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## GEORGIA PHOTO ID REQUIREMENT: PROOF POSITIVE OF THE NEED TO EXTEND SECTION 5

DAVID H. HARRIS, JR.\*

### I. INTRODUCTION

In *Common Cause/Georgia v. Billups* (“Common Cause/Georgia”),<sup>1</sup> the United States District Court for the Northern District of Georgia entered a preliminary injunction<sup>2</sup> enjoining the State of Georgia from enforcing or applying a new voter ID law.<sup>3</sup> Passed by the Georgia General Assembly in 2005, the new law would require voters in Georgia to present a photo ID as a pre-condition to in-person voting. The law would also allow poll workers to deny registered voters in Georgia admission to the polls, a ballot, or the right to cast their ballots and to have their ballots counted in special, general, run off, or referenda elections because of their failure or refusal to present a photo ID.<sup>4</sup>

The litigation is far from over. The case is back before the district court after a brief visit to the Eleventh Circuit,<sup>5</sup> and there is a new statute on the books.<sup>6</sup> The action was stayed pending review of the new statute by the United States Department of Justice (“DOJ”),<sup>7</sup> which was precleared.<sup>8</sup> A new complaint has been filed.<sup>9</sup> However, the conclusions reached by the court in its decision granting a prelimi-

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1. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

2. *Id.* (order granting preliminary injunction and enjoining defendants from applying the 2005 Amendment to GA. CODE ANN. § 21-2-417).

3. 2005 Ga. Laws 53 § 59 (codified as amended at GA. CODE ANN. § 21-2-417 (2005)).

4. *Common Cause/Georgia*, 406 F. Supp. 2d at 1377-78.

5. *Common Cause/Georgia v. Cox*, No. 05-15784 (11th Cir. Feb. 10, 2006) (order remanding action to District Court).

6. 2005 Ga. Laws 432 (2005 Georgia Senate Bill No. 84, Signed by Governor on January 26, 2006).

7. *Common Cause/Georgia v. Cox*, No. 05-0201 (N.D. Ga. filed Mar. 2, 2006) (order staying action pending DOJ Section 5 review of S.B. 84).

8. Preclearance Letter from John Tanner, Chief, Voting Section, Civil Rights Division, U.S. Dep't of Justice, to Thurbert Baker, Attorney General, State of Georgia (April 21, 2006).

9. *Common Cause/Georgia v. Cox*, No. 05-0201 (N.D. Ga. filed April 26, 2006) (second amended complaint).

nary injunction beg an important question, which is a subtext of this article: Why was this photo ID requirement precleared by the Department of Justice in the first place?<sup>10</sup>

This article will show that the 2005 Georgia Photo ID statute is just one graphic example of the continuing need for Section 5 of the Voting Rights Act. The efforts to curtail minority voting, even where minority voter registration has reached a level of parity with whites, continue. Without Section 5, the expense of case-by-case litigation and the continuing promulgation of old and new schemes to limit minority voting will result in a *de facto* retrogression of minority voting.

After giving a brief overview of the procedural history of the *Common Cause/Georgia* litigation in Part II, this article will examine several provisions of the Voting Rights Act ("VRA") in Part III. This article will then explore the Georgia statute in Part IV, analyze the reasoning of the district court injunction in Part V, and conclude in Part VII with a discussion of the Department of Justice's failure to exercise its power under Section 5 of the Voting Rights Act against an obviously discriminatory impediment to voting and the necessity of continuing and strengthening Section 5 of the Voting Rights Act to make it unnecessary for litigants to expend tremendous resources litigating these types of cases.<sup>11</sup> Although the State of Indiana is the only other state to impose a similar photo identification requirement for in-person voting, this article will not discuss that law.<sup>12</sup> Nevertheless, it is worth noting that while Indiana is not covered under Section 5 of the VRA,<sup>13</sup> and the statute is currently being challenged in litigation, which has been unsuccessful to date.<sup>14</sup> This article will also not discuss the 2006 Georgia Photo ID statute, as it would be premature to do so and discussion is unnecessary to make the basic points throughout this article.

10. Preclearance Letter from John Tanner, Chief, Voting Section, Civil Rights Division, U.S. Dep't of Justice, to Thurbert Baker, Attorney General, State of Georgia (Aug. 26, 2005) (in State's Brief In Opposition To Plaintiffs' Motion For Preliminary Injunction, Exhibit 3, *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (No. 4:05CV00201)).

11. This article is the first installment in a series of three planned articles. The second article will further explore the importance and necessity of Section 5 and other sections of the Voting Rights Act that are set to expire in 2007, especially as they relate to language minorities. The third article will discuss the necessity for additional election reform legislation to augment various voting rights statutes and court decisions, in an effort to make the voting franchise meaningful.

12. 2005 Ind. Acts 483, *amending* IND. CODE §§ 3-11-8-25.1 and 3-5-2-40.5.

13. 28 C.F.R. Part 51, Appendix (listing covered jurisdictions).

14. *Indiana Democratic Party et al. v. Rokita et al.*, Civil Action No. 1:05-cv-00634-SEB-VVS (S.D. Ind. April 14, 2006), 2006 WL 1005037 (plaintiffs' motion for summary judgment denied and defendants motion for summary judgment allowed) (It is noteworthy that the court in the Indiana case noted the poor case development by plaintiffs which factored heavily in the court's decision). Appeal filed on May 5, 2006.

## II. PROCEDURAL HISTORY

In 2005, the Georgia General Assembly adopted House Bill 244 ("HB 244") ("2005 Photo ID statute"),<sup>15</sup> the most restrictive and draconian form of identification requirements for in-person voting in the country.<sup>16</sup> This 2005 amendment to title 21, section 2-417 of the Georgia Code required that all registered voters in Georgia who vote in person in all primary, special, or general elections for state, national, and local offices held on or after July 1, 2005, present a *government-issued* Photo ID to election officials as a condition of being admitted to the polls and before being issued a ballot and being allowed to vote.<sup>17</sup> As a result, this effectively eliminated all alternative forms of non-photo identification and non-government-issued photo identification that would permit a registered voter to vote at the polls.<sup>18</sup>

On April 22, 2005, Governor Sonny Perdue signed HB 244, and the 2005 Photo ID requirement of HB 244 became effective on July 1, 2005 subject to preclearance by the United States Department of Justice.<sup>19</sup> The State of Georgia submitted HB 244 to the Voting Section of the Civil Rights Division of the United States Department of Justice for preclearance, pursuant to Section 5 of the Voting Rights Act, on July 13, 2005.<sup>20</sup> Despite a very strong recommendation of its staff to interpose an objection,<sup>21</sup> the Voting Section granted preclearance to Georgia's 2005 Photo ID requirement on August 26, 2005.<sup>22</sup>

On September 19, 2005, Common Cause/Georgia, the League of Women Voters of Georgia, the National Association for the Advancement of Colored People (NAACP), Inc., and an impressive number of organizations and individuals filed a civil action in the United States District Court for the Northern District of Georgia seeking declaratory and injunctive relief. Plaintiffs prayed the Court to declare the Georgia 2005 Photo ID statute "unconstitutional both on its face and as applied, and to enjoin its enforcement on the ground that it imposes an unauthorized, unnecessary, and undue burden on the fundamental

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15. 2005 Ga. Laws 53.

16. Recommendation Memorandum from Robert Berman, Section 5 Review Team, Ga. Dep't. of Justice, to Alberto R. Gonzales, Attorney General, Ga. Dep't. of Justice 19 (Aug. 25, 2005) in Dan Eggen, *Criticism of Voting Law Was Overruled: Justice Dept. Backed Georgia Measure Despite Fears of Discrimination*, WASH. POST, Nov. 17, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602504.html>.

17. 2005 Ga. Laws Act 53 § 59 (codified as amended at GA. CODE ANN. §21-2-417 (2005)).

18. *Id.*

19. Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326, 1335-36 (N.D. Ga. 2005).

20. Recommendation Memorandum, *supra* note 16, at 1.

21. Recommendation Memorandum, *supra* note 16.

22. Preclearance Letter from John Tanner, Chief, Voting Section, Civil Rights Division, U.S. Dep't of Justice, to Thurbert Baker, Attorney General, State of Georgia (Aug. 26, 2005) (in State's Brief In Opposition To Plaintiffs' Motion For Preliminary Injunction, Exhibit 3, Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (No. 4:05CV00201)).

right to vote of hundreds of thousands of registered Georgia voters, in violation of article II, section 1, paragraph 2 of the Georgia Constitution, the Fourteenth and Twenty-Fourth Amendments to the federal Constitution, the Civil Rights Act of 1964, and Section 2 of the Voting Rights Act of 1965.”<sup>23</sup> Plaintiffs, represented by local and national civil rights organizations and private attorneys, filed a motion for a preliminary injunction on October 6, 2005.<sup>24</sup> Subsequently, over 43 affidavits and declarations were filed and Georgia Secretary of State Cathy Cox was deposed.<sup>25</sup> After extensive motions and memoranda of law were filed, a hearing in federal district court was held on October 12, 2005.<sup>26</sup> Thus, the amount of resources “thrown” into this litigation has been massive.

