Rights Act extensions of 1982 and 2006. We issued reports on the continued need for the Act² and provided expert testimony on racial discrimination in the then-covered jurisdictions.³

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

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

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

The Voting Rights Act of 1965 has proven to be one of the most effective civil rights statutes in eliminating racial discrimination in voting. For almost half a century, the Act has been utilized to ensure equal access to the ballot box by blocking and preventing numerous forms of voting discrimination.

Unfortunately, the recent decision in *Shelby* invalidated the coverage formula of Section 4(b), which determines which jurisdictions are subject to preclearance. For decades prior to the *Shelby* decision, certain states and localities had to submit all of their voting changes to the federal government (either the Department of Justice (DOJ) or the D.C. District Court) for approval before they could be implemented, a process known as “preclearance.” The coverage formula – Section 4(b) of the Act – determined which jurisdictions fell under the government’s purview. Prior to *Shelby*, Section 5 required nine states and portions of six others (previously seven, before New Hampshire bailed out) to get preclearance approval from DOJ or the federal court in the District of Columbia before they could implement any voting changes, because of those jurisdictions’ past history and ongoing incidents of discrimination against racial and language minorities.

In *Shelby*, the Court declared this coverage formula unconstitutional. With the loss of Section 4(b), Section 5 has been rendered virtually useless, resulting in the loss of the most innovative and incisive tools against racial discrimination in voting, including preclearance and notice of voting changes. The Court, however, left in place the preclearance process itself, meaning that it was left to Congress to design a new coverage formula and other protections for citizens. The overwhelming evidence of the continued need for a robust Voting Rights Act means that Congress must now develop new mechanisms to prevent racially discriminatory voting practices.

This statement focuses on three major inquiries. First, it provides evidence of ongoing discrimination in voting and demonstrates the need for a robust Voting Rights Act. Second, it explains that what remains of the current Voting Rights Act, post-*Shelby*, does not go far enough to ensure the eradication of racial discrimination in voting. Third, this statement demonstrates that the Voting Rights Amendment Act (VRAA) is directly responsive to *Shelby* and the Supreme Court’s directive to Congress to prevent such discrimination in voting.

We look forward to working with the Committee in restoring and updating the critical protections of the Voting Rights Act and in ensuring all voters have access to the ballot free from discrimination.

I. Bipartisan History of the Voting Rights Act

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

⁴ Fredrickson & Vagins, *supra* note 2.

The passage of the Act represented the most aggressive steps ever taken to protect minority voting rights. The impact in increasing African American voter registration was immediate and dramatic.⁵ DOJ has therefore called the Act the “most successful piece of civil rights legislation ever adopted.”⁶ Progress has been made, but despite the Supreme Court’s recent decision, the full array of the Act’s protections is still needed today.

In the 49 years since its passage, the Voting Rights Act has guaranteed millions of minority voters a chance to have their voices heard in federal, state, and local governments across the country. These increases in representation translate to vital and tangible benefits such as much-needed education, healthcare, and economic development for previously underserved communities. Prior to the Act’s passage, African American communities had been denied resources and opportunities for many years; their issues were often ignored, and they were discounted as citizens. Officials elected when equal voting opportunities are afforded to minority citizens have been more responsive to the needs of minority communities.⁷

As President Ronald Reagan noted upon signing the 1982 reauthorization of the Voting Rights Act, the right to vote is the “crown jewel of American liberties.”⁸ Recognizing this importance, Congress has passed every Voting Rights Act reauthorization and extension by overwhelmingly bipartisan votes. The 1965 Act passed the Senate 77-19, and the House 333-85.⁹ The 1970 extension passed the Senate 64-12, and the House 234-179.¹⁰ The reauthorization in 1982 garnered similar support passing 85-8 in the Senate¹¹ and 389-24 in the House.¹² Congress last extended the Act in 2006, 98-0 in the Senate and 390-33 in the House,¹³ concluding that the coverage formula enforced by Section 5 was needed for at least another 25 years. Including the 2006 reauthorization, the last three extensions have been signed by Republican presidents.

In 2006, the congressional fact-finding effort built a strong case for the continuing need to maintain the Voting Rights Act’s protections. The resulting record included more than 750 Section 5

⁵ In Mississippi, African American registration went from less than 10% in 1964 to almost 60% in 1968; in Alabama, registration rose from 24% to 57%. In the South as a whole, African American registration rose to a record 62% within a few years of the Act’s passage. See Victor Rodriguez, *Section 5 of the Voting Rights Act of 1965 after Boerne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769, 782 (2003).

⁶ U.S. Department of Justice, Civil Rights Division, Voting Section, *Introduction to Federal Voting Rights Laws*, <http://www.justice.gov/crt/about/vot/intro/intro.php>.

⁷ Fredrickson & Vagins, *supra* note 2, at 2.

