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### How Section 5 of the Voting Rights Act Failed Displaced New Orleans Voters

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## HOW SECTION 5 OF THE VOTING RIGHTS ACT FAILED DISPLACED NEW ORLEANS VOTERS

REA L. HOLMES\*

Hurricane Katrina served as a wake-up call to America. In full color, the country saw firsthand how race and socioeconomics affect every aspect of one's life. The heart-wrenching images of thousands of tired, scared, and helpless people will forever be etched in America's history. Even more devastating is the continued struggle the citizens of New Orleans and the Gulf Coast face almost a year after the storm.

Life, as it usually does, has slowly begun to move forward in New Orleans. Rebuilding strategies are being crafted and debated by many.<sup>1</sup> One recent strategy discussed was how best to hold elections in a city that does not have the infrastructure to support many of its own current and returning residents. In the wake of Hurricane Katrina, state officials were forced to postpone the February 4, 2006, primary and March 4, 2006, general elections. Between December 2005 and April 2006, state officials were under pressure to devise an election plan that would not only be accepted by the public, but also be precleared by the Department of Justice (DOJ) in accordance with section 5 of the Voting Rights Act (VRA).<sup>2</sup> While the elections took place in April and May of this year, the effectiveness of the election plan continues to be debated.

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1. See Stephanie Grace, Editorial, *Candidates Duck Rebuilding Decisions*, TIMES-PICAYUNE (New Orleans), Apr. 18, 2006, Metro, at 5.

2. 42 U.S.C. § 1973 (2000).

This essay examines the obstacles Louisiana state officials faced in preparing an election plan. First, this essay explores the racial and political makeup of the state and New Orleans pre-Katrina. Next, the essay delves into the factors that led to postponing the elections and the controversy surrounding that decision. The essay then turns to the election plan for New Orleans, including the initial proposed plan and the DOJ's role in approving the New Orleans election plan. This section outlines the factors used by the DOJ and whether it was justified in preclearing the plan. Next, the essay addresses the actual voting procedures in place for both the primary and general elections, as well as the opposition to the plan. As is discussed, the state had to amend existing election law in order to allow greater access to the ballot beyond 2006. The final section articulates proposals for future New Orleans elections. These future elections will provide a chance for both state and federal officials to apply the lessons learned from the previous post-Katrina elections to ensure that voting procedures are in place to ease the burden on displaced voters.

### I. LOUISIANA BEFORE THE STORM

Many label Louisiana, and New Orleans in particular, a melting pot of diverse cultures.<sup>3</sup> Before Hurricane Katrina, Louisiana was 32.3% African-American, but only 2.4% Hispanic, 1.2% Asian, and 0.5% Native-American.<sup>4</sup> In contrast, New Orleans was a majority-minority city with its population being almost 70% African-American, 3.8% Hispanic, and 2.7% Asian.<sup>5</sup> Instead of a melting pot, however, much of New Orleans remained segregated by class and race. For example, in addition to being 63.7% African-American,<sup>6</sup> Orleans Parish, which encompasses most of New Orleans, was also “one of the poorest areas in the nation.”<sup>7</sup> When New Orleans' levee system failed and

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3. See, e.g., Tomas Alex Tizon & Doug Smith, *Evacuees of Hurricane Katrina Resettle Along a Racial Divide*, L.A. TIMES, Dec. 12, 2005, Main News, at 1 (quoting Laura Ann Sanchez, a family and demographics researcher, referring to New Orleans' “truly astonishing melting pot of race and culture”).

4. MICHAEL BARONE & RICHARD E. COHEN, *THE ALMANAC OF AMERICAN POLITICS 2006*, at 727 (2005).

5. *Id.* at 739.

6. *Id.*

7. Tizon & Smith, *supra* note 3.

sent water careening into areas such as the Ninth Ward, poor African Americans were most affected by the devastating storm.<sup>8</sup>

Less known was that the hurricane also greatly affected the political and racial make-up of New Orleans' voter districts and possibly the state legislature. Since the passage of the VRA in 1965, African Americans have garnered increasing political power in New Orleans and Louisiana. As of October 2005, 51% of Orleans Parish's registered voters were African-American Democrats.<sup>9</sup> Moreover, "[f]our of the nine African-Americans in the State Senate hail from New Orleans—as do a third of the African-American representatives in the State House."<sup>10</sup>

Much of African Americans' political success can be attributed to the VRA. "In 1964, before the passage of the Voting Rights Act, less than a third of Louisiana's voting-age blacks were registered to vote . . ."<sup>11</sup> Conversely, pre-Katrina, "[b]lack registration . . . [was] disproportionately high in relation to the eligible black population."<sup>12</sup> Moreover, in each U.S. Senate primary or runoff election since 1996 where Louisiana's African-American electorate cast a majority of its votes for a candidate, that candidate won.<sup>13</sup> Thus, before the storm, it appeared that "[t]he initial goals of the Voting Rights Act [had] long since been achieved in Louisiana."<sup>14</sup>

Despite the initial success of the VRA in Louisiana, voter disenfranchisement remains a distinct possibility as state and local officials continue to debate how best to hold future elections. Reports vary on the long range effects Katrina will have on New Orleans' population. A recent study found that three years after Katrina, New Orleans'

8. *See id.*

9. *See* Fred Brown, *Disrupted Elections in La.*, DENV. POST, Oct. 2, 2005, at E06 (stating that of Orleans Parish's 299,298 voters, 154,000 are black Democrats).