A preliminary injunction was granted by the district court on October 18, 2005.<sup>27</sup> After the state defendants filed an interlocutory appeal with the Eleventh Circuit,<sup>28</sup> the district court denied defendants’ motion to stay the injunction pending appeal.<sup>29</sup> On October 27, 2005, the Eleventh Circuit granted defendants’ request for an expedited appeal, but denied defendants’ motion to stay the district court injunction pending resolution of the expedited appeal.<sup>30</sup> Finally, the district court granted defendants’ motion to stay the district court proceedings pending appeal.<sup>31</sup>

While the litigation proceeded, the Georgia General Assembly enacted, and the Governor signed into law, a revised Photo ID statute (“2006 Photo ID statute”).<sup>32</sup> In light of the 2006 Photo ID statute, plaintiffs filed a motion to remand with the Eleventh Circuit.<sup>33</sup> The Eleventh Circuit granted plaintiffs’ motion to remand for such further proceedings as the district court deemed appropriate in light of the

23. *Common Cause/Georgia*, 406 F. Supp. 2d at 1328-29 (citations omitted).

24. Plaintiff’s Motion for Preliminary Injunction, *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (No. 4:05CV00201-HLM).

25. *Id.*

26. *Id.*

27. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

28. Defendant’s Notice of Appeal as to Order on Motion for Preliminary Injunction, *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (No. 4:05CV00201).

29. *Common Cause/Georgia v. Cox*, No. 05-0201 (N.D. Ga. filed Oct. 20, 2005) (order denying the Defendant’s Motion for Stay Pending Appeal).

30. *Common Cause/Georgia v. Billups*, No. 05-15784, (11th Cir. Oct. 27, 2005) (order denying Appellant’s Motion to Stay the Preliminary Injunction entered by the District Court and granting Appellant’s Motion for Expedited Treatment of their Motion for Stay Pending appeal and Motion to Expedite Consideration and Disposition of the Appeal).

31. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (order granting Defendant’s Motion to Stay Proceedings Pending Resolution of Expedited Appeal to the Eleventh Circuit).

32. 2005 Ga. Laws 432 (2005 Georgia Senate Bill No. 84, signed by Governor on January 26, 2006).

33. Appellee’s Motion for Remand, *Common Cause/Georgia v. Billups* No. 05-15784-GG (11th Cir. Jan. 31, 2006).

enactment of the 2006 Photo ID statute and its pending Section 5 review.<sup>34</sup>

Plaintiffs then filed a motion for leave to file a second amended complaint, with the proposed second amended complaint attached.<sup>35</sup> The proposed amended complaint attacks both the 2005 and 2006 Photo ID statutes.<sup>36</sup> On March 2, 2006, the district court stayed the action pending the Department of Justice's Section 5 review of 2006 Photo ID statute and stated that if the Department of Justice grants preclearance, the plaintiffs' motion for leave to amend complaint would be promptly granted.<sup>37</sup> On April 21, 2006, the Department of Justice granted preclearance.<sup>38</sup> The same day, the court granted plaintiffs leave to file a second amended complaint<sup>39</sup> and the second amended complaint was filed on April 26, 2006.<sup>40</sup> A motion and briefing schedule has been set.<sup>41</sup>

Although there will be much more litigation, some analysis of the district court's October 18, 2005 preliminary injunction is appropriate, especially in light of Congress' deliberations over extending Section 5 of the VRA beyond 2007. The strength of the district court's preliminary injunction against the 2005 Georgia Photo ID requirement, especially given the extreme hurdles imposed by the courts in granting a preliminary injunction against a state statute,<sup>42</sup> is a strong indicator that the 2005 Georgia Photo ID requirement was very wrong and will disenfranchise huge numbers of minorities, impoverished persons, elderly persons, and disabled individuals who are already registered to vote. Before examining the district court order, some background information on the VRA and Photo ID statute are necessary.

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34. *Common Cause/Georgia v. Billups*, No. 05-15784-GG (11th Cir. Jan. 31, 2006) (granting Appellee's Motion to Remand).

35. Plaintiff's Motion for Leave to File Second Amended Complaint and Plaintiff's Brief In Support, *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (No. 4:05CV00201).

36. *Id.*

37. *Common Cause/Georgia v. Cox*, No. 05-0201 (N.D. Ga. filed Mar. 2, 2006) (order staying action pending DOJ Section 5 review of S.B. 84).

38. Preclearance Letter from John Tanner, Chief, Voting Section, Civil Rights Division, U.S. Dep't of Justice, to Thurbert Baker, Attorney General, State of Georgia (April 21, 2006).

39. *Common Cause/Georgia v. Cox*, No. 05-0201 (N.D. Ga. filed April 21, 2006) (order granting plaintiffs leave to file second amended complaint).

40. *Common Cause/Georgia v. Cox*, No. 05-0201 (N.D. Ga. filed April 26, 2006) (second amended complaint).

41. *Common Cause/Georgia v. Cox*, No. 05-0201 (N.D. Ga. filed April 21, 2006) (order granting plaintiffs leave to file second amended complaint and setting motion and briefing schedule); *Id.* (May 5, 2006) (consent order to revise briefing schedule).

42. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (order granting preliminary injunction and enjoining defendants from applying the 2005 Amendment to GA. CODE. ANN. § 21-2-417).

III. OVERVIEW OF THE VOTING RIGHTS ACT<sup>43</sup>

Congress enacted the Voting Rights Act of 1965<sup>44</sup> to prevent and eliminate the very types of impediments to voting that the 2005 Georgia Photo ID requirement (i.e., “a prerequisite to voting”) created.<sup>45</sup> The Fifteenth Amendment to the United States Constitution<sup>46</sup> did not effectively enfranchise former slaves.<sup>47</sup> In fact, during the post-reconstruction/Jim Crow-era, Blacks experienced violence and intimidation, and fell victim to various legal and pseudo-legal mechanisms utilized to prevent them from voting.<sup>48</sup> Dr. John Hope Franklin fairly describes the events that began at the end of Reconstruction in 1876 that led to the almost total disenfranchisement of Blacks in America.

Intimidation continued on an extensive scale. Earlier it had been justified in order to wrest political control from unworthy Republicans, both white and black, but once control was secured, the more sensitive white Southerners deemed it irresponsible to depend on night riders and Red Shirts to maintain the Democrats in power. For many white Southerners, however, violence was still the surest means of keeping blacks politically impotent, and in countless communities blacks were not allowed, under penalties of severe reprisals, to show their faces in town on election day.

Other devices, hardly more legal than violence and intimidation, had a more respectable appearance. Polling places were frequently set up far from black communities, and the more diligent blacks failed to reach them upon finding roads blocked and ferries conveniently out of repair at election time. Polling places were sometimes changed with-

43. This overview is far from detailed and does not cover all of the sections of the Voting Rights Act. Only the sections relevant to the thesis of this article, Sections 2, 4, and 5, are discussed.

44. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (current version at 42 U.S.C. § 1973 (2000)).

45. The Voting Rights Act states:

No voting qualification or *prerequisite to voting* or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

42 U.S.C. § 1973(a) (emphasis added).

The Voting Rights Act further states, “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.”

42 U.S.C. § 1973b(2).

46. The U.S. CONST. amend. XV, §§ 1, 2 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude” and “The Congress shall have power to enforce this article by appropriate legislation.”).

47. See JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS (8th ed. 2000).

48. *Id.*

out notifying black voters; or, if they were notified, election officials thought nothing of making a last-minute decision not to change the place after all. Election laws were so imperfect that in many communities uniform ballots were not required and officials winked at Democrats who made up several extra ballots to cast with the one given them. The practice of stuffing ballot boxes was widespread. Criminal manipulation of the counting gave point to the assertion of an enthusiastic Democrat that "the white and black Republicans may outvote us, but we can outcount them."<sup>49</sup>

What happened after Reconstruction mirrors what happens today. There are continuing efforts to prevent people of color from voting.

