

LEGAL DEPARTMENT
SOUTHERN
REGIONAL OFFICE
VOTING RIGHTS
PROJECT



October 13, 2009

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RE: Comment under Section 5 of the Voting Rights Act, Submission No. 2009-3258, Telfair County, Georgia

Dear Mr. Coates:

The Voting Rights Project of the ACLU (“ACLU”) submits this comment letter to urge the Department of Justice to interpose an objection to the Board of Commissioners of Telfair County, GA’s (“Board of Commissioners” or “Board”) submission under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, of the changes in the manner in which the Chairperson of the Board of Commissioners is elected as well as the reduction in the number of single-member commissioner districts from five to four. Additionally, there is substantial evidence that this plan was adopted with a racially discriminatory purpose.

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The ACLU represented African American voters in Telfair County who sued under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, in four cases spanning over two decades that created and preserved single-member district plans in Telfair County, including the five-single-member-district plan that is proposed to be changed in the present submission. Prior to 2004, there had never been two African American commissioners sitting simultaneously on the Board. Now that Districts 1 and 2 have been able to elect black candidates, the Board seeks to reduce the black voting age population in both districts making it more difficult for black voters to elect candidates of their choice. In addition, given the prevalence of racial bloc voting, election of the chair of the Board at-large, as opposed to election by members of the Board, will further dilute the African American vote and reduce the likelihood of an African American ever serving as chair. These proposed changes are retrogressive within the meaning of Section 5, and the Board of Commissioners has failed to meet its burden of proof under Section 5.

HISTORY OF VOTING DISCRIMINATION AND PRIOR LAW SUITS

Located in rural south central Georgia, Telfair County was home to the father-son dynasty of two of the state's most well known governors, Eugene and Herman Talmadge. Both were staunch segregationists whose harsh views on race directly reflected the ideas and values of the white communities in which they lived. After the Supreme Court outlawed segregation in public schools in 1954, Herman Talmadge predicted "blood will run in Atlanta's streets." As a member of the U.S. Senate from 1956 to 1980, Herman Talmadge voted against the landmark 1964 Civil Rights Act and the 1965 Voting Rights Act. The county and its political bodies have a history of discrimination in voting which includes packing black voters into as few districts as possible to dilute their voting strength, failing to reapportion to correct for population inequality, violations of Section 2 of the Voting Rights Act, enacting discriminatory majority vote and numbered post requirements, and failing to comply with Section 5 of the Voting Rights Act. Voting in the county has been, and remains, significantly polarized on racial lines, and few blacks have been elected to office except from majority or near-majority black districts.

At the time the ACLU filed its first suit against Telfair County in 1986, race relations were sharply polarized. In 1986, the Telfair County Board of Education, which contained one majority black district, was last apportioned using 1970 census data. By 1980, the county population was 11,445, and 31.19% black. Based on the 1980 census, the total deviation was 47.09%. Blacks also were heavily packed into a single district, where they constituted 89.12% of the population. Had the districts been unpacked and properly apportioned, blacks would have constituted a majority in two of the seven school board districts with a greater opportunity to elect candidates of their choice.

In September 1986, the ACLU filed suit in federal court on behalf of five black voters in Telfair County alleging that the county board of education was malapportioned.¹ The law suit also charged the defendants with violating Section 5 of the Voting Rights Act because of their refusal to call a special election as required by state law after the only two candidates running in the primary from District One were disqualified. One of the candidates did not reside in the district and the other had served as a deputy registrar. Because nobody else was nominated, there was no candidate for county school board on the ballot in the general election from District One, which was majority black. The plaintiffs contended that the refusal to call a special election required by state law constituted a voting change requiring Section 5 preclearance. The plaintiffs also asked the court to invalidate the old districting plan and require the board to adopt a new apportionment.

On October 31, 1986, less than a week before the November general election, the court entered a consent order staying the elections, ordering a new apportionment plan, and providing for a special election. The court found that "Plaintiffs have established a prima facie case that the current apportionment of the Board of

¹ Spaulding v. Telfair County, Civ. No 386-061 (M.D. Ga.).