10. Kristen Clarke-Avery & M. David Gelfand, *Voting Rights Challenges in a Post-Katrina World: With Constituents Dispersed, and Voting Districts Underpopulated, How Should New Orleans Hold Elections?*, FINDLAW LEGAL COMMENT., Oct. 11, 2005, [http://writ.news.findlaw.com/commentary/20051011\\_gelfand.html](http://writ.news.findlaw.com/commentary/20051011_gelfand.html).

11. Edward Blum & Abigail Thernstrom, *Executive Summary of the Bullock-Gaddie Expert Report on Louisiana*, AM. ENTERPRISE INST. FOR PUB. POL'Y RES., Feb. 10, 2006, [http://www.aei.org/include/pub\\_print.asp?pubID=23861](http://www.aei.org/include/pub_print.asp?pubID=23861).

12. *Id.*

13. *Id.*

14. *Id.*

population will only reach 272,000 or “about 56 percent of the pre-Katrina population.”<sup>15</sup> Moreover, low-lying areas, such as the Ninth Ward, are expected to repopulate at slower rates than the rest of the city.<sup>16</sup>

These projections highlight the real possibility that New Orleans and Louisiana will lose the achievements brought about by the VRA because of the lack of returning African Americans. As noted above, New Orleans was, and may still be, a center of African-American political participation. Future New Orleans elections, therefore, will greatly determine African-American representation in Louisiana.

## II. POSTPONED ELECTIONS

Before Katrina, the scheduled February 4, 2006, election was viewed as relatively mild. Mayor Ray Nagin was predicted to “walk into a second term with only token opposition.”<sup>17</sup> Besides the mayor, a wide range of other positions were to be on the February ballot, including City Council seats, assessors, and the criminal sheriff.<sup>18</sup> However, in late 2005, due to the difficulties of conducting an election, Louisiana Secretary of State Al Ater advised Governor Kathleen Blanco to postpone the election indefinitely, citing “[t]he unavailability of polling places, difficulties in locating and training poll commissioners and workers for absentee balloting, and the huge task of recertifying and replacing damaged voting machines.”<sup>19</sup>

The difficulty of holding a fair election was compounded by Louisiana’s election system. All congressional, state, and local candidates, regardless of party affiliation, run in an open primary.<sup>20</sup> If a

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15. KEVIN MCCARTHY ET AL., *THE REPOPULATION OF NEW ORLEANS AFTER HURRICANE KATRINA*, at xiii (2006), available at [http://www.rand.org/pubs/technical\\_reports/2006/RAND\\_TR369.pdf](http://www.rand.org/pubs/technical_reports/2006/RAND_TR369.pdf).

16. *Id.*

17. Gordon Russell, *Katrina Rewrites N.O. Politics: Mayor’s Race Reduced to a Question Mark*, *TIMES-PICAYUNE* (New Orleans), Oct. 23, 2005, National, at 1.

18. Frank Donze & Ed Anderson, *February Elections Planned Amid Immense Challenges: 204 of 442 N.O. Precincts Are Out of Commission*, *TIMES-PICAYUNE* (New Orleans), Oct. 11, 2005, Metro, at 1.

19. *Katrina Blows Municipal Elections Further into Next Year*, CNN, Dec. 2, 2005, [http://www.cnn.com/2005/US/12/02/elections.postponed/index.html?section=cnn\\_topstories](http://www.cnn.com/2005/US/12/02/elections.postponed/index.html?section=cnn_topstories).

20. BARONE & COHEN, *supra* note 4, at 726.

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candidate receives 50% or more of the vote, she automatically wins the election.<sup>21</sup> If no one receives 50%, the candidates with the two highest vote totals compete in a runoff election one month after the primary.<sup>22</sup> This system presented unique challenges for New Orleans because it required the battered city to conduct two elections within thirty days of each other.

Upon the recommendation of Secretary Ater, Governor Blanco issued Executive Order KBB 2005-96 on December 9, 2005, postponing both the primary and general elections scheduled for early 2006.<sup>23</sup> The postponement drew widespread criticism from those who thought an election would signal to the world that New Orleans was moving in the right direction.<sup>24</sup> An election would be seen as a symbol of American democracy at work and a sign of progress in New Orleans. Even in America's darkest days of the Civil War, President Lincoln steadfastly refused to call off the 1864 election: "[T]he election was a necessity. We cannot have free government without elections."<sup>25</sup>

Opponents of postponement echoed Lincoln's sentiments. An editorial by New Orleans' *Times-Picayune* newspaper equated a delay to "conceding defeat."<sup>26</sup> The editorial further noted that delaying the elections until late 2006 "would send the message that New Orleans couldn't manage something as basic as an election in its first year after Hurricane Katrina. It would also keep officials in office more than six months after their terms should have expired."<sup>27</sup> The possibility of city officials maintaining their positions angered many residents who

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21. *Id.*

22. *Id.*

23. La. Exec. Order KBB 2005-96 (Dec. 9, 2005), available at <http://www.gov.state.la.us/assets/docs/PDFs/EO%2096.pdf>. On September 14, 2005, Governor Blanco postponed a Jefferson Parish special primary election scheduled for October 15, 2005, and the special general elections scheduled for November 12, 2005. La. Exec. Order KBB 2005-36 (Sept. 14, 2005), available at <http://www.gov.state.la.us/assets/docs/36DelayVoting-10-15-05&11-12-05.pdf>.

