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AN INTRODUCTION TO THE EXPIRING PROVISIONS OF THE VOTING RIGHTS ACT AND LEGAL ISSUES RELATING TO REAUTHORIZATION

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

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AN INTRODUCTION TO THE EXPIRING PROVISIONS OF THE VOTING RIGHTS ACT AND LEGAL ISSUES RELATING TO REAUTHORIZATION

TUESDAY, MAY 9, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:30 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Sessions, Graham, Cornyn, Leahy, Kennedy, and Feingold.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good morning, ladies and gentlemen. The Judiciary Committee will now proceed. Today we have the second in a series of hearings on renewing the temporary provisions of the Voting Rights Act. It is clear that the Voting Rights Act of 1965 has been effective in combating State-sponsored discrimination against minority voters, but there is still some discrimination which persists, and any is too much on the important right to vote.

The Supreme Court has held that we must establish a record and under the 14th and 15th Amendments, they have imposed a complex test of a program or legislation which must be congruent and proportionate. That has involved some grave complexities as they have interpreted, for example, the Civil Rights Act and *Lane* v. *Tennessee* and *Garrett* v. *Alabama*, making it very difficult to figure out exactly what is congruent and proportionate. There had been the test of substantial evidence, and in *Lane* they upheld the statute as it applied to access, and in *Garrett* they rejected the statute as applied to discrimination. So we have a challenge to establish a record which will withstand constitutional scrutiny.

There has been a shift in the Supreme Court standards with the more recent cases. Justice O'Connor's opinion imposed a standard of "influence districts where minority voters may not be able to elect a candidate of choice, but play a substantial if not decisive role in the electoral process."

Today we have a panel of experts to explore the constitutional, legal issues on very touchy subjects like how do you make a determination of substantial if not decisive? So we are in a tough line.

And then in *Reno* v. *Bossier Parish* or *Bossier Parish II*, the Supreme Court held that Section 5 prohibited voting changes that had the purpose to retrogress or reduce minority voting strength.

We have a distinguished panel, and we welcome you here, and very much appreciate your coming in to lend support to our efforts to establish this record.

Now I want to yield to, and with my compliments, Senator Kennedy, for his outstanding leadership on this important subject.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman, and thank you for setting these series of hearings that are going to be enormously important in terms of building the record in support of this legislation.

I think all of us understand this is one of the most important undertakings that we will have in this Congress, the extension of the Voting Rights Act, and I think all of us are very encouraged by the extraordinary bipartisanship which has been demonstrated here in the Senate, as well as in the House, and between the House and the Senate, we are off to a very important and favorable start.

I remember the 8 days of hearings that we had in this Committee in 1965, and the many days of debate on the floor, and we were able to pass the landmark civil rights law in the 1965 Act, with President Johnson signing this legislation in the President's Room in the Capitol. None of us imagined at that time that this legislation would be necessary in the year 2006 or into this century. But unfortunately, as the House record makes very, very clear, and other sources, that many Americans still face the barriers on voting because of race and ethnic background, the language-minority status, so the Congress must decide whether those barriers make the renewal of the Act, expiring provisions, necessary now, and in what form.

As the Chairman has pointed out, part of this assessment is understanding the relevant legal framework, and he has outlined those challenges in his opening comments.

So part of today's discussion may seem technical, but it really goes to the heart of protecting voting rights and ensuring that any bill we pass in this area gets it right.

I thank the Chair and look forward to the testimony.

Chairman SPECTER. Thank you very much, Senator Kennedy.

Senator Sessions, would you care to make an opening statement?

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Briefly, Mr. Chairman. I would thank you for having a good panel today. I am not sure, we may need to at some point hear from attorneys general and Governors who have to work with the Act on a regular basis, but I think the panel will be fair, and have both sides be heard.

Mr. Chairman, Alabama has a very grim history of voting rights in our State. Before 1965 only 19 percent of African-Americans in our State were voting, and they were denied the right to vote with any number of tactics and strategies, but it was in many ways a

ruthless decision just to deny them the right to vote, so that the majority of the white community could maintain power, and that is just what it was.

The Voting Rights Act, however one feels about it in terms of constitutionality or how it was crafted, was one of the best things that ever happened to the State. We now have—at one point I think we were the No. 1 State in the Nation with African-American office holders. I think today that may continue to be true, or we may be No. 2. In this last Presidential election, according to the Census Bureau, a larger percentage of African-Americans voted than whites in the State of Alabama. Now, that is the goal of the Act, that was the purpose of the Act, to have that kind of thing occur.

The large numbers of African-Americans holding important offices, for example—there were over 750 elected officials, who are African-Americans in Alabama. That includes a United States Congressman, eight State Senators, 27 members of the State House of Representatives, 46 mayors, and 80 members of county commissions, school board members, town council members and the like.

So I just would first want to say that the people of Alabama understand that this change is good, and that the people of my State do not want to do anything that would suggest that there would be any interest in moving away from this great right of everybody to vote, and including African-Americans in our State, and I think that is important to say. They do not want to fight over it. We are growing economically. We are doing well economically, and we want to continue to do so, and that would never have happened had the kind of discrimination in the '60s and before continued today. I want to be real clear about that.

How we deal with the Act is something that is worthy of discussion. Some of our panelists have different ideas, and we would be delighted to hear them. I think we should think about this in a calm and reasoned and effective way, and not allow ourselves to be driven by racial politics or attempts to polarize votes, or attempts to gain political advantage on one side or the other. We ought to ask ourselves how is this Act working? What is necessary? How we should improve it if need be, and maybe some other areas of the country ought to be covered by it. Certainly I hear complaints in big cities. I never heard any complaints out of Philadelphia about votes, but I have in Boston and Chicago and New York, and so there are other areas of the country perhaps that need some of the provisions in here to apply to them.

I am hopeful that we will have a good discussion, that we will reauthorize this Act in a way that guarantees that there is no backsliding on the right of African-Americans to vote in the south or in any other part of the country.

One of the best things that has happened, I will repeat, to our State, is the full participation of African-Americans in public life, and that was denied to them before this Voting Rights Act was enacted.

As we go forward, I would hope that we will think carefully about how to make it applicable to the State in effective ways. As a United States Attorney I had the responsibility of enforcing the Act. As Attorney General of Alabama for a short period, 2 years,

I saw it from the State side. I see my colleague, Senator Cornyn, here; he is former Attorney General of Texas. You have to deal with it in a number of ways. So we have some perspective on the practical application of the Act that I think would be worthy of some discussion and detail as we go forward.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Sessions.

Senator Cornyn, would you care to make an opening statement?

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you, Mr. Chairman. Just briefly. Thank you for the opportunity, and thank you for conducting these important hearings. I can think of few issues more important to our country than full participation in the political process, and that is what we are here to try to guarantee and to continue.

I particularly appreciate your courtesies, Mr. Chairman, in making sure that we have an orderly process and an opportunity to have a full and complete record during the course of these hearings, and I particularly look forward to hearing from the witnesses today and tomorrow and the coming weeks about the expiring provisions of Section 5 of the Voting Rights Act, and specifically about which jurisdictions throughout our Nation should be subject to Federal oversight in the future and why.

I know that there are a number of significant changes in the legislation that has been introduced, including the overruling of a couple of opinions of the U.S. Supreme Court, and I think we ought to look at those very carefully.

Finally, I would say that we all know that whatever we do as a Congress will be scrutinized in the Federal Courts, and part of our goal I think ought to be to make sure that, to the extent possible, we make sure that Congress will prevails, and that anything we do in terms of reauthorizing the Voting Rights Act is not susceptible to a likely successful challenge in the Federal Courts.

So I appreciate very much the opportunity to be here and welcome each of the witnesses, I look forward to your testimony.

Chairman SPECTER. Thank you very much, Senator Cornyn.

Senator Sessions, Senator Cornyn and Senator Coburn had written especially to me on the issue of adequacy of the hearings and an opportunity for a wide variety of witnesses to appear, and I have assured them that that would be the case. We are trying to comply with the request of the House to move ahead.

Senator Feingold has arrived. Would you care to make an opening statement, Senator Feingold?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Just a couple of comments. Let me thank our witnesses for being here, particularly on such short notice. I have asked to be added as a co-sponsor of the reauthorizing legislation that the chairman and Senator Leahy have introduced, and I am glad that the Committee is moving forward with the hearings process.

This bipartisan legislation sends a strong and important message that Congress remains committed to protecting constitutional rights of minority voters under the 14th and 15th Amendments. I believe this legislation is crucial, and I look forward to its prompt approval in the Senate and the House.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Feingold.

We turn now to our first witness, Professor Chandler Davidson, Professor at Rice University, and the Tsanoff Chair of Public Affairs Emeritus. He and Professor Bernard Grofman of the University of California directed about 30 political science historians and sociologists and voting rights lawyers in an effort to assess the impact of the Voting Rights Act in the South, and his resulting book, "Quiet Revolution in the South" won the Richard Fenno prize awarded by the American Political Science Association for the best book published on legislative behavior of that year. He holds a bachelor's degree from the University of Texas, a master's and Ph.D. from Princeton.

Thank you for joining us, Professor Davidson. Our customary procedure is to have 5 minutes for statements by witnesses. Your full statements will be included in the record, and then we will turn to the panel for 5-minute rounds.

STATEMENT OF CHANDLER DAVIDSON, PROFESSOR EMERITUS, RICE UNIVERSITY, HOUSTON, TEXAS

Mr. DAVIDSON. Chairman Specter, and distinguished members of this Committee, thank you for inviting me to testify before you today. I am deeply honored. The Voting Rights Act was the climax of the period described as the Second Reconstruction. Passed at the behest of President Lyndon Johnson by a bipartisan Congressional majority in 1965, its purpose is to enforce the 15th Amendment. It consists of both a permanent part applying nationwide, and a nonpermanent one consisting of features originally intended to expire in 1970. Congress, however, renewed and amended them in 1970, 1975 and 1982.

The Act has targeted both major types of racial vote discrimination: disenfranchisement and vote dilution. The first is exemplified by literacy tests administered unfairly by whites. The second consists of procedures in predominantly white venues, which combined with racially polarized voting, prevent minority voters from electing their preferred candidates.

The major permanent feature of the Act is Section 2, which applies nationally. It prohibits any voting qualification or practice, whose purpose or result is denial or abridgement of voting rights on the basis of a citizen's race, color or membership in one of four language groups. An important nonpermanent feature is Section 5. It requires all covered States and political subdivisions to submit proposed election-related changes for preclearance, either to the Attorney General or the U.S. District Court for the District of Columbia, to ensure that the proposed change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. Currently, the jurisdictions subject to preclearance include eight States in their entirety and parts of eight others.

Another important temporary provision of the Act, contained in Sections 6 through 9 and 13, enables the Attorney General to send Federal observers to certain jurisdictions when racial vote discrimination appears likely on election day.

Yet another temporary provision concerns citizens whose proficiency in English is limited. In 1975 Congress concluded that, "through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the election process," including American Indians, Asian Americans, Alaska natives and citizens of Spanish heritage. Under different coverage formulas, Section 4(f)4 and Section 203 require language assistance for these citizens.

The Act has had a major impact in incorporating racial and language minorities into the polity. Perhaps the most striking evidence is the extraordinary increase in black elected officials in the South. In 1970 there were 565. In 2000, there were 5,579. Nonetheless, race is still a major fault line in American politics, and problems of racial discrimination in voting are widespread, if diminished.

Research in 2005 by the National Commission on the Voting Rights Act, a task force created by the Lawyers' Committee for Civil Rights Under Law, focused on the extent to which the Federal Government and private citizens employed the Act to combat racial or language-group discrimination since 1982. Among its findings, the Justice Department sent 626 letters objecting to one or more proposed discriminatory election changes in Section 5 jurisdictions, and there would have been even more if some jurisdictions had not withdrawn their proposals after the Department had requested more information about them.

The Department sent several thousand Federal observers to participate in 622 election day coverages when it had reason to expect racial problems at the polls. Not only did they sometimes report discrimination, their presence probably discouraged even more.

A nationwide study of Section 2 lawsuits with results favorable to minority plaintiffs, conducted at the University of Michigan Law School, revealed 117 reported cases between 1982 and 2005. For the same period, research by the National Commission, revealed 653 successful Section 2 cases, reported and unreported, in nine Section 5-covered States alone.

In summary, the Commission's findings and other research point to a worrisome persistence of activities the Act was fashioned to prevent. For this reason, it is my opinion, as one who has written about the Act and its effects for more than 30 years, that its nonpermanent features should be renewed.

[The prepared statement of Mr. Davidson appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Davidson.

Our next witness is Mr. Theodore M. Shaw, Director-Counsel and President of the NAACP Legal Defense and Educational Fund, who has a reputation as one of the Nation's leading civil rights attorneys. Since joining the Legal Defense Fund in 1982, he has litigated school desegregation, capital punishment, and other civil rights cases. He has taught constitutional law at Michigan Law School, Temple Law School and New York Law School. He has a

bachelor's degree from Wesleyan and a law degree from Columbia, where he was a Charles Evans Hughes Fellow.

Thank you for coming in today, Mr. Shaw, and the floor is yours for 5 minutes.

STATEMENT OF THEODORE M. SHAW, DIRECTOR-COUNSEL AND PRESIDENT, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NEW YORK, NEW YORK

Mr. SHAW. Thank you, Mr. Chairman, for inviting me to participate in this important hearing, and I thank the other distinguished members of the Committee.

The Legal Defense Fund has been engaged in voting rights almost since its inception over six decades ago, and we have been engaged in the enforcement of the Voting Rights Act since the moment it was enacted. We have a very solid conceptual understanding of the Voting Rights Act, but our understanding is not limited to a conceptual analysis, as important as that is. It is tempered by experience in representing African-American plaintiffs in litigation, including some of the most important cases involving the interpretation and application of the Voting Rights Act that have been decided by the Supreme Court in other cases. We have been involved in almost every major voting rights case before the Supreme Court. This experience is directly rooted in our representation of African-Americans.

The Voting Rights Act is an integrated statutory scheme that works to address one of this Nation's most difficult and deeply entrenched betrayals of democracy. It is only appropriate that Congress enacted one of the most vigilant laws to successfully address that betrayal.

We recognize what has been called the new federalism, which the Supreme Court has articulated in the *Boerne* line of cases, and those cases have raised significant questions about the scope and the reach of Congressional authority under Section 5 of the 14th Amendment. But even in recognizing that, we also recognize that in each of the cases that have followed *Boerne*, whether we are talking about *Florida Prepaid*, *Kimel*, *Morrison*, *Garrett*, *Hibbs*, *Tennessee* v. *Lane*, in each of those cases in which the Voting Rights Act has been referenced, the Court has held up the Voting Rights Act as an example of proportionality and congruence, and there is no indication on the part of the Court, certainly a majority of the Court, that the Voting Rights Act itself is unconstitutional.

We believe that the Court has pointed to the Act as an example of the kind of proportionality that would survive *Boerne* and of congruence, and we recognize that the Court is in flux. It has changed. But no one can read the Court's tea leaves. The Legal Defense Fund believes that Congress, while respectful of the Supreme Court's admonitions concerning proportionality and congruence, should not, given the successes of the Act, undermine the strength of the Act by preemptively weakening it on anticipation of a hostility that exceeds anything that the Court has said.

We believe that the best indication of where Congress is, is the *Monterey County* case, *Lopez*, that was decided, in which the Court declined to call into question the constitutionality of Section 5's region application.

We also believe at the Legal Defense Fund that Congress should exercise an abundance of caution as it reauthorizes the temporary provisions of the Voting Rights Act, and restores the Voting Rights Act to its full strength. But we believe that an abundance of caution should be reflected, not in a weakening of the reach of the Act, but rather, in ensuring that the record is a strong record. That record exists as manifested in the reports that have been done by the Leadership Conference with respect to the States. It exists with respect to the National Commission, with respect to the ACLU report, and it is a strong record.

Finally, some say that the Act is a victim of its own successes. We caution, by looking at the school desegregation experience, we caution what may happen when we remove the protection of the Constitution or civil rights initiatives or laws. There is a danger in back-sliding. There is a danger in resegregation of politics, just as we have seen in resegregation of public schools with the abandonment of desegregation efforts that were vigorously prosecuted and protected by the courts.

Thank you, and I look forward to a question and answer period.

[The prepared statement of Mr. Shaw appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Shaw.

Our next witness is Professor Richard Hasen, the Hannon Distinguished Professor of Law at Loyola. He is the co-author of a leading case book on election law, and has authored more than three dozen articles on the subject, and his most recent book "The Supreme Court and Election Law: Judging Equality from *Baker* v. *Carr* to *Bush* v. *Gore*." It is quite a treatise. He has his bachelor's degree from the University of California, has a master's, J.D. and Ph.D. from UCLA.