Education is in violation of the Fourteenth Amendment,” and required the defendants to develop and implement a new apportionment for the school board within 60 days. The order also required that the new apportionment plan “shall fairly represent black residents of Telfair County and contain at least two majority black districts, one of which shall contain a black population of at least 65%.”²

After negotiations, the parties agreed on a plan which was implemented by final court order in April 1987. The new plan created two majority black school board districts with African American populations of 77.52% and 53.02% respectively, and set a special election for June 30.

Approximately three weeks after the final order was issued, and eight months after the law suit was originally filed, seven white citizens of the county and Lumber City, a town located in Telfair County, moved to intervene to oppose the settlement. The would-be intervenors asserted their rights on various grounds, including a claim that the court ordered redistricting plan diluted their voting strength, was an “unconstitutional gerrymander,” and commingled the interests of Lumber City residents with residents of the rural portion of the county. The court denied the motion to intervene on the grounds that it was not timely.

The plaintiffs filed suit again in 1987, prior to the decision of the Supreme Court in *Holder v. Hall*, contending that the sole commissioner system for the Board of Commissioners diluted black voting strength.³ Although blacks were about one third of the county's population, no black person had ever been elected to the commission. The sole commissioner decided not to contest the allegations of the complaint and agreed to adopt a new form of government consisting of a board of commissioners elected from districts. Two white residents, however, who opposed such a remedy, moved to intervene in the law suit, claiming that the plaintiffs had instituted “[a] campaign to terrorize and intimidate the taxpayers of Telfair County.” They raised some 21 defenses to the complaint, including that the suit was barred by the Eleventh Amendment, that “Blacks have not been discriminated against in Telfair County,” plaintiffs lacked standing, and the action was “barred by the doctrines of sovereign governmental, judicial, official, and good faith immunity.”⁴ The district court denied intervention noting that the movants’ petition “shows disturbing substantive defects. Essentially it consists of a litany of defenses which the movants believe should be asserted against the plaintiffs. I have examined these defenses. Most of them are ethereal at best, and spurious at worst.”⁵ The parties agreed that plaintiffs had established “a prima facie case” that the sole commissioner form of government violated Section 2, and the court subsequently issued an order in October 1988, implementing an agreed upon plan providing for a board of commissioners elected from five single member districts, one of which was majority black⁶

² Id., Order of October 31, 1986, pp. 1-2.

³ Clark v. Telfair County, Civ. No. 287-25 (S.D. Ga.).

⁴ Id., Proposed Answer of Intervenors Fred A Smith and Joe Tom Jeffries

⁵ Id., Order of December 9, 1987.

⁶ Id., Order of October 26, 1988.

Black voters in Lumber City in Telfair County represented by the ACLU also filed suit in federal court in 1987, challenging at-large city elections as diluting minority voting strength in violation of Section 2 of the Voting Rights Act and the Constitution. The law suit also charged that the majority vote requirement and numbered post provisions for city elections had never been precleared, as required by Section 5.⁷ According to the 1980 census, 55% of Lumber City's 1,426 residents were white and 45% were black, yet no black candidate had ever been elected to the six-member council, and the only black person to win a plurality of votes was defeated in a runoff in 1985.

Six months after the suit was filed the district court granted the plaintiffs' motion for summary judgment and enjoined city elections on the grounds that preclearance had not been secured for the majority vote and numbered post provisions.⁸ The city then submitted a number of voting changes to the Department of Justice for preclearance, including the majority vote and numbered post requirements, but the Attorney General objected to both in a July 1988 letter noting the presence of racially polarized voting in city elections.

The reality of the potential for discrimination becomes readily apparent from the results of the 1985 election where, by virtue of the majority vote requirement, the black candidate failed to become the first black elected to the city council, although she appeared to have been the clear choice of minority voters.⁹

The Department further noted that a 1988 ordinance containing the majority vote and numbered post requirements was adopted at a time when blacks were becoming politically active in city elections and were challenging the legality of the at-large system. In objecting to the change, the department found that it was "tainted, at least in part, by a proscribed purpose," and that "[w]here, as in Lumber City, racial bloc voting exists in the context of an at-large system, the use of certain election features, such as a majority vote requirement, serves but to enhance the opportunity for discrimination against minority voters."¹⁰

On October 7, 1988, at the request of the city, the Attorney General declined to withdraw the objections to the majority vote and numbered post requirements, explaining that the department's decision was based on "concerns that racial bloc voting exists in Lumber City elections, and that black persons do not constitute a majority of the voters in the city such as would mitigate the racially discriminatory impact of those electoral features."¹¹

⁷ Woodward v. Mayor and Town Council of Lumber City, Civ. No. 387-027 (S.D. Ga.).

