

THE POLITICS OF PERSUASION: PASSAGE OF THE VOTING RIGHTS ACT REAUTHORIZATION ACT OF 2006

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I. INTRODUCTION

The Voting Rights Act (VRA or “Act”) is one of the most successful civil rights laws ever enacted. It has made the dream of political participation a reality for millions of minorities in the United States. Many of the Act’s most important protections are temporary measures that prevent and remedy discrimination in states with histories of voter disenfranchisement. Some have argued that renewal of these provisions, which had been scheduled to expire on August 6, 2007,¹ was non-controversial.² Political reality painted a far different picture. Conservatives ideologically opposed to the VRA’s broad protections mobilized to end them.³ Southerners covered by the Act’s preclearance provisions argued their states no longer needed federal review of voting changes.⁴ Republicans, deeply divided over immigration reform, splintered on whether

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^{*} This article is dedicated to Representative James Sensenbrenner (R – WI), whose leadership and fortitude in working with his House and Senate counterparts (particularly Reps. Chabot, Conyers, Honda, Lewis, Sanchez, and Watt and Sens. Kennedy, Leahy, and Specter) to set aside partisan differences made reauthorization of the Voting Rights Act possible. With the assistance of his Chief of Staff, Phil Kiko, and the others mentioned above, Rep. Sensenbrenner ably managed the legislation from start to finish. He embodies the highest standards of personal and professional integrity. He is a true civil rights warrior.

1. See, e.g., 42 U.S.C. §§ 1973b(a)(8), 1973aa-1a(b)(1) (2000).

2. See Katherine Tate, *Black Politics, the GOP Southern Strategy, and the Reauthorization of the Voting Rights Act*, 4 THE FORUM 2, 1 (2006), available at <http://www.bepress.com/forum/vol4/iss2/art1/>. “The extension of the temporary provisions of the 1965 Voting Rights Act sailed through Congress and was signed into law by President George Bush on July 27, 2006 without any major turbulence.” *Id.*

3. See *infra* notes 34–48, 297–304, 458–61 and accompanying text.

4. See *infra* notes 386, 390–97, 402–11, 422–33, 469, 503–18, 552–61, 584–603, 622–27, 635–47 and accompanying text.

language assistance should continue under the Act.⁵ Partisanship also threatened to derail any efforts to renew an Act that increased participation by minority voters who tended to favor Democrats.⁶

Against this backdrop, a broad coalition of civil rights groups, grassroots organizations, and voting rights advocates sought not only to renew the VRA's expiring provisions, but to strengthen them. With some unlikely allies, a few lucky breaks, and a little help from the White House and the Supreme Court, they achieved their goal. This article explores the long journey towards the twenty-five year reauthorization of the revitalized Act. Part II describes the hazards of building strong bipartisan support for the coalition's efforts. Part III summarizes the legislative changes made to the Act to update it and to clarify legislative intent that had been undermined by two Supreme Court decisions. Part IV details the political obstacles that had to be overcome during the reauthorization process. Part V concludes by briefly discussing the future of the Act. Landslide votes in the House and Senate and nearly universal accolades for the VRA conceal the long, strange trip towards passage of the Voting Rights Act Reauthorization Act of 2006 (VRARA).⁷ In the end, the politics of persuasion, buttressed by a strong record and key allies, carried the day.

II. PRELUDE TO REAUTHORIZATION: BUILDING BIPARTISAN SUPPORT

Reauthorization could not be achieved without support from both political parties. Historically, the VRA had received strong bipartisan backing, including renewal under four Republican Presidents.⁸ But it was unclear that a similar broad-based political coalition could be assembled before several provisions of the Act expired in 2007. Achieving consensus on a bill that Republicans, Democrats, and the civil rights community could support was no small feat. The politics would be challenging, but there were several hopeful signs for passage of a revitalized Act.

A. Politics and Pitfalls

At first glance, the political landscape did not appear favorable for reauthorization in 2006. The Republicans held the White House after President Bush's narrow reelection in 2004.⁹ Republicans held comfortable majorities with fifty-five seats in the Senate and 232 seats in the House of Representatives.¹⁰ Across the country, voters were deeply divided along party lines.¹¹ The highly charged political environment was

5. See *infra* notes 305–11, 331–85, 399–411, 440–48, 471, 528–51, 571–76 and accompanying text.

6. See *infra* notes 14–33 and accompanying text.

7. Pub L. No. 109-246, 120 Stat. 577 (2006).

8. See generally Pub. L. No. 91-285, 84 Stat. 314 (signed into law by President Nixon on June 22, 1970); Pub. L. No. 94-73, 89 Stat. 402 (signed into law by President Ford on August 6, 1975); Pub. L. No. 97-205, 96 Stat. 134 (signed into law by President Reagan on June 29, 1982); Pub. L. No. 102-344, 106 Stat. 921 (signed into law by President Bush on August 26, 1992).

9. See Ken Herman & Scott Shepard, *Final Election 2004 Update: Win for W, Kerry Concedes: "Congratulations, Mr. President,"* ATLANTA J. & CONST., Nov. 3, 2004, at 1.

10. See Andrea Stone, *Conservatives Welcome "New Day,"* USA TODAY, Dec. 20, 2004, at A6.

11. See Dan Balz, *Partisan Polarization Intensified in 2004 Election, Only 59 of the Nation's 435 Congressional Districts Split Their Vote for President and House,* WASH. POST, Mar. 29, 2005, at A4.

reflected in Washington, with the 109th Congress described as “one of the most partisan and polarized ever.”¹² Although the Republican Party had been instrumental in the enactment of the VRA and subsequent reauthorizations,¹³ it was unclear that politicians would be able to set aside their partisan differences to renew the Act’s expiring provisions.

The VRA itself seemed likely to deepen this political divide. Many conservatives criticized the special provisions of the Act for benefiting the Democratic Party.¹⁴ There was some evidence to support their conclusion. Black voters were the primary beneficiaries of the 1965 Act,¹⁵ with most southern states covered by Section 5 of the Act to prevent discrimination against them.¹⁶ Results from the 2004 Presidential election indicated that few of the fourteen million black voters supported the Republican Party.¹⁷ According to the National Exit Poll (NEP), eighty-eight percent of all black voters voted for Democratic candidate John Kerry.¹⁸ In 2004, President Bush received a lower percentage of the black vote than Presidents Nixon, Ford, candidate Dole, and President Reagan when he was first elected in 1980.¹⁹

Voters covered by the Act’s language assistance provisions²⁰ were more of a mixed bag for the Republican Party. Native American voters, like black voters, tended to vote overwhelmingly for Democratic candidates. In 2000, Native American voters in Washington turned out in large numbers against Republican Senator Slade Gordon, who lost to Maria Cantwell by about 2,000 votes.²¹ In 2002, the Native American vote made the difference in two closely watched campaigns. Strong Navajo support helped elect Democrat Janet Napolitano governor of Arizona by 11,819 votes, less than one percent of the votes cast.²² In South Dakota, Democratic Senator Tim Johnson won reelection by an even narrower margin of 524 votes over former Congressman John Thune, with heavy Lakota Sioux turnout on the Pine Ridge Reservation providing the difference.²³

12. Debra Rosenberg et al., *Firmly in Control, Holding the Line: The Republicans Kept their Lead in the Congress, Doesn’t Mean Bush Will Have an Easy Time of It*, NEWSWEEK, Nov. 15, 2004, at 30.

13. See *supra* note 8 and accompanying text.

14. See *infra* notes 458-63, 498-502, 622-27 and accompanying text.

15. See James Thomas Tucker, *Affirmative Action and [Mis]representation: Part I—Reclaiming the Civil Rights Vision of the Right to Vote*, 43 HOW. L. J. 343 (2000).

16. See UNITED STATES COMMISSION ON CIVIL RIGHTS, A CITIZEN’S GUIDE TO UNDERSTANDING THE VOTING RIGHTS ACT 7-10, 47-50 (1984) [hereinafter CITIZEN’S GUIDE].

17. U.S. Census Bureau, Table 4a, Reported Voting and Registration of the Total Voting-Age Population by Sex, Race and Hispanic Origin: November 2004, available at <http://www.census.gov/population/www/socdemo/voting/cps2004.html> (last visited Feb. 1, 2007). [hereinafter U.S. Census Bureau].

18. See CNN.com Election Results (2004), <http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html>. (last visited Feb. 1, 2007). According to the NEP, black voters comprised eleven percent of all voters in the 2004 Presidential election. See *id.*

19. See Bob Wing, *Race, Racism and the Law: Race and Election 2004*, <http://academic.udayton.edu/Race/04needs/politics02.htm>. (last visited Apr. 3, 2007).

20. See *infra* Part III(B) and accompanying text (discussing Sections 4(f)(4) and 203 of the Voting Rights Act).

21. See Daniel Kraker, *Tribal Poll Power: American Indians Could Decide Tight Races in Key Western states, Including Arizona*, TUCSON WEEKLY, Sept. 9, 2004, available at <http://www.tucsonweekly.com>.

22. FIRST AMERICAN EDUCATION PROJECT, NATIVE VOTE 2004: A NATIONAL SURVEY AND ANALYSIS OF EFFORTS TO INCREASE THE NATIVE VOTE IN 2004 AND THE RESULTS ACHIEVED 13, 19 (2005).

23. See Carson Walker, *GOP Eyes American Indian Vote in Traditional Democratic Stronghold*, RAPID CITY J., Mar. 5, 2004, at *1.

Although the NEP did not measure the Native American vote in the 2004 Presidential election, county-level vote totals indicate it was “largely Democratic.”²⁴

On the other hand, Republicans had made substantial inroads among other language minority voters. In the 2004 election, estimates of support for President Bush among the 2.7 million Asian voters²⁵ ranged from one estimate of twenty-four percent to forty-four percent in the NEP.²⁶ However, Asian support varied widely by ethnicity. Chinese, Asian Indian, and Hmong voters supported Democrat John Kerry, while Vietnamese and Filipino voters supported President Bush.²⁷ Japanese, Korean, and Pacific Islander voters were evenly split between the two parties.²⁸ Neither party could afford to ignore the growing political power of Asian voters, who had the highest percentage increase of new voter registrations between 1996 and 2004.²⁹

Republican efforts to win the rapidly increasing Latino vote also paid dividends. Between 2000 and 2004, the number of eligible Latino voters increased twenty percent to sixteen million, six times faster than for the non-Hispanic population.³⁰ Between 1996 and 2004, Latino turnout increased by more than one-third, from 4.9 million to 6.7 million.³¹ President Bush recognized the importance of the Latino vote and actively courted it in 2004, just as he had when he was Governor of Texas.³² According to the NEP, he was rewarded for his efforts by receiving forty-four percent of the Latino vote, including a majority of the Latino vote in his home state of Texas and in Florida, dominated by Cuban Republicans.³³ If Republicans wanted to continue to win over Asian and Latino voters, it seemed apparent they would have to support reauthorization.

Nevertheless, some Republicans were divided over the key provisions of the VRA, with the greatest resistance directed at voter assistance in non-English languages – especially Spanish. Since 1981, bills had been introduced in Congress to repeal federal requirements for bilingual materials or assistance in several areas including voting.³⁴ In

24. Wing, *supra* note 19.

25. U.S. Census Bureau, *supra* note 17.

26. See Wing, *supra* note 19.

27. New California Media, Executive Summary, *Poll of Asian Pacific Islanders on the 2004 Presidential Election* (Sept. 14, 2004), http://www.ncmonline.com/media/pdf/polls/apia_summary.pdf.

28. See *id.*

29. ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN AMERICANS AND THE VOTING RIGHTS ACT: THE CASE FOR REAUTHORIZATION vi (May 2006), available at http://www.aaldef.org/article/php?article_id=137. Despite these gains, Asian voting age U.S. citizens still lagged about 25 percent behind non-Hispanic white voter registration, with just 51.8 percent registered in the 2004 Presidential election compared to 75.1 percent among non-Hispanic whites. See U.S. Census Bureau, *supra* note 17.

30. PEW HISPANIC CENTER, FACT SHEET: THE HISPANIC ELECTORATE IN 2004, <http://pewhispanic.org/files/factsheets/8.pdf>.

31. See U.S. Census Bureau, Voting and Registration in the Election of November 1996, at 5 (July 1998); U.S. Census Bureau, *supra* note 17. Latino voter registration trailed non-Hispanic white registration by about twenty percent, with just 57.8 percent registered in the 2004 Presidential election. See *id.*

32. See R.G. Ratcliffe, *Campaign 98: Upbeat Bush Predicting Win in El Paso Area*, HOUS. CHRON., Oct. 30, 1998, at A1.

33. See Wing, *supra* note 19. There was some disagreement over how well President Bush actually did among Latino voters, with the National Annenberg Election Survey estimating he received forty-one percent of the Latino vote, compared to the Velasquez Institute's estimate of just thirty-three percent. See also National Annenberg Election Survey, *Bush 2004 Gains among Hispanics Strongest with Men, And in South and Northeast, Annenberg Data Shows* (Dec. 21, 2004), http://www.annenbergpublicpolicycenter.org/naes/2004_03_hispanic-data-12_21_pr.pdf (last visited Nov. 22, 2006).

34. See, e.g., National Language Act of 1999, H.R. 1005, 106th Cong. (1st Sess. 1999); Declaration of

1982 and 1983, Senator Sam Hayakawa of California, who founded the English-only group U.S. English, succeeded in attaching an amendment to separate immigration bills declaring that the sense of the Senate was that English is the official language of the United States.³⁵ In 1985, the Senate passed an immigration bill containing similar language offered by Senator James McClure of Idaho, but it was excluded from the final conference bill that was signed into law.³⁶ The most significant challenge came in 1996, when the Bill Emerson English Language Empowerment Act of 1996 was adopted by the House of Representatives,³⁷ but died in a Senate committee.³⁸ That bill would have repealed the VRA's language assistance provisions.³⁹ Similar legislation was introduced in the 109th Congress in advance of the reauthorization debate.⁴⁰

In 2006, opposition to the language assistance provisions of the VRA also was expected because of the continuing debate over the Comprehensive Immigration Reform Act. The Republican Party was bitterly divided over whether it should seek gains among Latinos by promoting a guest worker program or taking more dramatic steps to deport and prosecute illegal immigrants.⁴¹ Furthermore, the immigration debate divided some minorities, with reports of growing resentment among blacks who perceived that Latino immigrants were taking their job opportunities.⁴² If language

Official Language Act of 1999, H.R. 50, 106th Cong. (1st Sess. 1999); National Language Act of 1997, H.R. 1005, 105th Cong. (1st Sess. 1997); Declaration of Official Language Act of 1997, H.R. 622, 105th Cong. (1st Sess. 1997); Bilingual Voting Requirements Repeal Act of 1995, H.R. 351, 104th Cong. (2d Sess. 1996); English Language Empowerment Act of 1996, H.R. 3898, 104th Cong. (2d Sess. 1996); National Language Act of 1995, H.R. 1005, 104th Cong. (1st Sess. 1995); Declaration of Official Language Act of 1995, H.R. 739, 104th Cong. (1st Sess. 1995); *see also* MEXICAN AM. LEGAL DEF. & EDUC. FUND, REDRESSING IMPEDIMENTS TO VOTING LANGUAGE MINORITIES: THE NEED TO REAUTHORIZE AND EXPAND SECTION 203 OF THE VOTING RIGHTS ACT 46-71, *reprinted in* S. 2236 *Hearings*, 102d Cong., 2d Sess., S. HRG. 102-1066, at 454-71 (1992) (summarizing efforts by the English-only movement to repeal bilingual requirements between 1981 and 1992). Other federal laws mandating bilingual materials or assistance also have been threatened by proposed legislation, such as the Bilingual Education Act, 20 U.S.C. §§ 7401 to 7491, provisions for language assistance at migrant health care centers, *see* 42 U.S.C. §§ 254b(b)(1)(A)(iv) & 254c(e)(3)(J), and for persons receiving treatment in alcohol rehabilitation programs, *see* 42 U.S.C. § 4577(b).

35. CONGRESSIONAL QUARTERLY, CQ BILL ANALYSIS: S3828, THE NATIONAL LANGUAGE ACT OF 2006 (Sept. 9, 2006). The legislation was opposed by the Reagan Administration and ultimately failed to become law when the House adjourned without passing it. *Id.*

36. *See* S. AMEND 599 to S. 1200, A bill to amend the Immigration and Nationality Act to effectively control unauthorized immigration into the United States, and for other purposes, S. 1200 99th Cong. (1985) (as amended by S. AMEND 599; passed by voice vote on Sept. 12, 1985); Pub. L. No. 99-603 (1986); The Library of Congress, Thomas, <http://thomas.loc.gov> (last visited Nov. 22, 2006).

37. *See* Bill Emerson English Language Empowerment Act of 1996, H.R. 123, 104th Cong. (2d Sess. 1996). The bill was adopted by vote of 259 to 169. *See* 142 CONG. REC. H9769-71 (daily ed. Aug. 1, 1996).

38. *See* Language of Government Act of 1995, S. 356, 104th Cong. (1st Sess. 1995); S. 175, 104th Cong. (1st Sess. 1995).

39. *See generally* Lucy Chiu, Note, *The Emerson English Language Empowerment Act: The House's "Straw Man" Bill*, 23 J. LEGIS. 231 (1997) (describing the 1996 and 1997 Bill Emerson Language Empowerment Acts). An identical bill was introduced in 1997, except that it would not have repealed the bilingual election requirements under section 203 of the Voting Rights Act. *See id.*; Bill Emerson English Language Empowerment Act of 1997, H.R. 123, 105th Cong. (1st Sess. 1997).

40. *See generally* National Language Act of 2005, H.R. 4408, 109th Cong. (2005) (declaring English the official language of the U.S. government and repealing the language assistance provisions of the Voting Rights Act); English Language Unity Act of 2005, H.R. 997, 109th Cong. (2005) (declaring English the official language of the U.S. government).

41. *See* Emily Heil, *Immigration Leaves GOP in Tough Spot*, CONG. DAILY, Mar. 13, 2006, available at 2006 WLNR 4121343.

42. *See* Erin Teixeira, *Growing Anger Among Blacks as Latinos "Take Over,"* CHI. SUN-TIMES, Apr. 7, 2006, at 24.

assistance was tied to pending immigration legislation, it would be an uphill battle to keep it in the reauthorization bill.

Finally, some conservatives were at best skeptical, and at worst hostile, towards Justice Department oversight of voting changes under Section 5 of the Act. Abigail Thernstrom, who criticized Section 5 as “an instrument for affirmative action in the electoral sphere,”⁴³ was appointed by President Bush as Vice Chair of the United States Commission on Civil Rights.⁴⁴ Along with other conservative members who formed a majority on the Commission, Thernstrom urged Congress to “let these emergency provisions expire”⁴⁵ months before the Commission examined any evidence of the continued need for the provisions.⁴⁶

President Bush reportedly expressed similar reservations when he was Governor of Texas. In 1997, Bush’s Secretary of State, Antonio Garza, Jr., wrote that it was “an affront to the integrity of Texans and their state lawmakers that the Texas election process is continuously thwarted by Section 5 of the federal Voting Rights Act” because of what he described as “the heavy hand of federal bureaucracy, resulting in a micromanagement mess.”⁴⁷ Add to that what was widely perceived among civil rights groups as reluctance by the Bush Administration’s Justice Department to enforce Section 5, and it seemed reauthorization would be an uphill battle.⁴⁸

B. Republican Support for the Voting Rights Act

Despite the partisan political landscape, there were many positive indications that the Republican leadership would support reauthorization. President Bush repeatedly had signaled approval of the language assistance provisions. In 1996, then-Governor Bush opposed the Bill Emerson English-only bill.⁴⁹ Bush described his approach as “English-plus,” or the reciprocal obligation of Spanish-speaking Latinos to learn English and Americans to learn a second language.⁵⁰ As he explained in his 1999 biography, “[t]hose who advocate ‘English-only’ poke a stick in the eye of people of Hispanic heritage. ‘English-only’ says me, not you. It says I count, but you do not.

43. ABIGAIL THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 27 (1987). For a discussion of Thernstrom’s longstanding hostility to the temporary provisions of the Voting Rights Act, see generally Adam Shatz, *The Thernstroms in Black and White*, THE AM. PROSPECT, Mar. 12, 2001, available at <http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=4548>.

44. Steve Miller, *Two Set for Civil Rights Panel*, WASH. TIMES, Dec. 6, 2004.

45. Abigail Thernstrom & Edward Blum, *Voting Rights Act: After 40 Years, It’s Time for Virginia to Move On*, RICHMOND TIMES-DISPATCH, Aug. 1, 2005; see also Editorial, *Abigail Thernstrom on why Congress Would be Wise to Let Part of the Voting Rights Act Expire*, N.Y. SUN, July 29, 2005, at 10.

46. See U.S. COMM’N ON CIVIL RIGHTS, REAUTHORIZATION OF THE TEMPORARY PROVISIONS OF THE VOTING RIGHTS ACT: AN EXAMINATION OF THE ACT’S SECTION 5 PRECLEARANCE PROVISION (2006). According to the Commission’s own transmittal letter, the Commission did not convene a “panel of experts” to review evidence of the need for Section 5 until October 7, 2005, several months after Vice Chair Thernstrom published her ongoing series of attacks on the provision. See *id.* at vi.

47. Antonio O. Garza, Jr., opinion, *Fed Meddling in Texas Elections Must End*, SAN ANTONIO BUS. J., Nov. 17, 1997.

48. See Dan Eggen, *Politics Alleged in Voting Cases: Justice Officials are Accused of Influence*, WASH. POST, Jan. 23, 2006, at A1.

49. See Robert D. King, *Should English be the Law?*, ATLANTIC MONTHLY, Apr. 1, 1997, at 55.

50. Claudia Kolker, *Partial to Gov. Bush’s Style, Latinos Look for Substance*, L.A. TIMES, Aug. 30, 1999, at 1.

That is not the message of America.”⁵¹ President Bush also opposed dismantling bilingual education, as long as it allowed students to become proficient in English.⁵² His views were consistent with the basis for the language assistance provisions, which was “to permit persons disabled by [educational] disparities to vote now.”⁵³ Shortly after taking office, President Bush affirmed his commitment to maintain Executive Order 13,166, a Clinton Administration initiative intended to “improve access” to federal programs “for persons who, as a result of national origin, are limited in their English proficiency (LEP).”⁵⁴

Early on, President Bush publicly supported the VRA without clarifying the extent of his support. In August 2005, President Bush issued a proclamation to mark the fortieth anniversary of the Act in which he acknowledged it “remains essential as we continue our progress toward a society in which every person of every background can realize the American dream.”⁵⁵ During a December 2005 bill signing to place a statue of civil rights heroine Rosa Parks in the Capitol, he stated that “Congress should renew the Voting Rights Act.”⁵⁶ The President made similar comments to mark the Martin Luther King, Jr. holiday in January 2006.⁵⁷ Administration officials, including Alberto Gonzales, the first Latino to serve as Attorney General of the United States, likewise acknowledged the continuing need for the Act.⁵⁸ The Attorney General touted the Administration’s substantial efforts to enforce the language assistance provisions, resulting in more cases filed than the first twenty-six years the provisions were in effect.⁵⁹

Other Republican leaders agreed with the Administration. In early 2004, Republican Senate Majority Leader Bill Frist introduced an amendment to a gun immunity bill to make the temporary provisions of the VRA permanent.⁶⁰ The

51. GEORGE W. BUSH, *A CHARGE TO KEEP: MY JOURNEY TO THE WHITE HOUSE* 237 (1999).

52. See Frank Trejo, *Bush, Gingrich Address LULAC: Many Say GOP Beginning to Recognize Hispanics’ Clout*, DALLAS MORNING NEWS, July 2, 1998, at A25.

53. S. REP. NO. 94-295 at 34 (1975), as reprinted in 1975 U.S.C.A.N. 800, 801.

54. Exec. Order No. 13,166, 65 C.F.R. 289 (2000). President Bush reaffirmed the policy in a letter from the Assistant Attorney General of the Civil Rights Division. See Letter from Ralph F. Boyd, Jr., Asst. Att’y Gen., Civil Rts. Div., U.S. Dept. of Just., to Jim Boulet, Jr., Exec. Dir. of English First, (Oct. 3, 2001) (on file with author).

55. The White House, *40th Anniversary of the Voting Rights Act of 1965: A Proclamation by the President of the United States of America*, Aug. 5, 2005, available at <http://www.whitehouse.gov/news/releases>.

56. The White House, *President Signs H.R. 4145 to Place Statue of Rosa Parks in U.S. Capitol*, Dec. 1, 2005, <http://www.whitehouse.gov/news/releases/2005/12/print/20051201-1.html>.

57. See James Gerstenzang, *President Urges Extension of the Voting Rights Act*, L.A. TIMES, Jan. 17, 2006, at 8.

58. See generally Att’y Gen. Alberto R. Gonzales, Prepared Remarks at the Anniversary of the Voting Rights Act, Aug. 2, 2005, <http://www.usdoj.gov/ag/speeches/2005/080205agvotingrights.htm>.

The Voting Rights Act has been enormously successful, but our work is never complete. For this reason, this Administration looks forward to working with Congress on the reauthorization of this important legislation Particular emphasis has been placed on the minority language provisions of the Voting Rights Act All of the official information provided by states and counties to voters in English, must also be translated into the covered language. All materials. All information. All elections.

Id.

59. See *id.*

60. Sheryl Gay Stohlberg, *Senate Votes to Require Safety Locks on Guns*, N.Y. TIMES, Feb. 27, 2004, at A18. Senator Frist introduced the amendment following a trip with Representative John Lewis to Alabama

amendment caught civil rights groups off guard, with Representative John Lewis asking Frist to withdraw the amendment as “premature” before a record had been developed.⁶¹ Theodore M. Shaw, Director of the NAACP Legal Defense and Education Fund (LDF) explained, “If they are permanent, it is a trap.... They will be struck down as illegal and unconstitutional.”⁶² Others were less charitable in their opinion of Frist’s proposal. Reverend Jesse Jackson maintained that, “Frist... and House Majority Leader Tom DeLay... are maneuvering to use the courts to gut the Voting Rights Act.”⁶³ Nevertheless, with some education about how to proceed on reauthorization, it appeared Senator Frist was receptive to renewing the Act’s expiring provisions. The press reported in June 2005 that House Republican leaders likely would join Frist in his support, though it was unclear if they would offer their own language in place of a Democratic bill.⁶⁴

Republican National Committee (RNC) Chairman Ken Mehlman also came out early in favor of reauthorization. In April 2005, during an interview on National Public Radio, he stated that Section 5 “requires renewal” and “we look forward to working with both parties to make sure that’s renewed.”⁶⁵ Mehlman’s support derived in part from his efforts to reach out to black and Latino voters to bring them into the Republican Party. After becoming RNC Chairman in January 2005 he began logging thousands of miles of travel to black churches and organizations, describing Republicans as “the party of Lincoln and Frederick Douglass.”⁶⁶ He actively recruited black Republicans for statewide offices, including candidates for governor in Ohio and Pennsylvania and for Senate in Maryland.⁶⁷ He described the importance of making Republicans “whole again” by bringing black voters “back home” to the Party that supported reauthorization of the VRA and ended slavery.⁶⁸ In July 2005, Mehlman spoke at the NAACP’s annual convention, publicly apologizing for the Republican’s “Southern strategy” in which “[s]ome Republicans gave up on winning the African American vote, looking the other way or trying to benefit politically from racial polarization.”⁶⁹ While Democratic National Committee (DNC) Chairman Howard

and Tennessee. *Id.* Republican Senator George Allen of Virginia also supported making the VRA permanent, but later agreed with the NAACP that it would make the Act “vulnerable to a court challenge.” Teddy Davis, *Parties Strategize on Renewing Voting Rights Act*, ROLL CALL, Aug. 1, 2005, http://teddydavis.org/article/roll_call/parties_strategize.html.

61. Stohlberg, *supra* note 60, at A18; *see also* 152 CONG. REC. S7965 (daily ed. July 20, 2006) (statement of Sen. Frist describing the amendment he offered with Senator Mitch McConnell “to extend the expiring provisions of the Voting Rights Act permanently”).

62. *Voting Rights Activists Want Law Extended, But Not Permanently*, CHARLESTON GAZETTE, June 27, 2005, at 5C.

63. Jesse Jackson, *Republicans Maneuvering to get Voting Rights Act Killed; Making it National and Permanent would Set the Act up for Being Ruled Unconstitutional*, CHI. SUN-TIMES, Mar. 8, 2005, at 31.

64. *See* Lynn Sweet, Editorial, *Hastert Lashes Dems on Race; Hastert Went too Far in Ascribing a Motive to their Blocking Tactics*, CHI. SUN-TIMES, June 16, 2005, at 41.