Adopted at a time when African Americans were almost totally disenfranchised in Southern states, and substantially disenfranchised in most other states, the VRA codified and effectuated the Fifteenth Amendment's permanent command that throughout the nation, no person shall be denied the right to vote on account of race or color.<sup>50</sup> It was designed by Congress to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century."<sup>51</sup> Using the enforcement power granted in Section 2 of the Fifteenth Amendment, Congress drafted the VRA to eliminate state discretion<sup>52</sup> and to create stringent new remedies, such as Section 5, for voting discrimination where it persisted on a pervasive scale.<sup>53</sup> In addition, the VRA strengthens existing remedies for pockets of voting discrimination elsewhere in the country.<sup>54</sup>

The VRA is not just another statute prohibiting discrimination in voting – there have been many.<sup>55</sup> It is also an aggressive mechanism to root out and destroy discriminatory voting practices and to prevent states and other jurisdictions with histories of recalcitrant voting discrimination from inventing new mechanisms to prevent people of color from voting.<sup>56</sup> As the Supreme Court noted in upholding the constitutionality of the VRA:

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49. *Id.* at 282-283.

50. U.S. Department of Justice, Civil Rights Division, Voting Section: *Introduction To Federal Voting Rights Laws*, <http://www.usdoj.gov/crt/voting/intro/intro.htm> (last visited Mar. 10, 2006).

51. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

52. U.S. Department of Justice, Civil Rights Division, Voting Section: *Introduction To Federal Voting Rights Laws*, <http://www.usdoj.gov/crt/voting/intro/intro.htm> (last visited Mar. 10, 2006).

53. *Katzenbach*, 383 U.S. at 308.

54. U.S. Department of Justice, Civil Rights Division, Voting Section: *Introduction To Federal Voting Rights Laws*, <http://www.usdoj.gov/crt/voting/intro/intro.htm> (last visited Mar. 10, 2006).

55. *Katzenbach*, 383 U.S. at 310-11, 326.

56. See U.S. Department of Justice, Civil Rights Division, Voting Section: *Introduction To Federal Voting Rights Laws*, [http://www.usdoj.gov/crt/voting/intro/intro\\_b.htm](http://www.usdoj.gov/crt/voting/intro/intro_b.htm) (last visited Mar. 10, 2006).



Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.<sup>57</sup>

Section 2 of the VRA, the most comprehensive section of the VRA, imposes a nationwide prohibition against *any* voting practice or procedure that discriminates on the basis of race, color, or membership in a language minority group.<sup>58</sup> Section 2, *inter alia*, covers redistricting plans and at-large election systems, poll worker hiring, voter registration procedures, and election day procedures.<sup>59</sup> The 2005 Photo ID statute falls within the scrutiny of Section 2.<sup>60</sup> 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 impact.<sup>61</sup> Section 2 permits the Attorney General and private attorneys general representing private citizens to bring civil actions under Section 2 in order to obtain court-ordered remedies for violations of the VRA.<sup>62</sup>

With the 1982 amendments to Section 2 in place,<sup>63</sup> making clear that discriminatory impact<sup>64</sup> is just as actionable as intentional discrimination,<sup>65</sup> Section 2 was responsible for massive litigation around the country over the past two decades that resulted in drastic increases

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57. *Katzenbach*, 383 U.S. at 328 (footnote omitted).

58. 42 U.S.C. § 1973 (2000).

59. U.S. Department of Justice, Civil Rights Division, Voting Section Home Page: *The Statutes We Enforce*, <http://www.usdoj.gov/crt/voting/overview.htm#vra> (last visited Mar. 10, 2006).

60. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (considering the Section 2 claim and stating, "Recognizing that Plaintiffs may be able to produce sufficient evidence at a later stage of the proceedings to support their § 2 vote denial claim, the Court reserves a final ruling on the merits of that claim for a later date.")

61. U.S. Department of Justice, Civil Rights Division, Voting Section Home Page: *The Statutes We Enforce*, <http://www.usdoj.gov/crt/voting/overview.htm> (last visited Mar.10 2006).

62. *Id.*

63. PL 97-205, June 29, 1982, 96 Stat 131.

64. A "totality of the circumstances" test is used to determine discriminatory impact. The Voting Rights Act states in part:

A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. (emphasis added)

42 U.S.C. § 1973(b).

See also *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Johnson v. Governor of the State of Florida*, 405 F.3d 1214 (11th Cir. 2005).

65. U.S. Department of Justice, Civil Rights Division, Voting Section Home Page: *The Statutes We Enforce*, <http://www.usdoj.gov/crt/voting/overview.htm> (last visited Mar. 10, 2006).

in minority representation in Congress, state legislatures, and county and local elected boards.<sup>66</sup> Although mostly used in redistricting litigation,<sup>67</sup> Section 2 can be used to attack any voting practice or procedure that has a discriminatory intent or impact against ethnic and language minorities anywhere in the country.<sup>68</sup>

Section 4 of the VRA, *inter alia*, establishes the criteria for determining whether a jurisdiction (state, county, or local government) is a "covered jurisdiction" under special provisions of the VRA.<sup>69</sup> The criteria include whether, on November 1, 1964, the state or a political subdivision of the state maintained a "test or device" restricting the opportunity to vote, such as a literacy test, and whether the Director of the Census determined that less than 50 percent of persons of voting age were registered to vote on November 1, 1964, or that less than 50 percent of persons of voting age voted in the presidential election of November 1964.<sup>70</sup> The Attorney General determined, based on Section 4 criteria, that the entire state of Georgia was covered under Section 5.<sup>71</sup> Section 4 of the VRA ended the use of literacy requirements for voting in six Southern states (Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia) and in many counties of North Carolina where voter registration or turnout in the 1964 presidential election was less than fifty percent of the voting-age population.<sup>72</sup>

Section 5 freezes election practices or procedures in covered jurisdictions, as determined by Section 4.<sup>73</sup> Under Section 5, no voting change promulgated after the date set by the Attorney General in accordance with Section 4 (e.g., November 1, 1964 in the case of Georgia)<sup>74</sup> can be effectuated unless and until the new procedure has been approved.<sup>75</sup> Approval can only be achieved by either seeking administrative review for preclearance from the United States Attorney Gen-

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66. See generally *Thornburg v. Gingles*, 478 U.S. 30 (1986); U.S. Department of Justice, Civil Rights Division, Voting Section Home Page: *The Statutes We Enforce*, <http://www.usdoj.gov/crt/voting/overview.htm> (last visited Mar. 10, 2006).

67. *Id.*

68. See *Common Cause/Georgia*, 406 F. Supp. 2d at 1372-1375, and cases cited therein.

69. 42 U.S.C. § 1973b (2006).

70. U.S. Department of Justice, Civil Rights Division, Voting Section Home Page: *The Statutes We Enforce*, <http://www.usdoj.gov/crt/voting/overview.htm> (last visited Mar. 10, 2006).

71. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965) (to be codified at 28 C.F.R. pt. 51).

72. U.S. Department of Justice, Civil Rights Division, Voting Section Home Page: *The Statutes We Enforce*, [http://www.usdoj.gov/crt/voting/misc/sec\\_4.htm](http://www.usdoj.gov/crt/voting/misc/sec_4.htm) (last visited Mar. 10, 2006). There are provisions for including additional jurisdictions on or after August 6, 1970. 42 U.S.C. § 1973b.

73. 42 U.S.C. § 1973c (2006).

74. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965) (to be codified at 28 C.F.R. pt. 51).

75. 42 U.S.C. § 1973c.

eral or by filing a civil action for a declaratory judgment that can only be heard before a three-judge district court in the United States District Court for the District of Columbia.<sup>76</sup> Section 5 places the burden of production and proof on the covered jurisdiction to prove that a proposed change in voting procedures has neither a discriminatory purpose nor effect.<sup>77</sup> With respect to a proposed change submitted to the Attorney General for preclearance,<sup>78</sup> if the proposed change has not been shown to the satisfaction of the Attorney General to be free of discriminatory purpose or effect, the Attorney General will block implementation of the change by interposing an objection.<sup>79</sup>

One way to describe Section 2 is as a “sledge hammer”: it allows litigants to attack any voting practice or procedure in any jurisdiction that discriminates against racial and language minorities; and it allows federal courts wide latitude in formulating remedies. Section 5 places voting practices in the “deep freezer” in jurisdictions determined, pursuant to Section 4, to have especially pervasive histories of voter discrimination. Section 5 is the only means that allows jurisdictions covered under Section 4 to make voting practice and procedure changes.

The impact the VRA has been impressive.<sup>80</sup> Nevertheless, much more work is needed to prevent new discriminatory voting devices from being enacted or promulgated. It is also very necessary for the Department of Justice to fully and faithfully perform its duties under the VRA. In the case of the 2005 Georgia Photo ID requirement, the Department of Justice utterly failed to meet its statutory obligations due to pressure from the political leadership.