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

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

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

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

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

¹³ See *Senate Roll Call Vote No. 212* (July 20, 2006), available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212; *House Roll Call Vote No. 374* (July 13, 2006), available at <http://clerk.house.gov/evs/2006/roll374.xml>.

objections by DOJ that blocked the implementation of some 2,400 discriminatory voting changes; the withdrawal or modification of over 800 potentially discriminatory voting changes after DOJ requested more information; 105 successful actions to require covered jurisdictions to comply with Section 5; 25 denials of Section 5 preclearance by federal courts; high degrees of racially polarized voting in the jurisdictions covered by Section 5; and reports from tens of thousands of federal observers dispatched to monitor elections in covered jurisdictions.¹⁴ In total, the record included over 15,000 pages of testimony, reports and statements from over 90 witnesses in over a dozen hearings.¹⁵ According to the legislative findings, without Section 5 "racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years."¹⁶

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

II. *Shelby County v. Holder*

On June 25, 2013, the Supreme Court, in *Shelby County v. Holder*, invalidated the coverage formula in Section 4(b), which defines who is subject to Section 5, one of the key provisions of the Voting Rights Act that has helped to protect the right to vote for people of color for nearly 50 years. With this decision, voters lost the ability to learn of voting changes that could disfranchise them and lost the main mechanism to stop discriminatory voting changes before implementation of the laws.

A. Procedural History

In 2008, the City of Calera, a subsidiary of Shelby County, Alabama, sought to make over 170 annexations, in conjunction with changes to its redistricting plan. Together, these changes would eliminate the city's sole majority African American district, which had elected an African American candidate – who was the City's lone African American councilperson – for the previous 20 years.¹⁷

In its submission to DOJ, Calera admitted that it had already adopted the annexations without receiving preclearance. DOJ objected to both the unprecleared annexations, as well as the redistricting plan. Notwithstanding this denial, Calera went on to conduct City Council elections with both the annexations and the rejected plan in place, causing the city's sole African American councilmember to lose his seat. DOJ was then compelled to bring an enforcement action under Section 5 to enjoin certification of the results of the illegal election. After a consent decree was reached with a new precleared plan, the city's lone majority African American district was restored,

¹⁴Laughlin McDonald, *Don't Strike Down Section 5*, <http://www.aclu.org/blog/voting-rights/dont-strike-down-section-5> (Mar. 6, 2013); see also H. R. Rep. No. 109-478 (2006); S. Rep. No. 109-295 (2006).

¹⁵Deborah J. Vagins & Laughlin McDonald, *Supreme Court Put a Dagger in the Heart of the Voting Rights Act*, <http://www.aclu.org/blog/voting-rights/supreme-court-put-dagger-heart-voting-rights-act> (July 2, 2013).

¹⁶Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, PL 109-246, July 27, 2006, 120 Stat 577.

¹⁷Letter from Grace Chung Baker, Acting Assistant Attorney General, to Dan Head (Aug. 25, 2008), available at http://www.justice.gov/crt/records/vot/obj_letters/letters/AL/1_080825.pdf.

and black voters in Calera succeeded in electing their candidate of choice. Shelby County subsequently challenged Sections 4(b) and 5 of the Voting Rights Act as facially unconstitutional.

B. The Supreme Court Decision

The Supreme Court found that while “voting discrimination still exists,” Section 4(b) of the Voting Rights Act was unconstitutional, on the basis that the coverage formula had not been updated recently and no longer reflected current conditions of discrimination. Therefore, the formula could no longer be used as a basis for subjecting jurisdictions to preclearance, and the protections of Section 5.¹⁸ Section 5’s continued operation thus depends on establishing new coverage, which complies with the Court’s decision. As the Court noted: “[w]e issue no holding on section 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions.”¹⁹ Without congressional action through the creation of a new coverage formula and other mechanisms that provide notice of and “freeze” voting changes before they take effect, the kind of discrimination occurring in Calera, Alabama, and elsewhere cannot be stopped before U.S. citizens lose their right to vote.

III. Recent Examples of Racial Discrimination in Voting

As Chief Justice Roberts acknowledged in *Shelby*, “voting discrimination still exists; no one doubts that.”²⁰ The following violations brought under the various sections of the Voting Rights Act are just a few recent examples, which demonstrate the continuing problem of race discrimination in voting in America.

a. Section 5 of the Voting Rights Act

Section 5 has been particularly effective in stopping discriminatory state and local voting changes from going into effect. It is important that the safeguards of Section 5 apply in those jurisdictions with recent and egregious examples of discrimination. The elimination of precincts, changes in polling locations, methods of electing school board or city council members, moving to at-large districts, annexations, and other changes can have the purpose or effect of denying or abridging the right to vote on the basis of race, color, or membership in a language minority group. Recent examples of such discriminatory voting measures blocked by Section 5 are numerous. In those areas where voting discrimination continues to exist, Section 5 must be enforced, and a coverage formula is needed to achieve this. Here are a few examples of the effectiveness of Section 5:

- **Mississippi:** In 2011, the City of Clinton, Mississippi proposed a redistricting plan for its six-member council that, like the existing plan, did not include a single ward where African American voters had the power to elect their candidate of choice, despite the fact that 34% of the city’s population is African American. After careful review under Section 5, DOJ found reliable evidence that the City of Clinton acted with a racially discriminatory purpose in its decision not to create an ability-to-elect ward for African American voters. In the wake of the Justice Department’s objection, the city redrew the council district lines,

¹⁸*Shelby County*, 133 S. Ct. at 2612.

