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Before the Senate Committee on the Judiciary

Subcommittee on the Constitution, Civil Rights and Property Rights

**“The Continuing Need for Federal Examiners and Observers to Ensure
Electoral Integrity”**

**Hearing on S. 2703
Federal Observer Provisions**

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Introduction

My perspective regarding the value and continuing significance of the federal observer program is shaped by personal and professional experiences with the electoral process in the State of Mississippi. I graduated from Tougaloo College in Tougaloo, Mississippi in 1967, and was the first African-American female to receive a law degree from the University of Mississippi School of Law in January 1970. In addition, I completed an intensive three-month program at Harvard University and received a criminal law certification from Northwestern University. Finally, I attended the Institute of Politics at Millsaps College in Mississippi and graduated from this program in the early 1970s.

I have extensive experience in the field of voting rights and general civil rights litigation. Following my graduation from law school, I served as a staff attorney with the Lawyers' Committee for Civil Rights under Law between 1970 and 1972. I also worked with lawyers Frank Parker, Carroll Rhodes and Ellis Turnage to file various redistricting lawsuits around the state. In 1976, I became the first African-American to serve as a judge in the State of Mississippi when I received a Special Chancellor appointment in a child custody matter in Scott County. I have also held a number of leadership roles in the non-profit legal sector including the Southern Legal Rights Association and East Mississippi Legal Services. In 1980, I became Executive Director of the Governor's Office of Human Development under the William Winter administration. Between 1984 and 1989, I served as the Assistant Secretary of State for Elections and Public Lands, and between 1989 and 1996 served as the Assistant Secretary of State for Elections and General Counsel. In this capacity, I worked closely with the U.S. Department of Justice,

and with local officials and voters around the state on issues connected to voting and elections.

In 1996, I returned to private practice in Forest, Mississippi and continue this practice today. I have also held a number of concurrent roles including serving as the President of “Elections, Inc.,” a think tank that focuses on voting and election-related issues, and as President of the National Association of State Election Directors. In addition, I have also served as a long-time Adjunct Professor of Pre-Law at Tougaloo College.

Past Discrimination Giving Rise to the Federal Observer Provisions

Throughout the course of history in Mississippi, local officials have gone to great lengths to restrict minority voters’ access to the ballot box and dilute African-American voting strength. Tactics used by officials have included changing the method of election, cracking and packing Black constituencies, adopting discriminatory polling place changes, intimidation, and harassment. This history surrounding official obstruction of Black voting rights in Mississippi and other Southern states provided the central evidence that Congress considered when adopting the Voting Rights Act in 1965. Nonetheless, following the passage of the Act in 1965, an all-white legislature in the State of Mississippi passed a series of bills aimed at undermining the goals of the Act. Some of these laws changed the method of election for many offices while other laws converted single-member districts to at-large systems. In addition, district lines were drawn to fragment cohesive African-American population centers. After adopting these laws, the state chose not to submit any of these voting changes for preclearance as required under

the Voting Rights Act. This defiance led to the Court's ruling in *Allen v. State Board of Elections*,¹ compelling the state to comply with the preclearance mandates of the Act. In addition, in *Perkins v. Matthews*,² the Court made clear that changing polling place locations and altering boundary lines through annexation were also subject to preclearance under the Voting Rights Act.

Moreover, the battle over dual registration shows how Mississippi, even in its more recent history, has continued to defy the protections codified within the Voting Rights Act. Indeed, for nearly a century, up until 1988, Mississippi had a dual registration requirement that obligated voters to register separately for state and municipal elections. Eventually, a federal district court found that the original version of this dual registration requirement, enacted in 1890, had been "adopted for a racially discriminatory purpose" and that a revised version of the dual registration requirement, adopted in 1984, violated Section 2 of the Voting Rights Act. In particular, the court noted that the requirement "result[ed] in a denial or abridgement of the right of black citizens in Mississippi to vote and participate in the electoral process."³

Significantly, the *PUSH* court also found that in Mississippi "[b]lacks ... continue to face disproportionate economic and educational levels resulting from past discrimination which inhibits their political participation," and that "administrative barriers," such as dual registration, were "harder to overcome for persons of lower socio-economic status and persons of lower educational attainment, a group that is

¹ 393 U.S. 544 (1969).

