REPORT

Introduction

The Voting Rights Act has been called the most effective civil rights law ever enacted. It ended literacy tests, poll taxes, and other techniques used to deny minorities the right to vote, enabling them to participate more fully in the political process. It has also played a significant role in increasing the number of minority politicians elected to office, and there is general agreement that the Act has been instrumental in developing a political community of interest and awareness in minority communities. Among other things, the Voting Rights Act provides tools, including federal poll-watchers and language assistance, for combating strategies of vote suppression.

Yet despite the progress that has been made since the passage of the Act, members of minority groups still face discrimination in exercising their right to vote, as allegations in recent elections make clear. Following an investigation into the 2000 presidential election, for example, the U.S. Commission on Civil Rights concluded that voter disenfranchisement was widespread in Florida, falling most harshly on black voters but also affecting thousands of Spanish-speaking voters.¹ Allegations of voter intimidation and harassment directed at minority groups have also marked elections in 2002, 2003, and 2004 in states across the country.²

Although some provisions of the Voting Rights Act are permanent, others are currently set to expire on August 6, 2007, unless the Congress reauthorizes them. The latter include the remedial provisions guaranteeing language assistance for voters, authorizing federal examiners and observers to monitor elections, and requiring that states and counties with documented histories of discriminatory voting practices submit planned election law changes for approval by federal officials. Legislation to reauthorize the Act is expected to be introduced by August 2005.

In 1981, the ABA passed policy supporting the reauthorization of the Voting Rights Act of 1965, as amended, for a period of five years.³ That policy was later archived by the Association. This recommendation reaffirms that policy by supporting the reauthorization of the expiring remedial provisions of the Voting Rights Act that enable continued efforts to prevent and dismantle discrimination in voting. Collectively, these provisions serve to enhance access to the political process, deter and/or document ongoing abuses and prohibit discriminatory voting practices.

The ABA has adopted a number of policies opposing discrimination against minorities and endorsing legal remedies to address that discrimination.⁴ This resolution seeks to enhance current ABA policy by guaranteeing that the rights of minorities and traditionally disenfranchised populations continue to be protected under the Voting Rights Act.

⁴ The ABA has numerous policies opposing discrimination, including: ABA Report with Recommendation #127 adopted August 1995 (Endorses legal remedies and voluntary actions that take race into consideration in order to eliminate or prevent discrimination.); ABA Report with Recommendation #102 adopted February 1986 (Opposes the provision of federal financial assistance for institutions that discriminate in any of their operations on the basis of
The Voting Rights Act was originally enacted in 1965 for five years. Grounded in the Fifteenth Amendment to the U.S. Constitution, it was passed in order to address claims of massive discrimination against black citizens, particularly in the South. At the time, the Congress received testimony that discrimination was virulent, persistent, and adaptive and that case-by-case litigation by private litigants was inadequate to deal effectively with the problem.

As enacted in 1965, the Act contained various remedial provisions. Some of these provisions applied nationally, while other “special” provisions applied only in certain jurisdictions. The Act contained a formula to determine what jurisdictions would be covered by the Section 5 preclearance provisions.

The Act was amended nominally in 1968 but went through its first major extension in 1970, when the Congress extended its life to 1975. The 1970 amendments also contained other provisions, including (1) outlawing nationally literacy tests (2) outlawing nationally and permanently durational residency requirements for presidential and vice presidential elections and (3) lowering nationally and permanently the voting age to eighteen for federal, state, and local elections.

The next major changes to the Act occurred in 1975 when (1) it was reauthorized generally for seven years, (2) protections were extended to cover language minority groups, and (3) literacy tests were banned permanently. These 1975 language minority amendments expanded the Act to take into account the Fourteenth Amendment to the Constitution.

In 1982, after extensive hearings, the Congress renewed the “special” provisions of the Act for twenty-five years, until 2007. It also adopted a new standard, effective in 1984, for
terminating coverage of jurisdictions under the Section 5 preclearance and Federal examiner and observer provisions. Among other things, the Congress amended Section 2 of the Act to provide that a plaintiff could establish a violation of the Section without having to prove discriminatory purpose. In addition, it extended the Act's language assistance requirements for ten years, until 1992. In 1992, the Congress extended the language assistance provisions for fifteen more years, until 2007.

Key Elements of The Act

As indicated above, the Act contains certain provisions that are permanent and others that are subject to periodic reauthorization. This Report addresses those that are subject to periodic reauthorization and set to expire in 2007: Sections 4 through 9 of Title I of the Act and Section 203 of Title II of the Act.

Section 4(b)

Section 4(b) is known as the "triggering" device of the Act. Its two part-formula determines what specific jurisdictions will be subject to, or "covered by," certain remedial provisions of the Act, including Section 5. Jurisdictions are covered under Section 4(b) if the U.S. Attorney General and the U.S. Bureau of the Census determine that (1) they had a "test or device" on November 1 of 1964, 1968, or 1972, and (2) less than 50 percent of voting age residents were registered to vote or voted in the presidential elections of 1964, 1968, and 1972.

