Department of Justice

STATEMENT

OF

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DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

ENFORCEMENT OF THE VOTING RIGHTS ACT

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Chairman Specter, Ranking Member Leahy, distinguished members of the Committee:

On behalf of the Department of Justice, I want to thank you for the opportunity to appear before you today. The President and the Attorney General have directed the Justice Department to bring all of its resources to bear in enforcing the Voting Rights Act and preserving the integrity of our voting process. The President also has called upon Congress to renew the Voting Rights Act and his Administration appreciates this opportunity to work with Congress on the reauthorization of this landmark legislation.

It is my privilege this morning to provide you with an overview of the Justice Department's enforcement of three important provisions of the Voting Rights Act – section 5, which involves the Act's pre-clearance mechanisms, and sections 203 and 4(f)(4), which contain the Act's language minority provisions. I am also pleased to provide you today with an explanation of the Department's use of two other provisions of the Act – sections 6 and 8, which pertain to Federal examiners and observers. As you know, all of these provisions of the Voting Rights Act are due to expire in 2007.

Let me begin with the Justice Department's enforcement of Section 5. Section 5 mandates that all covered jurisdictions seek pre-clearance of any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." This approval can be sought administratively from the Attorney General or through the judicial route by filing a declaratory judgment action in the United States District Court for the District of Columbia. In the latter case, the Attorney General litigates the declaratory action and either supports or opposes the court's approval of the voting change at issue. However, under both approaches, the voting change – whether it

be a new law, ordinance, regulation, or procedure – cannot be implemented until the administrative or judicial approval is secured.

In determining which jurisdictions are subject to the section 5 pre-clearance requirements, the Voting Rights Act contains a formula that is predicated on historical voter turnout as well as the presence of certain discriminatory voting tests or devices.[1] There are 16 States – 9 in whole and 7 others in part – that meet this formula. The entire States of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia are covered, although 10 counties and cities in Virginia have "bailed out"[2] of coverage in recent years. Meanwhile, certain counties and townships are covered in the States of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota.[3]

For reasons of expense and timing, the vast majority of voting changes by covered jurisdictions are submitted to the Attorney General for administrative review. The Voting Section of the Civil Rights Division receives roughly 4,000-6,000 submissions annually, although each submission may contain numerous voting changes that must be reviewed.[4] Redistricting plans are only a small portion of those submissions. For example, in Calendar Year 2004, we received 5,211 submissions, 242 of which involved redistricting plans. In Calendar Year 2005, we received a total of 4,734 submissions, 125 of which involved redistricting plans. In Calendar Year 2006, we already have received 4,094 submissions (as of May 5), 19 of which have been redistricting plans. Perhaps not surprisingly, the number of section 5 submissions sent to the Department of Justice tends to reach its apex two years after the national Census, the point at which jurisdictions have the demographic data necessary to redraw their political districts. For example, in 2002

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[1] Specifically, a jurisdiction is covered under section 5 if (i) less than 50% of a jurisdiction's voting age population either was registered to vote *or* actually voted in November 1964, November 1968, or November 1972; and (ii) the Attorney General determines that the jurisdiction maintained certain "tests or devices," as defined by subsection 4(c) of the Act, in November 1964, November 1968, or November 1972. 42 U.S.C. 1973b.

[2] Subparagraph 4(a)(1) of the Voting Rights Act, 42 U.S.C. 1973b(a)(1), contains detailed procedures by which a covered jurisdiction may secure a declaratory judgment excusing the jurisdiction from further compliance with section 5. This procedure frequently is referred to as the "bail out" provision.

[3] 28 C.F.R. Appendix to Part 51 – Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as amended.

[4] A chart denoting the number of annual submissions received by the Civil Rights Division pursuant to section 5 each year is attached hereto.

we received 5,910 submissions, of which 1,138 were redistricting plans. Similarly, in 1992, we received 5,307 submissions, 974 of which involved redistricting plans.

Our function in evaluating section 5 submissions is, in the words of the Supreme Court, "to insure that no voting-procedure changes [are] made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Miller v. Johnson*, 515 U.S. 900, 926 (1995) (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)). Stated differently, we examine whether the purpose or effect of a voting change is to put racial minorities in a position inferior to the one they occupy under the status quo, as compared to non-minorities, *vis a vis* their ability to elect their candidates of choice. Impressively, the outstanding career attorneys in our Voting Section undertake this often highly complex examination in a brief, sixty-day period of time, as is required under the statute.

