

# VOTING RIGHTS IN FLORIDA 1982-2006

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## TABLE OF CONTENTS

Executive Summary	2
Introduction to the Voting Rights Act	4
I. Florida and Section 5 of the Voting Rights Act	6
A. History of Florida’s Designation Under Section 5	6
B. Florida’s History Under Section 5	8
1. The Reapportionment Objections	9
2. Section 5 Objections to Florida’s Administration of Elections	11
3. Section 5’s Importance in Ensuring Electoral Fairness Where No Objection Was Interposed	13
II. Protection of Language Minorities in Florida	15
A. Florida’s Spanish-Speaking Population	19
B. Discrimination Against Florida’s Haitian-American Voters	23
III. Florida’s Voting Rights Landscape	26
A. Section 2 Litigation Establishing Voting Rights Violations	26
1. At-Large Election Systems	26
2. Litigation Documenting Other Discriminatory Voting Practices	31
B. Other Evidence of Discrimination	34
Conclusion	37

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## EXECUTIVE SUMMARY

The essential role of the Voting Rights Act in protecting the voting rights of Florida's racial and language minorities cannot be overemphasized. Since 1982 the protections of the Act have been exceedingly important in guaranteeing Florida's minority voters access to the ballot box. Review of Florida's history under the Voting Rights Act since 1982 reveals that the special protections afforded race and language minorities under Sections 5, 4(f)(4) and 203 of the Act are needed now more than ever.

Portions of Florida were brought under the Section 5 preclearance provisions of the Voting Rights Act as a result of the Act's expansion in 1975. In that enactment, Congress was particularly concerned about addressing discrimination against members of language minority groups and literacy requirements. As a result of the 1975 expansion, five Florida counties were designated as Section 5 covered jurisdictions – Collier, Hardee, Hendry, Hillsborough and Monroe Counties.

Although the Department of Justice's review under Section 5 is limited to voting changes affecting only five counties, as a practical matter this includes all statewide changes such as voter registration requirements and list maintenance, state reapportionment, and other significant state legislation affecting voting. The Section 5 review process in Florida has proven invaluable in protecting minority voting rights on a statewide basis, as demonstrated by the objections filed by DOJ and the resolutions thereto, as well as the dialogue occasioned by the Section 5 review process even where no objection was interposed.

As a result of the Section 5 objection to Florida's 1992 state reapportionment plan, the state created a majority-minority state senate district in the Tampa Bay/Hillsborough County area where previously none had existed even though black and Hispanic persons constituted more than 40.1 percent of the voting-age population in the area and the legislative record showed that the redistricting had been undertaken with the purpose of protecting white incumbents. Similarly, the Department of Justice's objection to Florida's 2002 state reapportionment plan resulted in the preservation of a Hispanic majority state house of representatives district in Collier County which the state had planned to eliminate.

The Department of Justice has also interposed objections to two statewide changes to the administration of elections, in both instances protecting the rights of race and language minority voters throughout the state. The first objection was interposed in 1985 to legislation that would have prevented absentee voters from receiving assistance in marking their ballots from persons of their choice in violation of Section 208 of the Voting Rights Act. In this regard, the objection both protected minority voting rights and eliminated the need for litigation under Section 208. The second objection, in 1998, also preserved minority voting rights, this time in the face of documented experience in the preclearance counties that absentee ballot changes adversely impacted the ability of minority voters to cast a ballot.

Perhaps even more significant in the discussion of Section 5's salutary impact in Florida is the history of the dialogue among interested constituencies, Department of Justice officials and state officials that is the result of the Section 5 review process. On several occasions, this dialogue

has been shown to shape results that protect the rights of minority voters without the need for an objection or litigation.

The language minority protections of Sections 4(f)(4) and 203 are exceptionally important in Florida, where the defining feature of the latter part of the twentieth century was the enormous increase in the state's limited English proficient population. According to the 2000 Census, almost 400,000 Floridians live in linguistically isolated households with no English proficient member. Florida is home to an increasing number of citizens arriving from Puerto Rico, and it also has a protected Native American population with limited English proficiency.

A recent and ongoing history of discrimination against language minority groups with respect to the exercise of the right to vote is well-documented in Florida. The discrimination has been particularly prevalent in areas that have experienced substantial growth in the language minority population, including Miami-Dade County and much of central Florida. Section 203 remains necessary to protect this population.

In addition to the state's history and experiences with the special coverage provisions of the Voting Rights Act, a review of the history of Florida's voting rights problems in other areas is instructive in evaluating the need for continuing the special coverage provisions in Florida. This history reveals a predilection by many Florida counties to use at-large election schemes to dilute minority voting strength, the widespread use of many franchise restrictions to purposely restrict the access of minority voters to the ballot, and well-documented racially polarized voting. The state has also repeatedly sought to remove valid voters from the voter rolls in a manner that disproportionately impacts black voters.

Maintaining a framework of federal scrutiny for Florida's voting changes through Section 5 is important in regaining and retaining public confidence in the system – particularly among minority voters. Sections 203 and 4(f)(4) continue to be essential to guarantee an opportunity for meaningful participation in the electoral process by Florida's language minorities.

## INTRODUCTION TO THE VOTING RIGHTS ACT

The Voting Rights Act of 1965<sup>2</sup> has been described as “the most effective civil rights statute enacted by Congress.”<sup>3</sup> The portions of the Act that have had the most impact in Florida are Section 2, Section 5 and Sections 203 and 4(f)(4). Two of these provisions are scheduled to expire in 2007 unless reenacted by Congress.<sup>4</sup>

Section 2 of the Voting Rights Act is a permanent provision applying to all jurisdictions.<sup>5</sup> As presently enacted, it prohibits all voting practices and procedures that can be shown to result in a denial or abridgement of the right to vote on the basis of race, color, or membership in a language minority group.<sup>6</sup> To prevail under Section 2, a plaintiff must show that the challenged practice results in race or language minorities having “an inequality in the opportunities... to elect their preferred representatives.”<sup>7</sup> This Section may be enforced either by the United States Attorney General or by affected groups or individuals by filing lawsuits in the United States District Court where the claim arises.

Section 5 of the Voting Rights Act<sup>8</sup> is presently scheduled to expire in 2007.<sup>9</sup> Section 5 is often referred to as the “preclearance” section of the Voting Rights Act. Section 5 applies to a limited number of jurisdictions, referred to as “covered” jurisdictions.<sup>10</sup> Covered jurisdictions are prohibited from changing any election-related procedures until those changes have been precleared, i.e., determined to have neither the intent nor the effect of diminution in minority voting strength. Covered jurisdictions have the option to seek preclearance by making a submission to the Department of Justice or by filing a declaratory judgment action in the United States District Court for the District of Columbia. In either forum, the burden of proof is on the covered jurisdiction seeking preclearance to establish that the proposed changes do not have a discriminatory purpose or effect. As a practical matter, covered jurisdictions almost always seek preclearance through the Justice Department as opposed to filing a declaratory judgment action.<sup>11</sup> The Attorney General is required to review the submissions and take action within

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<sup>2</sup> Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973bb1 (2000).

<sup>3</sup> U.S. Dep’t of Justice, Civil Rights Div., Voting Sec. Overview, *The Statutes We Enforce*, <http://www.usdoj.gov/crt/voting/overview.htm> (last visited Feb. 27, 2006). *See also*, QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990, (CHANDLER DAVIDSON & BERNARD GROFMAN, eds., 1994).

<sup>4</sup> Another expiring provision of the Voting Rights Act, Section 6 (42 U.S.C. §1973d (2000)) provides for the appointment of federal examiners for Section 5 covered jurisdictions upon certification by the Attorney General. These federal observers monitor procedures in polling places and at sites where ballots are counted and report to the Department of Justice. Because the provision has not been invoked by the Attorney General in Florida, Section 6 will not be discussed in this report.

<sup>5</sup> 42 U.S.C. § 1973 (2000).

<sup>6</sup> Section 2 was amended by Congress in 1982 to provide for an “effects” test to establish a violation of the Act, rather than requiring that a plaintiff establish that the voting practice was enacted for a discriminatory purpose. Voting Rights Act of 1982, Pub. L. No. 97-205 § 3, 96 Stat. 134 (1982); S. REP. NO. 97-417 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177; *Thornburg v. Gingles*, 478 U.S. 30 (1986).

<sup>7</sup> *Thornburg*, 478 U.S. at 47.

<sup>8</sup> 42 U.S.C. § 1973c (2002).

<sup>9</sup> 42 U.S.C. § 1973b(a)(8) (2000).

<sup>10</sup> *See discussion infra*.

<sup>11</sup> MARK A. POSNER, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, POLITICIZATION OF JUSTICE DEPARTMENT DECISIONMAKING UNDER SECTION 5 OF THE VOTING RIGHTS ACT: IS IT A PROBLEM AND WHAT

sixty days. The Attorney General preclears the vast majority of proposed changes.<sup>12</sup> In those instances in which the Department of Justice concludes that the submitting jurisdiction has not satisfied its burden to show that the proposed change is free of discrimination, the Attorney General interposes an objection to the proposed change.<sup>13</sup> The covered jurisdiction then has three options – it can forgo or amend the proposed change, request that the Department of Justice reconsider its objection, or file a declaratory judgment action in the United States District Court for the District of Columbia.<sup>14</sup> There is no judicial review of a decision by the Department of Justice *not* to object to a proposed change, though the decision is not a safe harbor for potential Section 2 claims or any subsequent action regarding the procedure.<sup>15</sup>

Section 203<sup>16</sup> of the Voting Rights Act protects language minorities. Like the Section 5 provisions, the language minority protections apply only to those jurisdictions which have been designated as “covered” for the purpose of Section 203. Designations of covered jurisdictions for the purposes of Section 203 are made following each decennial census based on a formula that determines that more than 5 percent of the voting-age citizen population in a jurisdiction belong to a single language minority community and have limited English proficiency (LEP) OR more than 10,000 voting-age citizens in a jurisdiction belong to a single language minority community and are limited English proficient AND the illiteracy rate of the citizens in the language minority group is higher than the national illiteracy rate. Section 203 requires that covered jurisdictions provide all election materials and information that are available in English in the minority language. Section 203 is also scheduled to expire in 2007 unless renewed by Congress.<sup>17</sup>

Language minorities in some areas are also protected by Section 4(f)(4) of the Voting Rights Act.<sup>18</sup> These jurisdictions were designated under a formula resulting from the 1975 amendments to Sections 4 and 5 of the Act. Jurisdictions are covered for the purposes of Section 4(f)(4) if (1) over 5 percent of the voting age citizens on November 1, 1972, were members of a single language minority group; (2) the United States Attorney General finds that election materials were provided in English only on November 1, 1972; AND (3) the Director of the Census determines that fewer than 50 percent of voting-age citizens were registered to vote on November 1, 1972 or that fewer than 50 percent voted in the November 1972 Presidential election. Although the language minority provisions appear in different sections of the Act and in some instances cover different geographic areas, their requirements are identical.<sup>19</sup>

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SHOULD CONGRESS DO? 6 (Jan. 2006), *available at* [http://www.acslaw.org/files/Section percent205 percent20decisionmaking percent201-30-06.pdf](http://www.acslaw.org/files/Section%205%20decisionmaking%201-30-06.pdf). (noting “Since 1965, the Department has reviewed over 435,000 voting changes while only sixty-eight declaratory judgment actions have been filed.”)

<sup>12</sup> Only about one percent of submissions are determined by the Attorney General to fail the preclearance standard. U.S. Dep’t of Justice, Civil Rights Div., About Section 5 of the Voting Rights Act, [http://www.usdoj/crt/voting/sec\\_5/about.htm](http://www.usdoj/crt/voting/sec_5/about.htm) (last visited Feb. 27, 2006).

<sup>13</sup> 28 C.F.R. § 51.51 (2005).

<sup>14</sup> *Id.*

<sup>15</sup> 28 C.F.R. § 51.49 (2005).

<sup>16</sup> 42 U.S.C. § 1973aa-1a (2002).

<sup>17</sup> 42 U.S.C. § 1973aa-1a(b)(1) (2000).

<sup>18</sup> 42 U.S.C. § 1973b(f)(4) (2000).

<sup>19</sup> 28 C.F.R. § 55.8 (2005).

The essential role of the Voting Rights Act in protecting the voting rights of Florida’s racial and language minorities cannot be overemphasized. Since 1982 the protections of the Act have been exceedingly important in guaranteeing Florida’s minority voters access to the ballot box. Review of Florida’s history under the Voting Rights Act since 1982 reveals that the special protections afforded race and language minorities under Sections 5 and 203 of the Act are needed now more than ever. This report begins with an overview of Florida’s unique history as a partially-covered Section 5 jurisdiction, its experiences under the coverage, and the indispensable role that Section 5 plays in ensuring electoral fairness throughout the state. The report then reviews the protections afforded language minorities under Section 203 and their critical importance for Florida’s increasingly diverse population. The report concludes with a discussion of Florida’s voting rights landscape outside of the protections of Sections 5 and 203.

## **I. Florida and Section 5 of the Voting Rights Act**

Florida’s experiences under the special provisions of Section 5 of the Voting Rights Act differ from many of its neighboring southern states. In many ways, as will be explained below, it is these differences that make continuing Section 5 coverage in Florida particularly important.

### **A. History of Florida’s Designation Under Section 5**

Section 5 was enacted as part of the original Voting Rights Act of 1965, but it applied only to jurisdictions identified by a formula set forth in Section 4 of the Act. The first element in the formula was that the state or political subdivision of the state maintained on November 1, 1964, a “test or device” restricting the opportunity to register and vote. The second element of the formula was satisfied if the Director of the Census determined that less than 50 percent of persons of voting age were registered to vote on November 1, 1964, or that less than 50 percent of persons of voting age voted in the presidential election of November 1964.

Application of this formula in 1965 resulted in seven entire states being designated “covered jurisdictions”: Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. In addition, some political subdivisions in four other states (Arizona, Hawaii, Idaho, and North Carolina) were covered. Neither Florida nor any of its political subdivisions were covered under the formula prescribed by the 1965 Act.<sup>20</sup>

In 1975, when Section 5 of the Voting Rights Act was scheduled to expire, Congress extended its provisions and expanded its scope. The expansion was intended to address voting discrimination against members of “language minority groups.”<sup>21</sup> The formulaic definition of “test or device” for the purpose of determining Section 5 coverage was expanded to include the practice of providing election information, including ballots, only in English in states or political subdivisions where members of a single language minority constituted more than five percent of

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<sup>20</sup> Section 5 was originally enacted in 1965 as a temporary measure for only five years. In 1970, Congress renewed the provisions for another five years. It also added an updated coverage formula, identical to the original formula except that it referenced November 1968 dates to determine maintenance of a test or device, and levels of voter registration and electoral participation. Application of this formula resulted in the partial coverage of ten states. Florida was not among them.

<sup>21</sup> The expansion of the Voting Rights Act in 1975 also expanded protections for language minority groups outside of areas covered by Section 5. *See* discussion *infra*.

the citizens of voting age.<sup>22</sup> Application of this formula resulted in the states of Alaska, Arizona, and Texas being covered by Section 5 in their entirety, and parts of California, Florida, Michigan, New York, North Carolina, and South Dakota being covered.

The Senate Report accompanying this expansion of Section 5 described it as follows:

The focus of the proposed legislation, in this regard, is to insure that the Act's special temporary remedies are applicable to states and political subdivisions where (i) there has been evidenced a generally low voting turnout or registration rate and (ii) significant concentrations of minorities with native languages other than English reside. The provisions of S. 1279 accomplish this goal by expanding the definition of 'test or device' to include the conduct of English only elections where large numbers of language minority persons live. *In these newly covered areas, where severe voting discrimination was documented, S. 1279 would, for ten years, mandate bilingual elections, make applicable the Section 5 preclearance provisions, and authorize the appointment of Federal examiners and observers by the Attorney General.*<sup>23</sup>

The Attorney General designated five of Florida's 67 counties as covered jurisdictions for the purposes of Section 5 – Collier, Hardee, Hendry, Hillsborough and Monroe.<sup>24</sup> All changes affecting voting in those counties, as well as statewide changes that apply to those counties, must be submitted to the Department of Justice for preclearance prior to their going into effect. The designation of these five counties was based on documentation that fewer than 50 percent of the voting age population was registered to vote or voted in the 1972 presidential election and that the counties had utilized some form of literacy test only in English in areas where more than 5 percent of the population was a language minority.<sup>25</sup> These preclearance requirements were also implemented against a well-documented backdrop of discrimination, voter intimidation, and low rates of minority voter registration in Florida.<sup>26</sup>

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<sup>22</sup> As before, the formula was updated to reference the presence of tests or devices and levels of voter registration and participation as of November 1972. Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975).

