Committee on the Judiciary

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Oversight Hearing on the Voting Section of the Civil Rights Division of the U. S. Department of Justice

Testimony of Laughlin McDonald
Director, ACLU Voting Rights Project
2600 Marquis One Tower
245 Peachtree Center Avenue
Atlanta, GA 30303
(404) 523-2721
lmcdonald@aclu.org

October 30, 2007

Committee on the Judiciary

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Oversight Hearing on the Voting Section of the Civil Rights Division of the U. S. Department of Justice

Testimony of Laughlin McDonald
Director, ACLU Voting Rights Project
2600 Marquis One Tower
245 Peachtree Center Avenue
Atlanta, GA 30303
(404) 523-2721
lmcdonald@aclu.org

October 30, 2007

Mr. Chairman and members of the committee, thank you for inviting me to testify about the Voting Section of the Civil Rights Division of the Department of Justice. I would like to focus my remarks primarily on the role of the Voting Section in enforcing the special preclearance provisions of Section 5 of the Voting Rights Act.

To put my remarks in context, I have been the director of the ACLU's Voting Rights Project since 1972. As part of our work, we have brought litigation to enforce equal voting rights on behalf of racial and language minorities. During the recent hearings on extension and amendment of the Voting Rights Act, we submitted a report to Congress of the more than 290 voting cases we had been involved in since the last extension of Section 5 in 1982.[1] That report, along with substantial other evidence before

[1]The Case for Extending and Amending the Voting Rights Act: Voting Rights Litigation, 1982-2006 (ACLU; March 2006).

Congress, documented that discrimination in voting is not a thing of the past but a continuing problem.

The Voting Rights Project has had direct contact with the Voting Section over the years involving Section 5 submissions. We have also participated with the Voting Section in vote dilution litigation brought under Section 2 of the Voting Rights Act, most recently in Charleston, South Carolina, on behalf of African Americans, and Blaine County, Montana, on behalf of American Indians.[2] I have gotten to know many of the staff members of the Voting Section and have great respect for them and the work they have done. But unfortunately, recent revelations of partisan bias in the decision making of the Voting Section seriously undermine voting rights enforcement in this country.

The Voting Section has a unique and major role in protecting voting rights. Aside from conducting administrative review of voting changes in jurisdictions covered by Section 5, it enforces the requirement that certain jurisdictions provide bilingual material and other assistance in voting to language minorities. It certifies jurisdictions for the assignment of federal observers to monitor elections. It undertakes investigations and litigation throughout the United States. It has the largest staff and resources of any entity in the country committed to

[2]United States v. Charleston County and Moultrie v. Charleston County Council, 365 F.3d 341 (4th Cir. 2004); United States v. Blaine County, Montana, 363 F.3d 897 (9th Cir. 2004).

protecting voting rights. It enforces the National Voter Registration Act, the Help American Vote Act, and the Uniformed and Overseas Citizens Absentee Voting Act. And, it defends against challenges to the constitutionality of the various voting rights laws enacted by Congress.

The revelations of partisan bias in the Voting Section's decision making, however, breed a lack of confidence and trust in the section. Partisan bias undermines the section's effectiveness. It calls into question the section's decisions about what to investigate and what kind of cases to bring. It calls into question the section's decisions about where and why to assign federal observers. It creates a lack of confidence in Section 5 itself and the other special provisions of the Voting Rights Act. It is a clear signal that partisanship can trump racial fairness, and thus increases the likelihood that minorities will be manipulated to advance partisan goals. It also shifts the burden of enforcing voting rights upon those who have been the victims of discrimination and who have the least resources to remedy it.

Congressional oversight is critical to restoring public trust and confidence in the Voting Section of the Department of Justice, and insuring that the nations's voting laws are fairly and adequately enforced.

One recent example of partisan bias infecting Voting Section

decision making is the preclearance of Georgia's photo ID law. In 2005, the Georgia legislature, in a vote sharply divided on racial and partisan lines, passed a new voter identification bill which had the dubious distinction of being one of the most restrictive in the United States. To vote in person - but not by absentee ballot - a voter would have to present one of six specified forms of government issued photo ID.[3] Those without such an ID would have to purchase one at a cost of $10 (later raised to $20). The stated purpose of the bill was to prevent "voter fraud,"[4] but not only were there laws already on the books that made voter fraud a crime, there was no evidence of fraudulent in-person voting to justify the stringent photo ID requirement.