We welcome you here, Mr. Hasen, and look forward to your testimony.

STATEMENT OF RICHARD L. HASEN, WILLIAM H. HANNON DISTINGUISHED PROFESSOR OF LAW, LOYOLA LAW SCHOOL, LOS ANGELES, CALIFORNIA

Mr. HASEN. Thank you very much, Chairman Specter, and Senators on the Judiciary Committee. I appreciate this opportunity to appear before you today to testify about Senate Bill 2703 concerning reauthorization of the expiring provisions of the Voting Rights Act.

I come before you as a strong supporter of the Act, who believes the expiring provisions should be renewed in some form, but also as someone, who after studying this issue for a number of years, has deep concerns about the constitutionality of the proposed amendments. I believe the Act has been an unqualified success in a remarkably increasing minority voter registration and turnout, increasing the number of African-American and Latino elected officials, and the ability of minority voters to effectively exercise their right to elect representatives of their choice.

But I urge the Committee to spend the time to craft a bill that will both pass constitutional muster in the Supreme Court and do the important work of continuing to protect minority voting rights in this country.

The constitutional issue, which I have explored in a Law Review article and have submitted to the Committee, is this: in recent years the Supreme Court has held that Congress has limited power to enact civil rights laws regulating the States. Beginning with the 1997 case, *City of Boerne* v. *Flores*, the Court has held that Congress must produce a strong evidentiary record of intentional State discrimination to justify laws that burden the States. In addition, whatever burden is placed on the States must be congruent and proportional to the extent of the violations.

Beginning in 1965, Congress imposed the strong preclearance remedy on those jurisdictions with what the Supreme Court called a pervasive, flagrant and unremitting history of discrimination on the basis of race. In fact, *Carolina* v. *Katzenbach*, the Court upheld Section 5 of the Act as a permissible exercise of Congressional power.

What has changed since 1965? Both the law and the facts. On the law, the Court, in my view, wrongly, has placed a higher burden on Congress to justify laws aimed at protecting civil rights. On the facts we have an evidentiary problem. Because the Act has been so effective, it will be hard to produce enough evidence of intentional discrimination by the States so as to justify the extraordinary preclearance remedy for another 25 years.

I am afraid that much of the evidence referenced in the bill's findings will not be enough for the Supreme Court. For example, the findings point to Department of Justice objections to preclearance requests by the States. As you can see from Figure 3 in my article, in recent years objections have been rare. In the most recent 1998 to 2002 period, DOJ objected to a meager 0.05 percent of preclearance requests. Updating these data, DOJ interposed just two objections nationwide overall in 2004, and one objection in 2005.

The problem with using objections as evidence of intentional State discrimination is unfortunately even worse than it appears. In the 1990's DOJ adopted a policy of objecting to certain State actions that were perfectly constitutional, a policy the Supreme Court later rejected.

The House Judiciary Committee has put together a voluminous record to support renewal of Section 5. Although I have not yet reviewed that entire record, my impression from what I have reviewed is that the record documents isolated instances of intentional State discrimination voting. The vast majority of evidence relates to conduct that does not show constitutional misconduct by the States. Moreover, the record seems to show that the problems continue to exist across the Nation.

The Court may insist on evidence that covered jurisdictions present greater problems than the rest of the Nation to justify the geographically selective preclearance remedy. I have heard the argument that the Court will give Congress a pass on Congress's requirements to produce evidence because Section 5 has been such a good deterrent. I hope that that theory is right, but I am not confident that the new Supreme Court would be inclined to agree on this point. The problem with such a theory is that it would justify preclearance for an undetermined amount of time into the future.

In addition to the problem of producing enough evidence of intentional State discrimination, there is the tailoring issue. That current Act uses a formula for coverage based on a jurisdiction's voter registration or turnout, and its prior use of a discriminatory tester device for voting, such as a literacy test. The proposed amendments would not update this formula in any way. The Act relies on data from 1964, 1968 or 1972 elections. This turnout figures, particularly turnout in minority communities, bear little resemblance to turnout figures today.

I recognize this is politically difficult, but Congress should update the coverage formula based on data indicating where intentional State discrimination in voting on the basis of race is now a problem or is likely to be one in the near future.

Here are three additional steps that Congress should carefully consider to bolster the constitutional case. First, Congress should make it easier for covered jurisdictions to bail out from coverage under Section 5 upon a showing that the jurisdiction has taken steps to fully enfranchise and include minority voters. The current draft does not touch bailout, and few jurisdictions have bailed out in recent years.

Second, Congress should impose a shorter time limit, perhaps 7 to 10 years for extension. The bill includes a 25-year extension, and the Court may believe it is beyond congruent and proportional to require, for example, the State of South Carolina to pre-clear every voting change, no matter how minor, through 2031.

Third, Congress should more carefully reverse only certain aspects of *Georgia* v. *Ashcroft*. *Georgia* v. *Ashcroft* makes it easier for covered jurisdictions to obtain preclearance, meaning that the burden on covered jurisdictions is eased, and therefore, the law looks more congruent and proportional. Reversing the case as a whole, as this bill apparently would do, though the language in this respect is poorly drafted, could weaken the constitutional case for the bill. I would suggest tweaking rather than reversing the *Ashcroft* standard.

Besides these changes, there are ways to strengthen the bill to assure that the new provisions of the Act remain a crucial element in assuring political equality and the right to vote for all Americans, regardless of race. At the top of my list, given recent troubling allegations of partisan manipulation of the preclearance process is for the Court to reverse the Supreme Court's holding in *Morriss* v. *Gressette*. This reversal would allow appeals of DOJ decisions to grant preclearance in controversial and politically charged cases, such as those involving Texas redistricting and the Georgia voter identification law.

Thank you for the opportunity to present these views. I look forward to your questions.

[The prepared statement of Mr. Hasen appears as a submission for the record.]

Chairman SPECTER. Thank you, Professor Hasen.

Our next witness is the Director of the American Civil Liberties Union Voting Rights Project, Laughlin McDonald. He has had a leading role in litigating the Voting Rights Act of 1965, being involved in almost three dozen lawsuits, and has won some of the most significant victories for the ACLU on issues such as enforce-

ment of one person-one vote. An author of five books, has more than a dozen articles on voting discrimination, he received his bachelor's from Columbia and his law degree from the University of Virginia.

Thank you for coming in today, Mr. McDonald, and the floor is yours.

STATEMENT OF LAUGHLIN MCDONALD, DIRECTOR, ACLU VOTING RIGHTS PROJECT, ATLANTA, GEORGIA

Mr. MCDONALD. Thank you very much, Mr. Chairman, and members of the Committee.

On behalf of the ACLU, I would like to express our strong support for the pending bill, which would extend Section 5 and remedy the *Bossier II* and *Georgia* v. *Ashcroft* decisions.

I also want to point out that the Section 5 provisions have been challenged a number of times, and all those challenges have been rejected. It was challenged in 1965 by six southern States in *South Carolina* v. *Katzenbach*. The 1975 extension of Section 5 was challenged by the city of Rome, Georgia, and was rejected by the Supreme Court. After the extension of Section 5 in 1982, Sumter County, South Carolina filed yet another challenge to the constitutionality of the statute, and it said essentially that the 1982 extension was unconstitutional because the trigger coverage formula was outdated. The three-judge court, however, rejected that challenge and held, "Section 5 had a much larger purpose than to increase voter registration in a county like Sumter to more than 50 percent."

People have talked about the *Boerne* decision, but I would echo Ted Shaw's comments that every one of the so-called *Boerne* decisions expressly cites the Voting Rights Act and Section 5 as preeminent examples of Congressional authority to enforce the race discrimination provisions of the 14th and 15th Amendment, and it is especially worthy of note that the Supreme Court itself relied upon *City of Boerne* in 1999 in rejecting a challenge to the constitutionality of Section 5 made by the State of California. It held that legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power, even if the process that prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States. I sometimes think the Supreme Court does not write with the felicity and clarity that it ought to, and certainly "congruence and proportionality" is a clumsy phrase.

But I think also the sunset provisions of any extension of Section 5, as well as its limited geographic application, would further argue for its constitutionality, and *Boerne*, for example, makes precisely that point, that termination dates or geographic restrictions tend to ensure Congress's means are proportionate to ends legitimate.

I think the case for extension of Section 5 has been documented very well by the various organizations and by the testimony of witnesses, both before the House and the Senate, and I will not repeat what is contained in those reports, but I would like to update the report that the ACLU filed by bringing to the Committee's attention two recent developments in the courts that were not covered in the report.

In May 5, 2006, just several days ago, the Court of Appeals of the Eighth Circuit reversed a decision of the District Court which had dismissed a vote dilution challenge to elections for the city of Martin in South Dakota, and it concluded, "Plaintiffs proved by a preponderance of the evidence that the white majority usually defeated the Indian-preferred candidate in Martin aldermanic elections." And the Court also noted the ongoing history of intentional discrimination against Native Americans in Martin. Here is what the Court said: "For more than a decade Martin has been the focus of racial tension between Native-Americans and whites...Most recently, resolution specialists from the Justice Department attempted to mediate and end the claims of racial discrimination by the local sheriff against Native-Americans."

Martin is the county seat of Bennett County, which is located between Shannon and Todd Counties, both of which are covered by Section 5. I think the history of discrimination reported in that decision and other decisions in Indian country really underscore the ongoing nature of discrimination and strongly support the continuation of Section 5.

There is a more recent lawsuit that has been filed just 2 weeks ago because Randolph County, Georgia, had implemented a voting change without complying with the Voting Rights Act. What they essentially did was to adopt a redistricting plan that took a black incumbent out of his majority black district, Mr. Cook, and put him into a majority white district. Well, given the existence of racial polarization in Randolph County, there was very little prospect that Mr. Cook, who had the overwhelming support of black voters, would be elected.

We had a hearing before a single-judge court who granted a temporary restraining order, in effect enjoining the implementation of that change, and we have a hearing before a three-judge court later on this month. But all of that underscores continuing problems.

And let me finally say that one of the most sobering facts to emerge from the report compiled by Congress is the continuation of racially polarized voting. I would suggest that everyone read the 2002 opinion by the three-judge court in the Colleton County case, and it said that, "Racially polarized voting has seen little change in the last decade. Voting in South Carolina continues to be polarized to a very high degree."

And I would close, Mr. Chairman, by saying that the Supreme Court has called the right to vote a "fundamental political right preservative of all rights," and the House and Senate bills will help ensure that that fundamental right continues to remain a reality.

[The prepared statement of Mr. McDonald appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. McDonald. What was the situs of the case involving Mr. Cook?

Mr. MCDONALD. Randolph County, Georgia, Your Honor.

Chairman SPECTER. Georgia?

Mr. MCDONALD. Yes, sir.

Chairman SPECTER. We have 9 minutes left on a vote, so we will recess very briefly, and we will return just in a few minutes. When the votes occur, that is our No. 1 duty, even with the distinguished panelists we have here today.

[Recess 10:10 a.m. to 10:30 a.m.]

Chairman SPECTER. We turn now to the final witness on the panel, Professor Samuel Issacharoff, Professor of Constitutional Law at New York University; lengthy career in legal education, having taught at Columbia, Oxford, University of Texas, and University of Pennsylvania; published extensively, including the book "The Law of Democracy: Legal Structure of the Political Process"; a bachelor's degree from State University of New York, law degree from the Yale Law School, where he served as an editor of the Yale Law Journal.

Thank you for joining us, Professor Issacharoff, and we look forward to your testimony.

STATEMENT OF SAMUEL ISSACHAROFF, REISS PROFESSOR OF CONSTITUTIONAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NEW YORK

Mr. ISSACHAROFF. Thank you very much, Chairman Specter and members of the Committee. It is a great honor to be here. I began my legal career as a law student watching this Committee's deliberations in 1982 over the reauthorization of Section 5 and the amendment of Section 2, and it is a great—

Chairman SPECTER. Did you write a comment for the Yale Law Journal on that?

Mr. ISSACHAROFF. I did, Your Honor.

[Laughter.]

Chairman SPECTER. Don't promote me, Professor.

Mr. ISSACHAROFF. It is embarrassing to have one's student note brought up.

Chairman SPECTER. I wrote one myself. That is why I asked.

Mr. ISSACHAROFF. Several members of the panel have already spoken of the tremendous responsibilities and the need for caution on the part of this Committee, and I fully agree with those views. I think that the reason for caution is twofold.

First, as has been amply explained and demonstrated, the Voting Rights Act has been the most effective civil rights statute that the Congress has ever passed, and it behooves this Committee to act cautiously in preserving its legacy and making sure not to derail what has actually transformed the face of politics in the United States.

I think that the second source of caution is that the Supreme Court has sent mixed signals as to what the responsibilities of the Congress are with regard to any civil rights statute pursuing the aims of the 14th and 15th Amendment. Part of the signal is from cases like *City of Boerne* and the congruence and proportionality standard. Other times, however, is in the *Hibbs* case, the Court has granted this Congress wide berth to pass a statute that seems appropriate to whatever this Congress believes needs to be done to enforce the Reconstruction Amendments.

I think, however, that a major source of constitutional tension arises with the coverage formula for jurisdictions under Section 5 of the Voting Rights Act. The bulk of the coverage of Section 5 today is still triggered by voter turnout figures from 1964, a date that seems remote in the approaching 2007 expiration, and risks appearing constitutionally antiquated by the proposed next expira-

tion date of 2032. By my calculation, in 2032 the youngest eligible voter from 1964 will be 86 years old.

I have prepared written comments and submitted a copy of the Law Review article on some of the issues involved in reauthorization. I thought I would direct my comments briefly to five issues that I think this body might consider in reauthorizing Section 5 in a way that gives it greater constitutional protection and may also give it greater effectiveness.

First, I would recommend that the unit of coverage be moved from the States to political subdivisions of the States. I think that virtually every objection from the Department of Justice over the last 5 years, or maybe even more, on matters not having to do with redistricting has been directly to local jurisdictions and not to the States.

Second, I think that is important, as Professor Hasen said a minute ago, to liberalize the bailout provisions. I think that moving the scope of coverage from the States to the political subdivisions would have that effect. I think that it also would help the Act if bailout provisions were more objective based upon lack of objections by the Justice Department or lack of any affirmative lawsuits under Section 2 or other claims of minority vote harassment.

Third, I think that if we were to start from scratch today, we might consider a different kind of administrative mechanism other than the preclearance, and one way of thinking about this is that preclearance is extremely onerous and applies an ex ante and ahead-of-time review much like the FDA to any proposed change. One could also imagine a Securities and Exchange Commission type reporting system that covered jurisdictions who have not actively violated the Act in the last 5 years, or some defined period, would be required to post on a website any proposed change and the reasons for it and be subject to either affirmative litigation under Section 2 or simply a false statement litigation.

Fourth, I would expand the jurisdictional reach of Section 5 by allowing this disclosure regime to be applied to any jurisdiction that has been found guilty of a Section 2 violation or that has engaged in affirmative actions against minority voters.

And, finally, I think that there is reason for concern with the language on the overruling of *Georgia* v. *Ashcroft*, and I think that the reason for the concern is that the current statute faces a climate very different from that in 1965 in that you have real bipartisan competition in most of the covered jurisdictions today, which means that certain features of conduct, State conduct, will not go by unattended, will not simply pass muster without anybody realizing. And I would recommend removing statewide redistricting from Section 5 overview altogether. That has been an area of some controversy with the Department of Justice, and it has been an area where there is plenty of litigation in every redistricting anyway, and I don't think Section 5 worked particularly effectively there.

Thank you.

[The prepared statement of Mr. Issacharoff appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Issacharoff.

Focusing on the standards from *Boerne III*, there must be a showing that it is "recent in time and persists to the present day." Professor Davidson, what is the best evidence that discrimination persists to the present time? I am going to ask every one of you that question because the critical aspect of our record is to show just that.

Professor Davidson?

Mr. DAVIDSON. One example of it is certainly the large number of Section 5 objections since 1982, and it is true—

Chairman SPECTER. Did they persist right up to the present time?

Mr. DAVIDSON. There have been very few in recent years. There are a number of possible explanations for that. I think some of them have been mentioned this—

Chairman SPECTER. Well, I am not looking for explanations as to why not. I am looking for evidence as to what is. What is the best evidence of discrimination right up to the present time?