¹⁹ *Id.*

²⁰ *Id.*

creating, for the first time, a ward where African American voters have the ability to elect their preferred candidate.

- **Mississippi:** In 2011, the city of Natchez, Mississippi proposed a redistricting plan that reduced the percentage of African American voters in one ward by 6 percent and placed these voters into the three wards that were already majority African American. This change decreased the black voting-age population in the impacted ward from almost 53 percent to under 47 percent, thus eliminating the ability of African Americans in that ward to elect their preferred candidate. After careful review, the Justice Department concluded that the city's efforts to reduce the African American population were done with a discriminatory purpose.
- **Mississippi:** In 2001, three weeks before Election Day in Kilmichael, Mississippi, the town council decided to cancel the municipal election. At the time the election was cancelled, the most recent census numbers showed an increase in the black population such that the town was now 52.4 percent black, though the mayor and all five members of the Board of Alderman were white. All council members were elected at-large to four year terms, with a plurality vote requirement. The stated purpose for the town's action was to develop a single-member ward system for electing town officials.

In response to the town, DOJ noted that the decision to cancel the election came only after blacks became a majority of the population in the town and only after the qualification period for the election was closed and it became evident that there were several black candidates for office, and that under the existing at-large electoral method, the minority community had the very strong potential to win a majority of the municipal offices, including the office of mayor. Thus, the Department objected to the attempt to cancel the election, concluding that the town's decision was motivated by an intent to negatively impact the voting strength of black voters.

- **Texas:** In late 2011, the county commission in Nueces County, Texas, enacted a redistricting plan that diminished the voice of Hispanics at the polls by swapping Hispanic and white voters between election precincts. After careful review of the 2011 plan, DOJ concluded that the county's actions "appear to have been undertaken to have an adverse impact on Hispanic voters." DOJ also noted that the county offered "no plausible non-discriminatory justification" for these voter swaps, and instead offered "shifting explanations" for the changes.²¹
- **Texas:** North Harris Montgomery Community College district in Texas sought to reduce the number of polling places for local and school board elections in 2006 from 84 polling places to 12.²² Moreover, the assignment of voters to each polling place was very unbalanced. The polling place with the smallest proportion of minority voters would have served 6,500 voters while the site with the largest proportion of minority voters would have served over 67,000.

²¹ Letter from Thomas E. Perez, Assistant Attorney General, to Joseph M. Nixon, et al. (Feb. 7, 2012), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/TX/1_120207.pdf.

²² Letter from Wan J. Kim, Assistant Attorney General, to Renee Smith Byas (May 5, 2006), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/TX/TX-2960.pdf.

Following a DOJ complaint, a three judge court entered a consent decree prohibiting the locality from implementing the change without first obtaining preclearance.²³ Section 5 prohibited this change due to the retrogressive effect.

- **Georgia:** In 2006, Randolph County, Georgia, attempted to reassign the African American Board of Education Chair's electorate district from a 70 percent African American voting population to a 70 percent white voting population.²⁴ These changes were done in a special closed door meeting the sole purpose of which was to change the voter registration district of the Chair. In a unanimous vote, the all-white members of the Board of Registrars voted for the district change. Section 5 prevented this discriminatory change from taking place.
- **Georgia:** In 2009, Georgia implemented an error-filled voter registration verification system that matched voter registration lists with other government databases. Individuals who were identified as failing to match were flagged and required to appear on a specific date and time at the county courthouse with only three days' notice to prove their voter registration. The verification systems errors disproportionately impacted minority voters. Although representing equal shares of new voter registrants, more than 60 percent more African American voters were flagged for additional inquiry than white voters. In addition, Hispanic and Asian registrants were more than twice as likely to be flagged for further verification as white voter registration applicants. Section 5 stopped this retrogressive voter registration provision from continuing. The objection was later withdrawn on the mistaken premise that the state had significantly changed the database matching system.
- **Louisiana:** In 2011, East Feliciana Parish, Louisiana proposed a redistricting plan that included the creation, realignment, and renumbering of voting precincts. Under the proposed changes, DOJ concluded that the significant reduction in the percentage of black people in the total population, the voting age population, and the number of registered voters in the district would mean that black voters in the proposed district would no longer have the ability to elect a candidate of choice to office. Therefore, DOJ blocked the implementation of this change.
- **Louisiana:** In 2004, DOJ objected to the proposed redistricting plan for the City of Ville Platte, Louisiana, which would have eliminated a majority black city council district by shifting part of the population to another majority black district. While the city's black population percentage had increased both consistently and considerably since the previous census, becoming a majority of the population, the proposed 2003 redistricting plan eliminated the black population majority in one district by reducing it from 55.1 to 38.1 percent, and shifting the population to a district that already has a black population of 78.8 percent, thereby reducing the representation of blacks in the city.²⁵ After careful analysis DOJ concluded that the plan to reduce the number of districts where black voters had an

²³ United States v. N. Harris Montgomery Cmty. Coll. Dist., Civil Action No. H 06-2488 (S.D. Tex. Aug. 4, 2006) (consent decree judgment).