The new requirement would also have an undeniable adverse impact upon minorities, the elderly, the disabled, and the poor. The League of Women Voters and the American Association of Retired Persons estimated that 152,664 people over the age of 60 who voted in the 2004 presidential election did not have a Georgia driver's license and were unlikely to have other photo

[3]I.e., a Georgia driver's license, a Georgia ID card, a U.S. passport, a government employee ID card, a military ID, or a tribal ID. O.C.G.A. § 21-2-417.

[4]Common Cause v. Billups, 406 F.Supp.2d 1326, 1361 (N.D. Ga. 2005).

ID.[5] Governor Sonny Perdue himself estimated that approximately 300,000 voting age Georgians did not have a driver's license or state issued ID card.[6] It was subsequently shown that 300,000 registered voters lacked a driver's license or state issued photo ID.[7] Getting a photo ID would not only burden those individuals, but would place a special burden on those living in retirement communities, assisted living facilities, and in rural areas. The problem was exacerbated further by the fact that while the state has 159 counties, there were only 56 Department of Motor Vehicle offices that issued drivers licenses or photo IDs, none of which were located in the City of Atlanta.[8]

According to the 2000 census, blacks in Georgia were nearly five times more likely not to have access to a motor vehicle than whites, and would thus be less likely to have a driver's license or access to transportation to purchase a photo ID. The disproportionate impact of the photo ID bill on African American voters was clear, but that was apparently the reason some white legislators supported the measure. Representative Sue Burmeister (R-Augusta), a sponsor of the photo ID bill, advised officials in

---

[5]Id. at 1334.

[6]Department of Justice, Voting Section, Section 5 Recommendation: August 25, 2005, p. 20.

[7]"Lawyers: State misinforms voters," Athens Banner-Herald, October 17, 2006.

[8]Section 5 Recommendation: August 25, 2005, p. 10.

the Voting Section of the Department of Justice that “if there are fewer black voters because of this bill, it will only be because there is less opportunity for fraud. She said that when black voters in her black precincts are not paid to vote, they do not go to the polls.”[9] Burmeister was later quoted to the same effect in a local newspaper, that if black people in her district "are not paid to vote, they don't go to the polls,” and if fewer blacks voted as a result of the photo ID bill it would only be because it ended voter fraud.[10]

Black members of the legislature were strongly opposed to the photo ID bill. During the legislative debate Senator Emmanuel Jones (D-Decatur) wore shackles to the well of the Senate, and Representative Alisha Thomas Morgan (D-Austell) brought shackles to the well of the House in protest over the bill’s potential to suppress the black vote.[11]

Secretary of State Cathy Cox wrote to Governor Perdue on April 8, 2005, and urged him not to sign the photo ID bill into law. "I cannot recall one documented case of voter fraud during my tenure as Secretary of State or Assistant Secretary of State

---

[9]Id., p. 6.

[10]"Georgia voter ID memo stirs tension," The Oxford Press, November 18, 2005.

[11]“ID Bill Could Make Georgia Unique in Turn Away Voters,” The Macon Telegraph, March 19, 2005; “Firebrand ‘Standing Up’: Legislator Makes no Apologies for her Convictions,” The Atlanta Journal-Constitution, March 24, 2005.

that specifically related to the impersonation of a registered voter at voting polls," she said. In her judgment the bill “creates a very significant obstacle to voting on the part of hundreds of thousands of Georgians, including the poor, the infirm and the elderly who do not have drivers licenses because they are either too poor to own a car, are unable to drive [a] car, or have no need to drive a car.” She described the justification for the bill as a measure to combat voter fraud as "a pretext."[12] Despite his acknowledgment that hundreds of thousands of Georgians did not have a drivers license or ID card, Perdue signed the photo ID bill into law.