24. See, e.g., Editorial, *They Did It in Baghdad*, TIMES-PICAYUNE (New Orleans), Dec. 8, 2005, Metro, at 6.

25. Commentary, *Election Terrors*, PROGRESSIVE, Sept. 1, 2004, at 8 (quoting President Abraham Lincoln).

26. Editorial, *supra* note 24.

27. *Id.*

felt the mayor and other city officials were directly responsible for the lack of preparation and inadequate response to Hurricane Katrina.<sup>28</sup>

In the end, the fervor over proving New Orleans was on the fast track to recovery hurt displaced voters. Contrary to the *Times-Picayune's* contention, holding elections is far from "basic." From voter education, to ordering ballots, to voter registration, the election process is a complex undertaking. If the 2000 presidential election taught Americans anything, it was that every detail surrounding an election has far-reaching implications. While New Orleans may have desired to paint a rosy picture, the truth is that the hurricane destroyed voting machines and polling sites and, more importantly, scattered the electorate.<sup>29</sup> By February 2006, there remained concerns over whether officials could even provide safe polling places in parts of Orleans Parish. As critics noted, "the integrity of the election [was] threatened by serious problems within the city itself, where some polling stations [were] dilapidated and possibly hazardous, and others [were] inaccessible to the disabled—a violation of federal law."<sup>30</sup>

While there were real and legitimate concerns over elected officials remaining in office, postponing the election until September would have allowed officials the time needed to ensure fair voting procedures were in place. In the end, however, political pressure prevailed, and the primary election was rescheduled for Saturday, April 22, 2006, and the general elections for Saturday, May 20, 2006.<sup>31</sup>

### III. PLANNING FOR THE ELECTION

#### A. *An Initial Election Plan*

Immediately after the storm, Louisiana Secretary of State Al Ater began to devise an election plan. In November 2005, Secretary Ater initially proposed a sweeping election plan to the Louisiana Legisla-

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28. See, e.g., Musa Eubanks & Veda Manue, Letter to the Editor, *The Right to Oust Our Leaders*, *TIMES-PICAYUNE* (New Orleans), Dec. 11, 2005, Metro, at 18.

29. Bruce Egler, *Blanco Postpones N.O. Elections: Group Sues to Keep Primary on Feb. 4*, *TIMES-PICAYUNE* (New Orleans), Dec. 13, 2005, Metro, at 1.

30. Tracy Clark-Flory, *Whitewashing the New Orleans Vote?*, *SALON*, Apr. 15, 2006, [http://www.salon.com/news/feature/2006/04/15/neworleans\\_vote/print.html](http://www.salon.com/news/feature/2006/04/15/neworleans_vote/print.html).

31. See *id.*

ture.<sup>32</sup> Secretary Ater suggested a combination of absentee balloting and expanded polling locations in order to reach every voter.<sup>33</sup> He stated, “If there are five voters in Boise, Idaho, I want to find them.”<sup>34</sup> First, to accommodate highly concentrated voters outside of New Orleans, Secretary Ater proposed satellite voting locations in places such as Baton Rouge, Houston, and Atlanta.<sup>35</sup> Second, for those who could not vote in person, an expanded absentee ballot campaign was planned in which the Louisiana law requiring first-time voters to vote in person would have been waived.<sup>36</sup> Third, he requested \$2.5 million in federal aid to inspect and replace voting machines damaged during the storm.<sup>37</sup> Fourth, Ater recommended a massive nationwide outreach program.<sup>38</sup> He was also in negotiations with the Federal Emergency Management Agency (FEMA) for it to provide another \$1 million to conduct a mass-mailing to inform displaced voters of upcoming election procedures.<sup>39</sup>

Unfortunately for the displaced voters, Secretary Ater’s initial plan was not adopted by the state legislature. As will be discussed, the legislature instead chose to allow only in-state satellite locations and failed to lift all restrictions placed on a first-time voter’s ability to cast an absentee ballot.<sup>40</sup>

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32. See Donze & Anderson, *supra* note 18.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Benjamin Greenberg, *Voter Disenfranchisement by Attrition: With Friends Like FEMA, Who Needs Jim Crow?*, IN THESE TIMES, Nov. 16, 2005, [http://www.inthesetimes.com/site/main/article/voter\\_disenfranchisement\\_by\\_attrition/](http://www.inthesetimes.com/site/main/article/voter_disenfranchisement_by_attrition/). Mr. Greenberg suggested that under the Stafford Act, FEMA should be the one to provide the state with election funds. The Act “gives FEMA [a] role in coordinating relief efforts, provides that FEMA may make contributions towards the repair of damaged public facilities and provide ‘technical and advisory assistance’ for ‘the performance of essential community services.’” *Id.*

39. Donze & Anderson, *supra* note 18.

40. See *infra* Part IV.



### B. *Approval Needed for an Election Plan*

Due to Louisiana's history of minority voter disenfranchisement, it is considered a "covered jurisdiction,"<sup>41</sup> and section 5 of the VRA therefore requires that any changes in the state's voting procedures, practices, or qualifications must be approved or "precleared" by either the DOJ or a three judge panel of the U.S. District Court for the District of Columbia.<sup>42</sup> The burden is on the jurisdiction to prove the voting changes lacked a discriminatory purpose or effect towards racial or language minorities.<sup>43</sup> Louisiana, therefore, had to seek DOJ approval before any post-Katrina election plan could be implemented.