65. GOP Chairman Ken Mehlman Speaking on National Public Radio on Apr. 1, 2005, News & Notes, <http://www.npr.org/templates/story/story.php?storyId=4571305> (last visited Nov. 22, 2006).

66. Adam Nagourney, *Lost Horizons*, N.Y. TIMES, Sept. 24, 2006, at 632.

67. *Id.*

68. Marjory Raymer, *Republican Honcho Woos Black Voters*, FLINT J., July 21, 2005, at 3.

69. Edwin Chin, *GOP Rejects Its Past in Courting Black Support*, L.A. TIMES, July 15, 2005, at 22. President Bush agreed with Mehlman’s comments. *See id.*

Dean dismissed Mehlman's outreach to minorities,⁷⁰ his efforts resonated with many black voters.⁷¹ Clearly, civil rights groups had powerful allies among Republican leaders supporting VRA reauthorization.

C. Strange Bedfellows

Renewal of the expiring provisions of the Act would not have been possible without an unlikely alliance between a liberal Democrat and two conservative Republicans. Mel Watt served as Chairman of the Congressional Black Caucus and was a member of the House Judiciary Committee that would consider any proposed reauthorization bill.⁷² A graduate of Yale Law School, in 1992 Representative Watt joined Eva Clayton as the first African-Americans elected to Congress from North Carolina since 1901.⁷³ Months after taking office, Representative Watt's Twelfth Congressional District was struck down in *Shaw v. Reno*,⁷⁴ in which the United States Supreme Court "sidestepped" its precedent to allow white voters in a majority black district to bring a claim for representational harm.⁷⁵ Between 1993 and 2001, Representative Watt endured no less than four Supreme Court decisions⁷⁶ that resulted in his district being redrawn into a majority-white district.⁷⁷ Representative Watt responded by establishing the Judge A. Leon Higginbotham, Jr. Memorial Voting Rights Braintrust of the Congressional Black Caucus to develop strategies to respond to threats to minority voting rights.⁷⁸

Although Representative John Conyers of Michigan was the ranking Democrat on the House Judiciary Committee, Representative Watt secured his approval to conduct direct negotiations with Republican leadership on VRA reauthorization.⁷⁹ The

70. See Brendan McCarthy & Jeff Zeleny, *Dean Blasts GOP Over Voting Rights*, CHI. TRIB., June 13, 2005, at 8.

71. See Nagourney, *supra* note 66, at 632; Jim Wooten, Editorial, *Our Opinion: GOP's Appeal Gains Ground Among Blacks*, ATL. J. & CONST., July 17, 2005, at E6.

72. See About Congressman Watt, <http://www.house.gov/watt/About/about.htm> (last visited Nov. 22, 2006).

73. See *id.*; see also Wikipedia, African-Americans in the United States Congress (Nov. 17, 2006), http://en.wikipedia.org/wiki/African_Americans_in_the_United_States_Congress (last visited Nov. 22, 2006) (listing all African-Americans elected to Congress).

74. 509 U.S. 630, 659 (1993) [hereinafter *Shaw I*] (White, J., dissenting). *Shaw I* ignored longstanding precedent in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977), in which the Court denied a challenge by Hasidic Jews who alleged that the creation of nonwhite majority-minority districts violated the Fourteenth Amendment.

75. See *Shaw I*, 509 U.S. at 657.

76. See *id.* at 630; *Shaw v. Hunt*, 517 U.S. 899 (1996) [hereinafter *Shaw II*]; *Hunt v. Cromartie*, 526 U.S. 541 (1999) [hereinafter *Cromartie I*]; *Easley v. Cromartie*, 532 U.S. 234 (2001) [hereinafter *Cromartie II*]. For an extended discussion of *Shaw* and its progeny, see generally James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443 (1999); James Thomas Tucker, *Affirmative Action and Misrepresentation: Part II – Deconstructing the Obstructionist Vision of the Right to Vote*, 43 HOW. L. J. 405 (2000).

77. See generally *Cromartie I*, 526 U.S. at 544 (noting that following *Shaw II*, the district was redrawn to be forty-seven percent black total population, forty-three percent black voting age population, and forty-six percent black registered voters).

78. See Webcast, Comments of Representative Mel Watt, Chairman, (Congressional Black Caucus Voting Rights Braintrust) (Sept. 8, 2006), http://www.broadcasturban.net/webcast/cbcf2006/fri_voting.htm [hereinafter 2006 Braintrust].

79. See Seth Stern, *110th House Committees: Judiciary*, CQ WEEKLY, Nov. 11, 2006, at 3001.

Leadership Conference on Civil Rights (LCCR) agreed to have Representative Watt represent the single position of civil rights groups on the reauthorization bill.⁸⁰ Representative Watt was the right man for the job. A self-described “policy ‘wonk,’” he would do “‘the heavy lifting’” behind the scenes to get a good bill enacted that was supported by a strong record.⁸¹ Representative Watt further recognized that passage of the bill would not be possible without Republican support that would evaporate if Democrats claimed the bill as their own.⁸² He also understood that he would have to work quietly to restrain the impulse of DNC Chairman Howard Dean and other Democrats⁸³ to push the VRA bill by attacking with “partisan vitriol” any Republicans slow in their support.⁸⁴

Representative Watt found his ally in James Sensenbrenner, the conservative Republican from Wisconsin who was Chairman of the House Judiciary Committee. In many ways, Chairman Sensenbrenner was an improbable partner for VRA reauthorization. During prior efforts to extend the Act, he expressed reservations about the language assistance provisions. In the 1981 House hearings he stated, “I must express one concern with the administration of the present law and that is with the application of bilingual ballot provisions in certain jurisdictions where there has not been much of a demand for ballots printed in a language other than English.”⁸⁵ In 1992, he joined six other Republicans in filing dissenting views on the fifteen year extension of the language assistance provisions, arguing they would “turn this country, blessed with a common language, into a modern-day Tower of Babel.”⁸⁶ He also supported the Bill Emerson English-only legislation.⁸⁷ In 1996, Representative Sensenbrenner explained the importance of repealing the language assistance provisions, arguing they were “unnecessary and costly” and the rationale for using them was “perplexing” because “only citizens may vote.”⁸⁸

Still, there was good reason to believe that Chairman Sensenbrenner would support a strong VRA reauthorization bill. At the start of the 1981 hearings, he was “an

80. See 2006 Braintrust, *supra* note 78.

81. Tim Funk, *Watt Brokers Extension of Voting Rights Act: Charlotte Democrat in Spotlight as Bipartisan Support Announced*, CHARLOTTE OBSERVER, May 3, 2006.

82. See 2006 Braintrust, *supra* note 78.

83. See *id.* and accompanying text.

84. Erin P. Billings & Ben Pershing, *If the first four months of the year are an indicator, the next five weeks of Congressional business promise even more partisan vitriol, legislative gridlock and yes, even chatter about a post-election, lame-duck session*, ROLL CALL, Apr. 25, 2006, at 60; see also 2006 Braintrust, *supra* note 78 (describing these challenges).

85. *Hearings Before the Subcomm. on Civil and Constitutional Rts. of the House Comm. on the Judiciary*, 97th Cong. 5 (1981) [hereinafter *1981 House Hearings*] (statement of Rep. Sensenbrenner).

86. See H.R. REP. NO. 102-655, at 28 (1992), as reprinted in 1992 U.S.C.C.A.N. 790 (dissenting views of Reps. Hyde, Sensenbrenner, McCollum, Coble, James, Ramstad, and Allen). Representative Sensenbrenner further argued that the legislative record showed

there is no evidence that this law has been effective, there is no evidence that this law is needed, there is every expectation that this law will have serious, harmful effects on state and local governments and on our federal system as a whole, and that the American people do not want the Congress to penalize the use of the English language in voting or any other aspect of official life.

Id. at 15, as reprinted in 1992 U.S.C.C.A.N. 777 (dissenting views of Reps. Hyde, Sensenbrenner, McCollum, Coble, James, Ramstad, and Allen).

87. See 142 CONG. REC. H9772 (daily ed. Aug. 1, 1996).

88. 142 CONG. REC. H9740 (daily ed. Aug. 1, 1996) (statement of Rep. Sensenbrenner).

admitted skeptic” of the other expiring provisions of the VRA, including Section 5.⁸⁹ However, his attendance at extensive House hearings, including field hearings in Austin, Texas and Montgomery, Alabama,⁹⁰ and observations of over 100 witnesses who described widespread voting discrimination, caused him to become a leader in the 1982 extension.⁹¹ During his February 1982 testimony before the Senate Judiciary Committee, he acknowledged to laughter, “I am not the most civil-righteous individual in the House of Representatives.”⁹² However, he willingly took on the Reagan Administration, which initially opposed renewing Section 5 and amending Section 2 to restore the “effects” test.⁹³ As Chairman Sensenbrenner explained during his testimony,

[A]fter sitting through the extensive hearings and seeing the abuses that were attempted to be perpetrated up to the present time in many of the covered jurisdictions, I... reached the conclusion that section 5 has been a successful law and the bilingual preclearance and ballot provisions also have been very successful....Without an effective section 2, there would be no way of catching the abuses that were enacted prior to 1965 in covered jurisdictions, as well as the abuses that might have happened in noncovered jurisdictions up until the present time.⁹⁴

Having successfully championed the 1982 VRA extension, he proudly displayed a signed copy of the bill in his office with the pen President Reagan used to sign it into law.⁹⁵ He also had refrained from co-sponsoring any of the post-1996 bills to repeal the language assistance provisions.⁹⁶ Chairman Sensenbrenner would support the 2006 VRA renewal if the record established the continued need for the Act’s temporary provisions.⁹⁷

Chairman Sensenbrenner was assisted ably by Republican Steve Chabot of Ohio, who served as Chairman of the House Judiciary Subcommittee on the Constitution.⁹⁸ Representative Chabot shared many common traits with Chairman Sensenbrenner. He had solid conservative credentials, having served as a House Manager during the Senate impeachment trial of President Clinton.⁹⁹ He also supported the 1996 effort to repeal

89. Jennifer Yachnin, *VRA’s Unlikely Patron Keeps Fighting*, ROLL CALL, Mar. 2, 2006.

90. See *1981 House Hearings*, *supra* note 85, at 885, 1511.

91. See generally Yachnin, *supra* note 89.

92. *Hearings Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary*, 97th Cong. 890 (1982) [hereinafter *1982 Senate Hearings*] (testimony of Rep. Sensenbrenner).

93. See generally Yachnin, *supra* note 89.

94. *1982 Senate Hearings*, *supra* note 92, at 891. Representative Sensenbrenner also vigorously defended the restored “effects” test in an exchange with Senator Orrin Hatch, who was Chairman of the Senate Judiciary Committee. See *id.* at 878–89.

95. See generally Yachnin, *supra* note 89.

96. Compare bills cited *supra* note s 34, 39–40, with the bills’ co-sponsors, see The Library of Congress, Thomas, <http://thomas.loc.gov> (visited Nov. 22, 2006).

97. Craig Gilbert, *Iron Will Brings Perils, Payoffs for Sensenbrenner*, MILWAUKEE J. SENTINEL, July 10, 2005, at A1. [hereinafter *Iron Will*]. Although many Democrats disagreed with Chairman Sensenbrenner’s positions on legislation, they held him in “high regard” for being “evenhanded” and not “foreclosing debate.” *Id.*

98. *Members Bio: Rep. Chabot, Steven J., R-Ohio (1st Cong. Dist.)*, U.S. FED. NEWS, Apr. 29, 2005 [hereinafter *Chabot Bio*].

99. See *id.*

the language assistance provisions,¹⁰⁰ but like the Chairman did not co-sponsor any subsequent efforts.¹⁰¹ He was widely praised for his “even-handed and thoughtful approach” in the highly partisan impeachment trial, attributes that would serve him well in helping to build a record supporting VRA renewal.¹⁰² The strengths of Chairman Sensenbrenner and Representative Chabot complimented one another perfectly to navigate the treacherous waters of reauthorization.

In late spring and early summer 2005, Representative Watt met with Chairman Sensenbrenner about reauthorization.¹⁰³ There were several reasons for their meetings. There was a sense of urgency to begin the process early because Representative Lamar Smith, a conservative Texas Republican who opposed the preclearance and language assistance provisions,¹⁰⁴ likely would replace Chairman Sensenbrenner if the Republicans maintained control of the House.¹⁰⁵ Furthermore, an extensive record would have to be developed to support the renewed bill, requiring significant committee time in both the House and Senate.¹⁰⁶ In addition, it was likely there would be extended negotiations with LCCR over the language of the bill.¹⁰⁷ Equally important, a personal relationship built on trust had to be developed between Republicans, Democrats, and the civil rights community.¹⁰⁸ As Chairman Sensenbrenner later explained, “If there is partisanship that enters into the Voting Rights Act reauthorization, it will not be done either by myself or by Congressman Watt.... This is too important a law to allow it to fall off the edge into a partisan abyss.”¹⁰⁹

Before the July 4, 2005 recess, Republican Speaker of the House Dennis Hastert said that VRA renewal was among his priorities.¹¹⁰ Despite Speaker Hastert’s statement, many were surprised by Chairman Sensenbrenner’s announcement on July 10, 2005 about his plans to push for early reauthorization. Speaking at the NAACP’s annual convention near his home outside of Milwaukee, Sensenbrenner stated:

I am here to tell you publicly what I have told others privately, including the head of the Congressional Black Caucus, Representative Mel Watt—during this Congress we are going to extend the Voting Rights Act.... Soon I will be introducing legislation to extend the Voting Rights Act. Just like its enactment and its 1982 extension, this bipartisan effort will succeed.... [W]hile we have made progress and curtailed injustices thanks to the Voting Rights Act, our work is not yet complete. We cannot let discriminatory practices of the past resurface to threaten future gains. The Voting

100. See 142 CONG. REC. H9772 (daily ed. Aug. 1, 1996).

101. See *supra* note 96.

102. See *Chabot Bio*, *supra* note 98.

103. See 2006 Braintrust, *supra* note 78.

104. See *infra* note 333 and accompanying text; see also *infra* notes 337–39 (recording Rep. Smith’s votes against the language assistance provisions during the House Judiciary Committee markup).

105. Seth Stern, *Texas’ Smith Likely to Replace Sensenbrenner as House Judiciary Chairman*, CQ TODAY, Apr. 26, 2006. Republicans placed a six-year term limit on committee chairmanships, which meant Chairman Sensenbrenner’s term would expire in January 2007. See *id.*

106. See 2006 Braintrust, *supra* note 78.

107. See *id.*

108. See *id.*

109. See Yachnin, *supra* note 89.

110. 151 CONG. REC. E1684 (daily ed. June 29, 2005) (extended remarks of Rep. Lewis).

Rights Act must continue to exist—and exist in its current form.¹¹¹

The next day, Speaker Hastert, joined by Republican Majority Leader, Tom DeLay, Majority Whip, Roy Blunt, and Chief Deputy Whip, Eric Cantor, commended Sensenbrenner “for moving expeditiously to take up this important legislation.”¹¹² Hilary Shelton, Director of the NAACP’s Washington office, praised Chairman Sensenbrenner, encouraging him to also “strengthen”¹¹³ the VRA to “guarantee as broadly as possible that every American vote is going to be counted.”¹¹⁴ Several Democratic leaders met a few weeks later to discuss strategy and were cautiously optimistic about the prospects of reauthorization.¹¹⁵

That optimism was buoyed in anticipation of the fortieth anniversary of the VRA. Chairman Sensenbrenner and Representative Chabot co-sponsored a resolution introduced by Representative Lewis expressing the sense of Congress that “it will advance the legacy of the Voting Rights Act of 1965 by ensuring the continued effectiveness of the Act to protect the voting rights of all Americans.”¹¹⁶ Even though the resolution was largely symbolic, it sent an important message. While there had been “noteworthy progress” under the Act, the Republican leadership on the Judiciary Committee agreed that “voter inequities, disparities, and obstacles still remain for far too many voters and serve to demonstrate the ongoing importance” of the VRA.¹¹⁷ They further observed that it was vital that the Act’s provisions be “fully effective to prevent discrimination and dilution of the equal rights of minority voters.”¹¹⁸ A companion resolution introduced in the Senate by Senator Ted Kennedy drew the support of Chairman Sensenbrenner’s Republican counterpart on the Senate Judiciary Committee, Arlen Specter of Pennsylvania.¹¹⁹ The VRA still faced a long road ahead, but it looked like it might be renewed after all.

III .THE BILL: RENEWING AND RESTORING THE VOTING RIGHTS ACT

Chairman Sensenbrenner delegated to Representative Chabot the important task of building a record supporting VRA reauthorization. Between October 2005 and April 2006, the House Subcommittee on the Constitution held ten oversight hearings “examining the effectiveness of the temporary provisions of the VRA over the last twenty-five years.”¹²⁰ The Subcommittee received testimony from thirty-nine

111. *Rep. Sensenbrenner to Introduce 25-Year Voting Rights Extension Legislation, Calls for Bipartisan Approach to Civil Rights Issues*, U.S. FED. NEWS, July 10, 2005, available at 2005 WLNR 10836466.

112. *House Leadership Commends House Judiciary Committee for Plans to Take up Voting Rights Act Reauthorization*, U.S. FED. NEWS, July 11, 2005, available at 2005 WLNR 10891261.

113. Mike Allen, *Washington—House Judiciary Committee*, CONTRA COSTA TIMES, July 10, 2005, at F4.

114. India Autry, *Voting Act Gets Early Lift from House*, NEWSDAY, July 19, 2005, at A35.

115. *See Parties Strategize on Renewing Voting Rights Act*, *supra* note 60.

116. H.R. Con. Res. 216, 109th Cong. (2005); *see also* H. REP. 109-195, 109th Cong. (2005) (accompanying committee report explaining the provisions of the resolution).

117. H.R. Con. Res. 216, 109th Cong. (2005).

118. *Id.*

119. *See* S. RES. 232, 109th Cong. (2005); 151 CONG. REC. S9541 (July 29, 2005) (statement of Sen. Kennedy).

120. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006, H.R. REP. NO. 109-478, at 5 (2006) [hereinafter VRARA].

witnesses, “including State and local elected officials, scholars, attorneys, and other representatives from the voting and civil rights community.”¹²¹ The hearings produced over 12,000 pages of testimony and documentary evidence.¹²² Key reports included findings from ten field hearings of the National Commission on Voting Rights,¹²³ a summary of the ACLU’s 293 voting cases since 1982,¹²⁴ LCCR’s fourteen state reports documenting voting discrimination in states covered by the Act’s special provisions,¹²⁵ and a report by Arizona State University researchers identifying the need, availability, quality, and cost of language assistance under the VRA.¹²⁶ As Chairman Sensenbrenner commented, the voluminous record gathered by Representative Chabot represented “quality, rather than quantity.”¹²⁷

The House record established several things. It showed “the extent to which discrimination against minorities in voting has and continues to occur,” which supported “the continued need for the expiring provisions.”¹²⁸ Additionally, the evidence demonstrated that despite the substantial progress racial and language minorities had made under the VRA, there was a substantial basis for renewing the expiring provisions for twenty-five years.¹²⁹ At the same time, there was a need “to update the VRA’s temporary provisions, and to restore the VRA to its original intent,” to effectively remedy the “continuing vestiges of racial discrimination.”¹³⁰ After extensive negotiations between Chairman Sensenbrenner, Representative Chabot, Representative Conyers, and Representative Watt, the House Judiciary Committee assembled a consensus bipartisan bill to address the findings in the record. This section discusses how the legislation renewed and restored the VRA.

A. Section 5 Preclearance and Clarification of Congressional Intent

Section 5 is in the “heart of the Voting Rights Act,”¹³¹ the temporary provisions in sections 4 through 9 that focus on eradicating “the blight of racial discrimination in

121. *Id.*

122. *Id.*

123. See NAT’L COMM’N ON THE VOTING RTS. ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK, 1982-2005 (2006) [hereinafter, PROTECTING MINORITY VOTERS], reprinted in *Voting Rights Act: Evidence of Continued Need*, H.R. REP. 109-103, at 104 (2006).

124. See VOTING RTS. PROJECT OF THE AM. CIV. LIBERTIES UNION, VOTE: THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT, VOTING RIGHTS LITIGATION 1982-2005 (2006), reprinted in *Voting Rights Act: Evidence of Continued Need*, H.R. REP. NO. 109-103, at 378 (2006).

125. See Appendices to the Statement of Wade Henderson, Executive Director of the Leadership Conference on Civil Rights, reprinted in *Voting Rights Act: Evidence of Continued Need*, H. HRG. 109-103, at 1308 (2006). Eleven of the reports were entered into the record during the House oversight hearings. See H.R. REP. NO. 109-478, at 5 (2006). The remaining three reports were entered into the Senate record.

126. DR. JAMES THOMAS TUCKER & DR. RODOLFO ESPINO ET AL., MINORITY LANGUAGE ASSISTANCE PRACTICES IN PUBLIC ELECTIONS 5-13 (2006) (“LANGUAGE ASSISTANCE PRACTICES”), reprinted in *Voting Rights Act: Evidence of Continued Need*, H.R. REP. NO. 109-103, at 2094 (2006).

127. *Renewing the Temporary Provisions of the Voting Rights Act: An Introduction to the Evidence: Hearing Before the Senate Jud. Comm.*, 109th Cong., 2d Sess., S. HRG. No. 109-555, at 6 (2006) [hereinafter *Introduction Senate Hearing*] (testimony of Rep. Sensenbrenner).

128. H.R. REP. NO. 109-478, at 5 (2006).

129. See *id.*

130. *Id.*

131. U.S. COMM’N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 5 (1975) [hereinafter TEN YEARS AFTER], available at <http://www.law.umaryland.edu/marshall/uscrr/documents/cr12v943a.pdf>.

voting.”¹³² Section 5 “was enacted to prevent States and political subdivisions with a history of voting discrimination from constantly devising new ways to discriminate once the old ways are abolished by legislation or court decree.”¹³³ Originally enacted in 1965 for five years,¹³⁴ Section 5 initially was limited primarily to seven southern states that had engaged in extensive discrimination against African-Americans attempting to register to vote or to cast a ballot.¹³⁵ In 1975, Section 5 was expanded to also cover language minorities.¹³⁶ Section 5 was reauthorized for five years in 1970,¹³⁷ seven years in 1975,¹³⁸ and twenty-five years in 1982.¹³⁹ Like the other temporary provisions of the VRA, Section 5 was scheduled to expire on August 6, 2007 if not reauthorized.¹⁴⁰

A jurisdiction and its political subunits¹⁴¹ becomes covered by Section 5 under one of three tests, or “triggers,” described in Section 4 of the VRA: (1) as of November 1, 1964, the jurisdiction maintained any test or device as a precondition for voting or registering, and less than fifty percent of its voting age population were registered on November 1, 1964 or voted in the Presidential election of 1964;¹⁴² or (2) the same requirements as of November 1, 1968 and in the Presidential election of 1968;¹⁴³ or (3) the jurisdiction meets the criteria for coverage under Section 4(f)(4) of the Act.¹⁴⁴ In addition, a “pocket trigger” in Section 3(c) allows a court to require a jurisdiction to comply with Section 5 for an “appropriate time” if the court finds voting discrimination in violation of the fourteenth or fifteenth amendments.¹⁴⁵ As a result of the Section 4 triggers, nine states are covered in whole,¹⁴⁶ and seven states are covered in part, by Section 5.¹⁴⁷ A jurisdiction may be removed, or “bailout,” from coverage if it can show, among other things, that for the past ten years it has fully complied with Section 5, not engaged in voting discrimination on the basis of race, color, or language minority status, and does not have any pending lawsuits against it alleging voting

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

133. CITIZEN’S GUIDE, *supra* note 16, at 7.

134. *See* Pub. L. No. 89-110, 79 Stat. 437 (1965).

135. *See* Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 18–20* (Bernard Grofman & Chandler Davidson eds., 1992).

136. *See infra* notes 183–191 and accompanying text.

137. *See* Pub. L. No. 91-285, 84 Stat. 314 (1970).

138. *See* Pub. L. No. 94-73, 89 Stat. 400 (1975).

139. *See* Pub. L. No. 97-205, 96 Stat. 131 (1982).

140. *See* 42 U.S.C. § 1973b(a)(8) (2006).

141. *See generally* 28 C.F.R. § 51.6 (2006). “All political subunits within a covered jurisdiction (e.g., counties, cities, school districts) are subject to the requirement of section 5.” *Id.*

142. 42 U.S.C. § 1973b(b) (2006).

143. *Id.* This test was added in the 1970 VRA Amendments. *See* Pub. L. No. 91-285, 84 Stat. 314 (1970).

144. *Id.*; *see generally infra* notes 183–200, 203–07 and accompanying text (describing coverage under Section 4(f)(4)). Language minority coverage was added in the 1975 VRA Amendments. *See id.*

145. *See* 42 U.S.C. § 1973a(c) (2006). The Section 5 pocket trigger has been applied to the States of Arkansas and New Mexico; Buffalo County, South Dakota; Escambia County, Florida, and Cicero, Illinois. *See* *PROTECTING MINORITY VOTERS*, *supra* note 123, at 34, *reprinted in Voting Rights Act: Evidence of Continued Need*, H.R. REP. 109-103, at 154.

146. *See* 28 C.F.R. Part 51, App. (2007). States covered in their entirety include Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. *See id.*

147. *See id.* States with partial coverage include California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. *See id.*

discrimination.¹⁴⁸ The Supreme Court repeatedly has upheld the Section 5 triggers, narrowed by the bailout provision, as a constitutional exercise of congressional powers to protect the fundamental right to vote.¹⁴⁹

Section 5 requires a covered jurisdiction to submit for approval, or “preclearance,”¹⁵⁰ any proposed change affecting voting to either the U.S. Attorney General¹⁵¹ or the U.S. District Court for the District of Columbia before the change can be implemented.¹⁵² “Change affecting voting” is broadly defined as “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” adopted after the coverage date.¹⁵³ It includes changes in voter registration, voting precinct boundaries, polling place locations, voting unit boundaries (including annexations and redistricting), candidate qualifications, and methods of elections, among others.¹⁵⁴ Covered jurisdictions must demonstrate that a change affecting voting “does not have the purpose and will not have the effect” of denying or abridging the rights of minorities to vote¹⁵⁵ compared to an existing “benchmark.”¹⁵⁶ An “objection” is interposed if the Attorney General or court finds that a jurisdiction has not met its burden.¹⁵⁷ This administrative process allows the federal government to determine in advance whether covered changes “evade the remedies for discrimination contained in the Act itself.”¹⁵⁸ Between 1982 and 2004 the Attorney General objected to more discriminatory voting changes than between 1965 and 1982.¹⁵⁹

148. See 42 U.S.C. § 1973b(a). Thirteen political subdivisions in Virginia have bailed out from Section 5 coverage. See http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited Nov. 22, 2006).

149. See *Lopez v. Monterey County*, 525 U.S. 266, 283 (1999); *City of Rome v. United States*, 446 U.S. 156, 177 (1980); *South Carolina v. Katzenbach*, 383 U.S. at 308, 325–27.

150. 28 C.F.R. § 51.2 (2006).

151. According to the Department of Justice, over ninety-nine percent of voting changes are submitted to the Attorney General. See U.S. Dept. of Justice, Civil Rights Division homepage, http://www.usdoj.gov/crt/voting/sec_5/about.htm (last visited Nov. 22, 2006). Reasons cited by the Department for the large number of administrative submissions include “the relative simplicity of the process, the significant cost savings over litigation, and the presence of specific deadlines governing the Attorney General’s issuance of a determination letter.” *Id.* Section 5 requires the Attorney General to decide whether to preclear a voting change within sixty days of submission. See 42 U.S.C. § 1973c(a) (2006).

152. See 42 U.S.C. § 1973c; CITIZEN’S GUIDE, *supra* note 16, at 7.

153. 42 U.S.C. § 1973c. Section 14(c) of the VRA defines “voting” as including “all action necessary to make a vote effective in any primary, special, or general election, including but not limited to, registration, listing pursuant to this [Act], or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly . . .” 42 U.S.C. § 19731(c)(1) (2006).

154. See *Presley v. Etowah County Comm’n*, 502 U.S. 491, 502–03 (1992); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); 28 C.F.R. § 51.13 (2006).

155. 42 U.S.C. § 1973c(a)-(b) (2006). A voting change has the effect of denying or abridging the right to vote if it leads to “retrogression,” which means it “will make members of such group worse off than they had been before the change.” 28 C.F.R. § 51.54(a) (2006).

