

Testimony of Brenda Wright, National Voting Rights Institute
before the National Commission on the Voting Rights Act
Jackson, Mississippi
October 29, 2005

Thank you for the opportunity of presenting this testimony today in support of reauthorization of critical provisions of the Voting Rights Act of 1965.

The Voting Rights Act of 1965 is inextricably tied to the history of the state of Mississippi. Mississippi's history of discrimination in voting was a primary impetus for Congress' enactment of the Voting Rights Act.¹ Mississippi's continued resistance to the Act's guarantees also has been an important consideration in Congress' several extensions of the Act since 1965.² Virtually every conceivable device for disfranchising people has been used here at one time or another, and some of those devices were invented here.³

Since these hearings are primarily focused on the post-1982 record of voting rights violations, I would like to focus my testimony here today on a battle that started in the 1980s, and continued into the late 1990s, over the requirement of dual registration in Mississippi. "Dual registration" refers to the practice of requiring citizens to register more than once in order to be eligible to vote in different categories of elections. Although the battle over dual registration concerns just one of the racially discriminatory barriers to voting that black Mississippians have encountered over the years, I think it will be illustrative of several themes that are important in understanding the need for reauthorization of the expiring provisions of the Voting Rights Act.

First, the battle over dual registration illustrates how registration requirements that are facially neutral have been used, time and again, disproportionately to disfranchise black citizens in Mississippi. Second, it illustrates the critical importance of Section 5 in preventing states like

¹ See *South Carolina v. Katzenbach*, 383 U.S. 301, 310-13, 315 (1966).

² Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi After 1965*, at 180-181 (1990).

³ Mississippi has used poll taxes, literacy tests, lengthy residency requirements, tests of "good moral character," white primaries, publication of registrants names to facilitate retaliation, prohibitions on registration outside of a county clerk's office, re-registration programs, and dual registration requirements. See *Mississippi Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245, 12560-52 (N.D. Miss. 1987), *aff'd*, 932 F.2d 400 (5th Cir. 1991); Parker, *supra* n. 2, at 26-29, 185, 205-06 (1990).

Mississippi from backsliding on voting rights. We had to get rid of dual registration through a court battle not just once, but twice, and the most recent battle did not end until 1998. The second time, however, was somewhat quicker than the first, because the first time we had to file suit under Section 2 of the Voting Rights Act, while the second time we were able to rely on the Section 5 preclearance requirement (although even that took some doing). Third, the dual registration battle shows how Mississippi, even in its more recent history, has continued to defy even the basic requirement of submitting voting changes for preclearance, requiring federal court intervention even to get the preclearance review mandated by Congress under Section 5.

The original form of dual registration in Mississippi was the requirement that, in order to vote in local elections, voters had to register twice – once with the county registrar (to vote in county, state and federal elections) and once with the municipal clerk (to vote in municipal elections).⁴ This requirement was part of the package of voter registration barriers adopted by the Mississippi Legislature in 1892 to implement the provisions of the 1890 Constitutional Convention, whose overall purpose was to disfranchise black citizens of Mississippi to the greatest extent possible.⁵ By 1984 Mississippi was the only state still to require dual registration.⁶

In 1984, a group of African American citizens and two voter registration organizations, represented by the Lawyers' Committee, the NAACP Legal Defense & Educational Fund, and Greenville attorney Johnnie Walls, filed suit challenging the dual registration requirement as a violation of the 14th and 15th Amendments and Section 2 of the Voting Rights Act.⁷ The lawsuit also challenged Mississippi laws that effectively prohibited any voter registration from being conducted outside the county registrar's office.

In a decision issued in 1987, the district court found that both of these limitations on voter registration had been adopted for a racially discriminatory purpose.⁸ It also found that these barriers continued to have a

⁴ *PUSH*, 674 F. Supp. at 1247-1250.

⁵ *Id.* at 1251 (noting that dual registration requirement “was enacted as part of the ‘Mississippi plan’ to deny blacks the right to vote following the Constitutional Convention of 1890”).

⁶ *Id.* at 1252.

⁷ *PUSH*, 674 F. Supp. 1245.