Section 4(b) triggers coverage either at the state level or at the political subdivision (county or parish) level. If a state is covered, all political entities (counties, cities, school boards, etc.) within that state are covered. If only a political subdivision is covered, all political entities within that subdivision are covered. Nine states and parts of seven other states are currently covered by Section 4(b).

Section 4(a)

Jurisdictions covered by Section 4(b) can seek to escape, or "bail out" of, this coverage under the provisions of Section 4(a). In order to bail out under the standards in effect since 1984, the covered jurisdiction must demonstrate to a three-judge panel of the U.S. District Court for the District of Columbia that during the past ten years: (1) no test or device has been used within the state or political subdivision; (2) all changes affecting voting have been reviewed under Section 5 prior to their implementation; (3) no change affecting voting has been the subject of an objection by the Attorney General or the denial of a Section 5 declaratory judgment from the District Court of District of Columbia; (4) there have been no adverse judgments in lawsuits

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13 Public Law 97-205, §2 (b)
14 PL 97-205, § 3
15 Public Law 97-205§§2(d), 4, June 29, 1982, 96 Stat. 131
16 PL 102-344, § 2, 106 Stat. 921
17 42 U.S.C. § 1973b(b)
18 28 C.F.R. Appendix to Part 51, "Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended", also available at http://www.usdoj.gov/crt/voting/28cfr/51/apdx_txt.htm
19 42 U.S.C. § 1973b(a)
alleging voting discrimination; (5) there have been no consent decrees or agreements that resulted in the abandonment of a discriminatory voting practice; (6) there are no pending lawsuits that allege voting discrimination; and (7) federal examiners have not been assigned. In addition, before being allowed to bail out, the jurisdiction must have eliminated those voting procedures and methods of elections that inhibit or dilute equal access to the electoral process. It also must demonstrate that it has made constructive efforts to eliminate intimidation and harassment of persons seeking to register and vote; to expand opportunities for voter participation, such as opportunities for registration and voting; and to appoint minority officials throughout the jurisdiction and at all levels of the stages of the electoral process.

After the granting of a declaratory judgment, the statute requires a ten-year "recapture" period. During this time, the District Court may reopen proceedings should the jurisdiction engage in any conduct that would have prevented the jurisdiction from bailing out in the first instance. Under such circumstances, the court will review the evidence and determine whether to reinstate coverage.

Section 5

Section 5 is known as the "preclearance" provision of the Act and requires that covered jurisdictions submit all changes to their voting laws or procedures for approval before implementing them. Although preclearance can be obtained from the U.S. District Court for the District of Columbia or from the U.S. Attorney General, most jurisdictions seek preclearance through the U.S. Attorney General.

Preclearance assures that the election change being contemplated does not intentionally or in effect deny or abridge the right to vote on account of race, color, or membership in a language minority. The submitting jurisdiction bears the burden of proving to the preclearing body that the change will not worsen the position of these protected groups. If it does not carry its burden, the preclearing authority will block the election change.

Sections 6-9

Sections 6 through 9 of the Act provide for the appointment of federal examiners and poll-watchers in jurisdictions covered under Section 4. Federal examiners are appointed pursuant to Section 6 of the Act upon certification by the U.S. Attorney General. A total of 148 political subdivisions in nine states have been certified pursuant to Section 6.

Once appointed, federal examiners list qualified voter registration applicants and give that list to the appropriate local election officials, who are required to put the names on the

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20 42 U.S.C. § 1973c
21 42 U.S.C. §§1973d-g
22 Federal examiners may also be appointed by federal court order pursuant to Section 3(a), which does not expire. 42 U.S.C. § 1973a(a).
county's voter registration rolls. Examiners are required under the Act to be available during each election and for two days afterwards to take complaints from any federally registered voters who claim that they were not allowed to vote.

Under Section 8, federal observers can also be assigned in counties with examiners. The federal observers enter and monitor voting and vote tabulation places to ensure that all people who are entitled to vote are being allowed to do so and that their votes are being properly counted. They then report to the federal examiner and the Attorney General. If the federal examiner was authorized by court order, the observers report to the court as well.

Section 203

Section 203 was added to the Act in 1975 and requires the provision of language assistance, including notices, instructions, assistance, and other materials, for American Indians, Asian Americans, Alaskan Natives, and/or people of Spanish heritage in certain jurisdictions. Language assistance is required in jurisdictions wherein the U.S. Bureau of the Census determines (1) that the number of U.S. citizens of voting age in a single language minority group with limited English proficiency (a) is more than 10,000, (b) is more than five per cent of all voting age citizens, or (c) on an Indian reservation, exceeds five per cent of all reservation residents; and (2) that the illiteracy rate of the group is higher than the national illiteracy rate. Jurisdictions may escape coverage by obtaining a declaratory judgment from the U.S. District Court for the District of Columbia determining that the illiteracy rate of the group is less than or equal to the national illiteracy rate. Jurisdictions in all or part of 30 states are covered by Section 203.