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76. *Id.*

77. *Id.*

78. 28 C.F.R. § 51 (2006).

79. 28 C.F.R. § 51.52(c) (2006).

80. In its description of the effects of the VRA, the Voting Rights Section of the DOJ made the following observations:

At the time the Act was first adopted, only one-third of all African Americans of voting age were on the registration rolls in the specially covered states, while two-thirds of eligible whites were registered. Now black voter registration rates are approaching parity with that of whites in many areas, and Hispanic voters in jurisdictions added to the list of those specially covered by the Act in 1975 are not far behind. Enforcement of the Act has also increased the opportunity of black and Latino voters to elect representatives of their choice by providing a vehicle for challenging discriminatory election methods such as at-large elections, racially gerrymandered districting plans, or runoff requirements that may dilute minority voting strength. Virtually excluded from all public offices in the South in 1965, black and Hispanic voters are now substantially represented in the state legislatures and local governing bodies throughout the region.

U.S. Department of Justice, Civil Rights Division, Voting Section Home Page: *Introduction To Federal Voting Rights Laws*, <http://www.usdoj.gov/crt/voting/intro/intro.htm> (last visited Mar. 10, 2006).

## IV. 2005 GEORGIA PHOTO ID REQUIREMENT

Prior to 1998, Georgia, like most states, did not require voters to present any form of identification – driver's license, photo identification, or otherwise – to vote on election day.<sup>81</sup> In 1997, the Georgia General Assembly adopted a requirement that registered voters identify themselves by presenting one of seventeen forms of identification as a precondition to being admitted to the polls to vote.<sup>82</sup> Those forms of identification included both photo identification and non-photo identification issued by government and non-government entities. They included a Georgia driver's license; Georgia or federal government ID card; U.S. passport; private employee photo identification; student photo identification; Georgia or federal gun license; pilot's license; certified copy of a birth certificate; social security card; certified naturalization documentation; certified copy of court records showing adoption, name, or sex change; current utility bill showing name and address; bank statement (or copy) showing name and address; government check or paycheck showing name and address; and any government document (or copy) showing name and address.<sup>83</sup>

In recent years, a number of states have enacted some form of identification requirement as a prerequisite for registered voters to vote at polling sites on election days.<sup>84</sup> Typical identification requirements not only allow a voter to use a driver's license and other forms of government-issued photo identification, but also allow voters to produce non-government-issued photo identification and to produce several alternative forms of non-photo identification, including voter registration cards, credit cards, social security cards, utility bills, bank statements, paychecks, birth certificates, gun licenses, and bank and billing statements showing the name and current address of the voter, to name a few.<sup>85</sup> Some states also provide fail-safe mechanisms for voters who arrive at the polls without identification, including allowing voters to sign affidavits of identity.<sup>86</sup>

Under the 1997 Georgia statute, voters remained free to use any of eight non-photo methods of identification for voting, including a birth

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81. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (order granting preliminary injunction and enjoining defendants from applying the 2005 Amendment to GA. CODE. ANN. § 21-2-417).

82. 1997 Ga. Laws 662 § 3 (codified as amended in former GA. CODE. ANN. § 21-2-417 (2003)); *See also* *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (order granting preliminary injunction and enjoining defendants from applying the 2005 Amendment to GA. CODE. ANN. § 21-2-417).

83. *Id.*; Laws 1997, p. 662, § 3, as amended by Laws 1998, p. 295, § 1; Laws 2001, p. 230, § 15 and Laws 2003, Act 209, § 48, eff. July 1, 2003.

84. Recommendation Memorandum, *supra* note 16, at 38-51; 406 F. Supp. 2d at 1376, n.10.

85. *Id.*

86. *Id.*

certificate, a social security card, a copy of a current utility bill, a government check, a payroll check, or a bank statement showing the voter's name and address.<sup>87</sup> Furthermore, if a voter did not have one of the seventeen forms of identification specified in 1997 Georgia statute, the voter was entitled to be to vote simply by signing a statement under oath swearing or affirming that he or she was the person identified on the elector's certificate.<sup>88</sup>

In 2005, the Georgia General Assembly adopted House Bill 244,<sup>89</sup> the most restrictive form of identification requirements for in-person voting in the country,<sup>90</sup> effectively eliminating non-government-issued photo identification and all other alternative forms of non-photo identification.<sup>91</sup> The 2005 amendment to title 21, section 2-417 of the Georgia Code required that:

all registered voters in Georgia who vote in person in all primary, special, or general elections for state, national, and local offices held on or after July 1, 2005, present a *government-issued Photo ID* to election officials as a condition of being admitted to the polls and before being issued a ballot and being allowed to vote.<sup>92</sup>

The permitted forms of the 2005 Georgia Photo ID requirement were: Georgia driver's license; state or federal issued government-issued photo identification (employee or non-employee); passport; military photo identification card; or tribal photo identification card.<sup>93</sup> All of these forms of acceptable picture identification are government-issued and no private form of picture identification, such as non-government employer picture identification, would be acceptable under the statute.<sup>94</sup>

The 2005 Georgia Photo ID law would allow voters who show up at the polls without the "proper" photo identification to cast a provisional ballot, consistent with the Help America Vote Act (HAVA)<sup>95</sup> and Georgia's implementing statute,<sup>96</sup> upon swearing or affirming that the voter is the person identified in the elector's voter certificate.<sup>97</sup> Those provisional ballots, however, would only be counted if the voter returns to the polling place with the required photo identification within two days after the election.<sup>98</sup>

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87. Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326, 1331 (N.D. Ga. 2005).

88. *Id.*

89. 2005 Ga. Laws 53, § 59 (amending GA. CODE ANN. § 21-2-417 (2003)).

90. Section 5 Recommendation Memorandum, *supra* note 16, at 42.

91. 2005 Ga. Laws 53, § 59 (amending GA. CODE ANN. § 21-2-417 (2003)).

92. *Id.* (emphasis added)

93. *Id.*

94. Recommendation Memorandum, *supra* note 16, at 33-35.

95. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002).

96. GA. CODE ANN. § 21-2-418 (2005).

97. GA. CODE ANN. § 21-2-419 (2005).

98. *Id.*

Under HB 244, persons who do not possess a valid driver's license, passport, government photo ID, military photo ID, or tribal photo ID could obtain a photo ID card<sup>99</sup> from the State of Georgia at its Department of Driver Services ("DDS") offices.<sup>100</sup> The district court noted that DDS had 56 full-time customer service centers and two part-time customer service centers in Georgia serving Georgia's 159 counties.<sup>101</sup> Persons who reside in many counties, particularly counties in south and middle Georgia, would have lengthy drives to their nearest DDS service centers.<sup>102</sup> Worse yet, there are no DDS service centers located within the city limits of Atlanta, where there are high concentrations of Blacks, or within the Rome, Georgia, city limits.<sup>103</sup> However, Fulton and DeKalb counties have DDS customer service centers located at four locations. Floyd County, where Rome, Georgia is located, has a full-time DDS customer service center.<sup>104</sup>

Beyond the insufficient number of DDS service centers, on the same day the Georgia General Assembly enacted the Photo ID requirement, it also doubled the minimum fee for a five-year Photo ID card from \$10.00 to \$20.00 and authorized a new ten-year Photo ID card for \$35.00.<sup>105</sup> Voters who could not afford the fee could obtain a photo ID card by signing an affidavit attesting that: (1) he or she is indigent and cannot pay the fee for an identification card; (2) he or she desires an identification card in order to vote; and (3) he or she does not have any other form of identification that is acceptable under chapter 21, section 2-417 of the Georgia Code for identification at the polls in order to vote; and by producing evidence that he or she is registered to vote in Georgia.<sup>106</sup> Although the State of Georgia opined that the requirement of indigency would not be enforced,<sup>107</sup> the court in *Common Cause/Georgia* noted that the evidence failed to indicate that the Georgia had made efforts to publicize its "no questions asked" policy or that DDS employees tell voters of that policy.<sup>108</sup> Indeed, a rational person reading the affidavit would likely believe that he or she actually must be indigent and lack funds to pay for a Photo ID card. Such a person would also likely not complete the affidavit for fear that signing a statement under oath that is not true

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99. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

100. *Id.*

101. *Id.* at 1338.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1337.

106. *Id.*

107. *Id.* at 1363.