Mr. DAVIDSON. I had the privilege of attending several of the—in fact, most of the hearings that the National Commission on the Voting Rights Act held this past year, regional hearings around the country. And I was struck at every one of them by the testimony of people talking about racially polarized voting in their areas, talking about difficulties that some members of minority communities had faced at the polls.

Chairman SPECTER. So you think it continues right to the present time.

Mr. DAVIDSON. Yes, sir, I do.

Chairman SPECTER. I only have a few minutes, so I want to move to Mr. Shaw with the same question. Best evidence that it exists now, Mr. Shaw?

Mr. SHAW. I think the record as it stands now is replete with examples of ongoing discrimination. Let me point to one, and also, I want to use it as an opportunity to address one of the suggestions that Professor Issacharoff has made.

In Louisiana, in the last decennial redistricting, or after the last decennial redistricting, Louisiana, the State of Louisiana, sought preclearance of its plan for the State House of Representatives and filed the Declaratory Judgment Act in the D.C. District Court rather than seeking preclearance. And among the things that it was trying to do, it wanted to have a redistricting plan that eliminated one black opportunity district in Orleans Parish. The State argued that there ought to be proportionate representation for white voters in Orleans Parish, even though it was not arguing that black voters ought to have proportionate representation statewide. There was no replacement district that was created. Its novel theory was based in part upon population loss in Orleans Parish over the prior decade.

That plan ultimately did not work. It was not successful. But it was a statewide attempt that would have been discriminatory and it would have harmed the voting rights of African-Americans. And I also point to it as an example of how we still have these problems on the statewide level.

I agree also with Professor Davidson about the importance of racially polarized voting, which people underrecognize in terms of its

significance and how it interacts with redistricting schemes and ways that perpetuate discrimination.

Chairman SPECTER. Did you want to make a comment on what Professor Issacharoff said?

Mr. DAVIDSON. Pardon me?

Chairman SPECTER. Did you want to make a comment on something that Professor—

Mr. DAVIDSON. Yes. Well, I tried to do it just now. The point I am making, is that Professor Issacharoff's view is an interesting idea, but I strongly disagree with the notion that State level redistricting should drop out of Voting Rights Act protection. The Louisiana redestricting is an example of what one State was doing that was a clear violation of the Voting Rights Act.

Chairman SPECTER. My time is limited, so what I am going to ask Professor Hasen, Mr. McDonald, and Professor Issacharoff to do is to submit in writing the best evidence that you know that the discriminatory practices exist right up to the present time. I want to have as strong a record as we can on that point.

Then I would also ask you to submit one other point in writing. We are a little constrained on time today because we have the Brett Kavanaugh hearing this afternoon. We have an extraordinarily busy Judiciary Committee schedule, and we are also preparing for the immigration work next week. But what I would like you to do is address the question of the Supreme Court standard on *Boerne* of congruence and proportionality as to whether there is anything that the Congress can do legislatively.

I am very much concerned about the Supreme Court striking down our acts, as they did in *Morrison*, because of our "method of reasoning." And Justice Scalia has been very critical of the proportionality and congruence test, saying that it is the Court's effort to make Congress do our homework, treating us really like schoolchildren. And it is such an ephemeral and undefinable test which leads to policy-driven decisions. I would like you scholars to give the Committee suggestions, if you have any, as to how we deal with that or if we can deal with it in a legislative context.

Senator Feingold?

Senator FEINGOLD. Yes, thank you, Mr. Chairman.

Mr. McDonald, we have heard testimony from Professor Hasen that there is an "evidentiary problem" in terms of reauthorizing certain expiring provisions, and that it will be difficult to produce evidence of intentional discrimination by the States that can withstand a Supreme Court challenge.

Now, from what I have heard, the testimony before the House Judiciary Committee as well as reports by groups like the ACLU provide compelling evidence to the contrary. Given your extensive work on current voting rights litigation, could you please share your views on this assertion?

Mr. MCDONALD. Well, one of the things that we tried to do was to make the very best case that we could for the need to extend Section 5, and we attempted to do that not by making, you know, statements on our behalf but by having the Department of Justice's findings be presented to the Committee, by having the Court's findings be presented to the Committee. And one of the critical things, I think, is that people need to talk to minorities in these commu-

nities. I mean, go to Randolph County, Georgia, and hear Bobby Jenkins, who is the plaintiff in this recent lawsuit that we filed, and he will tell you about the reality of racial division and polarization. Talk to Beulah Dollar, who is a black woman elected from a majority black district in Telfair County, Georgia. I had a long conversation with her the day that I left Atlanta on Monday about a new voting practice being implemented in that jurisdiction, and I wrote a letter pointing out to the judge of probate that they were implementing what probably was a change in voting that needed to be precleared under Section 5.

But in our report, we talked about the approximately 293 cases that we have been involved in since 1982 and have let people who are plaintiffs in those cases speak for themselves, report the findings of the courts, and the stipulations that parties have made. I think it is a very strong record for the continued need for Section 5.

Senator FEINGOLD. Mr. Shaw, Professor Issacharoff testified that legislation that is hostile to minority interests will face "political objections" as well as litigation under either Section 2 or the Constitution. This seems to be shifting the burden back to individuals to fight for their rights as opposed to keeping the burden on those charged with crafting the law for jurisdictions with a history of discrimination.

Many advocates of the Voting Rights Act have made the case regarding the importance of deterrent effects of the expiring provisions of the Act, in particular, Section 5 and Section 203. Can you explain this argument to us?

Mr. SHAW. Senator, the testimony that we have heard about concerns with respect to Section 5 and a number of Section 5 objections recently does not capture the entire field that is in play. So, for example, the Department of Justice entertains requests for information from jurisdictions that sometimes obviate the necessity of a Section 5 adverse finding. And that is still the Act working in a powerful way.

The fact is, from what we understand, that also some jurisdictions do not engage in actions they otherwise might take that would have a discriminatory, retrogressive, or dilutive effect because of the existence of Section 5 and the preclearance requirements. And, of course, while my testimony did not focus on Section 203, we also believe that Section 203 ought to be extended because it has helped to extend democracy in a meaningful way.

But the main point here that I am trying to make is that both with respect to the effect of the existence of Section 5 on jurisdictions that otherwise would engage in discriminatory activities and with respect to the request for information, the Act works powerfully in ways that may appear under the radar screen that may not appear easily in statistics.

Senator FEINGOLD. Thank you, Mr. Shaw.

Back to Mr. McDonald. You have made the point that objections by the Department of Justice are not necessarily the best measure of whether there is a continued need for expiring provisions, such as Section 5. Is there any way to measure the deterrent effect of these provisions? And are there other ways of gauging whether they are still needed?

Mr. MCDONALD. Well, some jurisdictions openly say that they are going to make a voting change, but in doing so they must comply with Section 5. I know the State of Georgia just last year made some changes to its redistricting plan, and they adopted a resolution that they would comply with Section 5. And the jurisdictions just do not want to have that struggle.

Nobody has really mentioned another critical role that Section 5 plays, and that is, the courts routinely apply it. Redistricting is such a politically charged issue that so many States are simply unable to do it. South Carolina has not redistricted itself constitutionally in three decades. Georgia was unable to do it this time around. So the courts ended up doing it, and all of those courts in South Carolina and in Georgia expressly said that in adopting plans they would comply with the non-retrogression standard of Section 5 and the racial fairness standard of Section 2.

So Section 5 plays a very important role that does not necessarily have only to do with preclearance decisions by the Attorney General.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Feingold.

Senator Sessions has graciously agreed to chair the balance of this hearing, so I turn the gavel over to him.

Thank you very much, gentlemen, for coming in. Your testimony is very, very important. I regret to leaving a little early, but we have the Kavanaugh hearing on tap for 2 o'clock this afternoon.

Thank you very much, Senator Sessions.

Senator SESSIONS. [Presiding.] Well, Mr. Chairman, we know you are not afraid of work, so you are doing something, I am sure.

[Laughter.]

Senator SESSIONS. No one works harder at keeping this Committee going and dealing with the issues we have to deal with.

Chairman SPECTER. Thank you.

Senator SESSIONS. You know, as I indicated in my remarks, there was very, very real discrimination, particularly in the South, and perhaps other areas of the country, but certainly in the South, for a number of years, and over these 40 years a lot has changed. It really has.

I would like to ask, Mr. Hasen, if you would explain the purpose or the theory, as you understand it, for the fact that Section 5 was not permanent at the time it passed and how we should think about that today in your view.

Mr. HASEN. Thank you, Senator. Section 5 was put in place by Congress after it became clear that a number of jurisdictions with a history of discrimination in voting on the basis of race were playing a kind of cat-and-mouse game where the Federal Government would come in, challenge a particular voting rule. That voting rule would then be changed to a different voting rule, which would also be discriminatory. And the purpose of the preclearance provision was to put the burden on those jurisdictions that showed a history of discrimination to justify any changes in their laws to show that they did not have a discriminatory purpose or effect.

The reason that the provisions were set up as temporary is because of the unprecedented nature of the kind of remedy that preclearance is. Never before or since has a State or unit of a State

had the requirement to have to get permission to change its laws from the Federal Government. Some have analogized it to a kind of Federal receivership. So it was what the Supreme Court in the *Katzenbach* case called "strong medicine." And so given that it was strong medicine, Congress decided, wisely, I believe, that it should be a temporary measure and that by having these periodic sunsets and the ability for these hearings, it gives a chance for Congress to evaluate whether the strong medicine is still necessary.

And so I think that as you go forward and think about extension, it would be worthwhile to look at the evidence and determine how far should extension go, both geographically and temporally. Should the same provisions that were in place based on data in 1964 be in place in the future for the next 25 years, up until 2031? And should the same areas be covered?

So I think it is Congress's obligation now to decide whether that strong medicine should continue in the same form as it has or whether changes are necessary given changes that have occurred on the ground in these covered jurisdictions and in the rest of the United States.

Senator SESSIONS. Thank you for saying that. I think it is important. For example, we do have—tend to have racially polarized voting, I believe as Mr. McDonald said. But my home city of Mobile, a majority-white city, just elected an African-American mayor last month. And he mounted very aggressive campaign, and he had biracial support and was funded aggressively and able to compete on TV and that kind of thing and won the race with a rather significant vote.

So I think there is progress occurring out there, and whether things are perfect or not—we know that is not so. We know we are not perfect, and we still have problems.

With regard to some of the matters that I hear complaints about from district attorneys and county attorneys, maybe, Mr. Hasen, you would comment. For example, if you move a voting place from a school on one side of the street to the courthouse on the other side of the street, the county or the governmental entity must petition the Department of Justice to approve that and demonstrate that it did not have an intent to discriminate. And at some point, you know, people begin to get a little irritated about that. I mean, they had no problems. They may have African-American officials. Maybe every person in the county—all office holders could be African-Americans, as some are. Are there things like that that you think we ought to consider in terms of making the Act fit the challenges of today rather than problems perhaps in the past?

Mr. HASEN. Well, you are right that one of the things about the preclearance provision is that it applies to every voting change, no matter how minor or major, so everything from moving a polling place across the street to a statewide redistricting. And so there are a number of creative ways that you could think about making changes.

One thing that I think would go a long way toward helping the constitutional case and also take off some of the burden in a lot of these jurisdictions is to ease the bailout requirements. For example, if the Department of Justice was required to proactively go through, pick out those jurisdictions that meet the bailout criteria,

and say, you know what, you have no history of discrimination, you have taken steps to increase minority voter turnout and participation, we think that you should apply for bailout.

If the burden was put on the Department of Justice rather than on the States, the States just—they are used to—the covered States are used to preclearance. They know how to do that. Bailout could be made a lot easier, and this would actually also help the constitutional case showing that the law is going to then be focused on places that continue to have a history of discrimination. So you can really use the bailout to winnow out those places that have made significant progress on the basis of race, and so that those places that are doing well will not have to go through the kind of preclearance for these minor types of changes.

Senator SESSIONS. I could not agree more. I think that really makes sense. And just briefly, Professor Davidson, you have studied the history of this. I cited the numbers that in Alabama, according to the Census Bureau, in 2004 a larger percentage of African-Americans voted than whites. I guess we would have to conclude that is a fairly significant historical event. Would you not agree?

Mr. DAVIDSON. Yes, sir. I think there is no question but that African-Americans have made a great deal of progress over the last 40 years, and one of the things that several people at our hearings said was essentially to acknowledge that fact. I don't think there are very many people who would deny that progress has been made.

I think sometimes it is important to take a historical look at our race problems in the United States, and if you go back to the founding of our Republic, which was—what?—in 1790 or somewhere around there, up to the present, the current period from 1965 forward has been the longest period in which African-Americans have enjoyed relatively free access to the polls and the right to vote—some, what, 40 years out of about 220 years in American history.

And I think that fact is in the minds of a lot of people. Is 40 years really long enough given the history of vote discrimination and other kinds of discrimination in this country?

Senator SESSIONS. And I would say this: There are a lot of African-American citizens alive in our State today that felt that discrimination. It is not an academic matter to them. And they are sensitive about it to this very day, and I think we should recognize that. And that is why I think most of us are prepared to accept and support a reauthorization, as long as—but I think in the course of it, if we can make it better, we should do that.

Senator Cornyn, I would recognize you, the former Attorney General of Texas, who has had to wrestle with some of these issues, I am sure. We did in Alabama.

Senator CORNYN. Thank you. Thank you, Mr. Chairman. And, again, thanks to the panel for being here.

I am struck by some of the—well, first of all, let me just say, I cannot think of any greater self-inflicted wound that the country could have inflicted upon itself than what this country did at its very founding to African-Americans. And we have, as Professor Davidson notes, had a checkered history in terms of improving equal justice and trying to achieve equal justice under the law to all citi-

zens regardless of race or ethnicity or heritage. And I agree, we all want to remain vigilant in that effort.

The process, I guess, by which we are getting started, though, concerns me a little bit. There is a bill that has actually been filed that makes findings, and now we are only beginning to gather the evidence. I guess from my previous experience on the bench, I am accustomed to getting the facts before we make findings and then reach conclusions. But be that as it may, I want to make sure that we are not indulging in some stereotypes but, rather, looking at what the facts are as they exist.

I was struck, Professor Hasen, by the chart that you held up demonstrating that between 1998 and 2002, that when it came to preclearance requests by various political subdivisions, only 0.05 percent received objections by the Department of Justice. Did I interpret that correctly?

Mr. HASEN. Yes, that is right.

Senator CORNYN. And if we look at the slope of that line there, is it fair to conclude that that represents improvement in terms of the compliance of political subdivisions with the Voting Rights Act? Or would you—

Mr. HASEN. Oh, it absolutely shows compliance. What it shows is that Section 5 has served as a deterrent to many actions that otherwise could have been discriminatory.

Senator CORNYN. OK. And you mentioned in your opening statement, Professor Hasen—and then I want to turn to Professor Issacharoff because he alluded to this as well, there are triggers in the bill that go back to 1964 and 1968 and 1972, and you would certainly agree that the circumstances were different, and let's just say worse, when it came to protecting the franchise of minority voters back in those years than exist today. Would you agree with that?

Mr. HASEN. I think everyone on the panel would agree with that, yes.

Senator CORNYN. And so I guess, Professor Issacharoff, you mentioned a number of, I think, very interesting ideas that we ought to consider seriously with regard to how the preclearance requirements should be addressed. But I guess for the members of the Committee and those who are not as versed as the panel is in the differences between Section 5 and Section 2, is there anything about Section 5 that offers a different standard of protection to minority voters than is otherwise provided in the Voting Rights Act in general? Or is it simply a matter of getting two bites at the apple, so to speak, one in the preclearance process and then one through litigation?

Mr. ISSACHAROFF. Well, there are several differences, Senator. First, of course, Section 2 is nationwide in its coverage, and Section 5 applies only to a select number of jurisdictions.

I think that the Supreme Court in the *Beer* v. *United States* case set up very different standards between the two provisions or between the Constitution and Section 5 of the Voting Rights Act. So that Section 5, as presently construed, applies primarily to retrogression, to steps backward, and does not reach under the *Bossier Parish II* decision, does not necessarily reach intentionally discriminatory conduct, and certainly does not reach everything that

would be violative of Section 2 if it was simply a carrying forward of the prior regime, of whatever was in place beforehand.

I think more significantly what Section 5 does is it imposes a freeze upon State conduct. It operates under the assumption that State conduct is likely to be discriminatory unless proven otherwise and prohibits the States or their subdivisions from acting. And this was absolutely critical to the whole structure of the Voting Rights Act initially because Section 5 piggybacked on Section 4, which was a suspension of basically as many of the known obstacles to voting as could be fashioned in the statute, things like the literacy test, and then Section 5 was intended to freeze in place what the voting system looked like absent those discriminatory obstacles.