156. See generally 28 C.F.R. § 51.54(b)(1) (2006) (describing the benchmark as “the voting practice or procedure in effect at the time of the submission.”). Practices or procedures not in effect on the coverage date that have not been precleared cannot serve as the benchmark. See *id.*

157. See 28 C.F.R. § 51.52(c) (2006).

158. *Katzenbach*, 383 U.S. at 335.

159. See PROTECTING MINORITY VOTERS, *supra* note 123, at 54, reprinted in *Voting Rights Act: Evidence of Continued Need*, 109th Cong. H.R. REP. NO. 109-103, at 174. In addition, several hundred more Section 5 submissions were withdrawn or the voting changes were modified to eliminate the discriminatory purpose and effect after the Attorney General signaled an objection was likely. See LUIS RICARDO FRAGA & MARIA LIZET OCAMPO, THE DETERRENT EFFECT OF SECTION 5 OF THE VOTING RIGHTS ACT: THE ROLE OF MORE INFORMATION REQUESTS (2006), reprinted in *Voting Rights Act: Evidence of Continued Need Before the Subcomm. On the Constitution of the H. Comm. on the Judiciary*, 109th Cong. H.R. REP. NO. 109-103, at

The VRARA amended the provisions for Section 5 preclearance in three ways. First, it reauthorized the provisions for twenty-five years from their effective date of July 27, 2006, when the bill was signed into law, or until July 27, 2031.¹⁶⁰ This extension was accomplished by striking “Voting Rights Act Amendments of 1982” from Section 4(a) and replacing it with “Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.”¹⁶¹ Although this change was consistent with past amendments to the VRA, it created a shorter coverage period than for the reauthorized Section 203.¹⁶²

Second, the VRARA clarified congressional intent to address the Supreme Court’s decision in *Reno v. Bossier Parish School Board* (“*Bossier II*”).¹⁶³ In Bossier Parish, Louisiana, African-Americans comprised twenty percent of the population but had never been elected to the twelve-member school board, which was elected from single-member districts.¹⁶⁴ After the 1990 Census, the school board refused to include any majority-black districts, even though it admitted “it was obvious that a reasonably compact black-majority district could be drawn within Bossier City.”¹⁶⁵ It was undisputed that two of the white board members opposed “black representation” or a “black-majority district.”¹⁶⁶ Nevertheless, in a 5 to 4 decision, the Supreme Court found that there was no basis for an objection under Section 5.¹⁶⁷ The Court held that Section 5 “prevents nothing but backsliding” that makes minority voters worse off than they were before the voting change under the statute’s language “does not have the purpose and will not have the effect.”¹⁶⁸ Since African-American voters in Bossier Parish had never had a majority-black district, the Court concluded an objection was improper, regardless of the presence of intentional discrimination.¹⁶⁹

Bossier II substantially curtailed the ability of the Attorney General and the District of Columbia court to object to voting changes with a discriminatory purpose.¹⁷⁰ For example, the House Judiciary Committee noted that it would not have allowed the court to issue an objection to Georgia’s 1980 congressional redistricting plan, in which redistricting chair Joe Mack Wilson proclaimed “I don’t want to draw nigger districts,” because the existing plan did not have any majority-black districts.¹⁷¹ Section 5 of the VRARA addressed *Bossier II* in three ways. It struck “does not have the purpose and will not have the effect” from Section 5, replacing it with “neither has the purpose nor

2537 (2006).

160. See *infra* notes 218, 222, 276, and 524 and accompanying text.

161. Pub L. No. 109-246 § 4, 120 Stat. 580 (2006).

162. See *infra* note 216 and accompanying text.

163. 528 U.S. 320 (2000).

164. *Id.* at 323.

165. *Id.* at 350 (Souter, J., dissenting).

166. *Id.* at 348 (Souter, J., dissenting).

167. *Id.* at 340–41.

168. *Id.* at 335–36.

169. *Reno v. Bossier Parish School Board*, 528 U.S. 320, 335–41 (2000).

170. Section 5 objections based solely on discriminatory purpose comprised twenty-five percent of all objections in the 1980’s and forty-three percent of all objections in the 1990’s. See Peyton McCrary et al., *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 278 (2006).

171. See H.R. REP. NO. 109-478, at 67 (2006) (quoting *Busbee v. Smith*, 549 F. Supp. 495, 501 (D.D.C. 1982)).

will have the effect.”¹⁷² It added a subsection (b) to Section 5, providing that any voting change “that has the purpose or will have the effect of diminishing the ability of any citizens... on account of race or color, or in contravention of... section 4(f)(2) to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.”¹⁷³ It also added a subsection (c), clarifying that the term “purpose” includes “any discriminatory purpose.”¹⁷⁴ In this manner, Congress clarified that a Section 5 objection could be made based upon discriminatory purpose, effect, or both.

Third, the VRARA restored the standard for determining discriminatory effect that had been in place for three decades. In the 1976 case of *Beer v. United States*, the Supreme Court held that a voting change had a discriminatory effect if it “would lead to a retrogression in the position of racial minorities with respect to their *effective exercise* of the electoral franchise.”¹⁷⁵ Citing the VRA’s legislative history, *Beer* explained that this standard required examining whether “the ability of minority groups... to elect their choices to office is *augmented, diminished, or not affected*” by the voting change.¹⁷⁶ Despite *Beer*’s straightforward test, in 2003 a narrow majority of the Court in *Georgia v. Ashcroft* adopted a new totality of the circumstances standard for determining discriminatory effect that did not rest on just the ability to elect.¹⁷⁷ Rather, the *Ashcroft* Court held that:

any assessment of the retrogression of a minority group’s effective exercise of the electoral franchise depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect candidates of choice, the extent of the minority group’s opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan.¹⁷⁸

In the process, the Court indicated that no discriminatory effect was present if minority voters could influence election results, even if their preferred candidates of choice were defeated.¹⁷⁹

The House Judiciary Committee was concerned that the amorphous *Ashcroft* standard “would encourage States to spread minority voters under the guise of ‘influence’ and would effectively shut minority voters out of the political process.”¹⁸⁰ In other words, instead of having at least the same opportunity to elect their preferred candidates of choice under the *Beer* standard, under *Ashcroft* minority voters would be turned “into second class voters who can influence elections of white candidates.”¹⁸¹ The VRARA restores the *Beer* test for discriminatory effect by adding subsection (d) to

172. VRARA, Pub L. No. 109-246 § 5, 120 Stat. 580–81 (2006).

173. *Id.*

174. *Id.*

175. 425 U.S. 130, 141 (1976) (emphasis added).

176. *Id.* (quoting H.R. REP. NO. 96-196, at 60 (1975)) (emphasis in original).

177. *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003).

178. *Id.* at 479.

179. *See id.* at 483.

180. H.R. REP. NO. 109-478, at 70 (2006).

181. *Id.*

Section 5, clarifying that the purpose of Section 5 “is to protect the ability of such citizens to elect their preferred candidates of choice.”¹⁸²

B. The Language Assistance Provisions

The language assistance provisions of the VRA, Sections 4(f)(4) and 203, eliminate language barriers for millions of non-English speaking voting-age citizens.¹⁸³ The provisions apply to four language groups: Alaskan Natives; American Indians; persons of Spanish Heritage; and Asian Americans,¹⁸⁴ as well as the distinct languages and dialects within these language groups.¹⁸⁵ Other language groups were not included because there was no evidence that they experienced similar difficulties in voting.¹⁸⁶ Congress originally focused on protection of Spanish-language minorities in Texas who had experienced a well-documented history of discrimination in voting and education.¹⁸⁷ At the same time, Congress considered evidence of widespread discrimination against the other three covered language minority groups.¹⁸⁸

As a result of this evidence, Congress enacted the minority language assistance to secure equal access to the political process for covered language groups throughout the United States. Congress modeled the temporary language assistance provisions on the permanent requirements of Section 4(e) of the VRA,¹⁸⁹ which provides for language assistance for “persons educated in American-flag schools in which the predominant classroom language was other than English.”¹⁹⁰ The language assistance provisions in Sections 4(f)(4) and 203 were adopted in 1975,¹⁹¹ reauthorized for ten years in 1982,¹⁹² and extended for fifteen years in 1992¹⁹³ to conform to the expiration date for the Act’s

182. VRARA, Pub L. No. 109-246 § 5, 120 Stat. 580-81 (2006).

183. See 42 U.S.C. § 1973b(f)(1) (2000); 42 U.S.C. § 1973aa-1a(a) (2000) (stating congressional findings for the language assistance provisions).

184. See 42 U.S.C. §§ 1973l(c)(3), 1973aa-1a(e) (2000).

185. See 121 CONG. REC. 16246 (1975) (statement of Rep. Edwards); S. REP. NO. 94-295 at 24 n.14 (1975), as reprinted in 1975 U.S.C.C.A.N. 790-91 n.14 (quoting Letter from Meyer Zitter, Chief, Population Division, Bureau of the Census, to House Judiciary Committee, Apr. 29, 1975).

186. See S. REP. NO. 94-295 at 31, as reprinted in 1975 U.S.C.C.A.N. 797.

187. See David H. Hunter, *The 1975 Voting Rights Act and Language Minorities*, 25 CATH. U. L. REV. 250, 254-57 (1976).

188. See S. REP. NO. 94-295, at 24-31, 37-39 (1975), as reprinted in 1975 U.S.C.C.A.N. at 790-797, 804-06; 121 CONG. REC. 16246-47, 16250-53 (1975) (statement of Rep. Edwards); TEN YEARS AFTER, *supra* npte 131, at 22-25, 57-59, 85-87, 97-99, 103-4, 108-11, 114-21, 123, 144, 160, 166, 220-30, 242-48, 251-54, 331-32 (1975).

189. For a discussion of the legislative history of Section 4(e), see generally Juan Cartegna, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT’L BLACK L.J. 201 (2005).

190. 42 U.S.C. § 1973b(e)(1)(2000). In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the United States Supreme Court upheld the constitutionality of Section 4(e). The Court concluded that Congress may have “questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise.” *Id.* at 654. The *Katzenbach* Court upheld the language assistance requirements as a valid exercise of congressional enforcement powers under the Fourteenth and Fifteenth Amendments, which give “the same broad powers expressed in the Necessary and Proper Clause.” *Id.* at 650.

191. See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975) (codified as amended in scattered sections between 42 U.S.C. §§ 1973 to 1973bb-1).

192. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982).

193. See Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921 (1992).

other temporary provisions.¹⁹⁴ During prior reauthorizations, the specific requirements for language assistance changed to respond to evidence of continued voting discrimination against the four groups of covered language minority voters.¹⁹⁵

Jurisdictions are selected for coverage under the temporary provisions through two separate triggering formulas. Under Section 4(f)(4) of the Act, a jurisdiction is covered if three criteria are met as of November 1, 1972: (1) over five percent of voting age citizens were members of a single language group; (2) the jurisdiction used English-only election materials; and (3) less than fifty percent of voting age citizens were registered to vote or fewer than fifty percent voted in the 1972 Presidential election.¹⁹⁶ This trigger covers jurisdictions that have experienced “more serious problems” of voting discrimination against language minority citizens.¹⁹⁷ Jurisdictions covered under Section 4(f)(4), which includes three states and nineteen political subdivisions,¹⁹⁸ must provide assistance in the language triggering coverage and are subject to the Act’s special provisions, including Section 5 preclearance and federal observer coverage.¹⁹⁹ Bailout under Section 4(a) of the VRA allows jurisdictions that have eliminated voting discrimination to be removed from coverage under Section 4(f)(4).²⁰⁰

Under Section 203 of the Act, a jurisdiction is covered if the Director of the Census determines that two criteria are met. First, the limited-English proficient citizens of voting age in a single language group: (a) number more than 10,000; (b) comprise more than five percent of all citizens of voting age; or (c) comprise more than five percent of all American Indians of a single language group residing on an Indian reservation. Second, the illiteracy rate of the language minority citizens must exceed the national illiteracy rate.²⁰¹ A person is “limited-English proficient” (or LEP) if he or she speaks English “less than very well” and would need assistance to participate in the political process effectively.²⁰²

194. The language assistance provisions were scheduled to expire on August 6, 2007. See 42 U.S.C. § 1973b(a)(8) (2000); 42 U.S.C. § 1973aa-1a(b)(1) (2000).

195. For a discussion of the legislative history of the temporary language assistance provisions and how they work, see generally James Thomas Tucker, *Enfranchising Language Minorities: The Language Assistance Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y (forthcoming 2007) (manuscript at 106–36, on file with author).

196. See 42 U.S.C. § 1973b(b) (2000).

197. Voting Rights Act of 1975, S. REP. NO. 94-295 at 31, *as reprinted in* 1975 U.S.C.C.A.N. 798; see also *id.* at 9, *reprinted in* 1975 U.S.C.C.A.N. 775 (section 4(f)(4) applies to areas “where severe voting discrimination was documented” against language minorities). Specifically, “the more severe remedies of title II are premised not only on educational disparities” like the less stringent provisions under title III of the 1975 amendments, “but also on evidence that language minorities have been subjected to ‘physical, economic, and political intimidation’ when they seek to participate in the political process.” 121 CONG. REC. H4718 (daily ed. June 2, 1975) (statement of Rep. Edwards).

198. Section 4(f)(4) coverage applies in three states (Alaska for Alaskan Natives, and Arizona and Texas for Spanish Heritage) and nineteen counties or townships in six additional states. See Voting Rights Act Amendments of 1975, 40 Fed. Reg. 43746 (Sept. 23, 1975); Voting Rights Act of 1975, 40 Fed. Reg. 49422 (Oct. 22, 1975); Voting Rights Act Amendments of 1975, 41 Fed. Reg. 784 (Jan. 5, 1976) (corrected at Voting Rights Act of 1975, 41 Fed. Reg. 1503 (Jan. 8, 1976)); Voting Rights Act of 1975, 41 Fed. Reg. 34329 (Aug. 13, 1976).

199. See 28 C.F.R. § 55.8(b) (1976).

200. See 42 U.S.C. § 1973b(a) (2000); § 1973b(a)(8), *supra* note 140 and accompanying text. Covered counties in Colorado, New Mexico, and Oklahoma have bailed out pursuant to Section 4(a) of the VRA. See 28 C.F.R. § 55.7(a) (1976).

201. See 42 U.S.C. § 1973aa-1a(b)(2) (2000).

202. See generally 42 U.S.C. § 1973aa-1a(b)(3)(B) (2000) (defining “limited-English proficient” as the

Jurisdictions covered under Sections 4(f)(4) and 203 must provide written “voting materials”²⁰³ in the covered language at “all stages of the electoral process”²⁰⁴ unless the language is unwritten.²⁰⁵ In addition, oral language assistance must be provided to the extent necessary to allow language minority citizens to participate effectively.²⁰⁶ Following the July 2002 Census Department determinations, five states are covered in their entirety and twenty-six states are partially covered.²⁰⁷ Language assistance currently must be provided in 505 jurisdictions, which include all counties or parishes, and those townships or boroughs specifically identified for coverage under one of the triggering formulas.²⁰⁸ Section 203(d) of the Act allows a covered jurisdiction to bailout from coverage if it can demonstrate “that the illiteracy rate of the applicable language minority group” that triggered coverage “is equal to or less than the national illiteracy rate.”²⁰⁹

inability “to speak or understand English adequately enough to participate in the electoral process”); H.R. REP. NO. 102-655 at 8, *as reprinted in* 1992 U.S.C.C.A.N. 772 (explaining the manner in which the Director of Census determines the number of limited-English proficient persons).

203. “Voting materials” are defined in the Act as “registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots.” 42 U.S.C. § 1973aa-1a(b)(3)(A) (2000).

204. 28 C.F.R. § 55.15(1976). According to the Justice Department, Section 203(c) encompasses voter registration through activities related to conducting elections, including, for example, the issuance, at any time during the year, of notifications, announcements, or other informational materials concerning the opportunity to register, the deadline for voter registration, the time, places and subject matters of elections, and the absentee voting process.

Id.; *see also* 28 C.F.R. § 55.18 (1976) (“voting materials” include materials provided by mail, public notices, registration materials, polling place activities and materials, and publicity concerning the availability of minority language materials).

205. Written materials do not have to be provided for most Alaskan Native or American Indian languages, which are historically unwritten. *See* 42 U.S.C. § 1973aa-1a(c) (2000).

206. *See id.*; 28 C.F.R. § 55.20 (1976). The Department of Justice Guidelines require covered jurisdictions to determine the number of “helpers” necessary to provide oral assistance in the minority language. *See* 28 C.F.R. § 55.20(c) (1976). Failure to recruit a sufficient number of bilingual poll workers also might violate Section 2, which is the general non-discrimination provision of the Act. *See Harris v. Graddick*, 593 F. Supp. 128 (M.D. Ala. 1984).

207. *See Voting Rights Act Amendments of 1992, Determinations Under Section 203*, 67 Fed. Reg. 48871 (July 26, 2002) (to be codified at 28 C.F.R. pt. 55) [hereinafter 2002 Determinations]. The states covered statewide are Alaska for Alaskan Natives; and Arizona, California, New Mexico, and Texas for Spanish Heritage. For a detailed discussion of the 2002 determinations, *see generally* LANGUAGE ASSISTANCE PRACTICES, *supra* note 126, *reprinted in Minority Language Assistance Practices In Public Elections: Executive Summary*, H.R. REP. NO. 109-103, at 2124, 2139-47 (2006). The Section 4(f)(4) determinations are unaffected by the new Section 203 determinations and remain in effect. *See 2002 Determinations, supra*, at 48872.

208. *See* LANGUAGE ASSISTANCE PRACTICES, *supra* note 126, at 7, *reprinted in Minority Language Assistance Practices In Public Elections: Executive Summary*, 109th Cong. 2141 (2006) (statement by Dr. James Thomas Tucker). Forty-eight of these political subdivisions must provide language assistance in more than one minority language: thirty-one in two languages; fourteen in three languages; two in four languages; and one, Los Angeles County, California, in six languages (Spanish, Chinese, Filipino, Japanese, Korean, and Vietnamese). The following number of covered jurisdictions are required to provide assistance in the identified language: Spanish statewide in Arizona, California, New Mexico, and Texas and 224 political subdivisions in twenty states, for a total of 425 counties and townships; American Indian languages in 81 political subdivisions of eighteen states; Alaskan Native languages statewide in Alaska and thirteen boroughs in the state; and Asian languages (Chinese, Filipino, Japanese, Korean, and Vietnamese) in sixteen counties in seven states. *See id.* at 7-13, *reprinted in Minority Language Assistance Practices In Public Elections: Executive Summary*, 109th Cong. 2141-47 (2006) (statement by Dr. James Thomas Tucker).

209. 42 U.S.C. § 1973aa-1a(d) (2000). “Having found that the voting barriers experienced by these citizens is in large part due to disparate and inadequate educational opportunities,” this bailout procedure “rewards” jurisdictions that are able to remove these barriers. 121 CONG. REC. H4719 (daily ed. June 2, 1975)

The VRARA maintained the existing Section 203 coverage formula, despite efforts to lower the 10,000 voting age citizen trigger to cover more language minority voters. Margaret Fung, Executive Director of the Asian American Legal Defense and Education Fund (AALDEF), and Karen Narasaki, Executive Director of the Asian American Justice Center (AAJC), proposed lowering the trigger to 7,500.²¹⁰ House leaders rejected the proposal under pressure from members who opposed Sections 4(f)(4) and 203.²¹¹ Representative Watt regretted that the amendment could not be included in the bill but explained, “The current emotional climate surrounding immigration reform made such a change ‘politically... dangerous,’ and could have jeopardized the bipartisan support for the bill.”²¹²

Conversely, the VRARA updated the coverage determinations to reflect changes in how the Census Bureau collects language ability data. In future censuses, the existing method of collection, decennial long-form data, will be replaced by the American Community Survey, which will “provide long-form type information every year instead of once in ten years.”²¹³ The VRARA responded to this data collection change by providing that coverage determinations under Section 203(b) will be made using “the 2010 American Community Survey census data and subsequent American Community Survey data in 5-year increments, or comparable census data.”²¹⁴ The bill otherwise left Section 203(b)(4) unchanged, ensuring that coverage determinations will continue to “be effective upon publication in the Federal Register” and not “subject to review in any court.”²¹⁵ The bill continued to provide the Director of the Census with the flexibility to update census data and publish Section 203(c) coverage determinations more frequently, as new data becomes available.²¹⁶

Section 7 of the VRARA provided for a straight reauthorization of the language assistance provisions by substituting “2032” for “2007” in the sunset date specified in Section 203(b)(1) of the Act.²¹⁷ However, the revised expiration date of August 6,

(statement of Rep. Edwards).

210. *Voting Rights Act: Section 203—Bilingual Election Requirements (Part I)*, 109th Cong. at 19-20 (2005) (testimony of Margaret Fung, Executive Director of AALDEF, Before the Subcomm. on the Const. of the House Jud. Comm.) (hereinafter “Bilingual Elections I”); *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part II)*, 109th Cong. at 53-54 (statement of Karen Narasaki, Executive Director of AAJC, Before the Subcomm. on the Const. of the House Jud. Comm.). The proposal would have added coverage to nearly 78,000 LEP Cambodian, Hmong, and Laotian voters in nine jurisdictions who were the victims of education and voting discrimination. *See id.* at 49 (statement of Karen Narasaki).

211. *See infra* notes 305–11, 341 and accompanying text.

212. Funk, *supra* note 81.

213. U.S. CENSUS BUREAU, *AMERICAN COMMUNITY SURVEY: A HANDBOOK FOR STATE AND LOCAL OFFICIALS 1* (2004). Because the American Community Survey is part of the census, responding to it is required by law. *Id.* at 2.

214. VRARA 2006 § 8, Pub. L. No. 109-246 § 8, 120 Stat. 581 (2006).

215. 42 U.S.C. § 1973aa-1a(b)(4) (2000).

216. *See Doi v. Bell*, 449 F. Supp. 267 (D. Haw. 1978).

217. *See VRARA* § 7, Pub. L. No. 109-246 § 7, 120 Stat. 581 (2006); 42 U.S.C. § 1973aa-1a(b)(1) (2000). A substantial record of documented discrimination in voting and education supported maintaining the protections in Sections 4(f)(4) and 203 of the VRA for the four covered language groups. *See Enfranchising Language Minorities*, *supra* note 195, at 140–49 (summarizing educational discrimination); James Thomas Tucker, *The Continuing Need for and Constitutionality of Section 203 of the Voting Rights Act* (2006) (manuscript on file with author), introduced into the Senate record at S. Hrg. 109-823, at 466; *see also* James Thomas Tucker, *The ESL Logjam: Waiting Times for ESL Classes and the Impact on English Language Learners*, 96 NAT’L CIVIC REV. 30 (Mar. 2007) (describing lack of English learning opportunities for adults);

2032 for Section 203 coverage inadvertently created three anomalous results in the statute. First, it adopted a later sunset date than the one used for Section 5 coverage, which expires twenty-five years from the date of enactment, or July 27, 2031.²¹⁸ Second, the later date only applies to jurisdictions covered under Section 203 and not the jurisdictions covered for language assistance under Section 4(f)(4).²¹⁹ Instead, those jurisdictions will only remain covered after July 27, 2031 if they independently meet the coverage formula in Section 203(b)(2) of the Act.²²⁰ Third, unless the sunset date for Section 4 is changed from July 27, 2031, during the last year Section 203 is in effect observer coverage only will be available in jurisdictions certified by a federal court for coverage under Section 3(a) of the Act.²²¹ These anomalies are consistent with a similar result in 1982, when Section 203 was extended for ten years and the remaining temporary provisions were extended for twenty-five years.²²²

C. The Federal Examiner and Observer Provisions

Under the VRA's original framework, federal examiners were authorized to examine voter registration applicants concerning their qualifications for voting, to create lists of eligible voters to forward to the local registrar, and to issue voter registration certificates to eligible voters.²²³ Although federal examiners initially accounted for a large percentage of black voters registered in the South after passage of the VRA in 1965, they were "used sparingly in recent years."²²⁴ As of December 31, 2005, there were only 112,078 federally registered voters remaining in five southern

James Thomas Tucker & Rodolfo Espino, *Government Effectiveness and Efficiency? The Minority Language Assistance Provisions of the Voting Rights Act*, 13 TEX. J. C.L. & C.R. (2007) (forthcoming 2007) (describing widespread noncompliance with the language assistance provisions of the Voting Rights Act); Michael Jones-Correa & Israel Waismel-Manor, *Verifying Implementation of Language Provisions in the Voting Rights Act* (2006), reprinted in *Voting Rights Act: Evidence of Continued Need: Hearing Before Subcomm. On the Constitution of the H. Comm. on the Judiciary* 109th Cong. 2514-32 (2006) (describing the lack of availability of bilingual written materials and election personnel in covered jurisdictions).

218. See *supra* notes 161-63 and accompanying text.

219. See *id.*

220. See 42 U.S.C.A. § 1973aa-1a(b)(2) (West 2003). At the time of the 2006 reauthorization, one of the three Section 4(f)(4) covered states, Texas, and fourteen of the nineteen Section 4(f)(4) covered counties or townships was covered under both Section 4(f)(4) and Section 203(b)(2). See LANGUAGE ASSISTANCE PRACTICES, *supra* note 126, at 6 & Appendix C, reprinted in *Voting Rights Act: Evidence of Continued Need: Hearing Before Subcomm. On the Constitution of the H. Comm. on the Judiciary* 109th Cong. 2101, 2272-95 (2006). Two states (Alaska for Alaskan Natives and Arizona for Spanish) and five counties and townships (Spanish in Yuba County in California, Collier and Monroe Counties in Florida, and Buena Vista Township in Michigan and American Indian coverage in Jackson County in North Carolina) were covered under Section 4(f)(4), but not Section 203. *Id.*

221. See generally 42 U.S.C.A. § 1973d (West 2003) (providing that observer coverage certifications are to be made by a federal court pursuant to Section 3(a) or by the Attorney General pursuant to Section 4(b) of the Act); see also *infra* note 233 and accompanying text (describing the process for certifying jurisdictions for federal observer coverage).

222. See Pub. L. No. 97-205, 96 Stat. 131 (1982).

223. See 42 U.S.C.A. § 1973e (West 2003). For a detailed discussion of the federal observer provisions and how they work, see generally James Thomas Tucker, *The Power of Observation: The Role of Federal Observers Under the Voting Rights Act* (forthcoming 2007) (a shorter version was presented as Testimony of James Thomas Tucker, Hearing Before the Committee on the Judiciary of the United States Senate, *The Continuing Need for Federal Examiners and Observers to Ensure Election Integrity*, S. HRG. 109-669, at 463-90, 402-08 (July 10, 2006)).

224. S. REP. NO. 94-295, at 20 (1975), as reprinted in 1975 U.S.C.C.A.N. 786.

states.²²⁵ According to the Office of Personnel Management (OPM), federal examiners had not registered any new voters since 1983. Instead, the federal examiner provisions were only used to certify jurisdictions so they would be eligible for federal observers.

Once a jurisdiction was certified for federal examiners, it became eligible to be designated by the Attorney General for federal observers. The role of federal observers is very straight-forward: they are non-lawyer employees of the United States Office of Personnel Management (OPM) authorized to observe “whether persons who are entitled to vote are being permitted to vote” and “whether votes cast by persons entitled to vote are being properly tabulated.”²²⁶ They are “trained by OPM and the Justice Department to watch, listen, and take careful notes of everything that happens inside the polling place during an election, and are also trained not to interfere with the election in any way.”²²⁷ When a voter requires assistance to cast a ballot, the observer may accompany that voter behind the curtain of the voting booth if the observer first obtains the voter’s permission.²²⁸ According to the 1975 Senate Report, “the role of Federal observers can be critical in that they provide a calming and objective presence which can serve to deter any abuse which might occur. Federal observers can prevent or diminish the intimidation frequently experienced by minority voters at the polls.”²²⁹ They also prepare reports that can be used in subsequent litigation and the observers can testify as witnesses.²³⁰ Since 1965, approximately 30,000 federal observers have monitored elections in certified jurisdictions. The number of observers has gone up dramatically in recent years as part of the Justice Department’s increased enforcement activities in jurisdictions covered by the language assistance provisions of the VRA²³¹

225. U.S. Dep’t of Justice, Civil Rights Div., Voting Sec., Federal Examiners and Federal Observers, http://www.usdoj.gov/crt/voting/examine/activ_exam.htm (last visited Feb. 28, 2006). The five states were Alabama (50,566), Georgia (2,253), Louisiana (12,289), Mississippi (42,388), and South Carolina (4,582). *Id.*

226. *See* 42 U.S.C.A. § 1973f (West 2003).