<sup>23</sup> S. REP. NO. 94-295, at 9 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 774, 775 (emphasis added).

<sup>24</sup> Voting Rights Act Amendments of 1975, 40 Fed. Reg. 43,746 (Sept. 23, 1975) (designating Hardee, Hillsborough and Monroe); Voting Rights Act Amendments of 1975, 41 Fed. Reg. 34,329 (Aug. 13, 1976) (designating Collier and Hendry).

<sup>25</sup> Voting Rights Act Amendments of 1975, 41 Fed. Reg. 34,329.

<sup>26</sup> In 1961, the United States Commission on Civil Rights documented extreme differentials in voter registration between Florida's white and black populations. Significantly, the rate of black registration was lowest in those Florida counties with the highest percentage of black population:

In Florida whites comprise 84.8 percent of the population 21 years or over; nonwhites 15.2 percent. Whites account, however, for 90.9 percent of the total number registered to vote and nonwhites 9.1 percent. In two Florida counties no Negroes are registered to vote although they represent 15.2 percent and 11.9 percent respectively of the population. In four counties less than 10 percent of the voting age Negroes are registered. The Negro voting age population ranges between 24 percent and 51.1 percent of the total voting age population in these counties.... In seven counties from 10 to 24 percent of the voting age Negroes were registered.... [T]he median figure [of black voting age population in those counties] is 17.4 percent. In 27 counties between 25 and 49 percent of the voting age Negroes are registered.... [T]he median figure [of black voting age population in those counties] is 16.5 percent. In 27 counties 50 percent or more of the voting age Negroes are registered.... [T]he median figure [of black voting age population in those



Congress extended Section 5 again in 1982 for a period of 25 years but did not alter or update the formula for coverage set forth in Section 4.<sup>27</sup> Congress did, however, modify the procedure for a jurisdiction to seek declaratory relief to terminate its coverage under Section 5. As the Senate Report which accompanies that legislation reflects, Congress believed that numerous (perhaps all) jurisdictions subject to Section 5 would, within the 25-year period, be eligible for and receive termination of coverage. The Report optimistically states, “If there are any jurisdictions left under the preclearance requirement at the end of this period this preclearance obligation would terminate unless the Congress amended the act.”<sup>28</sup> A review of the history under Section 5 since 1982 reveals that optimism was misplaced, for Florida as well as most of the other preclearance jurisdictions.<sup>29</sup>

## B. Florida’s History Under Section 5

Florida’s experiences under Section 5 demonstrate its continuing importance in ensuring equal access to the ballot box for Florida’s growing minority population. While Department of Justice review is limited in Florida to voting changes affecting only five counties, as a practical matter, this includes all statewide changes such as voter registration requirements and list maintenance, state reapportionment and other significant state legislation affecting voting, as well as voting changes emanating from the five preclearance counties.

Since 1982 the Department of Justice has objected to five voting changes in Florida. The Department directed only one of its five objections at a change enacted by one of the five counties, and it later withdrew that objection.<sup>30</sup> The Department of Justice directed the remaining four objections at statewide reapportionment plans and legislation affecting the

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counties] is 16 percent.

U.S. COMM’N ON CIVIL RIGHTS, VOTING: 1961 U.S. COMM’N ON CIVIL RIGHTS REPORT, 106 (1961), *available at* <http://www.law.umaryland.edu/marshall/usccr/documents/cr11961bk1.pdf> (last visited Feb. 24, 2006). The Report also documents voter intimidation in Florida in the form of cross burning and fire bombing, along with threats, urging registered black voters to remove their names from the voter registration lists. *Id.* at 28-29. *See also*, ALEJANDRO PORTES & ALEX STEPICK, CITY ON THE EDGE 78 (1993) (citing BRUCE PORTER & MARVIN DUNN, MIAMI RIOT OF 1980: CROSSING THE BOUNDS 10 (1984)) (recounting Klan march incident with cross burning and a dummy hanging by a noose bearing a red lettered sign “this nigger voted,” designed to stop black participation in a primary election).

<sup>27</sup> Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982).

<sup>28</sup> S. REP. NO. 97-417, at 75 (1982) *as reprinted in* 1982 U.S.C.C.A.N 177, 254.

<sup>29</sup> Only a handful of Section 5 designated jurisdictions have successfully “bailed-out” of its coverage since 1982. Those jurisdictions consist solely of eleven political subdivisions in Virginia. U.S. Department of Justice, Civil Rights Division, Voting Sec. Overview, Sec. 5 Covered Jurisdictions, [http://www.usdoj.gov/crt/voting/sec\\_5/covered.htm](http://www.usdoj.gov/crt/voting/sec_5/covered.htm) (see n.1) (last visited Feb. 27, 2006).

<sup>30</sup> In 1984 the Department of Justice (DOJ) objected to certain provisions in a home rule charter enacted by Hillsborough County. DOJ’s objection was based on its understanding that substantial local governmental powers had been transferred from the Hillsborough legislative delegation which contained minority representation to the county commission which did not contain minority representation, resulting in retrogression in minority voting strength. Letter from Wm. Bradford Reynolds, Assistant Att’y Gen., Civil Rights Div., to Sara M. Potopulos, Assistant Hillsborough County Att’y (Aug. 20, 1984) (on file with author). Hillsborough County requested that DOJ reconsider the objection, and following its review of additional information, DOJ concluded that in fact “the charter does not in any way enhance the powers of the commission or diminish the powers of the legislative delegation.” DOJ then withdrew its objection to the charter. Letter from Wm. Bradford Reynolds, Assistant Att’y Gen., Civil Rights Div., to Joe Horn Mount, Hillsborough County Att’y 1 (Jan. 4, 1985) (on file with author).

administration of elections.<sup>31</sup> Significantly, the Department of Justice has been compelled to object to both of the statewide reapportionment plans submitted by Florida after the last two decennial censuses, even though its review is limited to how the redistricting affects minorities in only 5 of 67 counties.

## 1. The Reapportionment Objections

Florida's 1992 and 2002 reapportionment processes were procedurally complex, fraught with allegations of discrimination, partisan gerrymandering, intense disagreement and several lawsuits. A more detailed description of that history is contained in Appendix I. A brief discussion of Section 5's impact on minority voting rights through Florida statewide reapportionment processes appears below.

In 1992 the Department of Justice objected to Florida's redistricting plan for the state senate. The Department observed:

With regard to the Hillsborough County area, the state has chosen to draw its senatorial districts such that there are no districts in which minority persons constitute a majority of the voting age population. To accomplish this result, the state chose to divide the politically cohesive minority populations in the Tampa and St. Petersburg areas.<sup>32</sup>

The Department of Justice noted in its letter that there were other possible Voting Rights Act violations in the Florida redistricting plan beyond the scope of its Section 5 preclearance jurisdiction:

[S]ome of the comments we received alluded to various concerns involving the adequacy of the plans in non-covered counties. Because our review of these plans is limited by law to the direct impact on geographic areas covered by Section 5, we did not undertake to assess the lawfulness of the legislative choices outside of Collier, Hardee, Hendry, Hillsborough and Monroe counties. We do note, however, that allegations have been raised regarding dilution of minority voting strength in an effort to protect Anglo incumbents in non-covered jurisdictions, for example, in the Pensacola-Escambia County area and the Dade County area. Because these and other legislative choices did not directly impact upon the five covered counties, they cannot be the basis of withholding preclearance of either plan.<sup>33</sup>

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<sup>31</sup> "Changes affecting voting" subject to Section 5 review generally fall into four categories: (1) changes in the manner of voting; (2) changes in candidacy requirements and qualifications; (3) changes in the composition of the electorate that may vote for candidates for a given office; and (4) changes affecting the creation or abolition of an elective office. *Presley v. Etowah*, 502 U.S. 491, 492 (1992).

<sup>32</sup> Letter from John R. Dunne, Assistant Att'y Gen., Civil Rights Div., to Robert A. Butterworth, Att'y Gen., State of Fla. 2 (June 16, 1992) (on file with author).

<sup>33</sup> *Id.* at 4.

The end result of the Section 5 review of Florida's 1992 redistricting process was the creation of a majority-minority state senate district in the Tampa Bay/Hillsborough County area.<sup>34</sup> But for the Section 5 review process, although a "substantial number of minority persons live in the Hillsborough County area," there would have been no state senate district in the "area in which the total of black and Hispanic persons constituted more than 40.1 percent of the voting-age population."<sup>35</sup> Moreover, as DOJ had noted, the legislative record showed that the redistricting had been undertaken with the purpose of protecting white incumbents.<sup>36</sup>

In 1992, Section 5 served as a crucial check on a Florida redistricting process that favored partisan and incumbent interests irrespective of the impact on minority voting strength.<sup>37</sup> In addition, the 1992 Section 5 review of Florida's redistricting process has had the salutary effect of ensuring that both the courts and the legislators consider whether districting changes promote racial fairness, attention that is unlikely to be allocated to such considerations absent the requisite Section 5 review by the Department of Justice.<sup>38</sup>

Like the reapportionment process that preceded it, the 2002 reapportionment process in Florida was characterized by controversy, allegations of partisan gerrymandering and minority vote dilution, litigation and an objection by the Department of Justice under Section 5 of the Voting Rights Act.<sup>39</sup> This time, the Department of Justice interposed an objection to the 2002 redistricting plan for the Florida House of Representatives, stating that the plan reduced "the ability of Collier County Hispanic voters to elect their candidate of choice [and] the drop in Hispanic population in the proposed district will make it impossible for these Hispanic voters to continue to do so."<sup>40</sup>

As a result of the DOJ's Section 5 objection to the 2002 reapportionment plan, the Hispanic minority-majority district was preserved in Collier County and its existence is attributable solely to the Department of Justice's Section 5 review. Once again, the Section 5 process was essential to put the brakes on a controversial reapportionment process that was met with extreme suspicion in Florida's minority communities.<sup>41</sup>

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<sup>34</sup> *DeGrandy v. Wetherell*, 815 F. Supp. 1550 (N.D. Fla. 1992) (three judge court). The minority population of the district was later reduced by settlement agreement as a result of a subsequent challenge based on *Shaw v. Reno*, 509 U.S. 630 (1993). See *Lawyer v. Dep't of Justice*, 521 U.S. 567, 572-73 (1997).

<sup>35</sup> *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 601 So.2d 543, 545 (Fla. 1992).

<sup>36</sup> Letter from John R. Dunne, Assistant Att'y Gen, Civil Rights Div., to Robert A. Butterworth, Att'y Gen., State of Fla. 3 (June 16, 1992) (on file with author). See also Bryant, Giddings & Kaplan, *Partisan Gerrymandering: A New Concern for Florida's 1992 Reapportionment*, 19 Fla. St. U.L. Rev. 265 (1991).

<sup>37</sup> *Conference, The Supreme Court, Racial Politics, and the Right to Vote: Shaw v. Reno and the Future of the Voting Rights Act*, 44 Am. L. Rev. 1, 16 (1994) (statement of Donald B. Verrilli, Jr.).

<sup>38</sup> RICHARD K. SCHER, JON L. MILLS & JOHN J. HOTALING, *VOTING RIGHTS AND DEMOCRACY: THE LAW AND POLITICS OF REDISTRICTING* 51-56 (1996).

<sup>39</sup> See *infra* Appendix I, for a more detailed description of the process.

<sup>40</sup> Letter from Ralph F. Boyd, Jr., Assistant Att'y Gen., to John M. McKay, President of the Fla. Senate and Tom Feeney, Speaker of the Fla. House of Reps. 1 (July 1, 2002) (on file with author).

<sup>41</sup> See, e.g., *Brown v. State of Florida*, 208 F. Supp. 2d 1344 (S.D. Fla. 2002); *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002) (three judge court).

## 2. Section 5 Objections to Florida’s Administration of Elections

In addition to objecting to both of Florida’s reapportionment plans since 1982, the Department of Justice has also twice interposed objections to election legislation that adversely affects minority voters. In the first instance, DOJ objected to a prospective change in Florida legislation that would prevent absentee voters from receiving assistance in marking their ballots from persons of their choice in violation of Section 208 of the Voting Rights Act.<sup>42</sup> The crucial importance of securing assistance for minority voters, particularly illiterate or language minority voters, and the reluctance of some local Florida jurisdictions to provide or permit such assistance, is discussed in Section II, below. Without DOJ’s Section 5 review of this statewide change to Florida election law, it is likely that access to the franchise for many vulnerable minority voters would have been jeopardized.

The second objection interposed by the Department of Justice to Florida election procedures was directed at three of thirty-seven changes proposed by Florida to the administration of absentee ballots in 1998.<sup>43</sup> The changes were a part of a large Voter Fraud Act that made sweeping changes to Florida electoral systems in response to widespread voter fraud in the city of Miami.<sup>44</sup> The three provisions to which DOJ objected placed heavy emphasis on literacy skills, ability to provide a Social Security number and a witness’s signature. In reviewing these changes, DOJ had actual data showing that they disproportionately impacted minority voters:

Our analysis has revealed that during the limited time the State chose to implement the unprecleared absentee voting requirements<sup>45</sup> ... the votes of minority electors would have been more likely than white voters to be considered “illegal” and thus not counted. Minority voters were more likely to fail to meet one of the State’s new requirements than were white voters. For example, in Hillsborough County twice as many black absentee voters as white absentee voters failed to meet one of the State’s new requirements.<sup>46</sup>

As the Department of Justice noted, there are many reasons for the disparity in minority voters’ ability to comply with the requirements:

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<sup>42</sup> Letter from Wm. Bradford Reynolds, Assistant Att’y Gen., Civil Rights Div., to Jim Smith, Att’y Gen., State of Fla. 3 (Jan. 15, 1985) (on file with author).

<sup>43</sup> Letter from Bill Lann Lee, Acting Assistant Att’y Gen., to Robert A. Butterworth, Att’y Gen., State of Fla. (Aug. 14, 1998) (on file with author).

<sup>44</sup> Letter from Mike Cochran, Assistant Gen. Counsel, Fla. Dep’t of State, to Elizabeth Johnson, Chief, Voting Sec., U.S. Dep’t of Justice 1 (Aug. 6, 1998) (on file with author).

<sup>45</sup> The records from this period reflect some confusion on the part of Florida elections officials concerning whether it was appropriate to implement certain changes prior to preclearance. As a result, Florida implemented the unprecleared changes throughout the state for a brief period in advance of the September 1998 primary. On August 10, 1998, the Department of Justice advised Florida that the Voting Rights Act prohibits unprecleared changes from being implemented in the 5 preclearance counties. Letter from Elizabeth Johnson, Chief, Voting Sec., to Robert A. Butterworth, Att’y Gen., State of Fla. 4 (Aug. 10, 1998) (on file with author). Thereafter, the Division of Elections instructed Florida elections officials that unprecleared changes should not be implemented in *any* Florida counties. Absentee Voting, Op. Fla. Div. of Elections DE 98-13 (1998), *available at* <http://election.dos.state.fl.us/opinions/new/1998/de9813.pdf>.

<sup>46</sup> Letter from Elizabeth Johnson, Chief, Voting Sec., to Robert A. Butterworth, Att’y Gen., State of Fla. 4 (Aug. 10, 1998) (on file with author).

The literacy rate in the five covered counties is significantly higher for the white population than for the minority population.... Election supervisors indicated that the absentee ballots were rejected primarily because they were not in compliance with the new witness requirements (e.g., witness is not a registered voter, witness did not include county of registration or voter identification number) or did not bear the last four digits of the voter's social security number.

Our analysis suggests that it may be more difficult for minority voters to locate registered voters to be witnesses because the pool of available witnesses is made smaller by the fact that minority voters have lower registration rates and tend to live in areas with high minority concentrations. Moreover, the ability to meet the proposed requirements appears to be made more difficult for Hispanic voters by virtue of the fact that in two covered counties the Spanish language translation of the voter certificate is inserted in the absentee voting packet rather than appearing on the envelope as part of the absentee voter certificate itself and *in two covered counties there is no Spanish language translation of the certificate at all.*<sup>47</sup>

Thus, even in the face of a documented discriminatory impact on minority voters, without Section 5 review, these additional requirements that raised the burden on voters seeking to cast a ballot would have been implemented in Florida. Because of the objection and Florida's decision not to implement the changes outside the preclearance counties, these discriminatory changes were averted throughout the state.