⁸ *Id.* at 1252.

racially discriminatory effect. Black voter registration rates lagged far below those of whites; 79 percent of voting age whites were registered compared to only 54 percent of voting age blacks, a difference of 25 percentage points.⁹ With respect to the dual registration requirement, the court found that “[m]ore black citizens than white have been denied the right to vote in municipal elections, because their names could not be found on municipal voter registration rolls, and this has probably resulted in the defeat of black candidates.”¹⁰ In one example cited by the court:

In the March 10, 1987 municipal Democratic primary election in the City of Marks, Mississippi, 56 voters who had registered to vote with the Quitman County Circuit Clerk prior to August 3, 1984, but who had not registered with the Marks Municipal Clerk, were required to cast affidavit ballots by election officials. These affidavit ballots were later rejected and not counted by the Marks Municipal Democratic Committee. All 56 of these voters were black. In that election, two black candidates for the board of aldermen lost by voter margins less than the number of affidavit ballots that were rejected.¹¹

The district court noted that, because of past discrimination, blacks had lower income and educational levels than whites, making it more difficult for blacks to overcome “administrative barriers” such as dual registration requirements.¹² Many communities, particularly small communities in the Delta, were located far from the nearest registrar’s office. Blacks were far less likely than whites to have access to an automobile, and far more likely to work for hourly wages in blue collar and service positions that afforded less opportunity to take time off to register during the limited hours the registration offices were open.¹³ The court also noted that “the widespread variations among counties in voter registration practices, as attested to by the various circuit clerks, may result in the unequal treatment of similarly situated persons.”¹⁴

The court further found that “the evidence in this case” supported findings made by other courts:

⁹ *Id.* at 1255.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 1255-56.

¹³ *Id.* at 1256-57.

¹⁴ *Id.* at 1267.

(1) that there is an extensive past history of purposeful official discrimination in Mississippi that has touched on the right of black citizens to register, to vote, and otherwise to participate in the democratic process; (2) that racially polarized voting has prevailed in Mississippi elections, resulting in the defeat of black preferred candidates by white bloc voting and in black voters being unable to elect candidates of their choice; (3) that there continue to exist socio-economic disparities between whites and blacks in Mississippi that impair equal access to the political process in Mississippi; (4) that there is evidence of racial campaign tactics still being used in Mississippi; and (5) that the percentage of elected officials who are black remains disproportionately low.¹⁵

As a result of the *PUSH* litigation, Mississippi eliminated the dual registration requirement and implemented a fully unitary system.¹⁶ Registering once was finally sufficient to make a voter eligible to vote in all elections, federal, state, and local. This state of affairs, unfortunately, did not last. In 1994, Mississippi began preparations to implement the requirements of the newly enacted NVRA. The NVRA requires states to provide voter registration at agencies serving the public, such as drivers' license and public assistance offices, and limits the circumstances under which a registered voter's name may be removed from the voter rolls.¹⁷ Although the requirements of the NVRA apply only to registration for federal elections, virtually every state implemented the NVRA so that NVRA registrations would be valid for all elections, recognizing that maintaining separate systems of registration for federal and state elections would be confusing to voters and wasteful of state resources.

¹⁵ *Id.* at 1252.

¹⁶ *Mississippi State Chapter, Operation PUSH v. Mabus*, 717 F. Supp. 1189 (N.D. Miss. 1989), *aff'd*, 932 F.2d 400 (5th Cir. 1991).

¹⁷ The NVRA created nationwide standards requiring states to end "discriminatory and unfair registration laws and procedures" that Congress found "have a direct and damaging effect on voter participation," including disproportionate harm to racial minorities. 42 U.S.C. § 1973gg(a)(3). The primary requirements of the NVRA are: (1) states must permit voter registration simultaneously with applications for, or renewal of, drivers' licenses at motor vehicle offices, *see* 42 U.S.C. § 1973gg-3; (2) states must accept mail-in voter registration forms and make such forms widely available, *see* 42 U.S.C. § 1973gg-4; (3) states must designate and provide voter registration opportunities in public assistance offices, offices primarily engaged in providing state-funded programs for persons with disabilities, armed forces recruitment offices, and in other governmental or non-governmental offices designated by the state, *see* 42 U.S.C. § 1973gg-5; and (4) states must maintain an accurate and current voter registration roll through uniform and non-discriminatory procedures, with limits on purges of voter rolls, *see* 42 U.S.C. § 1973gg-6. The requirements of the NVRA do not apply to a handful of states that, on and after March 11, 1993, permitted election-day registration at the polls, or did not require registration as a precondition to voting. 42 U.S.C. § 1973gg-2.

Mississippi also started out with the intention of creating a unitary NVRA-compliant registration system, publishing an NVRA implementation manual for county clerks that clearly contemplated a unified system. The state then began conducting voter registration under this unified plan as of January 1, 1995, as required by the NVRA. Several thousand voters were registered under this system in the first few weeks of 1995, all of them on the assumption that they were registering to vote for all elections, not just federal elections. Although the Mississippi Legislature had not yet enacted the implementing legislation for the NVRA-compliant system as of January 1, it was expected to do so in the 1995 legislative session. On February 1, 1995, the Department of Justice granted preclearance to the unitary system described in the 1994 NVRA implementation manual.¹⁸