227. U.S. Dep’t of Justice, Civil Rights Div., Voting Section, Frequently Asked Questions http://www.usdoj.gov/crt/voting/examine/activ_exam.htm (last visited Feb. 25, 2002); *see also* U.S. OFFICE OF PERSONNEL MGT., MINORITY LANGUAGE CAPTAIN/CO-CAPTAIN MANUAL, app. E (1998) (training pamphlet on file with author) (summarizing the training federal observers receive concerning their election-day responsibilities). In jurisdictions with significant numbers of language minorities, bilingual observers are preferable because they are able to not only observe the manner in which language minority voters are treated, but also can assess the quality of any written language materials and oral language assistance offered to voters in their native language. *See generally* COMPTROLLER GENERAL OF THE UNITED STATES, VOTING RIGHTS ACT: ENFORCEMENT NEEDS STRENGTHENING 24–25 (1978) (summarizing complaints received from minority contacts about the absence of minorities serving as federal observers).

228. *See* *United States v. Executive Comm. of Democratic Party of Greene County*, 254 F. Supp. 543 (N.D. Ala. 1966); *United States v. Louisiana*, 265 F. Supp. 703, 715 (E.D. La. 1966).

229. S. REP. NO. 94-295, at 21 (1975), as *reprinted in* 1975 U.S.C.C.A.N. 787.

230. *See generally* 42 U.S.C.A. § 1973f (West 2003) (providing that persons assigned as observers “shall report to an examiner ... to the Attorney General, and if the appointment of examiners has been authorized pursuant to section 3(a), to the court”); *see also* S. REP. NO. 94-295 at 21 (1975), as *reprinted in* 1975 U.S.C.C.A.N. 787 (noting that “observer reports have served as important records relating to the conduct of particular elections in subsequent voting rights litigation”); *accord* U.S. Dept. of Justice, Civil Rights Div., Voting Section, Frequently Asked Questions, <http://www.usdoj.gov/crt/voting/misc/faq.htm> (last visited Feb. 25, 2002) (observers “prepare reports that may be filed in court, and they can serve as witnesses in court if the need arises”); *James v. Humphreys County Bd. of Election Comm’rs*, 384 F. Supp. 114, 125 (N.D. Miss. 1974) (noting that federal observer reports “were compiled by disinterested persons almost immediately following the election; they were submitted in the regular course of official duty and are regarded as highly credible”). Federal courts have found the provisions to be constitutional. *See Greene County*, 254 F. Supp. at 547; *United States v. Louisiana*, 265 F. Supp. at 703.

231. According to the Justice Department, in 2004 “a record 1,463 federal observers and 533 Department

The federal observer and examiner provisions were codified as Sections 3, 6–9, and 13 of the VRA. Under the original statutory framework, a jurisdiction had to be certified for federal examiners before federal observers could be dispatched to cover its elections. Certification occurred through two different mechanisms. If Section 4(f)(4) or Section 5 applied to the jurisdiction, then certification took place under Section 6. That Section provided that the Attorney General could certify the jurisdiction for federal examiners if he or she either had received twenty meritorious written complaints from residents in the jurisdiction alleging voting discrimination or their appointment was necessary to enforce voting rights protected under the Fourteenth and Fifteenth Amendments to the United States Constitution.²³² Nearly all of the more recent certifications were based upon the Attorney General’s determination.

If a jurisdiction was not covered by Sections 4(f)(4) or 5, then certification occurred under Section 3(a). That Section permitted a federal court to certify a jurisdiction for federal examiners “for such period of time... as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment.”²³³ Federal courts were authorized to certify a jurisdiction for coverage as part of any “interlocutory order” or “as part of any final judgment,” as long as “the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred” in the jurisdiction being covered.²³⁴ Like the “pocket trigger” for Section 5 coverage,²³⁵ Section 3(a) allowed private parties and the Attorney General to request certification of a jurisdiction not otherwise subject to the VRA’s special provisions (including the observer provisions).²³⁶

Certified jurisdictions could petition for termination of federal examiner coverage. Previously, Section 13 provided that a jurisdiction certified under Section 6 could petition the Attorney General to request the Director of the Census to take a census or survey of voter participation.²³⁷ Alternatively, a certified jurisdiction could file a declaratory judgment action seeking termination in the District Court of the District of Columbia.²³⁸ A jurisdiction certified under Section 3(a) could petition the court that

personnel were sent to monitor 163 elections in 105 jurisdictions in 29 states.” Press Release, U.S. Dept. of Justice (June 5, 2006) (available at http://www.usdoj.gov/opa/pr/2006/June/06_crt_347.html). In 2005, an off-election year, the Department deployed 640 federal observers and 191 Department personnel to monitor 47 elections in 36 jurisdictions in 14 states. *Id.* As recently as November 7, 2006, the Justice Department sent over 500 federal observers and 350 Department employees to 69 jurisdictions in twenty-two states, primarily to monitor compliance with the language assistance provisions. *See* U.S. Dept. of Justice, Justice Department Sends Election Observers to 22 States Across the Country in Unprecedented Monitoring Effort for a Midterm Election (Nov. 6, 2006), http://www.usdoj.gov/opa/pr/2006/November/06_crt_758.html.

232. *See* 42 U.S.C.A. § 1973d (West 2003).

233. *Id.* § 1973a(a).

234. *Id.* Appointment of examiners do not have to be authorized if the violations of the right to vote: “(1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.” *Id.*

235. *See supra* note 146 and accompanying text.

236. *See* 42 U.S.C. § 1973a(a) (West 2003).

237. *Id.* § 1973k. The Attorney General could terminate the certification if: (1) the Director of the Census determined more than fifty percent of the nonwhite persons of voting age are registered to vote; (2) all persons listed by an examiner were placed on the voter registration lists; and (3) there was no longer reasonable cause to believe that persons will be denied the right to vote on account of race or color or on the basis of their language. *Id.*

238. *Id.*

issued the order to terminate certification.²³⁹

By 2006, there were a total of 165 political subdivisions of sixteen states certified for federal examiners. The Attorney General had certified a total of 148 counties or parishes in nine states under Section 6 of the VRA.²⁴⁰ Federal courts had certified seventeen political subdivisions in nine states under Section 3(a) of the VRA for designated periods of time specified in the courts' orders.²⁴¹ All of the 3(a) certified jurisdictions except for Landry Parish, Louisiana were certified as a result of court orders remedying voting discrimination against language minority citizens.²⁴²

The VRARA made several changes to the existing framework of the federal examiner and observer provisions to update the certification process to contemporary needs and usage. Section 3(c) of the VRARA repealed the federal examiner provisions in Sections 6, 7, and 9 in their entirety because those provisions had outlived their utility.²⁴³ Section 3(d) of the VRARA substituted references to "observers" for references to "examiners" in the remaining Sections of the Act.²⁴⁴ Section 3(a) of the VRARA used the two existing certification methods, with some slight modifications, but applied them to federal observers in Section 8 of the Act.²⁴⁵ Section 3(d) of the VRARA updated the process for terminating certifications by the Attorney General based solely upon evidence that "there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color."²⁴⁶ A federal court would continue to retain the authority to terminate certifications made under the pocket trigger for observer coverage.²⁴⁷ The VRARA's changes to the federal examiner and observer provisions enhanced opportunities for observer coverage in jurisdictions where it is needed.

D. The Expert Witness Fees Provision

Two important amendments were added to the VRA in 1975 to facilitate its enforcement. In Section 3(a) of the Act, "any aggrieved person" was authorized to obtain federal court authorization for examiners and observers in "a proceeding under

239. *Id.* § 1973a(a).

240. U.S. Dep't of Justice, Civil Rights Div., Voting Section, Federal Examiners and Federal Observers, http://www.usdoj.gov/crt/voting/examine/activ_exam.htm (last visited Feb. 28, 2006). The jurisdictions certified by the Attorney General included twenty-two jurisdictions in Alabama, three in Arizona, twenty-nine in Georgia, twelve in Louisiana, fifty in Mississippi, three in New York, one in North Carolina, eleven in South Carolina, and seventeen in Texas. *Id.*

241. *Id.* The certified jurisdictions included three counties and three cities in California; St. Landry Parish in Louisiana; Boston, Massachusetts; two counties in New Mexico; two counties and one school district in New York; Berks County, Pennsylvania; Buffalo County, South Dakota; Ector County, Texas; and Yakima County, Washington. *See id.*

242. *See id.*

243. *See* Pub L. No. 109-246 § 3(c), 120 Stat. 580 (2006).

244. *See id.* at §3(d).

245. *See id.* at §3(a). For one of the certification methods, the VRARA substitutes a requirement of "written meritorious complaints" from "residents, elected officials, or civic participation organizations" in place of the current requirement of 20 such complaints from "residents" of the jurisdiction. The other method of certification under Section 6 is identical, except for the substitution of "observer" for "examiner." *Cf. id.* with 42 U.S.C.A. § 1973d (West 2003).

246. *See* Pub. L. No. 109-246 § 3(b), 120 Stat. 577, 579 (2006).

247. *See id.*

any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision.”²⁴⁸ As a result, private parties may secure application of the Act’s special provisions.²⁴⁹ In Section 14 of the Act, private parties were given an incentive to enforce the Act.²⁵⁰ Under this “private attorneys general” provision,²⁵¹ private parties who have prevailed in “any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment” may be awarded a reasonable attorney’s fee.²⁵² Congress recognized the important role of dual enforcement by the Attorney General and private parties who would “assist the process of enforcing voting rights” of language minorities.²⁵³

Even with these changes, the VRA still failed to include an explicit provision permitting recovery of expert witness fees. In 1991, the United States Supreme Court held that absent such express authority under federal civil rights laws, expert fees could not be recovered as part of reasonable attorneys’ fees.²⁵⁴ That same year, Congress responded by amending the Civil Rights Act of 1964 to provide for recovery of expert witness fees, recognizing “employment discrimination victims very often cannot win their cases without the help of costly statisticians and other experts.”²⁵⁵ However, the VRA was unaffected by the amendment.

Section 6 of the VRARA addressed this deficiency by harmonizing the VRA with other federal civil rights statutes.²⁵⁶ It amended Section 14(e) of the Act by providing for recovery of “reasonable expert fees, and other reasonable litigation expenses” in addition to reasonable attorneys’ fees.²⁵⁷ There was “substantial testimony indicating that much of the burden associated with either proving or defending a Section 2 vote dilution claim is established by information that only an expert can prepare.”²⁵⁸ As Senator Patrick Leahy explained, this simple amendment would “have a significant impact on the ability of litigants to successfully combat discrimination in court.”²⁵⁹

248. Pub. L. No. 94-73, § 402, 89 Stat. at 404 (codified as amended at 42 U.S.C. § 19731 (2000)); *see* § 401, 89 Stat. at 404 (adding the words “or an aggrieved person”) (codified as amended at 42 U.S.C. § 1973a(a) (2000)).

249. *See* S. REP. NO. 295, at 40 (1975), *as reprinted in* 1975 U.S.C.A.A.N. 806 (“The amendment proposed by S. 1279 would authorize courts to grant similar relief to private parties in suits brought to protect voting rights in covered and non-covered jurisdictions”).

250. *See* Pub. L. No. 94-73, § 402, 89 Stat. 400 at 404 (adding that the court has discretion to “. . . allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.”) (codified as amended at 42 U.S.C. § 19731 (2000)).

251. S. REP. NO. 295, at 40 (1975), *as reprinted in* 1975 U.S.C.A.A.N. 807.

252. 42 U.S.C. § 19731(e) (2000). For an additional discussion of this provision, *see* Martha S. Davis, *Attorney Fee Awards in Voting Rights Litigation*, 34 S.D. L. REV. 303 (1989).

253. S. REP. NO. 94-295, at 40 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 807; 121 CONG. REC. S13374 (daily ed. July 23, 1975) (statement of Sen. Tunney). The Senate Committee specifically noted that it was “aware of the significant numbers of suits brought under the fourteenth amendment to enforce the voting rights of Spanish-speaking citizens.” S. REP. NO. 94-295, at 40 n.40.

254. *See* West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101-02 (1991).

255. H.R. REP. NO. 102-40, at 77 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 615.

256. *See* H. REP. NO. 109-478, at 64 (2006); 152 CONG. REC. H5149 (daily ed. July 13, 2006) (statement of Rep. Chabot).

257. VRARA § 6, Pub L. No. 109-246, § 6, 120 Stat. 581 (2006).

258. H. REP. NO. 109-478, at 64 (2006).

259. 152 CONG. REC. S3988 (daily ed. May 3, 2006) (statement of Sen. Leahy).

E. Factual Purpose and Findings

Finally, Section 2 of the VRARA summarized the congressional purpose and findings essential to establish the constitutionality of the renewed and restored Act.²⁶⁰ In *City of Boerne v. Flores*, the United States Supreme Court set the parameters for congressional exercise of its remedial powers under the Fourteenth and Fifteenth Amendments.²⁶¹ According to the Court, “[w]hile preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved” considered “in light of the evil presented.”²⁶² *Boerne* cited the evidence of racial discrimination supporting the VRA as the type of record necessary to meet the congruence standard.²⁶³ Where that record is established, Congress has “wide latitude” in determining appropriate deterrent or remedial legislation,²⁶⁴ “even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’”²⁶⁵ This is particularly true for legislation such as the VRA in which “the possibility of overbreadth” is reduced by limiting its applications “to those cases in which constitutional violations were most likely” and terminating it when the danger subsided.²⁶⁶ Following *Boerne*, the Court confirmed that congressional power is at its apex for legislation protecting fundamental rights afforded heightened constitutional scrutiny.²⁶⁷

The House Judiciary Committee observed that the “substantial volume of evidence” of racial discrimination it developed during the ten oversight hearings far exceeded the records in the two post-*Boerne* decisions, *Lane* and *Hibbs*.²⁶⁸ This evidence, as described in Section 2 of the VRARA, included “vestiges of discrimination” such as “second generation barriers” to minority voting.²⁶⁹ It also encompassed “continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions” that made racial and language minorities “politically vulnerable.”²⁷⁰ The evidence showed that in jurisdictions covered by the temporary provisions, there was substantial non-compliance with Section 5, many had been denied bailout, minorities continued to file Section 2 cases, and the Department of Justice had to actively enforce the language assistance

260. See VRARA § 2, Pub L. No. 109-246, § 2, 120 Stat. 577–78 (2006).

261. See generally *City of Boerne v. P.F. Flores*, 521 U.S. 507, 517–19 (1997) (noting that the “positive grant of legislative power” given to Congress under the Enforcement Clause of the Fourteenth Amendment was “remedial” in nature) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)).

262. *Id.* at 530.

263. See *id.* at 530, 532–33.

264. *Id.* at 519–20.

265. *Id.* at 518 (citing several examples from the VRA that are constitutional).

266. *Id.* at 533 (citing several examples from the VRA).

267. See generally *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (upholding congressional abrogation of state sovereign immunity under Title II of the Americans with Disabilities Act because it protected the fundamental right of access to the courts); *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003) (upholding the congressional abrogation of state sovereign immunity under the Family Medical Leave Act because the Act prevented sex discrimination).

268. See *id.*; H. REP. No. 109-478, at 57 (2006).

269. VRARA § 2(b)(2), Pub L. No. 109-246, § 2(b)(2), 120 Stat. 577 (2006).

270. *Id.* § 2(b)(3).

provisions.²⁷¹ Similarly, there had been widespread use of federal observers in certified jurisdictions to document and prevent voting discrimination.²⁷² In addition, the Court's misconstruction of Section 5 in *Bossier II* and *Ashcroft* had greatly weakened the VRA's effectiveness.²⁷³

Despite substantial progress under the Act, forty years was insufficient "to eliminate the vestiges of discrimination following nearly 100 years of disregard" for the Constitution.²⁷⁴ Unless the VRA was reauthorized, minority voters would be deprived of their fundamental right to vote, undermining their "significant gains."²⁷⁵ These findings presented a compelling basis to reauthorize the Act for twenty-five years under the *Boerne* line of cases.²⁷⁶

IV. THE DEBATE: NAVIGATING A TREACHEROUS PATH TO REAUTHORIZATION

On April 27, 2006, the late Coretta Scott King's birthday,²⁷⁷ the prospects for reauthorization appeared bright. In a nod to bipartisanship and the storied history of the VRA, Chairman Sensenbrenner and Representative Conyers repeated their 1982 appearance before the Senate Judiciary Committee,²⁷⁸ joined by Representative Watt and Representative Lewis.²⁷⁹ Chairman Sensenbrenner introduced the entire House record into the Senate's record, laying a strong foundation for Senate consideration of the bill.²⁸⁰ In the process, he left no doubt that he fully supported the VRARA, including extension of Section 5 preclearance and the language assistance provisions.²⁸¹ Representative Conyers acknowledged Chairman Sensenbrenner's bipartisan leadership, agreeing that the record supported renewal and restoration of the expiring provisions "to ensure the continuing vitality of the Voting Rights Act."²⁸² There were indications that not everyone concurred, with Republican Senator John Cornyn of Texas extolling "marked progress" under the Act that required crafting "future national policy accordingly."²⁸³ Near the end of the hearing, Republican Senator Arlen Specter of Pennsylvania, Chairman of the Senate Judiciary Committee, committed to a "joint introduction, bicameral introduction" and to timetables to expedite consideration of the VRARA.²⁸⁴

271. *Id.* § 2(b)(4).

272. *Id.* § 2(b)(5).

273. *Id.* § 2(b)(6).

274. *Id.* § 2(b)(7).

275. VRARA § 2(b)(9), Pub. L. No. 109-246, § 2(b)(9), 120 Stat. 577 (2006). Equally important, the VRARA reaffirmed the existing statutory findings in Sections 4(f)(1), 10(a), 202(a), and 203(a) of the VRA. *See id.*; 42 U.S.C. §§ 1973b(f)(1); 1973h(a), 1973aa-1(a); 1973aa-1a(a).

276. *See* H. REP. No. 109-478, at 57-58 (2006).

277. *See Introduction Senate Hearing, supra* note 127, at 7 (testimony of Rep. Conyers).

278. *See 1982 Senate Hearings, supra* note 92, at 876-97 (Feb. 4, 1982) (testimony of Rep. Sensenbrenner); *id.* at 1650-52 (Mar. 1, 1982) (testimony of Rep. Conyers).

279. *See Introduction Senate Hearing, supra* note 127, at 2 (Apr. 27, 2006) (statement of Chairman Specter).

280. *See id.* at 5-6 (testimony of Rep. Sensenbrenner).

281. *See id.* at 6 (testimony of Rep. Sensenbrenner).

282. *Id.* at 8 (testimony of Rep. Conyers).

283. *Id.* at 4 (statement of Sen. Cornyn).

284. *See id.* at 10 (statement of Chairman Specter).

On May 2, 2006, the die was cast. With great fanfare, the VRARA was introduced bicamerally in the House and the Senate. A bipartisan group of more than two dozen members from both chambers joined together in a press event on the steps of the Capitol.²⁸⁵ The group was led by Representative Lewis and included leaders from both parties: Senate Majority Leader Bill Frist, Senate Minority Leader Harry Reid, House Speaker Dennis Hastert, and House Minority Leader Nancy Pelosi.²⁸⁶ Representative Watt observed,

[L]ike other landmark civil rights bills, the renewed and restored bill that we introduced today is good for all Americans. It is not a Republican bill, it is not a Democratic bill, it is not a House bill or a Senate bill. And it is not a bill solely for minorities. This is a bipartisan, bicameral bill that unites us as a country by ensuring that all Americans may have their voices heard.²⁸⁷

The VRARA was titled “The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.”²⁸⁸ Representative Watt explained that although the three African-American civil rights “pioneers have left us, this bill allows us to ensure that rights they fought for remain for future generations.”²⁸⁹

The leadership’s bipartisan commitment was evident at the bill’s introduction. Chairman Sensenbrenner said he would hold two legislative hearings within two days, followed by a committee markup the following week.²⁹⁰ House Majority Leader John Boehner said he hoped to have the bill on the House floor before Memorial Day.²⁹¹ Senator Specter was expected to complete six committee hearings by mid-May, with a markup immediately following the Memorial Day recess.²⁹² According to Representative Watt, supporters had not “sensed” any significant opposition to the bill.²⁹³

The importance of the bipartisan bicameral introduction cannot be overstated. It ensured that the bill being considered by the Senate was identical to the one considered by the House, avoiding the possibility of a protracted battle over language in conference. With the benefit of a substantial House record supporting the VRARA, the Senate would have the evidence it needed to support the bill’s congressional findings independent of the record it later developed. Equally important, it sent the important

285. See Gregory Stanford, *Rare Bipartisanship Brings Voting Rights Act Renewal*, MILWAUKEE J. SENTINEL, May 7, 2006, at 4.

286. Seth Stern, *Extension of the Voting Rights Act is Rare Cause Both Parties Can Support*, CQ TODAY, (Wash., D.C.), May 2, 2006, available at 2006 WLNR 7842524.

287. *Rep. Watt Comments on Introduction of Bicameral/Bipartisan Voting Rights Act Reauthorization Bill*, U.S. FED. NEWS, May 2, 2006, available at 2006 WLNR 8232980.

288. See H.R. 9 § 1, 109th Cong. (2006) (enacted); S. 2703 § 1, 109th Cong. (2006) (enacting H.R. 9, as amended).

289. Gary Martin, *Lawmakers Unite in Push to Renew Voting Rights Act*, SAN ANTONIO EXPRESS-NEWS, May 3, 2006, at A9.

290. Jennifer Yachnin, *Parties Show Unity on VRA*, ROLL CALL (Wash., D.C.), May 3, 2006, available at 2006 WLNR 7552896.

291. *Id.*

292. *Id.*

293. *Id.*

message of inevitability of passage of a clean bill, unencumbered by parochial interests that would threaten reauthorization. Moreover, the Hill photo opportunity for the party leadership committed them to the bipartisan agreement reached on the VRARA in the House. Republican leadership would be held accountable if they broke their promise, which DNC Chairman Howard Dean had made clear on several occasions the previous year.²⁹⁴

A. House Markup and Defeat of the King Amendments

The bipartisan commitment was soon put to the test in the House. On May 4, 2006, Constitution Subcommittee Chairman Chabot held two legislative hearings examining H.R. 9.²⁹⁵ Two of the seven witnesses at those hearings alluded to the political challenges the VRARA would face ahead. Roger Clegg, General Counsel for the conservative Center for Equal Opportunity, testified that the expiring provisions were no longer needed.²⁹⁶ Quoting from Representative Lewis' affidavit in *Ashcroft*, Clegg argued that people in Georgia and "in the American South... are preparing to lay down the burden of race."²⁹⁷ Clegg also tried to link the language assistance provisions to the immigration debate, contending that they said "you can be a full participant in American democracy without knowing English—which is a lie."²⁹⁸

Supervisor Chris Norby from Orange County, California, who had been actively lobbying against the language assistance provisions, agreed.²⁹⁹ Norby was trying to remove his county from Section 203 coverage³⁰⁰ and to defeat a lawsuit against the county by the Mexican American Legal Defense and Education Fund seeking to translate recall petitions.³⁰¹ He claimed that the provisions "perpetuate negative stereotypes, are outdated, vague, and violate the spirit of assimilation that holds our country together."³⁰² Norby even suggested that providing election materials in other languages would "create an anti-immigrant backlash" and create "Minutemen."³⁰³ The

294. See Lynn Sweet, *Toned-Down Dean Finds Friendly Audience at PUSH*, CHI. SUN-TIMES, June 13, 2005, at 2.

295. H.R. REP. NO. 109-478, at 5, 85 (2006).

296. *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006 (Part I): Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 13-37 (2006) (testimony of Roger Clegg).

297. *Id.* at 14 (testimony of Roger Clegg). Representative Lewis took strong exception to Clegg's testimony noting, "We have come a great distance, but we still have a great distance to go before all Americans have free and equal access to the ballot box." *Id.* at 76 (statement of Rep. Lewis).

298. *Id.* at 14 (testimony of Roger Clegg).

299. See Abraham Mahshie, *O.C. Supervisor Lobbies to Limit Bilingual Ballots*, ORANGE COUNTY REG., Apr. 1, 2006, available at http://www.oregister.com/oregister/news/local/print_1083013.php.

300. See generally 2002 Determinations, *supra* note 207, at 48,873 (determining that Orange County was covered under Section 203 for Spanish, Chinese, Korean, and Vietnamese).

301. On November 25, 2005, the Ninth Circuit held that Orange County violated Section 203 by failing to translate the recall petitions. *Padilla v. Lever*, No. 03-56259 (9th Cir. Nov. 25, 2005), *vacated on reh'g en banc*, 463 F.3d 1046 (2006). On September 19, 2006, an en banc panel of the Ninth Circuit reached the opposite conclusion, holding that recall petitions were not covered "voting materials" under Section 203. See *Padilla v. Lever*, 463 F.3d 1046 (9th Cir. 2006) (en banc).

302. *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006 (Part II): Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 14 (2006) (testimony of Chris Norby).

303. *Id.* at 94-95 (testimony of Chris Norby).

themes raised by Clegg and Norby would resonate with a small group of conservative Republicans over the next two months.

Clegg and Norby found their closest ally in Steve King, a Republican Congressman from Iowa. Representative King was an outspoken critic of the Bush Administration's immigration policy.³⁰⁴ He argued that illegal immigrants had killed more Americans than Al Qaeda, referring to illegal immigration as "a slow motion holocaust on our hands."³⁰⁵ He also was widely criticized for suggesting use of an electric fence to stop immigration from Mexico saying, "We do that with livestock all the time."³⁰⁶ Representative King asserted that civil rights groups promoted bilingual ballots to create "cultural enclaves" to "control the immigrants" and give the groups political power.³⁰⁷ On February 3, 2006, he sent a letter signed by fifty-six Representatives to Chairman Sensenbrenner opposing Sections 4(f)(4) and 203 claiming they "are a serious affront to generations of immigrants... that have made great sacrifices to learn English in order to become naturalized citizens."³⁰⁸ The letter cited a number of unfounded allegations about language assistance, including its purported cost, lack of use, and that it promoted voter fraud.³⁰⁹ The King letter reportedly was drafted by ProEnglish, a group actively lobbying to repeal the language assistance provisions.³¹⁰

On May 10, 2006, the House Judiciary Committee held the markup on H.R. 9.³¹¹ The Committee considered several amendments to the bill. Representative Darrell Issa of California offered an amendment requiring the Comptroller General to "study the implementation, effectiveness, and efficiency" of Section 203 and "alternatives to the current implementation consistent with that section."³¹² The amendment was similar to previous studies that the General Accounting Office (GAO) had conducted in 1984 and 1996,³¹³ as well as a 2005 Arizona State University study of language assistance availability, quality, and cost submitted into the record during the House's oversight

304. *Winners and Losers*, DES MOINES CITYVIEW, Sept. 28, 2006, at 10, available at <http://www.dmcityview.com/archives/2006/09sep/09-28-06/winners-losers.shtml>.

305. *Iowa Pol: I Said Holocaust, Not the Holocaust*, THE JEWISH DAILY FORWARD, July 7, 2006, available at <http://www.forward.com/articles/iowa-pol-i-said-holocaust-not-the-holocaust>.

306. *They're People Too*, L.A. TIMES, July 26, 2006, at 10.

307. Brian DeBose, *Lawmakers Push Official English*, WASH. TIMES, Apr. 3, 2006, at A6.

308. See Letter of Fifty-Six Congressmen to Rep. James Sensenbrenner, Chairman, House Judiciary Committee (Feb. 3, 2006) (on file with author) available at <http://www.proenglish.org/issues/ballots/kingletter.pdf>.

309. See *id.* There is substantial evidence refuting King's claims. See generally Tucker, *supra* note 195 (discussing the need, use, and cost of language assistance); Tucker & Espino, *supra* note 217.

310. See Duke Falconer, *Who Really Stalled the Voting Rights Act Renewal*, E PLURIBUS MEDIA, July 12, 2006, http://www.epluribusmedia.org/features/2006/20060712_votingrights_p1.html. K.C. McAlpin, the Executive Director of ProEnglish, testified against renewing the language assistance provisions. See *Voting Rights Act: Section 20—Bilingual Election Requirements (Part II)*: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 63-76 (2005) (testimony of K.C. McAlpin, Executive Director, ProEnglish).

311. See H. REP. NO. 109-478, at 85 (2006).

312. *Id.* at 124-25.