² 400 U.S. 379 (1971) (finding that each of the challenged changes falls within 5 as a "standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," and requires preclearance before they can be put into effect).

³ *Operation PUSH v. Allain*, 674 F. Supp. 1245, 1252 (N.D. Miss. 1987), *aff'd sub nom.* *Operation PUSH v. Mabus*, 932 F.2d 400, 413 (5th Cir. 1991). Ironically, our office was one of the named defendants in the suit.

disproportionately black."⁴ The court also found that the registration rate among black citizens lagged some 25 percentage points behind the registration rate of white citizens (54 percent for blacks in comparison to 79 percent for whites).⁵ Finally, the *PUSH* court also found that in Mississippi "the widespread variations among counties in voter registration practices ... may result in the unequal treatment of similarly situated persons" and that "[u]nfettered discretion in voting registration procedures unnecessarily restricts access to the political process."⁶ As jurisdictions throughout Mississippi have come to grips with the court's ruling in *PUSH*, federal observers have played an important role in providing oversight to help ensure that jurisdictions throughout the state do not continue to deny minority voters access to the ballot box.

Resistance on multiple levels to court rulings such as *PUSH* and to the preclearance requirements of the Voting Rights Act have resulted in litigation and enforcement actions to ensure compliance with the Act.⁷ The *PUSH* ruling and ensuing battles that followed, all occurring after the 1982 renewal, speaks volumes about continued voting discrimination in the State of Mississippi.

When the Act was passed in 1965, there was not a single black elected official beyond the all-black Delta town of Mound Bayou. Today, Mississippi has elected more African-American local and state legislators, judges, and other officials than any other state. Despite this progress, today Mississippi remains one of the poorest states in the country and its 36 percent Black population constitutes the largest proportion of all states.

Although it is important to recognize the advancements that have been made within

⁴ Id. at 1255-56.

⁵ Id. at 1253-55

⁶ Id. at 1267.

⁷ Brenda Wright, Mississippi Hearings of the National Commission on the Voting Rights Act (October 29, 2005).

Mississippi with respect to minority voting rights, there are still recent examples of continued voting discrimination. This discrimination impedes the ability of Black voters to cast an equal and meaningful ballot. The impact of this discrimination is demonstrated by the fact that no African-American candidate has won statewide office since Reconstruction.⁸ It is also illustrated by the use of racial appeals in election campaigns, and the significant number of objections interposed by the Department of Justice to retrogressive voting changes. Indeed, the Jackson-Clarion Ledger recently highlighted the persisting nature of discrimination in Mississippi in a May 21, 2006, editorial.⁹

Ongoing Voting Discrimination in the State of Mississippi

The legacy of past and present voting discrimination in covered jurisdictions helps illustrate the continuing need for the federal observer provisions of the Voting Rights Act. So long as voting discrimination persists, there remains the potential for harassment, intimidation and other obstructionist tactics to emerge during the course of an election. The federal observer provisions serve as a safeguard against these problems by providing an effective oversight mechanism to protect minority voters' access to the ballot box.

To illustrate the connection between ongoing voting discrimination and the electoral process, it is useful to look at levels of racially polarized voting within covered

⁸ Despite several state-wide campaigns by overly qualified African-American candidates (such as Gary Anderson, Henry Kirskey, Barbara Blackmon, etc.), Mississippi has yet to elect any Black officials on a state-wide basis.