Importantly for this discussion, while Section 5 applies to only five Florida counties, the state's decision not to implement statewide electoral administration changes in the face of a Department of Justice objection ensures that Section 5 protects minorities throughout Florida from discriminatory changes to the administration of elections. Florida's decision was based on its determination that implementing objectionable changes in the remaining 62 counties would be inappropriate, both because of the potential discriminatory effects of the changes and because implementing the changes in some Florida counties and not others would violate the equal protection guarantees of Florida's constitution.<sup>48</sup>

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<sup>47</sup> *Id.* (emphasis supplied).

<sup>48</sup> Absentee Voting. Op. Fla. Div. of Elections DE 98-13 (1998), available at <http://election.dos.state.fl.us/opinions/new/1998/de9813.pdf>

### 3. Section 5's Importance in Ensuring Electoral Fairness Where No Objection Was Interposed

Perhaps even more salient to the protection of minority voting rights in Florida than objections actually interposed by DOJ is the dialogue between and among the Civil Rights Division, state officials, and interested persons and groups that is necessitated by Section 5. The Section 5 implementing regulations require the Department of Justice's decision making process to be guided by "a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice."<sup>49</sup> A review of some examples of this dialogue reveals instances in which Florida state officials rethought or clarified their practices as a result of Section 5.

In 1998, among the same package of revisions that produced the objection to the absentee voter forms, were revisions requiring voters to show photo identification and changes to the list maintenance procedures. Review of the correspondence between the Department of Justice and the Florida Attorney General's office shows, for example, that the Section 5 review resulted in Florida clarifying its position with respect to what would constitute acceptable photo identification and procedures in the covered counties.<sup>50</sup> The Section 5 process also provided an opportunity for DOJ to share the concerns of other interested parties and have Florida officials respond to those concerns:

We have received information from members of the public and elected officials tending to show that some of the sections relating to absentee ballot procedures may have the discriminatory effect prohibited by Section 5.... A summary of the objections and public comments that we have received has been provided to [counsel for the Secretary of State].<sup>51</sup>

This submission was later withdrawn by Florida.<sup>52</sup>

The Section 5 review process that was undertaken around the Florida Election Reform Act of 2001 also provides insight into the importance of Section 5 review, even when no objection is interposed. Part of that Act was directed at improving the state's voter list maintenance procedures, which were widely criticized following the 2000 Presidential Election.<sup>53</sup> After discussion, fact-finding and correspondence with Florida officials and interested parties, DOJ precleared the voter list maintenance changes with the following caveat:

This determination is expressly based on the State's entire Section 5 submission, including the representations and clarifications in your January 29, 2002, letter ...

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<sup>49</sup> 28 C.F.R. § 51.53 (2005).

<sup>50</sup> Letter from Elizabeth Johnson, Chief, Voting Sec. to Robert A. Butterworth, Att'y Gen., State of Fla. (July 27, 1998) (on file with author); Letter from Bill Lann Lee, Chief, Voting Sec., to George L. Waas, Assistant Att'y Gen. State of Fla. (June 1, 1999) (on file with author).

<sup>51</sup> Letter from Elizabeth Johnson, Chief, Voting Sec., to Robert A. Butterworth, Att'y Gen., State of Fla. 3 (Aug. 10, 1998) (on file with author).

<sup>52</sup> U.S. Dep't of Justice, Notice of Preclearance Activity Under the Voting Rights Act of 1965, as amended, Aug. 14, 1998, <http://www.usdoj.gov/crt/voting/notices/vnote814.html>.

<sup>53</sup> See discussion *infra*.

regarding the State's implementation of the [voter list maintenance] sections. The state represented, for example:

- that there is no longer a presumption favoring the accuracy of any computer database and that the presumption now favors the voter; Jan. 29 letter at 3;
- that the appearance of a voter's name on the State's list of potentially ineligible voters does not, by itself, confirm that voter's ineligibility; Jan. 29 letter at 4;....
- that through implementation of Fla. Stat. § 98.0977, the burden of proof is shifted from the voter to the supervisor of elections to establish ineligibility by the highest degree of proof consistent with the fact that the fundamental right to vote is at stake; Jan 29 letter at 5;....

Modification of the implementing procedures set forth in your Jan. 29 letter would likely constitute voting changes requiring preclearance under Section 5.<sup>54</sup>

In the next legislative session, Florida again altered its voter list maintenance procedures and submitted those proposed changes to the Department of Justice for preclearance. Community and civil rights groups raised concerns with DOJ through the preclearance process that some of the changes made by the new legislation would in fact alter the burden of proof regarding voter ineligibility from resting on the supervisor of elections to the voter.<sup>55</sup> The Department of Justice then requested that the state:

Provide a detailed explanation of how the requirements and procedures established by [the new law] compare with those established by Fla. Stat. § 98.0977 as it was precleared on March 28, 2002. In particular, please address whether and how the new requirements and procedures are consistent with the State's prior representations in its letter dated January 29, 2002, and upon which preclearance was based....

Concerns have been raised that the new procedures enacted... rely on a presumption that the database is correct, permit voters to be removed from the voter rolls without actual notice and an opportunity to respond, and value process over substantive rights. Any information addressing these concerns would assist us in our review of your submission.<sup>56</sup>

The Florida Attorney General responded, "the burden always remains on the supervisor to establish ineligibility.... By way of reiteration, there is no longer a presumption favoring the accuracy of the computer database; the presumption now favors the voter."<sup>57</sup>

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<sup>54</sup> Letter from Joseph D. Rich, Chief, Voting Sec., to Robert A. Butterworth, Att'y Gen., State of Fla. 1-2 (Mar. 28, 2002) (on file with author).

<sup>55</sup> See, e.g., Letter from Dennis C. Hayes, Gen. Counsel, NAACP, et al., to Joseph D. Rich, Chief, Voting Rights Sec. (Mar. 28, 2002) (on file with author); Letter from Fla. Equal Voting Rights Project to Chief, Voting Sec. (June 11, 2002) (on file with author).

<sup>56</sup> Letter from Joseph D. Rich, Chief, Voting Sec., to Robert A. Butterworth, Att'y Gen. State of Fla. 3-4 (June 24, 2002) (on file with author).

<sup>57</sup> Letter from Robert A. Butterworth, Att'y Gen., State of Fla., to Joseph D. Rich, Voting Sec., Civil Rights Div. 5 (July 10, 2002) (on file with author).

This Section 5 dialogue with the Department of Justice had demonstrable importance on two subsequent occasions. First, in 2003, the State of Florida prepared and designed a manual to assist all county supervisors of elections in using Florida's newly-created Central Voter Database.<sup>58</sup> As a result of advocacy by civil rights groups, the manual was revised and the Division of Elections sent all Florida supervisors of elections a copy of Attorney General Butterworth's representations regarding the burden of proof resting on the supervisor along with the manual.<sup>59</sup> A year later, the availability of the Section 5 review and dialogue process avoided litigation on this same issue. Civil rights organizations determined that a communication from the Director of the Florida Division of Elections to supervisors of elections regarding voter list maintenance procedures abrogated the state's commitment to maintain the burden of proof on the state in voter purge decisions, and requested that the Division of Elections account for this discrepancy with the state's Section 5 representations.<sup>60</sup> The Division of Elections immediately retreated from this position, "[a]s stated in our exchanges with the US DOJ, an affirmative determination as to whether a voter is eligible to vote or not must be made by the supervisors of elections prior to removal of any voter from the voter registration rolls."<sup>61</sup>

As these examples illustrate, the Section 5 review process serves the important function of permitting all interested parties – state legislative and administrative officials, Justice Department officials, and interested groups and individuals in the state -- with a vital opportunity to take a "second look" at electoral changes and how they will be implemented, which focuses exclusively on how those changes may affect minority voters.<sup>62</sup> This process often provides the public with its only opportunity to review and comment on the new law's fairness to minorities. On some occasions, this "second look" occasioned by the Section 5 review process has resulted in substantive changes that protect minority voting rights without the necessity of a Department of Justice objection.

## II. Protection of Language Minorities in Florida

Florida has a sizeable native-born population that may require language assistance, primarily voters of Puerto Rican and Native American ancestry.<sup>63</sup> In addition, Florida has a large

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<sup>58</sup> FLA. DIV. OF ELECTIONS, FLA.'S CENTRAL VOTER DATABASE TRAINING WORKBOOK AND USER'S GUIDE, Version 2.0 (Sept. 2003).

<sup>59</sup> Letter from Sharon D. Larson, Assistant Gen. Counsel, Fla. Dep't of State to Anita S. Hodgkiss, Lawyer's Comm. for Civil Rights (Sept. 19, 2003) (on file with author); Letter from Edward C. Kast, Dir., Div. of Elections, to Fla. Supervisors of Elections (Sept. 30, 2003) (enclosing preclearance correspondence) (on file with author).

<sup>60</sup> Letter from the Lawyers' Comm. for Civil Rights Under Law, et al., to Edward C. Kast, Dir., Div. of Elections (June 3, 2004) (on file with author).

<sup>61</sup> Letter from Dawn K. Roberts, Dir., Div. of Elections, to Lawyers' Comm. for Civil Rights Under Law, et al. 2 (June 17, 2004) (on file with author). Florida eventually instructed supervisors not to use the state-created list of potentially ineligible voters at all in 2004 because of serious flaws in the data. *See discussion infra* Part II.B, pp. 39-40.

<sup>62</sup> In this regard, Section 5 also encourages fairness to minorities in a more subtle way—by encouraging covered jurisdictions to maintain statistical information regarding race and ethnicity in order to measure the impact on minorities of particular voting changes.

<sup>63</sup> Voting Rights Act Amendments of 1992, Determinations Under Sec. 203, 67 Fed. Reg. 48,871, 48,873 (July 26, 2002).



immigrant population, the majority of which comes from the Caribbean.<sup>64</sup> Rates of educational attainment among these immigrants is significantly lower than Florida's native-born population.<sup>65</sup> They are far less likely to be proficient in English than native born citizens.<sup>66</sup> Almost 400,000 Floridians live in linguistically isolated households in which no member of the household over the age of 14 speaks English well.<sup>67</sup>

Despite low rates of education and English competency, Caribbean immigrants have a relatively high rate of U.S. citizenship when compared with other immigrant groups from Latin America. Roughly half of the foreign born Caribbean population has U.S. citizenship, compared with 28 percent for other Latin American immigrants.<sup>68</sup> Florida's foreign-born population has a higher than average rate of naturalization,<sup>69</sup> and is more likely to be eligible to vote than other immigrant populations. Indeed, Florida's Hispanic population has a higher rate of voter registration and of voting than the national average.<sup>70</sup> It is essential that our legal framework continue to protect the rights of new Americans, as well as native-born Americans who lack English proficiency due to heritage or environment, to cast a ballot.

As mentioned previously, when Congress reauthorized the Voting Rights Act in 1975, it added protections for language minorities. The expansion was based on evidence presented at Congressional hearings that Congress considered "overwhelming evidence of voting discrimination against language minorities."<sup>71</sup> Congress found that this overwhelming discrimination "most severely affected [p]ersons of Spanish heritage."<sup>72</sup> As a result, Congress expanded Section 5 protections to areas where significant numbers of language minorities resided in some jurisdictions,<sup>73</sup> and made the temporary ban on the use of literacy tests or similar devices permanent.<sup>74</sup> Congress also created Sections 203 and 4(f)(4) of the Act, which required covered jurisdictions to provide bilingual election assistance to language minorities.<sup>75</sup> The 1975

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<sup>64</sup> Florida's Caribbean immigrants include Spanish speakers from, among other places, Cuba and the Dominican Republic, Creole speakers from Haiti, and immigrants from English speaking countries such as Jamaica and Trinidad. U.S. CENSUS BUREAU, COMING FROM THE AMERICAS: A PROFILE OF THE NATION'S FOREIGN-BORN POPULATION FROM LATIN AMERICA (2000 Update) n.1 (2002), <http://www.census.gov/prod/2002pubs/cenbr01-2.pdf>. This report is concerned with the Spanish and Creole speakers.

<sup>65</sup> *Id.* at 2.

<sup>66</sup> A survey of Haitian entrants in 1983, for example, revealed that "[o]n average, none had advanced beyond the fifth or sixth grade, and about four-fifths spoke little or no English." PORTES & STEPICK, *supra* note 26, at 56.

<sup>67</sup> U.S. Census Bureau, American FactFinder, QT-P17. Ability to Speak English: 2000, [http://factfinder.census.gov/servlet/QTTable?\\_bm=y&-state=qt&-context=qt&-qr\\_name=DEC\\_2000\\_SF3\\_U\\_QTP17&-ds\\_name=DEC\\_2000\\_SF3\\_U&-tree\\_id=403&-all\\_geo\\_types=N&-redoLog=true&-\\_caller=geoselect&-geo\\_id=04000US12&-search\\_results=01000US&-format=&-\\_lang=en](http://factfinder.census.gov/servlet/QTTable?_bm=y&-state=qt&-context=qt&-qr_name=DEC_2000_SF3_U_QTP17&-ds_name=DEC_2000_SF3_U&-tree_id=403&-all_geo_types=N&-redoLog=true&-_caller=geoselect&-geo_id=04000US12&-search_results=01000US&-format=&-_lang=en).

<sup>68</sup> U.S. CENSUS BUREAU, *supra* note 64, at 3.

<sup>69</sup> U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION: 2000 3 (2003), *available at* <http://purl.access.gpo.gov/GPO/LPS47197>.

<sup>70</sup> U.S. Census Bureau, Tbl. 4a. Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2004, <http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls> (last visited Feb. 21, 2006).

<sup>71</sup> S. REP. NO. 94-295, at 30 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 774, 797.

<sup>72</sup> *Id.*

<sup>73</sup> *See supra* Part I.A.

<sup>74</sup> Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat 400 (amending Sec. 4 of the Voting Rights Act of 1965, 42 USC §1973b).

<sup>75</sup> *See supra* Introduction to the Voting Rights Act.

coverage formula for Section 203 required that jurisdictions provide bilingual assistance “if the Director of the Census determines (i) that more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and (ii) that the illiteracy rate of such persons as a group is higher than the national illiteracy rate.”<sup>76</sup>

In 1992, Congress strengthened the language minority protections contained in Section 203 through the Voting Rights Language Assistance Act of 1992. The coverage formula for Section 203’s bilingual assistance provisions was expanded to require that:

(1)(a) if a jurisdiction has 10,000 or more limited-English proficient voting age citizens of a single language minority or (1)(b) a reservation has 5 percent or more American Indian or Alaska Native limited-English proficient voting age citizens and (2) the single language minorities meet the remaining § 203 requirements, then the jurisdiction must provide language assistance.<sup>77</sup>

Application of the 4(f)(4) and 203 coverage formulas has resulted in the five preclearance counties (Collier, Hardee, Hendry, Hillsborough and Monroe) being covered for Spanish under Section 4(f)(4)<sup>78</sup> and in ten Florida counties being covered under Section 203.<sup>79</sup>

The language minority protections are extremely important for Florida. The defining feature of the latter part of the twentieth century for Florida was the enormous increase in the state’s immigrant population. In a 1994 report, the governor’s office suggested that Florida’s population growth was largely attributable to the increasing arrival of immigrants to the state.<sup>80</sup> As the name of the governor’s report –*The Unfair Burden: Immigration’s Impact on Florida* – implies, these recent immigrants have not been completely welcome. The governor’s report chronicles the arrival of almost one million Cuban refugees from 1959 to 1979, but attributes the more recent waves of immigration from the Caribbean as by far the most dramatic:

From April to September of 1980, approximately 125,000 Cubans departed from the Port of Mariel, and arrived in south Florida in what is now referred to as the Mariel Boatlift. In May, 1980 alone, over 85,000 Cubans arrived on Florida’s shores. This, along with approximately 25,000 Haitian refugees, overwhelmed all local, state and federal programs in place at that time in south Florida.

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<sup>76</sup> Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat 400 (inserting Title III, Bilingual Election Requirements, Sec. 203, 42 USC §1973aa-1a).

<sup>77</sup> Voting Rights Language Assistance Act of 1992, H.R. REP. NO. 102-655, at 4 (1992), *as reprinted in* 1978 U.S.C.C.A.N. 766, 767-68.

<sup>78</sup> Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 53 Fed. Reg. 735, 736 (Jan. 12, 1988) (to be codified at 28 C.F.R. app. § 55).

<sup>79</sup> Broward (Spanish and Seminole), Collier (Seminole), Glades (Seminole), Hardee (Spanish), Hendry (Spanish), Hillsborough (Spanish), Miami-Dade (Spanish), Orange (Spanish), Osceola (Spanish) and Palm Beach (Spanish). Voting Rights Act Amendments of 1992, Determinations Under Sec. 203, 67 Fed. Reg. 48,871, 48,873 (July 26, 2002).