313. See U.S. GEN. ACCT. OFF., BILINGUAL VOTING ASSISTANCE: COST OF AND USE DURING THE NOVEMBER 1984 GENERAL ELECTION: BRIEFING REPORT TO THE HONORABLE QUENTIN N. BURDICK, UNITED STATES SENATE (1986); U.S. GEN. ACCT. OFF., BILINGUAL VOTING ASSISTANCE: ASSISTANCE PROVIDED AND COSTS: REPORT TO THE HONORABLE JOHN EDWARD PORTER, HOUSE OF REPRESENTATIVES (1997).

hearings.³¹⁴ Chairman Sensenbrenner and Representative Conyers both accepted the amendment as “non-controversial,” and it was adopted by voice vote.³¹⁵ However, the amendment created what Representative Watt described as a “challenge... to convince the Senate to put this in their bill” to ensure that a conference would not be necessary.³¹⁶

Representative Sheila Jackson Lee offered an amendment that would make any mid-decade redistricting, which followed adoption of an earlier plan in a Section 5 covered jurisdiction, a “per se violation” requiring denial of preclearance.³¹⁷ The amendment was a response to the mid-decade Texas redistricting spearheaded by former House Speaker Tom DeLay, which had been precleared by the Justice Department.³¹⁸ Representative Conyers opposed the amendment because the Texas redistricting case was before the United States Supreme Court and the legislative record did not support the change.³¹⁹ Chairman Sensenbrenner was more direct saying, “This bill is the subject of lengthy negotiations and it is an agreed upon bill, and this amendment is a deal breaker, and I will be very blunt in saying that.”³²⁰ Mr. Watt acknowledged that Representative Jackson Lee and others would have “individual... interests that go beyond the scope” of the bill, but asked that they “keep the balance” achieved through the VRARA to avoid a “divisive fight.”³²¹ Representative Jackson Lee reluctantly agreed, and withdrew her amendment.³²²

Representative Dan Lungren of California likewise offered an amendment focusing on local interests. He proposed modifying the bailout requirements in Section 4(a) of the Act to exempt jurisdictions that were covered by Section 5 preclearance because of the presence of large numbers of nonvoting military personnel and their families.³²³ He explained, in “certain small jurisdictions in my State, Merced County, Kings County, Yuba County... voter turnout narrowly fell below the 50 percent rule because military personnel often voted in their home States by absentee ballot.”³²⁴ Representative Lungren contended that these jurisdictions were “accidentally swept into coverage” for reasons Congress never intended, making the Act constitutionally vulnerable.³²⁵ He further argued that under Section 5, counties were held accountable for compliance by independent political bodies over which they had no control.³²⁶ Representative Watt described the amendment as a “back-door attempt to circumvent the existing bailout requirements” supported solely by materials submitted by lawyers lobbying for the

314. See LANGUAGE ASSISTANCE PRACTICES, *supra* note 126, reprinted in H. HRG. 109-103, at 2124.

315. H. R. REP. No. 109-478, at 126–27 (2006). The Issa Amendment became Section 9 of the VRARA. See Pub. L. No. 109-246, § 9, 120 Stat. 577, 581 (2006).

316. H. R. REP. No. 109-478, at 126–27 (2006).

317. *Id.* at 127–28.

318. See *id.* at 129–30 (statement of Rep. Jackson Lee); Dan Eggen, *Justice Staff Saw Texas Districting as Illegal; Voting Rights Finding on Map Pushed by DeLay was Overruled*, WASH. POST, Dec. 2, 2005, at A1.

319. H. R. REP. No. 109-478, at 130 (2006) (statement of Rep. Conyers); see also *infra* notes 433–38 and accompanying text (discussing *LULAC v. Perry*).

320. H. R. REP. No. 109-478, at 130 (statement of Rep. Sensenbrenner).

321. *Id.* at 131–32 (statement of Rep. Watt).

322. See *id.* at 132.

323. See *id.* at 151–54.

324. *Id.* at 155–56 (statement of Rep. Lungren).

325. *Id.* (statement of Rep. Lungren).

326. H. R. REP. No. 109-478, at 159–60 (statement of Rep. Lungren).

covered counties.³²⁷ Chairman Sensenbrenner pointed out at least one of the three California counties affected by the amendment had a Section 5 objection and that it was inappropriate to give a “get-out-of-jail-free card” without information about the responsibility for that objection.³²⁸ Representative Lungren withdrew his amendment after several members said they wanted to have more information, but suggested he might try to offer it during the floor debate.³²⁹

Representative King offered the two most contentious amendments. His first amendment would strike Sections 7 and 8 of the VRARA, allowing the language assistance provisions to sunset in August 2007.³³⁰ He attempted to inject immigration into the debate on the VRARA arguing, “Reauthorizing the multilingual voting mandate contradicts our immigration law because English is a condition for naturalization.”³³¹ Representative Lamar Smith echoed King’s concerns by maintaining, “if you were born in America, you should know English. If you are a naturalized citizen, you should have passed an English proficiency test.”³³² Chairman Sensenbrenner disagreed, noting “we are not dealing with illegal immigrants, we are dealing with United States citizens, and they are people who have either attained citizenship by reason of birth in the United States... or have been naturalized.”³³³ He also pointed out that it was unfair to “close the door to understanding a ballot because of the failure of our educational system” or because people move from a place where English is not commonly used.³³⁴ Members of the Congressional Black Caucus and Congressional Hispanic Caucus demonstrated their unity on the bill by unanimously reaffirming the continued need for the language assistance provisions.³³⁵ The King Amendment was defeated by a vote of twenty-six to nine, with a majority of Republicans opposing it.³³⁶ Representative King offered a separate amendment to change the sunset date for the language assistance provisions from 2032 to 2013, a six-year reauthorization to “get... through the next census... to see the effect on reauthorization.”³³⁷ It was defeated twenty-four to ten.³³⁸

Following the debate on the amendments, the Judiciary Committee voted thirty-three to one to report the VRARA out favorably as modified by the Issa Amendment, with only Representative King opposing it.³³⁹ Despite the favorable vote, there already had been two casualties from the debate. Efforts to lower the numerical trigger for

327. *Id.* at 157 (statement of Rep. Watt).

328. *Id.* at 162 (statement of Rep. Sensenbrenner). Chairman Sensenbrenner also noted that the United States Supreme Court had upheld the trigger for Section 5 coverage on three occasions. *Id.*

329. *See id.* at 156–65.

330. *See id.* at 132–34 (statement of Rep. King); VRARA §§ 7-8, *enacted as* Pub L. No. 109-246, §§ 7-8, 120 Stat. 577, 581 (2006).

331. H. R. REP. No. 109-478, at 134 (2006) (statement of Rep. King).

332. *Id.* at 137 (statement of Rep. Smith). Representative Smith also candidly stated his opposition to reauthorization of Section 5, which he claimed “overly burden many jurisdictions” that “no longer disenfranchise minority or other voters.” *Id.*

333. *Id.* at 135 (statement of Rep. Sensenbrenner).

334. *Id.*

335. *See id.* at 135–36, 140–44, 148 (statements of Rep. Conyers, Rep. Scott, Rep. Waters, Rep. Sanchez, Rep. Jackson Lee, and Rep. Watt).

336. H. R. REP. No. 109-478, at 85–86, 149–51.

337. *See id.* at 165–67 (statement of Rep. King).

338. *See id.* at 86–87, 168–70.

339. *See id.* at 87, 171–73.

coverage under the language assistance provisions failed after English-only forces mobilized to express their opposition.³⁴⁰ Furthermore, the House committee report agreed with Supervisor Norby's argument that initiative and recall petitions were not "voting materials" that had to be translated under Section 203.³⁴¹ However, these concessions did little to mollify the bill's detractors, who continued to build their opposition and were waiting for the next chance to strike. The immigration debate in the Senate offered them their opportunity.

B. Immigration and English-Only in the Senate

During the year leading up to the introduction of the VRARA, there had been growing efforts to address immigration reform. The Republican Party was bitterly divided over the issue. Some Republicans called for forced deportation of illegal aliens who would be declared felons,³⁴² while others joined a bipartisan coalition led by Republican Senator John McCain and Democratic Senator Ted Kennedy and supported by President Bush that proposed a path to earned citizenship.³⁴³ On April 10, 2006, immigration was thrust into the national headlines when hundreds of thousands of protestors marched throughout the country, including large rallies in Washington, Atlanta, Phoenix, New York, and Houston.³⁴⁴ Three weeks later the rallies were repeated when more than one million immigrants and supporters marched in a national "day without immigrants."³⁴⁵ The timing could not have been worse for the VRARA. As many newspapers noted, the immigration debate threatened to spill over into reauthorization of the language assistance provisions.³⁴⁶ Chairman Sensenbrenner managed to disentangle the provisions from immigration during the markup of the

340. See *supra* notes 305–11 and accompanying text.

341. See generally H. REP. NO. 109-478, at 59:

"[L]anguage assistance that facilitates equal participation in the voting process so language minority citizens are able to cast effective ballots does not require private citizens to make privately prepared and distributed materials available in the covered languages To impose Section 203's requirements on private citizens whose actions are outside governmentally administered voting systems would have the effect of penalizing private citizens for injuries caused by States."

342. See Comprehensive Enforcement and Immigration Reform Act of 2005, S. 1438, 109th Cong. (1st Sess. 2005) (sponsored by Sens. Cornyn and Kyl); Employers that Abide by the Law and Guaranteeing Uniform Enforcement to Stop Terrorism (REAL GUEST) Act of 2005, H.R. 3333, 109th Cong. (1st Sess. 2005) (sponsored by Rep. Tancredo).

343. See The Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (1st Sess. 2005) (sponsored by Sens. McCain and Kennedy); H.R. 2330, 109th Cong. (1st Sess. 2005) (sponsored by Reps. Kolbe, Flake, and Gutierrez); *George W. Bush Delivers Remarks on Immigration, as Prepared for Delivery*, FDCH CAP. TRANSCRIPTS, May 15, 2006, available at 2006 WLNR 8355672 ("President's May 15, 2006 Address").

344. See Maura Reynolds & Faye Fiore, *The Immigration Debate: Across the U.S., "We Are America,"* L.A. TIMES, Apr. 11, 2006, at 1; *The Immigration Debate; Immigrants Rally in Scores of Cities for Legal Status*, N.Y. TIMES, Apr. 11, 2006, at A1.

345. See Mike Colias, *Immigration: "Marching Not Enough," Organizers of Rallies Say*, MIAMI HERALD, May 3, 2006, at A3; *Jubilant Marchers Grab Nation's Attention: Immigration Rallies*, SEATTLE TIMES, May 2, 2006, at A10.

346. See, e.g., Craig Gilbert, *Sensenbrenner Backs Keeping Bilingual Ballots; Immigration Fire Feeds on Mandate Extension*, MILWAUKEE J. & SENTINEL, May 5, 2006, at 3; Brian DeBose, *Language Rules Impede Extension of Voter Rights Act*, WASH. TIMES, May 5, 2006, at A6; Nicole Gaouette, *House GOP Group Targets Bilingual Ballots; The 56 Lawmakers Want to Let Language Assistance Provisions in the Voting Rights Act Expire*, L.A. TIMES, May 6, 2006, at 9.

VRARA,³⁴⁷ but the threat had not subsided.

The difficulty in keeping the two issues disentangled was complicated by the decidedly mixed signals the Bush Administration was sending on English-only efforts. In late April 2006, a Spanish-language pop version of “The Star Spangled Banner,” “*Nuestro Himno*,” was released in preparation for the immigration rallies.³⁴⁸ President Bush denounced the release saying, “I think the national anthem ought to be sung in English and I think people who want to be a citizen of this country ought to learn English, and they ought to learn to sing the national anthem in English.”³⁴⁹ He further stated the anthem would not “hold the same value” if it was sung in Spanish.³⁵⁰ The President’s statement stood in marked contrast from reports that in 2000 he would sometimes sing the national anthem in Spanish and that he had Jon Secada perform the anthem in Spanish in 2001.³⁵¹ Some notable people in the Administration publicly disagreed with the President.³⁵² In a speech on May 15, 2006, the President reaffirmed the need for newcomers to “assimilate into our society” by learning English.³⁵³

President Bush’s personal struggle to reconcile English language acquisition with immigration spilled over into the Senate three days later. For the first time in twenty-three years,³⁵⁴ the Senate took up an amendment to make English the national language in connection with the Comprehensive Immigration Reform Act.³⁵⁵ The amendment offered by Senator James Inhofe of Oklahoma declared, “English is the national language of the United States.”³⁵⁶ It also purported to “preserve and enhance the role of English as the national language” by providing,

Unless specifically stated in applicable law, no person has a right, entitlement, or claim to have the Government of the United States or any of its officials or representatives act, communicate, perform or provide services, or provide materials in any language other than English. If exceptions are made, that does not create a legal entitlement to additional services in that language or any language other than

347. See *supra* notes 330–38 and accompanying text.

348. Mark Silva, *Bush Thinks National Anthem Should Be Sung in English*, CHI. TRIB., Apr. 29, 2006, at 3. The Spanish version included lines not in the national anthem, such as “My people keep fighting. It’s time to break the chains.” Joyce Howard Price, *President Supports Anthem in English; Spanish Version Called an Insult*, WASH. TIMES, Apr. 29, 2006, at A1.

349. Price, *supra* note 348.

350. Lesley Clark, *Anthem Song Sparks Debate in the ‘Land of the Free,’* MIAMI HERALD, Apr. 29, 2006, at 1A.

351. Peter Baker, *Singing U.S. Praises in Spanish Nothing New*, FORT WORTH STAR-TELEGRAM, May 5, 2006, at A23.

352. *Id.* Secretary of State Condoleezza Rice supported the “individualization” of the national anthem, as confirmed by the State Department’s website, which had four Spanish versions of the anthem. *Id.* First Lady Laura Bush said that she did not see “anything wrong with singing [the anthem] in Spanish.” Editorial, *Pandering with the Anthem*, CHI. TRIB., May 8, 2006, at 22.

353. Address to the Nation on Immigration Reform, 42 WKLY. COMP. PRES. DOC. 931, 934 (May 15, 2006).

354. See CQ BILL ANALYSIS: S3828, *supra* note 35.

355. See The Comprehensive Immigration Reform Act, S. 2611, 109th Cong. (2d Sess. 2006). The 1983 vote was also an amendment to an immigration bill, but would have made English the official language. See *supra* note 35 and accompanying text.

356. The Comprehensive Immigration Reform Act, S. 4064, 109th Cong. (2006) (amendment to S. 2611), available at 152 CONG. REC. S. 2723–24 (daily ed. May 17, 2006).

English.³⁵⁷

U.S. English, which sponsored the 1983 English-only amendment, applauded the measure as “the right thing to do for our immigrants and for our society.”³⁵⁸ Upon introducing his amendment, Senator Inhofe quoted President Bush’s May 15th speech and noted he previously had stated, “Every new citizen of the United States has an obligation” to learn “the English language.”³⁵⁹

Supporters of the Inhofe Amendment went to great pains to clarify that it was “not an English-only amendment.”³⁶⁰ At the same time, they parsed their words carefully to achieve that result to the greatest extent possible. Senator Inhofe acknowledged his amendment would make English the “official” or “national” language.³⁶¹ Although some supporters suggested the Amendment would not apply to executive orders,³⁶² Senator Inhofe made it clear that it repealed Executive Order 13166.³⁶³ He argued that “there is no legal basis for Executive Order 13166 that purported to direct services in languages other than English” under Title VI of the Civil Rights Act, citing several court decisions.³⁶⁴ Senator Inhofe explained that as a result, the Amendment’s exception for other requirements “provided by law” did not apply.³⁶⁵ Senator Durbin therefore concluded, “I believe what he is really aiming for is an Executive Order by President Clinton.”³⁶⁶

Conversely, the Amendment’s supporters begrudgingly acknowledged that existing requirements under the VRA for language assistance were unaffected. Still, they signaled their intent to separately repeal sections 4(f)(4) and 203. Senator Inhofe stated, “Maybe it should be changed, but that should take special legislation that addresses the Voting Rights Act.”³⁶⁷ Senator Alexander agreed, noting, “We can have those discussions at another time.”³⁶⁸ He further explained, “In my opinion, I don’t think there should be [bilingual ballots] because you have to be a citizen to vote and you have

357. *Id.* The Inhofe Amendment further provided that immigrants seeking to become U.S. citizens “must, among other requirements, demonstrate an understanding of the English language, United States history and Government...” *Id.* Additionally, it required that the Department of Homeland Security redesign the citizenship test to reflect those requirements. *Id.*

358. *Sen. Inhofe to Introduce Official English Amendment in Senate*, U.S. FED. NEWS, Mar. 30, 2006, available at 2006 WLNR 16370489.

359. 152 CONG. REC. S4686 (daily ed. May 17, 2006) (statement of Sen. Inhofe).

360. 152 CONG. REC. S4736 (daily ed. May 18, 2006) (statement of Sen. Kyl).

361. 152 CONG. REC. S4686 (daily ed. May 17, 2006) (statement of Sen. Inhofe); *contra* 152 CONG. REC. S4758 (daily ed. May 18, 2006) (statement of Sen. Alexander) (“The Inhofe amendment is not an official English amendment.”).

362. *See, e.g.*, 152 CONG. REC. S4738, 4764 (daily ed. May 18, 2006) (statement of Sen. Graham); 152 CONG. REC. S4752–53 (daily ed. May 18, 2006) (statements of Sens. Durbin and Inhofe); 152 CONG. REC. S4758–59 (daily ed. May 18, 2006) (statement of Sen. Alexander).

363. *See supra* note 54 and accompanying text.

364. 152 CONG. REC. S4753–55 (daily ed. May 18, 2006) (statement of Sen. Inhofe). Senator Inhofe cited Justice Scalia’s opinion in *Alexander v. Sandoval*, 532 U.S. 275 (2001), in which the Court held that there was no private cause of action to enforce Executive Order 13166. 152 CONG. REC. S4753 (daily ed. May 18, 2006) (statement of Sen. Inhofe).

365. 152 CONG. REC. S4764 (daily ed. May 18, 2006) (statement of Sen. Inhofe).

366. 152 CONG. REC. S4765 (daily ed. May 18, 2006) (statement of Sen. Durbin).

367. 152 CONG. REC. S4686 (daily ed. May 17, 2006) (statement of Sen. Inhofe).

368. 152 CONG. REC. S4736 (daily ed. May 18, 2006) (statement of Sen. Alexander).

to demonstrate an eighth grade understanding of English to be a citizen.”³⁶⁹ Senator Inhofe likewise decried “an entitlement to have the Federal Government provide for language, services, and materials.”³⁷⁰

Debate on the Inhofe Amendment highlighted the deep ideological divide that threatened to splinter fragile political support for the language assistance provisions. Senator Sessions argued that providing government materials and services in languages other than English threatened to tear the country apart.³⁷¹ Senator Graham described the Inhofe Amendment as a response to the use of “Mexican flags” in the immigration demonstrations saying, “I am not going to sit on the sidelines and watch demonstrations that destroy national unity.”³⁷² In contrast, opponents criticized the Amendment as threatening democracy, including the right to vote,³⁷³ failing to provide funding for English language instruction,³⁷⁴ encouraging constitutional violations,³⁷⁵ and dividing and stigmatizing non-English speaking Americans who would be denied basic government services.³⁷⁶ Ideological division was evident when Senator Reid opined, “I really believe this amendment is racist. I think it is directed basically to people who speak Spanish.”³⁷⁷

Efforts to prevent restrictions on language assistance from being included in the immigration bill failed when the Inhofe Amendment passed the full Senate by a vote of sixty-two to thirty-five.³⁷⁸ However, the Inhofe Amendment was substantially diluted by the subsequent passage of an alternative amendment by Senator Ken Salazar of Colorado.³⁷⁹ The Salazar Amendment declared, “English is the common and unifying language of the United States,” and purported “to preserve and enhance the role of the English language,” without making English the national language.³⁸⁰ Although both amendments were dead letters after it became apparent that agreement could not be reached on the immigration bill, they were nevertheless problematic. Eleven Democrats crossed party lines to vote for the Inhofe Amendment,³⁸¹ including many who were co-sponsors of the VRARA.³⁸² Equally troubling, President Bush continued to send mixed messages by expressing support for both amendments at the same time the Attorney

369. 152 CONG. REC. S4759 (daily ed. May 18, 2006) (statement of Sen. Alexander).

370. 152 CONG. REC. S4768 (daily ed. May 18, 2006) (statement of Sen. Inhofe).

371. See 152 CONG. REC. S4736 (daily ed. May 18, 2006) (statement of Sen. Sessions).

372. 152 CONG. REC. S4739 (daily ed. May 18, 2006) (statement of Sen. Graham).

373. See 152 CONG. REC. S4756–57 (daily ed. May 18, 2006) (statement of Sen. Akaka).

374. See 152 CONG. REC. S4758 (daily ed. May 18, 2006) (statement of Sen. Salazar); 152 CONG. REC. S4763 (daily ed. May 18, 2006) (statement of Sen. Kennedy).

375. See 152 CONG. REC. S4760 (daily ed. May 18, 2006) (statement of Sen. Bingaman); 152 CONG. REC. S4767 (daily ed. May 18, 2006) (statement of Sen. Reid).

376. See 152 CONG. REC. S4756 (daily ed. May 18, 2006) (statement of Sen. Akaka); 152 CONG. REC. S4762, S4769 (daily ed. May 18, 2006) (statement of Sen. Leahy); 152 CONG. REC. S4763 (daily ed. May 18, 2006) (statement of Sen. Kennedy); 152 CONG. REC. S4767 (daily ed. May 18, 2006) (statement of Sen. Reid).

377. 152 CONG. REC. S4766 (daily ed. May 18, 2006) (statement of Sen. Reid).

378. See 152 CONG. REC. S4769–70 (daily ed. May 18, 2006).

379. See 152 CONG. REC. S4770 (daily ed. May 18, 2006).

380. The Comprehensive Immigration Reform Act, S. 4073, 109th Cong., 2d Sess. (2006) (amendment to S. 2611), available at 152 CONG. REC. S. 4761 (daily ed. May 18, 2006).

381. See 152 CONG. REC. S4769–70 (daily ed. May 18, 2006).

382. See The Library of Congress, Co-Sponsors of S. 2703, Thomas, <http://thomas.loc.gov> (last visited Nov. 22, 2006).

General said the President opposed them.³⁸³ Reauthorization appeared to be in trouble.

C. Hijinx in the House and Slogging in the Senate: The Bill is Hijacked

That message was not lost on a small group of Republicans in the House. English-only advocates jumped on the Inhofe Amendment. Representative King argued, “The Senate demonstrated their overwhelming support for English as our official language” and therefore supported his efforts to eliminate Section 203.³⁸⁴ Emboldened by their Senate victory, opponents of the language assistance provisions soon formed a coalition with conservative Republicans from Georgia and Texas who opposed reauthorization of Section 5.³⁸⁵

Republican Majority Leader John Boehner had proposed bringing the VRARA to the House floor for a vote before the Memorial Day recess.³⁸⁶ His plan quickly evaporated. Part of the delay was because of Boehner’s efforts to bring the bill up under suspension of the House rules, which would have barred all amendments and required a two-thirds majority for passage.³⁸⁷ Boehner attempted to place the bill on the suspension calendar to facilitate passage of a clean bill without the possibility of divisive amendments that might force the bill’s sponsors to pull their support. He also recognized that it would expedite enactment of the same bicameral bills introduced in the House and the Senate.³⁸⁸ However, the growing rebellion within the ranks made it impossible for Republican leadership to seek suspension of the rules.

Two days before the Senate passed the Inhofe and Salazar Amendments, Republican Representative Lynn Westmoreland of Georgia circulated a “Dear Colleague” letter opposing suspension.³⁸⁹ Westmoreland argued, “We must have the opportunity to consider this important bill under regular order... because amendments are needed.”³⁹⁰ He contended that the Section 5 trigger needed to be “updated” because it unfairly targeted states such as Georgia.³⁹¹ Representative Westmoreland suggested that in place of the existing trigger based upon registration and turnout in the 1960s and 1970s, Section 5 coverage should be based upon “recent elections.”³⁹² Representative Westmoreland participated during the Judiciary Committee hearings on the VRARA, even though he was not on the committee.³⁹³ Despite Westmoreland’s participation

383. See Suzanne Gamboa, *Bush Takes Both Sides of Debate; It Is Unclear Which of 2 Senate Proposals About English the President Supports*, ORLANDO SENT., May 20, 2006, at A16.

384. Press Release, Congressman Steve King, King Comments on English as the Official Language Amendment Passes in Senate, May 18, 2006, available at http://www.house.gov/apps/list/press/ia05_king/PREngishPassesSenate051806.html.

385. See Todd J. Gillman, *Texans, Others Stall Voting Rights Renewal GOP Bloc Decries Regulatory Burden; Democrats Livid*, DALLAS MORNING NEWS, May 19, 2006, at 1A.

386. See *VRA Renewal Runs Into Delays*, U.S. FED. NEWS, May 17, 2006, available at 2006 WLNR 9900643 [hereinafter *Runs Into Delays*].

387. *Amendment to Voting Rights Act Extension Has Dim Prospects on House Floor*, CQ TODAY, June 16, 2006, available at 2006 WLNR 10725930.

388. *Id.*

389. See *Runs Into Delays*, *supra* note 386.

390. *Id.*

391. *Id.*

392. Seth Stern & Susan Ferrechio, *Not So Fast: Republicans Want Chance to Amend Extension to Voting Rights Act*, CQ Today, May 16, 2006, available at 2006 WLNR 8746302.

393. See *Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing on H.R. 109-*

during the hearings, his proposed amendment to Section 5 was never offered during the House markup of the VRARA.³⁹⁴ A separate amendment by Representative Charlie Norwood of Georgia to change the Section 5 trigger also had not been offered.³⁹⁵ Representative Westmoreland later explained, “A lot of it looks as if these are some old boys from the South who are trying to do away” with the VRA. “But these old boys are trying to make it constitutional enough that it will withstand the scrutiny of the Supreme Court.”³⁹⁶

On June 20, 2006, the House Rules Committee took up consideration of the VRARA.³⁹⁷ Representative King resurrected his amendment to strike the language assistance provisions from the bill, arguing that voters should be proficient enough to vote in English.³⁹⁸ Chairman Sensenbrenner opposed King’s efforts, again trying to disentangle the bill from the immigration debate.³⁹⁹ The Rules Committee agreed with Sensenbrenner and rejected consideration of the King Amendment, which already had been debated and lost during the markup.⁴⁰⁰ However, to placate Georgia and Texas Republicans seeking to “get the federal government’s foot off our neck,” the Committee agreed to allow the Norwood and Westmoreland Amendments to proceed to the floor.⁴⁰¹ No one was satisfied with this result. Republican Representative Jack Kingston of Georgia derided the rule, stating, “people are very concerned that we’re not having the bilingual ballot issue in there.”⁴⁰² Democratic Representative Artur Davis of Alabama also criticized the arrangement, asserting, “My preference would have been that it come on suspension. There were good reasons for [leadership] to make that commitment... instead of accommodating the concerns of a very small group of Members.”⁴⁰³

The Republican leadership’s concessions quickly proved to be insufficient to quell the growing rebellion within their ranks. The next day, Representative King presented Chairman Sensenbrenner with a letter signed by seventy-nine Representatives stating that they would not support reauthorization until the language assistance provisions were removed from the bill.⁴⁰⁴ During the weekly Republican Conference meeting held in anticipation of the floor vote on the VRARA later that afternoon, things quickly got out of control.⁴⁰⁵ A vocal group of the rebels chanted “in unison for the legislation to

74 *Before the Subcomm. on the Const. of the House Comm. on the Judiciary*, 109th Cong. 66-68 (2005) (statements of Reps. Chabot and Westmoreland).

394. See *Runs Into Delays*, *supra* note 386; *infra* note 397 and accompanying text. Chairman Sensenbrenner later pointed this out during the House floor debate. See 152 CONG. REC. H5185 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner).

395. See *supra* note 393 and accompanying text; *infra* note 397 and accompanying text.

396. Carl Hulse, *Rebellion Stalls Extension of Voting Act*, N.Y. TIMES, June 22, 2006, at A1.

397. See H. REP. 109-516, at 1–3 (2006); see also H.R. 878, 109th Cong. (2006) (providing for the rule).

398. See Keith Perine, *House Expected to Pass Bipartisan 25-Year Voting Rights Act Extension*, CQ TODAY, June 20, 2006, available at 2006 WLNR 11023622 [hereinafter *Expected to Pass*].

399. See *id.*

400. See H. REP. 109-516, at 1–3 (2006).

401. *Expected to Pass*, *supra* note 398; See H. REP. 109-516 (2006).

402. *Expected to Pass*, *supra* note 398.

403. Jennifer Yachnin, *VRA Set for Floor Vote This Week*, ROLL CALL, June 19, 2006, available at 2006 WLNR 10563332 (alteration in original).