⁹ See Editorial, The Jackson Clarion-Ledger, Voting Rights Act Should be Continued (May 21, 2006) (noting the “[s]tate has made tremendous progress in race relations and has a record of which it can boast, including having the highest number of black elected officials in the country. But it also has some issues, of fact and history, including the fact that no black candidate has won a statewide office since the beginning of the 20th century.”)

jurisdictions. In my view, voting has been and remains significantly racially polarized in the State of Mississippi. Although the Voting Rights Act has helped increase the numbers of African-Americans serving in local and state governments, many of those who have been successful represent majority Black districts. Levels of persistent racial polarization are reflected in a number of recent court decisions. For example, in *Jordan v. Winter*, a case challenging the redistricting plan for the state's congressional districts, a three-judge district court concluded that "blacks consistently lose elections in Mississippi because the majority of voters choose their preferred candidates on the basis of race."¹⁰ In *Martin v. Allain*, a statewide challenge to the election of state trial court judges from multi-member districts, the federal district court noted that "racial polarization exists throughout the State of Mississippi." The court also noted that these patterns were particularly severe in inter-racial contests noting that "blacks overwhelmingly tend to vote for blacks and whites almost unanimously vote for whites in most black versus white elections."¹¹ Racial polarization has also been confirmed in a number of decisions involving challenges to local redistricting.¹²

I believe that current levels of voting discrimination are connected to the legacy of racial discrimination in the State of Mississippi. This discrimination provides the context that led to Congress' enactment of the federal observer provisions of the Act.

¹⁰ 604 F. Supp. 807, 812-813 (N.D. Miss. 1984) (three-judge court), aff'd 469 U.S. 1002 (1984).

¹¹ *Martin*, 658 F. Supp. At 1193.

¹² See generally, *Houston v. Lafayette County*, 20 F. Supp. 2d 996 (N.D. Miss. 1998); *Teague v. Attala County*, 92 F. 3d 283 (5th Cir. 1996), cert. denied, 522 U.S. 807 (1997); *Clark v. Calhoun County*, 88 F. 3d 1393 (5th Cir. 1996); *Ewing v. Monroe County*, 740 F. Supp. 417 (N.D. Miss. 1990); *Gunn v. Chickasaw County*, 705 F. Supp. 315 (N.D. Miss. 1989); *Jordan v. City of Greenwood*, 599 F. Supp. 397 (N.D. Miss. 1984).

This discrimination also provides sufficient evidence of the continuing need for the expiring federal observer provisions.

Purpose of and Authority for the Federal Observer Program

Since the Act was passed in 1965, the Civil Rights Division of the U.S. Department of Justice has coordinated a program to deploy federal observers to monitor local, state and federal elections. The federal observer program allows federal observers to enter polling places to monitor, report, and document their observations about the election process. Authority for deploying federal observers is codified within Section 8 of the Voting Rights Act. Generally, election observers are deployed to those jurisdictions where (1) either the Department of Justice's independent investigation revealed a possibility of intimidation or harassment of minority voters, or other significant problems that might bar minority voter access; or (2) where a significant number of aggrieved citizens in certified jurisdictions file viable complaints with the Department of Justice regarding the potential for serious Election Day problems.

The federal observer provisions of the Act were specifically designed to ensure that newly enfranchised African-American citizens would be able to vote free from discrimination, intimidation, or harassment. The observer provisions have helped protect the integrity of the electoral process by ensuring that there is an effective means of providing oversight where potential problems are likely to emerge.

The Attorney General's authority to certify jurisdictions for federal observers is limited to certain "covered" jurisdictions, many of which are in the State of Mississippi. However, jurisdictions can be newly designated as eligible for federal observer coverage

by order of a federal court. Courts can designate jurisdictions for this coverage if a meritorious lawsuit has been brought by the Department of Justice or by private citizens showing violations of the voting guarantees of the Fourteenth or Fifteenth Amendments. This feature of Section 8 of the Act helps ensure that the designated list of jurisdictions eligible for federal observer coverage is appropriately revised and amended over the course of time. Indeed, many jurisdictions that are designated for observer coverage today became so following recent litigation alleging various forms of voting discrimination.¹³