Employing this standard over the last 40 years, we have found retrogression in an extremely small number of cases. Since 1965, out of the 125,885 total section 5 submissions received by the Department of Justice, the Attorney General has interposed an objection to just 1,402. And in the last ten years, there have been only 92 objections. In other words, the overall objection rate since 1965 is only slightly above 1%, while the annual objection rate since the mid-1990s has declined even more, now averaging less than 0.2%. This tiny objection rate reflects the overwhelming – indeed, near universal – compliance with the Voting Rights Act by covered jurisdictions.

Recently, the Supreme Court revised the standard applicable in section 5 retrogression inquiries. See *Georgia v. Ashcroft*, 539 U.S. 461 (2003). The Court in that decision expanded the factors to be considered in the retrogression determination by examining all the relevant circumstances, which include a review of the minority voters' ability to elect candidates of their choice, the feasibility of devising a non-retrogressive alternative plan, and the extent of minority voters' opportunity to participate in and "influence" the political process. In implementing that opinion, the attorneys and analysts in the Division's Voting Section continue to conduct wide-ranging investigations into all of the circumstances surrounding voting changes, including soliciting comments and opinions from the affected community, and undertaking complex statistical analyses.

In addition to our Section 5 work, I'd also like to explain the Justice Department's enforcement efforts regarding two other important provisions of the Voting Rights Act: sections 203 and 4(f)(4), which are the Act's language minority provisions. These provisions, which have been in effect since 1975, mandate that any covered jurisdiction that "provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots" must provide

such materials and information "in the language of the applicable minority group as well as in the English language."[5]

In determining which States or political subdivisions are subject to the requirements of sections 203 and 4(f)(4), the Voting Rights Act contains a formula that uses Census Bureau data regarding ethnicity figures, English proficiency rates, and literacy rates.[6] Currently, there are a total of 496 jurisdictions that are subject to the requirements of either section 203 or section 4(f)(4).[7] The only language minority groups covered under sections 203 and 4(f)(4) are American Indians, Asian Americans, Alaskan Natives, and citizens of Spanish heritage.[8]

Under this Administration, the Justice Department's Civil Rights Division has undertaken the most extensive section 203 and section 4(f)(4) enforcement activities in its history. The initiative began immediately following the Census Bureau's July 2002 determinations (using 2000 Census data) as to which jurisdictions were covered under section 203. The Civil Rights Division not only mailed formal notice and detailed information on section 203 compliance to each of the 296 covered section 203 jurisdictions across the United States, but it also initiated face-to-face meetings with State and local election officials and minority community members in the 80 newly covered jurisdictions to explain the law, answer questions, and work to foster the implementation of effective legal compliance programs. That effort has been a continuing one. Division

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[5] Section 203(c), 42 U.S.C. 1973aa-1a(c).

[6] For example, Section 203 is triggered if, in a particular jurisdiction: (i) more than 5% of the citizen voting age population, or more than 10,000 citizens of voting age, are members of a single language minority, and (ii) the illiteracy rate of the citizens in the language minority group is higher than the national illiteracy rate. Section 203(b)(2)(A), 42 U.S.C. 1973aa-1a(b)(2)(A). With respect to section 4(f)(4), a jurisdiction is subject to the translation obligations if: (i) less than 50% of the citizen voting age population was either registered to vote, or actually voted, in the November 1972 presidential election, (ii) the jurisdiction provided certain specified election materials exclusively in English in November 1972, and (iii) more than 5% of the citizen voting age population in November 1972, as determined by the then-latest available Census Bureau figures, were members of a single language minority. Section 4(f)(3)-(4), 42 U.S.C. 1973b(f)(3)-(4). Essentially, section 4(f)(4) applies the 1972 section 5 coverage trigger to language translation obligations.

[7] There are 296 jurisdictions throughout the United States covered by section 203. There are approximately 298 jurisdictions covered by section 4(f)(4). Some coverage overlaps, most notably in Texas and Arizona, which explains the 496 figure in the text above.

[8] Section 203(e), 42 U.S.C. 1973aa-1a(e).

attorneys speak regularly before gatherings of state and local election officials, community and advocacy groups to explain the law, answer questions, and encourage voluntary compliance.