<sup>80</sup> EXECUTIVE OFFICE OF THE GOVERNOR & FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, *THE UNFAIR BURDEN: IMMIGRATION’S IMPACT ON FLORIDA* 7 (1994). The report claimed that “[d]uring the last fourteen years, Florida has been the destination of a disproportionate number of immigrants, and each wave has further strained the state’s resources as well as its ability to assist these individuals and assimilate them into their communities.” *Id.* at i.

The sheer magnitude of the number of immigrants arriving in south Florida forced President Carter to declare a state of emergency. The Federal Emergency Management Agency (FEMA) was called into action and a Cuban/Haitian Task Force was appointed to assist in resettlement efforts.<sup>81</sup>

In 1988, when considering a voting rights case in Dade County, a local federal judge remarked:

Dade County presents a dynamic, evolving community. Over the last fifteen years Dade County has experienced a tremendous influx of people from other countries and other states, and the frequency of immigration among the former group has become exceptional in the 1980s. Thus, although the plaintiffs have referred to Dade County as a tri-ethnic community, it is clear that Dade County is multi-ethnic. While the primary groups are Blacks, Hispanics and Non Latin Whites, the Hispanic population, for example, includes not only Cubans, but people from various parts of Central and South America, and both the Hispanic and Black communities have members from Caribbean countries. Dade County has truly become a microcosm of the Western Hemisphere, and is a uniquely situated venue for allegations that a violation of the Voting Rights Act has occurred.<sup>82</sup>

The huge influx of immigrants into Florida, particularly immigrants who did not speak English, led to a significant backlash against immigrants and efforts to require “English only” in government, schools and elections.

Miami thus became the birthplace of the contemporary English Only movement in the United States. It happened in November 1980, when voters in Dade County... approved a landmark ordinance that reversed the policy of official bilingualism and biculturalism established by the Board of County Commissioners in 1973. The measure, passed overwhelmingly, prohibited “the expenditure of any county funds for the purpose of utilizing any language other than English or any culture other than that of the United States” (Section 1) and provided that “all county governmental meetings, hearings, and publications shall be in the English language only” (Section 2).<sup>83</sup>

Florida’s nascent “English only” movement was “a vehicle for the expression of mass native white resistance to Latinization.”<sup>84</sup> The majority of the non-Hispanic white voters who supported the initiative hoped to “make Miami a less attractive place to live for Cubans and other Spanish-speaking people.”<sup>85</sup>

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<sup>81</sup> *Id.* at 7. In 1980 alone, “nearly 200,000 Cubans and Haitians landed in Florida.” Anthony P. Maingot, *Immigration from the Caribbean Basin*, in MIAMI NOW 18, 34 (Guillermo J. Grenier & Alex Stepick III eds., 1993).

<sup>82</sup> *Meek v. Metropolitan Dade County*, No. 86-1820-CIV-Ryskamp (S.D. Fla. Oct. 5, 1988), Slip op. at 14.

<sup>83</sup> Max J. Castro, *The Politics of Language in Miami*, in MIAMI NOW 109, 119 (Guillermo J. Grenier & Alex Stepick III, eds., 1993).

<sup>84</sup> *Id.* at 122.

<sup>85</sup> *Id.*

Haitian immigrants were met with even greater hostility. Federal immigration officials devised a special “Haitian Program” designed to repatriate as quickly as possible all Haitian asylum seekers due to what they termed the “HAITIAN THREAT ... individuals that are threatening the community's well-being-socially & economically.”<sup>86</sup> While the majority of arriving Haitians eventually won a series of legal battles permitting them to stay, become permanent residents and later naturalized citizens, the effects of this discrimination linger among Haitian immigrants. “The policy of persecution, legal confusion, and social isolation have all contributed to Haitians’ dismal socioeconomic conditions in the United States. Their employment situation compares unfavorably to any other immigrant population in the country.”<sup>87</sup>

Efforts to make immigrants less welcome in Florida have not reduced immigration rates. The 2000 census reported that the Miami metropolitan area was one of the 5 leading destinations for the foreign born population in the United States.<sup>88</sup> Florida has the fourth largest foreign-born population in the United States, behind California, New York and Texas.<sup>89</sup>

### A. Florida’s Spanish-Speaking Population

In the period since Congress incorporated protection of language minorities into the Voting Rights Act, the Spanish-speaking population of Florida has veritably exploded.<sup>90</sup> From 1980 to 1990, the Hispanic population of the state increased by more than 80 percent, from 8.8 percent of the total population to 12.2 percent.<sup>91</sup> From 1990 to 2000, the Hispanic population increased dramatically again, from 12.2 percent to 16.8 percent of the state’s total population. There are twelve Florida counties in which the Hispanic population exceeds 15 percent<sup>92</sup>, many of them among the most populous and fastest-growing counties in the state.<sup>93</sup> Almost one third of the Hispanic population of Florida reported during the 2000 Census either that they could not speak English “at all” (269,785), or that they did not speak English well (432,977).<sup>94</sup>

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<sup>86</sup> *Haitian Refugee Cntr. v. Civiletti*, 503 F. Supp. 442, 517 (S.D. Fla. 1980).

<sup>87</sup> Alex Stepick, *The Refugees Nobody Wants: Haitians in Miami*, in *MIAMI NOW* 57, 67 (Guillermo J. Grenier & Alex Stepick III, eds., 1993).

<sup>88</sup> U.S. CENSUS BUREAU, *supra* note 64, at 2.

<sup>89</sup> U.S. CENSUS BUREAU, *supra* note 69 at 3.

<sup>90</sup> The Department of Justice noted, in its objection to Florida’s 2002 reapportionment plan, that “[o]ne of the most significant changes to the state’s demography has been the increase in the Hispanic population.” Letter from Ralph F. Boyd, Jr., Assistant Att’y Gen., to John M. McKay, President of the Fla. Senate and Tom Feeney, Speaker of the Fla. House of Representatives (July 1, 2002) (on file with author).

<sup>91</sup> NATIONAL DATA CONSULTANTS, *FLORIDA COUNTY PERSPECTIVES* 91 (1992-1993).

<sup>92</sup> Broward (16.7 percent), Collier (19.6 percent), DeSoto (24.9 percent), Glades (15.1 percent), Hardee (35.7 percent), Hendry (39.6 percent), Hillsborough (18 percent), Miami-Dade (57.3 percent), Monroe (15.8 percent), Okeechobee (18.6 percent), Orange (18.8 percent), and Osceola (29.4 percent). U.S. Census Bureau, American FactFinder, QT-P3. Race and Hispanic or Latino: 2000, [http://factfinder.census.gov/servlet/QTTable?\\_bm=y&-state=qt&-context=qt&-qr\\_name=DEC\\_2000\\_SF1\\_U\\_QTP3&-ds\\_name=DEC\\_2000\\_SF1\\_U&-tree\\_id=4001&-all\\_geo\\_types=N&-\\_caller=geoselect&-geo\\_id=04000US12&-geo\\_id=05000US12011&-geo\\_id=05000US12021&-geo\\_id=05000US12027&-geo\\_id=05000US12043&-geo\\_id=05000US12049&-geo\\_id=05000US12051&-geo\\_id=05000US12057&-geo\\_id=05000US12086&-geo\\_id=05000US12087&-geo\\_id=05000US12093&-geo\\_id=05000US12095&-geo\\_id=05000US12097&-search\\_results=04000US12&-format=&-\\_lang=en](http://factfinder.census.gov/servlet/QTTable?_bm=y&-state=qt&-context=qt&-qr_name=DEC_2000_SF1_U_QTP3&-ds_name=DEC_2000_SF1_U&-tree_id=4001&-all_geo_types=N&-_caller=geoselect&-geo_id=04000US12&-geo_id=05000US12011&-geo_id=05000US12021&-geo_id=05000US12027&-geo_id=05000US12043&-geo_id=05000US12049&-geo_id=05000US12051&-geo_id=05000US12057&-geo_id=05000US12086&-geo_id=05000US12087&-geo_id=05000US12093&-geo_id=05000US12095&-geo_id=05000US12097&-search_results=04000US12&-format=&-_lang=en).

<sup>93</sup> More than 36 percent of Florida’s population lives in Miami-Dade, Broward, Orange and Hillsborough counties alone. *Id.* Osceola County, which had one of the highest growth rates in the state between the last two censuses, also had the highest Hispanic growth rate. *FLA. COUNTY PERSPECTIVES*, *supra* note 91.

<sup>94</sup> U.S. CENSUS BUREAU, *supra* note 67.

Because of documentation that a significant number of Spanish-speaking voters are unable to speak or understand English well enough to participate in the electoral process, the U.S. Census bureau has designated eight Florida counties as Section 203 covered jurisdictions for the Spanish language.<sup>95</sup> Under this designation, Broward, Hardee, Hendry, Hillsborough, Miami-Dade, Orange, Osceola and Palm Beach counties are required to provide Spanish language assistance to voters.<sup>96</sup> The bilingual assistance provision requires that all “voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots” be provided in the appropriate language of the minority group as well as English.<sup>97</sup>

Despite the requirements for bilingual ballots and other election materials in much of Florida, many Florida jurisdictions have repeatedly ignored the language assistance needs of their constituents and disenfranchised language minorities. In its exhaustive report on the 2000 Presidential Election in Florida, the U.S. Commission on Civil Rights found:

Despite the requirements that non-English-proficient voters be provided with some form of language assistance, large numbers of limited English-speaking voters were denied this assistance at polling places all around Florida. This occurred in counties and precincts where bilingual ballots and language assistance are mandated. Because of this failure to provide proper language assistance, voters faced problems understanding the ballots or the fundamental procedure for voting. The groups disproportionately affected were Haitian Americans and Spanish-speaking Latinos.

Many poll workers were not properly trained to handle language assistance issues. Some voters found that even when volunteers were available to provide assistance, the volunteers or precinct workers were prevented from providing language assistance. In some instances, bilingual poll workers were directed to not provide language assistance to voters who were in need of that assistance. Thus, these non-English minority voters found their polling places to have ballots that were, essentially, inaccessible to them.<sup>98</sup>

An especially dramatic example of Florida officials’ intransigence with respect to providing necessary language assistance to Spanish speakers occurred in central Florida in 2000. The U.S. Commission on Civil Rights found that during the 2000 election:

In some central Florida counties, Spanish-speaking voters did not receive bilingual assistance and some of these counties were subject to section 203 of the Voting Rights Act. This failure to provide proper language support led to

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<sup>95</sup> Voting Rights Act Amendments of 1992, Determinations Under Sec. 203, 67 Fed. Reg. 48,871, 48,873 (July 26, 2002).

<sup>96</sup> Two other counties, Collier and Glades (along with Broward), are Sec. 203 designated jurisdictions for Native American (Seminole) language assistance. *Id.*

<sup>97</sup> 42 U.S.C. § 1973aa-1a(c) (2000).

<sup>98</sup> U.S. COMM’N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLA. DURING THE 2000 PRESIDENTIAL ELECTION: CH. 6 ACCESSIBILITY ISSUES (2001), <http://purl.access.gpo.gov/GPO/LPS17743> (follow “Report on Voting Irregularities in Florida During the 2000 Presidential Election” hyperlink; then follow “Chapter 6: Accessibility Issues”).

widespread voter disenfranchisement of possibly several thousand Spanish-speaking voters in central Florida.<sup>99</sup>

Osceola County in central Florida experienced the highest growth rate in Hispanic population in the state. From 1980 to 1990, Osceola County's Hispanic population increased 1219.6 percent.<sup>100</sup> From 1990 to 2000 it increased dramatically again, from roughly 12,000 to over 50,000 persons. In the twenty-year period from 1980 to 2000, Osceola County changed from having a Hispanic population of merely 2 percent (fewer than 1,000 persons)<sup>101</sup> to being nearly one-third Latino (29.4 percent of the total population).<sup>102</sup>

Osceola County's voting discrimination against Hispanic voters was so pronounced that the Department of Justice filed suit against county officials in 2002, alleging widespread violations of minority voting rights, including: poll workers making hostile remarks to Spanish-speaking voters to discourage them from voting; the failure of poll officials to communicate effectively with Spanish-speaking voters, which prevented them from voting; failure to staff polling places with bilingual poll officials; and failure to translate ballots and other election materials into Spanish.<sup>103</sup> The parties resolved the case by a Consent Decree, requiring Osceola County to undertake a number of remedial actions. The Decree called for the creation of a Spanish Language Coordinator position, the hiring of bilingual poll workers, the availability of all election materials and ballots in Spanish, and future monitoring by the Department of Justice to ensure compliance.<sup>104</sup>

Ironically, at the time the lawsuit was filed in 2002, Osceola was not a Section 203 covered county because the Hispanic population had grown so rapidly since the designations had been made in 1992 based on the 1990 census, that the regulations had not yet caught up with the population demographics.<sup>105</sup> Osceola came under Section 203 coverage as a result of the 2002 designations based on the 2000 census within months of the Consent Decree in the Justice Department's case.<sup>106</sup>

The Justice Department brought a similar action against neighboring Orange County alleging that County officials failed to furnish "in the Spanish language, the information and assistance

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<sup>99</sup> U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLA. DURING THE 2000 PRESIDENTIAL ELECTION: CH. 9 FINDINGS AND RECOMMENDATIONS (2001), <http://purlaccess.gpo.gov/GPO/LPS17743> (follow "Report on Voting Irregularities in Florida During the 2000 Presidential Election" hyperlink; then follow "Chapter 9: Accessibility Issues").

<sup>100</sup> FLA. COUNTY PERSPECTIVES, *supra* note 91.

<sup>101</sup> *Id.*

<sup>102</sup> U.S. Census Bureau, Osceola County, Florida-QT-P9. Hispanic or Latino by Type: 2000, [http://factfinder.census.gov/servlet/QTTable?\\_bm=y&-state=qt&-context=qt&-qr\\_name=DEC\\_2000\\_SF1\\_U\\_QTP9&-ds\\_name=DEC\\_2000\\_SF1\\_U&-tree\\_id=4001&-all\\_geo\\_types=N&-redoLog=true&-\\_caller=geoselect&-geo\\_id=05000US12097&-search\\_results=01000US&-format=&-\\_lang=en](http://factfinder.census.gov/servlet/QTTable?_bm=y&-state=qt&-context=qt&-qr_name=DEC_2000_SF1_U_QTP9&-ds_name=DEC_2000_SF1_U&-tree_id=4001&-all_geo_types=N&-redoLog=true&-_caller=geoselect&-geo_id=05000US12097&-search_results=01000US&-format=&-_lang=en).

<sup>103</sup> Complaint, *United States v. Osceola County*, Civil Action No. 6:02-CV-738-ORL-22JGG (M.D. Fla. 2002), ¶7.

<sup>104</sup> Consent Decree, *United States v. Osceola County*, No. 6:02-CV-738-ORL-22JGG (M.D. Fla. July 22, 2002).

<sup>105</sup> Voting Rights Act Amendments of 1992, Determinations Under 203, 57 Fed. Reg. 43,213, 43,215 (Sept. 18, 1992).

<sup>106</sup> Voting Rights Act Amendments of 1992, Determinations Under 203, 67 Fed. Reg. 48,871, 48,873 (July 26, 2002).

necessary to comply with Section 203 of the Voting Rights Act.”<sup>107</sup> In particular, Orange County failed to “recruit, appoint, train and maintain an adequate pool of bilingual poll officials capable of providing Hispanic citizens with limited English proficiency with effective language assistance,” and failed to translate into Spanish election-related information both at polling places and in communications disseminated from the registrar’s office.<sup>108</sup> In addition, the Department of Justice alleged that “Orange County did not permit poll watchers to provide assistance to [Hispanic voters in need of language assistance] at the November 2000 election, and they did not receive assistance from other persons,” in violation of Section 208 of the Voting Rights Act.<sup>109</sup>

The parties settled this action, too, with a Consent Decree requiring, *inter alia*, that all information disseminated in English by Orange County concerning elections will also be provided in Spanish, the creation of Spanish Language Assistance Coordinators, the provision of bilingual poll workers, consultation with Orange County’s Hispanic community, and federal monitoring.<sup>110</sup> Perhaps most tellingly, the Consent Decree also required that Orange County election officials:

shall investigate any allegations of poll worker hostility toward Spanish-speaking and/or Hispanic voters in any election....Where it reasonably has been found that poll workers have engaged in inappropriate treatment of Spanish-speaking and/or Hispanic voters, the Supervisor shall remove these poll workers, and these poll workers shall not be eligible to be poll workers in future elections.<sup>111</sup>

Even in Miami-Dade County, where a majority (57.3 percent) of the population is of Hispanic origin,<sup>112</sup> election officials have violated Section 203 by producing and distributing a pamphlet in English only, which explained “changes in the election format,” and also “inform[ed] voters when to register, when to vote, and where to vote in the election.”<sup>113</sup> The Department of Justice sued Dade County, alleging a violation of Section 203, and the district court found that the county’s failure to publish the pamphlet in Spanish violated the statute. The court entered a temporary restraining order requiring the County to undertake remedial action to accommodate Spanish-speaking voters before the election.<sup>114</sup>

As these cases illustrate, continuation of protections for Florida’s language minorities is critically important to ensuring equal access to the franchise for the state’s burgeoning Spanish-speaking population. The protections currently afforded to Spanish and Native American language speakers by Section 203 also highlight an important gap in the statute’s reach.