The Role of Federal Observers in Mississippi

Federal observers have played a unique and extensive role monitoring local, state and federal elections throughout the State of Mississippi. Since 1982, federal observers have been deployed to 48 of the state's 82 counties.¹⁴ In total, federal observers have monitored elections in Mississippi on more than 250 occasions since the 1982 renewal – the highest number of deployments of all covered states.¹⁵ Indeed, Mississippi accounts

¹³ See e.g., *United States v. Berks County, Pennsylvania*, 277 F.Supp.2d 570 (E.D.Pa. 2003) (court found evidence that minority voters in Reading have enjoyed less opportunity than other voters to participate in the political process in past elections and that these harms would likely occur in future elections if Defendants follow their past policies and practices, *citing* *Berks County*, 250 F.Supp.2d at 541. In order to enforce the voting guarantees of the Fourteenth and Fifteenth amendments to the United States Constitution, the court authorized the Director of the Office of Personnel Management to appoint Federal examiners in accordance with section 42 U.S.C. § 1793d to serve through June 30, 2007, in the City of Reading, County of Berks, Pennsylvania. During the service of the examiner, the Director of the Office of Personnel Management, at the request of the Attorney General, may assign one or more persons, who may be officers of the United States, to enter and observe election and ballot tabulation procedures pursuant to Section 8 of the Voting Rights Act, 42 U.S.C. § 1973f; and Department of Justice personnel, including attorneys and staff members, shall be permitted into the polling places for the purpose of coordinating the work of the federal observers.)

¹⁴ See *The Voting Rights Act and Mississippi 1965-2006*, Robert McDuff, at 16 (2006)

¹⁵ See National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act, 1982-2005*, at 59-61 (2005).

for 40 percent of all federal observer deployment efforts since 1982. Moreover, many of these jurisdictions have been the subject of multiple observer deployments during that time period. It is worth noting that observers have monitored 19 elections in Sunflower County, 17 elections in Noxubee County and 16 elections in Bolivar County. Multiple observer deployments may provide an indication that a jurisdiction is somewhat hostile to the protections afforded by the Voting Rights Act or illustrate the degree of racial tension and intimidation experienced by voters in an area.

During my twelve years (1984-1996) as Assistant Secretary of State for Elections, my staff and I coordinated Election Day activities and worked with election officials on the municipal, county, state, and federal levels. During my tenure, I established procedures for conducting professional, open, and honest elections throughout the state. I helped implement an annual training program for local election administrators and organized voter registration conferences throughout the state. Our administration also took the federal observer provisions of the Act seriously and sought to avail ourselves of the protections afforded by the Act when appropriate. To this end, I developed Election Day complaint forms that could be used by voters or officials to document specific voting-related complaints. Our office not only received complaints from voters, but also from local and state officials. These complaints varied in range and scope. Some reported that officials selectively refused to provide voters with assistance they needed to cast their ballots while others reported illegal purges and outright denial of a ballot to a qualified voter. Often, when these problems occurred, voters were not provided any explanation or justification for the denial.

When our office received complaints regarding potential problems likely to emerge during an election, we contacted local officials and attempted to resolve the problems. In addition, we also worked closely with officials at the U.S. Department of Justice and, when appropriate, formally requested that federal observers be deployed to a particular area. Our efforts helped open dialogue between federal and local officials to try and identify ways to resolve problems prior to Election Day. Often, officials from the federal government would apprise local officials about the requirements of the Voting Rights Act and secured commitments from these officials that elections would be conducted accordingly.

However, when information reported by local leaders, officials, and voters suggested that a particular election was hotly contested and racially heated, our office would formally request that observers be deployed to address any potential intimidation or other impermissible activity likely to emerge on Election Day. In our office, we sometimes called federal observers “federal protectors” because we believed that they helped ensure the integrity of an election. Our requests to the Department of Justice were often substantiated with particularized information including detailed descriptions of the allegations and a list of community contacts in the area.¹⁶ My staff and I worked closely with the United States Justice Department officials and appreciated that the federal government would lend its resources to provide oversight during elections in our state.