²⁴ Letter from Wan J. Kim, Assistant Attorney General, to Tommy Coleman (Sept. 12, 2006), available at http://www.justice.gov/crt/records/vot/obj_letters/letters/GA/GA-2700.pdf.

²⁵ Leadership Conference on Civil and Human Rights, Real Stories of the Impact of the VRA, <http://www.civilrights.org/voting-rights/vra/real-stories.html> (last visited June 19, 2014).

opportunity to elect their candidate of choice from 4 to 3 was designed, at least in part, to make black voters worse off by eliminating the electoral ability of black voters in the District. Section 5 prevented this plan from being enacted.

- **South Dakota:** In December 2007, in Charles Mix County, South Dakota, after the first Native American candidate was poised to become a county commissioner, the county increased the number of county commissioners from three to five.²⁶ Native Americans would only have been able to elect the candidate of their choice in one of the five new districts as opposed to one of the three original districts. This racially discriminatory impact, in addition to comments admitting discriminatory purpose, led DOJ to object to the proposed plan.
- **Alaska:** In 2008, the state of Alaska submitted for Section 5 preclearance a plan to eliminate polling places in several Native villages, consolidating these communities with majority white communities far distances away. Some of these proposed changes included realigning Tatitlek, a community in which about 85 percent of the residents are Alaska Native, to the predominately white community Cordova, located over 33 miles away and not connected by road; consolidating a community, in which about 95 percent of residents are Alaska Native, with another community, approximately 77 miles apart and not connected by road. DOJ responded requesting information about reasons for the voting changes, distances between the polling places, and their accessibility to Alaska Native voters. Rather than responding and submitting the additional voting changes for Section 5 review, Alaska abruptly withdrew the request for changes two weeks later.²⁷
- **South Carolina:** In September 2003, the town of North in Orangeburg County, South Carolina proposed to annex a small population of whites voters into their town. However, because South Carolina is covered by Section 5 of the VRA, the Department of Justice performed an investigation to determine whether this change would discriminate against minority voters. Ultimately, the Department concluded that the annexation could not go forward because "race appears to be an overriding factor in how the town responds to annexation requests." In denying the town approval to proceed with the annexation, DOJ indicated that in the early 1990s, a large number of black voters who reside to the southeast of the town's current boundary made a petition for annexation that was denied, and that the town gave no explanation for the denial. DOJ noted that the granting of the petition by this group of citizens "would have resulted in black persons becoming a majority of the town's population."²⁸

²⁶ Letter from Grace Chung Baker, Acting Assistant Attorney General, to Sara Frankenstein (Feb. 11, 2008), available at http://www.justice.gov/crt/records/vot/obj_letters/letters/SD/1_080211.pdf ..

²⁷ See Letter from Christopher Coates, Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, (Sept. 10, 2008). See also Fact Sheet, LDF, Recent Examples of Discriminatory Voting Measures Blocked By Section 5 of the Voting Rights Act, available at http://www.naacpldf.org/files/case_issue/Shelby-Recent%20Section%20S%20Successes.pdf.

²⁸ Letter from Alexander Acosta, Assistant Attorney General, to Honorable H. Bruce Buckheister (Sept. 16, 2003), available at http://www.justice.gov/crt/records/vot/obj_letters/letters/SC/SC-2170.pdf.

Based on its investigation, the Department concluded that the county did not provide equal access to the annexation process for black and whites and blocked the proposed annexation from taking effect.

b. Section 2 of the Voting Rights Act

Section 2 prohibits not only election-related practices and procedures that are intended to be racially discriminatory, but also those that are shown to have a racially discriminatory result.²⁹ Section 2 has been effective in prohibiting nationwide voting practices and procedures, such as redistricting plans, at-large election systems, poll worker hiring, and voter registration procedures that discriminate on the basis of race, color or membership in a language minority group.³⁰ While Section 2 cases often require lengthy case-by-case litigation brought only after voting changes are implemented unlike Section 5 cases (as discussed more fully later in this statement), the cases listed below highlight the importance of Section 2 in challenging ongoing discrimination.

