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SPEECHES

PROTECTING THE RIGHT TO VOTE: THE VOTING RIGHTS ACT A HALF CENTURY LATER, WHERE ARE WE AND WHAT CHALLENGES REMAIN

The Honorable Gary Stein[*]

The Voting Rights Act,[1] and particularly section 5,[2] may be the most successful civil rights enactment in our Nation's history. The power of section 5 is that it prevents discriminatory election laws from taking effect without preclearance by the Justice Department or a federal court. Absent section 5, such laws could be challenged under section 2 of the Act; but that litigation would be expensive and time consuming, and pending the outcome, the law would be in effect. That is why the invalidation of section 5 is being pursued so vigorously.

In order to predict the future of the Voting Rights Act and section 5, it is first essential to understand its dramatic origins. In the late fifties and early sixties, the Justice Department had filed various voting rights cases throughout the South. Dallas County, Alabama, was a textbook example of the Southern pattern of obstruction of black registration.[3] The county seat of Dallas County

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1. 42 U.S.C. §§ 1973 to 1973aa-6 (2006).

2. *Id.* § 1973c.

3. JAMES BLACKSHER ET AL., VOTING RIGHTS IN ALABAMA: 1982-2006, at 3-4 (2006), *available at* www.protectcivilrights.org/pdf/voting/AlabamaVRA.pdf.

was Selma. The County had a voting age population of about 29,500, including 15,000 blacks. By the early sixties only 156 black residents out of 15,000 were registered. The County used a literacy test that it applied to turn down 175 black applicants with high school diplomas and twenty-one black applicants with college degrees.

While the Justice Department's lawsuit was proceeding in the courts, the Southern Christian Leadership Conference ("SCLC") and The Student Non-Violent Coordinating Committee ("SNCC") launched a registration campaign in Selma. They picked Selma because the Sherriff of Dallas County, Jim Clark, was a bully and a hothead, and they hoped he would overreact and provide media coverage. So, on March 7, 1965, a Sunday, SCLC and SNCC began a protest march from Selma to the state capital in Montgomery to present Governor George Wallace with a list of grievances. Outside of Selma, the marchers were crossing the Edmund Pettis Bridge. They were stopped by state troopers, sheriff's deputies, and members of a posse on horseback. These "law enforcers," without any provocation, fired tear gas and charged the marchers, trampling and injuring many of them. The entire scene was captured by television cameras and caused nationwide revulsion.[4]

Judge Frank Johnson's opinion in *Williams v. Wallace* describes what happened:

> In Dallas County, Alabama, the harassment and brutal treatment on the part of defendants Lingo and Clark, together with their troopers, deputies and 'possemen,' and while acting under instructions from Governor Wallace, reached a climax on Sunday, March 7, 1965. Upon this occasion approximately 650 Negroes left the church in Selma, Alabama, for the purpose of walking to Montgomery, Alabama, to present to the defendant Governor Wallace their grievances concerning the voter registration processes in these central Alabama counties and concerning the restrictions and the manner in which these restrictions had been imposed upon their public demonstrations. These Negroes proceeded in an orderly and peaceful manner to a bridge near the south edge of the City of Selma on U.S. Highway 80 that leads to Montgomery, Alabama, which is located approximately 45 miles east of Selma. They proceeded on a sidewalk across the bridge and then continued walking on the grassy portion of the highway toward Montgomery until confronted by a detachment of between 60 to 70 State troopers headed by the defendant Colonel Lingo, by a detachment of several Dallas County deputy sheriffs, and numerous Dallas County 'possemen' on horses, who were headed by Sheriff Clark. Up to this point the Negroes had observed all traffic laws and regulations, had not interfered with traffic in any manner, and had proceeded in an orderly and peaceful manner to the point of confrontation. They were ordered to disperse and were given two minutes to do so by Major Cloud, who was in active command of the troopers and who was acting upon specific instructions from his superior officers. The Negroes failed to disperse, and within approximately one minute (one minute of the allotted time not having passed), the State troopers and the members of the Dallas County sheriff's office and 'possemen' moved against