To determine whether an election plan violates section 5, the DOJ utilizes a nonretrogression standard set forth in *Beer v. United States*.<sup>44</sup> In *Beer*, New Orleans sought court approval, via a declaratory judgment, for a plan to redraw the city's districts that had been rejected by the DOJ.<sup>45</sup> The case focused on the number of minority-majority districts the city should create.<sup>46</sup> The district court found that the plan had a discriminatory effect on minorities because it failed to create districts that had a majority of voting-age minorities and dismissed the case.<sup>47</sup> The Supreme Court held that preclearance should be granted as long as the plan did not place minorities in a worse position than they were before the changes were implemented.<sup>48</sup>

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41. 28 C.F.R. pt. 51 app. (2006).

42. 42 U.S.C. § 1973c (2000). President George Bush signed the reauthorization of the VRA on July 27, 2006. Press Release, The White House, President George W. Bush, President Bush Signs Voting Rights Act Reauthorization and Amendments Act of 2006 (July 27, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/07/20060727.html>.

43. 42 U.S.C. § 1973c.

44. *See Beer v. United States*, 425 U.S. 130, 140-41 (1976). The *Beer* nonretrogression test is used for voting changes in practice or procedure, but not for redistricting. *See Georgia v. Ashcroft*, 539 U.S. 461, 479-80 (2003) (announcing a totality of the circumstances test to determine whether retrogression occurred in a redistricting plan).

45. *Beer*, 425 U.S. at 136.

46. *Id.* at 135-36.

47. *Id.* at 136-37.

48. *Id.* at 141-42.

The Code of Federal Regulations provides guidance on what factors will be used to determine retrogression.<sup>49</sup> In general, the DOJ will compare the existing law and proposed plans to determine what, if any, effect the changes will have on racial and language minorities.<sup>50</sup> In comparing the two plans, the DOJ uses four main factors:

- (a) The extent to which a reasonable and legitimate justification for the change exists.
- (b) The extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change.
- (c) The extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change.
- (d) The extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change.<sup>51</sup>

The DOJ analyzes these and other factors based on the conditions existing when the plan is submitted. In the case of New Orleans, the DOJ looked at the proposed plan in the context of the limitations created by the hurricane. The DOJ determined whether minorities would be in a better position under Louisiana's pre-Katrina election law or the proposed election plan.

As will be discussed below, over significant protest, the DOJ approved the plan on March 16, 2006.<sup>52</sup> This approval left many to wonder whether section 5 remained an effective tool if it could not even protect the displaced voters of New Orleans.

#### IV. NEW ORLEANS VOTING PROCEDURES

As noted previously, the election plan in place for the April primary was very different from Secretary Ater's original vision. In the end, the Louisiana legislature adopted, and the DOJ precleared, a plan that was more restrictive and provided fewer opportunities for displaced residents to vote. The election plan provided three options for

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49. 28 C.F.R. § 51.54 (2006).

50. 28 C.F.R. § 51.54(b)(1), (4).

51. 28 C.F.R. § 51.57 (2006).

52. Peter Whoriskey, *Election Plan for New Orleans Approved*, WASH. POST, Mar. 17, 2006, at A03.

a voter to cast a ballot.<sup>53</sup> First, a voter could vote in person at a designated Orleans Parish precinct.<sup>54</sup> Second, a voter could participate in “early voting” which took place in the weeks leading up to each election.<sup>55</sup> Depending upon how a person registered, an early voter could cast his or her ballot either in Orleans Parish or one of the ten satellite polling places located throughout the state.<sup>56</sup> Or third, a voter who registered between October 5, 2004, and September 24, 2005, could vote by absentee ballot.<sup>57</sup>

#### A. *Satellite Polling Sites*

In Ater’s original plan, satellite polling sites would be located outside of Louisiana in cities that held a significant population of displaced New Orleans voters, including Houston and Atlanta.<sup>58</sup> This methodology would have provided equal access to the ballot for displaced New Orleans residents. However, in the plan implemented, satellite polling sites were restricted to the state of Louisiana and were only available to those who had either registered in person or registered by mail before September 24, 2005.<sup>59</sup> The requirement for in-person registration placed a great burden on many potential voters because New Orleans had yet to regain a significant portion of its population. Estimates show that at the time of the election, New Orleans was 64% smaller than before Hurricanes Katrina and Rita.<sup>60</sup> Moreover, most of those who had returned to New Orleans were white and middle-class.<sup>61</sup> The U.S. Census Bureau found that the New Orleans metropolitan area black population “fell to 21 percent from 36 per-

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53. See ELECTIONS DIV., LA. SEC’Y OF STATE, DISPLACED VOTER INFORMATION (2006) (on file with author) [hereinafter ELECTIONS DIVISION].

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Donze & Anderson, *supra* note 18.