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<sup>107</sup> Complaint at ¶ 7, *United States v. Orange County*, No. 6:02-CV-00737-ORL-22JGG (M.D. Fla. 2002).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at ¶¶ 8, 14.

<sup>110</sup> Consent Decree ¶¶ 1, 2, 4, 6, 15, *United States v. Orange County*, No. 6:02-CV-00737-ORL-22JGG (M.D. Fla. Oct. 9, 2002).

<sup>111</sup> *Id.* at ¶ 10.

<sup>112</sup> U.S. CENSUS BUREAU, *supra* note 92.

<sup>113</sup> *United States v. Metropolitan Dade County*, 815 F. Supp. 1475, 1478 (S.D. Fla. 1993).

<sup>114</sup> *Id.*

## B. Discrimination Against Florida's Haitian-American Voters

When Congress passed the Voting Rights Act amendments that created Section 203 protections for language minorities in 1975, it specified that the only protected “language minorities” were “persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.”<sup>115</sup> Over 233,000 Haitian-Americans now live in Florida,<sup>116</sup> the majority of them in the three most populous southern counties. Almost half (over 95,000) of the state’s Haitian-American population lives in Miami-Dade County.<sup>117</sup> Most of the remaining Haitian-Americans in Florida live in Palm Beach (over 30,000) and Broward Counties (over 62,000).<sup>118</sup> Haitian-Americans are a growing segment of the population in Florida. The primary language spoken by Haitian immigrants is Haitian Creole,<sup>119</sup> and their literacy rate and ability to speak English is significantly below that of native-born Americans and even other immigrant groups.

The U.S. Commission on Civil Rights found that Florida’s widespread failure to provide proper language assistance in the 2000 Presidential Election disproportionately affected “Haitian Americans and Spanish-speaking Latinos.”<sup>120</sup> The Commission’s findings regarding the Haitian Creole speaking population were based in part on testimony by the Florida Attorney General conceding that “there might not have been enough handouts in Creole or enough interpreters there to assist.”<sup>121</sup> The Commission also heard and credited testimony that even where polling places were required by local law to provide voting assistance in Creole, they failed to do so and “[m]any Haitian American voters were, in effect, turned away from their polling places without the opportunity to vote.”<sup>122</sup>

The U.S. Department of Justice drew similar conclusions, and sued Miami-Dade County for Voting Rights Act violations against Haitian-American voters, alleging:

During the November 2000 Presidential election, Defendants, acting through their employees and agents, engaged in practices which prevented Creole-speaking Haitian-American voters in Miami-Dade County with limited ability to

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<sup>115</sup> 42 U.S.C. § 1973aa-1a(e) (2000).

<sup>116</sup> U.S. Census Bureau, Florida-QT-P13. Ancestry: 2000, [http://factfinder.census.gov/servlet/QTTTable?\\_bm=y&-state=qt&-context=qt&-qr\\_name=DEC\\_2000\\_SF3\\_U\\_QTP13&-ds\\_name=DEC\\_2000\\_SF3\\_U&-tree\\_id=403&-all\\_geo\\_types=N&-caller=geoselect&-geo\\_id=04000US12&-search\\_results=01000US&-format=&-\\_lang=en](http://factfinder.census.gov/servlet/QTTTable?_bm=y&-state=qt&-context=qt&-qr_name=DEC_2000_SF3_U_QTP13&-ds_name=DEC_2000_SF3_U&-tree_id=403&-all_geo_types=N&-caller=geoselect&-geo_id=04000US12&-search_results=01000US&-format=&-_lang=en).

<sup>117</sup> U.S. Census Bureau, Miami Dade County, Florida-QT-P13. Ancestry: 2000, [http://factfinder.census.gov/servlet/QTTTable?\\_bm=y&-state=qt&-context=qt&-qr\\_name=DEC\\_2000\\_SF3\\_U\\_QTP13&-ds\\_name=DEC\\_2000\\_SF3\\_U&-CONTEXT=qt&-tree\\_id=403&-all\\_geo\\_types=N&-redoLog=true&-\\_caller=geoselect&-geo\\_id=05000US12086&-search\\_results=04000US12&-format=&-\\_lang=en](http://factfinder.census.gov/servlet/QTTTable?_bm=y&-state=qt&-context=qt&-qr_name=DEC_2000_SF3_U_QTP13&-ds_name=DEC_2000_SF3_U&-CONTEXT=qt&-tree_id=403&-all_geo_types=N&-redoLog=true&-_caller=geoselect&-geo_id=05000US12086&-search_results=04000US12&-format=&-_lang=en). In 2000, Haitian-Americans constituted 4.2 percent of Miami Dade County’s total population.

<sup>118</sup> U.S. Census Bureau, Broward and Palm Beach Counties, Florida-QT-P13. Ancestry: 2000, [http://factfinder.census.gov/servlet/QTTTable?\\_bm=y&-state=qt&-context=qt&-qr\\_name=DEC\\_2000\\_SF3\\_U\\_QTP13&-ds\\_name=DEC\\_2000\\_SF3\\_U&-CONTEXT=qt&-tree\\_id=403&-all\\_geo\\_types=N&-redoLog=false&-\\_caller=geoselect&-geo\\_id=05000US12011&-geo\\_id=05000US12099&-search\\_results=04000US12&-format=&-\\_lang=en](http://factfinder.census.gov/servlet/QTTTable?_bm=y&-state=qt&-context=qt&-qr_name=DEC_2000_SF3_U_QTP13&-ds_name=DEC_2000_SF3_U&-CONTEXT=qt&-tree_id=403&-all_geo_types=N&-redoLog=false&-_caller=geoselect&-geo_id=05000US12011&-geo_id=05000US12099&-search_results=04000US12&-format=&-_lang=en).

<sup>119</sup> U.S. Dep’t of State: Bureau of Public Affairs, *Background Note: Haiti* (Feb. 2005), <http://www.state.gov/r/pa/ei/bgn/1982.htm>.

<sup>120</sup> U.S. COMM’N ON CIVIL RIGHTS, *supra* note 98.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* “[M]any Haitian American voters were denied the opportunity to vote.” U.S. COMM’N ON CIVIL RIGHTS, *supra* note 99.



understand English from securing assistance at the polls, in violation of Section 208 of the Voting Rights Act.<sup>123</sup>

Unfortunately, Creole speakers are not recognized as “language minorities” by Section 203. This is undoubtedly attributable to the fact that when the language minority protections were originally considered and enacted, Creole speakers were -- at best -- a negligible portion of the voting eligible population.<sup>124</sup>

Since Section 203 does not cover Haitian Creole speakers, the Department of Justice was forced to rely on Section 208 of the Voting Rights Act to protect Haitian-Americans’ voting rights. It is not an ideal fit for addressing discrimination that is so clearly language-based. Section 208 does not offer protections on the basis of language *per se*, nor does it require bilingual ballots or other election materials. Instead, Congress created Section 208 to protect voters who were disabled, blind or illiterate. It provides:

Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.<sup>125</sup>

In suing under Section 208 to protect the voting rights of Haitian-Americans who were not proficient in English, the Department of Justice claimed that Miami-Dade County:

denied certain voters assistance from persons of the voters' choice. At several precincts, only pollworkers were permitted to assist voters. Oftentimes, the only pollworkers available to provide assistance did not speak Creole.... In those circumstances where Miami-Dade County permitted voters assistance from persons of the voters' choice, the County limited the scope of the assistance assistors of choice could provide. Many of these precincts limited such assistance to reviewing sample ballots with the voters and standing next to them during pollworker demonstrations. This limited assistance was of little value to voters once they entered the voting booth.<sup>126</sup>

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<sup>123</sup> Complaint at ¶ 6, *United States v. Miami-Dade County*, No. 02-21698 (S.D. Fla. 2002).

<sup>124</sup> The Senate Report accompanying the 1975 expansion of the Voting Rights Act to protect language minorities states:

The definition of those groups included in ‘language minorities’ was determined on the basis of the evidence of voting discrimination. Persons of Spanish heritage was the group most severely affected by discriminatory practices, while the documentation concerning Asian Americans, American Indians and Alaskan Natives was substantial.

No evidence was received concerning the voting difficulties of other language groups. Indeed, the voter registration statistics for the 1972 Presidential election showed a high degree of participation by other language groups: German, 79 percent; Italian, 77.5 percent; French, 72.7 percent; Polish 79.8 percent; and Russian, 85.7 percent.

S. REP. NO. 94-295, at 797 (1975). *See also, id.* at 803-805.

<sup>125</sup> 42 U.S.C. 1973aa-6. (2000).

<sup>126</sup> Complaint at 6, *United States v. Miami-Dade County*, No. 02-21698 (S.D. Fla. 2002).

The case was eventually settled by a Consent Order that required Miami-Dade County to take a number of steps to “redress” the harm caused to its “sizeable Haitian-American population in the 2000 Presidential election.”<sup>127</sup> Because of the limitations inherent in Section 208, the relief required by the Consent Order is not as comprehensive or as helpful to the Creole speaking community as relief under Section 203 would be. For example, the county defendants were enjoined from “denying Haitian-American voters with limited English-speaking proficiency assistance from persons of the voters' choice ... including interpreting the ballot.”<sup>128</sup> There was, however, no requirement that the county provide interpretation services to voters. At best, Creole speakers could hope to be able to bring their own interpreters to the polls.

What is evident from these vignettes concerning Florida’s recent discrimination against non-English speaking voters is the vital importance of legal safeguards to protect the fundamental right to cast a ballot irrespective of fluency in English. The relatively recent influx of Creole speaking Haitians and their experiences here also argue strongly for an expansion of the definition of language minority in Section 203 to cover this group.

The Dissenting Views expressed in the House Report accompanying the 1992 amendments to Section 203 suggested that it is appropriate to require English competency in order to cast a ballot since prospective citizens must demonstrate English competency in order to naturalize.<sup>129</sup> This is both factually inaccurate and ignores the reality of Florida’s population.

First, a large number of Florida’s Caribbean citizens who need language assistance are native-born U.S. citizens. For example, sixty percent of Osceola’s Hispanic population is of Puerto Rican origin.<sup>130</sup> Those voters are native-born U.S. citizens with a constitutional right to vote that is not predicated on any naturalization process or English language skills. In addition, a sizeable Native American population exists in portions of Florida which are covered by Section 203.<sup>131</sup> As the U.S. Commission on Civil Rights observed, “[t]he majority of non-English-speaking Americans are native-born citizens constitutionally entitled to vote.”<sup>132</sup>

Moreover, our naturalization laws are far more nuanced than a simple “one size fits all” approach to English proficiency. Aged immigrants who have lived in the United States for many years are not required to demonstrate any English proficiency in order to naturalize,<sup>133</sup> nor are people with disabilities if their disability prevents them from learning English.<sup>134</sup> Florida’s population, including its immigrant population, is older on average than the population of the United States as a whole,<sup>135</sup> increasing the probability that many of Florida’s naturalized citizens will not be

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<sup>127</sup> Consent Order, *United States v. Miami-Dade County*, No. 02-21698 (S.D. Fla. June 17, 2002).

<sup>128</sup> *Id.* at 2.

<sup>129</sup> H.R. REP. NO. 102-655 at 21 (1992) as reprinted in 1992 U.S.C.C.A.N. 766, 783.

<sup>130</sup> U.S. CENSUS BUREAU, *supra* note 102.

<sup>131</sup> Voting Rights Act Amendments of 1992, 67 Fed. Reg. 48,871, 48,873 (July 26, 2002) (designating Broward, Collier and Glades Counties as Sec. 203 covered jurisdictions with respect to the Seminole population).

<sup>132</sup> U.S. COMM’N ON CIVIL RIGHTS, *supra* note 98.

<sup>133</sup> 8 U.S.C. § 1423(b)(2). (2000)

<sup>134</sup> 8 U.S.C. § 1423(b)(1). (2000)

<sup>135</sup> U.S. Census Bureau, United States and Florida-QT-P1. Age Groups and Sex: 2000,

[http://factfinder.census.gov/servlet/QTTable?\\_bm=y&-state=qt&-context=qt&-](http://factfinder.census.gov/servlet/QTTable?_bm=y&-state=qt&-context=qt&-qr_name=DEC_2000_SF1_U_QTP1&-ds_name=DEC_2000_SF1_U&-tree_id=4001&-all_geo_types=N&-)

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fluent in English. It is no accident that Florida was the jurisdiction in which a class action was filed and successfully litigated on behalf of literally thousands of aged and disabled naturalization applicants who sought waiver of the English language requirement from immigration officials.<sup>136</sup> Finally, even though individuals may have some basic English proficiency, presumably we want voters to be able to read and understand complex ballot questions such as constitutional amendments when they vote — these matters can often best be understood in the voter’s primary language if English language skills are limited. The rights of citizenship, including the franchise, of Florida’s language minority populations should not be diminished simply because their English is limited.

### III. Florida’s Voting Rights Landscape

Infringement of minority voting rights in violation of Section 2 of the Voting Rights Act or the United States Constitution and other documented discriminatory voting practices occurring in Florida after the 1982 amendments to the Act are discussed below. Although Section 2 is a permanent provision of the Act, a discussion of the breadth of Florida’s voting rights problems is instructive to consideration of the continuance of the non-permanent provisions of Section 5 and Section 203.

#### A. Section 2 Litigation Establishing Voting Rights Violations

##### 1. At-Large Election Systems

In the eleven years following the 1982 amendments to the Voting Rights Act, minority voters across the state of Florida successfully established that the at-large election systems employed by various jurisdictions discriminated against them on the basis of race eleven times.<sup>137</sup> Pure at-large election systems continue to exist in well over half of Florida’s 67 counties.<sup>138</sup>

Significantly, this litigation is geographically widespread, but closely correlated with concentrations of African-American population as measured by the 1990 census,<sup>139</sup> revealing a

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<sup>136</sup> *Campos v. I.N.S.*, 188 F.R.D. 656, 658-9 n.1 (S.D.Fla. 1999).

<sup>137</sup> *NAACP v. Gadsden County School Board*, 691 F.2d 978 (11th Cir. 1982); *Aziz v. City of Ft. Myers*, No. 79-57 Civ-FtM-H (M.D. Fla. Feb. 22, 1983); *McMillan v. Escambia County*, 748 F.2d 1037 (5th Cir. 1984); *Williams v. City of Leesburg*, No. 83-66-CIV-OC-14, 1985 U.S. Dist. LEXIS 14890 (M.D. Fla. Oct. 15, 1985); *James v. City of Sarasota*, 611 F. Supp. 25 (M.D. Fla. 1985); *NAACP v. Madison County*, No. TCA-84-7234-WS, 1986 U.S. Dist. LEXIS 24786 (N.D. Fla. May 30, 1986); *Potter v. Washington County*, 653 F. Supp. 121 (N.D. Fla. 1986); *NAACP v. Leon County*, 827 F.2d 1436 (11th Cir. 1987); *NAACP v. City of Starke*, 712 F. Supp. 1523 (M.D. Fla. 1989); *Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990) (en banc); *Meek v. Metropolitan Dade County*, 985 F.2d 1471 (11th Cir. 1993).

<sup>138</sup> Thirty-eight of Florida’s 67 counties, or 57 percent, continue to elect their county commissions through at-large systems. Florida Ass’n of Counties, County Info. by County, <http://www.fl-counties.com/flmap.htm>. (last visited Feb. 21, 2006).

<sup>139</sup> See *infra* Appendix II (1990 CENSUS: Concentration of Black Persons By County, *Showing where Cases of Electoral Race Discrimination Occurred*).

systemic and state-wide dilution of African-American votes. The litany of discrimination chronicled by these cases is a powerful testament to the ongoing need for voting rights protections in Florida. In fact, as the Eleventh Circuit Court of Appeals recognized in 1982, the at-large election systems found throughout Florida were the result of a state-wide scheme to disenfranchise black voters.