⁸ Woodward v. Mayor and Town Council of Lumber City, 676 F. Supp. 255 (S.D. Ga. 1987).

⁹ William Bradford Reynolds, Assistant Attorney General, to Ken W. Smith, Esq., July 8, 1988.

¹⁰ Id., p. 2.

¹¹ William Bradford Reynolds, Assistant Attorney General, to Ken W. Smith, Esq., November 13, 1989.

The court entered another order on January 5, 1989, with the consent of the parties, finding that at-large elections for Lumber City “are in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.” The next month, on February 16, 1989, the court approved a new election plan, and required the defendants to submit it for Section 5 preclearance. The plan provided for two districts, one 86% white and the other 74% black, each of which would elect two members of the council. However, the remaining two members and the mayor continued to be elected at-large. The plan also retained the majority vote and numbered post requirements, which the Attorney General had previously objected to. On November 13, 1989, once again at the request of the city, the Department of Justice again refused to preclear the plan saying:

The history of the city’s earlier efforts to impose similar requirements on the electoral process make it difficult to conclude now that black persons could elect a candidate of choice to an at-large seat in Lumber City.

While we note, at the outset, that the submitted changes result from a settlement in Woodard v. Mayor of Lumber City, CV 387-027 (S.D. Ga.), we are faced with unanswered concerns that the city may have sought here to limit the opportunity of blacks to elect candidates of their choice to the city council. In that regard, our information is that the city rejected a number of alternatives that contained fairly drawn districting plans and provided minority voters with an opportunity to participate equally in the electoral process and, instead, insisted on features such as the use of a majority vote requirement, numbered posts and staggered terms for at-large seats.¹²

In April 1990, the court directed the parties to make a “fresh start towards resolving the pending litigation,” and to independently submit new remedial plans.¹³ The plaintiffs proposed the elimination of all at-large seats, other than the mayor, and called for the creation of two districts, one 75% black, the other 86% white, which would elect three members each. The city defendants proposed a plan that was virtually identical to the one previously rejected by the Attorney General - including the majority vote requirement - and called for two members to be elected from a majority black district, two from a majority white district and two elected at-large.

After hearing evidence and witnesses, the court concluded in an August 3 ruling that 56% of the 1,486 residents of Lumber City were black, not the 45% that had been indicated by the 1980 census. “Despite the increase in black population and the percent of black registered voters, other factors remain which continue to abridge black political participation,” said the court. As evidence, the court noted that “[v]oting tends to be on racial lines . . . no black has ever been elected to office . . .

¹² *Id.*, p. 2.

¹³ Woodard, Order of August 3, 1990.

there have been very few black candidates for office; the first black to win a plurality of votes was defeated in a runoff.”¹⁴

Given the existence of racially polarized voting and the history of discrimination, the court ruled that use of a majority vote requirement in Lumber City could “enhance the opportunity for racial discrimination and submerge black voting strength.”¹⁵ The court imposed a plurality vote requirement in its place, but in all other respects adopted the plan proposed by the defendants and ordered the city divided into two districts, one majority black, and the other majority white, each containing two numbered posts. The order called for two additional council positions, as well as the mayor, to be elected at-large.

Unlike the court’s order of February 16, 1989, the August 3, 1990, order did not require the defendants to obtain Section 5 preclearance. Plaintiffs, however, appealed on the theory that the court-ordered plan incorporated policy choices of the defendants and was thus subject to Section 5. Elections were held under the new plan on October 2, 1990, and although blacks won both seats from the majority black district, the one black candidate who ran for one of the at-large seats received only 30% of the vote. Another black candidate ran for one of the two seats in the majority white district, which was 21% black, and received only 22.7% of the vote.