Section 5 has evolved. I think one of the interesting features is that we are today more concerned with vote dilution than vote exclusion as such. If you look at the Department of Justice statistics in the 6 years beginning in 1997, there were something on the order of, I think, 46 or 42 objections lodged by DOJ. Only six of them had to do with voter exclusion, and the remainder had to do with vote dilution.

So the Act keeps in place that freeze. We have tended to think of vote dilution being more a Section 2 matter, particularly after the 1982 amendments, and Section 5 now has to be a little bit retrofitted to deal with the new political realities.

Senator CORNYN. Well, you touched on an issue that I think concerns some people, and that is, the presumption that the States that are covered by Section 5—I guess it is—is it roughly nine States plus some other counties and political subdivisions around the country.

Mr. ISSACHAROFF. Basically yes, Senator.

Senator CORNYN. That there is some presumption that unless Congress imposes a preclearance requirement on those jurisdictions, somehow they will engage in intentional back-sliding when it comes to the voting rights of minority voters. And I could tell you that, you know, I was not alive—well, I guess I was alive, but I was very young back in 1964. But I think as we have all acknowledged, we have had a tremendous change in the culture, and in terms of attitudes, I cannot imagine any set of circumstances under which there would be some back-sliding or reversion if Section 5 were not to require preclearance. But, rather, I do believe that given the amount of litigation that exists today on the Voting Rights Act in literally every step of the proceeding, we ought to be concerned with providing equal and uniform rules that can be applied nationwide.

I see my time has run out. I will end here. Thank you, Mr. Chairman.

Senator SESSIONS. Our Ranking Member, Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman. And I am sorry to be in and out on this hearing, because I think it is an extremely important one, and I appreciate all of you being here.

Professor Davidson, you know, when I look at "Quiet Revolution in the South"—and most of the people I have talked with, and certainly my staff have talked with, say that is as important a book as we are going to find on the subject.

Mr. DAVIDSON. Thank you.

Senator LEAHY. I think if we read that, we can all agree there have been improvements in minority access to voting since the original Voting Rights Act was passed in 1965. Some would say we no longer need it as a result of that.

I was 25 when it passed, and I had only been able to vote for 4 years, and it was not an issue in my State of Vermont. But notwithstanding the progress, what risk do we face if we let the expiring provisions lapse? I mean, are we so solid in the gains that there is no risk of back-sliding?

Mr. DAVIDSON. If I could give you an anecdote from my home State of Texas—and I was amazed as I read in the newspapers as this unfolded. But in Waller County, Texas, which is the home of the historically black university, Prairie View, the town surrounding that university is still majority black. In the run-up to the 2004 elections, a couple of black Prairie View students ran for the county commissioner's court, the Democratic primary nomination. And the white district attorney, a former State district judge, announced that any Prairie View students—that Prairie View students voting who did not have parents living in that county, if they voted in that election they would be prosecuted.

Prairie View figured very importantly in Section 5 litigation in the 1970's when the Supreme Court held that students living in Prairie View as college students could vote in that county, even though their parents lived in other counties. But in spite of that fact, why, the students were threatened with prosecution, and the NAACP chapter of Prairie View A&M filed a Section 5 enforcement action, and the district attorney backed down.

Senator LEAHY. I take it by that you feel that we ought to keep Section 5.

Mr. DAVIDSON. Yes, I do. That is just one anecdote, I realize, but—

Senator LEAHY. I know there are many others, and I was thinking that—I think I know what Mr. Shaw's response would be on this, but we have an extensive record—11 hearings in the House of Representatives, 50 practitioners testified, elected officials advocates, academics, State-by-State reports detailing discrimination in Section 5, and 203 covered jurisdictions since 1982, the Voting Rights Project's 800-page report, the National Commission reports and so on. We had 30 other witnesses here.

Based on all this record, do you believe the Congress has the power under the 14th and 15th Amendments to reauthorize the expiring provisions of the Voting Rights Act?

Mr. SHAW. Senator, I believe that Congress does have that power. As we have talked about here, we are all concerned about the *Boerne* line of cases with respect to the issues of federalism that it raises. But there are also issues of separation of power, and I think that Congress certainly has the power to enact this legislation based on this record.

Senator LEAHY. And would you also agree with Professor Davidson that this is not the time to let it expire?

Mr. SHAW. That is right. We have made tremendous progress, but everyone here agrees that there is still work to be done.

Senator LEAHY. I realize my time is almost up, but I am going to actually submit some questions to each of you. But, Mr. McDon-

ald, in the Voting Rights Project report, you detailed a couple recent examples, modern examples, one in Martin, South Dakota, in which the Eighth Circuit found last week—and I am not going to get into ancient history, but last week found a history of ongoing intentional discrimination against Native Americans. You cite another very recent example in Randolph County, Georgia, intentional discrimination against black voters in that county. It is a county which has a history of going from one tactic to another, dating from before the Voting Rights Act to the present.

From a constitutional point of view, are these examples that Congress can rely on to support the extension of Section 5?

Mr. MCDONALD. I certainly think so, Senator. And as people were responding to your question, I just recall that the State of Georgia filed a brief in the Supreme Court in *Georgia* v. *Ashcroft*, and that would have been—I hope I am getting my dates correct, but several years ago, 2003, in which they made quite extraordinary arguments indicating what would happen if we did not have Section 5.

They argued, for example, that we should abolish the retrogression standard. They argued in the Supreme Court that racial minorities should never be allowed to participate in the Section 5 preclearance process. This is quite an extraordinary argument given the fact that racial minorities were the very group for whose protection Section 5 was passed.

And then they argued that you could abolish all the majority-black districts consistent with Section 5. But you look at a State like Georgia, I mean, there have been some people who have won an election, minorities, in jurisdictions that were not majority black, but every member of the State Senate is elected from a majority-black district. Probably 95 percent of those in the House of Representatives were elected from majority-black districts.

If you let the State do what it said it could do in its brief in *Georgia* v. *Ashcroft*, it would have a devastating impact on the ability of minority voters to elect candidates of their choice. That is the reality.

Senator LEAHY. But you are not eager to let Section 5 lapse?

Mr. MCDONALD. I do not think that the Georgia fox should be put in charge of the voting rights henhouse, Senator.

Senator LEAHY. Thank you.

My other questions, I see, you know, I have not had a chance to ask Professor Hasen or Professor Issacharoff, who has helped me on many, many other occasions with his erudition, and I will have to submit those for the record. But I thank the Chairman for letting me slip in here.

Senator SESSIONS. Thank you.

Senator LEAHY. Senator Cornyn, I went a little bit over time, and I apologize for that.

Senator SESSIONS. That is all right.

Senator LEAHY. It is an important subject.

Senator SESSIONS. It is, and, Mr. McDonald, you know, this Act is a complex Act, and it raises quite a number of issues with regard to Georgia. I think it is important to note that the individual who filed the brief was Mr. Baker, was it not, the Attorney General?

Mr. MCDONALD. He is African-American.

Senator SESSIONS. African-American, Democratic, statewide elected Attorney General, and he had some concerns of a fairly technical nature, and I am not sure it is fair to characterize it quite the way you did. I am sure he would take a different spin on it if he were here today.

Mr. MCDONALD. Yes, Senator. I would just say that people who are—he is an elected official, a politician, and they are subject to all kinds of pressures. I could simply point out that during the Reconstruction years, there were blacks who voted for racially segregated schools, who voted for poll taxes, and they did so for a lot of complex reasons. And the District of Columbia opinion in *Georgia* v. *Ashcroft* addresses that whole issue.

But I think that the mere fact that a black is in the decision-making process does not and should not shield from independent constitutional review the acts that a State takes.

Senator SESSIONS. Well, I am not sure Mr. Baker would appreciate suggesting that he was less than aggressive to protect the interests of African-Americans in Georgia, which I think you just did. And I think you are suggesting that for political reasons he did not follow the law. I think it is a complex thing. We could spend 30 minutes talking about the D.C. filing of that case and the jurisdiction. But I just wanted to raise that point.

Let me ask Mr. Shaw and maybe some of the others here about the Voting Rights Act which identifies those jurisdictions subject to additional oversight by looking at voter turnout in the Presidential elections of 1964, 1968, and 1972. We have heard testimony about why we need to keep those dates in. Would you support adding the Presidential election of 2000 and 2004 in order to pick up jurisdictions that may have begun discriminating since the 1970's?

Mr. SHAW. Certainly, Senator, we believe that we should not have a cutoff date with respect to problems of discrimination that inform the Voting Rights Act reauthorization.

With respect to those other dates and the trigger that originally was in place, I want to emphasize that that trigger served the purpose of identifying the jurisdictions where the problems originally existed. I believe that the record that we have now in some ways eclipses the old trigger to the extent that what we have done is looked at jurisdictions that have been covered and asked the question of whether there are continuing problems in those jurisdictions. And that is the basis on which the jurisdictions that are covered should continue to be covered.

Senator SESSIONS. Mr. McDonald, would you share your thoughts on that, too?

Mr. MCDONALD. Well, I think I share Ted Shaw's discussion. We do have a bailout, and for some reason, not many jurisdictions have attempted to bail out. And I think that may be for a combination of reasons. They do not think they would meet the standard, that being covered by Section 5 is really not that burdensome. But if there are jurisdictions that have clean records, there is plainly a procedure for them to bail out, which is another factor, I think, that underscores the constitutionality, the congruence and proportionality of Section 5.

Senator SESSIONS. Professor Issacharoff, you suggest that, "The bailout provisions in Section 4(a) appear unduly onerous and not

sufficiently geared to actual legal violations" and recommend liberalizing it. How would you suggest changing that provision? And I would just note that it does strike me as odd, as Mr. McDonald suggested, that so few have taken advantage of it. It must be some problem here that is delaying that. Would you share your thoughts on it?

Mr. ISSACHAROFF. To my knowledge, there are only three counties in Virginia that have availed themselves of the bailout, at least in the last 20 years. I maybe have missed some, but on the Justice Department website, those are the only ones I could identify.

It seems to me that the bailout was not intended to be acted upon with any ease, and that was part of the original implementation strategy of Section 4 and Section 5 together. The difficulty—

Senator SESSIONS. Was the bailout a part of the original Act or the reauthorization?

Mr. ISSACHAROFF. It was a reauthorization. But it was integrated into the entire Section 4, Section 5 structure. It seems to me the difficulty with the bailout is that there are provisions which have—at least appear to be difficult for jurisdictions to meet, that the affirmative steps taken are ill-defined and hard to quantify. It is hard to figure out exactly what fits in there. I know that some jurisdictions in recent years have started to try to pursue this, the Virginia cases that I am aware of. It appears to me that if there—and my suggestion is that if there were a lesser administrative type of review available, something between full preclearance coverage and no coverage at all, that one could go to a bailout structure that was quite objective, absence-of-objection letters or absence of violations over a defined period of time, and make that much more of an administrative matter rather than a litigated matter. I think that right now jurisdictions that would try to bail out are, for the most part, looking at a litigated path. And I think jurisdictions are probably gun-shy about that.

Senator SESSIONS. Well, it raises—certainly the counties spend a lot of money on lawyers, I've got to tell you. You know, they have to hire a lawyer to do their preclearance petition, and that may be as simple as moving a balloting place across the street. It could involve the most minute change in the ballot itself. There are a lot of things that they are required bureaucratically to do, and like you note, there are counties in Alabama and throughout the country that have never had—throughout the coverage of Section 5—who have never had a history of discrimination and some have certainly demonstrated since 1965 that they have no history of it. And perhaps that would be a step that we could take that would recognize and affirm areas of the country that are doing things correctly. Would you agree?

Mr. ISSACHAROFF. In part, Senator. I think the difficulty is that while these things seem trivial, things like moving the polling place across the street or changing the ballot a little bit, the history of disenfranchisement, particularly at the time of 1965, indicated that each and every one of them had been tried at some time or other in some place or other as a mechanism to frustrate the electoral aspirations of black Americans.

Senator SESSIONS. I am well aware of that. I really am. And I fully understand that. However, the district may be 100 percent Af-

rican-American virtually or 100 percent white, or the whole area may be such, and there is just no apparent argument that can be made in some of these instances that it had any intent to discriminate. Yet they have to go through this petition process.

Mr. ISSACHAROFF. They do. It is an administrative burden. I agree with you on that. And I think that from my perspective the Act would be strengthened and its constitutionality would be strengthened if there were more recognition of what has transpired over the past 40 years, if there were more congruence now, to use the court's language, if there were more congruence between the actual performance of these counties or political subdivisions and their continued coverage. And part of that could be addressed with an eased bailout provision.

Senator SESSIONS. Senator Cornyn?

Senator CORNYN. Professor Issacharoff, I am aware of the argument—and I would like to have you comment on it—that when it comes to redistricting, there are sometimes strategic alliances that are struck between African-Americans and Republicans and to the detriment of white Democrats. Are there unintended consequences of the Voting Rights Act on redistricting that we ought to be aware of and address during the course of this reauthorization?

Mr. ISSACHAROFF. I think the most significant transformation in the covered jurisdictions since 1965 has been the erosion of the Democratic Party monopoly in these States. Almost all of them were one-party Democratic States in which there was no effective competition. I think that the Voting Rights Act, both Section 5 and Section 2, broke up the lockhold. It made districted elections possible, which paradoxically facilitated the election of Republicans in many of these jurisdictions and facilitated the rebirth of the Republican Party in many parts of the South.

The Voting Rights Act applied to statewide redistricting has been a tremendous source of temptation for manipulation in my view by the Justice Department, unfortunately, and I say "unfortunately"—I refer to my own experiences in Texas, Senator. In the 1990's, I represented the State of Texas in its preclearance fight over its Congressional redistricting. Texas has gained three additional Congressional seats and created out of those three additional majority/minority districts. The Department of Justice objected. It was difficult to figure out what the retrogressive basis for the objection was, but while the objection was in place, there was an effort to redistrict through a court in Texas that would undo the plan that the State had put forward. At the time it was the Democratic Party.

One of the sources of objections was that the district should have been more concentrated in their minority population, what the Supreme Court addressed quite caustically in cases like *Miller* v. *Johnson*. I think that through the 1990's there was a view that Section 5 required creating districts that were as packed with African-American voters as possible. This had the effect of diminishing in my view, the effectiveness of the black franchise, diminishing in many States the electoral prospects of the Democratic Party, and there was a bit of a misshaped alliance between the interests of Republicans in many of these States and the interests of some minority voters in creating super-concentrated minority districts.

Mr. SHAW. Mr. Chairman, may I get a shot at that?

Senator CORNYN. Sure, Mr. Shaw. Go ahead.

Mr. SHAW. Thank you, Senator.

Senator SESSIONS. It is Senator Cornyn's time.

Mr. SHAW. Pardon me?

Senator SESSIONS. It is Senator Cornyn's time. He recognized you.

Senator CORNYN. We would be glad to hear from you.

Mr. SHAW. Well, thank you. Senator, just quickly on that, on the issue of unintended consequences of the Voting Rights Act, this is a function in part of racially polarized voting, and I think it is important to keep our eye on that continued reality. There are people who do blame African-American voters for the partisan losses of the Democratic Party. My view on this, our view on this is plainly that we in a nonpartisan way want to see the Voting Rights Act enforced. African-Americans ought to have the opportunity to elect representatives of choice like any other community or constituency in this country has, and African-Americans cannot expect it to be the ballast for any party by means of sacrificing their right to elect representatives of their choice.

The other thing I want to emphasize is that the progress that we have made in this country, which is tremendous, did not happen serendipitously. It happened only as a consequence of the Voting Rights Act. I think we all recognize that. We have acknowledged it, and I think it is so important not to kill the goose that laid the golden egg.

Senator CORNYN. Well, I appreciate your answer, and my purpose for asking the question is I want to make sure we have this complete understanding of reality and intended and unintended consequences alike. Obviously, this has a lot of political overtones as well in terms of electoral outcomes and advantaging or disadvantaging political parties. And I think we ought to just get it all out there and take a look at it and have a complete record and be guided by the facts, whatever they should show.

To that extent, let me ask, you know, it is interesting to me that with only about nine States and some political subdivisions in other States covered by Section 5, it is interesting to hear States that are not covered, representatives, Senators, Congressmen, advocating the maintenance of the preclearance requirements of Section 5 in other States, not their own, which makes me wonder if it is a good thing, unequivocally a good thing why it does not apply nationwide. But we understand the political reality of that. It is unlikely those States that are not covered, their representatives are likely to cover them by Section 5.