4. *Id.*

> the Negroes. The general plan as followed by the State troopers in this instance had been discused [sic] with and was known to Governor Wallace. The tactics employed by the State troopers, the deputies and 'possemen' against these Negro demonstrators were similar to those recommended for use by the United States Army to quell armed rioters in occupied countries. The troopers, equipped with tear gas, nausea gas and canisters of smoke, as well as billy clubs, advanced on the Negroes. Approximately 20 canisters of tear gas, nausea gas, and canisters of smoke were rolled into the Negroes by these State officers. The Negroes were then prodded, struck, beaten and knocked down by members of the Alabama State Troopers. The mounted 'possemen,' supposedly acting as an auxiliary law enforcement unit of the Dallas County sheriff's office, then, on their horses, moved in and chased and beat the fleeing Negroes. Approximately 75 to 80 of the Negroes were injured, with a large number being hospitalized.[5]

Following the national outrage that occurred over the events in Selma, President Johnson instructed the Department of Justice to prepare an expansive Voting Rights Bill that ultimately became the Voting Rights Act of 1965. The Director of Public Safety in Selma was named Wilson Baker, and he said to Attorney General Nicholas Katzenbach, "What do you expect would happen if the voter rights bill passes?"[6] Katzenbach answered as follows: "What do you mean if it passes? You people passed that on that bridge. You people in Selma passed that on that bridge that Sunday. You can be sure it will pass, and because of that, if nothing else."[7]

A few days later, Judge Frank Johnson, an Alabama District Court judge, issued an injunction ordering the State of Alabama to protect the marchers in their march from Selma to Montgomery. The march from Selma to Montgomery proceeded with the protection of the Alabama National Guard, which President Johnson put under federal command after Governor Wallace informed him that the State of Alabama couldn't afford to pay the cost of protecting the marchers.[8]

Once the Justice Department finished drafting the Voting Rights Act, President Johnson outlined the Bill in a speech to a joint session of Congress conducted during prime evening viewing hours for the television networks. This is part of what he said that night:

> I speak tonight for the dignity of man and the destiny of democracy. . . . At times history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. . . . So it was a century ago at Appomattox. So it was last week in Selma, Alabama. . . .
> . . . .
> There is no constitutional issue here. The command of the constitution is

5. Williams v. Wallace, 240 F. Supp. 100, 104-05 (M.D. Ala. 1965).

6. HOWELL RAINES, MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED 215 (1977).

7. *Id.*

8. *See* Steven F. Lawson, *Prelude to the Voting Rights Act: The Suffrage Crusade, 1962-1965,* 57 S.C. L. REV. 889, 914 (2006).

> plain. There is no moral issue. It is wrong . . . to deny any of your fellow Americans the right to vote . . . .
> . . . .
> This time, on this issue, there must be no delay, no hesitation and no compromise with our purpose. . . .
> . . . .
> . . . What happened in Selma is part of a far larger movement which reaches into every section and state of America. It is the effort of American Negroes to secure for themselves the full blessings of American life. Their cause must be our cause too. Because it is not just Negroes, but really it is all of us, who must overcome the crippling legacy of bigotry and injustice.[9]

And President Johnson added: "And we shall overcome."[10]

The Voting Rights Act passed the Senate on May 26 by a vote of 77-19, and it passed the House of Representatives on July 9.[11] On August 6 President Johnson signed the law and announced that the next day the Attorney General would "file a lawsuit challenging the constitutionality of the poll tax in the State of Mississippi."[12]

These are the critical provisions of the Act.

Section 2 of the Act forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[13]

Section 4 of the Act outlaws all literacy tests and similar tests of voting qualifications.[14]

Section 5, the preclearance provision, suspends all changes in state election procedures until they are submitted to and approved either by a three-judge federal district court in Washington or by the Attorney General.[15] Under section 5, preclearance can be granted only if the change "neither has the purpose nor will it have the effect of denying or abridging the right to vote on account of race or color."[16] Section 5 applies not only to the ballot access rights guaranteed by section 4 but to the drawing of legislative and congressional district lines as well.[17]

The Act applied section 5 only to states that had used a forbidden test or device prior to November 19, 1964, and had less than 50% voter registration or turnout in the 1964 presidential

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9. Special Message to the Congress: The American Promise, 1 PUB. PAPERS 281, 281-84 (Mar. 15, 1965).

10. *Id.* at 284.

11. 111 Cong. Rec. 11,752, 16,285-86 (1965).

12. Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 2 PUB. PAPERS 840, 842 (Aug. 6, 1965).

13. 42 U.S.C. § 1973 (2006).

14. *Id.* § 1973b.

15. *Id.* § 1973c.