Prior to oral argument in the court of appeals, 1990 census data was released for Georgia which showed that the population figures relied upon by the district court inflated the percentage of blacks residents, casting further doubt on the validity of using any at-large seats for the city council. The plaintiffs moved to supplement the record on appeal by adding the 1990 census data. The motion was granted and the court reversed in May 1991, remanding the case to the district court for further consideration of the question of remedy in light of the new census.

On October 2, 1992, the district court entered an order adopting a new districting plan prepared by the defendants based upon the 1990 census, and continuing the two at-large seats for the city council. The court later ruled that the redistricting plan was court ordered and need not be submitted for Section 5 preclearance. Although plaintiffs continued to object to the use of at-large seats for the city council, they decided against further appeals.

Ten years after the conclusion of *Woodard v. Mayor of Lumber City*, the ACLU again brought suit in Telfair County on behalf of black voters, this time challenging Board of Commission lines as malapportioned and violating Section 2 and the Constitution. The law suit was filed in August 2002 and was the fourth voting rights law suit brought by the ACLU in Telfair County since 1986.¹⁶

¹⁴ Id., p. 3.

¹⁵ Id., p. 4.

¹⁶ *Crisp v. Telfair County*, CV 302-040 (S.D. Ga.).

The 2000 census showed that the five county commission election districts had a total deviation of 56% (or 34% if the population of Telfair State Prison was not considered). The Board of Commissioners had adopted a reapportionment plan in February 2002, which had been drafted by the Georgia Reapportionment Office containing one majority black (67.76%) district, and another with 45.73% black population, but the plan had not been introduced by the local legislative delegation for enactment by the general assembly. Although 38.73% of the county population was black, no more than one African American had ever served on the five-seat commission.

After plaintiffs filed suit, the county stipulated that its commission districts were malapportioned, and that “[i]t is possible...to draw a five single member district plan with at least one majority black district in Telfair County.”¹⁷ The plaintiffs then filed for summary judgment and asked the court to hold the existing plan unconstitutional and order a new plan into effect.

With the parties in agreement on the five single member district plan, the Board of Commissioners again called on the local legislative delegation to introduce the plan in the 2003 general assembly session as a remedy to the malapportioned districts.¹⁸ The plan was adopted on the last day of the legislative session and signed into law on June 3, 2003.¹⁹

Ruling that the existing plan was malapportioned and “violates the one person, one vote standard of the equal protection clause of the Fourteenth Amendment,” the court noted that the plan had been submitted for Section 5 preclearance and ruled the motion for summary judgment was “largely moot.”²⁰ In 2004, District 2 elected a black candidate for the first time.

The districts created in *Crisp v. Telfair County* constitute the benchmark for the instant submission which seeks to reduce the percentages in the districts that elect black commissioners. Furthermore, under the benchmark, the chair is selected by a majority of commissioners. Since the minority community is currently represented in two of the five districts, they exert influence in the selection of the chair, although the black commissioners from Districts 1 or 2 have never served as chair. Should the chair be elected at large, given the level of racially polarized voting, the minority community would have less opportunity to influence the selection of the Board’s chairperson than under the existing benchmark system.

¹⁷ Id., Joint Stipulation of the Parties, November 25, 2002.

¹⁸ Telfair County, Georgia, Reapportionment Resolution, January 9, 2003.

¹⁹ Id., Order, July 8, 2003.

²⁰ Id., Order, July 24, 2003.

OTHER GEORGIA COUNTIES HAVE ALSO ATTEMPTED TO REDUCE THE NUMBER OF MAJORITY-MINORITY DISTRICTS

Telfair County is not the first Georgia jurisdiction to attempt to reduce the number of single-member districts in a plan in order to create an at-large chairperson seat after plaintiffs have successfully created single-member plans that led to minority electoral success. The ACLU represented minority voters who sued Camden County, GA under Section 2 in *Baker v. Gay*, No. 284-37 (S.D. Ga. 1984). Parties settled on a consent order that created a five single-member district plan in which two of the districts were majority minority and which elected minority representatives. In 1991 the county attempted to adopt a plan that included four single-member districts with the chair elected at large and submitted the plan to the Department of Justice. The Department requested more information on April 3, 1991, and the county abandoned its proposal, resulting in the maintenance of five single-member districts.