The Mississippi Legislature, however, never passed the implementing legislation. State Senator Kay Cobb, the chair of the Mississippi Senate Elections Committee, unexpectedly tabled the bill. She later explained her position in part by focusing upon the registration opportunities offered to welfare recipients under the NVRA, saying that people who “care enough to go get their welfare and their food stamps, but not walk across the street to the circuit clerk,” should not be accommodated.¹⁹ Then-Governor Kirk Fordice later sounded the same theme in opposing full NVRA implementation, saying the legislation “should be called ‘Welfare Voter’” rather than “Motor Voter” because it provides access to voter registration for public assistance recipients.²⁰ Of course, when white politicians in Mississippi resort to criticism of allegedly lazy welfare recipients, everyone understands that it is an appeal to racial prejudice. Editorial writers around the state condemned this as “racist rhetoric.”²¹

¹⁸ For details on Mississippi’s implementation of the NVRA, its re-institution of a dual registration requirement, and the ensuing litigation, see Brenda Wright, *Young v. Fordice*, Challenging Dual Registration Under Section 5 of the Voting Rights Act, 18 Miss. Coll. L. Rev. 67 (1997).

¹⁹ Grace Simmons, “‘Motor Voter’ No Good in State Races, Jackson Clarion Ledger, March 6, 1995, at A5.

²⁰ See “Fordice stoops to picking on poor,” Greenwood *Commonwealth*, May 6, 1997.

²¹ “It’s hard for Fordice to go forward with foot in mouth,” *Sun-Herald*, Biloxi-Gulfport, reprinted in *Daily Leader*, Brookhaven, May 7, 1997 (noting similarities between “racist rhetoric” of invoking “welfare queens” and Fordice’s use of “a similar slur to maintain a dual system of registration that keeps voters segregated at the polls in Mississippi”). As noted by another Mississippi columnist, “since the 1960’s and the evolution of Lyndon Johnson’s ‘Great Society,’ Mississippi and the South have become fertile ground for the myth of the ‘Welfare Queen’ and the popular notion that the word ‘welfare’ is interchangeable with the word ‘black’ in political discourse . . . No one on the political scene in Mississippi makes more frequent use of speed-dialing those fears and misconceptions than the current occupant of the Governor’s Mansion.” “Fordice shouldn’t throw rocks at the poor,” *DeSoto Times*, May 15, 1997. See also “Fordice

The result of this legislative impasse was that Mississippi implemented NVRA procedures for federal elections only – since that was required by federal law – but not for state elections. This belated decision to implement the NVRA only for federal elections changed the entire nature of the state’s NVRA implementation plan. No one had anticipated that NVRA registration would be valid for federal elections only, and the State certainly had never sought section 5 preclearance for a dual registration system. And the NVRA forms were very confusing; nowhere on the form was the voter notified that the form was only good for federal elections. Persons using the form would naturally assume that they were applying to register for all elections.²²

Nevertheless, to initiate this federal-election-only NVRA plan, state officials issued a memorandum with a new set of instructions to the Mississippi circuit clerks and the chairpersons of the Mississippi County Election Commissions. The February 10, 1995 memorandum announced that “Mississippians who have registered to vote under NVRA will also need to register under Mississippi election law to be eligible to vote in all elections.”²³ To prevent NVRA registrants from voting in state elections, the memorandum directed circuit clerks to prepare two separate sets of poll books for NVRA and non-NVRA registrants, or to adopt other procedures for distinguishing NVRA registrants from other registrants on their voting rolls.²⁴ The memorandum also acknowledged that “[a]nyone who has thus far registered under NVRA, or will do so in the future, may well assume that they are eligible to vote in all elections.”²⁵ The memorandum therefore asked circuit clerks to notify NVRA registrants of their limited eligibility to vote, and to provide “the opportunity to register for state elections.”²⁶

In other words, Mississippi once again had a dual registration system, and the electorate was divided into two classes of voters. One group of registrants, those who took advantage of the opportunity to register at

stoops to picking on poor,” Greenwood *Commonwealth*, May 6, 1997 (criticizing Fordice for “trying to feed on prejudice to make his case” against unified registration).

²² See *Young v. Fordice*, 520 U.S. 273, 283 (1997); see also Wright, Challenging Dual Registration, *supra* n. 18, at 72-74.

²³ Juris. Statement at 22a, *Young v. Fordice* (No. 95-2031) (Memorandum dated February 10, 1995, from Phil Carter, Assistant Attorney General, and Reese Partridge, Staff Attorney, Secretary of State’s Office, to Mississippi Circuit Clerks and Chairman, Mississippi County Elections Commission).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

drivers' license offices and other offices designated by the NVRA, were eligible to vote only in federal elections; the other group, who registered with the circuit clerk under pre-existing Mississippi procedures, were eligible to vote in all elections. There was no difference between these two groups of voters in terms of meeting the voter qualification requirements of Mississippi law. NVRA registrants differed from other Mississippi voters only in what forms they filled out and at what site they obtained a registration form.