But let me ask, Professor Hasen, what empirical data—not anecdotes but empirical data—can you cite, if any, that indicates the position of minorities in covered jurisdictions to participate fully in the electoral process is substantively different from minorities outside the covered jurisdictions under Section 5?

Mr. HASEN. I think that is the $64,000 question, and I think that—I am in the middle of going through the material in the House report. There certainly are examples, troubling examples that continue to occur in covered jurisdictions. I think Mr. McDonald's work on Indian country in South Dakota raises, I would say,

the largest set of concerns, as well as Mr. Shaw mentioned a case coming out of Louisiana. There are still cases that I think—within covered jurisdictions that are troubling.

One of the unanswered questions is whether the Supreme Court in reviewing the constitutionality of a renewed Section 5 is going to require not only evidence that there are problems in covered jurisdictions, but that those problems are different in magnitude from the problems outside of covered jurisdictions.

For example, you look at the Katz report, the report out of the University of Michigan, which looked at all the Section 2 filings, there are significant problems, racially polarized voting and other problems that exist across the Nation and not just in the covered jurisdictions.

If I could just add one other point?

Senator CORNYN. Certainly.

Mr. HASEN. Even if the Congress decides not to make significant changes before authorization to 2703 to deal with the constitutional questions, I think that some attention has to be paid to the language of the renewed Section 5. There is some new language in that provision that in the hands of judges, particularly in the hands of judges that might not look at legislative history, that could also have unintended consequences, to go back to your earlier point, and might not be read in the way that Congress intends. So I would hope that you would go back and look at that language as well.

Senator CORNYN. Thank you.

Mr. Chairman, obviously my concern is that we be guided by the facts and not by anecdotes, and I am sure—I mean, I am confident that we could probably identify misconduct, violations of the Voting Rights Act in all 50 States, and those ought to be vigorously prosecuted and those violations corrected. And the question is whether there is any rationale for disparate treatment anymore between those States that are covered by Section 5. And my hope is we would be guided by the empirical evidence and not anecdotes, because I am confident—this is in Waller County that the conduct that Professor Davidson mentioned, which is reprehensible and fortunately was not successful, I am sure those kinds of examples could be found on an anecdotal basis anywhere—in many places, let me put it that way, in the country.

Thank you very much, Mr. Chairman.

Senator SESSIONS. Thank you.

I would offer for the record Senator Leahy's statement into the record on his behalf, and I would like to followup, Professor Issacharoff and Professor Hasen, on the question that Senator Leahy asked you about, the constitutionality question.

Based on your review of the House record, do you believe we currently have enough evidence to meet the Supreme Court's test in *City of Boerne*? Who wants to go first?

Mr. HASEN. I have not reviewed the entire House record. First let me say that I think that the Supreme Court's standard is not sufficiently deferential to Congress and that, just speaking generally, the Court has applied too strict of a standard in terms of the kind of evidence that Congress has to come up with. From what I have reviewed so far of the House record, I am concerned that

there will be five or more Justices on the Court who will not be satisfied. If the question is whether I would be satisfied, it is a different question. I think that—

Senator SESSIONS. Are you one of those who believes in stare decisis like some of my colleagues on the Democratic side to such a degree that *Boerne* ought not to be re-evaluated? Or should the Court re-evaluate it if it is appropriate?

Mr. HASEN. Well, *Boerne* was a change from the standard in *Katzenbach*, and I would like to see us go back to that. But we are living in the reality that we have now, which is that the Supreme Court is requiring much more evidence than it ever did, and it is not clear to me that the record as I have looked at it so far—and I have not completed the review—that it is going to satisfy a majority of the Supreme Court.

Senator SESSIONS. What about you, Professor?

Mr. ISSACHAROFF. I would tend to agree with what Professor Hasen said. I think that while I have not gone through the entire record, I think the record shows that there are still significant issues with access to the ballot in the United States. One need not only look at the Section 5 record. One can look at the evidence before the Congress when it passed the Help America Vote Act.

I think that the record is problematic with regard to a couple of features, and that is, whether the covered jurisdictions continue to be significantly different than the non-covered jurisdictions. If you look at the history of recent Section 2 litigation under the Voting Rights Act, one sees Section 2 moving more and more to areas where you have recent immigrants coming into the country, and those tend to be as likely as not, as best I can tell, places that are not under covered jurisdictions, places like Lawrence, Massachusetts, some of the smaller towns of Pennsylvania. So I think that that is problematic under the *Boerne* standard.

I would also note, as this Committee is well aware, that the composition of the Court has changed, and that the likely median voter, as we talk about that in the Academy on the Court is probably Justice Kennedy at this point, and Justice Kennedy was a dissenter in *Hibbs*. And so if one looks at the track record of the Court, I think, unfortunately, one can expect much greater scrutiny of Congressional action than before.

I also think that Congress is a co-equal body, and I think that the Court is misstepping in demanding a level of factual precision from Congress as if it were reviewing some agency determination or a lower court finding under a clearly erroneous standard or something of that sort.

But, nonetheless, that is the world we live in, and I am concerned that the trigger is constitutionally difficult today. I am concerned that the extent of time and the time gap between the trigger and the proposed extension is a source of constitutional concern. And I think that the inability of jurisdictions to show compliance with the regulatory scheme effectively and to be able to bail out is also a source of constitutional concern.

Mr. HASEN. May I add one other point?

Senator SESSIONS. Yes, Professor Hasen, go ahead. And then I will followup.

Mr. HASEN. I have heard a number of people say let's just pass this bill as it is and we will roll the dice in the Supreme Court, and if the Court strikes it down, we will come back and we will write something that will meet the Supreme Court standard. I think there is a danger to that, and primarily the danger is that it could—it could create some bad law that could call into question something like Section 2. Section 2 has been incredibly important. I would hate to see Section 2, which applies nationwide, I would hate to see that be undermined. And I am worried that not responding to the *Boerne* line of cases—by Congress not doing that, it could have some unintended consequences in terms of other provisions of the Voting Rights Act.

Senator SESSIONS. Would you explain for the people that might be listening here today who are not really attuned to it, as fairly as you can, maybe both sides, as succinctly as you can, what the issue is here? What is it? What issue is the Supreme Court concerned about? It is not that they do not care about voting rights. It is not that they do not respect Congress, in my view. I think it is a concern that we may be crossing a line here that violates fundamental constitutional protections.

Could you articulate what they are, at least?

Mr. HASEN. Well, both the 14th and the 15th Amendments contain provisions giving Congress the power to enforce those amendments, so to enforce the Equal Protection Clause, to enforce the right to vote without discrimination on the basis of race. And so these lines of cases, what we have been calling the *Boerne* line of cases, address how much Congress can tell the States what to do in the area of civil rights.

Senator SESSIONS. But it is more than that, is it not? Doesn't it go to the fundamental question of the role that race plays in legislation?

Mr. HASEN. Well, not necessarily.

Senator SESSIONS. Equal rights?

Mr. HASEN. The *Boerne* line of cases, most of them do not deal with—

Senator SESSIONS. Well, but in the Voting Rights Act. I mean, is the Supreme Court concerned about an excessive focus on race in American politics? Is that the fundamental—

Mr. HASEN. I don't think that—that is the issue in the *Shaw* line of cases and *Miller* v. *Johnson*. I don't think that is the issue which raises the constitutional concern in this case. The issue instead is whether Congress can point to enough evidence of intentional discrimination, in this case on the basis of race in voting, in these jurisdictions that are targeted and whether the remedy, in this case the preclearance remedy, is congruent and proportional to the extent of those violations.

Senator SESSIONS. I see. OK.

Mr. SHAW. Senator, may I just—

Senator SESSIONS. Yes, Mr. Shaw?

Mr. SHAW. —add that Congress is actually at the height of its powers, the zenith of its powers in this area, unlike when it deals with disability or gender or some other classification. Here we have the confluence of both a suspect classification, that is, race, and also a fundamental right, the right to vote. And for those reasons,

the Congress is going to be given more deference and leeway under the *Boerne* line of cases, and the Court, I believe, acted consistently with that principle when it decided the *Lopez* case, which is a post-*Boerne* case, which rejected an attack on Section 5.

Senator SESSIONS. All right. That was a quick 2 minutes. I have a note here that you were arriving in 2 minutes.

We are delighted to have Senator Kennedy here and would recognize him as he gets settled, and I would just like to thank all of you for your thoughtful comments on this important subject.

Senator Kennedy?

Senator KENNEDY. Well, thank you. Again, thanks to all of you for being here.

I know that a number of areas have been gone through, but I think the country ought to be reminded once more about why this is needed. Maybe I will start with Professor Davidson, why we think that this is called for or not and in the form and the shape that it is. What is it about—you know, we know the different examples that have been illustrated, but you are one that has followed this closely over the years. And perhaps you would give us your judgment about the need for the legislation as it is.

Mr. DAVIDSON. Senator, as a number of panelists have said today, there is a wide range of information and research reports that focus on ongoing vote discrimination problems having to do with race that manifest themselves at the polling place, and in the hearings that the National Commission on the Voting Rights Act held around the country—those were ten hearings that were held in 2005, regional hearings—there was a wide range of testimony by minority spokespersons, by election officials, by people who were charged with getting out the vote or helping implement Section 203 to the effect that there is just a continuing range of voting problems that confront voters in many venues across the country.

Senator KENNEDY. And you think that the accumulation of those hearings and the records that were made in that underpins the basic concept of the need for the kind of extensive legislation that is being considered now for the Voting Rights Act?

Mr. DAVIDSON. Yes, sir, and there was also mention of data that were collected from the Justice Department with regard to various functions that the Justice Department is charged with here. There was the issue of the objections. There was also the point that I made very briefly in my opening remarks about the jurisdictions under Section 5, many of them after being queried by the Justice Department and asking for more information when they had made their submissions. They sent letters to the Justice Department saying that they were withdrawing the submitted changes. And in many of those cases, I think the inference that could be made is that they saw the handwriting on the wall that those would be changed that would be objected to if they did not withdraw them.

Senator KENNEDY. Mr. McDonald, some have suggested that certain types of voting changes are minor and should not need to be precleared under Section 5, such as changes in the location of polling places. But isn't the real test not the type of voting change but whether it discriminates? For instance, the ACLU report noted that in 1992, a jurisdiction in Georgia tried to move a precinct from a

county courthouse to a racially segregated American Legion Hall. Isn't that the sort of change that should be precleared?

Mr. MCDONALD. I think so, Senator. The Supreme Court was very clear when it construed Section 5 that it was not, you know, a short list or a laundry list of changes, but that it was to cover any change in voting. And as you mentioned, the change in polling place, I think that was St. Mary's, which is on the Georgia coast, but I also recall within the last couple of years one of the areas in metropolitan Atlanta relocated a polling place from a place that was in the black community to the police department. Fortunately, the Department of Justice objected to that, which they should have done. So it is not a laundry list. You have to look objectively at each change.

Senator KENNEDY. Let me ask you, Mr. Shaw—I am sure you have gone into it, and I will look at the record. You have talked a good deal about *Georgia* v. *Ashcroft* and the test and how that—did you get through—is there anything further you want to add to that discussion, or do you feel that the discussion earlier I imagine that was held here—I apologize. We are—as Senator Sessions knows, we are dealing with a major health bill over on the floor at the present time, and so I have been necessarily absent, but I apologize to all the witnesses. But is there anything further that you want to add to the discussion? I was not here. I will read the record carefully, but I want to make sure that has been fully ventilated from your point of view.

Mr. SHAW. Well, Senator Kennedy, I would only add that the *Georgia* v. *Ashcroft* standard of influence, which replaces opportunity to elect, is a standard that does not—it lacks clear definition. We feel like we do not know what it means. We are not advocating that all of *Georgia* v. *Ashcroft* should be overturned, so, for example, we believe where it is possible, where the record demonstrates that it is possible to have coalition districts as reliable crossover voting on the part of white voters consistently so that African-Americans are not deprived of the opportunity to elect representatives of choice, then that should be sufficient.

But what we are talking about is in the face of persistently polarized voting, we do not believe that influence district are enough. I do not think that anybody else settles simply for influence. They want the opportunity to elect representatives of their choice, and they do not want to be consistently defeated. That is what we are trying to address with respect to the *Georgia* v. *Ashcroft* fix.

Senator KENNEDY. OK. Thank you, Mr. Chairman. Thank you very much.

Senator SESSIONS. Thank you, Senator Kennedy, and I would just say once again that I believe the Nation is committed to full and open and fair voting rights in this country, and I do not think that there will be any move to substantially undermine the spirit of the Voting Rights Act or its provisions. I do think it is quite appropriate for us, as was intended from the beginning, that we take some time to review that Act, see how it is working, see if we can make it better, see if there are other areas of the country that might ought to be covered by some of these provisions, see if there are some areas that are covered now that no longer need to be.

I think just having stated previously how seriously African-Americans were denied the right to vote in the South and noting some of the changes that have occurred, I would like that chart to go up one more time that you have there that showed the complaints. As a citizen of Alabama, one of the States that clearly denied African-Americans the right to vote in 1965, I think the objections—the submissions receiving objections being now to—that is not 0.5 percent. That is five-tenths of—five-hundredths of 1 percent that I believe that figure represents were objected to. So we are doing some things that are working. There are active lawyers, civil rights groups that certainly are willing to raise an objection when one deserves to be raised, but 99.995 percent of the preclearance submissions or requests for approval of voting rights changes are not being objected to. So that is good news, and I think that says something for us.

If there is nothing further to come before us—Senator Kennedy, did you have—

Senator KENNEDY. If I could, staff just raised a point for Mr. McDonald. Would you agree that as a result, the number of Justice Department objections under Title 5 since 1982 likely underestimates the unconstitutional attempts to limit minority voting by covered jurisdictions?

Mr. MCDONALD. Well, I think, Senator, that some of the changes that were precleared should not have been. The recent photo ID requirement in Georgia, for example, I think should not have been precleared. It was precleared. And the Federal district court judge immediately granted a preliminary injunction against enforcement of that provision and said that it was in the nature of a poll tax. You had to buy this photo ID card. You know, people say, What new things will they come up with? Well, they did not come up with anything very new. They came up with something that was in the nature of a poll tax.

So the mere fact that there have not been a lot of objections does not mean that there should not have been more. But also, again, as Senator Sessions has noted, it shows the deterrent effect, which we still need.

You know, Senator Kennedy, I have become increasingly alarmed reading the newspapers, and I see what happens in other countries, and I am not trying to say the United States is like those places, because it is not. But you see what happens in places where we do not have a rule of law, with fair laws fairly enforced. There is all kinds of corruption and things which I do not need to detail, but the surest way that we can make certain that our country remains one where people participate fairly and equally in the political process is to have fair laws that are effective and that are fully enforced, all of which simply underscores the need to extend the provisions of the Voting Rights Act.

Senator KENNEDY. Thank you, Mr. Chairman.

Senator SESSIONS. Thank you. It has been an excellent hearing. Thank you very much.

We are adjourned.

[Whereupon, at 11:51 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

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Richard L. Hasen
William H. Hannon Distinguished Professor of Law
Tel 213 736 1466
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May 30, 2006

VIA E-MAIL AND OVERNIGHT MAIL

The Honorable Arlen Specter, Chairman
Attention: Barr Huefner, Hearing Clerk
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Re: Written Questions Submitted by Senators Specter, Cornyn, and Sessions

Dear Senator Specter:

Thank you again for giving me the opportunity to testify before the United State Senate Judiciary Committee regarding "An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Related to Reauthorization" on May 9, 2006. On May 19, 2006, I received a letter from the committee asking me to respond to questions from Senators Specter, Cornyn, and Sessions.

My responses appear on the attached pages. Please do not hesitate to contact me if I may be of further assistance to the committee. It is an honor to help the committee with the very important task of Voting Rights Act reauthorization.

Very Truly Yours,

Richard L. Hasen

Enclosure

The Honorable Arlen Specter, Chairman
Page 1

Answers of Professor Richard L. Hasen to Questions from Senator Specter

1) What is the best evidence that shows that racial discrimination still exists in the covered jurisdictions?

Answer: There is evidence in the House record showing that racial discrimination in voting still exists in the covered jurisdictions. For example, there is evidence of continuing problems in Louisiana (summarized in Debo Adegbile, Voting Rights in Louisiana: 1982–2006, February 2006) and in South Dakota (summarized in Laughlin McDonald, "The Voting Rights Act in Indian Country: South Dakota, A Case Study," 29 Amer. Ind. L. Rev. 43 (2004-2005)). Because I have not exhaustively reviewed the voluminous House record, I do not know that I can identify the "best" evidence showing that racial discrimination in voting still exists in the covered jurisdictions.