In 1945...the Florida Supreme Court outlawed the white primary. *Davis v. State ex rel. Cromwell*, 156 Fla. 181, 23 So. 2d 85 (1945) (en banc). In the very next legislative session, the Florida legislature enacted statutes requiring both primary and general elections to be conducted at-large. 1947 Fla. Laws, ch. 23726, §§ 7, 9... [T]he change had been made to dilute the growing strength of the black vote.<sup>140</sup>

The Eleventh Circuit concluded that in Gadsden County “the at-large election plan was adopted with the motivation of diluting the votes of the minority,” and that “black candidates *have* lost solely because of their race...Blacks comprised 48.5 percent of the registered voters in the county...yet they have been consistently unable to elect candidates of their own race due to the extremely high degree of racial polarization in the voting patterns.”<sup>141</sup>

Two years later, the U.S. Court of Appeals<sup>142</sup> again recognized that at-large election systems for a county commission and school board in Florida “had their genesis in the midst of a concerted state effort to institutionalize white supremacy,”<sup>143</sup> this time in Escambia County in the northwest corner of Florida.

State-enforced segregation has created two separate societies in Escambia County in which churches, clubs, neighborhoods and, until recently, schools in the county have remained segregated by race. The lower court found that this “continued separation [of blacks] from the dominant white society” not only has “left blacks in an inferior social and economic position, with generally inferior education,” but has “helped reduce black voting strength and participation in government.”<sup>144</sup>

And again, in 1983, along the southwestern coast of Florida in Lee County, a federal district court found that:

[P]urposeful discrimination in the adoption and maintenance of the at-large election for the City Council in Ft. Myers has been established.... [A]ctual

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<sup>140</sup> *NAACP v. Gadsden County School Board*, 691 F.2d 978, 982 (11th Cir. 1982).

<sup>141</sup> *Id.*

<sup>142</sup> Although the case, *McMillan v. Escambia County*, 748 F.2d 1037 (5th Cir. 1984), was decided by a United States Court of Appeals in 1984, and would ordinarily have been determined by the Eleventh Circuit, because the case had a long and protracted history and was a former Fifth Circuit case, it remained docketed as a Fifth Circuit case pursuant to Sec. 9(1) of Public Law 96-452, Oct. 14, 1980. Fifth Circuit Court of Appeals Reorganization Act of 1980, Publ. L. No. 96-452, § 9(1), 94 Stat. 1994 (1980).

<sup>143</sup> *McMillan*, 748 F.2d at 1044.

<sup>144</sup> *Id.* (citing *McMillan v. Escambia County, Fla.*, PCA No. 77-0432, slip op. at 17).

differential impact and dilution of the minority's voting power ... has also been established.<sup>145</sup>

In 1985, in the west central portion of Florida, the Sarasota City Commission admitted that its at-large election system violated the Voting Rights Act after years of litigation, and the federal district court agreed, finding that "Sarasota elections have been marked by racially polarized voting."<sup>146</sup> In a significant coda to the Sarasota case, the court made the following observation: "In accordance with this Court's Order of January 25, the city held municipal elections [using single member districts] on April 9, 1985. For the first time in the city's history, a black was elected to the city commission."<sup>147</sup> In a similar 1985 case from Lake County in the center of Florida city officials agreed to convert their at-large city commission elections to a system of three single member districts with two at-large representatives in order to address allegations that black citizens were denied equal opportunity in city elections.<sup>148</sup>

The next year two counties in north Florida, Madison and Washington, admitted liability and agreed to eliminate their at-large county election systems when faced with Voting Rights Act challenges.<sup>149</sup> In Madison County, the federal district court found:

That because of the lingering effects of historical racial discrimination within Madison County and the State of Florida and racially polarized voting in elections within Madison County, the at-large election system used to elect the Madison County Commission... has had the effect of denying black citizens of Madison County an equal opportunity to elect candidates of their own choice in violation of Plaintiffs' rights under the Voting Rights Act.<sup>150</sup>

The court enjoined the defendants from providing county-wide at-large elections and required that all "elections henceforth will proceed on a single member district basis."<sup>151</sup> Leon County, also in north Florida, conceded liability in a similar suit, and abandoned at-large elections in favor of five commission districts and two at large members.<sup>152</sup>

The U.S. District Court for the Middle District of Florida, when considering voting rights claims originating in central Florida's Bradford County, observed that the "State of Florida has a long and well documented history of discrimination against black individuals."<sup>153</sup> The discrimination against blacks was perpetrated not only by the state but also by the local jurisdictions in Bradford County.<sup>154</sup>

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<sup>145</sup> *Aziz v. City of Ft. Myers*, No. 79-57 Civ-FtM-H (M.D. Fla. Feb. 22, 1983), slip op. at 11.

<sup>146</sup> *James v. City of Sarasota*, 611 F. Supp. 25, 28 (D.C. Fla. 1985).

<sup>147</sup> *Id.* at 32. (Supplemental Decision, May 25, 1985).

<sup>148</sup> *Williams v. City of Leesburg*, No. 83-66-CIV-OC-14, 1985 U.S. Dist. LEXIS 14890 (M.D. Fla. Oct. 15, 1985).

<sup>149</sup> *NAACP v. Madison County*, No. TCA-84-7234-WS, 1986 U.S. Dist. LEXIS 24786 (N.D. Fla. May 30, 1986); *Potter v. Washington County*, 653 F. Supp. 121 (N.D. Fla. 1986) (elections for county commission and county school board).

<sup>150</sup> *NAACP v. Madison County*, 1986 U.S. Dist. LEXIS 24786 at \*2-3.

<sup>151</sup> *Id.* at \*3.

<sup>152</sup> *NAACP v. Leon County*, 827 F.2d 1436, 1437 (11th Cir. 1987).

<sup>153</sup> *NAACP v. City of Starke*, 712 F. Supp. 1523, 1537 (M.D. Fla. 1989).

<sup>154</sup> At the same time that plaintiffs filed their lawsuit against the City of Starke, they also sued the Bradford County Commission and School Board claiming that the at-large election schemes employed by those bodies discriminated

[T]he evidence is clear that black residents of Starke have suffered from pervasive racial discrimination. Perhaps the clearest example of city-sponsored discrimination can be found in the City Charter of 1927. The Charter explicitly empowered the City Council to establish and set aside separate and distinct districts within the city where blacks and whites could reside.<sup>155</sup>

Starke's *de jure* housing segregation resulted in a concentration of black residents in Starke in the City's northeastern "Reno" area.<sup>156</sup> Even though the black population was geographically compact and almost one third of the City's total population,<sup>157</sup>

[n]o black person has ever been elected to serve on the Starke City Commission. Similarly, no black has ever been elected to serve in any other elected city office which includes the positions of City Clerk and Chief of Police.

Additionally, prior to the implementation of a single member district election system for the Board of County Commissioners of Bradford County and the Bradford County School Board in 1986, no black had ever been elected to serve in any elective office in Bradford County.<sup>158</sup>

Continuing the theme of a complete absence of minority representation in local governments elected at large in Florida, the Eleventh Circuit observed that:

Not a single black has ever been elected in Liberty County. The most cross-over support any black candidate has ever received is 40.5 percent of the white vote. That candidate would have been defeated even if he had received 100 percent of the black vote. Thus, black voters have never had an opportunity to elect a black representative, despite their manifest preference for those black candidates that have presented themselves.<sup>159</sup>

The Eleventh Circuit held, "as a matter of law" that "the at-large method of electing county commissioners and school board members in Liberty County, Florida denies black voters a fair opportunity to participate in the political process and to elect candidates of their choice."<sup>160</sup>

Winding up the eleven-year run on eliminating discriminatory at-large elections schemes is a case from Dade County in southern Florida. The district court found, and the Eleventh Circuit

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against black voters. Those cases were settled by consent final judgments providing for single member districts for both bodies. *Id.* at 1528 n.5.

<sup>155</sup> *Id.* at 1537.

<sup>156</sup> *Id.* at 1529.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 1528 (footnote omitted). A visit to the website of Bradford County today reveals that minority representation continues on the County Commission with Ross Chandler as Commissioner for District 1. Bradford County, <http://www.bradford-co-fla.org> (follow "County Commissioners" hyperlink; then follow "District 1").

<sup>159</sup> *Solomon v. Liberty County*, 899 F.2d 1012, 1021 (11th Cir. 1990) (en banc) (Kravitch, J., specially concurring) (footnotes omitted).

<sup>160</sup> *Id.* at 1013 (en banc opinion).

affirmed the finding, that “the at-large voting system used by Dade County, Florida (“Dade County”), to elect the members of its County Commission dilutes black and Hispanic voting power in violation of section 2 of the Voting Rights Act of 1965.”<sup>161</sup> The court noted that “Dade County’s history of official discrimination, along with the presence of other Senate Report factors, supported a finding of racial bias motivating voting in Dade County.”<sup>162</sup>

At present, an especially interesting challenge to an at-large electoral system brought by the Department of Justice on behalf of Hispanic voters is pending in Osceola County.<sup>163</sup> As previously discussed, Osceola County has experienced substantial growth in its Hispanic population in the last two decades. The county’s population is currently estimated to be 35 percent Hispanic.<sup>164</sup> Osceola was one of many Florida counties that maintained an at-large election system for its board of county commissioners. In 1992, “the Board voted to place a referendum question on the ballot regarding whether the county should amend its home rule charter to provide for election of the Board from single member districts.”<sup>165</sup> Osceola voters elected to enact this change, and single member district elections were held for the board of county commissioners in 1994 and 1996. “The first Hispanic commissioner in the history of the county was elected under this single-member district system in 1996.”<sup>166</sup> At about the same time, at the urging of some of the commissioners, the county considered returning to the at-large method of electing commissioners, and enacted a referendum returning to the at-large method effective in 1998.<sup>167</sup> “Although numerous candidates have run, no Hispanic candidate has ever been elected to the Board of Commissioners under the at-large method of election, or to any other Osceola County office elected on a countywide basis.”<sup>168</sup> According to the Justice Department, among the reasons for the board of commissioners favoring the return to at-large elections was the fact that:

[T]he members of the Board of Commissioners recognized that there was substantial growth in the Hispanic population between 1992 and 1996 [and] a majority of Board members in 1994-1996 recognized that the growth of the Hispanic population would result in Hispanic voters achieving the ability to elect a candidate of their choice in one or more districts under the single-member district method of election.<sup>169</sup>

This is the kind of retrogressive change that would likely have been avoided if Section 5 review were available in Osceola County to ensure a forum that holds local jurisdictions accountable for their minority citizens’ electoral rights. Moreover, scrutiny of at-large election schemes in Florida and their potentially discriminatory effects is far from over. More than half of Florida’s counties maintain at-large systems even after the state legislature abolished the requirement that

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<sup>161</sup> *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1474-75 (11th Cir. 1993).

<sup>162</sup> *Id.* at 1487.

<sup>163</sup> Complaint, *United States v. Osceola County*, No. 6:05-CV-1053-ORL-31DAB (M.D. Fla. July 18, 2005).

<sup>164</sup> *Id.* at ¶ 8.

<sup>165</sup> *Id.* at ¶ 19.

<sup>166</sup> *Id.* at ¶ 20.

<sup>167</sup> *Id.* at ¶¶ 21-23.

<sup>168</sup> *Id.* at ¶ 13.

<sup>169</sup> *Id.* at ¶¶ 23-24.

they do so in 1984.<sup>170</sup> Many of these remaining 38 counties have a high minority population.<sup>171</sup> Whether voters and civil rights advocates will ever embark upon the Herculean task to systemically analyze and address these potentially discriminatory systems is an open question,<sup>172</sup> and it is worth considering that Congress originally enacted Section 5 of the Voting Rights Act precisely because “Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits.”<sup>173</sup>

## 2. Litigation Documenting Other Discriminatory Voting Practices

Two Eleventh Circuit cases from Florida challenging judicial election schemes provide additional documentation of discrimination against minority voters, even though the Court ultimately concluded that plaintiffs were not entitled to relief. In *Nipper v. Smith*,<sup>174</sup> the court recounted the following history:

Florida employed various franchise restrictions--from the poll tax to the white primary--for decades in an attempt to restrict the access of black voters to the ballot....

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<sup>170</sup> The Eleventh Circuit summarized this history as follows:

Until 1984 the at-large election system was the only method of election available to non-charter counties.... Fla. Const. Art. VIII, § 1(e). In that year the constitution was amended to permit commissioners to be elected "as provided by law." In 1985, § 124.011(1), Fla.Stat.1985 was enacted, the effect of which was to give non-charter counties the option of adopting an alternate method for electing county commissioners: a five-person board with all elected from single-member districts or a seven-person board with five elected from single-member districts and two elected at-large.

*NAACP v. Leon County*, 827 F.2d at 1444. (Godbold, J., dissenting).

<sup>171</sup> For example, Glades County's population is 10.5 percent black and 15.1 percent Hispanic, Marion County's population is 11.5 percent black and 6 percent Hispanic, Okeechobee County's population is 7.9 percent black and 18.6 percent Hispanic, Osceola County's population is 7.4 percent black and 29.4 percent Hispanic. U.S. Census Bureau, Glades, Marion, Okeechobee and Osceola Counties-QT-P3. Race and Hispanic or Latino: 2000, [http://factfinder.census.gov/servlet/QTTable?\\_bm=y&-state=qt&-context=qt&-qr\\_name=DEC\\_2000\\_SF1\\_U\\_QTP3&-ds\\_name=DEC\\_2000\\_SF1\\_U&-tree\\_id=4001&-all\\_geo\\_types=N&-redoLog=true&-\\_caller=geoselect&-geo\\_id=05000US12043&-geo\\_id=05000US12083&-geo\\_id=05000US12093&-geo\\_id=05000US12097&-search\\_results=04000US12&-format=&-\\_lang=en](http://factfinder.census.gov/servlet/QTTable?_bm=y&-state=qt&-context=qt&-qr_name=DEC_2000_SF1_U_QTP3&-ds_name=DEC_2000_SF1_U&-tree_id=4001&-all_geo_types=N&-redoLog=true&-_caller=geoselect&-geo_id=05000US12043&-geo_id=05000US12083&-geo_id=05000US12093&-geo_id=05000US12097&-search_results=04000US12&-format=&-_lang=en).

Each of these counties elects its county commission by at large vote. Florida Ass'n of Counties, County Info. by County, <http://www.fl-counties.com/flmap.htm> (last visited Feb. 26, 2006). None of these county commissions contain minority representation. Glades County Cmty. Dev., <http://www.myglades.com/> (follow "Commissioners" hyperlink); Marion County Fla. Bd. of Commissioners, [http://www.marioncountyfl.org/CO211/CO\\_home.htm](http://www.marioncountyfl.org/CO211/CO_home.htm) (follow "District 1-5" hyperlinks); Bd. of County Comm'rs, Okeechobee, <http://www.co.okeechobee.fl.us/>; Osceola County, Bd. of County Comm'rs, Comm'r Bios, <http://www.osceola.org/index.cfm?lsFuses=department/BCC/BCCBios> (last visited Feb. 27, 2006).

<sup>172</sup> The only pending challenge to an at-large system is the *Osceola County* case discussed above. See Complaint, *United States v. Osceola County*, *supra* note 163.

<sup>173</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (citing H.R. REP. NO.89- 439, at 9-11 (1965); S. REP. NO. 89- 162, pt. 3, at 6-9 (1965)). See also, ELLEN KATZ ET AL., DOCUMENTING DISCRIMINATION IN VOTING: JUDICIAL FINDINGS UNDER SECTION 2 OF THE VOTING RIGHTS ACT SINCE 1982 5 (DEC. 2005), <http://sitemaker.umich.edu/votingrights/files/finalreport.pdf>.

<sup>174</sup> *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc).



Transportation facilities in Florida were segregated until the 1950s, and many area school systems still have not achieved unitary status. Moreover, until 1958, Florida refused to permit black students to attend the University of Florida College of Law. Florida A & M Law School was created in 1951 for black students but was not accredited until several years later. When the state opened another law school in Tallahassee in 1967 at Florida State University, it closed the law school at Florida A & M....