A recent study by Prof. Lorraine C. Minnite of Department of Justice records shows that between 2002 and 2005, only 24 people nationwide were convicted or pleaded guilty to federal charges of illegal voting. This number includes 19 people who were ineligible to vote, five who were under supervision for felony convictions, 14 who were not U.S. citizens, and five who voted twice in the same election. The report further found that the available state-level evidence of voter fraud, while not definitive, “is also negligible.” Prof. Minnite concluded that “[t]he claim that voter fraud threatens the integrity of American

[12]Common Cause, 406 F.Supp.2d at 1333-34.

elections is itself a fraud."[13]

The New York Times similarly reported that five years after the current administration launched a Ballot Access and Voting Integrity Initiative in 2002, it had turned up virtually no evidence of any organized effort to skew or corrupt federal elections.[14] While there were a few instances of individual wrongdoing, most were the result of confusion about eligibility to vote. And most of those charged were Democrats.

The United States Elections Assistance Commission (EAC) issued a report in December 2006, in which it also concluded that many of the allegations of voter fraud made in reports and books it analyzed "were not substantiated," even though they were often cited as evidence of fraud. Overall, the report found "impersonation of voters is probably the least frequent type of fraud because it is the most likely type of fraud to be discovered, there are stiff penalties associated with this type of fraud, and it is an inefficient method of influencing an election."[15]

Georgia submitted its new photo ID bill for preclearance

---

[13]Lorraine C. Minnite, The Politics of Voter Fraud (Washington, D.C.; Project Vote, 2007), 5, 8-9.

[14]"In 5-Year Effort, Scant Evidence of Voter Fraud," The New York Times, April 12, 2007.

[15]United States Elections Assistance Commission, Election Crimes: An initial Review and Recommendations for Future Study (Washington, D.C.; December 2006), 9, 16.

under Section 5 of the Voting Rights Act,[16] and the Department of Justice approved it on August 26, 2005, despite the near unanimous recommendation by the career staff (4 out of 5) to object. The recommendation concluded that "the state has failed to meet its burden of proof to demonstrate that [the photo ID bill] does not have the effect of retrogressing minority voting strength."[17]

One of those who played a central role in overriding the recommendation of the career staff was Hans von Spakovsky, a Bush appointee and counsel to the Assistant Attorney General for Civil Rights.[18] According to The Washington Post, "[c]areer Justice Department lawyers involved in a Georgia case said von Spakovsky pushed strongly for approval of a state program requiring voters to have photo identification," and that the recommendation of staff lawyers to object to the state's submission "was overruled by von Spakovsky and other senior officials in the Civil Rights Division."[19]

While employed in the Voting Section, Von Spakovsky had previously written an article for the Texas Review of Law &

---

[16]42 U.S.C. § 1973c.

[17]Section 5 Recommendation: August 25, 2005, p. 20.

[18]"Official's Article on Voting Law Spurs Outcry," The Washington Post, April 13, 2005.

[19]"Bush Picks Controversial Nominees for FEC," The Washington Post, December 17, 2005.

Politics, using the pseudonym "Publius," in which he strongly endorsed photo ID requirements. He scoffed at the critics of photo IDs and dismissed the evidence of discriminatory impact against minority groups, such as African-Americans, as "merely anecdotal" and "unsubstantiated." One of his recommendations was to "require all voters to present photo identification at their precinct polling locations."[20] There does not appear to be a benign explanation for von Spakovsky's anonymity. Instead, it seems designed to prevent the public and those with business before the Voting Section from knowing the views of one of the senior officials involved in the preclearance process.

Not only was there evidence that the Georgia photo ID bill had been enacted with a discriminatory purpose, i.e., to suppress the minority vote, but its effect would clearly be retrogressive within the settled meaning of Section 5.[21] In any event, the career staff's entirely defensible conclusion that the state had failed to carry its burden of showing the absence of a discriminatory effect was overridden.

The staff recommendation was not only overridden, but the

---

[20]Publius, "Securing the Integrity of American Elections: The Need for Change," 9 Texas Review of Law & Politics 278, 289-300 (2005).

[21]A voting change has a discriminatory effect under Section 5 if it makes minorities worse off than under the preexisting rule or practice. Beer v. United States, 425 U.S. 130, 141 (1976).

leadership of the Voting Section instituted a new rule prohibiting the career staff from making recommendations in the future whether or not to object to proposed voting changes.[22] This was a reversal of long standing section policy and marginalized the career staff with its experience and expertise in administering Section 5. But it would obviously be easier to make partisan driven decisions by not having to override the recommendations of the career staff.