- **Wyoming:** The ACLU's Voting Rights Project filed suit in 2005 on behalf of tribal members on the Wind River Indian Reservation in Fremont County, Wyoming alleging that the at-large method of electing the five member county commission diluted Native American voting strength in violation of Section 2. At the time the suit was filed no Native American had ever been elected to the county commission despite the fact that Native Americans were 20 percent of the county's population and had frequently run for office with the overwhelming support of Native American voters. Following a lengthy trial the district court issued a detailed opinion on April 29, 2010, that the at-large system diluted Indian voting strength. The court concluded: "The evidence presented to this Court reveals that discrimination is ongoing, and that the effects of historical discrimination remain palpable." *Large v. Fremont County, Wyoming*, 709 F.Supp.2d 1176, 1184 (D. Wyo. 2010). As a remedy the court adopted a plan containing five single member districts, one of which was majority Native American allowing Native Americans the opportunity to elect candidates of their choice. The county did not appeal the decision on the merits but did appeal the remedy provided by the district court. The court of appeals, however, affirmed the decision of the district court.
- **Florida:** In 2008, the School Board of Osceola County changed their school board single-member district boundaries following a consent judgment and decree finding that the existing districts violated Section 2. The previous district boundaries diluted Latino voting strength by dividing the largest Latino population concentration between two districts such that none of the five districts was majority Latino in eligible voters. The new plan agreed to by the school board include one district with a Latino voter registration majority, allowing for the ability to elect a representative of their choice.³¹
- **Montana:** In 2012, Native American voters in Montana filed litigation in the case, *Wandering Medicine v. McCulloch*, alleging abridgment and dilution of voting strength, and

²⁹ United States Department of Justice: Statutes Enforced by the Voting Section, <http://www.justice.gov/crt/about/vot/overview.php#vra> (last visited June 19, 2014).

³⁰ *Id.*

³¹ *U.S. v. The School Board of Osceola County*, no. 6:08-cv-582 (M.D. Fla. Apr. 23, 2008).

seeking satellite offices on the Crow, Northern Cheyenne, and Fort Belknap reservations for late registration and in-person absentee voting.³² The ACLU Voting Rights Project and ACLU of Montana submitted an amicus brief in support of the plaintiffs. The Native Americans in Montana contend that because of the time, expense, and difficulty involved in traveling to the county offices, their voting strength is abridged and diluted in violation of Section 2, the Fourteenth Amendment, and state constitutional law. The parties agreed to submit to mediation and on June 16, 2014, and the court entered an order that the case had been settled and cancelled the trial.

c. Section 203 of the Voting Rights Act

Section 203 ensures that language minority citizens have an equal opportunity to vote in federal elections.³³ Section 203 particularly requires covered jurisdictions to provide bilingual written voting materials and voting assistance in the minority languages,³⁴ including registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots.³⁵ While Section 203 has limited reach, it has also been effective in preventing recent discrimination against language minority citizens.³⁶

- **Texas:** On February 27, 2006, the Department of Justice filed a complaint alleging that Hale County, Texas, violated Section 203 of the Voting Rights Act by failing to provide for an adequate number of bilingual poll workers trained to assist Spanish-speaking voters on Election Day and by failing to publicize effectively election information in Spanish.³⁷ On April 27, 2006, a consent decree was entered which would allow the Department to monitor future elections in Hale County and require the County to increase the number of bilingual poll workers, employ a bilingual coordinator, and establish a bilingual advisory group.
- **Alaska:** In *Nick et al. v. Bethel et al.*, a federal court issued a preliminary injunction and specific relief finding that the Bethel Census Area of Alaska had not complied with its obligations under section 203 of the VRA since 1975, to provide bilingual election materials for the Eskimo language of Yup'ik, which is a covered minority language group.³⁸ The ACLU and the Native American Rights Fund working on behalf of the Bethel-area Alaska Natives reached a settlement requiring the state to provide bilingual election materials, including ballots, and to provide bilingual outreach workers to ensure voter registration information and notice of election to all communities.³⁹

³² *Wandering Medicine v. McCulloch*, No. 1:12-cv-0135 (D. Mont.).

³³ *Id.* The language minority groups covered by Section 203 include Native Americans, Asian Americans, Alaskan Natives, and Spanish-heritage citizens if they meet certain population thresholds.

³⁴ United States Department of Justice: Statutes Enforced by the Voting Section, <http://www.justice.gov/crt/about/vot/overview.php#vra> (last visited June 19, 2014).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *United States v. Hale County, TX*, (N.D. Tex. 2006).

³⁸ *Nick et al. v. Bethel et al.*, case no. 3:07-cv-00098. (2008).

³⁹ *Id.* (settlement agreement), available at <https://www.aclu.org/voting-rights/nick-et-al-v-bethel-et-al-settlement-agreement-state-alaska>. See also Press Release, American Civil Liberties Union, State Of Ala., NARF, Northern Justice Project And ACLU Reach Settlement In Yup'ik Language Voter Assistance Case (Feb. 19, 2010), available at <https://www.aclu.org/voting-rights/state-alaska-narf-northern-justice-project-and-aclu-reach-settlement-yupik-language-vo>.