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Similarly Lamar County, Georgia attempted to adopt single-member districts and requested the state reapportionment office to prepare plans with two majority minority districts. Two different plans were presented: (1) a five-single-member district plan with two majority black districts, and (2) a four-single-member district plan with the chair elected at large with one majority minority district. The board selected the 4-1 plan based upon dubious pretext. Similar to the arguments advanced in Telfair County's present submission, Lamar County argued that the community supported the 4-1 plan. The plan drew an objection from the Department of Justice: "it is far from clear that the county's decision to adopt the 4-1 plan was free of discriminatory purpose – a purpose to minimize to the fullest extent possible black voting opportunities within the county. Accordingly without a more persuasive explanation offered by the county, I cannot conclude, as I must under the Voting Rights Act, that the submitted 4-1 plan is entitled to Section 5 preclearance."²¹

ANALYSIS OF THE PROPOSED CHANGE

Demographics

The population of Telfair County based on the 2000 census was 11,794. Based on 2008 estimates, the population increased to 13,355. In 2000, the voting age population was over 78%, and increased to over 80% in 2008. The African American population increased from 38.4% in 2000, to 42.4% in 2008, based on population estimates. Similar analysis shows a decrease in white population from 59.7% in 2000 to 56.8% in 2008.²² Nearly 5,700 African Americans are estimated to comprise the Telfair County population in 2008 - two years before the decennial census. This represents an increase from 4,534 in 2000. However, Telfair County contains census block 132719501002019 comprising the Telfair State Prison. The 2000 census data for this block indicates a total population of 1,072, and black population of 777. The

²¹ Wm. Bradford Reynolds, Assistant Attorney General, to Norman Smith, Esq., March 18, 1986.

²² U.S. Census Bureau. (2009, July 10). State and county Quickfacts: Telfair County, GA. Retrieved August 4, 2009, from <http://quickfacts.census.gov>.

United States Census Bureau utilizes a “usual residence” rule as the determining factor to count populations where they are located April 1 of the census year, and where they live and sleep most of the time. The prison population is included in all census data where applicable in Telfair County datasets.²³ The next American Community Survey figures for jurisdictions the size of Telfair County are not scheduled for release until 2010.²⁴

Table 1. Telfair Major Geographic Areas lists population and demographic data for the major areas in Telfair County. Population estimates for 2007 show a projected major increase in total population for McRae, from 2,682 in 2000, to 4,379 in July 2007.²⁵

Table 1. Telfair Major Geographic Areas

<u>AREA</u>	<u>TOTAL POPULATION</u>	<u>WHITE</u>	<u>AFRICAN AMERICAN</u>
Helena-McRae	7145	3860	3128
Jacksonville	1186	897	276
Lumber City	1799	1024	750
Milan	1664	1261	380

Source: U.S. Census American Fact finder.

Note: The Table details information based on the 2000 Census; racial categories are race alone; data does not include figures for other groups; and population counts are only for those areas within the Telfair County boundary.

Voter Registration & Elections

Voter registration across Telfair County increased significantly with the 2008 General Election. The 2008 election year also demonstrated the strongest increase in African American registration and turnout. See Figures 1 and 2 below, illustrating Telfair voter registration totals.

African American candidates in County Commission Districts 1 and 2 have been successful under the existing county commission plan enacted in 2003. In fact, both African American candidates ran unopposed in 2002 and 2004. In 2006, African American incumbent Sheryl Clark (District 1) defeated a white challenger in the Democratic primary with 60.57% of the vote. In 2008, African American incumbent

²³ The prison population is excluded in both the current and proposed redistricting plans.

²⁴ American Community Survey replaces the long form from the decennial census and provides population, housing and other social, economic, and demographic estimates based on sample population. Since 2005, single-year estimates have been available every year for geographies with population of 65,000 or more. In 2008, three-year estimates for geographies with populations of 20,000 were released annually. Five-year estimates will be released for all geographies by the end of 2010 and refreshed every year thereafter.