In August 2004, the Assistant Attorney General mailed letters to the 496 jurisdictions covered by sections 203 and/or 4(f)(4), reminding them of their obligations to provide language minority assistance in the November 2004 general election and offering them guidance on how to achieve compliance. The 2004 mailing to the section 4(f)(4) counties was the first blanket mailing to these political subdivisions since shortly after their original designations as covered jurisdictions in 1975.

In addition, the Division's Voting Section has been systematically requesting voter registration lists and bilingual poll official assignment data from all covered jurisdictions, beginning with the largest in terms of population. This information is then reviewed in order to identify polling places with a large number of language minority voters and to ascertain whether the polling places are served by a sufficient number of bilingual poll officials who can provide assistance to voters.

The Division also is systematically looking at the full range of information provided by covered jurisdictions to voters in English – including, among other things, ballots and election pamphlets, newspaper notices required by state law, and web site information – and determining whether: (i) the same information is being made available to each language minority community in an effective manner, and (ii) necessary translated materials, such as ballots and signage, are actually provided in polling places.

Not surprisingly, the extraordinary efforts undertaken by the Civil Rights Division in this area have been extremely successful. In the last five years, this Administration has filed more language minority cases under sections 203 and 4(f)(4) than were filed in the 26 previous years combined.[9] Each and every case has been successfully resolved with comprehensive relief for affected voters. And the pace is accelerating, with more cases filed and resolved in 2005 than in any previous year, breaking the previous record set in 2004. The lawsuits filed in 2004 alone provided comprehensive language minority programs to more citizens than all previous sections 203 and 4(f)(4) suits combined. The enforcement actions include cases in Florida, California, Massachusetts, New York, Pennsylvania, Texas, and Washington. Among these cases were the first suits ever filed under section 203 to protect Filipino and Vietnamese voters.

[9] Fifteen of the 28 language minority cases filed by the Department of Justice since the adoption of sections 203 and 4(f)(4) have been commenced since 2001.

These lawsuits have significantly narrowed gaps in electoral participation. In Yakima County, Washington, for example, Hispanic voter registration went up over 24% in less than six months after resolution of the Division's section 203 lawsuit. In San Diego County, California, Spanish and Filipino registration were up over 21%, and Vietnamese registration was up over 37%, within six months following the Division's enforcement action.

The Division's language minority enforcement efforts likewise have made a tremendous difference in enhancing minority representation in the politically elected ranks. A section 203 lawsuit in Passaic, New Jersey, was so successful for Hispanic voters that a section 2 challenge to the at-large election system was subsequently withdrawn. A Memorandum of Agreement in Harris County, Texas, helped double Vietnamese voter turnout, and the first Vietnamese candidate in history was elected to the Texas legislature – defeating the incumbent chair of the appropriations committee by 16 votes out of over 40,000 cast.

Although there is much more that I could say about the important work the Justice Department is doing with regard to the language minority provisions of the Voting Rights Act, there is one final area that I would like to cover with you today: the Justice Department's use of Federal examiners and observers pursuant to sections 6 and 8 of the Voting Right Act.[10]

Under the Voting Rights Act, Federal examiners are essentially officials assigned to a particular political subdivision to whom certain complaints of voting discrimination can be made. Governed by section 6 of the Act, the authority to appoint Federal examiners was first designed as a congressional response to the racially discriminatory voter registration practices that existed throughout the South at the time of the Act's original passage in 1965. Examiners are charged with processing (or "examining") applicants for voter registration and making a list of those applicants who meet State eligibility rules; the list is then given to the local county registrar, who is required to put those names on the county's voter registration rolls. Those on the examiner's list are commonly called "federally registered voters." The Voting Rights Act also requires the examiners to be available during each of the jurisdiction's elections, and for two days afterward, to take complaints from any federally registered voter claiming that he/she had not been allowed to vote.