108. *Id.*

and submitting it to a state agency would result in penalties.<sup>109</sup> Therefore, the availability of free photo ID cards simply did not, in the court's view, reduce the burden that the 2005 Photo ID statute imposed on the right to vote.<sup>110</sup>

The stated basis for the statute was to prevent voter fraud. Notably, however, there is no requirement under Georgia election laws that a person seeking to *register* to vote present photo identification. Furthermore, HB 244 did not address voter registration.<sup>111</sup>

Most telling of the disingenuous nature of the stated rationale or pretext to prevent voter fraud, HB 244 also relaxed the requirements for absentee voting, thus expanding the opportunity for voters to obtain absentee ballots.<sup>112</sup> Under prior law, voters seeking to obtain absentee ballots had to affirm that they met certain requirements. Under HB 244, those requirements no longer apply for purposes of obtaining absentee ballots.<sup>113</sup> Under the new, relaxed requirements for an absentee ballot, a voter only needs to submit a request to the local registrar providing his or her name, address, and an identifying number, or must appear in person at the registrar's office and provide such information.<sup>114</sup> As a matter of history, Blacks were much less likely to vote absentee than white voters.<sup>115</sup>

When HB 244 was being considered, Georgia Secretary of State Cathy Cox<sup>116</sup> voiced strenuous objections to enactment of the statute.<sup>117</sup> In her memorandum to the members of the Georgia State Senate, Secretary Cox noted that the relaxed absentee voting requirements presented "staggering opportunities for voter fraud,"<sup>118</sup> while the proposed strict Photo ID requirement solved a problem that did not exist.<sup>119</sup> Secretary Cox concluded that in her ten years of service as the state's chief elections officer, the Board had dealt with fraud or election law violations involving absentee ballots at virtually every meeting of the State Elections Board.<sup>120</sup> On the other hand, the relaxed absentee voting standards would make it "quite simple" for

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109. *Id.* at 1363-64.

110. *Id.*

111. *Id.* at 1352.

112. *Id.* at 1332-33.

113. *Id.* at 1352-53.

114. *Id.*

115. *Id.*

116. *Id.* at 1350 ("In Georgia, the Secretary of State serves as the Chair of the State Election Board, and is the principal official in the State Government in charge of elections and for purposes of the Help America Vote Act ("HAVA") and the National Voter Registration Act.").

117. *Id.* at 1332-36.

118. *Id.* at 1332.

119. *Id.*

120. *Id.*

voters to commit fraud through absentee ballots.<sup>121</sup> Secretary Cox noted that easing absentee voting requirements would completely contradict the reasons stated for the strict government-issued only Photo ID requirement.<sup>122</sup> Secretary Cox and her staff could not recall a single case or complaint of a voter impersonating another voter at the polls.<sup>123</sup>

In her April 8, 2005 letter to Georgia Governor Perdue, urging the governor to veto the bill, Secretary Cox observed, *inter alia*, that HB 244 would create “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 driver’s 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.”<sup>124</sup> Secretary Cox also stated that HB 244 would be “*very unlikely to receive pre-clearance under the Voting Rights Act by the Department of Justice.*”<sup>125</sup> Finally, she concluded that the bill would impose an undue burden on the fundamental right to vote.<sup>126</sup>

Later statements by Secretary Cox reinforced the contention that the strict photo identification requirement was unnecessary and, when viewed in the light of the relaxed absentee voting requirements, the justification for the strict Photo ID requirements was “but a pretext.”<sup>127</sup> Secretary Cox maintained her view that the Photo ID requirement created substantial obstacles to voting.<sup>128</sup>

## V. DISTRICT COURT INJUNCTION

In addition to the factors on which a plaintiff must prevail to obtain a preliminary injunction,<sup>129</sup> the court noted Plaintiffs’ “particularly heavy burden”<sup>130</sup> in seeking the preliminary injunction against a state statute.<sup>131</sup> Notwithstanding this fact, the Court found that Plaintiffs

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121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 1333 (emphasis added) (quoting from Secretary of State Cox’s memorandum to the Georgia State Senate about the Photo ID requirement).

125. *Id.*

126. *Id.*

127. *Id.* at 1334.

128. *Id.*

129. *Id.* at 1356 (“To obtain a preliminary injunction, a movant must show: (1) a substantial likelihood of ultimate success on the merits; (2) the preliminary injunction is necessary to prevent irreparable injury; (3) the threatened injury outweighs the harm the preliminary injunction would inflict on the non-movant; and (4) the preliminary injunction would serve the public interest. In the Eleventh Circuit, [a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion as to the four requisites.” (internal quotation marks and citations omitted) (alterations in original)).

130. *Id.* at 1356.

131. *Id.*



had a substantial likelihood of successes on the merits of their claim that the 2005 Photo ID requirement unduly burdened the right to vote and constituted a poll tax.<sup>132</sup> On the substantive issues presented, the Court found: (1) “[T]he Eleventh Amendment precludes the Court from entertaining Plaintiffs’ claims asserted under the Georgia Constitution”; (2) the 2005 Photo ID requirement imposes “severe” restrictions on the right to vote; (3) “[U]nder either the strict scrutiny or *Burdick* test, Plaintiffs have a substantial likelihood of succeeding on the merits of their claim that the Photo ID requirement unduly burdens the right to vote”; and (4) HB 244 constitutes a poll tax in violation of the Twenty-fourth Amendment with respect to federal elections and violates the Equal Protection Clause with respect to State and municipal elections.<sup>133</sup> The court did not issue a preliminary injunction based on the Civil Rights Act of 1964<sup>134</sup> or Section 2 of the VRA based solely on the lack of evidence presented at the preliminary injunction proceeding; but the court reserved a ruling on the those issues for later in the litigation.<sup>135</sup>

The Court made two statements that are very telling with respect to the illegality of the Georgia statute and to the strength of Plaintiffs’ case:

[It is] ironic that the State seeks to prevent one type of lying – fraudulent in-person voting – yet the State points to a DDS policy that apparently allows voters who want Photo ID cards to “lie” about their financial status as support for its argument that the Photo ID requirement does not unduly burden the right to vote.<sup>136</sup>

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[In reaching the conclusion to issue a preliminary injunction], the Court observes that it has great respect for the Georgia legislature. The Court, however, simply has more respect for the Constitution. Because the Court finds that Plaintiffs have a substantial likelihood of succeeding on their claims that the 2005 Photo ID requirement unduly burdens the right to vote and constitutes a poll tax, the Court must enter a preliminary injunction against the 2005 Photo ID requirement.<sup>137</sup>

132. *Id.* at 1376.

133. *Id.* at 1358-59, 1365, 1366, 1373.

134. See 42 U.S.C. § 1971(a)(2)(A) (2005) (applying different standards in determining whether individuals within the same county or other political subdivision are qualified to vote); 42 U.S.C. § 1971(a)(2)(B) (2005) (denying “the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election”).

135. *Common Cause/Georgia*, 406 F. Supp. 2d at 1372, 1375.

136. *Id.* at 1364 n.5.

137. *Id.* at 1376.

## VI. JUSTICE DEPARTMENT FAILURE TO ENFORCE SECTION 5

In response to the litigation over HB 244, the Georgia General Assembly enacted another statute in 2006 that amended the 2005 Photo ID requirement.<sup>138</sup> The 2006 statute is still very problematic, as shown by plaintiffs' proposed second amended complaint.<sup>139</sup> The 2006 statute will not be the topic of discussion in this article. It is not surprising that, given the retrogression-benchmark analysis, requiring the Department of Justice to review the 2006 statute in light of the 2005 statute that it previously authorized,<sup>140</sup> that the Department of Justice also precleared the 2006 statute<sup>141</sup> and Plaintiffs' motion to amend their complaint was in fact granted.<sup>142</sup>

As the litigation progresses, it is likely that the 2005 statute, as amended by the 2006 statute, the most restrictive and unduly burdensome voter identification requirement in the country,<sup>143</sup> will never come into fruition. However, the fact still remains that the litigation should not have been necessary as the 2005 statute never should have been precleared under Section 5 of the Voting Rights Act.

Pursuant to Section 5 of the VRA, when a covered jurisdiction submits voting changes to the Attorney General for preclearance, the Attorney General literally steps into the shoes of the United States District Court for the District of Columbia in determining if a voting change proposed by a covered jurisdiction should be approved.<sup>144</sup> The Attorney General's decision to reject a voting change is not subject to judicial review.<sup>145</sup> The jurisdiction's only recourse is to seek reconsideration<sup>146</sup> or file an action for a declaratory judgment with the United States District Court for the District of Columbia.<sup>147</sup> Based on personal experience and knowledge, most jurisdictions simply fix the problem identified by DOJ.

138. 2005 Ga. Laws 432 (2005 Georgia Senate Bill No. 84, Signed by Governor on January 26, 2006).