Despite the removal of overt badges of segregation, the district court nonetheless found that “black citizens in Florida still suffer in some ways from the effects of Florida’s history of purposeful discrimination,” particularly in terms of socio-economic disparities, such as family income and high school graduation rates. *Id.* at 1536. Black citizens in the region covered by the Fourth Circuit have lower median incomes than whites and are more likely to be unemployed and to fall below the poverty line. In addition, the limited evidence presented at trial (reflected in a consensus among the experts) suggested that, although little disparity exists in voter registration, black voter turnout appears to be slightly lower than white turnout. And the “rolloff” effect--which measures the number of voters who sign in at the polls but fail to cast a vote for a particular election on the ballot--is greater among black voters than white voters.<sup>175</sup>

The court also found that “the record reveals that sufficient racial bloc voting exists in Fourth Circuit and Duval County Court elections, such that the white majority usually defeats the minority’s candidate of choice.”<sup>176</sup>

Similarly, in *Davis v. Chiles*,<sup>177</sup> the Eleventh Circuit held that minority plaintiffs had established that the two judicial districts challenged in that case:

share a history of racially polarized voting. In the few elections in which black candidates have competed against white candidates (prior to Davis’s initiation of this litigation), no black lawyer has ever won election to either the Second Circuit or Leon County Courts. In each of these black-versus-white elections, the overwhelming majority of black voters supported the black candidates. Notwithstanding this political cohesion among black voters, however, white voters did not supply enough crossover votes for the black candidates to prevail, but instead provided overwhelming support to the white candidates. In 1992, for example, black voters in Leon County gave approximately 98 percent of their support to a black candidate, but a white candidate who received 68 percent of the white vote still won the election. As a result of this dynamic, racial block voting has become “a well-known political reality” in elections between black and white candidates for the Second Circuit and Leon County Courts.<sup>178</sup>

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<sup>175</sup> *Id.* at 1507-08, 1507 n.26.

<sup>176</sup> *Id.* at 1541.

<sup>177</sup> *Davis v. Chiles*, 139 F.3d 1414, 1416 (11th Cir. 1998).

<sup>178</sup> *Id.* at 1417 (footnotes omitted).

While the plaintiffs were unsuccessful in these two cases in securing a remedy, the bases for the court's decisions on remedy were governed by circumstances unique to the judicial election systems being challenged. The judicial findings of discrimination, vote dilution and racially polarized voting were not overruled by the Court and they cannot be discounted in reviewing Florida's history. Those findings echo the findings of the three judge district court in *DeGrandy v. Wetherell*.<sup>179</sup>

A longstanding general history of official discrimination against minorities has influenced Florida's electoral process. In 1885, Article VI, Section 8 of the Florida Constitution imposed a poll tax which disenfranchised poor minority voters. Additionally, Article XII, Section 12 of the 1885 Florida Constitution segregated African-American and white school children. Article XXVI, Section 24 of that same Florida Constitution also outlawed the intermarriage of white with African-Americans. As recently as 1967, § 350.20, Fla. Stat. provided in part: "The Florida Public Service Commissioners may prescribe reasonable rules and regulations relating to the separation of white and colored passengers in passenger cars being operated in this state by any railroad company or other common carrier." Additionally, § 1.01(6), Fla. Stat. (1967) provided that "the words 'Negro,' 'colored,' 'colored persons,' 'mulatto,' or 'persons of color,' when applied to persons, include every person having one-eighth or more of African or Negro blood." Federal precedent has also addressed numerous recent discriminatory election practices in Florida, including at-large election schemes, white primaries, majority vote requirements, and candidate filing fees. Such official state discrimination has adversely affected the ability of minorities to participate in the political process.

The parties agree that racially polarized voting exists throughout Florida to varying degrees. The results of Florida's legislative elections over the past ten years established the presence of racially polarized voting. See *In re Constitutionality of Senate Joint Resolution 2G Special Apportionment Session 1992*, No. 79-674, slip op. at 34-37 (Fla. May 13, 1992) (Chief Justice Shaw dissenting). In areas such as education, employment and health care, Florida's minorities have borne the effects of discrimination. The 1990 census figures demonstrate that among persons sixteen years or older, African-Americans are more than twice as likely to be unemployed as whites. In Florida, the poverty rate for African-Americans is more than three times higher than the rate for whites. Additionally, we note that voting studies have consistently indicated the strong relationship between socio-economic status and political participation. Thus, the legal barriers and the economic barriers which the legacy of racism has created in the state of Florida, have prevented African-Americans from fully participating in the political process.<sup>180</sup>

The existence of racially polarized voting adversely affecting Hispanic voters has also been documented by the Justice Department in central Florida: "Racially polarized voting patterns

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<sup>179</sup>*DeGrandy v. Wetherell*, 794 F. Supp.1076, 1079 (N.D. Fla. 1992) (three judge court).

<sup>180</sup>*Id.* at 1079.

prevail in elections for the Board of Commissioners, and white voters have voted sufficiently as a bloc to enable them usually to defeat the Hispanic voters' preferred candidates.”<sup>181</sup>

This strong evidence of racially-polarized voting, persistent use of at-large election schemes that adversely affect minority voters and the discriminatory practices discussed below all illustrate why the piecemeal approach to ensuring electoral fairness contemplated by Section 2 alone, without the additional protections offered by Sections 5 and 203, is simply inadequate in a state as large, diverse, and problematic as Florida.

## **B. Other Evidence of Discrimination**

Other evidence of ongoing discrimination against minority voters in Florida is found in a review of the U.S. Commission on Civil Rights report on the 2000 Presidential Election and in litigation that was filed related to that election. The administration of the 2000 Presidential Election and the debacle that followed have become synonymous in the political history of the United States with a governmental electoral system that utterly failed the electorate at every level.<sup>182</sup> Among the most disturbing aspects of that failed electoral process were persistent and well-documented racial and ethnic disparities at each of those levels. In its comprehensive investigation of the 2000 Presidential Election in Florida, the Commission on Civil Rights found the disparate and unlawful treatment of language minorities discussed above. The Commission also found widespread and disproportionate disenfranchisement of Florida minority voters with respect to spoiled ballots, and that:

[t]his disenfranchisement of Florida voters fell most harshly on the shoulders of African Americans. Statewide, based on county-level statistical estimates, African American voters were nearly 10 times more likely than white voters to have their ballots rejected in the November 2000 election.<sup>183</sup>

In reaching this conclusion, the Civil Rights Commission relied on the expert testimony and report of Dr. Allan Lichtman, who conducted a comprehensive statistical analysis of Florida's spoiled ballots in the 2000 election. Dr. Lichtman found that “blacks were far more likely than non-blacks to experience the rejection of ballots cast in Florida's 2000 election.”<sup>184</sup>

There were also problems at the polls due to Florida's flawed voter list maintenance procedures, and those problems had a disproportionate impact on minority voters. Florida permanently disenfranchises former felons, “which produces a stark disparity in disenfranchisement rates of

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<sup>181</sup> Complaint, *United States v. Osceola County*, *supra*, note 163 at ¶ 11.

<sup>182</sup> See, e.g., SAMUEL ISSACHAROFF ET AL., WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000 (Revised ed. 2001).

<sup>183</sup> U.S. COMM'N ON CIVIL RIGHTS, *supra* note 98. Florida Highway Patrol troopers also conducted an unauthorized vehicle checkpoint within a few miles of a polling place in a predominately African American neighborhood. *Id.*

<sup>184</sup> U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLA DURING THE 2000 PRESIDENTIAL ELECTION, APPENDIX VII: REPORT ON THE RACIAL IMPACT OF THE REJECTION OF BALLOTS CAST IN THE 2000 PRESIDENTIAL ELECTION IN THE STATE OF FLA, Allan J. Lichtman (June 2001), <http://purl.access.gpo.gov/GPO/LPS17743>, (follow “Report on Voting Irregularities in Florida During the 2000 Presidential Election” hyperlink; then follow “Appendices” hyperlink; then follow “Appendix VII: Report by Dr. Allan J. Lichtman on the Racial Impact of the Rejection of Ballots Cast in the 2000 Presidential Election in the State of Florida”).

African American men compared with their white counterparts.”<sup>185</sup> While there can be debate about the advisability of such a state policy and its discriminatory effects,<sup>186</sup> there is no debate that in the list maintenance, or “voter purge” process leading up to the 2000 election, something went terribly wrong and thousands of voters who should not have been disenfranchised ended up on the state’s “purge list.”<sup>187</sup> Creation of the now-infamous list was contracted to a private data corporation. The corporation, acting on instructions from Florida elections officials, purposely utilized extremely broad matching criteria guaranteed to produce “false positives” or partial matches of the data.<sup>188</sup>

The purge lists were then given to supervisors of election in Florida’s 67 counties with few instructions and little oversight by state officials, though Florida election law at that time put the onus on the voter to establish his or her eligibility to vote.<sup>189</sup>

Supervisors of elections in the various counties treated the list differently, but there is widespread agreement that the errors in the list disproportionately affected African-American voters. In Hillsborough County, it was reported that the “supervisor of elections estimated that 15 percent of those purged were purged in error and they were disproportionately African American.... [A]nother source estimated that 7,000 voters [in Hillsborough County], mostly African Americans and registered Democrats, were removed from the list.”<sup>190</sup> In Miami-Dade County, “over half of the African Americans who appealed from the Florida felon exclusion list were successfully reinstated to the voter rolls.”<sup>191</sup>

Florida’s flawed voter list maintenance procedures, its spoiled ballots, and other shortcomings that disproportionately affected minority voters formed the basis for a Voting Rights Act challenge filed by the NAACP and African-American voters against Florida agencies, the supervisors of elections in seven counties, and the corporation that produced the purge list.<sup>192</sup> The litigation resulted in a series of settlement agreements with the various defendants, which provided, among other things, that the private corporation re-run the purge data with more exacting match criteria, and that Florida state officials undertake remedial action to restore those voters who may have been erroneously purged from the voter lists as a result of the prior

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<sup>185</sup> U.S. COMM’N ON CIVIL RIGHTS, *supra* note 99. The Report also notes that “[t]hirty-one percent of the Florida disenfranchised population consists of African American men.” *Id.*

<sup>186</sup> See *Johnson v. Bush*, 405 F.3d 1214 (11th Cir. 2005).

<sup>187</sup> The voter exclusion list was designed to include not only persons convicted of a felony in Florida but also persons who had been determined mentally incompetent, persons who had duplicate registrations in more than one Florida county, and persons who were convicted of felonies in other states. U.S. COMM’N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLA. DURING THE 2000 PRESIDENTIAL ELECTION: CH.5, THE REALITY OF LIST MAINT. (2001), <http://purl.access.gpo.gov/GPO/LPS17743> (follow “Report on Voting Irregularities in Florida During the 2000 Presidential Election” hyperlink; then follow “Chapter 5, The reality of List Maintenance” hyperlink).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Amended Complaint, *NAACP et. al. v. Harris*, No. 01-0120-CIV-GOLD (S.D. Fla. July 6, 2001) (naming the Florida Secretary of State, the Director of the Florida Division of Elections, the Director of the Florida Department of Highway Safety and Motor Vehicles and the Secretary of the Florida Department of Children and Families as defendants as well as the supervisors of elections in Miami-Dade, Broward, Duval, Hillsborough, Leon, Orange and Volusia Counties)

overbroad match criteria. The settlement agreement with state officials also required that future voter list maintenance procedures be conducted with more exacting match criteria.<sup>193</sup> Settlement agreements between plaintiffs and supervisors of elections in the various counties also provided for remedial actions in future elections.<sup>194</sup>

Despite these agreements and electoral reform legislation that followed the 2000 election,<sup>195</sup> there is ample evidence that Florida's difficulties with voter list maintenance and the mechanics of election administration are far from over, and that problems in those areas continue to disenfranchise minority voters at a disproportionately high rate. Florida's list maintenance procedures in anticipation of the 2004 presidential election present an especially concerning case in point. In supposed accord with both legislative changes and the settlement agreement with the *NAACP v. Harris* plaintiffs, the Division of Elections undertook the creation of a new purge list. When civil rights groups screened the list, they discovered that as many as 25,585 former felons who had received clemency remained on the purge list.<sup>196</sup> After news organizations obtained copies of the purge list from state officials, they discovered – and reported – that “[i]t did not include the names of Hispanic voters, while it included many black voters who had actually had their voting rights restored.”<sup>197</sup> When these gross disparities were revealed, state elections officials instructed county supervisors of elections not to use the list<sup>198</sup> and requested an audit by the Department of State's Inspector General.<sup>199</sup> The audit concluded that, although there was no evidence of a purposeful effort to disenfranchise African-American voters, the list had been created in such a way that African Americans were over represented and Hispanics were virtually non-existent. Furthermore:

\* The department relied on flawed data from the Office of Executive Clemency when drawing up the felons list. For example, the office did not initially turn over the names of more than 5,000 felons whose civil rights were restored before 1977 because the office did not have birth dates for those people. In June, when asked about this possible flaw, state officials denied that it was a problem.

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<sup>193</sup> Settlement Agreement, *NAACP et. al. v. Harris*, No. 01-0120-CIV-GOLD (S.D. Fla. 2002) (on file with author) (between Plaintiffs and Defendant ChoicePoint Inc., d/b/a Database Technologies, Inc.); Settlement Agreement, *NAACP et. al. v. Smith*, No. 01-0120-CIV-GOLD (S.D. Fla. 2002) (on file with author) (between Plaintiffs and Defendants Jim Smith, Secretary of State of Florida and Edward G. Kast, Director of the Division of Elections); Letter from Richard E. Doran, Fla. Att’y Gen., to Joseph D. Rich, Chief, Voting Sec., Civil Rights Div., Dep’t of Justice (Dec. 9, 2002) (on file with author) (letter and accompanying attachments refer to Submission of Settlement Agreements in *NAACP v. Harris*, Section 5 Submission Nos. 2002-2520 and 2002-5023).

<sup>194</sup> Order Granting Plaintiffs’ and Defendant David C. Leahy’s Motion for Approval of Settlement Agreement, *NAACP et. al. v. Katherine Harris*, No.01-120-CIV-GOLD (S.D. Fla. 2002) (on file with author) (attached is the settlement agreement dated Aug. 6, 2002) (providing, *inter alia*, for adequate staffing and equipping of precincts).

<sup>195</sup> 2001 Fla. Laws. 117.

<sup>196</sup> Jim Ash & George Bennett, *Study Raises Issue About Purge of Felons*, PALM BEACH POST, June 9, 2004, at 1A. See also, Abby Goodnough, *In Florida, Wrestling Again Over Felons and Voting*, N.Y. TIMES, June 9, 2004, at A16; Erika Bolstad, Jason Grotto & David Kidwell, *Thousands of Eligible Voters are on the Felon List*, MIAMI HERALD, July 2, 2004, at 1A.

<sup>197</sup> Gary Fineout & Marc Caputo, *State Ceases Felon Voting Purge*, MIAMI HERALD, Aug. 14, 2004, at 6B; see also, Ford Fessenden, *Florida List for Purge of Voters Proves Flawed*, N. Y. TIMES, July 10, 2004, at A13. (“Of nearly 48,000 Florida residents on the felon list, only 61 are Hispanic. By contrast, more than 22,000 are African-American.”).

<sup>198</sup> Fineout & Caputo, *supra* note 197.

<sup>199</sup> S.V. Date, *Second Probe Ordered of Felon List Barring Vote*, PALM BEACH POST, July 24, 2004, at 3A.

\* The department did not ensure that some changes to the central voter database were approved by the U.S. Department of Justice, which must sign off on any new procedures that affect voting rights of minorities.

\* The department did not always comply with a legal agreement it reached in 2002 with the NAACP over how to use the central voter database and the felons list.<sup>200</sup>

In the September 2002 primary election, a more local but no less significant systems failure occurred in Miami-Dade County. The county Inspector General described this election as “nothing less than a debacle.”<sup>201</sup> This systems problem also disproportionately affected black voters, who were far more likely to have their votes “lost” than other voters.<sup>202</sup>

## CONCLUSION

The lingering effects of Florida’s recent – and nationally prominent – voting failures have eroded confidence in Florida’s electoral system, particularly among its minority voters.<sup>203</sup> While Section 5 is not a panacea, maintaining a framework of federal scrutiny for Florida’s voting changes is important in regaining and retaining public confidence in the system. It is also vital in ensuring that voting changes are scrutinized for their fairness to minority voters. Sections 203 and 4(f)(4) continue to be essential to guarantee an opportunity for meaningful participation in the electoral process by Florida’s language minorities.

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<sup>200</sup> Gary Fineout, *Felons List Audit Faults State*, MIAMI HERALD, Nov. 23, 2004 at 1B.

<sup>201</sup> Memorandum and Office of the Inspector Gen. Report from Christopher Mazzella, Inspector Gen., to Alex Penelas, Mayor Miami-Dade County et al., 1 (Sept. 20, 2002), *available at* <http://www.miamidadeig.org/archives/Sept102002election.pdf>.

<sup>202</sup> HUGH GLADWIN, ANALYSIS OF DATA ON PRECINCTS REPORTING PROBLEMS WITH IVOTRONICS VOTING MACHINES IN MIAMI-DADE COUNTY (2002), <http://www.acluf.org/pdfs/RacialImpactReportFINAL.pdf>.