2) Is there anything that Congress can do to ensure that the reauthorization of the Voting Rights Act is upheld by the Supreme Court under the "congruence and proportionality" test articulated in *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997)?

Answer: As explained in my earlier submitted testimony to this committee (available at <http://electionlawblog.org/archives/hasen-testimony-final.pdf>) and in my law review article, Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO STATE LAW JOURNAL 177 (2005) (available at <http://electionlawblog.org/archives/osu-final.pdf>), there is much that Congress can do to increase the chances that the Supreme Court will uphold a reauthorized VRA under the *Boerne* standard.

First, although the House record is voluminous, there is much in it which does not show a pattern of unconstitutional discrimination by the states as required by *Boerne*. For reasons I've explained earlier, much of the evidence of section 2 violations and of objections by the Department of Justice does not show a pattern of unconstitutional discrimination. It would be very useful for someone to go through the House record and pull out *the best examples* of intentional discrimination on the basis of race in voting taking place in covered jurisdictions, and then contrast that evidence with the identified similar problems in non-covered jurisdictions. The Supreme Court could well require evidence that there is a greater problem with intentional discrimination in voting in covered jurisdictions than in non-covered jurisdictions.

In addition to a more careful presentation of the evidence, I proposed (in my earlier testimony) four possible changes to the current draft bill to help it survive constitutional challenge:

> I recognize that this is politically difficult, but *Congress should update the coverage formula* based on data indicating where intentional state discrimination in voting on the basis of race is *now* a problem or likely to be one in the *near future*...

> [Second], Congress should take steps to *make it easier for covered jurisdictions to bail out* from coverage under section 5 upon a showing that the jurisdiction has taken steps to fully enfranchise and include minority voters. The current draft does not touch bail out, and few jurisdictions have bailed out in recent years.
>
> [Third], *Congress should impose a shorter time limit, perhaps 7-10 years,* for extension. The bill includes a 25 year extension, and the Court may believe it is beyond congruent and proportional to require, for example, the state of South Carolina to preclear every voting change, no matter how minor, through 2031.
>
> [Fourth], Congress should more carefully reverse only certain aspects of *Georgia v. Ashcroft. Georgia v. Ashcroft* makes it easier for covered jurisdictions to obtain preclearance, meaning that the burden on covered jurisdictions is eased (and therefore the law looks more "congruent and proportional"). Reversing the case as a whole, as this bill apparently could do-though the language in this respect is very poorly drafted-could weaken the constitutional case for the bill. I would suggest tweaking, rather than reversing, the Ashcroft standard.

On the very important question of bailout, here is a proposed bailout mechanism that I believe could help save the constitutionality of a renewed section 5:

> Amend section 1973(a)(1)(9) as follows:
>
> (9) ~~Nothing in this section shall prohibit t~~
> (a) The Attorney General shall regularly investigate and prepare a list based on such investigations of States and political subdivisions that, in the Attorney General's view, have complied with the requirements of subsection (a)(1) of this section. Beginning in 2007, the Attorney General shall cause to be published in the Federal Register by December 1 of each year a list of complying jurisdictions. The Attorney General shall promptly notify complying jurisdictions of their status and their ability to apply to the district court for bailout from the preclearance provisions of this Act.
>
> (b) The Attorney General ~~from~~ shall consent~~ing~~ to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of subsection (a)(1) of this section. Any aggrieved party may as of right intervene at any stage in such action. If the Attorney General consents and no aggrieved party intervenes, the court shall issue a declaratory judgment that the State or political subdivision has complied with the requirements of section (a)(1) of this section.

My proposal for easing bailout would put the onus on the Department of Justice to review each covered jurisdiction's history, and to proactively take steps to inform jurisdictions that have met the requirements that they may bail out. If no one objects and the DOJ consents, the court would be instructed to grant a bailout to the jurisdiction.

How does this help with the constitutional problem? The argument is that the coverage formula, even back in 1965, was not a perfect way of capturing those jurisdictions with a history of discrimination in voting on the basis of race. But it was a good, rough substitute. Today, as well, because section 5 is such a good deterrent, it is hard to come up with a formula to separate out those jurisdictions that still should be covered from those that have made enough progress. The "proactive bailout mechanism" I am suggesting is tailored to the Court's concern of tying remedies to evidence of discrimination. But rather than using coverage as the "opt in," proactive bailout serves for the opt out.

Proactive bailout (especially if coupled with other measures, such as a shortened time frame for renewal) could save the constitutionality of a renewed section 5. The case would be especially strengthened if DOJ could put proactive bailout into effect for some time period before the Supreme Court would hear a challenge to the constitutionality of a renewed section 5. The government could then show it is making a careful attempt to separate out those jurisdictions that still should be subject to preclearance from other jurisdictions.

Answers of Professor Richard L. Hasen to Questions from Senator Cornyn

1. What empirical data can you cite that indicates the ability of minorities in the covered jurisdictions to participate fully in the electoral process is substantially different from minorities outside the covered jurisdictions? Please be specific with respect to covered jurisdictions vs. non-covered jurisdictions.

Answer: I cannot answer this question because I have not undertaken an exhaustive review of the evidence presented in the House. But I agree with the implicit suggestion in your question that the Supreme Court could well require the government to make such a showing in order to sustain the constitutionality of a renewed section 5 of the Voting Rights Act attacked on *Boerne* grounds.

2. Currently, the Voting Rights Act identifies those jurisdictions subject to additional oversight by looking at voter turnout in the presidential elections of 1964, 1968, and 1972. Re-authorization of the Act in its current form would preserve these dates as the "triggers."

    a. Would you support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972? Why or why not?

    Answer: As noted in my answer to Senator Specter's second question, I believe that some updating of the coverage formula would be useful in defending a renewed Voting Rights Act from constitutional attack. Having said that, without doing substantial additional research I cannot express an opinion on whether updating the coverage formula to the elections of 2000 and 2004 would do a better job than the current formula in singling out those jurisdictions that continue to engage in intentional discrimination in voting on the basis of race from those which do not do so.

b. Would you support adding the Presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to section 2 litigation say, in the last 5 years, to this formula in order to pick up jurisdictions that have begun discriminating since the 1970s? Why or why not?

Answer: See my answer to part a.

In *City of Boerne v. Flores*, the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the Fourteenth and Fifteenth Amendments. *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997). In striking down the Religious Freedom Restoration Act, the Court observed, "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."

3. Given this statement, would you support removing – at a minimum – the year 1964 from the coverage formula? Why or why not?

Answer: I would not support removing 1964 from the coverage formula to satisfy a *Boerne* concern. The question about the coverage formula is whether or not the formula is successful in singling out those jurisdictions that continue to engage in intentional discrimination in voting on the basis of race from those which do not do so. If it is successful, I don't think the fact that the formula came from 1964 will persuade the Supreme Court to strike down the renewed Voting Rights Act against a *Boerne* challenge. It makes sense to remove 1964 from the coverage year only if Congress is convinced that the coverage formula is no longer successful at accomplishing its purpose.

4. While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions – yet, for the period 1996 through 2005, the Department of Justice reviewed 54,090 Section 5 submissions and objected to 72, or 0.153 percent. What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only 1 objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?

Answer: As my testimony and law review article cited in my answers to Senator Specter's first question indicate, I do not believe that the number of objections, standing alone, helps much to make the constitutional case that covered jurisdictions are still engaging in a pattern of unconstitutional racial discrimination in voting so as to justify a renewed section 5. But the *absence* of objections does *not* indicate that section 5 is no longer needed. *If in fact section 5 has been an effective deterrent to intentional discrimination in voting on the basis of race, we would not expect to see too many objections.* The relevant question is whether these covered jurisdictions would once again engage in unconstitutional discrimination in voting if the preclearance deterrent were removed.

Ideally, this is a judgment I believe Congress should make based upon a careful review of the record. However, I remain concerned that the Supreme Court is going to require proof of

such intentional discrimination in voting, proof that will be difficult to come by given how good a deterrent section 5 has been.

5. In light of the lack of clear differentiation between covered jurisdictions and non-covered jurisdictions, would you support re-authorization for a term of 5 years instead of 25? Why or why not? 10 years? Why or why not?

Answer: I believe that for Congress to maximize the chances of the Supreme Court upholding a renewed Voting Rights Act, reauthorization should be limited to a 7-10 year period.

6. Putting aside the constitutional questions with regard to overturning *Georgia v. Ashcroft* – I want to better understand some of the practical implications. Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are "influence" districts, with relatively low numbers of minority voters, should be protected under the plan? Why or why not?

Answer: I do not believe that the language stating that the Supreme Court "misconstrued" Congressional intent in *Georgia v. Ashcroft* or the new draft language for section 5 is sufficiently clear to be able to answer that question with any certainty.

Answers of Professor Richard L. Hasen to Questions from Senator Sessions

Based on your review of H.R. 9 and S. 2703 and the relevant Supreme Court decisions, if the amendments proposed by the bills to section 5 of the Voting Rights Act were enacted, in your opinion would the amended section 5 satisfy the "congruence and proportionality" standard of *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)?

Answer: I would hope that the proposed bills would meet the constitutional standard, but I am not confident that they would, for reasons stated in my earlier testimony and my law review article, cited in my answer to Senator Specter's first question.

You have testified that "*Congress should update the coverage formula* based on data indicating where intentional state discrimination in voting on the basis of race is *now* a problem or likely to be one in the *near future*." What information or evidence would you recommend using to update the coverage formula? What information or evidence should "trigger" coverage under section 4(b)?

Answer: I have not examined this question in detail, so I cannot give you a definitive answer. If the committee is interested in updating the coverage formula, I suggest that it begin by examining Professor Michael McDonald's work, "Who's Covered? The Voting Rights Act Section 4 Coverage Formula and Bailout Mechanism." The article is forthcoming in *The Future of the Voting Rights Act* (Russell Sage 2006), and a draft is posted on the Internet at <http://elections.gmu.edu/McDonald%202005%20VRA%20Section%204.pdf>. I would also

suggest that Congress cull through the voluminous House record to determine which jurisdictions currently present the potential for problems with intentional discrimination in voting on the basis of race. From that list, it may be possible to come up with a revised coverage formula to capture the jurisdictions that Congress believes should be covered.

In your testimony, you also stated that "Congress should take steps to *make it easier for covered jurisdictions to bail out* from coverage under section 5 . . . ." How would you suggest changing the bailout provisions in section 4(a)?

Because I believe it will be politically difficult for Congress to change the coverage formula, I believe that bailout reform could provide the best way to save the renewed Voting Rights Act from constitutional challenge. In my answer to Senator Specter's second question, I have set forth draft language explaining how I would change the bailout provisions.

You also suggested that "*Congress should impose a shorter time limit, perhaps 7–10 years*, for extension." In your opinion, would a shorter extension period help in defending the Act against a constitutional challenge under the "congruence and proportionality" standard of *City of Boerne* v. *Flores*?

Answer: I believe that for Congress to maximize the chances of the Supreme Court upholding a renewed Voting Rights Act, reauthorization should be limited to a 7-10 year period.

8 June 2006

Hon. Arlen Specter
Chairman,
United States Senate
Committee on the Judiciary
Washington, DC 20510-6275

Dear Senator Specter:

Enclosed are separate responses to Senators Cornyn and Leahy. Thank you again for inviting me to the hearings last month. The corrected transcript of my testimony is also included.

Sincerely yours,

Chandler Davidson
Radoslav Tsanoff Professor Emeritus
And Research Professor
Rice University

8 June 2006

Hon. John Cornyn
United States Senate
Committee on the Judiciary
Washington, DC 20510-6275

Dear Senator Cornyn:

Thank you for the additional questions you have posed regarding reauthorization of the Voting Rights Act.

Regarding Question 1: What empirical data can you cite that indicates the ability of minorities in the covered jurisdictions to participate fully in the electoral process is substantially different from minorities outside the covered jurisdictions? Please be specific with respect to covered jurisdictions vs. non-covered jurisdictions.

The focus of my research regarding the Act over the last year and a half has been on the extent of Sections 2 and 5 enforcement in Section 5-covered jurisdictions, and so I have no comparative data of the kind you are requesting.

The only such data of which I am aware that are publicly available are those collected and analyzed by Professor Ellen Katz and her students in the Voting Rights Initiative at the University of Michigan. These findings are mentioned in the report of the National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work 1982-2005*, of which I am the principal author. I quote from that Report (pp. 82-83):

> Katz's VRI research team also found that 57 percent of the successful [reported Section 2] cases were filed in Section 5-covered jurisdictions, which in 2000 contained less than one-quarter of the nation's population, 39 percent of the U.S. African Americans,

> 31.8 percent of Latinos, and 25 percent of Native Americans.

In other words, Professor Katz found that a disproportionate number of the reported Section 2 cases resolved favorably to minorities nationwide were filed in Section 5-covered jurisdictions. Put still differently, 57 percent of the successful Section 2 cases filed nationwide were filed in the sixteen states (32 percent of all fifty states) covered totally or partially by Section 5; and the Section 5-covered jurisdictions, containing less than 25 percent of the nation's population, contained a disproportionately large percentage of the major minority groups: 39 percent of African Americans, 31.8 percent of Latinos, and 25 percent of Native Americans. Inasmuch as each case in which minority plaintiffs ultimately succeeded is an instance of at least one form of vote discrimination proscribed by the major permanent feature of the Voting Rights Act, Katz's data point to disproportionate vote discrimination within Section 5-covered jurisdictions.

Furthermore, I have recently had the opportunity to read a draft of a paper based on the Michigan Voting Rights Initiative's extensive data base, also written by Professor Katz, which goes into much detail to examine differences between covered and non-covered jurisdictions. To quote from her paper, she provides

> an overview of the judicial findings in published Section 2 decisions, focusing in particular on how these findings differ between covered and non-covered jurisdictions. Briefly stated, when compared to courts in non-covered jurisdictions, courts in covered jurisdictions have more frequently found racial appeals, acts of official discrimination that impact voting rights, and the use of devices that "enhance" opportunities for discrimination against minority voters more likely to be employed. These courts more often identify a lack of success by minority candidates and a lower level of minority voter registration and turnout. Courts in covered jurisdictions have documented voting patterns that are more extensively racially polarized than have courts in non-covered jurisdictions. They have more often found that the effects of discrimination in various socio-economic arenas remain salient and continue to

shape contemporary opportunities for minority political participation.[1]

I urge you to examine the National Commission's final report, and particularly Chapter 6, which discusses Section 2 enforcement both nationwide and in covered jurisdictions, at http://www.votingrightsact.org/report/finalreport.pdf. The Web site of the Michigan Voting Rights Initiative at http://sitemaker.umich.edu/votingrights is also a very important source of information. And, of course, as the quoted passage from Katz's new paper indicates, I urge you to contact Prof. Katz to obtain a copy of it. She may be reached at ekatz@umich.edu.

Questions 2-6:

2. Currently, the Voting Rights Act identifies those jurisdictions subject to additional oversight by looking at voter turnout in the presidential elections of 1964, 1968, and 1972. Re-authorization of the Act in its current form would preserve these dates as the "triggers."

a. Would you support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972? Why or why not?

b. Would you support adding the Presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to section 2 litigation say, in the last 5 years, to this formula in order to pick up jurisdictions that have begun discriminating since the 1970s? Why or why not?

In *City of Boerne v. Flores*, the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the Fourteenth and Fifteenth Amendments. *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997). In striking down the Religious Freedom Restoration Act, the Court observed, "RFRA's legislative record lacks

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[1] Ellen D. Katz, "Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2," unpublished paper scheduled for publication by the Warren Institute, University of California, Berkeley.

examples of modern instances of generally applicable laws passed because of religious bigotry."

3. Given this statement, would you support removing - at a minimum - the year 1964 from the coverage formula? Why or why not?

4.While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions - yet, for the period 1996 through 2005, the Department of Justice reviewed 54,090 Section 5 submissions and objected to 72, or 0.153 percent. What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only 1 objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?

5.In light of the lack of clear differentiation between covered jurisdictions and non-covered jurisdictions, would you support re-authorization for a term of 5 years instead of 25? Why or why not? 10 years? Why or why not?

6.Putting aside the constitutional questions with regard to overturning *Georgia v. Ashcroft* - I want to better understand some of the practical implications.

Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are "influence" districts, with relatively low numbers of minority voters, should be protected under the plan? Why or why not?