59. ELECTIONS DIVISION, *supra* note 53.

60. Rick Lyman, *Reports Reveal Hurricanes’ Impact on Human Landscape*, N.Y. TIMES, June 7, 2006, at A16.

61. Clifford J. Levy, *New Orleans Elections Near, but Who Will Vote and How?*, N.Y. TIMES, Nov. 17, 2005, at A1.

cent.”<sup>62</sup> This racial stratification is due in part to the vast number of African-American evacuees who were relocated hundreds of miles from Louisiana.<sup>63</sup> According to reports, while suburban middle-class whites were more likely to find housing close to New Orleans, “[p]oor blacks from the city were more likely to land farther away in places much different from [their] home.”<sup>64</sup> In addition, the hardest hit areas of the city, including the Lower Ninth Ward, still remain uninhabitable.<sup>65</sup> While a great national diaspora might not have occurred, race and class determined where evacuees were, and largely remain, located.

Though many New Orleans residents relocated within Louisiana, including a large segment in Baton Rouge, other states absorbed a significant number of displaced residents. For example, Texas was one of the first states to provide assistance to New Orleans after the storm. Due in part to that generosity, “the Houston metropolitan area emerged with more than 130,000 new residents, many of them hurricane evacuees.”<sup>66</sup> Establishment of a satellite polling site in Houston would have allowed a significant number of displaced citizens to vote with minimal burden. Instead, the election plan forced displaced residents voting for the first time to travel back to Louisiana to cast their ballots, whether or not it was safe or even possible to relocate back to their old homes. In order to ease the burden, civil rights organizations provided bus transportation from Texas and other neighboring states to Louisiana.<sup>67</sup> Satellite locations in states with significant displaced New Orleans residents would have provided more evacuees with an opportunity to exercise their fundamental right to vote.

### B. *Absentee Ballots*

Absentee ballots were touted as an effective and efficient means for displaced voters to cast their ballots. Existing Louisiana election

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62. Lyman, *supra* note 60.

63. See Tizon & Smith, *supra* note 3.

64. *Id.*

65. See Michelle Krupa, *Potable Water Ready to Flow in Lower 9: Final Sliver of City Awaits State's OK*, TIMES-PICAYUNE (New Orleans), Oct. 7, 2006, National, at 1.

66. Lyman, *supra* note 60.

67. Clark-Flory, *supra* note 30.

law, however, did not permit all first-time voters to cast an absentee ballot. Louisiana's election code only allowed a person to cast an absentee ballot if he or she had voted in person during a previous election.<sup>68</sup> This law allowed the potential disenfranchisement of two different types of displaced New Orleans voters. First, citizens who registered to vote by mail before Katrina hit but failed to actually vote in person at a polling place would not be able to cast an absentee ballot.<sup>69</sup> Second, a person who registered to vote after Katrina would have to vote in New Orleans.<sup>70</sup> This law placed a heavy burden on both first-time voters and those residents who may have moved to a different voting precinct in the city. In order to vote, they would be forced to travel to a state-approved polling place.

In response to concerns, the state legislature lifted some of the absentee ballot provisions for the April and May elections only. Under the new plan, the ability for a first-time voter to cast a ballot depended on how and when he or she registered to vote. A person was automatically eligible to vote by absentee ballot if he or she met one of the following two provisions: (1) registered to vote in person, but never voted, or (2) previously registered and previously voted.<sup>71</sup>

If a displaced resident of New Orleans registered by mail and had *not* previously voted, his or her ability to vote by absentee ballot was based on when he or she registered. Louisiana adopted, and the DOJ precleared, a complex four-part test to determine if a person could cast an absentee ballot.<sup>72</sup>

*Registered by mail after September 24, 2005*

All residents who fell into this category had to vote in person and thus could *not* vote by absentee ballot. A resident was allowed to either vote on the actual election day or vote during the early voting period but *only* at a polling location within Orleans Parish.<sup>73</sup>

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68. See LA. REV. STAT. ANN. § 18:115(F)(1) (2006).

69. See NAACP LEGAL DEF. & EDUC. FUND, INC., PROTECT THE KATRINA VOTE (2006) (on file with author) [hereinafter NAACP].

70. ELECTIONS DIVISION, *supra* note 53.

71. *Id.*

72. See NAACP, *supra* note 69.

73. *Id.*

*Registered on or before October 5, 2004*

A first-time voter in this category was also *not* allowed to vote by absentee ballot and instead had to physically cast a ballot either in Orleans Parish on the election day or at one of the ten satellite polling sites across the state.<sup>74</sup>

*Registered by mail between October 5, 2004, and September 24, 2005*

A displaced voter who fell into this category could vote either in person, during the early voting period, or by absentee ballot.<sup>75</sup> The voter, however, had to complete a Displaced Voter Affidavit to accompany the request for an absentee ballot.<sup>76</sup> The affidavit had to be either notarized or signed by two witnesses and required the voter to certify that he or she was displaced due to Hurricanes Katrina or Rita and that he or she was eligible to vote.<sup>77</sup>

*Student voters*

Student voters encountered the fewest obstacles to voting. First-time student voters who registered by mail and attended school outside of Orleans Parish could avail themselves of any of the three voting options.<sup>78</sup>

All requests for absentee ballots had to be submitted by April 18, 2006, for the primary election and May 16, 2006, for the general election.<sup>79</sup> New Orleans' election plan, however, was not precleared by the DOJ until March 16, 2006.<sup>80</sup> While state officials had sent out voter information mailers before the plan received preclearance,<sup>81</sup> the uncertainty of the situation undoubtedly confused many voters.