Notably, in 1994 Deval L. Patrick, the then Assistant Attorney General in the Civil Rights Division, objected to a photo ID requirement from Louisiana essentially identical to the one from Georgia. Based upon evidence that "black persons are four to five times less likely than white persons in the state to possess a driver's license or other picture identification card," Patrick concluded the state failed to carry its burden of proof that the change would not have retrogressive impact upon minority voters.[23]

Shortly before DOJ precleared the Georgia photo ID bill, the legislature passed a new law increasing the fee for a five year

---

[22]"Staff Opinions Banned in Voting Rights Cases," The Washington Post, December 10, 2005. See also Joseph D. Rich, Mark Posner and Robert Kengle, "The Voting Section," in The Erosion of Rights: Declining Civil Rights Enforcement under the Bush Administration, ed. William L. Taylor, et al. (Wash., D.C.; Citizens' Commission on Civil Rights, 2007), 38.

[23]Deval L. Patrick, Assistant Attorney General, to Sheri Marcus Morris, Assistant Attorney General, November 21, 1994.

photo ID card to $20, and a ten years card to $35.[24] On September 2, 2005, the ACLU wrote a letter to John Tanner, the Chief of the Voting Section, noting that the fee increase imposed yet an additional and disparate burden upon racial and language minorities, and warranted a reconsideration of the preclerance decision. The ACLU also pointed out that the changes were being implemented absent compliance with Section 5 and their further use should be enjoined.[25] Tanner declined to take any action and, despite the obvious impact the new law would have on minority voting rights, said in response that the amount a state charged for a drivers license was not "a change affecting voting within the meaning of [Section 5]."[26] Such logic was explicitly rejected by the Supreme Court in its 1966 decision invalidating Virginia's poll tax for state elections. The Court acknowledged a state could charge a fee for drivers and other kinds of licenses, but rejected the argument that payment of any fee for voting was constitutional.[27] The increase in the fee for a document required by the state to vote <u>was</u> in fact a change

---

[24]O.C.G.A. § 40-5-103(a).

[25]Laughlin McDonald, ACLU Southern Regional Office, to John Tanner, Chief, Voting Section, September 2, 2005.

[26]John Tanner, Chief, Voting Section, to Laughlin McDonald, ACLU Southern regional Office, October 11, 2005.

[27]Harper v. Virginia State Bd. Of Elections, 383 U.S. 663, 668 (1966).

affecting voting.

Joseph Rich, who served as Chief of the Voting Section from 1999-2005, in testimony before a congressional committee described the failure to object to the Georgia photo ID bill as "the brazen insertion of partisan politics into the decision-making under Section 5."[28] Rich's comments were echoed by Bob Kengle, a lawyer who spent twenty years in the Civil Rights Division and served as Deputy Chief of the Voting Section. He left the section in 2005, he said, after reaching a "personal breaking point" precipitated by "institutional sabotage . . . from political appointees," "partisan favoritism," and the Administration's "notorious" Georgia Section 5 decision and its pursuit of "chimerical suspicions of vote fraud."[29]

The Voting Section has failed to object to other discriminatory voting changes, including 2001 legislative redistricting in South Dakota. The boundaries of District 27 that included Shannon and Todd Counties, which are covered by Section 5, were only slightly altered, but the demographic composition of the district was substantially changed. American Indians were 87% of the population of District 27 under the 1991 plan, and the district was one of the most underpopulated in the

[28]Testimony of Joseph D. Rich, Oversight Hearing of the Civil Rights Division, House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, March 22, 2007.

[29]Bob Kengle, "Why I Left the Civil Rights Division."

state. Under the 2001 plan, Indians were 90% of the population, while the district was one of the most overpopulated in the state. The new plan was more than arguably retrogressive within the meaning of Section 5 because it "packed," or over-concentrated, Indians compared to the pre-existing plan. Packing is one of the recognized methods of diluting minority voting strength.[30] The Department of Justice, however, precleared the new plan under Section 5. Tribal members subsequently challenged the plan under Section 2 and the court, making detailed and lengthy findings of past and continuing discrimination against Indians, invalidated it as diluting Indian voting strength.[31]

A challenge to the Georgia photo ID law was filed by a coalition of groups, the response to which underscored how sharply polarizing the new law was. Former President Jimmy Carter called the law a "disgrace to democracy," and said "it is highly discriminatory and, in my personal experience, directly designed to deprive older people, African-Americans and poor people of a right to vote." House Speaker Glenn Richardson (R-Hiram), however, called the lawsuit "ludicrous" and an example of "liberal special interests using unconscionable scare tactics to

[30]Voinovich v. Quilter, 507 U.S. 146, 153-54 (1993).