My recent research on the Voting Rights Act has concentrated on one issue, as I noted above: the extent of enforcement of Sections 5 and 2 in Section 5-covered jurisdictions. I believe the continuation of vote discrimination and of attempts by jurisdictions to engage in such discrimination in the last decade (as detailed in the National Commission's report, mentioned above, particularly in Chapters 4-7) is sufficiently serious to justify extending Section 5. But I have not given enough thought to Questions 2-6 to have an informed opinion.

Sincerely yours,

Chandler Davidson
Radoslav Tsanoff Professor Emeritus
and Research Professor
Rice University

8 June 2006

Hon. Patrick J. Leahy
United States Senate
Committee on the Judiciary
Washington, DC 20510-6275

Dear Senator Leahy:

Thank you for the additional questions you have posed regarding reauthorization of the Voting Rights Act. I will try as best I can to answer them in brief compass. Please see the enclosed responses and documents.

Sincerely yours,

Chandler Davidson
Radoslav Tsanoff Professor Emeritus
and Research Professor
Rice University

Hearing on S. 2703, the Voting Rights Act Reauthorization and Amendments
Questions for Professor Chandler Davidson
Submitted by Senator Patrick Leahy
May 16, 2006

1) **Professor Davidson, we can all agree that there have been improvements in minority access to voting that have occurred since the original Voting Rights Act was passed in 1965, but some claim that the protections in the bill have been so successful that they are no longer needed.**

In your view, what risks would we face to the progress we have made if we were to let the expiring provisions lapse? And have we *solidified* the gains we have made to date or are we at risk of backsliding like in the period after the Reconstruction?

These questions are logically connected, and I shall try to answer them as follows. The risks of letting the non-permanent features of the Act expire increase to the extent that the gains in minority voting rights are not accepted and internalized by the white majority, such that this majority will be willing to "do the right thing" on its own, without threat of deterrent action by the Justice Department or the U.S. Court for the District of Columbia (sometimes called "the D.C. Court.") Moreover, any comprehensive risk assessment must take into account the importance of what is at risk. In this case, *what is at risk is a fundamental right, the sine qua non of American democracy: the right to vote.*

My experience as a scholar of the Voting Rights Act and expert witness in over thirty voting rights cases from the 1970s

forward has led me to believe that in venues where racial issues are prominent in elections and where there is a long history of electoral discrimination, changes in election structures over the last quarter century that benefit racial or ethnic minorities are typically made over the objection of many whites, who may energetically oppose these changes at great cost to the taxpayer. The evidence in the book I co-edited with Bernard Grofman, *Quiet Revolution in the South*, indicates, for example, that most of the changes from at-large to district elections in local southern jurisdictions came about through Section 2 lawsuits filed after 1982.[1] More recent research conducted under my supervision for the report issued earlier this year by the National Commission on the Voting Rights Act, an organization created by the Lawyers' Committee for Civil Rights Under Law (hereinafter referred to as the *Commission Report*) discovered that since 1982, there were at least 653 Section 2 cases (both reported and unreported) resolved favorably to minority plaintiffs in eight of the nine states covered entirely by Section 5 (Alaska was left out of the analysis), plus North Carolina, forty of whose counties are covered. These 653 successful Section 2 cases affected minority populations in 825 separate counties—almost all of which were in states that belonged to the Confederacy. (Arizona, with its large Latino and Indian population, is the exception.)[2]

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[1] Chandler Davidson and Bernard Grofman (eds.), *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton: Princeton University Press, 1994). The research for this book was funded by the National Science Foundation.

[2] The National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act At Work, 1982-2005* (Washington, D.C.: Lawyers' Committee for Civil Rights Under Law, 2006), pp. 87-88. See http://www.votingrightsact.org to obtain access to the report and other documents, including testimony and documents submitted at ten hearings.

In addition to these 653 successful Section 2 cases there were 626 objection letters the Justice Department sent to Section 5-covered jurisdictions since 1982, prohibiting these jurisdictions from making one or more discriminatory changes in their election procedure.[3] There were 25 declaratory judgments adverse to covered jurisdictions' submissions of proposed election-related changes to the D.C. Court.[4] There were more than 200 proposed discriminatory submissions that jurisdictions withdrew from Department of Justice (DOJ) consideration in the same period, after the Department sent them queries implying that the changes would be objected to if they were not withdrawn or revised.[5] Each of these roughly 1,500 events in Section 5-covered jurisdictions—Section 2 cases, objection letters (often objecting to more than one proposed change in a submission), adverse declaratory judgments, and withdrawal letters—can be considered as an instance either of actual discriminatory voting procedure changed as the result of a legal action or as a discriminatory procedure proposed by officials and prohibited or discouraged by the DOJ or the D.C. Court since 1982.

Many of these lawsuits, objections, and withdrawals affected large populations of voters, including, for example, statewide or countywide redistricting. Finally, in many, though by no means all, of the instances in which existing discriminatory procedures were challenged through the courts or in which proposed discriminatory procedures were challenged in the D.C. Court, jurisdictions characterized by high degrees of racially polarized voting were willing to spend large sums of taxpayer money, sometimes amounting to more than a million

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[3] *Ibid.*, p. 52.
[4] *Ibid.*, pp. 57-58.
[5] *Ibid.*, pp. 58-59.

dollars over the course of years, to establish or maintain electoral procedures benefiting white voters at the expense of minority voters. And, as I will soon demonstrate, these indicia of vote discrimination in the covered jurisdictions are not "ancient history." *Many of them have occurred within the past decade, i.e., between 1996 and 2006.*

The point of this summary of data regarding Section 5-covered jurisdictions is to address your question of whether the gains achieved by the Voting Rights Act have solidified. It seems to me that this question concerns the values and preferences of officials in the covered jurisdictions today, and how they would be expressed if Section 5 in particular (and other temporary sections as well) no longer existed. Would the white officials in the Section 5-covered states, as of 2007, forbear engaging in the discriminatory electoral behavior that to one degree or another characterized southern politics in particular since federal oversight of the election process was withdrawn as a result of the infamous Compromise of 1877?

My answer to that question, I must say, has been influenced in part by having attended nine of the ten hearings the National Commission on the Voting Rights Act held across the nation in 2005. I was struck both by the testimony of long-time voting rights attorneys, minority activists, and various local officials, most of whom acknowledged dramatic gains in establishing minority voting rights under the Act, and yet expressed both frustration at the difficulty of achieving those gains and fear of what would result if the non-permanent features expired in 2007. These people included African Americans, Latinos, Indians, and Asian Americans.

I very much hope you will have a chance to read, however quickly, the testimony of some of the participants at these

hearings. They can be found by going to the Web site http://www.votingrightsact.org and then accessing the document, "Hearing Highlights."[6] In particular, I urge you at least to skim the following testimony (numbers refer to pagination):

- 4, Prof. Vernon Burton
- 5, Victor Landa
- 6, Anita Earls
- 7, Prof. Richard Engstrom
- 8, Alabama State Senator Bobby Singleton
- 13, Claude Foster
- 15, Nina Perales
- 20-21, Theodore Shaw
- 22, Joseph Rich
- 23-24, José Garza
- 32, Georgia State Senator Robert Brown
- 33-34, Tisha Tallman
- 38, North Carolina Congressman G.K. Butterfield
- 39-40, Meredith Bell Platts
- 40-41, Debo Adegbile
- 44-45, Prof. Dan McCool
- 45-47, Bryan Sells
- 47-50, South Dakota State Senator Theresa Two Bulls, Raymond Uses the Knife, Laurette Pourier, Jesse Clausen, O.J. Seamans, Craig Dillon, and Patrick Duffy
- 54, Rosalind Gold

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[6] This document of the National Commission on the Voting Rights Act is officially entitled, *Highlights of Hearings of the National Commission on the Voting Rights Act*.

- 55-56, Kathay Feng, 56-59, Robert Rubin, Joaquin Avila, Carolyn Fowler
- 61-64, North Carolina Congressman Melvin Watt, Sam Hirsch, J. Gerald Hebert
- 65, Prof. Richard Valelly
- 65-68, Mark Posner, Robert Kyle, Kent Willis
- 71-73, Robert McDuff, Carroll Rhodes
- 73-74, Brenda Wright
- 74-75, Deborah McDonald, John Walker

These excerpts from the hearings testimony are stories told of ongoing ethnic and racial discrimination affecting large numbers of minority voters. The thrust of their testimony was perhaps most dramatically summed up in the words of John Walker, an African-American attorney in Jackson, Mississippi, who told the Commission at its final hearing last October:

> We've seen . . . the news about Hurricane Katrina. Well, I would say that the Voting Rights Act . . . [is] the levees that keep repression out of Mississippi. If not for the Voting Rights Act—if that levee is broken—New Orleans would look like a Sunday school picnic compared to what will happen in Mississippi, because the oppression will rain down on us."[7]

Lest Mr. Walker's views be seen as an exaggeration, the history of Mississippi's dual registration law should be noted. A product of the state's disfranchising convention in 1890, the law, which required voters to register once for county, state,

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[7] *Hearings Highlights*, p. 75.

and federal elections, and again for municipal elections, was only struck down in 1987, as a result of a Section 2 lawsuit. The court found that the law was adopted for a discriminatory purpose and had a discriminatory effect, accounting, in part, for the 25 percentage-point difference in the registration rates of blacks and whites. By the early 1990s, a fully unitary registration system had been implemented as a result of the lawsuit. Within five years, however, events within the state subsequent to congressional passage of the "motor voter" statute led to the creation once more of a discriminatory dual registration system, and Mississippi became, once again, the only state in the union to have one. Moreover, the state refused to submit the changed procedure to DOJ for preclearance, even after the Department informed Mississippi that its new system had to be precleared.

Private citizens then filed a Section 5 enforcement action to force the state to preclear the change. The suit was ultimately decided in their favor by a unanimous U.S. Supreme Court. "The fact that [this enforcement action had to be filed] 30 years after the Voting Rights Act was adopted speaks volumes about Mississippi's determined resistance to the clear requirements of the Act," voting rights attorney Brenda Wright testified. When the change was finally submitted, the DOJ objected, holding that the state's new dual system was racially discriminatory both in purpose and effect.

But that is not the end of the story. The state legislature subsequently passed a bill to create a unitary registration system in order to gain preclearance. Then-Governor Kirk Fordice vetoed it, and yet another legal action filed by private citizens was required to guarantee the voting rights of African Americans. Only in late 1998—thirty-three years after passage

of the Act, eighteen years after Section 5 was last reauthorized, and more than a decade after the federal court struck down the original dual registration system—was the state's new dual registration system abolished.[8]

While this chain of events, coming to a conclusion only eight years ago, may be extraordinary even in Section 5-covered jurisdictions, it raises serious questions in my mind about what would happen in various locales if Section 5 were to lapse.

I think it is appropriate at this point to quote a written statement given to me last week by Larry Menefee, a well-known attorney in Montgomery, Alabama, who has litigated voting rights suits since the early 1970s (including *Bolden* v. *Mobile*, a case which, as you know, had an important impact on the 1982 reauthorization bill passed by Congress). I had asked Menefee the "solidification of gains" question you have posed to me, with regard to his native state of Alabama. Here is his response:

> Only *after* the 1990 round of legislative redistricting can one make an argument that black participation in Alabama politics was substantially equal to whites'. But even that statement needs a number of qualifications.
>
> 1. The first elections held were in 1994 with the new redistricting plans.
> 2. Legislative seniority on legislative committees, including chairs of committees, takes additional time.
> 3. Developing the relations, skills, and knowledge to be a successful legislator requires additional time.
>
> Senior, experienced legislators develop the skills and status to bargain with one another and with the executive branch. I suggest/argue, therefore, that *substantially equal political participation has existed between blacks*

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[8] This account of the dual registration system is taken from the *Hearings Highlights*, pp. 73-74.

> *and whites in the context of the Alabama Legislature for perhaps only the last four to eight years.*
>
> There are serious forces that currently operate to jeopardize even this recent black political participation. First, financial resources available for black candidates and to promote policy choices favored by blacks are significantly less than for white candidates and policy choices. Money is an important part of politics. Second, blacks' political participation is highly correlated with the Democratic Party and the viability of that biracial coalition. There are no black elected officials who are members of the Republican Party. The Republican Party has actively recruited white Democratic officeholders to switch parties with some success. The failure of both parties to seek black voters and black candidates means that continued black political participation may be eroded. The party organization of the Republican Party is, by several measures, substantially stronger than the Democratic Party.
>
> Thus, continued black political participation is threatened by unequal finances, party organization and continued racially polarized voting, whichis enhanced by the current partisan alignments.[9]

I would like to note at this point a further fact about southern Section 5-covered jurisdictions in particular. While racism of the rabid, violent kind that was widespread before and during the Civil Rights Movement in the South has dissipated sharply in the intervening years, race still plays a major role in social life and politics.

Indeed, racial violence and gross miscarriages of justice have not entirely disappeared from the scene. In my home state of Texas, two events *within the past decade* have drawn international attention and have had entire books devoted to them: the murder in 1998 of James Byrd, a black man tied behind a pickup truck by two white men and dragged to death along a lonely road near the East Texas town of Jasper; and the false arrest in a 1999 pre-dawn sting of forty blacks, as well as six

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[9] Document in my possession. Emphasis added.

whites with close social or marital ties to blacks, living in the small Panhandle town of Tulia. These arrests for drug use were based on the testimony of a single white lawman whose checkered career in law enforcement and prior links to the Ku Klux Klan were conveniently overlooked until the NAACP Legal Defense Fund intervened in the case. Twelve of the forty-six remained incarcerated until 2003, when the governor pardoned all thirty-five individuals who had been wrongly convicted.[10]

That these two egregious instances of modern-day racism are not unusual except perhaps for their viciousness or scope of harm is reflected in the fact that statistics published by Texas' Department of Public Safety reveal that in 2004—the last year for which data are publicly available—there were 285 hate-crime incidents involving 302 offenses in Texas. (There may be multiple offenders in a single hate crime.) Of the offenses, 69.2 percent were racial or based on ethnicity/national origins. By far the largest number of offenses were expressions of anti-black bias (115), followed by anti-homosexual bias (53) and by anti-white and anti-Hispanic bias (29 each). Thus, of all hate crime offenses, racial and otherwise, 38 percent were motivated by an anti-black bias and 10 percent each by an anti-white and anti-Hispanic bias.[11] This was in a state where in 2000 blacks made up 11.5 percent of the population, Hispanics 32.0 percent, and non-Hispanic whites, 52.4 percent.

I cite these statistics simply to underscore the continuation of racial hatred in one of the covered states. Racial tensions undoubtedly are reflected in the region's

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[10] On the Jasper case, see Roy Bragg, "Jasper trial defendant says Byrd's throat was cut," *San Antonio Express-News*, Sept. 17, 1999; regarding events in Tulia, see LDF Update Memo, last updated July 2005. Available from Vanita Gupta, lead LDF attorney in the case. (Copy in my personal files.)

[11] Texas Department of Public Safety, Crime in Texas, 2004, chap. 6, "Hate Crime." http://www.txdps.state.tx.us/crimereports/04/cit04ch6.pdf.

politics. As the eminent political scientists Earl Black and Merle Black point out in a recent book, one of several they have written on the South, race continues to be "the central political cleavage" in that region.[12] Another long-time student of the South, political scientist Richard Engstrom, avers that "one manifestation of this cleavage is racial divisions in voting. These divisions have tended to be pronounced when voters are presented with a choice between African American and white candidates. African Americans demonstrate in their voting behavior a distinct preference to be represented by people from within their own group, as do whites."[13]

In testifying before the National Commission on the Voting Rights Act in 2005, Professor Engstrom elaborated on this point in detail. He said that since the 2000 census, he had worked in seven states conducting studies "on what it takes to elect minority-choice representatives." As an example of his findings, he presented several data sets measuring racial polarization in different ways in various types of Louisiana elections. Specifically, he focused on ninety elections using three measures of polarization for each. "Almost every election analysis in those tables," he testified, showed "racially polarized voting in that election. . . . There are a few exceptions, usually when African Americans themselves may not be supportive of the African-American candidate. But . . . rarely is that the case." Engstrom analyzed elections for at least ten types of office in his study—from governor to the recorder of mortgages. "It doesn't matter what office is at issue; it

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[12] Earl Black and Merle Black, *The Rise of Southern Republicans* (Cambridge: Harvard University Press, 2002), p. 4.