Federal examiners can be appointed in two separate ways. The first route is through section 6's authorization for the Attorney General to "certify" for the appointment

[10] 42 U.S.C. 1973d, 1973f.

of Federal examiners any jurisdiction falling within the coverage of the Voting Rights Act in which there is reason to believe that voters have been denied the right to vote on account of their race or status as a language minority. In particular, the Attorney General must certify that either: (i) he has received complaints in writing from twenty or more residents alleging that they have been denied the right to vote under color of law on account of race or color or because they are a member of a language minority and he believes such complaints to be meritorious; or (ii) in his judgment, the appointment of examiners is necessary to enforce the guarantees of the Fourteenth or Fifteenth Amendments. The second method by which Federal examiners may be appointed is for a Federal court to do so pursuant to section 3(a) as part of an order of equitable relief in a voting rights lawsuit to remedy violations of the 14th or 15th Amendment. Judicial certifications, unlike those of the Attorney General, are not restricted to those political subdivisions covered by section 4 of the Voting Rights Act. Regardless of who makes the formal certification, once the determination is made, the actual selection of the examiner is undertaken by the Director of the Office of Personnel Management (OPM), who then oversees the examiner's activities.

The Voting Rights Act's ban on literacy tests and other discriminatory practices has mitigated many of the voter registration problems that made examiners so important. As a result, the need for, and role of, Federal examiners has greatly diminished over time. Although there are still 148 counties and parishes in nine States that the Attorney General has certified for Federal examiners,[11] nearly all of these certifications were certified shortly after the Voting Rights Act was passed in 1965 when conditions were radically different from today.[12] Moreover, many of the counties/parishes have not been the source of any race-based voting registration complaints for decades.

According to OPM, there have been no new "federally registered voters" (*i.e.*, voters registered by Federal examiners) added in any jurisdiction throughout the country since 1983. Nor has the Department of Justice received any complaints about covered jurisdictions refusing to register Federal voters in decades.

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[11] There are also 19 political subdivisions in 12 States currently certified by court order. With two exceptions, all of these certifications pertain to language-minority issues. An additional 14 jurisdictions in eight States previously were certified for Federal examiners by Federal courts under section 3(a), but the designations have since expired.

[12] The complete list of counties certified by the Attorney General, along with dates of certification, can be found on the website of the Department of Justice's Voting Section. See http://www.usdoj.gov/crt/voting/examine/activ_exam.htm.

In addition to the great advances in minority access to the franchise today as compared to thirty to forty years ago, the decline in registration-related complaints is also attributable to the passage of the National Voter Registration Act of 1993 (NVRA), which made voter registration dramatically more accessible.[13] Prior to this 1993 Act, there were few Federal standards for voter registration. Through the NVRA, however, Congress established specific, uniform requirements for voter registration and State maintenance of voter registration lists. All of these requirements are applicable across the United States, not just in those jurisdictions certified for Federal examiners or otherwise covered by the Voting Rights Act. The reality today is that the only real importance of the Federal examiner provision from a practical standpoint is its function as a statutory prerequisite to the Attorney General's ability to call upon OPM to assign Federal observers to monitor particular elections in certified jurisdictions.

At any time after a Federal examiner has been appointed to a particular jurisdiction, the Attorney General may request under section 8 that the Director of OPM assign Federal observers to monitor elections in that jurisdiction.[14] These observers are Federal employees who are recruited and supervised by OPM. They are authorized by statute to enter polling places and vote-tabulation rooms in order to observe whether eligible voters are being permitted to vote and whether votes casts by eligible voters are being properly counted.

The OPM observers work in conjunction with attorneys from the Justice Department's Civil Rights Division. Department of Justice attorneys assist OPM with the observers' training, brief the observers on relevant issues prior to the election, and work closely with them on election day. Federal observers are instructed to watch, listen, and take careful notes of everything that happens inside the polling place/vote-tabulation room during an election. They are also trained not to interfere with the election in any way. After the election, Justice Department attorneys debrief the observers, and the observers usually complete written reports on their observations. These reports are sent on to the Civil Rights Division and can be used in court if necessary.

Most Federal observers dispatched to cover elections find no irregularities. Still, problems occur. Over at least the last decade, most of these have related to compliance with the language minority requirements of section 203.[15] Where problems are discovered, a variety of actions may be taken depending on the relevant circumstances.

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[13] 42 U.S.C. 1973gg *et seq.*

[14] 42 U.S.C. 1973f.

[15] 42 U.S.C. 1973aa-1a.