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74. *Id.*

75. *Id.*

76. ELECTIONS DIVISION, *supra* note 53.

77. *Id.*

78. *Id.*

79. NAACP, *supra* note 69.

80. Whoriskey, *supra* note 52.

81. See Letter from Cleo Fields, Senator, State of La., to John K. Tanner, Civil Rights Div., U.S. Dep't of Justice (Mar. 7, 2006), at 5, available at <http://senate.legis.state.la.us/FieldsC/Topics/2006/letter.pdf>.

## V. OPPOSITION TO PRECLEARANCE

Over protest by civil rights groups,<sup>82</sup> the DOJ approved the plan for primary and general elections.<sup>83</sup> A DOJ letter, in response to an inquiry by Representative John Conyers, Jr. (D-MI) explained the reasoning behind preclearance.<sup>84</sup> The DOJ's main justification for approval appeared to revolve around the plan's supposed support by minority public officials.<sup>85</sup> In addition, while the DOJ noted that the dismissal of a section 2 claim against the plan could not be used in its determination, the case appears to have had some impact on the DOJ's decision.<sup>86</sup> As will be shown, these two factors failed to adequately explain why the DOJ felt compelled to approve a plan that clearly did not protect a minority's right to vote.

A. *Minority Support*

According to the DOJ, the proposed plan "enjoyed the endorsement of the Louisiana Legislative Black Caucus."<sup>87</sup> The emphasis on approval from minority state and federal officials derives from *Georgia v. Ashcroft*.<sup>88</sup> In *Georgia v. Ashcroft*, the Supreme Court ruled on whether a redistricting plan was properly precleared under section 5 of the VRA.<sup>89</sup> The Court articulated a totality of the circumstances standard to determine whether retrogression occurred.<sup>90</sup> A key, but not determinative, factor was Congressman John Lewis' (D-GA) support of the proposed redistricting plan.<sup>91</sup> The Court stated that the Congressman's testimony could not easily be dismissed, and his support

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82. See Clark-Flory, *supra* note 30.

83. Letter from William E. Moschella, Ass't Att'y Gen., U.S. Dep't of Justice, to John Conyers, Jr., Congressman, U.S. House of Reps. (Mar. 16, 2006), at 2, available at <http://electionlawblog.org/archives/new.orleans.conyers.letter.pdf>.

84. *Id.* at 1-2.

85. *Id.* at 1.

86. See *id.* at 2-3.

87. *Id.* at 1.

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

89. *Id.* at 465.

90. *Id.* at 480-81.

91. *Id.* at 472, 484.

was among many factors used in the totality of the circumstances standard.<sup>92</sup>

With regard to the Louisiana election plan, the DOJ stated emphatically that “[m]inority members of the Louisiana House and Senate were *unanimous* in casting their votes for the election procedures.”<sup>93</sup> The support, however, was far from unanimous. Cleo Fields, an African-American Louisiana State Senator, responded to the DOJ with a letter to Representative Conyers stating that the claim of their support was “simply not true.”<sup>94</sup> He stated that both he “along with other members of the [Black] Caucus objected to [the] plan.”<sup>95</sup> Moreover, on March 7, 2006, Senator Fields sent a similar letter to John Tanner of the DOJ’s Civil Rights Division expressing his opposition.<sup>96</sup>

The DOJ’s reliance on minority support of an election plan encounters two major obstacles. First, the theory assumes that all minorities agree on the right course of action and thus does not acknowledge the diversity within minority groups. Second, the DOJ has a history of using minority support as a justification for preclearance only when it suits the agency’s overall objectives. For example, Georgia, a covered jurisdiction under section 5,<sup>97</sup> passed a voter identification law that required voters to produce a driver’s license, or similar picture identification, in order to vote.<sup>98</sup> African-American legislators in Georgia overwhelmingly rejected the bill and vowed “to fight any plan that [did] not repeal the law.”<sup>99</sup> The lack of minority support, however, did not dissuade the DOJ from preclearing the change. Thus, if the DOJ chooses to rely on minority support of election plans, it should also rely on objections.<sup>100</sup>

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92. *Id.* at 489-90.

93. Letter from William E. Moschella to John Conyers, Jr., *supra* note 83, at 1.

94. Letter from Cleo Fields, Senator, State of La., to John Conyers, Jr., Congressman, U.S. House of Reps. (Mar. 17, 2006), *available at* <http://senate.legis.state.la.us/FieldsC/Topics/2006/letter.pdf>.

95. *Id.*

96. Letter from Cleo Fields to John K. Tanner, *supra* note 81.

97. 28 C.F.R. pt. 51 app. (2006).