16. *Id.*

17. *See* McDaniel v. Sanchez, 452 U.S. 130, 137 (1981) (holding that the Voting Rights Act requires preclearance of new legislative apportionment places).

election.[18] Then there is a bailout provision that authorizes bailout if a jurisdiction can show that for the prior ten years it had not used a forbidden voting test, had not been subject to a valid preclearance objection under section 5, and had not been found liable for any other voting-rights violations.[19] It also must show that it has "engaged in constructive efforts to eliminate intimidation and harassment of voters."[20] The Attorney General can consent to entry of judgment in favor of the bailout.[21] The District Court retains continuing jurisdiction over successful bailout suits for ten years and may reinstate coverage if any violation is found.[22]

Sections 4 and 5, when enacted, were temporary provisions that were in effect for only five years.

Congress reauthorized the Act in 1970 for five more years, in 1975 for seven years, and in 1982 for twenty-five years. The coverage formula remained the same, but the pertinent date for assessing the standards for coverage moved up from 1964 to 1972. The Supreme Court upheld the original statute in *South Carolina v. Katzenbach*[23] and upheld the various reauthorizations in *Georgia v. United States*,[24] *City of Rome v. United States*,[25] and *Lopez v. Monterey County*.[26] Most recently in 2006, Congress extended section 5 for another twenty-five years and retained 1972 as the last baseline year for triggering coverage under section 5.

When the Voting Rights Act initially was passed in 1965, the evidence before Congress indicated that black voting registration rates were approximately 50% lower than white voter registration in several of the covered states.[27] In addition, during the years before the Act was passed registration rates for blacks rose at a pitifully low rate in Alabama, Louisiana, and Mississippi, and voter turnout levels in covered jurisdictions were at least 12% below the national average in the 1964 presidential elections.[28]

In *South Carolina v. Katzenbach*, the Supreme Court noted that literacy tests and other kinds of voter qualification tests were discriminatorily applied to prevent blacks from voting.[29] In litigated cases courts found that "[w]hite applicants for registration . . . often

18. 42 U.S.C. §§ 1973c-1973bb.
19. *Id.* § 1973b.
20. *Id.* § 1973b(a)(1)(F).
21. *Id.* § 1973b(a)(9).
22. *Id.* § 1973b(a)(5).
23. 383 U.S. 301 (1966).
24. 411 U.S. 526 (1973).
25. 446 U.S. 156 (1980).
26. 525 U.S. 266 (1999).
27. *Katzenbach*, 383 U.S. at 313.
28. *Id.* at 313, 330.
29. *Id.* at 312-13.

[were] excused altogether from the literacy and understanding tests or [were]given easy versions, . . . received extensive help from voting officials, and [were] registered despite serious errors in their answers. Negroes . . . typically [were] required to pass difficult versions of all the tests, without any outside assistance and without the slightest error."[30] The requirement in some states of good moral character was "so vague and subjective that it . . . constituted an open invitation to abuse at the hands of voting officials."[31]

The Voting Rights Act clearly has been successful in expanding minority participation in elections in the covered jurisdiction. Because of that success, the constitutionality of section 5 currently is under attack on the ground that the increased participation by minorities in the political process demonstrates that the severe restriction imposed by section 5 no longer is needed.

The constitutional challenge to section 5 was asserted in *Northwest Austin Municipal Utility District No. One v. Holder* (*NAMUDNO I*).[32] In its decision upholding the constitutionality of section 5, the three-judge district court in *NAMUDNO I* considered several aspects of the record made before Congress at the time of the 2006 reauthorization.[33]

The court noted that prior to the Act's adoption in 1965 black registration was 32% in Louisiana, 19% in Alabama, and 6% in Mississippi, more than fifty percentage points below the rate for white citizens in each of those states.

The 2006 House Judiciary Committee Report acknowledged that there had been significant improvement in minority registration and turnout. However, the Report identified significant gaps still present: in Virginia, the racial disparity in registration between whites and blacks was 11% and the disparity in turnout was 14%; in Texas, the registration gap between whites and Hispanics was 20%; and in Florida, there was a 31% registration gap between whites and Hispanics and a 24% gap in turnout.[34]

Also, as the court noted, the statistics reported by Congress treated Hispanic voters as white, which had the effect of lowering overall white-voter registration and turnout rates. When black-voter registration and turnout were compared with non-Hispanic white statistics, in both Arizona and Florida non-Hispanic whites turned out to vote at a rate more than 20% higher than black voters. In Louisiana and Texas, voter registration rates among non-Hispanic

30. *Id.* at 312.