404. See *Rep. King Applauds Decision to Give Americans Another Chance to End Bilingual Voting*, U.S. FED. NEWS, June 21, 2006, available at 2006 WLNR 10888239.

405. See Keith Perine & Susan Ferrechio, *GOP Revolt Delays Voting Rights Bill*, C.Q. TODAY, June 21,

be dropped from consideration,” with cries of “pull the bill, pull the bill.”⁴⁰⁶ There were at least four reasons for the delay. First, the rebels raised concerns about the *Ashcroft* and *Bossier II* fixes to Section 5 after intense lobbying by Michael Carvin, a Washington lawyer who represented Bossier Parish and wanted to preserve the *Bossier II* ruling permitting intentional discrimination.⁴⁰⁷ Second, the group argued that no action should occur on the bill until the United States Supreme Court issued its opinion in the Texas redistricting case.⁴⁰⁸ Third, they were upset that the King Amendment was not included with other amendments considered under the rule for the bill.⁴⁰⁹ Finally, they were angry about Chairman Sensenbrenner’s process for developing the bill.⁴¹⁰

The rebels posed a significant dilemma for House leadership. Republican leaders had applied a long-standing rule that no bill would proceed to the floor for a vote without the support of a “majority of the majority.”⁴¹¹ In addition, the opposition suggested that the leadership might not be able to pass a clean bill after all. If that happened, then they would violate the agreement reached by Chairman Sensenbrenner and Representative Watt, turning a positive issue for the Republican Party into one that could very well cost them the 2006 election. The civil rights community would never forgive them if that happened, laying waste to Republican efforts to court African-American and Latino voters. Speaker Hastert and Majority Leader Boehner therefore acceded to the rebels’ demands, pulling the bill in hopes of mollifying the rebels with a compromise that would ensure the bill’s passage at a later date.⁴¹² Correspondingly, Boehner was noncommittal on when that would happen because past assurances on the bill’s timeframe would “come back and bite me.”⁴¹³ Instead, Republican leadership issued a joint statement saying they had time to address the rebels’ concerns, pledging to “offer members the time needed to evaluate the legislation.”⁴¹⁴

The response from the civil rights community and Democrats generally was tempered by the understanding that attacks on the Republican leadership would scuttle reauthorization. At least two incidents had made this point clear. In May 2006, DNC Chair Howard Dean attacked Chairman Sensenbrenner for purportedly trying to

2006, available at 2006 WLNR 11054772.

406. Mark Halperin et al., ABC News, *The Note: Strategy of Necessity*, available at <http://abcnews.go.com/Politics/TheNote/story?id=2110847> (last visited February 2, 2007); 2006 *Braintrust*, *supra* note 78.

407. See Halperin, *supra* note 406. See also *Bossier II*, 528 U.S. at 322 (noting that Carvin represented the Bossier Parish School Board).

408. See Jennifer Yachnin, *Some Seek Delay on VRA Vote*, ROLL CALL, June 8, 2006, at 1 [hereinafter *Some Seek Delay*]; Johanna Neuman, *GOP Halts Extension of Voting Rights Act*, L.A. TIMES, June 22, 2006, at 9 [hereinafter *GOP Halts Extension*]. In the Texas case, *League of United Latin American Citizens v. Perry*, the plaintiffs challenged the mid-decade congressional redistricting plan for maximizing Republican seats at the expense of Latino and African-American voters. See *Some Seek Delay*, *supra*; *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006); Michael Carvin represented the Republican Party in the case. See *LULAC*, 126 S. Ct. at 2604.

409. Charles Babington, *GOP Rebellion Stops Voting Rights Act*, WASH. POST, June 22, 2006, at A7 [hereinafter *GOP Rebellion*]; *GOP Halts Extension*, *supra* note 408, at 9.

410. See *GOP Halts Extension*, *supra* note 408, at 9; *GOP Rebellion*, *supra* note 409, at A7.

411. See *U.S. Representative John Boehner Holds a News Conference*, FDCH CAP. TRANSCRIPTS, July 13, 2006, available at 2006 WLNR 12063598.

412. See *U.S. Representative John Boehner Holds a News Conference*, FDCH CAP. TRANSCRIPTS, June 22, 2006, available at 2006 WLNR 10772566.

413. 152 CONG. REC. H4494 (daily ed. June 22, 2006) (statement of Rep. Boehner).

414. Laurie Kellman, *GOP Fails to Renew Voting Rights Act*, ORLANDO SENT., June 22, 2006, at A6.

eliminate the VRA's language assistance provisions.⁴¹⁵ Sensenbrenner angrily responded, "It's outrageous that the DNC would attempt to blowup the broad bipartisan support" the VRA enjoyed "by launching false attacks."⁴¹⁶ Similarly, in June 2006, Democratic congressional candidate John Cranley falsely accused Representative Chabot of trying to "gut" the VRA.⁴¹⁷ Recognition that Chairman Sensenbrenner was "sensitive" to being "publicly criticized"⁴¹⁸ kept most of the responses to the setback subdued.⁴¹⁹ Instead, the bill's supporters depicted the rebels as extremists isolated from their own party. Wade Henderson, Executive Director of LCCR, described them as "a small band of miscreants" who "at the last moment, hijacked this bipartisan, bicameral bill."⁴²⁰ The VRARA would not be derailed by partisanship, despite the efforts by a small band of House Republicans.

Delays in the House carried over to the Senate, and Senator Specter's commitment to conclude six hearings by mid-May quickly disappeared.⁴²¹ In contrast to the industrious House schedule,⁴²² the Senate took nearly three months to hold nine hearings.⁴²³ Senator Patrick Leahy, the Democratic manager for the bill in the Senate, described the hearings as plagued "by repeated cancellations and postponements."⁴²⁴ Conservative senators who echoed the complaints of their House counterparts were behind the delays. Senator Tom Coburn stated he would "like to see some changes,"⁴²⁵ later identified by Senator John Cornyn as the same proposals offered by the House rebels.⁴²⁶ Senator Cornyn also asked Senator Specter to defer markup of the VRARA until after the Texas decision was issued. He subsequently called for a hearing to examine the impact of the case on the bill.⁴²⁷

415. See *Rep. Sensenbrenner Requests Retraction by Chairman Dean for Democratic National Committee's False Attack on his Voting Rights Act Effort*, U.S. FED. NEWS, May 11, 2006, available at 2006 WLNR 8151493.

416. *Id.*

417. Michael Collins, Editorial, *Cranley Admits Mistake*, CIN. POST, July 15, 2006, at A14.

418. *Iron Will*, *supra* note 97, at 1.

419. DNC Chair Howard Dean was one notable exception. RNC Chairman Ken Mehlman opened his comments to the National Association of Latino Elected and Appointed Officials (NALEO) annual convention by pledging support for "expeditiously" reauthorizing the VRA, saying Republican leadership "will use their good offices to make sure that this law continues to be enforced and is reauthorized, and I will use my position as chairman of the party to do the same." *Republican National Committee Chairman Mehlman Addresses NALEO Annual Conference*, U.S. FED. NEWS, June 22, 2006, available at 2006 WLNR 18815533. Dean told the NALEO convention, "Twenty-four hours ago, Republicans pulled the Voting Rights Act off of the table. How can you come before a group and ask for their votes, when you don't want them to vote?" Gromer Jeffers, Jr., *Dean, GOP Chief Discuss Rights at Latino Summit: Republicans Blasted on Voting Act Delay, Mehlman Optimistic*, DALLAS MORNING NEWS, June 23, 2006, at 3A.

420. Babington, *supra* note 409; see also Hazel Trice Edney, *Voting Rights Act Extension "Hijacked" in Congress*, NEW AM. MEDIA, June 30, 2006, at 8 (reporting National Urban League head Marc Morial denounced the delay saying, "The Voting Rights Act got derailed, hijacked, expropriated by a handful of – you fill in the blank – southern members of Congress...").

421. See *supra* note 292 and accompanying text.

422. The House Judiciary Committee held nine hearings in less than one month between mid-October and mid-November 2005. See U.S. House of Representatives, Committee on the Judiciary, *Voting Rights Act Oversight Hearings*, available at <http://judiciary.house.gov/printshop.aspx?Section=110> (last visited Nov. 22, 2006).

423. See S. REP. 109-295, at 2–4 (2006).

424. 152 CONG. REC. S7745 (daily ed. July 18, 2006) (statement of Sen. Leahy).

425. Laurie Kellman, *Senators Set to Vote on Voting Rights Act*, CIN. POST, July 14, 2006, at A7.

426. See *infra* note 427 and accompanying text.

427. See Seth Stern, *Decision on Voting Rights Act Provisions Stalled by Division Over Bilingual*

Senator Specter conducted the hearings in a fair and even-handed fashion, readily acceding to requests by conservatives for “an opportunity for a wide variety of witnesses to appear.”⁴²⁸ One dozen of the forty-six witnesses who testified in the Senate hearings also testified in the House, with most supplementing evidence already in the extensive House record.⁴²⁹ Instead of trying to build a record, however, conservatives concentrated on calling witnesses ideologically opposed to reauthorization to undermine the VRARA.⁴³⁰ They submitted written questions demonstrating their hostility towards the Act, their support for amendments offered by the House rebels, and their contempt for the substantial record of discrimination, which they dismissed as mere “anecdotes.”⁴³¹ Although Senator Specter labored to get the bill out of committee, his conservative staff counsel actively undermined his efforts by working with conservative senators to delay and try to kill the bill.⁴³² Their efforts were apparent during the Senate floor debate and what followed.

D. Momentum Shift: Texas, the Stearns Amendment, and Voices from the Past

The pivotal date for reauthorization of the VRA came on June 28, 2006, when two events occurred. First, the Supreme Court issued its opinion in *LULAC v. Perry*, in which the plaintiffs challenged a mid-decade Texas congressional redistricting plan as an unconstitutional partisan gerrymander and for violating Section 2 of the VRA.⁴³³ The Court rejected the gerrymander claim, but found that the plan diluted the votes of Latinos because of racially polarized voting throughout the state in violation of Section 2.⁴³⁴ The Court recognized that the VRA prohibited the elimination of districts where minority voters had an opportunity to elect their preferred candidates, or so-called “opportunity districts,” even where minorities were not in the majority. According to the Court, although Latino voters had not elected their candidate of choice in the

Assistance, CQ TODAY, June 29, 2006, available at 2006 WLNR 11543081.

428. *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. at 4 (2006) (statement of Sen. Specter).

429. See S. REP. 109-295, at 2–4 (2006).

430. For example, they called the three most conservative members of the U.S. Commission on Civil Rights seeking to eliminate Section 5, without calling the remaining Commission members who supported it. See generally *id.* at 3 (listing Gerald Reynolds, Abigail Thernstrom, and Peter Kirsanow as witnesses); *supra* note 45 and accompanying text (describing the politics underlying their report). Commissioners called one witness, Vice Commissioner Abigail Thernstrom, to testify against the bill twice. See S. REP. 109-295, at 3–4 (2006). Conservatives also called Michael Carvin, who had worked with rebels to stall movement of the VRARA in the House. See *id.* at 4; *supra* notes 428–29 and accompanying text. Others called by conservatives included Linda Chavez, Chairman of the Center for Equal Opportunity, and Mauro Mujica, Chairman of U.S. English, who vigorously opposed the language assistance provisions, as well as longstanding opponents of Section 5 such as Professor Carol Swain, author of “Black Faces, Black Interests: The Representation of African-Americans in Congress,” and Roger Clegg, General Counsel for the Center for Equal Opportunity. See S. REP. 109-295, at 3–4 (2006).

431. See, e.g., *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., at 98–104 (2006) (written questions to Prof. Pamela Karlan).

432. Senator Specter, a moderate Republican, became Chairman of the Senate Judiciary Committee after agreeing to allow conservative Republicans to appoint conservative staff to the committee. See *National Briefing Dobson: It's His Way or the Highway*, AM. POL. NETWORK, Jan. 10, 2005, at 7.

433. *LULAC v. Perry*, 126 S.Ct. 2594 (2006).

434. See *id.* at 2607–23.

challenged district, District 23, they were “poised” to do so.⁴³⁵ In response, the state divided the cohesive Latino community in Webb County, moving 100,000 Latinos into an adjacent “Latino opportunity district” and leaving the others in District 23 where they now had “little hope of electing their candidate of choice.”⁴³⁶ Significantly, Chief Justice Roberts and Justices Scalia, Thomas, and Alito also concluded that the intentional creation of majority-minority or opportunity districts to comply with Section 5 of the VRA could be a compelling state interest.⁴³⁷ In doing so, they strongly implied that a majority of justices would reaffirm the constitutionality of Section 5 where it applied to “jurisdictions with a history of official discrimination.”⁴³⁸ When combined with the majority holding that the Texas plan diluted Latino voting power, the *LULAC* decision was powerful evidence supporting reauthorization of the VRA.

The Texas victory was bolstered by the decisive defeat of an amendment to the Commerce, State, and Justice (CJS) appropriations bill in the House. Representative Cliff Stearns of Florida proposed an amendment to the bill to cut off funding for Justice Department enforcement of the language assistance provisions.⁴³⁹ Supporters of the Stearns Amendment argued that Section 203 divided the nation, discouraged assimilation of immigrants, and violated the states’ rights to conduct their elections.⁴⁴⁰ At the same time, they overplayed their hand. Representative Stearns conceded, “If one faces a language barrier to voting, then I suspect that he or she is secluded from enjoying all the full rights and privileges of democracy in the United States.”⁴⁴¹ Similarly, Representative King acknowledged that the Amendment was a backdoor attempt to eliminate the language assistance provisions,⁴⁴² noting, “It ends the Federal foreign language mandate, at least for a year.”⁴⁴³ In short, the Amendment was a referendum on reauthorization of the VRA and the continuing need for the Act’s protections.

A unified bipartisan group, led by Republican Representative Lincoln Diaz-Balart, urged that immigration be removed from the debate on Section 203.⁴⁴⁴ Representative Lewis seized on Representative Stearns’ admission saying, “These are our neighbors. They are taxpayers. They are Americans. We should be opening up the process to each

435. *Id.* at 2621.

436. *Id.*

437. *See id.* at 2667 (Scalia, J., concurring in part and dissenting in part).

438. *LULAC v. Perry*, 126 S.Ct. 2594, 2667 (2006).

439. *See* Science, State, Justice, Commerce, and Related Agencies Appropriations Act for FY 2007, H.R. 1145, 109th Cong. (2006) (amendment to H.R. 5672). The amendment provided, “None of the funds made available in this Act may be used to carry out any provision of section 203 of the Voting Rights Act of 1965 . . .” *Id.*

440. *See* 152 CONG. REC. H4744 (daily ed. June 28, 2006) (statement of Rep. Stearns); 152 CONG. REC. H4746 (daily ed. June 28, 2006) (statement of Rep. Rohrabacher); 152 CONG. REC. H4746 (daily ed. June 28, 2006) (statement of Rep. King).

441. 152 CONG. REC. H4744 (daily ed. June 28, 2006) (statement of Rep. Stearns).

442. *See generally* Seth Stern, *Second Markup Fails to Revive Bill Barring Constitutional Challenges to Pledge*, C.Q. TODAY, June 29, 2006, available at 2006 WLNR 11541668 (describing Rep. King’s efforts to “lead a backdoor challenge” to the VRARA).

443. 152 CONG. REC. H4746 (daily ed. June 28, 2006) (statement of Rep. King).

444. *See, e.g.*, 152 CONG. REC. H4744-45 (daily ed. June 28, 2006) (statement of Rep. Diaz-Balart); 152 CONG. REC. H4746 (daily ed. June 28, 2006) (statement of Rep. Scott); 152 CONG. REC. H4746 (daily ed. June 28, 2006) (statement of Rep. Sanchez).

and every American. Let them come in and participate.”⁴⁴⁵ Representative Mike Honda likewise observed that the Stearns Amendment “would undermine the Voting Rights Act reauthorization process and effectively disenfranchise language minority voters through the appropriations process.”⁴⁴⁶ House members responded to their pleas, defeating the Stearns Amendment 254 to 167.⁴⁴⁷

The House rebels had suffered two defeats from which they would not recover. There was no longer any reason for House leadership to delay a vote because of the Texas decision. Furthermore, language in *LULAC* strongly supported the VRA’s constitutionality.⁴⁴⁸ Additionally, the vote against the Stearns Amendment was the fourth time that the House had repudiated English-only efforts.⁴⁴⁹ House leadership could adopt a more open-ended rule to allow a floor vote on the King Amendment, with some confidence that it would fail. There was no longer any reason to delay.

Moreover, Republican leadership was under increasing pressure from every quarter to get the VRARA back on track. Newspapers in Georgia and Texas, home to the rebels, called for immediate passage of the bill.⁴⁵⁰ Corporations, including Coca-Cola, Disney, and Wal-Mart, among many others, followed suit.⁴⁵¹ Leading Republicans also joined in,⁴⁵² along with civil rights leaders.⁴⁵³ Chairman Sensenbrenner authored an op-ed with LCCR Executive Director Wade Henderson calling for extension of Section 5 “and other key protections of the VRA for another 25 years.”⁴⁵⁴ But the most powerful message came from Luci Baines Johnson and Lynda Johnson Robb, the daughters of President Lyndon Johnson, who signed the VRA into law in August 1965.⁴⁵⁵ They observed, “In his own era, our father faced powerful opposition to the Voting Rights Act, including from members of his own party. Nevertheless, he pushed

445. 152 CONG. REC. H4745 (daily ed. June 28, 2006) (statement of Rep. Lewis).

446. 152 CONG. REC. H4748 (daily ed. June 28, 2006) (statement of Rep. Honda).

447. See Science, State, Justice, Commerce, and Related Agencies Appropriations Act for FY 2007, H.R. 1145, 109th Cong. (2006) (amendment to H.R. 5672). See also 152 CONG. REC. H4664 (daily ed. June 27, 2006) (reporting the vote on the Stearns Amendment).

448. See *supra* notes 433–38 and accompanying text.

449. The three prior occasions occurred during the House markup of the VRARA, when the two King Amendments failed and the Committee favorably reported the bill out with the language assistance provisions intact. See *supra* notes 336–38 and accompanying text.

450. See, e.g., Mike King, Editorial, *Our Opinions; Bilingual Ballots Pose No Threat*, ATLANTA J. & CONST., May 9, 2006, at A18; Cynthia Tucker, Editorial, *Our Opinion; Voting Rights Act Protection Not Outdated*, ATLANTA J. & CONST., June 25, 2006, at C6; Editorial, *Renew the Voting Rights Act: House Republicans Should Stop Stalling*, DALLAS MORNING NEWS, available at 2006 WLNR 8833764; Cragg Hines, *Disarray on Voting Rights Shows Heft of GOP Fringe*, HOUS. CHRON., June 25, 2006, at 3; Clay Robison, *Don’t Need Voting Rights Act? Who Are They Kidding?*, HOUS. CHRON., June 25, 2006, at 3.

451. See Josephine Hearn, *Corporate Executives Played Key Role in Passage of the VRA*, THE HILL, July 25, 2006, available at <http://www.thehill.com/thehill/export/TheHill/News/Frontpage/072506/vra.html> (last visited Nov. 22, 2006).

452. See, e.g., Jack Kemp, *Only “Know-Nothings” Oppose Voting Rights Act*, DAILY BREEZE, July 12, 2006, at A13; Joe Rogers, Guest Commentary, *Fight for Voting Equality*, DENVER POST, Mar. 9, 2006, at B7; see also *supra* note 65 (summarizing RNC Chairman Ken Mehlman’s comments).

453. See, e.g., Dorothy Height, *Voting Rights Delay an Affront to History*, USA TODAY, June 30, 2006, at A23; Marc Morial, Editorial, *Voting Rights Act Reauthorization: Congress Must Resist Obstructionists and Vote Today*, MISS. LINK, July 6, 2006, at B6.

454. Representative James Sensenbrenner & Wade Henderson, *Protecting Rights*, ROLL CALL, June 21, 2006, available at 2006 WLNR 10700708.

455. See Luci Baines Johnson & Lynda Johnson Robb, *Don’t Dismantle the Voting Rights Act*, N.Y. TIMES, July 7, 2006, at A17.

forward with the legislation because he knew it was desperately needed. It was the right thing to do then. It still is.”⁴⁵⁶ With the weight of history against the rebels and all eyes on Washington, Republican leadership had to act quickly to get the bill to the House floor.

That would present some challenges. On June 29, 2006, intense lobbying by Michael Carvin at a meeting of the Republican Conference succeeded in confusing members about the Court’s *LULAC* decision and the impact it had on the bill’s *Ashcroft* fix. Mark Braden, who represented a group of interveners in the *Ashcroft* litigation,⁴⁵⁷ strongly disagreed with Carvin’s conclusions. Majority Leader Boehner explained,

The Texas case... didn’t have any direct impact on the reauthorization of the Voting Rights Act, but it has raised some questions... And at least as of this morning, the confusion over the language over influence districts has escalated, because there are lawyers on both sides of this issue — Republican lawyers on both sides of this issue who have differing opinions as to what it means, the language in the Voting Rights Act.⁴⁵⁸

Despite a quarter century under the pre-*Ashcroft* standard,⁴⁵⁹ the House rebels claimed they were confused over the VRARA’s clarification that Section 5 protected “the ability of such [minority] citizens to elect their preferred candidates of choice.”⁴⁶⁰

On July 11, 2006, Republican leaders met again with their rank-and-file in a heated two-hour meeting. Two weeks of wrangling over the issue had done nothing to placate the rebels. As one senior leadership aide observed, “there are a lot of people who don’t agree with how to remedy this.”⁴⁶¹ Representative Watt was incensed with this latest delay saying, “Now it sounds like Republicans would like to get some political advantage out of this. They think this doesn’t benefit them in some way.”⁴⁶² Majority Leader Boehner was discouraged with the “complete disagreement” in the Conference.⁴⁶³ He and other Republican leaders were discussing several alternatives to get the bill to the floor. One compromise was to keep the bill’s language intact, but shorten the reauthorization from twenty-five years to six years.⁴⁶⁴ Another proposal would have an open rule on the bill, which would lead to a free-for-all permitting numerous amendments to be offered.⁴⁶⁵ There was a sense of urgency to bring the bill to the floor before thousands of members of the NAACP converged on Washington for

456. *Id.*

457. *See Georgia v. Ashcroft*, 539 U.S. 461, 465 (2003).

458. *U.S. Representative John Boehner Holds a News Conference*, FDCH CAP. TRANSCRIPTS, June 29, 2006, available at 2006 WLNR 11259000.

459. *See supra* notes 175–76, 181 and accompanying text.

460. VRARA § 5, enacted as Pub. L. No. 109-246 § 5, 120 Stat. 581; *see Susan Ferrechio, Another Set of Meetings for Another Try at Voting Rights Act Reauthorization*, C.Q. TODAY, July 11, 2006, available at 2006 WLNR 12254543.

461. Ferrechio, *supra* note 460.

462. *Id.*

463. *Id.*

464. *Id.*

465. *Id.*

their annual convention at the end of the week.⁴⁶⁶

Republican leadership decided to stop the rebellion in its tracks. On July 12, 2006, the House Rules Committee again took up consideration of the VRARA.⁴⁶⁷ Some concessions were made to the Republican dissidents, with a broader range of amendments allowed to come to the floor. The Norwood and Westmoreland Amendments under the original rule were included in the new rule.⁴⁶⁸ In addition, the rule included consideration of an amendment by Representative Louie Gohmert of Texas to limit reauthorization of the VRA's temporary provisions to ten years.⁴⁶⁹ To placate the vocal contingent of English-only Republicans, Representative King's amendment to strike the language assistance provisions from the bill would also be considered.⁴⁷⁰

Democrats were upset by the expanded rule, with Representative Lewis decrying it as "a big surprise" and "a step backwards."⁴⁷¹ Representative James McGovern called the amendments "poison pills" and asserted that allowing votes on them threatened the "careful bipartisan coalition."⁴⁷² House Minority Leader Nancy Pelosi agreed. She maintained that the bipartisan agreement was "not being honored" and that "Democrats would not be able to vote for the bill if any one of those amendments is passed."⁴⁷³ Two things were certain about the expanded rule: The stakes could not be any higher, and there would be a lively floor debate on the VRARA after all.

E. Passage of a Clean House Bill with No Amendments

For several months, the Bush Administration had expressed general support for renewing the VRA, without any firm commitment of whether it supported the House bill.⁴⁷⁴ That commitment finally came on the morning of the House floor vote on July 13, 2006. The White House issued a Statement of Administration Policy (SAP) stating, "The Administration is strongly committed to renewing the Voting Rights Act, and therefore supports passage of H.R. 9."⁴⁷⁵ Even more importantly, the Administration explicitly rejected the seeds of division the House rebels were trying to plant on the

466. See Peter Wallsten & Johanna Neuman, *Voting Rights Act Renewal Divides GOP*, L.A. TIMES, July 12, 2006, at 15.

467. See H.R. REP. 109-554 (2006); see also H.R. 910, 109th Cong. (2006) (providing for the rule).

468. H. REP. 109-554, at 2 (2006); see also *supra* note 397 and accompanying text (describing the initial rule).

469. H. REP. 109-554, at 2 (2006).

470. See *id.* Representative King claimed that an additional dozen members had joined the seventy-nine who already pledged support to repeal the language assistance provisions. See Basil Talbott, *Rules Panel Allows More Amendments to Voting Rights Act*, CONGRESS DAILY, July 13, 2006, available at 2006 WLNR 12106647.

471. Talbott, *supra* note 470.

472. *Id.*

473. U.S. Representative Nancy Pelosi Holds a News Conference, FDCH CAP. TRANSCRIPTS, July 13, 2006, available at 2006 WLNR 12076856.

474. See *supra* note 287 and accompanying text.

475. Executive Office of the President, *Statement of Administration Policy: H.R. 9 – Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006* (July 13, 2006), available at <http://www.whitehouse.gov/omb/legislative/sap/109-2/hr9sap-h.pdf> (last visited Nov. 22, 2006) [hereinafter SAP]; see also 152 CONG. REC. H5144 (daily ed. July 13, 2006) (providing a copy of the SAP introduced during the House floor debate).

fixes to Section 5. The SAP continued, “The Administration supports the legislative intent of H.R. 9 to overturn the U.S. Supreme Court’s 2003 decision in *Georgia v. Ashcroft* and its 2000 decision in *Reno v. Bossier Parish School Board*.”⁴⁷⁶ President Bush’s unambiguous statement deflated the hopes of the House rebels as the VRARA proceeded to the floor.

Three common themes quickly emerged during a floor debate “punctuated by shouting matches between white Republicans and black Democrats from Georgia.”⁴⁷⁷ First, there was strong bipartisan support for renewing the VRA.⁴⁷⁸ Speakers from both parties commended Chairman Sensenbrenner, Representative Chabot, Representative Conyers, and Representative Watt for their substantial work to achieve a compromise bill.⁴⁷⁹ The House Tri-Caucus spoke with a single voice in favor of a clean bill free of any amendments.⁴⁸⁰ Similarly, a coalition of the leading governmental organizations urged swift reauthorization of the expiring provisions of the VRA.⁴⁸¹ Republican and former Representative J.C. Watts expressed “strong support for a clean reauthorization of the Voting Rights Act.”⁴⁸² As Representative Corrine Brown of Florida explained, “That says it all. Bipartisan support. Democrats, Republicans, and the Administration. This is an American bill.”⁴⁸³

The bill’s supporters also invoked the history of discrimination against minorities. Representative Watt described how he stood “on the shoulders” of George H. White, the last African-American elected to Congress after Reconstruction, who lost his election in 1900 through disenfranchisement of black voters.⁴⁸⁴ He noted that it took nearly thirty years following passage of the VRA for African-Americans to be elected to Congress again in North Carolina.⁴⁸⁵ Representative Watt concluded, “The successes have been gradual and of very recent origin.”⁴⁸⁶ John Lewis, “the conscience of the Congress,”⁴⁸⁷ poignantly described the evidence underlying the VRA. He noted, “[A]ll across the American South very few African-Americans were registered to vote.... In Lowndes County, Alabama, more than 80 percent of that county was

476. SAP, *supra* note 475.

477. Bob Kemper, *Voting Act Ok'd in Tense House*, ATLANTA J. & CONST., July 14, 2006, at A1.

478. *See, e.g.*, 152 CONG. REC. H5143–44 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner); 152 CONG. REC. H5162 (daily ed. July 13, 2006) (statement of Rep. Pelosi).

479. *See, e.g.*, 152 CONG. REC. H5135 (daily ed. July 13, 2006) (statement of Rep. Hoyer); 152 CONG. REC. H5146 (daily ed. July 13, 2006) (statement of Rep. Conyers); 152 CONG. REC. H5147–48 (daily ed. July 13, 2006) (statement of Rep. Watt); 152 CONG. REC. H5162 (daily ed. July 13, 2006) (statement of Rep. Pelosi); 152 CONG. REC. H5165 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner).