IV. Section 5 Provides Necessary Protections Unavailable In Other Provisions

While there have been some successes under Section 2 and 203 of the Voting Rights Act, for example, those provisions and what remains of our legal avenues after *Shelby* are not enough to fully protect American citizens from discrimination in voting.

The protections that exist in Section 5, and enforced through Section 4(b), provide a powerful tool for deterring state and local governments from adopting discriminatory election procedures and preventing discriminatory practices that have been adopted from being enforced.⁴⁰ This preclearance requirement is a fundamental element of the Voting Rights Act that does not exist elsewhere in the Act or other federal voting laws, and has been rendered largely useless by the *Shelby* decision.

Section 5 was designed to check certain states' attempts to circumvent the protections of the 14th and 15th Amendments. Prior to the passage of the VRA, many states used an assortment of tactics – white-only primaries, literacy tests, poll taxes, violence and intimidation – to suppress minority voters, replacing one unconstitutional voting practice with another. As one method was deemed unconstitutional in the courts, another method would be enacted to take its place. However, new tactics have developed over time – e.g., redistricting, last minute polling place changes and reassignment of voting districts, voting changes to elected bodies to dilute representation, limitations on third party voter registration activities, reducing the days for early voting, and others – all of which have worked to disfranchise voters.

There are several unique elements of Section 5 that are particularly valuable in defeating discrimination in voting that do not exist in any other part of the Voting Rights Act. First, Section 5 requires those jurisdictions included in a coverage formula to submit all proposed election changes to the federal government prior to implementation.⁴¹ This functions as a notice mechanism giving DOJ and the public a level of knowledge regarding voting changes superior to placing the burden on individuals and watchdog groups to identify voting changes as they are proposed. As the examples previously discussed demonstrate, the majority of discriminatory changes take place at the local level where they are difficult to identify if the reporting onus is removed from the jurisdiction and placed on groups or individual voters.

Second, in evaluating the intent or effect of the proposed voting change, Section 5 places the burden of proof on the jurisdiction requesting the election change to show that the change does not have a “retrogressive” effect on minority voters.⁴² Unlike Section 2, which places the burden on the voter to prove discrimination, Section 5’s burden of proof makes it more effective in preventing discrimination by requiring the jurisdiction to show any change will not have a discriminatory impact prior to the law taking effect. The purpose of Section 5 is to “shift the advantage of time and inertia from the perpetrators” of discrimination in voting to the voters.⁴³

⁴⁰ *Shelby County*, 133 S. Ct. at 2639. (Ginsburg, J., dissenting) (citing *The Continuing Need for Section 5 Preclearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., 2d Sess., pp. 53–54 (2006)*).

⁴¹ 42 U.S.C. § 1973c.

⁴² *Beer v. United States*, 425 U.S. 130 (1976).

⁴³ *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

Third, although Section 2 is a valuable tool in stopping discriminatory voting practices after they occur, in its current form, it lacks Section 5's ability to prevent discrimination from occurring in the first place. Unlike Section 2, Section 5's preclearance mechanism "freezes" voting changes before enactment.

Fourth, Section 5 targets ongoing discrimination in a relatively low-cost way through an administrative process. By largely avoiding long and drawn out legal battles, Section 5 avoids the high costs of case-by-case litigation associated with Section 2.⁴⁴ Through the simple administrative process, covered jurisdictions submit proposed changes in writing to DOJ. Within sixty days, the Attorney General can decide whether to object to the change. If there is no objection, the jurisdiction may implement the change. If an objection is filed, the jurisdiction can abandon or change its proposal or it may submit the changes for a judicial determination without deference to the findings from DOJ.⁴⁵ This method allows for instances of discrimination to be identified and prevented when the change is proposed.

Other provisions of the Voting Rights Act have been used more often following the *Shelby* decision as a somewhat less effective and more cumbersome measure to challenge discriminatory voting laws while the legislative fix to the *Shelby* decision is debated. These provisions, in their current form, however, were never intended to be replacements for Section 5, and are not currently designed to serve the purpose of providing the encompassing protections that Section 5 had provided prior to *Shelby*.

For example, Section 3(c) of the Voting Rights Act permits a court to "bail-in" a state or jurisdiction – that is, through a order or consent decree, a court can subject a jurisdiction's voting changes to preclearance under Section 5 of the Voting Rights Act. Section 3(c), although effective for its originally designed purpose of bringing in non-covered jurisdictions that discriminate under preclearance, is limited in scope and time. A court, in applying Section 3(c), can limit preclearance to a specific voting change (rather than all changes in that jurisdiction) and to a specific length of time. Thus, any preclearance coverage imposed by 3(c) would likely be more limited than the extensive coverage of Section 5, which, until *Shelby*, lasted for the entire reauthorization period as determined by Congress. In addition, under current law, the court may only order a preclearance remedy if it finds a violation of the 14th or 15th amendments, which generally requires a finding that the jurisdiction engaged in intentional discrimination. This provision in its current form is not an adequate replacement for Section 5, as Section 5 includes protections against voting changes that have a discriminatory impact, which does not currently exist in Section 3(c). Section 3(c) coverage, therefore, leaves open the possibility for discrimination to occur in different ways, in other areas, or after the bail-in period expires.