¹⁶ For example, in recent years, the Magnolia Bar Association (the state’s African-American Bar Association) has trained attorneys and paralegals to monitor local elections especially in areas where there is a history of voter harassment and intimidation. This is a special project of the Magnolia Bar Association which became necessary with the increase of sophisticated forms of voter intimidation and harassment at the polling places. The presence of groups such as the Magnolia Bar Associations helps ensure that voter’s complaints on the ground get delivered to federal officials who are positioned to call for observer deployment.

Barry Weinberg and John Tanner were among those officials with whom I had a good working relationship.

In my experience, federal observers have served as a buffer between African-Americans and local election officials, many of whom were, and remain, disproportionately white. The mere suggestion that local voters might call on the Department of Justice to deploy federal observers has served as an effective tool to ensure that local election officials comply with the election code, and provide equal and fair access to all eligible voters. When local officials are placed on notice that their actions, as well as the conduct of the election itself, are being monitored, there have been noticeable and significant improvements in the quality of the electoral process.

In addition, the federal observer program has helped increase and strengthen confidence levels among those Black voters and community leaders who go to great lengths to file complaints about the problems that are likely to emerge during the course of an election. When observers are deployed, Black citizens have confidence that these complaints have been taken seriously and that the mandates set forth in the Reconstruction Amendments of the U. S. Constitution will be carried out.

Election-Day Problems: Reports from the Field

Sunflower, Mississippi

Since the 1982 renewal, federal observers have been deployed on numerous occasions to Sunflower, Mississippi.¹⁷ Former DOJ attorney Thomas Reed coordinated

¹⁷ See The Voting Rights Act and Mississippi 1965-2006, at 15 (2006) (noting that the repeated placement of federal observers in a particular area is some indication of the potential for discrimination in that area and the need for oversight and monitoring to ensure fairness at the polling place.)

and supervised many of these deployments.¹⁸ The decision to send observers to the region are based, in part, on evidence of persisting voting discrimination in the region and on credible and consistent reports received from voters. In one instance, observers were sent to monitor elections because of reports indicating that local law enforcement officers were intimidating minority voters by stationing themselves at polls in prior elections. In particular, Sunflower residents alleged that law enforcement officers were arresting voters at the polls for traffic violations and other minor offenses. Others alleged that the sheriff and local deputies were aggressively searching for individuals with outstanding warrants at polling sites. Federal observers were deployed, in part, to monitor for unwarranted police presence at polling sites and to help restore voter confidence in the electoral process.

On another occasion, observers were deployed to monitor a racially heated inter-racial mayoral contest. In particular, a viable African-American candidate was challenging the white incumbent. The white incumbent was known to espouse “reactionary ideas” with respect to African-Americans and was not a candidate of choice within the minority community.¹⁹ Beyond her political views, voters complained that the incumbent was using her misguided interpretation of state election law and her strong local ties to both serve as a poll watcher inside polling places and to encourage poll watchers to aggressively challenge Black voters. Federal observers closely monitored activity during the course of the election and were able to document evidence that suggested poll watchers were selectively challenging minority voters and, more often than not, mounting groundless challenges. Poll watchers challenged the registration

¹⁸ Interview with Thomas Reed, Former DOJ Attorney (July 7, 2006).

¹⁹ Id.

status of minority voters and alleged that voters eligible to vote in county elections were ineligible to vote in city elections. Although the observers could not interfere with the process, their presence often helped discourage particularly aggressive poll watchers and helped elevate confidence levels among affected minority voters.

Federal observer coverage in Sunflower also helped identify systemic deficiencies such as improperly or poorly trained poll workers. Indeed, observers identified a number of instances in which workers inappropriately applied provisions of the election code to the disadvantage of the voter. Often, the DOJ supervising attorney was able to meet with local officials during the course of an election to discuss the problems identified by observers and help correct these problems prior to any subsequent election. However, without the information documented and provided by observers, such negotiations would have proven difficult. Indeed, the experience in Sunflower, Mississippi illustrates the deterrent value of the observer program and the continuing need for federal oversight to ensure that minority voters are able to access polling sites and cast their ballots.