[31]Bone Shirt v. Hazeltine, 336 F.Supp.2d 976, 987-1017 (D. S.D. 2004).

frighten Georgia voters."[32]

On October 18, 2005, the federal court preliminarily enjoined use of the photo ID law on the grounds that it was in the nature of a poll tax, as well as a likely violation of the equal protection clause of the Fourteenth Amendment. The court expressly found the law "is most likely to prevent Georgia's elderly, poor, and African-American voters from voting."[33]

The court also noted that the Virginia poll tax invalidated by the Supreme Court was $1.50, while the fee for a photo ID for voting in Georgia was $20. The fee could be waived if a voter signed an affidavit that he or she was indigent and could not pay the $20, but the court concluded the waiver "does not reduce the burden that the Photo ID requirement imposes on the right to vote."[34]

A recent survey sponsored by the Brennan Center for Justice at the NYU School of Law concluded that 25% of African-American citizens of voting age have no current government issued photo ID, compared to 8% of white citizens of voting age.[35] Based on

---

[32]"Suit slams voter ID law," The Atlanta Journal-Constitution, September 20, 2005.

[33]Common Cause, 406 F.Supp.2d at 1365.

[34]Common Cause, 406 F.Supp.2d at 1364.

[35]Citizens without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification, Brennan Center for Justice at NYU School of Law, November 2006.

the 2000 census, this amounts to more than 5.5 million African American adult citizens without photo ID. The effect of photo ID laws in suppressing black - and thus Democratic - political participation is apparent. The survey also shows that the elderly and the poor are similarly adversely affected by photo ID requirements.

Cathy Cox released a report in June 2006, based on a comparison of the state's files of registered voters and persons issued valid driver's licenses. The study found nearly 700,000 Georgians who were registered to vote lacked a drivers license, the most commonly available form of photo ID for in-person voting. The study, Cox said, "provides powerful new evidence that supports the objections I've raised against the photo ID requirement from the outset - that huge numbers of Georgians are in jeopardy of being shut out of the voting process and having their voices silenced."[36] Cox issued another press release on June 23, 2006, that the voters who lacked a photo ID were disproportionately elderly and minority.[37]

Despite its grant of a preliminary injunction, the district court ultimately dismissed the complaint in the Georgia case concluding none of the plaintiffs had standing, the state was not

[36]News Release from Cathy Cox, June 19, 2006.

[37]Common Cause/Georgia v. Billups, 504 F.Supp.2d 1333, 1361 (N.D. Ga. 2007).

required to document "in-person voter fraud exist[s] in Georgia," the burden the law imposed on voters was not "significant," and the photo ID requirement was "rationally related" to a legitimate state interest.[38] The plaintiffs have filed a notice of appeal.

John Tanner, in recent remarks before the National Latino Congreso in Los Angeles, defended the preclearance of Georgia's photo ID law by claiming in "Georgia, the fact was and the court found that it was not racially discriminatory. That was the finding of the initial court."[39] The court, however, made no such finding. It did not reach the merits of plaintiffs' claim that the law violated the racial fairness provisions of Section 2 of the Voting Rights Act, but instead said it "reserves a final ruling on the merits of that claim for a later date."[40] Even in its final opinion on the merits, the court did not rule on the plaintiffs' Section 2 race discrimination claim.

Tanner also claimed "the minorities in Georgia statistically, slightly, were more likely to have ID" than whites.[41] Again, he was wrong. He was apparently relying on figures compiled by the Georgia Department of Driver Services

---

[38]Id. at 1377, 1381.

[39]TPMmuckraker.com, "DoJ Vote Chief Argues Voter ID Laws Discriminate against *Whites*," October 9, 2007.

[40]Common Cause, 406 F.Supp.2d at 1375.