Moreover, no state⁴⁶ or federal constitutional claim is an adequate substitute for Section 5 because no other law provides advance notice of the change and uses preclearance to stop the discriminatory practice from going into effect.

⁴⁴ See, e.g., Justin Levitt, *Shadowboxing and Unintended Consequences*, SCOTUSBlog (June 25, 2013), <http://www.scotusblog.com/2013/06/shadowboxing-and-unintended-consequences/>.

⁴⁵ 42 U.S.C. § 1973c.

⁴⁶ See, e.g., Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014), available at <http://www.vanderbiltlawreview.org/content/articles/2014/01/Douglas-67-Vand.-L.-Rev.-89.pdf>.

Only when the powerful tools of Section 5 and updated provisions of the Voting Rights Act are established under a new statutory regime can discrimination in voting be adequately prevented.

V. The Voting Rights Amendment Act of 2014 (VRAA)

On January 16, 2014, Senator Patrick Leahy introduced the Voting Rights Amendment Act of 2014.⁴⁷ An identical bipartisan version of the bill was introduced in the House of Representatives by Representatives Jim Sensenbrenner and John Conyers.⁴⁸ While the bill is not perfect, it represents an important bipartisan compromise and includes commonsense updates to a law that has protected the fundamental right to vote for American citizens for nearly 50 years. It thoughtfully and successfully answers Chief Justice Roberts' invitation to Congress in *Shelby* to modernize the Voting Rights Act.

The bill seeks to go beyond a static, geographically based statute and instead is flexible and forward-looking, capturing jurisdictions that have recently engaged in acts of discrimination. The bill will still require those jurisdictions with the worst, most recent records of discrimination to be subjected to preclearance, while also providing new nationwide tools to ensure an effective response to race discrimination wherever it occurs. In light of the new modest coverage formula, these other nationwide protections are critical in fulfilling the Voting Rights Act mandate of eradicating race discrimination in voting for all citizens. The following are important provisions in the new legislation:

a. “Rolling” Preclearance Formula

The Voting Rights Amendment Act creates a new preclearance formula that follows the Supreme Court's mandate in the *Shelby* decision to reflect only current conditions of discrimination and to respect the equal sovereignty of the states by no longer singling out states for coverage. Under the new formula, any state with five or more voting rights violations,⁴⁹ and at least one of which involves a statewide practice, during the past 15 years will be covered for a period of 10 years. Political subdivisions that have had three or more violations within the jurisdiction, or one violation in combination with persistent and extremely low minority voter turnout, will also be subject to preclearance.

⁴⁷ Voting Rights Amendment Act of 2014, S. 1945, 113th Cong. (2014).

⁴⁸ Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (2014).

⁴⁹ The Voting Rights Amendment Act defines a “voting rights violation” as a final judgment by any court that determines that a denial or abridgement of the right to vote on account of race, color, or membership in a language minority group, in violation of the 14th or 15th Amendment, occurring anywhere within the State or subdivision; A final judgment by any court that determines that a voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting was imposed or applied or would have been imposed or applied anywhere within the State or subdivision in a manner that resulted or would have resulted in a denial or abridgement of the right of any citizen to vote on account of race or color, or language minority in violation of section 2; A final judgment by any court that has denied a request for a preclearance declaratory judgment under section 3(c) or section 5, preventing a voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting from being enforced; and An objection by the Attorney General under section 3(c) or section 5, that has not been overturned or withdrawn, not including a DOJ objection to voter ID. *See* Voting Rights Amendment Act of 2014, S. 1945, 113th Cong. § 3(b)(3) (2014).

The rolling trigger would provide a flexible mechanism to require preclearance for those jurisdictions with a recent record of repeated violations of the Voting Rights Act. The “rolling” mechanism keeps the coverage designations continuously updated through an annual re-evaluation. Through the yearly evaluation process, states and jurisdictions that are conforming to the law will be removed from preclearance when they have not recently engaged in discrimination. Alternately, any jurisdiction that meets the threshold described above, will automatically become covered.

b. Notice and Disclosure Requirements

Every voter has a right to know of the voting changes that occur in his or her community, and as a matter of sound public policy this should not be limited to covered jurisdictions. The loss of notice provided under Section 5 following *Shelby* makes it nearly impossible to identify potentially discriminatory voting changes. This is particularly problematic if jurisdictions make last minute changes before an election. There has been criticism that Section 5’s notice provision singles out individual states for separate treatment – the Voting Rights Amendment Act would end this by requiring all political subdivisions provide public notice of voting changes within a certain time period of enactment or an election.