Conclusion

The Voting Rights Act of 1965, as amended in 1992, has had a significant impact on access to the constitutional right to vote and the political process for members of minority groups. In particular, its special remedial provisions have enabled the federal government to enforce the prohibition on discriminatory voting practices and mechanisms. These provisions have been very effective at enhancing the democratic principles that form the foundation of our nation. However, because of the persistence of discriminatory behavior in the election process, this recommendation seeks to ensure that the Act remains a valuable tool in the struggle to preserve and protect voting rights for all Americans.

Respectfully Submitted,

Stephen F. Hanlon, Chair

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25 42 U.S.C. § 1973f
26 42 U.S.C. § 1973aa-1a
Section of Individual Rights and Responsibilities
August 2005
1. **Summary of Recommendation**


2. **Approval by Submitting Entity**

The Section Council of the Section of Individual Rights & Responsibilities approved this Report with Recommendation at its spring meeting in Washington, D.C., on April 1, 2005.

The Standing Committee on Election Law approved the co-sponsorship of this Report with Recommendation on May 10, 2005.

3. **Has This or a Similar Recommendation Been Submitted to the House of Delegates Board of Governors Previously?**

Yes. In August 1981, the ABA adopted a similar policy supporting the extension of the Voting Rights Act of 1965. That policy was later archived by the Association. This recommendation reaffirms that policy by supporting the reauthorization of the expiring remedial provisions of the Voting Rights Act that enable continued efforts to prevent and dismantle discrimination in voting. Currently, there is no active ABA policy that speaks specifically to the Voting Rights Act of 1965.

4. **What Existing Association Policies Are Relevant To This Recommendation and Would They Be Affected by Its Adoption?**
The proposed resolution reiterates the importance of full participation in the political process of all citizens of the United States. The ABA has adopted a number of policies opposing discrimination against minorities and endorsing legal remedies to address that discrimination. This recommendation seeks to enhance current ABA policy by guaranteeing that the rights of minorities and traditionally disenfranchised populations continue to be protected under the Voting Rights Act.

5. **What Urgency Exists Which Requires Action at This Meeting of the House?**

Although some provisions of the Voting Rights Act of 1965, as amended in 1992, are permanent, others are currently set to expire on August 6, 2007, unless the U.S. Congress reauthorizes them. Legislation to reauthorize the Act is expected to be introduced by August 2005. As a result, the Act is likely to undergo intensive examination by Congress. This recommendation seeks to maintain the rights and protections currently guaranteed under the Voting Rights Act of 1965, as amended in 1992. It would provide the opportunity for the ABA to be an active participant in the reauthorization process.

6. **Status of Legislation**

Legislation to reauthorize the Voting Rights Act of 1965, as amended in 1992, is expected to be introduced in the U.S. Congress by August 2005, in time for the 40th anniversary of the Act. Temporary or “special” provisions of the Act, which are due to expire in August 2007, will be up for reauthorization. These provisions include, remedial provisions guaranteeing language assistance for voters, authorizing federal examiners and observers to monitor elections, and requiring that states and counties with documented histories of discriminatory voting practices submit planned election law changes for approval by federal officials.

7. **Cost to the Association (both direct and indirect costs)**

Adoption of this Recommendation would result only in minor indirect costs associated with Governmental Affairs and Section staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibility.

8. **Disclosure of Interest**

There are no known conflicts of interest.

9. **Referrals**
By copy of this form, this Report with Recommendations is being referred to the following ABA entities and affiliates that may have an interest in the subject matter, with requests for support/co-sponsorship:

Section of Administrative Law and Regulatory Practice
Section of Antitrust Law
Section of Business Law
Criminal Justice Section
Section of Dispute Resolution
Section of Environment, Energy, and Resources
Section of Family Law
General Practice, Solo and Small Firm Section
Government and Public Sector Lawyers Division
Section of Intellectual Property Law
Section of International Law and Practice
Section of Labor and Employment Law
Law Practice Management Section
Section of Legal Education and Admissions to the Bar
Section of Litigation
Section of Public Contract Law
Section of Public Utility, Communications and Transportation Law
Section of Real Property, Probate and Trust Law
Section of Science and Technology Law
Section of State and Local Government Law
Section of Taxation
Tort and Insurance Practice Section
Judicial Division
Law Student Division
Senior Lawyers Division
Young Lawyers Division
Center for Racial and Ethnic Diversity
Commission on Domestic Violence
Commission on Homelessness and Poverty
Commission on Law and Aging
Commission on Mental and Physical Disability Law
Commission on Racial and Ethnic Diversity in the Profession
Commission on Women in the Profession
Council on Racial and Ethnic Justice

10. **Contact Persons (prior to meeting)**

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