31. *Id.* at 313.

32. Utility District No. One v. Holder (*NAMUDNO I*), 573 F. Supp. 2d 221 (D.D.C. 2008).

33. *Id.* at 228-230, 283.

34. *See* H.R. REP. NO. 109-478, at 25-31.

whites were more than 5% higher than the corresponding rates for black voters. The District Court for the District of Columbia observed that the disparities in voter registration and turnout were comparable to those found to be significant in the Supreme Court's ruling in *City of Rome v. United States*,[35] which upheld the constitutionality of section 5.

The D.C. court in *NAMUDNO I* also considered whether or not there had been a significant increase in the number and proportion of minority elected officials.

When the Voting Rights Act was passed in 1965, there were only seventy-two black elected officials in the eleven covered states. The evidence before Congress at the time of the 2006 authorization indicated that the number of black elected officials had increased dramatically, but the percentage of statewide elected officials who were African American was 5%, still significantly below the African American proportion of the voting age population, which was 12%.

The House Judiciary Committee found that in Mississippi, Louisiana, and South Carolina no African American ever had been elected to statewide office. In Alabama only two African Americans ever had been elected to statewide office as of 2006.

In addition, in Alabama, Georgia, Louisiana, Mississippi, South Carolina, and North Carolina, where blacks comprised 35% of the average population, only 20.7% of state legislators were black. The House Committee also found that the number of Latino elected officials had failed to keep pace with Latino population growth.[36]

The court found, relying on the Supreme Court's opinion in *City of Rome*, that it was significant that the percentage of minority-elected officials continued to lag behind the minority percentage of the population when section 5 was reauthorized in 2006.

Finally, the three-judge district court considered the number of objections asserted by the Justice Department to proposed changes in voting laws in the covered jurisdictions. In 2006, Congress determined that more objections were interposed by the Attorney General between 1982 and 2004 than in the period between 1965 and the 1982 reauthorization. The court also noted that an objection to a minor procedural change by a small utility district is far less significant than an objection to a statewide redistricting plan, yet each counts as one objection. Congress also heard testimony, according to the court, about many Justice Department objection letters that summarized evidence of apparent intentional discrimination, which led the House committee to determine that covered jurisdictions continue to "'intentionally develop' voting changes 'to keep minority voters and candidates from succeeding in

35. City of Rome v. United States, 446 U.S. 156 (1980).

36. *See generally* H.R. REP. NO. 109-478.

the political process.'"[37] Although the rate of objection always has been low and has declined steadily over time—remaining at less than 1% since 2002—there were more than 600 objections by the Justice Department to voting changes between 1982 and 2004. In Louisiana alone the Justice Department objected to eighty-three voting changes between 1982 and 2004, which included every Louisiana congressional redistricting plan submitted for preclearance. The court also pointed out that the Attorney General frequently responds to preclearance requests by sending "more information requests" ("MIRs") to the applying jurisdiction requesting additional information to allow the Department to determine whether preclearance is appropriate. A large number of these MIRs have resulted in the jurisdiction either withdrawing the requested change or filing an amended plan. The district court noted that in addition to 792 objections filed by the Attorney General between 1982 and 2006, 855 requests for preclearance were withdrawn or amended as a result of requests for additional information, a circumstance found by Congress to be persuasive about the need for the continuation of section 5.

Based substantially on the foregoing findings, the three-judge district court upheld the constitutionality of the 2006 reauthorization of the Act.

A collateral issue in connection with the 2006 reauthorization was whether the coverage formula should have been updated, and several witnesses testified before Congress recommending a more current date for the coverage formula. However, a bill to change the coverage formula and update it was rejected by Congress, with the result that the critical date for coverage remained as 1972.

The *NAMUDNO I* case was appealed to and argued before the United States Supreme Court in April 2009.[38]

Several of the Justices displayed significant skepticism about the constitutionality of the 2006 reauthorization. Chief Justice Roberts pointed out that only one-twentieth of 1% of all preclearance submissions were not precleared.[39] That suggested to him that Congress had legislated too broadly.

Chief Justice Roberts also noted that the Act originally was authorized for five years and then extended and then extended again, and he observed that it begins to "look like the idea that this is going

37. *NAMUDNO I*, 573 F. Supp. 2d at 252 (quoting H.R. REP. No. 478) (alterations in original).