Under the proposed bill, reasonable and accessible public notice, including online, is required within 48 hours for voting changes that differ from those that were in effect 180 days before an election, and notice on polling place resources, including allocation of registered voters and number of voting machines and poll workers, is required no later than 30 days prior to the election, and any further change within 30 days of an election must be disclosed within 48 hours of the change occurring.⁵⁰ Additionally, states and jurisdictions must report, within ten days, changes to demographic and electoral data for specified geographic areas that changes the constituency that will participate in the election.⁵¹ The proposed notice requirements do not require non-covered jurisdictions submit their changes for DOJ approval.

This nationwide, uniform notice requirement will ensure community members across the country are adequately informed about pending voting changes. This will also allow these communities to make their voices heard regarding possible concerns with the change, in advance of its implementation.

c. Expanded Judicial Bail-in Provision

The VRAA amends the current bail-in provision of the Act in order to give courts additional authority to order remedies. This provision will allow courts to order a state or political subdivision’s voting changes be precleared when there is a voting rights violation based on a discriminatory result.⁵² As judicial bail-in is already available where discrimination under the Fourteenth or Fifteenth Amendments is found, this modest expansion would permit courts the option for bail-in where discrimination has been proven under other provisions of the VRA. This is a small universe of cases. However, providing courts with the full panoply of remedies after a

⁵⁰ S. 1945 §6.

⁵¹ S. 1945 § 6(b)(3)(c)(1).

⁵² This does not include a finding of a discriminatory result based on voter ID, which is currently exempt under this provision. See Voting Rights Amendment Act of 2014, S. 1945, 113th Cong. § 2(a) (2014).

finding of discrimination is an important addition to protect voters and is consistent with other provisions of the VRA.⁵³

Additionally, preclearance through judicial bail-in allows courts to pinpoint specific jurisdictions with egregious and recent discrimination, without burdening other political subdivisions. When combined with the new rolling preclearance trigger, this enhanced judicial bail-in will recreate the important role of preclearance that was lost in *Shelby*. Amending Section 3 would also help to limit expensive case-by-case litigation, just as Section 5 previously has operated.

d. Expansion of the Availability of Preliminary Relief

One of the most important tools lost in *Shelby* was the ability to ensure that a voting change was not discriminatory prior to its implementation. There is very often no way to remedy the injury to voters, given that what they lost is the equal opportunity to participate in an election that has already taken place. Previously, preclearance was the only tool that could ensure this in the covered jurisdictions. The VRAA proposes to expand the ability of voters to obtain preliminary relief through the courts when challenging voting changes under Section 2 in non-covered jurisdictions.⁵⁴ This provision will allow the courts to review and “freeze” voting changes that are especially likely to result in discrimination, as a case is proceeding on the merits.⁵⁵ Once a court decides that a change is not discriminatory, it is free to take effect, but if a court finds that there is discrimination, it would have succeeded in preventing that change to occur before it can deny individuals the right to vote.

Giving courts enhanced authority to order preliminary relief will work in concert with the new coverage formula to ensure that voters in non-covered jurisdictions may also be protected before discriminatory changes are implemented. This expansion of preliminary relief is fully consistent with *Shelby*'s call to identify discrimination wherever it occurs.

e. Additional Ability to Deploy Federal Observers

In places where there is evidence of possible race or language minority discrimination that would interfere with the right to vote, the bill gives DOJ the authority to deploy federal observers.⁵⁶ The Department's authority would apply in all covered jurisdictions, and where determined necessary to enforce the language minority provisions of Section 203. Federal observer coverage plays a critical role in the enforcement of the Voting Rights Act by allowing neutral observers to be present where there are concerns about racial intimidation or discrimination occurring in and around the polls.

⁵³ Congress added a results standard to Section 2 during the 1982 reauthorization of the Voting Rights Act as a product of bipartisan negotiations. Section 5 also reaches more broadly than discriminatory purpose. These standards have been consistently applied and upheld by the courts in the Section 2 and Section 5 contexts, and would strengthen the effectiveness of Section 3(c).

⁵⁴ S.1945 §2.

⁵⁵ *Id.*

⁵⁶ S. 1945 §5.

When combined with the other provisions of this bill, the ability to have federal observers monitor elections in areas previously known to discriminate or where real threats exist, is a necessary added layer of protection to ensure that no one's right to vote is compromised.

Conclusion

The ACLU thanks the Senate Judiciary Committee for holding this important hearing to address the Voting Rights Act following the *Shelby* decision. The Voting Rights Act's long bipartisan history of protecting the right to vote and rooting out racially discriminatory changes must continue. Therefore, it is crucial that congressional action be taken to restore and redesign its protections and allow the Voting Rights Act to continue to be the crown jewel of civil rights laws. All the other rights we enjoy as citizens depend on our ability to vote; it is necessary that we safeguard access to the ballot for every citizen. We look forward to working with the Committee as the Voting Rights Amendment Act proceeds through the legislative process. While we will continue to work for the bill's improvement, we urge swift passage as soon as possible.