Clarksdale, Mississippi

The experience in Clarksdale, Mississippi illustrates the value of the federal observer program in providing necessary oversight to help prevent mischief that might occur otherwise.²⁰ Black voters in Clarksdale have raised concerns about a number of practices that warrant oversight of its electoral process, including a purge in the last several years that removed a disproportionate number of eligible Black voters from the rolls. During a recent election, poll workers at a majority African-American precinct failed to offer affidavits to voters without proper identification. However, the presence of

²⁰ Interview with Reubin Smith, Registered Voter and Volunteer Poll Watcher in Clarksdale, Mississippi (July 7, 2006).

federal observers helped correct the problem to ensure that all eligible voters were ultimately able to cast their ballots. Black voters in Clarksdale have indicated that the federal observer program has helped increase voter confidence in the face of otherwise intimidating and impermissible activity.²¹ For instance, during a recent election, federal observers documented heavy police presence at majority Black precincts and no such presence at majority white precincts. Ultimately, this intimidating behavior did not depress minority voter turnout because many were aware that federal observers were closely monitoring the process and ensuring voter access.

Philadelphia, Mississippi

Nine counties in Mississippi are required to make their election-related materials available in the Choctaw language. Federal observer deployment has helped bring greater levels of encouragement among many of these voters who require effective language assistance to cast their ballots. Indeed, these bilingual observers have served as "eyes and ears" over the process – ensuring that local officials carry out a smooth language assistance program.²² In many of these communities, Choctaw voters have extended great appreciation to federal observers as this oversight had a measurable impact on voter confidence and turnout levels.

Greenwood, Mississippi

Corrupt election-day activity still exists in Mississippi, especially in the Delta region of the state, where increasing numbers of viable Black candidates are mounting challenges to long-term white incumbents. These contests often are very racially heated raising the specter for Election Day impropriety and tactics aimed at discouraging Black

²¹ Interview with Buster Moton, City Commissioner in Clarksdale, Mississippi (July 7, 2006).

²² Interview with Ana Henderson, Former DOJ Attorney (July 6, 2006).

voter turnout. One recent case involves the mayoral contest in Greenwood, Mississippi. A legal challenge to this election is now pending before the Mississippi Supreme Court. In May 2006, former Black councilwoman, Sheriel Perkins, challenged long-standing incumbent Harry White. Although election night results indicated that Perkins was the winner, White was ultimately declared the winner after a series of problems were identified with affidavit, curbside and absentee ballots. Perkins brought a challenge to the election that is currently pending before the Supreme Court. Indeed, federal observer presence would have helped protect the integrity of this election and instill voter confidence in the outcome.

Tunica, Mississippi

During a 1991 primary election in Tunica County, Mississippi, voters reported various complaints that led to a formal request for federal observer deployment during the general election. Among the numerous complaints received, some included concerns about potential tampering with absentee ballots, candidates' names omitted from ballots and intimidating poll watchers who prevented concerned voters from investigating these potential improprieties. This election also illustrates the value of the federal observer program, as monitors could have provided sufficient documentation of these problems to help in efforts to seek post-electoral relief.

Grenada, Mississippi

Federal observers have been deployed on a number of occasions to Grenada, Mississippi, and have played a significant role in helping to quell racial tensions preceding elections, and, by working with DOJ attorneys, helping resolve problems as

they occur during an election.²³ During a recent August 1999 primary election in Grenada, white poll watchers showed up at polling sites with cameras that were used only to take pictures of Black voters who needed assistance casting their ballots. This selective behavior proved intimidating to Black voters. Here, no formal follow-up steps needed to be taken by the Department of Justice or other officials because as soon as these individuals found out that there were federal observers monitoring the election, they left the polling site. Indeed, this example illustrates the deterrent effect and value of the federal observer program.