²⁵ U.S. Census Bureau. Table 4. Annual Estimates of the Population for Incorporated Places in Georgia, Listed Alphabetically April 1, 2000 to July 1, 2007, <http://www.census.gov/popest/cities/tables/SUB-EST2007-04-13.xls> (accessed August 4, 2009).

Alice B. Strong (District 2) defeated a white challenger in the Democratic primary with 54.28% of the vote, and defeated an African American Republican challenger in the General Election with 59.16% of the vote. Given the small number of precincts in the various commission districts, it is not possible to perform a reliable statistical analysis of these endogenous elections.²⁶

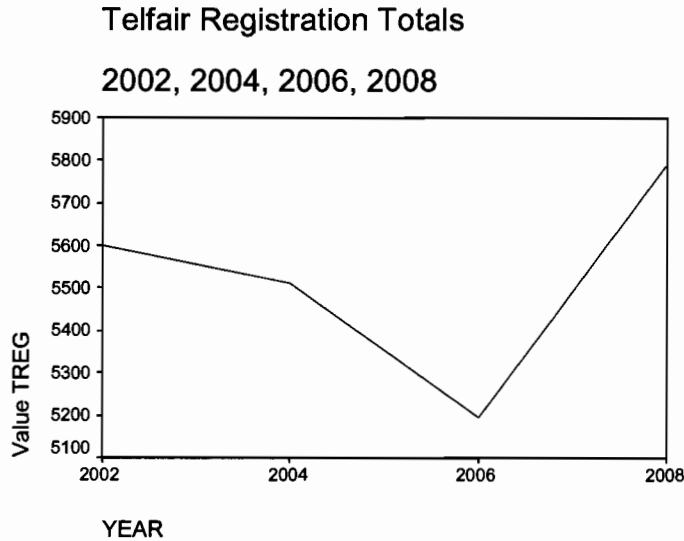


Fig. 1. Telfair County voter registration total for 2002-2008.

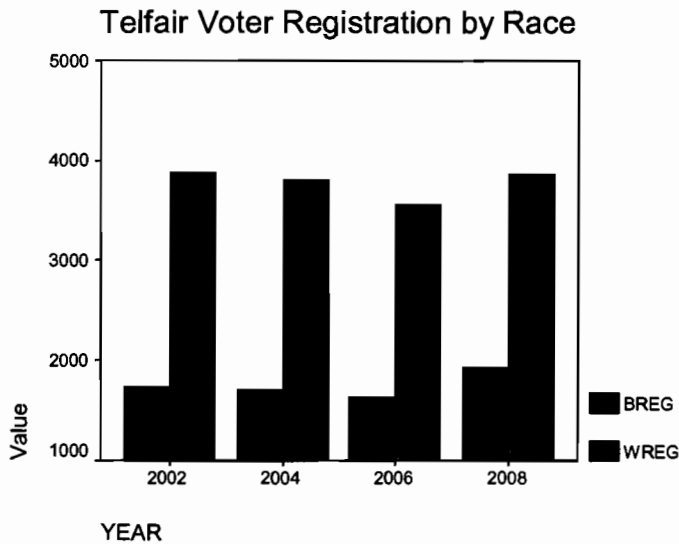


Fig. 2. Telfair voter registration by race.

A nonbinding referendum was held in Telfair County at the 2008 general election on the question: “Shall the governing authority of Telfair County be changed

²⁶ For example, there are portions of only two precincts in District 1, and portions of only three in District 3.

from a board of commissioners consisting of five members elected from commissioner districts with the chairperson elected by the board members from among their number to a board of commissioners consisting of four members elected from commissioner districts and a fifth member to serve as a chairperson elected by the electors from the county at large?” The referendum was supported by 64.45% of the voters. Although the election was countywide, a statistical racial bloc voting analysis is rendered impractical given that of the 3,859 votes cast, 1,223 (31.6%) were cast either absentee, provisional, or during Georgia’s early voting period. Such votes are not reallocated back to their respective precincts.