98. See Errin Haines, *Black Lawmakers Vow to Repeal Ga. Voter Law*, CHARLESTON GAZETTE (W. Va.), Dec. 30, 2005, at 5D.

99. *Id.*

100. See Election Law: Becker Responds to DOJ (Mar. 24, 2006),



### B. *Plan Survived Section 2 Claim*

The DOJ also noted a lawsuit brought in federal court regarding the proposed election plan.<sup>101</sup> Along with section 5, the VRA provides another avenue for citizens to object to changes in voting procedures. Section 2 of the VRA applies to all states and bans the abridgement or denial of the right to vote based on race or color.<sup>102</sup> Unlike section 5, section 2 requires that the plaintiffs, not the state, bear the burden to prove a violation.<sup>103</sup>

New Orleans voters, represented by the NAACP Legal Defense and Education Fund and other civil rights organizations, brought a section 2 claim in the U.S. District Court for the Eastern District of Louisiana.<sup>104</sup> The groups were concerned that flaws in the election plan would disenfranchise thousands of African Americans.<sup>105</sup> Judge Ivan Lemelle, an African-American federal district court judge, dismissed the claim, thus allowing the election to proceed.<sup>106</sup> Judge Lemelle stated the election was important because “we have a burning desire for wholeness, completeness, normalcy.”<sup>107</sup>

The Supreme Court, however, has long held that the success or failure of a section 2 claim should have no bearing on the DOJ’s preclearance decision. In *Georgia v. Ashcroft*, the Court stated, “In *Bossier Parish I*, we specifically held that a violation of § 2 is not an independent reason to deny preclearance under § 5.”<sup>108</sup> The Court explained the differences between the two sections: “In contrast to § 5’s retrogression standard, the ‘essence’ of a § 2 vote dilution claim is

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<http://electionlawblog.org/archives/005261.html>, for more examples of the DOJ’s uneven use of minority support.

101. See Letter from William E. Moschella to John Conyers, Jr., *supra* note 83, at 2.

102. 42 U.S.C. § 1973(a) (2000).

103. See 42 U.S.C. §§ 1973, 1973c (2000).

104. Letter from William E. Moschella to John Conyers, Jr., *supra* note 83, at 2.

105. Adam Nossitor, *Judge Orders New Orleans To Proceed with Election*, N.Y. TIMES, Mar. 28, 2006, at A12.

106. *Id.*

107. *Id.*

108. 539 U.S. 461, 478 (2003) (citing *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997)).

that ‘a certain electoral law, practice, or structure . . . cause[s] an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.’”<sup>109</sup> While the DOJ acknowledged that a section 2 claim had no bearing on its preclearance of New Orleans’ plan,<sup>110</sup> the mere mention of it brings into question whether the DOJ actually evaluated the merits of the proposed election plan separate and apart from Judge Lemelle’s section 2 ruling.

The DOJ, however, failed to protect displaced voters when it clearly had the means to do so. Minorities held a worse position than they had in previous elections and not all steps were taken to ease the burden on displaced residents’ ability to vote. The question must be asked: If the DOJ failed to find a section 5 violation in this case, what extreme circumstances would it take to find a violation?

## VI. FUTURE NEW ORLEANS’ ELECTIONS

Despite, or maybe because of, the obstacles displaced New Orleans residents faced, African Americans were able to have a voice in the Spring 2006 elections. Mayor Ray Nagin received an estimated 90% of the African-American vote for the April primary<sup>111</sup> and went on to win the general election.<sup>112</sup> As expected, overall turnout was down to 36% from 46% in the 2002 mayoral race.<sup>113</sup> The percentage of white voters participating in the primary election increased from previous elections.<sup>114</sup> Yet, voter turnout was low for black neighborhoods that were hardest hit by Hurricane Katrina.<sup>115</sup> While “[i]t is not unusual for white turnout to be higher [than black turnout], . . . in past

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109. *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)).

110. Letter from William E. Moschella to John Conyers, Jr., *supra* note 83, at 3.

111. Kim Cobb & Kristen Mack, *New Orleans Mayoral Election: Black Voters Made Their Presence Felt: Predictions of Large Racial Shift in City Politics Prove Unfounded*, HOUS. CHRON., Apr. 24, 2006, at A1.

112. Michelle Krupa & Matt Scallan, *Broad Appeal Aided Nagin in Runoff: Higher Turnout, White Support Gave Mayor the Edge Saturday*, TIMES-PICAYUNE (New Orleans), May 22, 2006, National, at 1.

113. *Id.*

114. *Id.*

115. Anne Rochell Konigsmark, *New Orleans’ Upheaval Shows in Vote Results: Mayor 1st in Primary, but His Re-Election Is Hardly a Certainty*, USA TODAY, Apr. 24, 2006, at 7A.

elections there typically was a 10-percentage-point difference between white and black participation.”<sup>116</sup>

Regardless of whether the “black candidate” won, Louisiana needs to take steps to ensure greater voter participation in future elections. The voting procedures for the April and May elections have yet to be extended to future elections. As a result, there remains a need to alter existing Louisiana election laws. New Orleans is expected to have recovered only around half of its pre-Katrina population by 2008.<sup>117</sup> Houses remain uninhabitable and plans continue to be drafted on how best to rebuild the city’s infrastructure. If another hurricane were to hit New Orleans, the city’s recovery could be even further extended. Therefore, to ensure equal access to the ballot, this essay proposes three key provisions that the legislature should adopt for elections through the 2008 presidential election. First, New Orleans should institute a same-day registration policy. Second, out-of-state satellite voting sites must be placed in states with large populations of displaced voters. Lastly, the legislature must further loosen absentee ballot guidelines. Without these, or similar provisions, the DOJ should deny preclearance. These provisions will allow displaced voters, who do not register to vote in another state, to have a voice in their city’s rebuilding.