[41]"DoJ Vote Chief Argues Voter ID Laws Discriminate against *Whites.*"

(DDS), which were recited in an October 7, 2005, letter from William E. Moschella, Assistant Attorney General, to Sen. Christopher S. Bond, responding to questions about the department's preclearance of the Georgia photo ID law. According to Moschella, "DDS has racial data on nearly 60 percent of its license and identification holders. Of those individuals, 28 percent are African-American, a percentage slightly higher than the African-American percentage of the voting age population in the Georgia." Those numbers, however, say nothing about those who did not possess a DDS license or identification, nor the 40% of those on the DDS list who were not racially identified.

But more to the point, Tanner failed to note that the Georgia Secretary of State compared the state voter registration list with the DDS list and concluded that 49.75% of those on the voter registration list who did not have a DDS license or identification were black. In the 22 counties holding special elections in 2007, 57.92% of those on the voter registration list who did not have a DDS license or identification were black.[42] The state's own figures thus show black voters are disproportionately affected by the photo ID requirement.

Other states have also adopted photo ID requirements for in person voting. Indiana adopted such a law in 2005, which requires persons voting in person to present a valid photo ID

[42]Common Cause/Georgia, Def. Ex. 35.

issued by the United States or the State of Indiana. The law was challenged in federal court but was upheld by the district court. In a divided opinion, the Court of Appeals for the Seventh Circuit affirmed.[43] Judge Evans, however, in a dissenting opinion, said "the Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."[44] The majority opinion also acknowledged there is "[n]o doubt most people who do not have photo ID are low on the economic ladder and thus, if they do vote, are more likely to vote for Democratic than Republican candidates," and that "the new law injures the Democratic Party."[45]

As Judge Evans further pointed out, the Indiana "law will make it significantly more difficult for some eligible voters . . . to vote - and this group is mostly comprised of people who are poor, elderly, minorities, disabled, or some combination thereof."[46] The majority opinion also conceded "the Indiana law will deter some people from voting."[47] Thus, the challenged law

---

[43]Crawford v. Marion County Election Board, 472 F.3d 949 (7th Cir. 2007).

[44]Id. at 954.

[45]Id. at 951.

[46]Id. at 955.

[47]Id. at 951.

has the effect, and according to Judge Evans "a not-too-thinly-veiled" purpose, of discouraging voting by those believed to vote Democratic, and it will make it significantly more difficult for some voters, including racial minorities, to vote on election day.

The stated rationale for the Indiana law, as was the case in Georgia, was "to reduce voting fraud."[48] But it was conceded by the state, and found by the lower court, that no one in the history of Indiana had ever been charged, much less convicted, of the crime of fraudulent in-person voting.[49]

The plaintiffs filed a petition for a writ of certiorari in the Indiana case, which was granted. Oral arguments will likely be heard next year. In the meantime, the parties in the Georgia photo ID case have requested the Eleventh Circuit to stay the appeal pending a final decision by the Supreme Court.

Unfortunately, the history of voting in the United States is replete with other examples, similar to the photo ID laws in Georgia and Indiana, of efforts to disfranchise voters for partisan and racial reasons. And many of them have also masqueraded as attempts to prevent voter fraud, insure the integrity of the electoral process, or advance a reasonable state interest.

---

[48]Id. at 952.

[49]Id. at 953, 955.

Edward McCrady, a legislator and historian from Charleston, South Carolina, was the author of a number of stringent restrictions on voting adopted by the state legislature in 1882, including the infamous Eight Box Law which imposed the functional equivalent of a literacy test for voting.[50] Eight separate ballot boxes, appropriately labeled, were provided for local, state, and national offices. In order to cast a valid ballot, each voter had to read the labels and put the ballot in the proper box. Although the McCrady laws were understood to be a legally acceptable way to dilute the black and Republican vote, McCrady touted them as good government election reform. He published a pamphlet the year before in which he urged a return to the limited franchise concept of the eighteenth century. "Raise the standard of citizenship," he wrote, "raise the qualifications of voters. But, raise them equally. If we are the superior race we claim to be, we, surely, need not fear the test."[51] Governor John Gary Evans later urged the members of the South Carolina Constitutional Convention of 1895 to enact a literacy test for voting, "for only the intelligent are capable

[50]1882 S.C. Acts 1115-120, No. 717.