In the absence of federal observers, there were also problems in Grenada that have gone unaddressed. For example, during a recent election, there was a racially heated bond issue on the ballot that, if successful, would have led to the closing of a predominantly Black school and greater funding for white schools.²⁴ The bond required more than 65 percent support from voters to pass. Because Blacks voted overwhelmingly against it, the bond failed. Subsequently, officials placed the bond issue on the ballot during the general election. This time, the bond issue passed because officials produced two separate ballots – one ballot containing the bond issue and a second ballot containing all other remaining contests on the ballot. Because many Blacks did not know about the bond referendum and because the separate bond ballot was not offered to Black voters, the referendum passed. Had federal observers been present, this problem would have likely been avoided.

General Complaints

²³ Interview with Kristen Clarke-Avery, Former DOJ Attorney (July 2006).

²⁴ Interview with Lewis Johnson, Councilmember of Grenada, Mississippi (July 2006).

In addition to the accounts provided above, I also recall receiving a range of complaints from voters about intimidating behavior at the polls including:

- Use of video cameras to intimidate Black voters in Noxubee and Lowndes Counties, Mississippi
- Black voters required to provide social security number in order to cast their ballots in Hinds County, Mississippi
- Election Official refusing to pick up and count absentee ballots from local post office in Warren County, Mississippi
- A Black incumbent's name excluded from ballots during a 1991 Hinds County election
- Voting machine problems, misalignment of ballots, and absentee balloting problems during a hotly contested election in Coahoma County
- White men wearing dark sunglasses and beige trench coats intimidating Black voters by demanding that Black voters provide their names and addresses and documenting this information in notebooks

Testimony from the National Commission Hearing

John Walker testified about the role that federal observers play in the State of Mississippi.²⁵ Walker noted that the observer role is key given varying interpretations of state and federal election law among different layers of government. In particular, he observed that the Voting Rights Act and threat of litigation “are the levees that keep the repression from raining back and running back into Mississippi.” On a practical level, he also noted that “the interpretation you get from the Secretary of State depends on who's

²⁵ John Walker, Mississippi Hearings of the National Commission on the Voting Rights Act (October 29, 2005).

giving the interpretation. One person in that office will give one interpretation, and another one will give a different one.” Walker believes that this, in part, is why the federal observer’s role is crucial, but noted that “it’s important that the people that they send to be federal observers are people who are supportive of the objectives of the Voting Rights Act, who are interested in seeing it [followed].”

Brenda Wright, the managing attorney and director of the nationwide litigation program for the National Voting Rights Institute in Boston, Massachusetts, testified that Section 5’s continuing success in curtailing legislation and practices which disenfranchise minority voters is inextricably linked to the importance and strengthening of the federal examiner and observer systems.²⁶ Wright noted that “most jurisdictions believe only certain things need to be submitted [for preclearance], such as redistricting plans” and noted that “there are a lot of voting changes that have not been submitted.” The observer program provides one vehicle that can be used to “catch” those non-compliant jurisdictions in order to ensure compliance with the preclearance provisions of the Act.

The Deterrent Value of the Federal Observer Program

Some who oppose renewal of the federal observer provisions of the Act note that the reports of potential problems likely to emerge on Election Day are often more egregious than the activity actually observed. For this reason, some opponents suggest that voters tend to overstate or embellish the problems that occur in covered jurisdictions. I believe that this argument is without merit. In my experience, federal observer deployment in the Deep South, particularly in the State of Mississippi, has yielded stark

²⁶ Brenda Wright, Mississippi Hearings of the National Commission on the Voting Rights Act (October 29, 2005).

evidence of racial intimidation and harassment. Moreover, for those elections in which the problems observed are not particularly severe, the deterrence value of the federal observer program should not be underestimated. Indeed, federal observers create a tremendous incentive for local election officials to comply with the election code and enforce the code evenly regardless of the race of the voter. In addition, observers also increase the motivation for those working inside polling places to not impose special requirements or burdens on Black voters seeking to cast their ballots because those workers know they are being watched. In this regard, the federal observer program prevents problems that otherwise are likely to impede access to the ballot box on Election Day.