What should have happened next was for Mississippi to submit its new, dual registration plan for Section 5 preclearance, so that it could be examined to determine if these procedures would have a racially discriminatory effect or were adopted for a racially discriminatory purpose. But the State refused to do so, even after the Department of Justice wrote to the State and advised it that the voting practices described in the new memorandum were subject to the Section 5 preclearance requirement and had to be submitted.

Accordingly, the only way to force Mississippi to comply with Section 5 was, once again, to go to federal court, this time with a Section 5 enforcement action.²⁷ The fact that we had to do this, 30 years after the Voting Rights Act was adopted, speaks volumes about Mississippi's determined resistance to the clear requirements of the Act. It must have been obvious to the State that a dual registration system, particularly with the confusing and inconsistent procedures the state adopted, would never be precleared, so the State elected to ignore the law. We had to litigate the Section 5 enforcement action all the way to the Supreme Court, which unanimously held that Mississippi had violated Section 5 by refusing to submit its federal-election-only NVRA plan for preclearance review.²⁸ And when, after almost two years of litigation, Mississippi finally was forced to submit its dual registration procedures for Section 5 preclearance, the Department of Justice objected. Not surprisingly, the Department found that the state's method of implementing this confusing registration system was racially discriminatory both in its effect and in its purpose.²⁹

²⁷ The plaintiffs in the case were Thomas Young, Reverend Rims Barber, and Richard L. Gardner, who all were active in conducting voter registration activities on behalf of the NAACP or minority voters generally, and Eleanor Faye Smith, an unregistered public assistance recipient. Their efforts helped to protect the voting rights of thousands of Mississippians.

²⁸ *Young v. Fordice*, 520 U.S. 273.

²⁹ Letter from Isabella Katz Pinzler, Acting Assistant Attorney General, Civil Rights Division, to Sandra M. Shelson, Special Assistant Attorney General, State of Mississippi, September 22, 1997.

As the Justice Department's objection letter indicated, much of the discrimination stemmed from the fact that Mississippi was conducting voter registration very differently in drivers' license offices than in the public assistance agencies covered by the NVRA. The predominantly white clientele registering at the drivers' license offices was not disadvantaged by the confusing NVRA registration forms used by the State, because those citizens were simultaneously being offered the opportunity to fill out a state mail-in form that was effective to register voters for all election. By contrast, the predominantly black clientele registering at public assistance agencies was not being offered a state mail-in form at the time of registration, but instead was being offered only the NVRA registration form that resulted only in registration for federal elections.³⁰ The Justice Department's objection letter also found that the State's notification efforts had been ineffective in bringing about re-registration of NVRA registrants; some 30,000 citizens remained registered only for federal elections as of 1997. In addition, notification efforts in the poorest and predominantly black areas of the state had lagged in comparison with the rest of the state.³¹ Finally, the Justice Department noted that the State's re-institution of a dual registration system "is particularly noteworthy because it occurred only a few years after a federal court had found that a similar requirement had led to pronounced discriminatory effects on black voters[,]” bolstering the conclusion that it was “tainted by improper racial considerations.”³²

The Department's Section 5 objection meant that Mississippi had been conducting voter registration under patently unlawful procedures for over two years. But even after the Department issued this objection, the State failed to correct the problem. Governor Fordice vetoed legislation in 1998 that would have created a unified system in order to cure the Section 5 violation.³³

Therefore, in the summer of 1998, we went back to court once again. The three-judge district court, noting “the failure of the State of Mississippi to enact remedial legislation after full and fair opportunity to do so,” entered an order enjoining the State from “denying the right to vote in any state,

³⁰ *Id.* at 3-4.

³¹ *Id.* at 4-5.

³² *Id.* at 5.

³³ *Young v. Fordice*, Civil Action No. 3:95CV197 (L)(N), Memorandum and Order at 6 (S.D. Miss. October 5, 1998).

county or municipal election to any voter who is registered and qualified to vote in federal elections under the NVRA.”³⁴ As a result, thousands of voters in Mississippi were restored to the voting rolls for full eligibility in all Mississippi elections.

As mentioned at the outset, this battle over dual registration requirements in Mississippi is just one small chapter in the struggle for voting rights in Mississippi. It is a good illustration, but just one illustration, of Mississippi’s entrenched resistance to full voting rights, the persistence of state officials in finding new excuses to create barriers to the right to vote, the critical role of Section 5 in protecting the right to vote, and the continued need for reauthorization of Section 5 to protect the hard-won gains that have been made.

Thank you for this opportunity to testify.

³⁴ *Id.* at 9.