139. Plaintiff's Motion for Leave to File Second Amended Complaint and Plaintiff's Brief In Support, Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (No. 4:05CV00201).

140. 28 C.F.R. § 51.54 (2006).

141. Preclearance Letter from John Tanner, Chief, Voting Section, Civil Rights Division, U.S. Dep't of Justice, to Thurbert Baker, Attorney General, State of Georgia (April 21, 2006).

142. Common Cause/Georgia v. Cox, No. 05-0201 (N.D. Ga. filed April 21, 2006) (order granting plaintiffs leave to file second amended complaint).

143. *Voting Rights Act: The Continuing Need For Section 5: Hearing Before The Subcommittee On The Constitution Of The Committee On The Judiciary, U.S. House Of Representatives*, 109th Cong. 90 (2005) (testimony of Laughlin McDonald, Director, Voting Rights Project, ACLU Foundation) ("[Georgia] passed the most draconian photo-ID requirement for in-person voting of any State in the Union.").

144. 42 U.S.C. § 1973c.

145. 28 C.F.R. § 51.49.

146. *Id.* at § 51.45.

147. 42 U.S.C. § 1973c.

The Attorney General delegated to the Voting Section of the Civil Rights Division in the United States Department of Justice the responsibility for reviewing voting changes submitted to the Attorney General for preclearance under Section 5.<sup>148</sup> The Voting Section is also responsible for defending Section 5 declaratory judgment actions in court.<sup>149</sup> In addition, the Voting Section also brings lawsuits to enjoin the enforcement of voting changes that have not undergone Section 5 review.<sup>150</sup>

Based on personal experience and knowledge, Voting Section staff includes career lawyers, analysts, statisticians, and geographers who, *inter alia*, review submissions from covered jurisdictions. The Voting Section reviews some 15,000 to 20,000 submissions per year.<sup>151</sup> Most routine submissions are reviewed by an analyst and an attorney. However, major submissions, such as statewide redistricting plans and changes such as Georgia's 2005 Photo ID statute, are reviewed by a team of two or three attorneys, an analyst, and a geographer/social science analyst. Notice of the submissions is posted on the Internet, and comments are invited.<sup>152</sup> Voting Section staff also contact local minority community leaders to determine if they are in favor of a proposed change. The Chief of the Voting Section, a career employee usually in the Senior Executive Service, has authority to sign letters notifying jurisdictions that their proposed changes in voting procedures have been precleared.<sup>153</sup>

If the Voting Section staff finds that a proposed change should not be precleared, they prepare a detailed "Section 5 Recommendation Memorandum," analyzing the proposed change and giving reasons why the change should not be precleared.<sup>154</sup> This memorandum and the proposed letter notifying the jurisdiction that DOJ is interposing an objection to the proposed change are then presented to the Section Chief. If the Section Chief disagrees and concludes that an objection

148. 28 C.F.R. § 51.3 (2006).

149. U.S. Department of Justice, Civil Rights Division, Voting Section Home Page: *The Statutes We Enforce*, [http://www.usdoj.gov/crt/voting/misc/sec\\_4.htm](http://www.usdoj.gov/crt/voting/misc/sec_4.htm) (last visited Mar. 10, 2006). There are provisions for including additional jurisdictions on or after August 6, 1970. 42 U.S.C. § 1973b.

150. 28 C.F.R. § 51.62.

151. U.S. Department of Justice, Civil Rights Division, Voting Section Home Page: *The Statutes We Enforce*, [http://www.usdoj.gov/crt/voting/misc/sec\\_4.htm](http://www.usdoj.gov/crt/voting/misc/sec_4.htm) (last visited Mar. 10, 2006).

152. See 28 C.F.R. § 51.29 (2006); U.S. Department of Justice, Civil Rights Division, Voting Section Home Page: *The Statutes We Enforce*, [http://www.usdoj.gov/crt/voting/misc/sec\\_4.htm](http://www.usdoj.gov/crt/voting/misc/sec_4.htm) (last visited Mar. 10, 2006).

153. See 28 C.F.R. § 51.3 (2006).

154. See, e.g., Recommendation Memorandum from Robert Berman, Section 5 Review Team, Ga. Dep't. of Justice, to Alberto R. Gonzales, Attorney General, Ga. Dep't. of Justice 19 (Aug. 25, 2005) in Dan Eggen, *Criticism of Voting Law Was Overruled: Justice Dept. Backed Georgia Measure Despite Fears of Discrimination*, WASH. POST, Nov. 17, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602504.html>.

should not be interposed, the Section Chief will sign a letter notifying the jurisdiction that DOJ is not interposing any objection to the voting change.

If the Section Chief agrees with the staff recommendation to interpose an objection, he forwards the recommendation and the letter to the Assistant Attorney General for Civil Rights, a presidential appointee confirmed by the Senate,<sup>155</sup> for his review.<sup>156</sup> If the Assistant Attorney General agrees with the Section Chief's recommendation, the Assistant Attorney General signs the letter notifying the jurisdiction that DOJ is objecting to the proposed change.<sup>157</sup> On the other hand, if the Assistant Attorney General disagrees with the staff recommendation, a letter is issued notifying the jurisdiction that DOJ is not interposing any objection to the voting change.<sup>158</sup>

The State of Georgia is covered under Section 5.<sup>159</sup> When a covered jurisdiction presents a proposed change in voting rules or procedures to DOJ, the Voting Section, in deciding whether to preclear a proposed voting change, must determine whether the proposed voting change "has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group."<sup>160</sup> In determining discriminatory effect, the Department must apply the standard of "retrogression." The regulations state:

A change affecting voting is considered to have a discriminatory effect under Section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., *will make members of such a group worse off than they had been before the change*) with respect to their opportunity to exercise the electoral franchise effectively.<sup>161</sup>

The Voting Section compares the proposed voting change with the existing rule or procedure, also referred to as the "benchmark."<sup>162</sup> The burden of proof and production is on the covered jurisdiction.<sup>163</sup> If the covered jurisdiction fails to show that the proposed voting rule or procedure change will *not* make members of the protected group worse off than they had been before the change, then the Department must refuse preclearance by interposing an objection. At that point, the

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155. See 28 U.S.C. § 506 (2005).

156. See 28 C.F.R. § 51.3 (2006).

157. *Id.*

158. *Id.*

159. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965) (to be codified at 28 C.F.R. pt. 51).

160. 28 C.F.R. § 51.52 (2006).

161. 28 C.F.R. § 51.54 (2006) (emphasis added).

162. *Id.*

163. 28 C.F.R. § 51.52 (2006).

proposed voting rule or procedure cannot be utilized<sup>164</sup> and is illegal.<sup>165</sup> If the covered jurisdiction attempts to enforce a proposed voting rule or procedure that has been denied preclearance, or attempts to enforce a proposed voting rule or procedure without first seeking preclearance, then the Voting Section is required to seek injunctive relief to enjoin utilization of the illegal voting rule or procedure.<sup>166</sup>

Georgia submitted HB 244 to the Department of Justice for preclearance on June 13, 2005 and provided supplemental information through August 26, 2005.<sup>167</sup> Three attorneys (including the Deputy Section Chief responsible for Section 5), one analyst and a geographer/social science analyst in the Voting Section reviewed the submission.<sup>168</sup> After a thorough analysis of social and demographic data provided by Georgia, census and other data from other sources, practices in other states, prior preclearance decisions, statements of support and opposition,<sup>169</sup> the Voting Section staff issued a Section 5 Recommendation Memorandum advising that an objection be interposed against preclearance of the 2005 Photo ID statute. As grounds for its decision, the Voting Section staff noted that the State of Georgia failed to demonstrate that HB 244 would not have the effect of retrogressing minority voting strength.<sup>170</sup>

In its memorandum, the Voting Section staff also noted that the benchmark for determining retrogression was the 1977 statute and amendments,<sup>171</sup> which had been precleared by the Department of Justice.<sup>172</sup> The 1977 statute had been precleared in part because of the fail-safe procedure and the eight alternative forms of non-photo identification that ensured that voters would not be turned away for lack of acceptable identification.<sup>173</sup> The 2003 amendment to the voter identification requirement was precleared because it increased the number of acceptable forms of voter identification.<sup>174</sup>

The question posed by Voting Section staff was whether there would be individuals who are permitted to vote under the benchmark procedure who would be precluded from casting a ballot at the polls under the new procedure and, if so, whether minorities are dispropor-

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164. 28 C.F.R. § 51.54 (2006).

165. 28 C.F.R. § 51.62 (2006).