[51]Edward McCrady, "The Necessity for Raising the Standard of Citizenship and the Right of the General Assembly of the State of South Carolina to Impose Qualifications Upon Elections" (1881), quoted in George Tindall, South Carolina Negroes 1877-1900 (Columbia: U. S.C. Press, 1952), 67.

of governing."[52] Other southern politicians of the post-Reconstruction era, including a future governor of Alabama, similarly touted restrictions on the franchise as a way to "make permanent and secure honest and efficient government."[53]

Restrictions on the franchise continued to gain support after the turn of the nineteenth century. Two historians did a survey of voting attitudes in 1918, and concluded "the theory that every man has a natural right to vote no longer commands the support of students of political science." They believed "if the state gives the vote to the ignorant, they will fall into anarchy to-day and into despotism tomorrow."[54]

The Supreme Court initially upheld poll taxes and literacy tests as good government measures.[55] There is no dispute,

---

[52]Evans, S.C. Con. Con. Journal (1895), 12, quoted in J. Morgan Kousser, Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910 (New Haven: Yale U. Press., 1975), 255.

[53]Mr. O'Neal, in Ala. Con. Con. Proceedings (1901), vol. 3, p. 2780, quoted in Kousser (1975), 263.

[54]Charles Seymour and Donald Paige Frary, How the World Votes: The Story of Democratic Development in Elections, 2 volumes (Springfield, Mass.; C.A. Nichols Co., 1918), 1:12-13, 2: 320-21.

[55]See Breedlove v. Suttles, 302 U.S. 277, 283-84 (1937) (upholding Georgia's poll tax, enacted by Democrats in the aftermath of Reconstruction, as "a familiar and reasonable regulation long enforced in many states"), and Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45, 54 (1959) (upholding North Carolina's literacy test for voting, first enacted by a Democratic controlled legislature in 1900, as "designed to promote intelligent use of the ballot," and

however, that both were adopted by the ex-Confederate states as "expedients to obstruct the exercise of the franchise by the negro race."[56] In recognition of that fact, the Supreme Court later reversed itself and invalidated poll taxes, while Congress, by passage of the Voting Rights Act of 1965, banned literacy and other test for voting because they had been adopted and administered with the discriminatory purpose of disfranchising minority voters.[57]

More than a century ago the Supreme Court described the right to vote as "preservative of all rights."[58] The white South understood that well enough, and in the years following Reconstruction disfranchised black voters as a way of depriving

---

advancing "the desire of North Carolina to raise the standards for people of all races who cast the ballot").

[56]Ratliff v. Beale, 74 Miss. 247, 20 So. 865, 868-69 (1896).

[57]See Harper v. Virginia State Board of Elections, 383 U.S. 663, 666 n.3 (1966) (invalidating Virginia's poll tax for state elections and noting "[t]he Virginia poll tax was born of a desire to disenfranchise the Negro") (quoting Harman v. Forssenius, 380 U.S. 528, 543 (1965)); South Carolina v. Katzenbach, 383 U.S. 301, 333-34 (1966) (the suspension of literacy tests in jurisdictions covered by Section 5 of the Voting Rights Act was appropriate because "in most of the States covered by the Act . . . various tests and devices have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been administered in a discriminatory fashion for many years"). See also V. O. Key, Jr., Southern Politics in State and Nation (Knoxville: U. of Tenn. Press, 1984), 555 (the poll tax and literacy tests were "legal means of accomplishing illegal discrimination" against black voters).

[58]Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

them of rights and maintaining white supremacy. Some of today's political office holders apparently believe that to maintain their dominance they too must suppress the minority vote. In doing so, they are repeating one of the most disgraceful chapters in our nation's history of voting rights. Unfortunately, the Department of Justice's preclearance of Georgia's photo ID law, and its continuing support of that decision, lend support to these modern disfranchising efforts.

Conclusion

The revelation of partisan bias in the Voting Section's decision making has seriously undermined voting rights enforcement in the country. It has created a lack of confidence and trust in the section, and has undermined its effectiveness. It has called into question the section's decisions about what to investigate, what kind of cases to bring, and where to assign federal observers. As important, it has created a lack of confidence in Section 5 and the other special provisions of the Voting Rights Act, and increased the likelihood that minorities will be manipulated to advance partisan goals. It has also shifted the burden of enforcing voting rights to minorities in contravention of congressional purpose in enacting the Voting Rights Act.

Congressional oversight is critical to restoring public trust and confidence in the Voting Section of the Department of

Justice, and insuring that the nations’s voting laws are fairly and adequately enforced.