38. Nw. Austin Mun. Util. Dist. No. One v. Mukasey (*NAMUDNO II*), 129 S. Ct. 2504 (2009).

39. Transcript of Oral Argument at 27, *NAMUDNO II*, 129 S. Ct. 2504 (No. 08-322).

to go on forever."[40]

Justice Kennedy observed, "Congress has made a finding that the sovereignty of Georgia is less than the sovereign dignity of Ohio," and "[t]he sovereignty of Alabama was less than the sovereign dignity of Michigan."[41] He observed that this is a great disparity in treatment, and the government of the United States is saying that our states must be treated differently. He said to the Government's lawyer: "And you have a very substantial burden if you're going to make that case."[42]

And yet, despite extremely hostile questioning from four members of the Court, the Justices, in an 8-1 decision, avoided the constitutional issue and instead held that the Northwest Austin Municipal Utility District had the authority to bail out from the provisions of the Voting Rights Act.[43] Justice Thomas, dissenting, would have invalidated section 5.

In the Court's disposition of *NAMUDNO II*, Chief Justice Roberts observed that the VRA's preclearance requirements and its coverage formula raise serious constitutional questions, but he went on to determine that the court did not need to decide the constitutional issue because the case could be resolved by determining whether or not *NAMUDNO* was eligible for bailout.

His opinion noted that section 4b of the Act authorized a bailout either by a state or political subdivision. Although describing *NAMUDNO* as a political subdivision of Texas in the ordinary sense of the term, he acknowledged that pursuant to section 14(c)(2) of the Act *NAMUDNO* did not meet the statutory definition. That section provides:

> '[P]olitical subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.[44]

The district court had concluded that the district did not meet the standard because it was neither a county nor a parish and did

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40. *Id.* at 32.

41. *Id* at. 34.

42. *Id.*at 35. Interestingly, Justice Kennedy used very similar language when he questioned Solicitor General Verelli in the health care case. *See Center for Constitutional Jurisprudence Argues Against Obamacare*, THE CLAREMONT INST., http://www.claremont.org/projects/pageid.2731/default.asp (last visited Sept. 7, 2012) ("Assume for the moment that this is unprecedented, this is a step beyond what our cases have allowed, the affirmative duty to act to go into commerce. If that is so, do you not have a heavy burden of justification? . . . [W]hen you are changing the relation of the individual to the government in this . . . unique way, do you not have a heavy burden of justification to show authorization under the constitution?").

43. *NAMUDNO II*, 129 S. Ct. at 2516.

44. 42 U.S.C. § 1973l(c)(2) (2006).

not conduct its own voter registration.[45]

Nevertheless, Chief Justice Roberts noted that in *United States v. Board of Commissioners*, the Court had held that the City of Sheffield was subject to section 5's preclearance provision, which applied only to states or political subdivisions, even though Sheffield was neither a state nor a political subdivision.[46] In *Sheffield*, the Court determined that the definition of political subdivision "was intended to operate only . . . [to] determine[] which political units in nondesignated States may be separately designated for coverage under" the Act.[47]

Based on *Sheffield*, Chief Justice Roberts concluded that the statutory definition of political subdivision in section 14(c)(2) does not apply to every use of that term in the Voting Rights Act.[48]

The Government argued that in *City of Rome*, the Court had concluded that a political subdivision of the State of Georgia could not independently bring a bailout action because the statute, as then written, authorized bailout suits only by a state, or by a political subdivision with respect to which a coverage determination had been made as a separate unit. Under the statute then in effect, political subdivisions that were covered because they were part of a covered state could not separately bail out.

However, in 1982 Congress may have repudiated *City of Rome* when it amended the Act to "expressly provide that bailout" also was available to "'political subdivisions' in a covered State, [even] 'though [coverage] determinations were *not* made with respect to such subdivision as a separate unit.'"[49] In other words, the Chief Justice noted that Congress determined that "a jurisdiction covered because it was within a covered State need not remain covered for as long as the State did," provided it met the bailout requirements.[50]

Chief Justice Roberts concluded that the Court's reasoning in *City of Rome* was no longer applicable. He added that bailout and preclearance under section 5 now are symmetrical. Since "all political units in a covered State are . . . treated for §5 purposes as [if] they were 'political subdivisions,'" he concluded that "they should also be treated as such for purposes of [the] bailout provision[]."[51]

Some observers regarded the Chief Justice's interpretation of section 4 in *NAMUDNO II* as a stretch and as a deliberate effort to

45. *NAMUDNO I,* 573 F. Supp. 2d 221, 232 (D.D.C. 2008).