*(1) Same-Day Registration*

Louisiana should suspend the thirty-day registration requirement and implement same-day registration. Unfortunately, this will not help those who register by mail and vote absentee. However, it will allow those either in New Orleans or at the proposed satellite polling stations a greater opportunity to vote. Some states already allow citizens to register on election day at the polls. For example, Wisconsin permits voters to complete a registration form at the polling location.<sup>118</sup> If the citizen provides proper identification, she is given a regular ballot that will be tabulated with those who pre-registered.<sup>119</sup> Same-day registration is ideal for voters at satellite locations in that they would be able to vote even if they did not receive prior registration information.

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116. *Id.*

117. *See supra* note 15 and accompanying text.

118. *See* WIS. STAT. § 6.29(2) (2004).

119. *Id.*

*(2) Allow Access to Absentee Ballots for First-Time Voters*

All restrictions for first-time voters should be eliminated, thus allowing them to vote by absentee ballot. If the state chooses not to allow out-of-state satellite voting sites, the burden on first-time voters will continue. All voters should be allowed to cast an absentee ballot if they register by mail, provide the proper identification, and complete the voter affidavit.

The federal government also has the opportunity to ensure voter participation in future congressional elections. If Louisiana fails to ease the absentee ballot burdens, the federal government should pass U.S. Senator Russell D. Feingold's (D-WI) Displaced Citizens Voter Protection Act of 2005.<sup>120</sup> The Act seeks to extend to displaced Hurricane Katrina evacuees the registration and voting procedures currently available to military and overseas voters.<sup>121</sup> Senator Feingold stated that:

[w]e must make sure that those who intend to return are given the opportunity to elect the federal leaders who will shape the recovery process. This is a common-sense measure that can assure those who have lost so much their right to participate in elections that will have a direct impact on their lives.<sup>122</sup>

The Feingold bill would apply to all federal elections held during 2006 through 2008.<sup>123</sup> It requires state voter registration authorities to inform voters of their expanded rights under the law.<sup>124</sup>

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120. S. 1867, 109th Cong. (2005).

121. *Id.* The bill is the Senate companion to H.R. 3734 introduced by U.S. Representative Artur Davis (D-AL). See H.R. 3734, 109th Cong. (2005). The Senate version currently has only two cosponsors, Mary Landrieu (D-LA) and John Kerry (D-MA). THOMAS, Library of Congress, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN01867:@@P> (last visited Oct. 9, 2006). The House version is supported by forty cosponsors. THOMAS, Library of Congress, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR03734:@@P> (last visited Oct. 9, 2006).

122. Press Release, U.S. Senator Russ Feingold, Feingold Bill Helps Ensure That Displaced Hurricane Katrina Survivors Can Vote in Their Home States: Utilizes Absentee Procedures Currently Available for Military and Overseas Voters (Oct. 12, 2005), available at <http://feingold.senate.gov/~feingold/releases/05/10/20051012.html>.

123. *Id.*

124. *Id.*

The Uniformed & Overseas Citizens Absentee Voting Act (UOCAV)<sup>125</sup> specifically requires every state to allow soldiers and overseas citizens to cast an absentee ballot in federal elections.<sup>126</sup> Like the Louisiana law for overseas voters,<sup>127</sup> there is no intent of residence requirement.<sup>128</sup> Most importantly, UOCAV does not require newly registered electors to have previously voted in person at their home precinct.<sup>129</sup> Therefore, any displaced voter, regardless of whether they had previously registered or voted in a New Orleans election, would be afforded the right to vote.

Either Louisiana or the federal government must ease the restrictions currently placed on absentee ballots. Allowing all voters, regardless of how they previously voted, the opportunity to cast an absentee ballot would increase voter participation.

### (3) *Out-of-State Satellite Polling Sites*

Louisiana must allow out-of-state satellite polling sites in states that have a significant population of displaced New Orleans residents. It is hard to understand why the state chose not to have such sites in the first place. Some point to the ability of Iraqi citizens living in the United States to cast ballots in this country for an election half a world away as a basis for allowing out-of-state polling sites for these elections.<sup>130</sup> Moreover, Louisiana must prepare itself for the possibility that another hurricane could strike New Orleans, thus causing more destruction and lessening the likelihood that people can move back to the city. By providing satellite polling sites, along with less restrictive absentee ballot provisions, all voters will have easier access to participation in future elections.

## VII. CONCLUSION

The complex challenges surrounding New Orleans' elections are most likely not high on many survivors' list of worries. The loss of life and home is far more devastating than the ability to vote. Yet, in

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125. 42 U.S.C. § 1973ff (2000).

126. 42 U.S.C. § 1973ff-1.

127. See LA. REV. STAT. ANN. § 18:101(E)(2) (2004).

128. See 42 U.S.C. § 1973ff.

129. See *id.*

130. See, e.g., Editorial, *supra* note 24.

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order for New Orleans to rise from the flood waters, it will need to re-establish the most basic of government services, including elections. Now more than ever, it is important for all New Orleans citizens to have a say in who will lead their city. To protect the right to vote, Louisiana must liberalize its election code to better allow displaced voters an opportunity to participate in elections. Only with these provisions will displaced residents be able to have a voice in how their city is rebuilt.