<sup>203</sup> Indeed, a recent survey commissioned by Florida indicates that Black and Hispanic voters in Florida are far less confident that their votes will be counted than their white counterparts. COLLINS CENTER FOR PUBLIC POLICY, 2004 Voter Satisfaction Survey, Voter Survey Tables, Confidence That Your Vote Will Count (Cross Tabulation by Race) 3 (2004), *available at* [http://www.collinscenter.org/usr\\_doc/2004\\_voter\\_survey\\_tables.pdf](http://www.collinscenter.org/usr_doc/2004_voter_survey_tables.pdf). (Black and Hispanic voters reported “excellent” confidence levels at 40 percent and 42 percent respectively, while white voters reported excellent confidence that their votes would count at 66 percent).

## Appendix I

### Detailed Discussion of Reapportionment History in Florida, 1992 and 2002

#### 1992

When the Florida legislature convened in 1992, one of the members of the Florida House of Representatives, Miguel DeGrandy, along with other registered voters, filed a complaint in a Florida U.S. District Court against the Speaker of the Florida House of Representatives, the President of the Florida Senate, the Governor of Florida, and other state officials challenging Florida's failure to reapportion its congressional and state legislative districts and claiming that Florida's current congressional and state legislative districts violated both the Equal Protection Clause of the United States Constitution and the Voting Rights Act of 1965. The plaintiffs asked the court to assert jurisdiction in order to lawfully redistrict and reapportion the state.<sup>1</sup>

Despite DeGrandy's lawsuit, the Florida Legislature ended its 1992 regular session in March without adopting either a congressional or a state reapportionment plan. Thereafter, the three-judge *DeGrandy* court convened, denied all motions to dismiss and established an expedited scheduling order to adopt congressional and state legislative plans by May 29, 1992. While the court expressly did not intend to prevent the state from attempting to enact its own plans, the court expressed great concern that "the state legislature would be unable to pass a congressional redistricting plan and have the Justice Department preclear that plan in time for the scheduled candidate qualification date [and as a result] minority voters would not be able to participate meaningfully in the political process and adequately decide on a candidate of their choice."<sup>2</sup>

The Governor of Florida called a special session of the Florida Legislature in April for the purposes of redistricting. The legislature was unable to reach agreement on a congressional redistricting plan. It did adopt Senate Joint Resolution 2-G reapportioning state legislative districts.<sup>3</sup> The Florida Attorney General submitted this reapportionment

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<sup>1</sup> *DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1080 (N.D. Fla. 1992) (three judge court). Miguel DeGrandy's suit was not the only challenge to Florida's discriminatory failure to redistrict filed in 1992. The Florida State Conference of NAACP Branches and numerous African-American voters filed a similar suit which was eventually consolidated with the DeGrandy matter. *Id.*

<sup>2</sup> *Id.*

<sup>3</sup> These proceedings were undertaken pursuant to Article 3, Section 16(a) of the Florida Constitution, providing, in pertinent part:

If the legislature should fail at its regular session to apportion themselves into the legislative districts as required by Article 3, Section 16, the governor is required to reconvene the legislature within thirty days in a special apportionment session.... If the legislature adopts a reapportionment plan, the constitution requires the attorney general to petition the Florida Supreme Court for a declaratory judgment determining

plan to the Department of Justice for preclearance on April 17, 1992 and the District Court bifurcated the Congressional and state reapportionment plans and later stayed its consideration of the state redistricting process.<sup>4</sup> From this point forward litigation concerning the congressional districts and litigation concerning the state legislative districts proceeded on two separate tracks. The three judge district court determined in fairly short order that Florida's congressional redistricting plan diluted minority voting strength and violated Section 2 of the Voting Rights Act.<sup>5</sup> The legal path of Florida's state legislative redistricting was much more convoluted.

After the Department of Justice interposed its objection to the state Senate reapportionment plan for Hillsborough County the Florida Supreme Court, acting pursuant to the state constitution, ordered an expedited schedule to address DOJ's objection. The Court encouraged the legislature to adopt a proper reapportionment plan, taking the Section 5 objection into consideration. The Florida Supreme Court also stated that in the event the Legislature "fails to adopt a plan by June 24, 1992, this Court will conclude that a legislative impasse has occurred, and this Court will promptly undertake to make such reapportionment."<sup>6</sup> Rather than attempt to address the objection raised by the Department of Justice, the Florida Legislature refused to convene for reapportionment and the Governor refused to call a special session.<sup>7</sup> The Florida Supreme Court then declared, "we believe that it is our obligation to redraw the plan to satisfy the objection of the Justice Department now that the Legislature has declared that it is not going to do so."<sup>8</sup> The Court proceeded to consider proposals submitted by interested parties and on June 25, 1992 it adopted a Senate redistricting plan which it believed cured the DOJ's Section 5 objection.

Although he concurred in the result, Chief Justice Shaw wrote separately to indicate that he believed the plan discriminated against minority voters in violation of Section 2 of the Voting Rights Act:

Because this Court's review in the present proceeding is limited in scope to DOJ's section 5 preclearance inquiry, I concur in the majority opinion. I believe the present revision in the plan meets the objection evinced in

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the validity of the apportionment.... If the Supreme Court determines that the legislative apportionment is valid, the plan must be precleared by the Department of Justice before it may be considered validly enacted.

*DeGrandy v. Wetherell*, 815 F. Supp. 1550, 1554 n.1 (N.D. Fla. 1992) (three judge court).

<sup>4</sup> The district court stayed its proceedings with respect to the state legislative districts following the initial determination by the Florida Supreme Court that the apportionment was valid pursuant to Art.3, § 16(a) of the Constitution. *DeGrandy*, 794 F. Supp. at 1081.

<sup>5</sup> *Id.* at 1076.

<sup>6</sup> *DeGrandy*, 815 F. Supp. at 1556.

<sup>7</sup> *Id.*

<sup>8</sup> *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 601 So.2d 543, 545 (Fla. 1992).



DOJ's admittedly restricted review. I write to note, however, that I still conclude that the overall plan, including the present revision, fails under Section 2 of the Act because it does not provide an equal opportunity for minorities to elect representatives of their choice to the Florida legislature, as noted in my earlier dissent.<sup>9</sup>

The parties then returned to the three judge district court to resolve the remaining state legislative reapportionment issues, and the Department of Justice filed its own lawsuit against Florida alleging that its state legislative reapportionment plans diluted minority voting strength in violation of Section 2 of the Voting Rights Act.<sup>10</sup> The district court consolidated the DOJ lawsuit with the pending action and “imposed the Florida Supreme Court plan as its own plan for section 5 purposes.”<sup>11</sup> The court proceeded to consider the claims of Section 2 violations in the redistricting of both houses of the state legislature and determined that they diluted minority voting strength in violation of Section 2. Eventually, the United States Supreme Court determined that plaintiffs were not entitled to relief under Section 2 but retained the Section 5 adjustment made by the Florida Supreme Court.<sup>12</sup>

## 2002

In January 2002 three minority members of the U.S. House of Representatives and a minority voter challenged Florida’s congressional redistricting plan in state court in Broward County. The action was removed by defendants to federal court, dismissed by plaintiffs, refiled in state court, removed again to federal court and eventually remanded to state court where it was dismissed for lack of subject matter jurisdiction.<sup>13</sup>

In March another group of plaintiffs filed a separate action for declaratory and

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<sup>9</sup> *Id.* at 548 (Shaw, C.J. specially concurring).

<sup>10</sup> *DeGrandy*, 815 F. Supp. at 1557 n.6 (citing *United States v. State of Florida et al.*, TCA 92-40220-WS).

<sup>11</sup> *DeGrandy*, 815 F. Supp. at 1558.

<sup>12</sup> *Johnson v. DeGrandy*, 512 U.S. 997, 1022 (1994). Remarkably, this litigation was not the final word on the Florida Senate districting plan. After the Supreme Court’s decision in *Shaw v. Reno*, 509 U.S. 630 (1993), cast doubt on whether “racially gerrymandered” districts were consistent with the equal protection clause, a group of plaintiffs challenged the state senate district drawn by the Florida Supreme Court in the Tampa Bay area. This claim was ultimately settled without any determination as to whether the district, as drawn, violated the equal protection clause. The settlement provided for some reduction in the minority population in the district and for making the district somewhat more compact. *Lawyer v. Dep’t of Justice*, 521 U.S. 567, 572-3 (1997).

<sup>13</sup> *Brown v. State of Florida*, 208 F. Supp. 2d 1344, 1346 (S.D. Fla. 2002); *Brown v. State of Florida*, No. 02-60267-Civ-Jordan (S.D. Fla. 2002), *dismissed and refiled to* No. 02-60459-Civ-Jordan (S.D. Fla. 2002), *remanded and removed to* No. 02-60689-Civ-Jordan (S.D. Fla. 2002), *remanded to* 9 Fla. L. Weekly Supp. 546a. (Fla. Cir. Ct. 2002) (dismissed for lack of subject matter jurisdiction).

injunctive relief against the Speaker of the Florida House of Representatives, the President of the Florida Senate, the Governor of Florida, the Florida Secretary of State and the Florida Attorney General in the Southern District of Florida. The plaintiffs alleged that the process used to adopt and the reapportionment plans adopted by the legislature violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, and that the reapportionment plans led to the dilution of black voting power in violation of Section 2 of the Voting Rights Act.<sup>14</sup> The Governor, the Speaker of the Florida House of Representatives and the President of the Florida Senate (but not the Florida Attorney General) submitted the plans to the Department of Justice for preclearance on April 29, 2002.<sup>15</sup>

In the meantime, the Florida Attorney General sought preclearance of the plans by filing suit in the United States District Court for the District of Columbia on May 14.<sup>16</sup> He later amended his complaint to request a declaration of validity.<sup>17</sup> On June 7, 2002, the United States Department of Justice pre-cleared Florida's congressional redistricting plan, and, at the request of the Governor, Speaker and President, Florida's action in the District of Columbia was dismissed.<sup>18</sup> On June 20, 2002, the Department of Justice pre-cleared Florida's State Senate redistricting plan.<sup>19</sup>

The DOJ interposed an objection to Florida's House of Representatives plan on July 1, 2002 stating that the plan reduced "the ability of Collier County Hispanic voters to elect their candidate of choice [and] the drop in Hispanic population in the proposed district will make it impossible for these Hispanic voters to continue to do so."<sup>20</sup> To address this objection, the *Martinez v. Bush* court "held an emergency evidentiary hearing and issued an order adopting an interim State House plan that had been proposed by Speaker Feeney."<sup>21</sup> While the *Martinez* court ultimately ruled against plaintiffs on their equal protection and Section 2 claims, the Hispanic minority-majority district preserved in Collier County by the DOJ's objection remained in place and is attributable solely to the Department of Justice's Section 5 review.

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<sup>14</sup> *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002) (three judge court).

<sup>15</sup> *Id.* at 1286.

<sup>16</sup> *Id.*

<sup>17</sup> *Martinez*, 234 F. Supp. 2d at 1287 (citing *Florida v. United States*, No. 1:02 CV 00941 (D.D.C.2002)).

<sup>18</sup> *Id.*

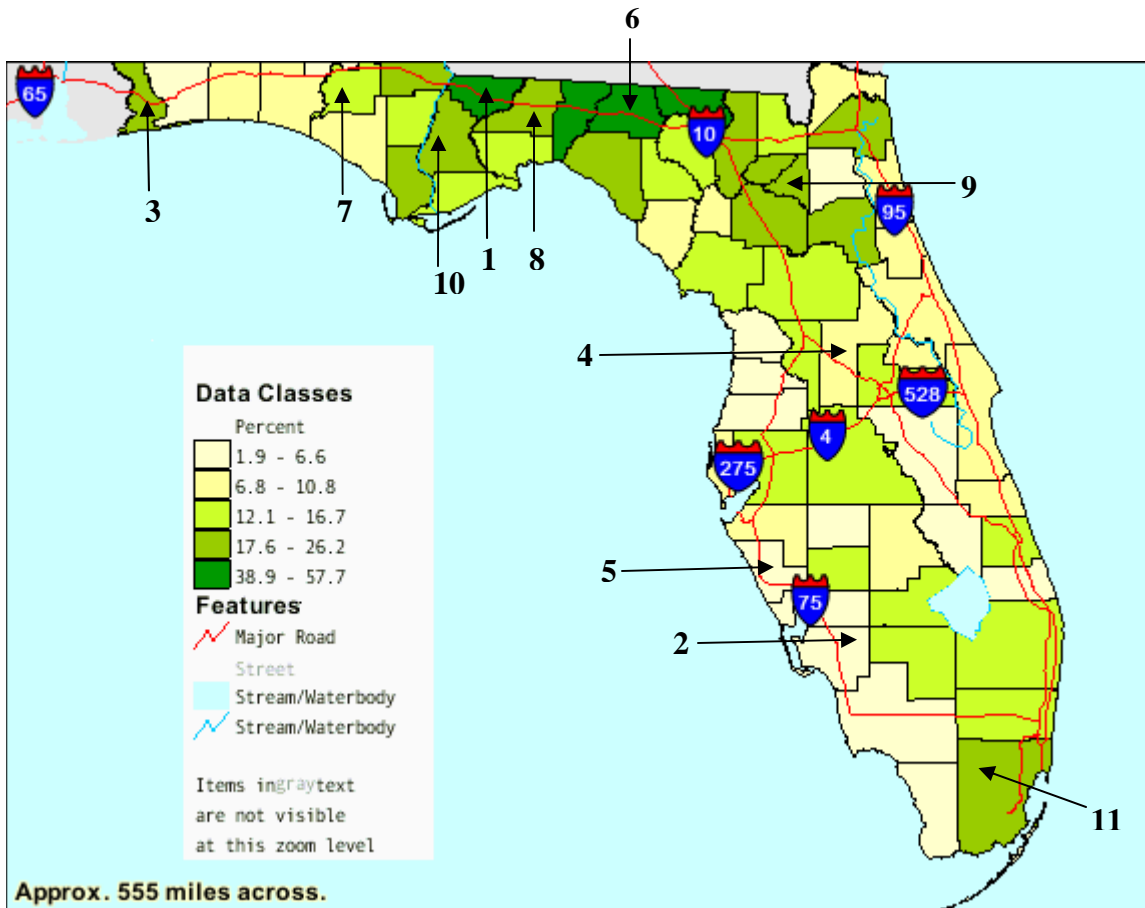
<sup>19</sup> *Id.* at 1288.

<sup>20</sup> Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to John M. McKay, President of the Florida Senate and Tom Feeney, Speaker of the Florida House of Representatives, July 1, 2002.

<sup>21</sup> *Martinez*, 234 F. Supp. 2d at 1288.

## Appendix II

### 1990 CENSUS: Concentration of Black Persons by County Showing Where Cases of Vote Dilution in At-Large Elections Was Established



In the eleven years following the 1982 amendments to the Voting Rights Act, minority voters across the state of Florida successfully established that the at-large election systems employed by various jurisdictions discriminated against them on the basis of race eleven times. The following is a chronological list of the cases and the counties where they arose:

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| 1. <i>NAACP v. Gadsden County School Board</i> , 691 F.2d 978 (11th Cir. 1982):                | Gadsden County    |
| 2. <i>Aziz v. City of Ft. Myers</i> , No. 79-57 Civ-FtM-H (M.D. Fla. Feb. 22, 1983):           | Lee County        |
| 3. <i>McMillan v. Escambia County</i> , 748 F.2d 1037 (5th Cir. 1984):                         | Escambia County   |
| 4. <i>Williams v. City of Leesburg</i> , 1985 U.S. Dist. LEXIS 14890 (M.D. Fla. Oct 15, 1985): | Lake County       |
| 5. <i>James v. City of Sarasota</i> , 611 F. Supp. 25 (M.D. Fla. 1985):                        | Sarasota County   |
| 6. <i>NAACP v. Madison County</i> , 1986 U.S. Dist. LEXIS 24786 (N.D. Fla. May 30, 1986):      | Madison County    |
| 7. <i>Potter v. Washington County</i> , 653 F. Supp. 121 (N.D. Fla. 1986):                     | Washington County |
| 8. <i>NAACP v. Leon County</i> , 827 F.2d 1436 (11th Cir. 1987):                               | Leon County       |
| 9. <i>NAACP v. City of Starke</i> , 712 F. Supp. 1523 (M.D. Fla. 1989):                        | Bradford County   |
| 10. <i>Solomon v. Liberty County</i> , 899 F.2d 1012 (11th Cir. 1990):                         | Liberty County    |
| 11. <i>Meek v. Metropolitan Dade County</i> , 985 F.2d 1471 (11th Cir. 1993):                  | Dade County       |