480. *See, e.g.*, 152 CONG. REC. H5135 (daily ed. July 13, 2006) (statement of Rep. Hoyer); 152 CONG. REC. H5152 (daily ed. July 13, 2006) (statement of Rep. Napolitano); 152 CONG. REC. H5152 (daily ed. July 13, 2006) (statement of Rep. Sanchez). The Tri-Caucus includes members of the Congressional Black Caucus (CBC), Congressional Hispanic Caucus (CHC), and the Congressional Asian Pacific American Caucus (CAPAC).

481. *See* 152 CONG. REC. H5146 (daily ed. July 13, 2006). Signatories of the letter included the Council of State Governments, the National Conference of State Legislatures, the National Association of Secretaries of State, the National Association of Counties, the National League of Cities, and the U.S. Conference of Mayors. *See id.*

482. *Id.* (letter from J.C. Watts to Chairman Sensenbrenner dated June 21, 2006).

483. 152 CONG. REC. H5190 (daily ed. July 13, 2006) (statement of Rep. Brown).

484. 152 CONG. REC. H5148 (daily ed. July 13, 2006) (statement of Rep. Watt).

485. *Id.*

486. *Id.*

487. 152 CONG. REC. H5162 (daily ed. July 13, 2006) (statement of Rep. Pelosi).

African-American, but not a single African-American was registered to vote.”⁴⁸⁸
According to Representative Lewis,

We cannot separate the debate today from our history and the past we have traveled. When we marched from Selma to Montgomery in 1965, it was dangerous. It was a matter of life and death. I was beaten, I had a concussion at the bridge. I almost died. I gave my blood, but some of my colleagues gave their very lives.⁴⁸⁹

As Representative Conyers explained, “we have to remember one historical fact. For 400 years, we have been dealing with the problem of discrimination and racism in America. I think it would be simplistic... that we would think, after 40 years, we do not need to worry about it that much anymore....”⁴⁹⁰

The Act’s history also showed that while there had been substantial progress, the special provisions were still needed. The bill’s supporters made this point by focusing on recent voting discrimination in Georgia and Texas, from which most of the Republican dissidents came. Several members described the discriminatory voter identification requirements in Georgia, which a federal court had struck down recently.⁴⁹¹ Others referred to the discriminatory Texas redistricting plan struck down by *LULAC*⁴⁹² and the success in using the VRA to stop the blanket rejection of voter registration applications from black students at Prairie View A&M.⁴⁹³ Representative Scott pointed out that since the 1982 VRA reauthorization, Georgia had at least eighty-three Section 5 objections by the Justice Department, thirty-eight discriminatory voting changes withdrawn after it became clear there would be an objection, seventeen successful Section 5 enforcement actions, and the deployment of federal observers on at least fifty-five occasions.⁴⁹⁴ Chairman Sensenbrenner noted that Texas had at least 105 Section 5 objections since 1982, along with fourteen Section 5 submissions that had been withdrawn since 2002 because they were discriminatory.⁴⁹⁵ Among all jurisdictions covered by Section 5, there were more Section 5 objections between 1982 and 2005 than there had been between 1965 and 1982.⁴⁹⁶ Recent examples of voting discrimination from the rebels’ own states sent a powerful message.

Chairman Sensenbrenner and his staff whipped the Republican rank-and-file to support a clean bill⁴⁹⁷ after Majority Whip Roy Blunt of Missouri defected to side with

488. 152 CONG. REC. H5164 (daily ed. July 13, 2006) (statement of Rep. Lewis).

489. *Id.*

490. 152 CONG. REC. H5189 (daily ed. July 13, 2006) (statement of Rep. Conyers).

491. *See, e.g.*, 152 CONG. REC. H5141 (daily ed. July 13, 2006) (statement of Rep. Jones); 152 CONG. REC. H5141 (daily ed. July 13, 2006) (statement of Rep. Scott).

492. *See, e.g.*, 152 CONG. REC. H5137 (daily ed. July 13, 2006) (statement of Rep. Doggett); 152 CONG. REC. H5167 (daily ed. July 13, 2006) (statement of Rep. Roybal-Allard); 152 CONG. REC. H5167 (daily ed. July 13, 2006) (statement of Rep. Blumenauer); 152 CONG. REC. H5173 (daily ed. July 13, 2006) (statement of Rep. Serrano); 152 CONG. REC. H5174 (daily ed. July 13, 2006) (statement of Rep. Ortiz).

493. *See* 152 CONG. REC. H5161–62 (daily ed. July 13, 2006) (statement of Rep. Johnson).

494. 152 CONG. REC. H5151 (daily ed. July 13, 2006) (statement of Rep. Scott).

495. *See* 152 CONG. REC. H5164–65 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner).

496. *See* 152 CONG. REC. H5160 (daily ed. July 13, 2006) (statement of Rep. Van Hollen).

497. *See generally* 152 CONG. REC. H5165 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner) (encouraging members to “[v]ote ‘yes’ on the bill, ‘no’ on the amendments, and let’s go down in history as the House that did the right thing”).

the House rebels.⁴⁹⁸ Sensenbrenner also attempted to diffuse the lingering doubts of southern conservatives about the *Ashcroft* fix. He first engaged in a colloquy with Representative Price of Georgia to clarify that “nothing in this legislation should be construed to allow the Supreme Court to say who is or who is not a minority community’s candidate of choice simply because of a candidate’s party affiliation.”⁴⁹⁹ The Chairman subsequently engaged in a similar colloquy with Representative Watt to confirm that determination of the retrogression standard was to be made “without consideration of political party control,” and that the bill simply restored the pre-*Ashcroft* standard articulated in *Beer v. United States*.⁵⁰⁰ Even with these clear statements of intent, Representative John Shadegg continued to protest that the *Ashcroft* fix potentially would require “that a minority candidate must be of a particular party.”⁵⁰¹

The debate on the four amendments proved contentious. Representative Norwood first offered his amendment, which would alter the Section 5 coverage formula to use a voter registration and turnout “rolling test based off of the last three presidential elections,”⁵⁰² in place of the 1964, 1968, and 1972 presidential elections.⁵⁰³ Representative Phil Gingrey of Georgia claimed that “a lot has changed in 40-plus years” requiring “a law that fits the world of 2006” to ensure Section 5’s constitutionality.⁵⁰⁴ The Amendment’s supporters argued that Georgia was a changed place, illustrated by improved black voter registration and turnout rates and Representative Lewis’s statements in his *Ashcroft* affidavit.⁵⁰⁵ Representative Norwood decried that Georgia had been “put in the penalty box of Section 5” under “the heavy hand of the Justice Department.”⁵⁰⁶ Instead, he proposed that his modified coverage formula would ensure that Section 5 applied nationwide, so “whether you are from Tennessee, whether you are from Wisconsin, [you] have the same equal rights that minorities in Georgia have.”⁵⁰⁷ According to Representative Norwood, his amendment would result in Section 5 coverage in 1,010 jurisdictions in thirty-nine states.⁵⁰⁸ Representative Linder concluded, “if this Voting Rights Act is good for Georgia and the 15 other states, it ought to be wonderful for the country.”⁵⁰⁹

Chairman Sensenbrenner responded forcefully, “The amendment not only guts the

498. Representative Blunt voted in favor of all four amendments to the VRARA offered by the dissident Republicans. See 152 CONG. REC. H5204–07 (daily ed. July 13, 2006).

499. 152 CONG. REC. H5160 (daily ed. July 13, 2006) (colloquy between Reps. Price and Sensenbrenner).

500. 152 CONG. REC. H5163 (daily ed. July 13, 2006) (colloquy between Reps. Sensenbrenner and Watt).

501. 152 CONG. REC. H5166 (daily ed. July 13, 2006) (statement of Rep. Shadegg).

502. H. REP. 109-554, at 2 (2006) (providing the language for the Norwood Amendment).

503. See 42 U.S.C. § 1973b(b) (2006).

504. 152 CONG. REC. H5135 (daily ed. July 13, 2006) (statement of Rep. Gingrey).

505. See, e.g., 152 CONG. REC. H5135, H5151-52, 5184 (daily ed. July 13, 2006) (statement of Rep. Gingrey); 152 CONG. REC. H5184 (daily ed. July 13, 2006) (statement of Rep. Deal); 152 CONG. REC. H5185 (daily ed. July 13, 2006) (statement of Rep. Gohmert); 152 CONG. REC. H5187 (daily ed. July 13, 2006) (statement of Rep. Westmoreland).

506. 152 CONG. REC. H5140 (daily ed. July 13, 2006) (statement of Rep. Norwood).

507. 152 CONG. REC. H5153 (daily ed. July 13, 2006) (statement of Rep. Norwood).

508. See 152 CONG. REC. H5179-81 (daily ed. July 13, 2006) (statement of Rep. Norwood). The coverage formula in the Norwood Amendment was devised, at least in part, by Ronald Keith Gaddie, a political science professor at the University of Oklahoma. See *id.*

509. 152 CONG. REC. H5183 (daily ed. July 13, 2006) (statement of Rep. Linder).

bill, but turns the Voting Rights Act into a farce.”⁵¹⁰ He used two examples to illustrate his point. Under the Norwood Amendment, only Glacier County would be covered in Montana, despite substantial evidence of voting discrimination against American Indians in other counties.⁵¹¹ Additionally, Hawaii, which had no history of voting discrimination against minorities, would become the only state covered in its entirety by Section 5.⁵¹² Chairman Sensenbrenner explained that these results occurred because the amendment was based upon “the constitutional flaw” that Section 5 coverage was determined “exclusively on voter participation, and not on any other factors.”⁵¹³ In the process, it ignored “the past history of discrimination and discriminatory voting practices,”⁵¹⁴ such as the ones that continued in Georgia despite higher black voter participation. The Chairman also pointed out that the existing Section 5 trigger had been upheld by the Supreme Court three times, including as recently as 1999.⁵¹⁵ According to Representative Watt, the Norwood Amendment merely resurrected previous efforts by southerners to render the Section 5 coverage formula unconstitutional.⁵¹⁶ The House rejected the Norwood Amendment by the widest margin of all the amendments, 318 to ninety-six.⁵¹⁷

Representative Gohmert of Texas next introduced an amendment to limit reauthorization of the VRA until 2016.⁵¹⁸ He explained it was needed because “Congress was getting a little more lazy in their obligation to continually monitor this act,” when there was “empirical evidence” showing the Act had to be reviewed more often.⁵¹⁹ Representative Dan Lungren concurred, saying the amendment would “save” the VRA from being struck down.⁵²⁰ Chairman Sensenbrenner strongly disagreed. He pointed out that the amendment flew in the face of the number of Section 5 objections since 1982.⁵²¹ He also maintained that it would deny Congress sufficient data to consider the continuing need for Section 5 when it expired.⁵²² Chairman Sensenbrenner further contended the nine-year reauthorization would nullify the incentive for jurisdictions to have a clean record for ten years to be eligible for bailout.⁵²³ Representative Chabot explained that the hearing process was time-consuming and had developed a substantial record supporting a twenty-five year reauthorization.⁵²⁴

510. 152 CONG. REC. H5181 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner).

511. *Id.*

512. *See* 152 CONG. REC. H5179-80 (daily ed. July 13, 2006) (depicting coverage under the Norwood Amendment); 152 CONG. REC. H5184 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner); 152 CONG. REC. H5175-76, H5184 (daily ed. July 13, 2006) (statement of Rep. Case).

513. 152 CONG. REC. H5185 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner).

514. *Id.*; *see also* 152 CONG. REC. H5183 (daily ed. July 13, 2006) (statement of Rep. Chabot) (making a similar argument).

515. *See* 152 CONG. REC. H5161 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner).

516. *See* 152 CONG. REC. H5182 (daily ed. July 13, 2006) (statement of Rep. Watt).

517. *See* 152 CONG. REC. H5204 (daily ed. July 13, 2006); *infra* note 547 and accompanying text.

518. H. REP. 109-554, at 2 (2006); *see also id.* at 3-4 (providing the language for the Gohmert Amendment).

519. 152 CONG. REC. H5186 (daily ed. July 13, 2006) (statement of Rep. Gohmert).

520. 152 CONG. REC. H5189 (daily ed. July 13, 2006) (statement of Rep. Lungren).

521. 152 CONG. REC. H5190 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner).

522. 152 CONG. REC. H5191 (statement of Rep. Sensenbrenner).

523. *Id.*

524. 152 CONG. REC. H5188 (daily ed. July 13, 2006) (statement of Rep. Chabot).

Representative Watt elaborated, observing that the Supreme Court had upheld similar time frames for actions to remedy discrimination.⁵²⁵ The Gohmert Amendment was defeated 288 to 134, though Majority Leader Boehner supported it.⁵²⁶

The King Amendment, identical to the one defeated in the committee markup,⁵²⁷ proved the most divisive. Representative King argued that to “improve” the VRA, it was necessary to “lift the Federal mandate imposing foreign language ballots on localities by allowing [the mandate] to sunset.”⁵²⁸ He asserted that naturalized citizens “have no claim to a foreign language ballot” because they were required to demonstrate English proficiency, and that LEP native-born citizens could bring an interpreter with them.⁵²⁹ Supporters of the King Amendment decried the Census definition of LEP persons and methods such as surname analysis and outreach used to target language assistance.⁵³⁰ They contended that as a result of “flawed” data, bilingual ballots and other translated election materials were unused at great expense to covered jurisdictions.⁵³¹ Although Representative King denied the amendment was an immigration measure⁵³² his supporters disagreed, saying it was necessary to ensure “that all of these immigrants learn to speak English.”⁵³³

Chairman Sensenbrenner vigorously responded to their arguments. He began by stating, “[W]e are dealing with United States citizens. Illegal immigrants... are not eligible to vote.”⁵³⁴ He added, “According to the 2000 Census, most of the people who are potential beneficiaries of section 203 assistance are native-born legal citizens” who were illiterate because of educational discrimination and lack of opportunities to learn English.⁵³⁵ The Chairman cited Supervisor Chris Norby’s testimony that ballot complexities required greater English proficiency than many Americans had mastered.⁵³⁶ He argued that eliminating Section 203 would remove the “incentive” jurisdictions had to be removed from coverage by teaching LEP citizens “how to read English.”⁵³⁷ He also pointed out that bringing assistance to the polls was “not feasible” for millions of Americans who lived in linguistically isolated households.⁵³⁸ Citing the

525. 152 CONG. REC. H5188 (daily ed. July 13, 2006) (statement of Rep. Watt).

526. 152 CONG. REC. H5205 (daily ed. July 13, 2006). Majority Leader Boehner opposed the other three amendments offered by the Republican dissidents. *See id.* at H5204, H5206.

527. *See* H. REP. 109-554, at 2 (2006); *see also id.* at 4 (providing the language for the King Amendment); *supra* note 400 and accompanying text.

528. 152 CONG. REC. H5191 (daily ed. July 13, 2006) (statement of Rep. King).

529. *Id.*

530. *See* 152 CONG. REC. H5191-93 (daily ed. July 13, 2006) (statement of Rep. King); 152 CONG. REC. H5192 (daily ed. July 13, 2006) (statement of Rep. Gingrey); 152 CONG. REC. H5197 (daily ed. July 13, 2006) (statement of Rep. Miller).

531. *See* 152 CONG. REC. H5192 (daily ed. July 13, 2006) (statement of Rep. Gingrey); 152 CONG. REC. H5193 (daily ed. July 13, 2006) (statement of Rep. Campbell).

532. *See* 152 CONG. REC. H5192-93 (daily ed. July 13, 2006) (statement of Rep. King).

533. 152 CONG. REC. H5195-96 (daily ed. July 13, 2006) (statement of Rep. Stearns); *see also* 152 CONG. REC. H5194 (daily ed. July 13, 2006) (statement of Rep. Istook) (arguing that the King Amendment would help immigrants “to assimilate in our melting pot, truly to become Americans”).

534. 152 CONG. REC. H5191, H5197-98 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner); *see also supra* note 333 and accompanying text (making a similar point during the committee markup).

535. 152 CONG. REC. H5191-92 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner).

536. 152 CONG. REC. H5192 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner).

537. *Id.*

538. *Id.*

strong support that language assistance in voting had among the American public, Chairman Sensenbrenner further reminded members, “2 weeks ago... the House soundly rejected on a bipartisan basis... an effort to defund... efforts to enforce Section 203.”⁵³⁹

Chairman Sensenbrenner was not alone in his past ambivalence towards the language assistance provisions,⁵⁴⁰ which divided Republicans more than any other amendment. The King Amendment’s strongest supporters came from three groups of Republicans: members from the heartland;⁵⁴¹ California members from Orange County,⁵⁴² home to Supervisor Chris Norby;⁵⁴³ and southern dissidents.⁵⁴⁴ Conversely, several Republicans opposed the Amendment. Representative Lincoln Diaz-Balart observed that the language assistance provisions had benefited voters in Florida.⁵⁴⁵ Representative Christopher Shays stated, “These are American citizens who own the right to vote, but may need the assistance provided in Section 203.”⁵⁴⁶ Representative Shadegg, who supported the other three “poison pill” amendments⁵⁴⁷ explained, “Whether an individual is Hispanic, Navajo, or any other background, [they] should be able to seek help when it comes to casting their vote.”⁵⁴⁸ Representative Mike Pence flatly rejected efforts to tie Section 203 to cultural assimilation arguing, “language requirements belong in immigration law, not in the ballot box.”⁵⁴⁹ Reflecting the deep ideological divide among Republicans, the King Amendment failed 238 to 185.⁵⁵⁰

Finally, Representative Westmoreland of Georgia offered an amendment “for an expedited, proactive procedure” for jurisdictions to bailout from coverage under Section 5.⁵⁵¹ The Westmoreland Amendment required that, within three years, the Department of Justice would have to begin an annual review of “jurisdictions eligible for bailout,”

539. *Id.*

540. *See generally* 152 CONG. REC. H5200-01 (daily ed. July 13, 2006) (statement of Rep. Norwood) (“Mr. Chairman, in 1982 you voted against section 203. Today you are promoting section 203. You are against the King amendment. What happened?”); *supra* notes 85, 88 and accompanying text (describing Chairman Sensenbrenner’s past opposition to the language assistance provisions).

541. *See* 152 CONG. REC. H5165 (daily ed. July 13, 2006) (statement of Rep. Paul); 152 CONG. REC. H5194 (daily ed. July 13, 2006) (statement of Rep. Istook).

542. *See* 152 CONG. REC. H5193 (daily ed. July 13, 2006) (statement of Rep. Campbell); 152 CONG. REC. H5197 (daily ed. July 13, 2006) (statement of Rep. Miller); 152 CONG. REC. H5196 (daily ed. July 13, 2006) (statement of Rep. Rohrabacher). Representative David Dreier, who represented parts of Los Angeles and San Bernardino Counties, joined the Orange County Republicans in supporting the King Amendment. *See* 152 CONG. REC. H5142 (daily ed. July 13, 2006) (statement of Rep. Dreier).

543. *See supra* notes 299–301 and accompanying text.

544. *See* 152 CONG. REC. H5192, H5201 (daily ed. July 13, 2006) (statement of Rep. Gingrey); 152 CONG. REC. H5194 (daily ed. July 13, 2006) (statement of Rep. Brown-Waite); 152 CONG. REC. H5195 (daily ed. July 13, 2006) (statement of Rep. Stearns); 152 CONG. REC. H5200–01 (daily ed. July 13, 2006) (statement of Rep. Norwood).

545. *See* 152 CONG. REC. H5133 (daily ed. July 13, 2006) (statement of Rep. Diaz-Balart).

546. 152 CONG. REC. H5137 (daily ed. July 13, 2006) (statement of Rep. Shays).

547. *See* 152 CONG. REC. H5204–07 (daily ed. July 13, 2006). Representative Shadegg voted against final passage of the VRARA when the amendments to modify Section 5 and limit reauthorization to ten years were defeated. *See* 152 CONG. REC. H5207 (daily ed. July 13, 2006); 152 CONG. REC. H5166 (statement of Rep. Shadegg) (calling the bill “trapped in time”).

548. 152 CONG. REC. H5166 (daily ed. July 13, 2006) (statement of Rep. Shadegg).

549. 152 CONG. REC. H5194 (daily ed. July 13, 2006) (statement of Rep. Pence).

550. 152 CONG. REC. H5205–06 (daily ed. July 13, 2006). A total of 181 Republicans and four Democrats voted in favor of the King Amendment, compared to 193 Democrats, forty-four Republicans, and one Independent who voted against it. *See id.*

551. *See* H. REP. 109-554, at 2 (2006); *see also id.* at 4 (providing the language for the Westmoreland Amendment).

notify them, and “consent to entry of a declaratory judgment allowing bailout.”⁵⁵² Echoing arguments made on behalf of the Norwood Amendment,⁵⁵³ Representative Westmoreland claimed his amendment would “help save” the VRA,⁵⁵⁴ although he separately acknowledged to the press that he would “feel fine” if Section 5 was eliminated.⁵⁵⁵ He asserted that the existing bailout procedure was too onerous, and that some liberal law professors believed it needed to be amended.⁵⁵⁶ Chairman Sensenbrenner criticized the proposal as “the worst amendment,” saying tongue-in-cheek that “the liberal law professors that instructed me at... law school about 40 years ago did not make very much impact then.”⁵⁵⁷ He explained, “It would redirect limited resources away from voting rights enforcement, give the executive branch unprecedented and unfettered authority to remove crucial voting rights protections... and impermissibly lock an executive branch agency into a litigation position.”⁵⁵⁸ Representative Chabot elaborated that the amendment “would render the Department of Justice ineffective in performing any of its responsibilities” under the VRA.⁵⁵⁹ The Westmoreland Amendment was defeated handily, 302 to 118.⁵⁶⁰

The House voted overwhelmingly in favor of the VRARA on final passage, 390 to thirty-three.⁵⁶¹ In the process, the vote exposed the roots of the Republican dissidents, with all but three coming from states covered in whole or in part by Section 5 or Section 203, led by six members each from California, Georgia, and Texas.⁵⁶² Although the dissenters were intent on rendering the VRA unconstitutional, their actions had the opposite effect. By debating a variety of amendments to the Act, they made it more likely it would be upheld through a very detailed record for renewing and restoring the expiring provisions. They also galvanized Republican leadership, which praised reauthorization of the VRA⁵⁶³ and encouraged swift passage by the Senate.⁵⁶⁴

F. The Political End Game: The NAACP Convention and Senate Markup

The House vote combined with the NAACP’s annual convention to move the bill in the Senate. By chance, the floor vote came just days before the convention in Washington. For months, RNC Chairman Ken Mehlman had been pleading with President Bush to speak at the NAACP convention, after refusing invitations during the

552. *Id.* at 2.

553. *See supra* notes 502–09 and accompanying text.

554. 152 CONG. REC. H5198 (daily ed. July 13, 2006) (statement of Rep. Westmoreland).

555. Wallsten & Neuman, *supra* note 466, at 15.

556. 152 CONG. REC. H5198–5200, H5204 (daily ed. July 13, 2006) (statement of Rep. Westmoreland).

557. 152 CONG. REC. H5200, H5204 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner).

558. 152 CONG. REC. H5200 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner).

559. 152 CONG. REC. H5201 (daily ed. July 13, 2006) (statement of Rep. Chabot).

560. *See* 152 CONG. REC. H5206–07 (daily ed. July 13, 2006).

561. *See* 152 CONG. REC. H5207 (daily ed. July 13, 2006).

562. *See id.*

563. *See Speaker Hastert Comments on Reauthorization of Voting Rights Act*, U.S. FED. NEWS, July 13, 2006, available at 2006 WLNR 12133683; *Rep. Boehner Issues Statement on House Passage of Voting Rights Act*, U.S. FED. NEWS, July 13, 2006, available at 2006 WLNR 12133564; *Republican National Committee Chairman Mehlman Issues Statement on House Vote to Renew the Voting Rights Act*, U.S. FED. NEWS, July 13, 2006, available at 2006 WLNR 18815544.

564. *See id.*

first five years of his presidency.⁵⁶⁵ The President relented after what was described as days of “ambivalence” about the Act following the House vote.⁵⁶⁶ However, he could not commit to appearing while the Senate passage of the bill was still in doubt. Republicans also did not want to face the fury of thousands of NAACP members converging on the Capitol. President Bush’s efforts to get movement in the Senate were bolstered by the House passage of a clean bill. Following the vote, the Senate bill finally had support from a majority of Senators.⁵⁶⁷ There was no reason for any further delay.

On July 19, 2006, the Senate Judiciary Committee marked up the bill after Senator Specter persuaded Senate Majority Leader Bill Frist to go through regular order.⁵⁶⁸ Senator Leahy offered a technical amendment to add the name of César E. Chávez to the title of the bill, which was accepted by voice vote.⁵⁶⁹ Senator Coburn offered an amendment to change the definition of “limited-English proficient” to include only persons who speak English “not well” or “not at all,” which failed by voice vote.⁵⁷⁰ The amendment would have further narrowed the definition added in 1982 by Senator Don Nickles of Oklahoma to restrict the scope of Section 203 coverage.⁵⁷¹ Like the Nickles Amendment,⁵⁷² the Coburn Amendment would have had a devastating impact, reducing Section 203 coverage by more than two-thirds.⁵⁷³ The Senate Judiciary Committee rejected the Coburn Amendment by voice vote because it was based upon the false premise that persons who speak English “well” do not need language assistance.⁵⁷⁴ Senator Coburn planned to offer two additional amendments, but

565. Nagourney, *supra* note 66, at 36. Mehlman’s request was part of his efforts to reach out to black voters on behalf of the Republican Party. *See id.*; *supra* notes 66–71 and accompanying text.

566. Seth Stern, *Senate Clears Voting Rights Extension*, C.Q. WKLY., July 24, 2006, at 2038.

567. *See* S. 2703, 109th Cong. (2006), available at The Library of Congress, Thomas, <http://thomas.loc.gov> (visited Nov. 22, 2006). On July 13, 2006, fifty-one senators joined Senator Specter in supporting the bill. *See id.* Six more senators subsequently signed on as cosponsors before final passage. *See id.*

568. *See* S. REP. 109-295, at 4 (2006); *see also* Stern, *supra* note 566, at 2039 (noting that Specter made the request “to ensure a full record in case of court challenges later”).

569. *Id.* The amendment was later dropped from the final bill, when the Senate passed H.R. 9 as the House had enacted it. *See infra* notes 583, 630 and accompanying text.

570. *See* S. REP. 109-295, at 4 (2006).

571. The Nickles Amendment was a modified version of the “dominant language” amendment that Congress rejected in 1975. *See generally* 128 CONG. REC. S7104 (daily ed. June 18, 1982) (statement of Sen. Nickles) (stating that “the amendment I offer would more accurately target bilingual assistance to those who are truly in need of such assistance”). The amendment was proposed on the floor of the Senate and accepted without debate. *Id.*

572. The Nickles Amendment had a significant impact on the scope of the minority language requirements, reducing the number of jurisdictions covered by Section 203 from over 300 counties prior to 1984, to just 197 counties by 1992 despite the continued growth of language minority communities during that period. *See* S. REP. 102-315, at 10 (1992).

573. The Coburn Amendment would have eliminated statewide coverage for Spanish in two states, reducing the number of covered counties from fifty-eight to ten in California and thirty-three to one in New Mexico. The impact of the Coburn Amendment was determined by using sampled data from the 2000 Census.