Existing and Proposed Plans

Telfair County’s six Voting Precincts (Helena, Jacksonville, Lumber City, McRae, Milan, Scotland) are split among various county commission districts. Under the existing plan (telfcc2), District 1 contains parts of the Helena and McRae voting precincts. District 2 contains parts of the Lumber City, McRae, and Scotland precincts. See Table 2. Telfair County VTD Data. Districts 1 and 2 currently have black populations of 68.13% (64.97% black voting age population (BVAP)) and 44.16% (42.78% BVAP), respectively. None of the other three commission districts are above 24% total black population. District 1 contains a significant portion of the Helena and McRae precincts, those being the most populated areas of the county and containing significant black population. The areas in District 1 from Helena and McRae precincts are approximately 45% and 77% black voting age population, respectively.

Table 2. Telfair County VTD Data

<u>PRECINCT</u>	<u>POPULATION</u>	<u>BLACK POPULATION</u>	<u>WHITE POPULATION</u>
*Helena	2748	1326	1347
Jacksonville	1061	271	779
Lumber City	1972	788	1167
McRae	3939	1692	2190
Milan	1505	371	1115
Scotland	569	120	444

Source. U.S. Census Bureau

*VTD houses Telfair County Prison

The proposed plan (telfcc09p1) reduces the African American population in District 1 from 68.18% to 62.81% (58.88 BVAP), a significant decrease despite the district remaining majority-minority. The portion of the McCrae precinct currently in District 1 is approximately 77% African American VAP; under the proposed plan, it is reduced to 65%. The proposed plan increases the white population from the McCrae precinct by nearly 300 persons resulting in a decreased minority population.

Under the current plan, District 2 has approximately 45, 23, and 96 percent black voting age population from areas in Lumber City, McRae and Scotland precincts. Though not a majority-minority district at 46.16%, it elected an African American candidate under the existing plan in 2004 and 2008.

The proposed plan maintains portions of Lumber City (43% BVAP), McRae (56% BVAP), and Scotland (20% BVAP) precincts in District 2. The area in Scotland precinct increases from approximately 2 white persons to 444. This results in a 44.01% (40.89% BVAP) black district under the proposed plan. The additional minority voting strength from the McRae portion of the district is offset by the increase of white population from the district's portion of Scotland precinct. All districts in the proposed plan are necessarily larger given the reduction from 5 to 4 districts. Districts 3 and 4 remain relatively unaffected given the small number of African Americans residing in those areas of the county.

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The most recent County Commissioner election for District 2 (2008) involved the primary race featuring African American incumbent Alice B. Strong, who defeated a white challenger, David Cole Deen, 54.28% to 45.72%. The election showed that Deen gained significantly more precinct (polling) votes, with Strong winning mainly through absentee votes. This scenario was evidenced in the 2008 General election as well. Georgia has only recently passed legislation allowing absentee votes to be reallocated back to the voters' residential precincts, though it is uncertain if this particular law will apply to local elections.

Although a statistical analysis is not feasible, it is apparent that black voting strength will be diluted by the proposed decrease of minority population in District 2. Black voters have only been able to elect their candidate of choice in District 2 beginning in 2004. Prior to its creation in 2003, District 2 had been represented by white commissioners. The resulting reduction in black voting age population in District 2 will adversely affect minority voting and will place black voters in a more difficult position to elect candidates of choice. That reduction, prompted by the increase in white population in the district, will no doubt aid challenges to the incumbent minority official.

While a statistical analysis of endogenous elections is not feasible, such analysis of exogenous elections is practical using results from the six county precincts. An analysis of the 2008 US presidential race in Telfair County shows extreme levels of racially polarized voting. Whites gave 91% of their votes to presidential candidate John McCain, compared to 7.8% for Barack Obama. Results from precinct data also demonstrate overwhelming black support for Barack Obama.²⁷ Similar analysis demonstrates white voter turnout at 54% compared to 3% among African Americans. Given that 31% of the votes cast were through an alternative form of voting, and President Obama received 42.66% of all votes cast, one may safely conclude that a

²⁷ Results were formulated by regression analysis for the 2008 Telfair County General Election. Results for Black support produce extremely large percentages; bivariate ecological regression may yield results beyond the ordinary 1-100 bounds.

large percentage of minority voters participated in voting options other than precinct voting on Election Day, and cast their votes for Obama. Black/white support for candidates in the 2008 presidential election demonstrates racial voting in Telfair County elections.