Notwithstanding the deterrence value of the observer program, significant problems remain. Without federal observers, there would be no vehicle in place to effectively document the problems that do occur. Some of these problems may necessitate litigation or other action following an election. Moreover, observers accurately document the problems that voters have on Election Day, providing the Department of Justice with an important tool to help identify those jurisdictions that may be non-compliant with the provisions of the Act. To that end, the observer program facilitates DOJ enforcement efforts under the Act.

The Experience in Other Parts of the South

Evidence of persisting discrimination with respect to ballot box access is certainly not limited to Mississippi. Indeed, there have been a number of consent decrees that have been entered since the 1982 renewal that make clear the continuing need for the federal

observer provisions throughout the Deep South. The federal observer program has helped enhance the quality of the government's enforcement efforts in that it provides a mechanism to measure whether jurisdictions are complying with the requirements and obligations that have been placed upon them. In many instances, the reports prepared and compiled by federal observers are critical in establishing a pattern of violations that require additional action by the Department of Justice.

Some jurisdictions in the South fail to appoint African-American voters to poll worker positions that sometimes lead to Election Day problems. For example, in *U.S. v. Conecuh County, Alabama*,²⁷ (S.D. Ala. Jan. 16, 1984), the court entered a decree requiring that local political party executive committees, the entity responsible for nominating poll workers, "engage in affirmative recruitment efforts aimed at ensuring that the pool of persons from which nominations are made fully reflects the availability of all qualified persons in Conecuh County who are interested in serving as election officials, without regard to their race or color." The jurisdiction was required to "seek out and propose for nomination black citizens, send notices to minority group organizations advising them that the party intends to nominate persons to serve as election officials and encourage them to have interested persons notify the chairperson of the respective political party executive committee of their willingness to serve as election officials."

In 1993, a consent decree was entered in *U.S. v. Johnson County, Georgia*,²⁸ (S.D. Ga. filed Sept. 14, 1993), addressing the jurisdiction's failure to recruit and hire election officials that reflected the diversity of the county. Census figures indicated that the total population in Johnson County was 34 percent black at the time the decree was entered.

²⁷ No. 83-1201, slip op. at 3-4.

²⁸ No. 393-45, slip op. at 2-3.

However, only 14 percent of poll officials in the county were black and the vast majority of polling sites had no Black officials. The consent decree required that local officials take a number of steps to recruit Black poll workers including media publicity, and developing and publicizing a policy with respect to conducting elections free of racial discrimination. Officials were also required to revise their training protocol so that poll workers would be instructed on how to perform their duties in a racially nondiscriminatory manner.

Despite the specific requirements set forth in these consent decrees, federal observers were deployed to both regions and documented problems with respect to the conduct and administration of the election. For example, observer deployment to Johnson County showed that African-American citizens were still not being appointed to poll worker positions in sufficient numbers. Additional investigation yielded evidence that the supervisor of elections was resistant to the terms of the consent decree. Relying on evidence yielded from federal observers, officials from the Department of Justice worked closely with local officials to resolve these problems and implement an effective recruitment mechanism.

Conclusion

Congress has the authority to renew the expiring federal observer provisions of the Voting Rights Act. The extensive record that has been compiled provides evidence of continuing discrimination in covered jurisdictions. So long as such discrimination exists, there is the possibility that problems might emerge that would inhibit minority voters' access to the ballot box. The federal observer program has helped provide an effective

means of oversight in this regard to help ensure that all voters will be able to freely cast their ballot and have those ballots counted.

Although the Voting Rights Act does not permit federal observers to interfere with the conduct of the election, the Department of Justice retains the authority to stop discriminatory action as it occurs and has effectively used this authority in the State of Mississippi. Moreover, the mere presence of neutral third-party observers inside polling places has the prophylactic effect of deterring impermissible and illegal conduct among hostile voters and local officials on Election Day.