46. *NAMUDNO II*, 129 S. Ct. at 2514.

47. United States v. Bd. of Comm'rs. of Sheffield, 435 U.S. 110, 129 (1978).

48. *NAMUDNO II,* 129 S. Ct. at 2515.

49. *Id.* (quoting 42 U.S.C. § 1973b(a)(1) (2006) (first alteration added)).

50. *Id.*

51. *Id.* at 2516 (quoting City of Rome v. United States, 446 U.S. 156, 192 (1980) (Stevens, J., concurring)).

avoid reaching the constitutional issue. If that were so, it is an understandable stretch, because a decision invalidating the Voting Rights Act would be regarded by many as a rejection by the Court of an enormously popular, important, and historic congressional enactment.

But despite the Court's avoidance of the constitutional issue in *NAMUDNO II*, a number of cases currently pending around the country are directly challenging the constitutionality of Congress's 2006 reauthorization of the Voting Rights Act and, specifically, the constitutionality of section 5.

A case entitled *Shelby County v. Holder* was decided by the District Court for the District of Columbia in September 2011 and rejected a facial challenge to the constitutionality of section 5.[52] The District of Columbia Court of Appeals heard oral argument on January 19, 2012, and decided to uphold the 2006 reauthorization of the Voting Rights Act on May 18, 2012.[53] As expected, Shelby County has petitioned the United States Supreme Court for certiorari.[54]

In addition, the State of Texas filed a declaratory judgment action on January 24, 2012, in the District Court for the District of Columbia asserting that its new photo identification law is entitled to preclearance.[55] The Attorney General, on March 12, 2012, objected to preclearance of the voter ID law in a letter signed by Assistant Attorney General Thomas Perez, today's keynote speaker.[56] In its letter objecting to preclearance, the Justice Department noted that a Hispanic voter in Texas "is 46.5[%] more likely than a non-Hispanic voter to lack" the forms of identification required to vote. The Justice Department also noted that 29% of the registered voters in Texas without the required identification were Hispanic, even though Hispanic voters represent only 21.8% of the registered voters.

No data was provided by Texas concerning whether African American or Asian voters were disproportionately affected by the voter ID law. The Attorney General concluded that the State had "not met its burden of proving that . . . the proposed [ID] requirement

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52. 811 F. Supp. 2d 424, 492 (D.D.C. 2011), *aff'd*, 679 F.3d 848 (D.C. Cir. 2012).

53. *See* Shelby Cnty. v. Holder, 679 F.3d 848 (D.C. Cir. 2012).

54. Petition for Certiorari, Shelby Cnty. v. Holder, No. 12-96 (U.S. July 20, 2012), *available at* http://www.projectonfairrepresentation.org/wp-content/uploads/2008/08/Shelby-County-v-Holder-Petition-for-a-Writ-of-Certiorari.pdf.

55. Expedited Complaint for Declaratory Judgment, Texas v. Holder, No.12-cv-00128 (D.D.C. Mar. 12, 2012), *available at* https://www.oag.state.tx.us/newspubs/releases/2012/031412txvotingrights.pdf.

56. Letter from Thomas E. Perez, Assistant Attorney General, Dept. of Justice, to Keith Ingram, Dir. of Elections, Office of the Tex. Sec'y of State (Mar. 12, 2012) (on file with U.S. Department of Justice), *available* at http://d2o6nd3dubbyr6.cloudfront.net/media/documents/2011-2775_ltr.pdf.

will not have a retrogressive effect" on the ability of minority voters to participate in elections. Therefore, the Attorney General objected to the adoption of the voter ID law.

The Texas case has an expedited discovery schedule. The Government is attempting to bifurcate the preclearance and the constitutional issues, and a trial began on July 9, 2012.[57] Because Texas would be entitled to a direct appeal to the United States Supreme Court, the case could reach the Court sometime during the term beginning in October 2012.

In addition there are pending cases filed by South Carolina and Florida. The South Carolina suit challenges the Justice Department's denial of preclearance for South Carolina's new photo ID law.[58] The complaint that is currently filed does not raise a constitutional issue, but it is likely that a constitutional issue will be asserted as the case proceeds.