166. *Id.*

167. Recommendation Memorandum, *supra* note 16, at 1.

168. *Id.*

169. *Id.* at 6-31.

170. *Id.* at 51.

171. See 1997 Ga. Laws 662, § 3; 1998 Ga. Laws 295, § 1; 2001 Ga. Laws 230, § 15; 2003 Ga. Laws 209, § 48; See also Recommendation Memorandum, *supra* note 16, at 2-3.

172. Recommendation Memorandum, *supra* note 16, at 19.

173. *Id.*

174. *Id.*

tionately represented in that group.<sup>175</sup> The retrogression analysis focused not on the 2005 Photo ID statute, but whether the elimination of other acceptable forms of non-photo identification, combined with the elimination of fail-safe procedures, is retrogressive to minority voters.<sup>176</sup> The analysis also included whether the state could have achieved its stated purpose while avoiding retrogression.<sup>177</sup> The staff observed in its memorandum that “[w]hile retrogression might be allowed if it was unavoidable, it is not considered unavoidable if there is a failure or unwillingness to enact a method that is not retrogressive.”<sup>178</sup>

After analyzing data provided by the State of Georgia, which Voting Section staff concluded was spotty at best,<sup>179</sup> the staff found that African Americans were more likely than Whites to lack acceptable photo identification. More importantly, the State of Georgia was unable to point to any other evidence to overcome this conclusion. Indeed, the staff noted that the Georgia General Assembly did not consider statistical evidence of whether African Americans were more likely than Whites to lack acceptable identification.<sup>180</sup>

Finally, following the United States Supreme Court decision in *Georgia v. Ashcroft*,<sup>181</sup> the Voting Rights staff weighed the support of minority representatives in Georgia.<sup>182</sup> Specifically, the staff noted that all but one African American member of the Georgia General Assembly opposed the 2005 Photo ID requirement.<sup>183</sup> In all, forty-seven African American legislators and U.S. Congressman John Lewis opposed the legislation.<sup>184</sup>

Proponents of preclearance argued that a photo ID requirement had been upheld in other states not covered by Section 5.<sup>185</sup> The Voting Section staff observed, however, that those states allowed numerous types of photo and non-photo identification, and “both states retained fail-safe options for voters who lacked ID, so any discriminatory effect would have been lesser than the impact on Black voters

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175. *Id.* at 20.

176. *Id.* at 32.

177. *Id.* at 32-37.

178. *Id.* at 32.

179. *Id.* at 20 (concluding that information gathered from the Department of Driver Services (DDS) was not reliable for estimating the number of people with or without DDS issued identification because there were an “unknowable number” of invalid records due to death, persons moving out of the state, and other reasons).

180. *Id.* at 32.

181. *Georgia v. Ashcroft*, 539 U.S. 461, 484 (2003).

182. Recommendation Memorandum, *supra* note 16, at 32.

183. *Id.* at p. 33.

184. *Id.* at p. 33.

185. *Id.* at p. 32.

stemming from the restriction on acceptable ID under Georgia law.”<sup>186</sup>

In its analysis relating to non-retrogressive alternatives, the Voting Section staff found that the State of Georgia “failed to demonstrate that it could satisfy its stated goal of combating voter fraud while avoiding retrogression.”<sup>187</sup> The Voting Section staff noted that:

The state could have avoided retrogression by retaining various forms of currently accepted voter ID for which no substantiated security concerns were raised. Supporters of the ID restriction suggested that the risk of mail being stolen compromised the security of bank statements and government checks as acceptable ID. Even though no evidence was raised to support these claims, if true, the state could have retained other forms of non-photo ID such as birth certificates, Social Security cards, and other government documents, which were not described as likely to be stolen from voters’ mail boxes. Retention of these items as acceptable ID would have had a greater likelihood of accommodating the low income black population that is least likely to have a photo ID.

Moreover, there was no evidence presented to demonstrate that any of the existing forms of non-photo ID were unreliable or that their retention would not have reasonably allowed the state to prevent voter fraud. First-time voters who register by mail without providing ID are still permitted to show any of the non-photo IDs set forth in HAVA, including government checks and bank statements, so the reliability of this type of ID for all other voters should not be in question.<sup>188</sup>

The Voting Section staff also criticized the rationale for eliminating the non-government issued forms of photo identification, such as IDs issued by colleges and universities, airport security, factory floors, and other restricted work places.<sup>189</sup> Such IDs are accepted for financial transactions, and businesses have the incentive to use reliable, non-duplicable IDs.<sup>190</sup> “The retention of these forms of identification would have, at a minimum, lessened the impact of the restrictions for minority voters.”<sup>191</sup>

The removal of the affidavit of identity alternative also showed an unwillingness to utilize non-retrogressive alternatives.<sup>192</sup> The Voting Section staff opined that state officials presented no evidence that the penalty of law was an insufficient deterrent to falsely signing an affida-

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186. *Id.* at p. 32.

187. *Id.* at p. 33.

188. *Id.* at 33-34.

189. *Id.* at 34.

190. *Id.*

191. *Id.*

192. *Id.* at 34-35.

vit of identity.<sup>193</sup> “The failure to adopt any of these non- or less-retrogressive alternatives to satisfy its goal of preventing voter fraud weighs strongly in favor of interposing an objection.”<sup>194</sup>

Noting that African Americans are far less likely to vote through absentee ballots, which the district court also pointed out,<sup>195</sup> the Voting Section staff was not persuaded by the argument that the relaxation of the absentee voting requirements would offset the retrogressive nature of the strict, government-issued-only 2005 Photo ID statute.<sup>196</sup> Given Georgia’s historical disenfranchisement, many elderly minority voters prefer to go to the polls.<sup>197</sup> It is symbolic for them.<sup>198</sup> They do not want to vote absentee. Moreover, the likelihood of African Americans knowing of the “no-excuse absentee voting” permission is extremely low.<sup>199</sup> The Voting Section staff was unwilling to conclude that the GLOW mobile driver’s license office program, analogous to the old “bookmobile” program and discussed in detail by the district court,<sup>200</sup> was enough to offset the retrogressive nature of the Georgia statute.<sup>201</sup> The Voting Section staff was unwilling to find retrogressive purpose,<sup>202</sup> although, given the statements made by Secretary Cox,<sup>203</sup> the retrogressive purpose is obvious.

The Voting Section staff compared Georgia’s law with that of other states.<sup>204</sup> Although twenty-two states require all voters to present some form of identification, in 16 of those states the identification need not be photo identification.<sup>205</sup> Five of the six states that request photo ID provide fail-safe mechanisms, including sworn affidavits of identity, which allows individuals who are validly registered voters to vote.<sup>206</sup> Indiana is the only other state that prohibits voters from casting a valid ballot without possessing photo identification.<sup>207</sup> Although Indiana is not covered under Section 5, its statute is also being attacked in litigation, although unsuccessful to date.<sup>208</sup> Finally, the staff

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193. *Id.* at 34.

194. *Id.* at 35.

195. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1353 (N.D. Ga. 2005).

196. Recommendation Memorandum, *supra* note 16, at 35-37.

197. *Id.* at 36.

198. *Id.*

199. *Id.*

200. *Common Cause/Georgia*, 406 F. Supp. 2d at 1363.

201. Recommendation Memorandum, *supra* note 16, at 37.

202. *Id.*

203. *Common Cause/Georgia*, 406 F. Supp. 2d at 1334.

204. Recommendation Memorandum, *supra* note 16, at 38-51.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*; *Indiana Democratic Party et al. v. Rokita et al.*, Civil Action No. 1:05-cv-00634-SEB-VVS (S.D. Ind. April 14, 2006), 2006 WL 1005037 (plaintiffs’ motion for summary judgment denied and defendants motion for summary judgment allowed) (It is noteworthy that the



underscored the transportation issues related to casting a provisional ballot, obtaining a valid photo ID, and returning to the polling site with the photo ID on election day.<sup>209</sup>

## VII. CONCLUSION

The fact that Georgia, a state long-covered under Section 5, would adopt “the most draconian photo-ID requirement for in-person voting of any State in the Union,”<sup>210</sup> and the most clearly discriminatory, is proof positive that Section 5 of the Voting Rights Act is still very much needed and must be extended beyond 2007.<sup>211</sup> Notwithstanding 41 years of the VRA and Section 5 enforcement, Section 5-covered jurisdictions, like Georgia, are still willing to impose extreme barriers to voting with full knowledge that these barriers will have a disparate impact upon racial and language minority voters.