On occasion, Justice Department personnel will assess the situation and work with county/parish officials on election day to clarify Federal legal requirements and immediately resolve the identified problem. Other times, the Department will send a letter to the jurisdiction following the election in which we identify certain incidents or practices that should be addressed or improved in the future (*e.g.*, removal of certain poll workers, additional training for election-day officials, etc.). Department attorneys likewise may recommend further investigation. If no Federal issues are identified, the matter may be referred to State authorities. If necessary, the Department will commence a civil action (or contempt motion if applicable) to enforce the protections of the Voting Rights Act.

Notwithstanding the general overall compliance with the Voting Rights Act, the Department of Justice has taken full advantage of the Federal observer provisions to help avoid slippage or complacency by covered jurisdictions. In 2004, for example, the Civil Rights Division worked with OPM to send 1,463 observers to cover 55 elections in 30 jurisdictions in 10 different States. In 2004, for example, the Civil Rights Division worked with OPM to send 1,463 observers to cover 55 elections in 30 jurisdictions in 14 different States. In 2005, 640 federal observers were sent to cover 22 elections in 17 jurisdictions in 10 different States. Meanwhile, already in 2006 (as of May 5, 2006), 30 Federal observers have been dispatched to cover 2 elections in 3 jurisdictions in 2 different States.

In addition to Federal observers, the Civil Rights Division will send Justice Department personnel, in cooperation with state and local election officials, to monitor elections if it has received complaints or has uncovered credible evidence of possible violations of the Voting Rights Act. In fact, the great bulk of our recent enforcement cases since approximately 1993 have involved jurisdictions (*e.g.*, Massachusetts, California, New York, New Jersey, Florida, Washington, and Pennsylvania) where there is no statutory authority to send Federal observers. We have expended substantial resources in this endeavor. For example, in 2004, the Department of Justice sent 393 departmental personnel to monitor 108 elections in 80 jurisdictions in 27 different States. In 2005, we sent 122 departmental personnel to monitor 25 elections in 21 jurisdictions in 10 different States. So far in 2006, the Department has sent 48 personnel to cover 29 elections in 6 jurisdictions in 3 different States. Those monitors helped account for the record-setting work we have done in enforcing the Voting Rights Act in recent years.

Let me say in conclusion that the Civil Rights Division has made the vigorous enforcement of voting rights a primary objective. The fruits of our efforts in enforcing the Voting Rights Act have been dramatic. Indeed, at the time the Voting Rights Act was first passed in 1965, only one-third of all African-American citizens of voting age were on the registration rolls in the jurisdictions covered by Section 5 of the Act, while two-thirds of eligible whites were registered. Today, African-American voter registration rates not only are approaching parity with that of whites, but actually have exceeded that of whites in some areas,

and Hispanic voters are not far behind. Forty years ago, the gap in voter registration rates between African-Americans and whites in Mississippi and Alabama ranged from 63.2 to 49.9 percentage points. For example, only 6.7% of African-Americans in Mississippi were registered, in comparison with 69.9% of whites.[16] Yet by the 2004 general election, the Census Bureau reported that a higher percentage of African-Americans were registered to votes than whites (76.2% versus 73.6%). Meanwhile, in Alabama in 2004, African-Americans reported registering at a rate only 1.7 percentage points below that of whites (73.2% versus 74.9%). Moreover, the Census Bureau also recorded an increase in turnout for African-Americans in the South from 44% in 1964 to 53.9% in 2000.[17]

Enforcement of the Voting Rights Act also has helped to increase the opportunity of minority voters to elect representatives of their choice. Virtually excluded from all public offices in the South in 1965, minority elected officials are now substantially present in State legislatures and local governing bodies throughout the region. For example, the number of African-American elected officials has increased dramatically during the life of the Voting Rights Act, from only 1,469 in 1970 to 9,101 in 2001.[18] In fact, many covered States, such as Georgia and Alabama, have more elected African-American officials today than most that are not covered by section 5.

But our work is never complete. The Department of Justice is proud of the role it plays in enforcing this statute, and we look forward to working with Congress during these reauthorization hearings.

At this point, I would be happy to answer any additional questions from the Committee.

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[16] *The Voting Rights Act: Ten Years After*, U.S. Civil Rights Commission, January 1975, page 43.

[17] *Current Population Survey,* U.S. Census Bureau.

[18] *Black Elected Officials – A Statistical Summary 2001,* Joint Center for Political and Economic Studies, Table 1, page 13.