574. As one witness testified, “while they may speak conversational English well, these U.S. citizens may not be fully proficient because they were intentionally denied the academic instruction necessary to vote effectively in English-only elections that employ complicated language and terminology.” *Continuing Need for Section 203’s Provisions for Limited English Proficient Voters: Testimony Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of John Trasviña, Interim President and General Counsel, Mexican American Legal Defense and Educational Fund).

refrained when it became apparent they would not pass.⁵⁷⁵ Senator Sessions expressed the Committee's sentiment for a clean bill saying, "there's no interest in the Senate in making amendments to the House version."⁵⁷⁶ The bill was reported favorably out of Committee eighteen to zero.⁵⁷⁷

On July 20, 2006, the Senate debate on the VRARA began. That morning, President Bush spoke at the NAACP convention. He recognized the event "as a moment of opportunity."⁵⁷⁸ At the same time he noted, "many African Americans distrust my political party."⁵⁷⁹ To allay that distrust, the President thanked the House for reauthorizing the VRA saying, "Soon the Senate will take up the legislation. I look forward to the Senate passing this bill promptly, without amendment, so I can sign it into law."⁵⁸⁰ Later, the President issued a statement describing the Act as "one of the most important pieces of legislation in our Nation's history" to allow millions of Americans to "enjoy the full promise of freedom."⁵⁸¹ The struggle to get a clean bill through both houses of Congress was concluding. And the NAACP had played a critical role at both the beginning and end of the reauthorization process, as several Senators acknowledged during the floor debate.⁵⁸²

G. Final Senate Passage and the Bill-Signing

The Senate debate was characterized by concerted efforts of a few conservatives to undermine the constitutionality of Section 5 despite their expressed support for the bill.⁵⁸³ Their irresolute backing was most apparent in their description of the Senate hearings. Senator Specter emphasized his efforts "to compile a very extensive record in order to avoid having the act declared unconstitutional" through nine hearings with forty-six witnesses that built on the twelve House hearings.⁵⁸⁴ Senator Cornyn acknowledged that Senator Specter readily acceded "to requests that were made to have a complete record" through "a sufficient number of fair and balanced hearings."⁵⁸⁵ At the same time, he argued that the "act's language was a bit of a foregone conclusion" that precluded a "serious, reasoned deliberation over some of the suggested possible

575. See 152 CONG. REC. S7989 (daily ed. July 20, 2006) (statement of Sen. Coburn). Senator Coburn indicated the amendments would have limited VRA reauthorization to seven years and required a photo identification in all federal elections. *Id.*

576. Seth Stern, *Voting Rights Act Renewal Advances in Committee*, CQ COMM. COVERAGE, July 19, 2006, available at 2006 WLNR 12770100.

577. See S. REP. 109-295, at 4 (2006).

578. President's Remarks at the NAACP Annual Convention, 42 WKLY. COMP. PRES. DOC. 1366 (July 20, 2006).

579. *Id.* at 1367.

580. *Id.* at 1371.

581. President's Statement on Legislation to Reauthorize the Voting Rights Act, 42 WKLY. COMP. PRES. DOC. 1366 (July 20, 2006).

582. See, e.g., 152 CONG. REC. S7964 (daily ed. July 20, 2006) (statement of Sen. Leahy); 152 CONG. REC. S7975 (daily ed. July 20, 2006) (statement of Sen. McConnell); 152 CONG. REC. S7976 (daily ed. July 20, 2006) (statement of Sen. Pryor); 152 CONG. REC. S7999 (daily ed. July 20, 2006) (statement of Sen. Dodd); 152 CONG. REC. S8003 (daily ed. July 20, 2006) (statement of Sen. Lieberman).

583. See generally 152 CONG. REC. S8012 (daily ed. July 20, 2006) (roll call vote for H.R. 9).

584. 152 CONG. REC. S7950 (daily ed. July 20, 2006) (statement of Sen. Specter).

585. 152 CONG. REC. S7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn).

improvements.”⁵⁸⁶ Senator Coburn went even further, criticizing the conduct of the hearings as characterized by “political fear and perceived intimidation” that prevented consideration of amendments.⁵⁸⁷ Democratic Senators strongly disagreed, emphasizing the breadth and depth of the record and the bipartisan way in which the hearings were conducted.⁵⁸⁸ Far from rubber-stamping the House bill, Senator Durbin explained, “They were contentious. People were debating whether we needed a Voting Rights Act or whether this was some vestige of America’s past which had no relevance today.”⁵⁸⁹

Like the southern rebels in the House, a few Senate Republicans attacked the continuing need for Section 5.⁵⁹⁰ Senator Specter described a “different America” with a “different political reality.”⁵⁹¹ To make his point, he attempted to substitute his conservative staff’s politicized characterizations for the record, which he claimed showed “discrimination has become more incidental and less systematic.”⁵⁹² Despite *Boerne*’s broad protections for voting,⁵⁹³ Senator Specter argued “only six cases” of “unconstitutional discrimination” against minorities supported reauthorization.⁵⁹⁴ He also grossly mischaracterized the record, claiming that only “[thirty-nine] court cases ended with a finding that one of the 880 covered jurisdictions had violated Section 2,” in contrast to forty such cases in noncovered jurisdictions since 1982.⁵⁹⁵ In other words, Senator Specter attempted to undermine the bill by claiming that “discrimination has become more incidental and less systematic.”⁵⁹⁶

A small group of conservative senators agreed with Senator Specter, emphasizing the gains African-Americans had made in voter registration and turnout under the Act.⁵⁹⁷ Senator Cornyn argued that the “continual decline — almost to the point of statistically negligible numbers — of objections issued by the Department of Justice”

586. *Id.*

587. 152 CONG. REC. S7989-90 (daily ed. July 20, 2006) (statement of Sen. Coburn).

588. *See* 152 CONG. REC. S7963-64, S8009 (daily ed. July 20, 2006) (statement of Sen. Leahy); 152 CONG. REC. S7970 (daily ed. July 20, 2006) (statement of Sen. Feinstein); 152 CONG. REC. S7974 (daily ed. July 20, 2006) (statement of Sen. Durbin); 152 CONG. REC. S8009-10 (daily ed. July 20, 2006) (statement of Sen. Kennedy).

589. 152 CONG. REC. S7974 (daily ed. July 20, 2006) (statement of Sen. Durbin).

590. *See supra* notes 404–14 and accompanying text.

591. 152 CONG. REC. S7950 (daily ed. July 20, 2006) (statement of Sen. Specter).

592. 152 CONG. REC. S7950-63 (daily ed. July 20, 2006) (statement of Sen. Specter).

593. *See supra* notes 261–67 and accompanying text.

594. 152 CONG. REC. S7950 (daily ed. July 20, 2006) (statement of Sen. Specter).

595. *Id.* Senator Specter’s assertion only referred to a fraction of the published cases in which Section 2 violations had been found in covered jurisdictions, excluding hundreds of unpublished decisions. According to the National Commission on Voting Rights report, between mid-1982 and the end of 2005, at least 653 successful Section 2 cases had been brought in nine of the jurisdictions covered by Section 5 – 614 more than Senator Specter cited. *Compare* PROTECTING MINORITY VOTERS, *supra* note 123, at Table 5, *reprinted in Voting Rights Act: Evidence of Continued Need: Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties*, 109th Cong. at 251 (2006). For a comprehensive summary of the Section 2 cases included in the National Commission’s report, see Ellen Katz, Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, Final Report of the Voting Rights Initiative of the University of Michigan Law School, *reprinted in Hearing to Examine the Impact and Effectiveness of the Voting Rights Act*, H. HRG. 109-70, at 964 (2005).

596. 152 CONG. REC. S7950 (daily ed. July 20, 2006) (statement of Sen. Specter).

597. *See* 152 CONG. REC. S7980 (daily ed. July 20, 2006) (statement of Sen. Cornyn); 152 CONG. REC. S7985 (daily ed. July 20, 2006) (statement of Sen. Graham); 152 CONG. REC. S7989 (daily ed. July 20, 2006) (statement of Sen. Coburn).

illustrated why preclearance was unnecessary.⁵⁹⁸ Senator Sessions said that to the extent “misconduct” occurred, it “could have been remedied through ordinary litigation under Section 2 of the Act and 42 U.S.C. § 1983.”⁵⁹⁹ He contended the Norwood Amendment should be adopted “to update the coverage trigger” for Section 5 to apply to other jurisdictions nationwide.⁶⁰⁰ In addition, Senator Sessions claimed the Westmoreland Amendment’s “proactive bailout” was needed because existing bailout requirements were too onerous.⁶⁰¹ Senator Chambliss directly tied these complaints to the House rebellion, praising Georgia Republicans for raising “legitimate concerns” and advancing “positive amendments which I believe would have strengthened this bill.”⁶⁰²

A bipartisan group of senators flatly rejected their claims. Senator Leahy, the Democratic Floor Manager on the bill, submitted extensive summaries of the “robust record” of “voluminous evidence of recurring discrimination” in jurisdictions covered by Section 5⁶⁰³ and Section 203.⁶⁰⁴ He cited the last minute cancellation of an election by the white mayor and all-white board of Kilmichael, Mississippi, in 2001 when several African-Americans declared their candidacies in the majority-black community.⁶⁰⁵ Following a Section 5 objection, voters in Kilmichael elected the first black mayor and three black aldermen.⁶⁰⁶ Senator Kennedy described Georgia’s unconstitutional voter identification law struck down by federal courts in 2006 along with the discriminatory Texas redistricting plan.⁶⁰⁷ He also commented that the “so-called updated trigger” under the Norwood Amendment would essentially exclude Louisiana, despite “substantial evidence” of ongoing voting discrimination there.⁶⁰⁸ Senator Feinstein noted that a Section 5 objection to a discriminatory redistricting plan in Monterey County, California, resulted in the election of the first Latino Supervisor in more than one hundred years.⁶⁰⁹ In addition, Senator Durbin observed that in 2004 South Dakota’s redistricting plan was struck down for discriminating against American Indian voters.⁶¹⁰ As Senator Brownback concluded, the VRA “is central in getting everybody participating in the democracy and a true opportunity to register to vote and to actually vote.... It is critical that we extend it.”⁶¹¹ Passing amendments to “gut” the Act would not achieve that.⁶¹²

598. 152 CONG. REC. S7980-81 (daily ed. July 20, 2006) (statement of Sen. Cornyn).

599. 152 CONG. REC. S7986 (daily ed. July 20, 2006) (statement of Sen. Sessions).

600. *Id.* at S7987; *see also* 152 CONG. REC. S7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn) (contending the Senate should have considered the Norwood Amendment to “update the coverage formula”); 152 CONG. REC. S7989-90 (daily ed. July 20, 2006) (statement of Sen. Coburn) (same).

601. 152 CONG. REC. S7987 (daily ed. July 20, 2006) (statement of Sen. Sessions).

602. 152 CONG. REC. S7983 (daily ed. July 20, 2006) (statement of Sen. Chambliss).

603. 152 CONG. REC. S7745-49 (daily ed. July 18, 2006) (statement of Sen. Leahy).

604. 152 CONG. REC. S7902-05 (daily ed. July 19, 2006) (statement of Sen. Leahy).

605. 152 CONG. REC. S8008 (daily ed. July 20, 2006) (statement of Sen. Leahy).

606. *Id.*

607. 152 CONG. REC. S7967 (daily ed. July 20, 2006) (statement of Sen. Kennedy); *see also* 152 CONG. REC. S7974 (daily ed. July 20, 2006) (statement of Sen. Durbin) (discussing the Georgia voter identification case).

608. 152 CONG. REC. S8010 (daily ed. July 20, 2006) (statement of Sen. Kennedy).

609. 152 CONG. REC. S7969 (daily ed. July 20, 2006) (statement of Sen. Feinstein).

610. 152 CONG. REC. S7974 (daily ed. July 20, 2006) (statement of Sen. Durbin). He further noted that the federal judge relied upon evidence that a state official did not want American Indians to vote. *See id.*

611. 152 CONG. REC. S7965 (daily ed. July 20, 2006) (statement of Sen. Brownback).

612. 152 CONG. REC. S8010 (daily ed. July 20, 2006) (statement of Sen. Kennedy).

Moreover, the bill's supporters argued that the numbers supported reauthorization. They noted that fifty-six percent of the 1,100 Section 5 objections had been issued since 1982⁶¹³ in states such as Georgia⁶¹⁴ and Mississippi, which had twice as many objections during that period as it did during the Act's first seventeen years.⁶¹⁵ Senator Kennedy offered several reasons for the recent drop in the number of objections: the *Bossier II* limitation on purpose objections; discriminatory voting changes withdrawn after the Justice Department indicated it would likely object; and discriminatory submissions the Department wrongfully precleared.⁶¹⁶ Furthermore, he argued that conservatives improperly discounted "the discriminatory changes the Act has deterred... and the dialogue the Act promotes... to ensure consideration of minority communities' concerns in the legislative process."⁶¹⁷ The numbers of Section 5 objections were compelling, but even they did not tell the whole story.

In addition, senators from both parties responded to contentions the Westmoreland Amendment was needed for a meaningful bailout. Republican Senator George Allen stated, "Some will argue that counties and cities and States cannot be removed from 'bailout' or preclearance if they so desire and have a good record. The facts are that there are 11 counties and cities in Virginia that have been able to 'bailout'" by showing the absence of voting discrimination.⁶¹⁸ Senator Kennedy elaborated further, "every jurisdiction that has sought a bailout has succeeded," referring to letters from two such jurisdictions that did not find the process "onerous."⁶¹⁹ The defeat of the Norwood and Westmoreland Amendments, after a "full airing" in the House in light of the record, likewise demonstrated why the Section 5 trigger and bailout provisions needed to be retained.⁶²⁰

Finally, a small cadre of conservative Republicans attacked the VRARA's *Bossier II* and *Ashcroft* fixes for their "perceived potential to put a partisan thumb on the scale."⁶²¹ Senator Kyl argued the fixes would be "abused by the Justice Department to require creation of the maximum number of black majority districts possible or the maximum number of so-called coalition or influence districts" for partisan gains.⁶²² In a colloquy with other conservatives,⁶²³ Senator Kyl made several claims: Section 5 only applied to "protection of naturally occurring" majority-minority legislative districts,⁶²⁴

613. 152 CONG. REC. S7984 (daily ed. July 20, 2006) (statement of Sen. Obama); *see also* 152 CONG. REC. S8002 (daily ed. July 20, 2006) (statement of Sen. Reid); 152 CONG. REC. S8003 (daily ed. July 20, 2006) (statement of Sen. Lieberman) (describing the number of Section 5 objections).

614. 152 CONG. REC. S7974 (daily ed. July 20, 2006) (statement of Sen. Durbin).

615. 152 CONG. REC. S7967 (daily ed. July 20, 2006) (statement of Sen. Kennedy).

616. *Id.*

617. *Id.*

618. 152 CONG. REC. S7972 (daily ed. July 20, 2006) (statement of Sen. Allen).

619. 152 CONG. REC. S7968 (daily ed. July 20, 2006) (statement of Sen. Kennedy).

620. 152 CONG. REC. S8010 (daily ed. July 20, 2006) (statement of Sen. Kennedy).

621. 152 CONG. REC. S7979 (daily ed. July 20, 2006) (statement of Sen. Kyl).

622. 152 CONG. REC. S7978 (daily ed. July 20, 2006) (statement of Sen. Kyl).

623. *See* 152 CONG. REC. S7978-79 (daily ed. July 20, 2006) (statement of Sen. Cornyn); 152 CONG. REC. S7979-80 (daily ed. July 20, 2006) (statement of Sen. McConnell); 152 CONG. REC. S7979 (daily ed. July 20, 2006) (statement of Sen. Hatch); 152 CONG. REC. S7980 (daily ed. July 20, 2006) (statement of Sen. Cornyn); *see also* 152 CONG. REC. S7987 (daily ed. July 20, 2006) (statement of Sen. Sessions) (arguing that the "bipartisan support for this bill indicates that both Republicans and Democrats do not expect or intend it to be interpreted to advantage one party or another").

624. 152 CONG. REC. S.7978 (daily ed. July 20, 2006) (Statement of Sen. Kyl). *But see* James Thomas

it only barred departing from “normal rules of decision” that required such districts; it did not require maximization; purpose objections could not be based upon “partisan advantage” or incumbent protection; and the fixes were “importing the constitutional test in Section 5”⁶²⁵ that required discriminatory purpose and effect.⁶²⁶

Democratic senators flatly rejected the conservatives’ claims. According to Senator Leahy, the statements of conservatives “reflected their individual views” but were not in accord with the evidence that informed the Judiciary Committee’s vote.⁶²⁷ Senator Kennedy explained why the blanket limitations conservatives were trying to impose were improper:

Contrary to the suggestions of Senator Cornyn and Senator Kyl on the floor, while the standard rejects the notion that “ability-to-elect” districts can be traded for “influence” districts, it also recognizes that minority voters may be able to elect candidates of their choice with reliable crossover support and, thus, does not mandate the creation and maintenance of majority-minority districts in all circumstances. The test is fact-specific, and turns on the particular circumstances of each case. As both Senator Cornyn and Senator Kyl noted, the Voting Rights Act is not about electing candidates of particular parties. It’s about enabling minority voters to participate effectively and equally in the political process.⁶²⁸

Statements by the small group of conservative Republicans therefore were entitled to no weight to the extent they conflicted with the plain language of the VRARA and the bipartisan House Report that informed the Senate’s vote.⁶²⁹

Unlike the southern rebels in the House, none of the half dozen conservative Republican dissenters opposed the bill on final passage despite their attacks. The Senate passed H.R. 9 unanimously⁶³⁰ by a vote of ninety-eight to zero.⁶³¹ One week later, President Bush signed the VRARA into law. In his remarks, the President observed, “we’ve made progress toward equality, yet the work for a more perfect union is never ending.”⁶³² More importantly, he committed the Administration to “vigorously

Tucker, *Redefining American Democracy: Do Alternative Voting Systems Capture the True Meaning of “Representation”?*, 7 MICH. J. RACE & LAW 357, 362–63 (2002) (noting that “all districting is gerrymandering” because districting criteria are “far from neutral”).

625. 152 CONG. REC. S7978–79 (daily ed. July 20, 2006) (statement of Sen. Kyl).

626. See *Washington v. Davis*, 426 U.S. 229, 239–42 (1976).

627. 152 CONG. REC. S8004-07 (daily ed. July 20, 2006) (statement of Sen. Leahy).

628. 152 CONG. REC. S8010 (daily ed. July 20, 2006) (statement of Sen. Kennedy).

629. See H.R. REP. 109-478, at 65–72 (2006).

630. See 152 CONG. REC. S7949 (daily ed. July 20, 2006). The Senate voted on H.R. 9 to avoid a conference because of slight differences between the House and Senate bills. After the bicameral introduction of H.R. 9 and S. 2703, H.R. 9 was amended during markup to include the Issa study on effective implementation of the language assistance provisions and S. 2703 had a technical amendment added in markup to add the name of César E. Chávez to the title of the bill. See *supra* notes 312-16, 569 and accompanying text. As Senator Leahy explained, he did not want “to complicate final passage of the Voting Rights Act so I urge the Senate to proceed to the House-passed bill and resist amendments so it can be signed into law without having to be reconsidered by the House.” 152 CONG. REC. S7964 (daily ed. July 20, 2006) (statement of Sen. Leahy).

631. See 152 CONG. REC. S8012 (daily ed. July 20, 2006).

632. President’s Remarks on Signing The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 42 WKLY. COMP. PRES. DOC. 1392 (July 27, 2006).

enforce the provisions of this law” and to “defend it in court.”⁶³³ The long battle for reauthorization was over.

*H. The After Game: Senate Conservatives Attempt to Rewrite Legislative History...
Post-Enactment*

Perhaps the strangest episode in the odyssey of reauthorization came after the VRARA passed the Senate and hours before it was signed into law. On July 26, 2006, Senator Specter and eight conservative Republicans filed the Senate Judiciary Committee’s Report on the bill.⁶³⁴ The report parroted Senator Specter’s remarks during the Senate floor debate suggesting that the Act had achieved its purposes and was no longer needed.⁶³⁵ He qualified the continued need for the VRA through statements such as, “[t]hese types of anecdotes, and the others in the record, demonstrate that the type of behavior that *may* warrant oversight by federal officials.”⁶³⁶ Similarly, he cited Thernstrom’s claim about the number of whites who are now “good friends” with African-Americans and appointments of four blacks to two federal offices, despite its lack of relevance to evidence of voting discrimination.⁶³⁷ Moreover, he argued, “covered jurisdictions that once sponsored violence against minority voters now elect hundreds of minorities to elected office.”⁶³⁸ Additionally, Senator Specter cited increased black voter registration and turnout data,⁶³⁹ which he suggested showed that minorities had equal access to the political process.⁶⁴⁰ In summary, Senator Specter’s views, which were not supported by a majority of the Judiciary Committee,⁶⁴¹ tried to undermine the Act he had just helped reauthorize.

Three conservative Republicans supported Senator Specter’s efforts. Senator Kyl repeated his personal views on how to interpret the *Bossier II* and *Ashcroft* fixes.⁶⁴²

633. *Id.*

634. *See* S. REP. 109-295, at 1 (2006).

635. *Compare* S. REP. NO. 109-295, at 11–21 (2006), with *supra* notes 592, 594–96 and accompanying text.

636. S. REP. 109-295, at 14 (2006) (emphasis added).

637. *Id.* at 9.

638. *Id.*

639. *See id.* at 11. The 2004 registration and turnout data cited by Senator Specter was replete with errors rendering it unworthy of any credibility. It artificially lowered white registration and turnout by lumping in severely depressed data for Latinos with non-Hispanic whites. According to Census data, black voters only registered at a higher rate than the national average for non-Hispanic whites in one covered state, Mississippi. *See* U.S. Census Bureau, Table 4a, Reported Voting and Registration of the Total Voting-Age Population by Sex, Race and Hispanic Origin: November 2004, available at U.S. Census Bureau, <http://www.census.gov/population/www/socdemo/voting/cps2004.html> (visited Feb. 7, 2007). Additionally, black registration and turnout in the 2004 election was higher than for non-Hispanic whites in only Mississippi and North Carolina. *See id.*

640. *But see supra* notes 93–94 and accompanying text (describing Chairman Sensenbrenner’s explanation for why increased black voter registration and turnout do not require modifying the trigger for Section 5 coverage).

641. Senator Mike DeWine of Ohio was the sole Republican on the Committee who declined to join the committee report, saying that he did not think it “was indicated in this case.” Seth Stern, *Senate Democrats Suggest Republicans Tried to Undercut Voting Rights Act*, C.Q. TODAY, July 27, 2006, available at 2006 WLNR 13284338. All eight Democrats on the committee rejected Senator Specter’s report. *See infra* notes 647–51 and accompanying text.

642. *Compare* S. REP. 109-295, at 22–24 (2006) (additional views of Sen. Kyl) with *supra* notes 621–26 and accompanying text.

Senators Cornyn and Coburn likewise reaffirmed their floor statements.⁶⁴³ They claimed the record did not support keeping the existing Section 5 trigger, describing it as “anecdotal accounts” that “implicate only a portion” of covered jurisdictions.⁶⁴⁴ The two senators again denounced the “seemingly rushed, somewhat incomplete legislative process” that prevented “consideration of numerous suggested improvements.”⁶⁴⁵ In doing so, they admitted their views were filed “post-enactment” and that the committee report was not filed “until several days after passage of the legislation and just before it [was] signed into law.”⁶⁴⁶

The eight Democratic senators on the Judiciary Committee unanimously objected to the post-enactment committee report and additional views.⁶⁴⁷ They criticized the report and views for failing to reflect the views of the bill’s co-sponsors, the record, and the endorsement the bill had when it was reported favorably out of committee.⁶⁴⁸ In addition, they pointed out that the report and views could not have informed the floor debate because they were unavailable to the senators.⁶⁴⁹ The eight senators argued, “[n]othing written... after final passage can diminish the force of those findings contained within the enacted legislation itself or the Member’s vote supporting them.”⁶⁵⁰ Consequently, they concluded, “[a]ny after-the-fact attempts to re-characterize the legislation’s language and effects should not be credited.”⁶⁵¹

Civil rights groups also sharply criticized the small group of Republicans for filing the post-enactment report. According to Caroline Fredrickson, Director of the ACLU’s Washington Legislative Office, “It’s outrageous that several members... who signed this report who purport to support the [VRA] show up at the signing ceremony at the same time they file this report which seeks to lay out a roadmap to challenge the constitutionality of the law.”⁶⁵² Still, it is unlikely that federal courts will credit the post-enactment report or additional views as part of the VRA’s legislative history.⁶⁵³

In the end, the actions by the small group of conservatives in the House and Senate took some of the luster off the victory achieved by Republican leadership.

643. Compare S. REP. 109-295, at 25–53 (2006) (additional views of Sens. Cornyn and Coburn) with *supra* notes 283, 575, 587, 597, 598, 600 and accompanying text.

644. S. REP. 109-295, at 25–30 (additional views of Sens. Cornyn and Coburn).

645. *Id.* at 25–26.

646. Compare S. REP. 109-295, at 25–53 (2006) (additional views of Sens. Cornyn and Coburn) with *supra* notes 283, 575, 587, 597, 598, 600 and accompanying text.

647. See S. REP. 109-295, at 54–55 (additional views of Sens. Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, and Durbin).

648. *Id.*

649. *Id.* at 54–55.

650. *Id.* at 55.

651. *Id.*

652. Stern, *supra* note 641.

653. See generally *Chapman v. United States*, 500 U.S. 453, 464 n.4 (1991) (observing that subsequent legislative history is “an unreliable guide to legislative intent”); *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118, n.13 (1980) (noting that “subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment”); *Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (concluding that after-the-fact legislative observations cannot be considered part of the legislative history of the enacted statute); *Sullivan v. Finkelstein*, 496 U.S. 617, 631 (1990) (Scalia, J., concurring) (describing “post-enactment legislative history” as a “contradiction in terms”); *Strickland v. Commissioner*, 48 F.3d 12, 18 (1st Cir. 1995) (describing “subsequent legislative history” as “an oxymoron,” and finding that a subsequent expression of a congressional committee cannot dictate statutory interpretation because that is the role of the courts).

Nevertheless, leaders on both sides of the aisle deserve credit for their bipartisan success in renewing the bill. Without that bipartisanship, the VRARA surely would have foundered in the political storm it encountered on both sides of the Hill.

V. EPILOGUE: THE FUTURE OF THE VOTING RIGHTS ACT

Passage of the VRARA is not the end of the road, but a new beginning. While the politics of persuasion carried the day, civil rights advocates must remain vigilant for efforts to undermine the renewed and restored Act. One week after President Bush signed the VRARA into law, a bill was introduced in the Senate that would declare English the official language of the United States, repealing the Act's language assistance provisions.⁶⁵⁴ The next day, a constitutional challenge to Section 5 was filed in a municipal utility district in Austin Texas, Lamar Smith's district.⁶⁵⁵ A similar challenge has been promised for the language assistance provisions.⁶⁵⁶ In addition, the Census Bureau's ability to make future Section 203 determinations is in doubt because of budget shortfalls for the annual American Community Survey.⁶⁵⁷ The Stearns Amendment highlights the need to monitor closely the appropriations process to ensure it is not abused by promoting discrimination against racial and language minorities. Finally, the reauthorized Act will do little good if it is not vigorously enforced by the Department of Justice, free of any political interference.⁶⁵⁸

Despite these challenges, there is already evidence that the revitalized provisions in the Act are working. In September 2006, the Department of Justice made the first objection under the restored pre-*Bossier II* purpose prong of Section 5 to a submission from Randolph County, Georgia.⁶⁵⁹ The objection is in stark contrast to the claims of Georgia Republicans that the Act is no longer needed.⁶⁶⁰ It also shows that while our nation has come a long way, it still has far to go. But thanks to the renewal and restoration of the VRA, the Department and private citizens continue to have powerful tools at their disposal to eradicate the blight of voting discrimination.

654. See National Language Act of 2006, S. 3828, 109th Cong. § 2 (2006). Representative Peter King previously introduced a companion bill in the House. See National Language Act of 2005, H.R. 4408, 109th Cong. § 3 (2005).

655. See *Northwest Austin Mun. Util. Dist. v. Gonzales*, No. 1:06-cv-01384-PLF (D.D.C. Aug. 8, 2006) (three-judge panel). Gregory Coleman, a former Solicitor General of Texas who testified against reauthorizing Section 5, represents the Municipal Utility District (MUD). See *Modern Enforcement of the Voting Rights Act, Hearing Before the Senate Jud. Comm.*, 109th Cong. 20–21 (2006) (testimony of Gregory Coleman).

656. See generally *Bilingual Elections I*, *supra* note 210, 109th Cong. 44–45 (2006) (testimony of Linda Chavez) (responding to a question about the constitutionality of Section 203, "I would suggest that it will, in fact, probably be challenged if it is reauthorized.").

657. See D'Vera Cohn, *Census Bureau Fears Budget Fallout: Proposed Cuts Said to Hurt Preparations for 2010 Count*, WASH. POST, July 15, 2006, at A10.

658. See *supra* notes 48, 633 and accompanying text; see also 152 CONG. REC. S7967 (daily ed. July 20, 2006) (statement of Sen. Kennedy) (criticizing the Department's "political leadership" for "refus[ing] to follow the recommendations of career experts" in preclearing "matters that merit objection").

659. See Letter from Asst. Att'y Gen. Wan J. Kim to Tommy Coleman, Attorney for Randolph County, GA (Sept. 12, 2006), available at http://www.usdoj.gov/crt/voting/sec_5/pdfs/1_091206.pdf.

660. See *supra* notes 385, 389–96, 504, 551, 602 and accompanying text.