The 2008 U.S. Senate race between white Republican, Democratic, and Libertarian challengers further demonstrates racial bloc voting patterns. In the General Election, Republican candidate Saxby Chambliss got 71.54% of the white vote in Telfair County while challenger Jim Martin was overwhelmingly supported by black voters. Martin won Telfair County with 51.53% of the votes, but lost statewide in a runoff election. Polarized voting results of the runoff election show similar outcomes with 92% white support for Chambliss and only 7.5% white support for Martin. Black voters overwhelmingly supported Martin in the runoff. However, Chambliss won Telfair County with 52% of the vote. Outcomes such as this demonstrate that minority representation on the Telfair County Commission would likely be reduced by 50 percent if the county's proposed plan is accepted. Evidence demonstrates that black voters are cohesive and at-large/countywide elections generally result in the minority preferred candidate losing. The result and impact of the proposed plan will certainly place minorities at a disadvantage and erode the significant gains they have made in past elections under the existing plan.

THE PROPOSED CHANGES SHOULD BE OBJECTED TO

Neither the state nor the county can carry its burden of proof under Section 5 of showing that the proposed changes will not have a discriminatory purpose or effect. As the Court held in *McCain v. Lybrand*, 465 U.S. 236, 257 (1984): "The preclearance process is by design a stringent one; it is predicated on the congressional finding that there is a risk that covered jurisdictions may attempt to circumvent the protections afforded by the Act; the burden of proof (the risk of nonpersuasion) is placed upon the covered jurisdiction." And as Grofman, Handley, and Niemi have noted: "Jurisdictions that wished to continue to discriminate against blacks simply moved from denying them access to the ballot to more sophisticated schemes developed to dilute the impact of their new voting strength."²⁸

In its submission, the Board says it is "merely attempting to comply with state and federal laws."²⁹ But where a proposed change in voting has a discriminatory purpose or effect within the meaning of Section 5, an effort to comply with state law is irrelevant.

Notably, the submitted plan was adopted without any input from the local minority community. As the county's submission letter states, "[a]ll proposed changes were initiated and carried out at the State level."³⁰ In addition, the vote of the Board

²⁸ Bernard Grofman, Lisa Handley, and Richard G. Niemi, *Minority Representation and the Quest for Voting Equality*. (New York: Cambridge University Press, 1992), 23-24.

²⁹ Joseph I Marchant to Chief, Voting Section, September 17, 2009.

³⁰ *Id.*

whether to approve the proposed plan was along racial lines, with the two black commissioners voting against the plan and the three white commissioners voting in favor of it. And as noted above, the proposed plan, with its reduction of black population in District 1 and 2, will dilute the voting strength of minority voters. It will also make it much more difficult for a black ever to serve as chair of the Board. Telfair County has produced no evidence that racially polarized voting, as found in prior judicial decisions and Section 5 objections by the Attorney General, has diminished in any way. To the contrary, the elections discussed above demonstrate that voting is still substantially along racial lines.

The county has also produced no evidence that the proposed changes are necessary to promote a compelling or other state or local interests. Indeed, in its submission letter the county attorney acknowledges that “I am not in a position to offer any reason or rationale for the proposed changes.”³¹ Many of the factors identified in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), as probative of a discriminatory purpose are present here: the sequence of events leading up to the proposed changes, including the relatively recent election of two blacks to the commission; the historical background of voting in Telfair County, with its racially polarized voting and efforts to dilute black voting strength; the fact that the proposed changes bear more heavily on one race than another; the absence of any “reason or rationale” for the proposed changes; and departures from the normal procedural sequence, such as the failure to consult local officials or members of the minority community. The evidence strongly suggests that the reason for the change was to dilute the voting strength of black voters and insure white control of the commission and its chair.

CONCLUSION

On behalf of the plaintiffs and voters represented by the ACLU, the ACLU respectfully requests that the Department of Justice deny preclearance to the present submission by Telfair County for failure of the county to prove that the change would have neither a discriminatory purpose or effect.

Sincerely,



Laughlin McDonald

Fred McBride

Meredith Bell-Platts

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³¹ Id.