In addition, in August 2011 Florida filed a declaratory judgment seeking preclearance of changes to Florida election law or, in the alternative, a declaration that section 5 is unconstitutional.[59] The case was bifurcated so that the preclearance issue would be decided before the constitutional issue. Discovery on the preclearance issue has been completed, and a trial schedule has not yet been set.

Ironically, the rash of voter ID laws enacted throughout the country may, sooner or later, change the context that determines whether section 5 is constitutional. Currently, the record before Congress in 2006 did not include the recent data concerning the proliferation of voter ID laws. According to the Brennan Center for Justice, voter ID laws have been signed into law in seven states during 2011: Alabama, Kansas, Rhode Island, South Carolina, Tennessee, Texas, and Wisconsin.[60] Prior to that only Indiana and Georgia had adopted voter ID laws.[61] In addition, voter ID legislation has been introduced in at least twenty-seven additional states.[62] To the extent that voter ID laws are introduced in covered

57. Rachel Weiner, *Texas Case Puts Voter ID Laws to Test*, WASH. POST (July 9, 2012, 2:26 PM), http://www.washingtonpost.com/blogs/the-fix/post/texas-case-puts-voter-id-laws-to-test/2012/07/09/gJQAJJufYW_blog.html.

58. Complaint, South Carolina v. United States, No. 1:12-cv-203 (D.D.C. Feb. 7, 2012).

59. Complaint, Florida v. United States, No. 1:11-CV-01428 (D.D.C. Aug. 1, 2011); *see also* First Amended Complaint, Florida v. United States, No. 1:11-CV-01428 (D.D.C. Oct. 11, 2011).

60. *Summary of Voter ID Laws Passed*, BRENNAN CTR. FOR JUSTICE, http://brennan.3cdn.net/71d8c8a3f9ff136320_tem6bnk3g.pdf (last visited Sept. 7, 2012).

61. *See* GA. CODE ANN. § 21-2-417 (2008); IND. CODE § 3-5-2-40.5 (2006).

62. *2012 Summary of Voting Law Changes*, BRENNAN CTR. FOR JUSTICE (Aug. 31, 2012), http://www.brennancenter.org/content/resource/2012_summary_of_voting_law_changes/; *see, e.g.*, H.B. 3058, 97th Gen. Assemb., Reg. Sess. (Ill. 2011); H.P. 176,

jurisdictions under the Voting Rights Act, and the Attorney General determines that such laws may diminish participation in elections by minorities, the enactment of those laws persuasively could demonstrate the continuing need for section 5.

CONCLUSION

I think it is reasonable to assume that the Voting Rights Act will be back before the Supreme Court sometime during the 2012-2013 term for a determination about the constitutionality of section 5. Justice Thomas made his position clear by writing a dissent in *NAMUDNO*. And as we know from *NAMUDNO*, there seems to be substantial hostility to the law on the part of the other four of the Court's conservative Justices.

Two factors may give the court pause. One is that this rash of voter ID laws has made it clear that in many states, including covered states, these laws masquerade as clean election laws when their real purpose is to reduce minority participation in elections. The Court will understand that if it invalidates section 5, the enactment of so many voter ID laws may very well motivate Congress to reenact or amend the Voting Rights Act based on a more expansive record that includes the voter ID laws.

The other factor that may affect the Court's disposition is that bailouts undoubtedly are going to be much more frequent over the next several years. Since *NAMUDNO*, the rate of successful bailout petitions has accelerated significantly, with twelve petitions having been granted between October 2010 and April 2012. The plaintiff's brief in *NAMUDNO* argued that a broader availability of bailout would make it harder to invalidate section 5. Although that may not change the Court's disposition, certainly it is an argument that was unavailable in *NAMUDNO*.

But very much a part of the entire equation is that this is a historic and transformational law. It occupies a very special place in our nation's struggle to eradicate the obstructions to minority voting rights that endured for a century after the end of the Civil War. The Supreme Court will pay a price if it invalidates the most important section of one of the most influential and socially revolutionary laws ever passed by Congress. The Court may well follow its expressed instincts and invalidate section 5 of the Voting Rights Act. But my hope is that Congress will have the last word.

125th Leg., Reg. Sess. (Me. 2011); H.B. 113, 431st Gen. Assemb., Reg. Sess. (Md. 2012).