The conclusion reached in *Common Cause/Georgia* and in the Recommendation Memorandum submitted by the staff of the Voting Section, analyzing this patently discriminatory voting statute, greatly underscores the need for Section 5 reauthorization. Both *Common Cause/Georgia* and the Recommendation Memorandum found that the 2005 Georgia Photo ID statute would impose an undue burden on the right to vote and that this undue burden would have a greater impact on minority voters.<sup>212</sup>

The legal standards applied in *Common Cause/Georgia* and the Recommendation Memorandum, including the burden of proof,<sup>213</sup> were different, and the *Common Cause/Georgia* court is prohibited from considering Section 5 issues.<sup>214</sup> However, the facts examined in *Common Cause/Georgia* and in the Recommendation Memorandum were identical, and *Common Cause/Georgia* and the Recommenda-

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court in the Indiana case noted the poor case development by plaintiffs which factored heavily in the court's decision). Appeal filed on May 5, 2006.

209. Recommendation Memorandum, *supra* note 16, at 51.

210. *Voting Rights Act: The Continuing Need For Section 5, Hearing Before The Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 90 (2005) (Testimony of Laughlin McDonald, Director, Voting Rights Project, ACLU Foundation).

211. Section 5 is set to expire on August 6, 2007 unless reauthorized by Congress. Voting Rights Act, Pub. L. No. 97-205, 96 Stat 131 (1982). The National Commission on the Voting Rights Act, Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005 (2006) available at [www.votingrightsact.org/report/finalreport.pdf](http://www.votingrightsact.org/report/finalreport.pdf) (last visited Apr. 2, 2006).

212. Recommendation Memorandum, *supra* note 16, at 31; the district court noted that “[u]nfortunately, the 2005 Photo ID requirement is most likely to prevent Georgia’s elderly, poor, and African-American voters from voting.” 406 F. Supp. 2d at 1365 (emphasis added).

213. In *Common Cause/Georgia v. Billups*, the burden of proof on all issues was upon the plaintiffs. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d at 1356. Under Section 5 the burden of proof is on the covered jurisdiction. Recommendation Memorandum, *supra* note 16, at 31-32.

214. 42 U.S.C. § 1973c (2005).

tion Memorandum compared the new law against the old.<sup>215</sup> Notwithstanding the different legal standards that were applied, both *Common Cause/Georgia* and the Recommendation Memorandum found the 2005 Georgia Photo ID statute illegal as imposing an undue burden upon minority voters – they reached the same conclusion.

Congressional hearings on reauthorization of Section 5 and other provisions of the VRA that are set to expire in 2007 began on October 18, 2005.<sup>216</sup> During the October 25, 2005 hearing before the House Judiciary Committee, Subcommittee on the Constitution, a long-time voting rights attorney Laughlin McDonald noted that the 2005 Georgia ID law was a “dramatic example” of the fact that minority voters are still vulnerable to disenfranchisement schemes, even where they are registered and voting at the same level as whites.<sup>217</sup> This fact, by itself, and strong evidence of continuing disenfranchisement efforts in other states as shown by recent congressional testimony,<sup>218</sup> proves that Section 5 must be reauthorized.

To explore and document the question of reauthorization of Section 5 and other critical provisions of the Voting Rights Act that are set to expire, the Lawyers’ Committee for Civil Rights Under Law commissioned a National Commission on the Voting Rights Act. This Commission held ten field hearings in different geographical locations and received testimony from 100 witnesses. The Commission issued a report recommending reauthorization.<sup>219</sup> In one of its concluding statements, the Commission noted that:

[t]aken as a whole, the evidence presented at the hearings strongly suggests that the two major problems which have been the focus of the Act—*restricted ballot access* and minority vote dilution—continue in twenty-first century America. Several people who gave testimony stressed that problems encountered by minorities are the work of both white Democrats and Republicans.<sup>220</sup>

The findings of the Commission mirror Congress’ findings in reaching its 1982 decision to extend Section 5 another 25 years.<sup>221</sup> The Senate Report addressing the question of extending Section 5 beyond

215. See *Common Cause/Georgia*, 406 F. Supp. 2d 1326.

216. *Voting Rights Act: To examine the Impact and Effectiveness of the Act, Hearing Before the Subcomm. on the Constitution on the H. Comm. on the Judiciary*, 109th Cong. 2005, available at <http://judiciary.house.gov/committeestructure.aspx?committee=7> [hereinafter *Hearings*].

217. *Voting Rights Act: The Continuing Need For Section 5, Hearing Before The Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 90 (2005) (testimony of Laughlin McDonald, Director, Voting Rights Project, ACLU Foundation).

218. *Hearings*, *supra* note 216.

219. The National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005* (2006) available at [www.votingrightsact.org/report/final-report.pdf](http://www.votingrightsact.org/report/final-report.pdf) (last visited Apr. 2, 2006).

220. *Id.* at 7 (emphasis added).

221. S. Rep. No. 97-417 (1982), *reprinted in* 1982 U.S.C.A.N. 177.

1982 noted, *inter alia*, the continuing level of objectionable voting law changes.<sup>222</sup> In considering extending Section 5 beyond 2007, Congress has received massive testimony, including anecdotal and statistical data, clearly showing that disenfranchisement efforts persist today and that Section 5 must be extended and improved.<sup>223</sup>

More than reauthorization of Section 5, even with recommended improvements,<sup>224</sup> is required. The Recommendation Memorandum of the Voting Section staff should have been followed and an objection should have been interposed. If an objection had been interposed, the costly and ongoing *Common Cause/Georgia* litigation would not have been necessary. Section 5's purpose of effectuating compliance with voting rights laws without case-by-case litigation<sup>225</sup> is being severely frustrated by the current Department of Justice political leadership.<sup>226</sup> The fact that the Chief of the Voting Section failed to follow staff recommendation and refused to recommend to the Assistant Attorney General that an objection be imposed is very unfortunate, but not surprising. Starting in 2001, extreme pressure has been placed on the staff of the Civil Rights Division to mirror the Administration's antipathy to civil rights.<sup>227</sup> Senior career staff have been reassigned or threatened with reassignment if they did not "tow the line" and sharply curtail civil rights enforcement efforts.<sup>228</sup> Career staff members have been departing in large numbers, frustrated at the inability to bring cases and the threatening and distrustful atmosphere created by the current political leadership.<sup>229</sup> The problem has reached crisis proportions and has received press coverage,<sup>230</sup> albeit not enough press coverage. Given this political backdrop, it is not surprising that the Section Chief of the Voting Section did not follow staff recom-

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222. *Id.* at 12, 1982 U.S.C.C.A.N. at 189.

223. *Hearings*, *supra* note 216.

224. *Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary, U.S. House of Representatives*, 109th Cong 8, 13-29 (2005) (statement of Congressman Scott of Georgia) (testimony of Theodore M. Shaw, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.) (addressing problems created by *Georgia v. Ashcroft*), available at <http://judiciary.house.gov/media/pdfs/printers/109th/24504.pdf>.

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

226. See Dan Eggen, *Civil Rights Focus Shift Roils Staff at Justice: Veterans Exit Division as Traditional Cases Decline*, WASHINGTON POST, Nov. 13, 2005, at A1; William R. Yeomans, *An Uncivil Division*, LEGAL AFFAIRS, Sept./Oct. 2005 at 20.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*; Dan Eggen, *Justice Plays Down Memo Critical of Ga. Voter ID Plan*, WASHINGTON POST, Nov. 18, 2005, at A3; Dan Eggen, *Criticism of Voting Law Was Overruled: Justice Dept. Backed Georgia Measure Despite Fears of Discrimination*, WASHINGTON POST, Nov. 17, 2005, at A1.

mendations and approved Georgia's clearly illegal 2005 Photo ID statute.

Private litigants and nonprofit organizations supplement the work of the Department of Justice by bringing individual lawsuits, but cannot be reasonably expected to fully replace the Department of Justice, with resources overshadowing the largest law firm in the world, when the political leadership insists on dilatory civil rights enforcement. Aggressive congressional oversight and investigation is necessary. Congress must hold the executive branch, regardless of party affiliation, accountable for faithful and effective enforcement of civil rights laws.

The sad fact is that civil rights legislation does not change attitudes. The same hostility to people of color voting that existed in 1876 and existed during the first half of the Twentieth Century (which led to the enactment of the Voting Rights Act) exists today. There is no indication that this hostility, which has been the catalyst for countless disenfranchisement efforts, will end during our lifetimes. As long as there are persons in power, from legislatures to poll workers, who are willing to introduce schemes to limit voting by racial and language minorities, the Voting Rights Act is needed. As long as states with especially recalcitrant histories of electoral discrimination, like Georgia, are willing to introduce under color of law any scheme to limit minority access to the ballot box, Section 5, and its vigilant enforcement, is most especially needed.