[13] Richard Engstrom, "Race and Southern Politics: The Special Case of Congressional Redistricting," in Robert P. Steed and Laurence W. Moreland (eds.), *Writing Southern Politics: Contemporary Interpretations and Future Directions* (Lexington: The University Press of Kentucky, 2006), p. 93.

doesn't matter whether it's high profile or low profile; it doesn't matter whether it's top of the ballot or down the ballot. Time, place, and office do not matter. What we find consistently in almost every instance" is racially polarized voting.[14]

Engstrom claimed there was nothing unique in Louisiana in this respect. He pointed to other states in which he had recently conducted polarization analyses—South Carolina, Georgia, Florida, Alabama, and North Carolina (regarding African Americans and whites). He also noted that, in voting cases, he has worked as an expert for defendants and plaintiffs, for states, for civil rights organizations, and for the Department of Justice. He believes, as a consequence of his research, that Section 5 is still needed.[15]

The extent of continuing racially polarized voting was documented in detail by the National Commission Report, and I urge you to read Chapter 7 of that document to gain a fuller understanding of the problem.[16]

Also of importance is the recency of a good many legal actions and Justice Department interventions. The focus on the sharp decline in Section 5 objections that characterized some of the testimony by my fellow panelists during your Committee's hearings on the Act (a decline I will address in answering your second question below) might be interpreted as indicating that vote discrimination is long past. I have collected information on various indicia of such discrimination in the last decade—i.e., from 1996 on. In a historical time frame that reaches

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[14] *Hearing Highlights, op. cit.*, p. 7.
[15] *Ibid.*, pp. 7-8.
[16] The National Commission on the Voting Rights Act, *Protecting Minority Voters, op. cit.*, pp. 89-97. http://www.votingrightsact.org.

back to the First Reconstruction, the period from 1996-2006 is very brief indeed. Unfortunately, the short time and minimal resources available to me at present have precluded my extending the list beyond what is contained in Appendix A to this letter—a list of reported Section 2 cases favorable to minority plaintiffs decided in 1996 or later. (I may be able to supply more information on recent discrimination shortly, if it is not too late.) This list is derived from the work of Professor Ellen Katz and her students at the University of Michigan.

Let me now summarize my remarks so far. The question you posed is whether the progress made under the Voting Rights Act has solidified to the point where the non-permanent sections can be allowed to lapse without the likelihood of regression on the part of the white majority in these jurisdictions. My considered opinion is that it has not.

Just to be perfectly clear, I find it hard to imagine in the future the kind of regression that followed the Compromise of 1877, leading to mass violence and systematic, widespread disfranchisement. America's racial progress since the Civil Rights Movement has been profound, and the degree of anti-black violence and of unconcealed animus by whites to the full exercise of black citizenship rights that characterized the pre-Voting Rights Act period has declined sharply. This is the result of significant changes in white attitudes and values. As a native of a southern state whose scholarship over forty years has focused on minority voting rights, I believe that an important change in race relations has occurred, thanks in large part to the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

By the same token, I do not believe whites in covered jurisdictions have reached a point where, in the main, they can

be counted on to "do the right thing" regarding minority voting rights without continued oversight by the federal government. And I do not believe that Section 2, as important a deterrent as it is, will be sufficient if Section 5 is allowed to lapse. The First Reconstruction began to come apart rapidly after 1877, and by the first decade of the Twentieth Century blacks in the South were virtually excluded from the electorate. Sixty years passed before the federal government begin seriously to enforce the Fifteenth Amendment, and, as the remarks by Mr. Menefee quoted above suggest, it was only in the last decade or two of the Twentieth Century that blacks in the Deep South began to enjoy anything approximating full political incorporation. It is my considered opinion that the "solidification" of which you speak has not yet occurred to a degree that warrants dispensing with Section 5 and certain other nonpermanent features of the Act.

Your next question is as follows:

2) **We have received testimony about the significance of Department of Justice statistics involving the number of formal objections raised in response to pre-clearance submissions.**

What is your view of the relevance of the number or percentage of objections lodged by the Justice Department in terms of whether we should renew the pre-clearance requirements for covered jurisdictions?

The number of DOJ objections to changes in election procedures submitted for preclearance by Section 5-covered jurisdictions is one important measure of the tendency of these

jurisdictions to discriminate, at least up to the present. However, the sharp decline in objections since the mid-1990s may reflect more than a decline in "objectionable" submissions in the usual sense. The Commission Report deals briefly with the "mystery" of the decline in objections, and points to three separate possible explanations.

1. Since 2001 the Department of Justice has not been enforcing Section 5 as aggressively as it should be. In 2005, critics, including some former career lawyers in the DOJ, have alleged that political appointees in the Department have made decisions during the current administration without appropriate consultation with the Section 5 Unit's professional staff, and that some attorneys in the Civil Rights Division have been punished for aggressive enforcement of civil rights laws.[17]
2. The Supreme Court's interpretation of what Section 5 means has changed. Preclearance requires the jurisdiction to show that the proposed vote-related change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." In January 2000, the Court announced its decision in *Reno v. Bossier Parish School Board (Bossier II)*, which radically changed the nature of proof of discrimination regarding the intent prong of Section 5, by requiring the DOJ during the preclearance process to establish not only that the jurisdiction intended to discriminate, but to make the

[17] The National Commission on the Voting Rights Act, *op. cit.*, p. 77.

situation of minority voters worse than before—what is called "intent to retrogress." In the Bossier Parish, La., there had never been any blacks elected to the school board. Consequently, the new redistricting plan, which was intentionally drawn to prevent the election of blacks, could not be objected to because the officials' intentional discrimination did not make blacks worse off than before. Research by a DOJ historian and his colleagues revealed that the proportion of objections based entirely on the intent requirement of Section 5 gradually increased from 2 percent in the 1970s to 43 percent in the 1990s. The authors point out that the number of objections after *Bossier II* decreased to 16 percent of the number in the comparable period in the 1990s. While the authors do not attribute the decline entirely to the new retrogressive intent standard, it is reasonable to believe the court's decision could partially account for the low number of objections since 2001. Thus, if *Bossier II* is overturned by Congress as part of the reauthorization bill, the number of objections might well increase, simply because what had been treated as discriminatory intent before 2000 would be so treated once again.[18]

3. Another explanation is that covered jurisdictions have finally accepted Section 5 as a principle they must comply with whenever they make a voting change, like it or not, and they have developed an efficient procedure for substantially increasing the likelihood

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[18] *Ibid.*, pp. 78-79.

of preclearance. In this respect, Section 5 may be no different from governmental regulation in other areas where a decrease in the number of violations over time results primarily from those who are subject to the regulation improving their procedures for ensuring compliance—as opposed to a lessening of the need for the regulation itself. A good example of this may be found in environmental regulation. Whether those being regulated would continue to abide by the rules if the governmental regulations were abolished, however, is unclear.[19]

4. The decline in objections may be the result of a combination of the above three changes.

From this, it can be seen that the decline in objections may not, in itself, be a robust indication of a sharp decline in covered jurisdictions' willingness to make racially discriminatory voting changes.

Aside from the problem of explaining the decline in objections, it is important to note that, in addition to objections, there are four other indicia of actual or potential vote discrimination—indicia contained in DOJ records.

The first of these is an adverse declaratory judgment issued by the D.C. Court. As you know, a jurisdiction may submit a proposed change to that court rather than to DOJ. When the court rules adversely to the jurisdiction, this is the equivalent of a DOJ administrative objection.

The second is a withdrawal of a proposed preclearance submission, whereby a jurisdiction, upon being queried by the

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[19] *Ibid.*, p. 80.

DOJ regarding the submission, decides to withdraw it, inferring in many instances that it would otherwise result in an objection. (Not all withdrawals are for this reason, but inasmuch as, to my knowledge, no research has been conducted on the reasons for withdrawals, and inasmuch as it is commonly assumed by those familiar with withdrawals that a main reason is a jurisidiction's fear of an objection, withdrawals have been treated by the National Commission as the equivalent of objections.)[20]

The third is a successful Section 5 enforcement action. An enforcement action is a suit that may be filed by the DOJ or private parties to ensure that Section 5 is adhered to. A noteworthy recent enforcement action was filed in Waller County, Texas in 2004, which successfully prevented the white District Attorney from illegally trying to prevent college students at the historically black Prairie View A&M University from voting in the Democratic primary (in which two black students were on the ballot), on the grounds that, as college students whose parents lived in other counties, they were required to vote in their home counties.[21] Most such actions are filed to force a jurisdiction to submit a proposed or actual change to the DOJ for preclearance after the jurisdiction has failed to do so. The DOJ records are not sufficiently well-kept to enable us to determine precisely how many successful actions have been filed.

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[20] See *ibid.*, endnote 198 for a discussion of the plausibility of treating withdrawn submissions as the equivalent of objections. In brief, because not all withdrawals are the result of anticipating an objection, counting withdrawals as the equivalent of objections tends to *overstate* the incidence of objectionable proposed changes. On the other hand, because the Commission defined a withdrawal as a withdrawn submission letter, and submission letters often contain multiple intended changes of specific election procedures which are withdrawn simultaneously, counting submissions as withdrawals tends to *understate* the number of withdrawn changes overall.

[21] *Ibid.*, p. 65.

Moreover, there is no systematic collection of data regarding them. However, the staff of the National Commission attempted in 2005 to tally the number from various sources.

The fourth is an "observer coverage." Sections 3 and 6 of the Act allow federal courts and the Attorney General, respectively, to certify certain jurisdictions for the presence of federal examiners. Once a jurisdiction is certified, Section 8 authorizes the DOJ to request that trained federal observers be sent there to monitor voting during elections. Typically, such requests result from communication among Voting Section lawyers and local officials, minority leaders, and U.S. Attorneys in various communities in the months before Election Day to determine whether voting rights violations are expected. When racial tensions are running high, or there are threats of vote suppression efforts or perhaps inflammatory political rhetoric in a campaign involving minority candidates, a federal presence is indicated, and observes are sent. They have the right to go inside polling places during voting hours, and to observe the counting of votes. While the presence of federal observers in a jurisdiction is not an indication that discrimination has occurred, observer reports on file in the DOJ indicate that this is sometimes the case; and there is agreement among knowledgeable persons that the presence of observers often deters discrimination that might otherwise occur.

A full understanding of the incidence or likelihood of actual or attempted vote discrimination as this bears on the question of whether to renew the preclearance requirement, therefore, requires an assessment of more than the incidence of DOJ objections alone. And, in particular, it is important to factor in data from the other four types of indicia of actual, proposed, or anticipated vote discrimination: adverse

declaratory judgments, submission withdrawals, enforcement actions, and observer coverages.

The data from 1982 to, roughly, the present, compiled from the Commission Report, are summarized in Table 1.

TABLE 1

INDICIA OF VOTE DISCRIMINATION-RELATED ACTIVITIES

1. Objections[22]	626
2. Adverse declaratory judgments	25
3. Withdrawals	205
4. Successful Sec. 5 enforcement actions (9 states only)	105
5. Observer coverages	622
TOTAL	1,583

Again, it should be stressed that of the four types of "vote discrimination-related activities" only adverse declaratory judgments are precisely equivalent to objections. The remaining three, however, are useful indicia of discriminatory problems that would no longer be targeted were the non-permanent features of Section 5 to lapse.

In order better to grasp the importance of considering all five measures, or "variables," rather than objections alone, I have used data compiled by the National Commission to construct a graph (Figure 1, Appendix A), which compares, in five-year intervals from 1966 to 2004, the number of objection letters (red line) and the total number of all five variables, including the objection letters (blue line). In the latter period (four years rather than five, due to the lack of data for 2005 at the time the report was written), if one were only to rely on the

[22] Objections are defined here as objection letters. Such letters may contain objections to more than one proposed change from the jurisdiction. For a description of each of these five measures, see *ibid.*, Chapter Five.

number of objection letters, one would conclude that there were only 39 instances of discriminatory Act-related behavior within covered jurisdictions. However, the five variables combined indicate 91 such instances.

So far, I have relied on data from the Commission Report. However, a recent analysis by scholars at Stanford University has become available which adds an important dimension to research on withdrawals of changes in submissions. In an unpublished paper, political scientist Luis Fraga and his student, Maria Lizet Ocampo, have employed a different methodology from that in the Commission Report. The latter simply identified all withdrawal letters as those which the DOJ had marked as "Withdrawn" after the jurisdiction had received a "More Information Request" (MIR) from the department.[23] A "withdrawal" was defined by the Commission as such a withdrawal letter. Fraga and Ocampo improved on this procedure in two ways. First, they defined withdrawals as pertaining to individual proposed changes within withdrawal letters, rather than to withdrawal letters as such. (This is an improvement because a single withdrawal letter may contain multiple changes that are withdrawn.) Second, Fraga and Ocampo note that an MIR can do something different from causing a jurisdiction to

[23] Fraga and Ocampo explain that a MIR "is a formal letter from a senior official within the DOJ sent to a jurisdiction requesting that it provide additional information specific to a proposed change in voting procedure or practice in situations where the initial submission was inadequate to provide a basis for assessment." One or more MIRs may be included within a single more information letter. In these letters, the DOJ describes additional information it needs to fully evaluate whether or not a proposed change should be precleared. See Appendix B for examples of MIRs.

withdraw a submitted change: it can cause the jurisdiction to submit a different change (called a "superseding change") that meets with DOJ approval; or it can cause the jurisdiction simply to do nothing, i.e., to proceed no further in its efforts to get DOJ approval because the jurisdiction has decided, after receiving the Department's inquiry, to forgo the original change it proposed. (This is called a "no response".) All three of these alternatives—withdrawals, superseding changes, and no responses—result in the prevention of a proposed change that would probably have been found discriminatory.

Fraga and Ocampo then tally the results of MIRs from 1982 to July 2005 and compare them with the number of DOJ objections each year during that period. (Unlike the Commission Report, these scholars define an "objection" as each *proposed electoral change* objected to, rather than as each *submission letter*—inasmuch as a single letter can object to multiple changes. Thus these authors' tally of objections is much larger than that of the Commission.)

The authors' conclusions are worth quoting verbatim.

> Overall, we find that MIRs enhanced the deterrent effect of Section 5 by 51%. Our study reveals that 13,697 MIRs and 3,120 follow-up requests were sent to jurisdictions from 1982 to 2005. A total of 1,162 changes that received an MIR led to withdrawals, superseding changes, or no responses. This is separate from and in addition to the 2,282 changes that were objected to by the DOJ during the same 23-year period. There is, however, notable variation in the relative impact of MIR outcomes to objections across the years examined. Significantly, MIR induced outcomes have had a much greater deterrent effect [than objections] since 1999 when the number of objections decreased substantially. By our count, from 1999 to July

> 2005, 357 changes were deterred through the MIR process, compared to only 59 objections during the same period.[24]

Thus, according to their figures, in this most recent period six times as many MIRs as objections deterred potentially discriminatory changes. Their findings are shown graphically in Figure 2, a chart in their paper. (See Appendix A.)

To summarize the answer to your second question, then, by employing the data and methodology of the Commission Report, and supplementing it with data from the new study by two Stanford University scholars which uses a somewhat different methodology, *I conclude that reliance upon DOJ objections alone as a measure of the extent of potential vote discrimination in covered jurisdictions is misleading.* This is because reliance solely on objections ignores, on the one hand, adverse declaratory judgments by the D.C. Court, withdrawal letters, Section 5 enforcement actions, and observer coverages. On the other hand, it ignores the three specific types of results of "more information" letters—results that also prevent potentially discriminatory election changes from being put in place. When these additional indicia of potential vote discrimination are taken into account, the extent of the problems faced by minority voters in Section 5-covered jurisdictions, even in recent years, is significantly greater than a focus on objections alone would lead one to believe.

I hope that my answers to your questions will shed light on the facts that are germane to the reauthorization debate.

Sincerely yours,

Chandler Davidson
Radoslav Professor of Public Policy Emeritus
Research Professor

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[24] *Ibid.*, p. 3.

Supplemental Testimony
Professor Samuel Issacharoff
New York Univeristy School of Law

On the Reauthorization of Section 5 of the Voting Rights Act

June 12, 2006

I have been asked to answer additional questions prompted by my earlier testimony and that of other witnesses. I will first address the broader questions then return to some of the particulars.

1. The evidence of continued discrimination in jurisdictions covered under Section 5 of the Voting Rights Act and the likely constitutionality of a 25-year extension based on that evidence.

This is the core of the inquiry from Chairmen Specter and is presented as well in the questions of Senators Cornyn and Sessions.

As I noted earlier, the exact constitutional framework for reviewing an extension of Section 5 is not altogether clear. The questions ask primarily about the congruence and proportionality standard of *City of Boerne v. Flores.*[1] But the Supreme Court failed to apply such an exacting standard in *Nevada Department of Human Resources v. Hibbs,*[2] and chose not to demand strict conformity to the congruence and proportionality standard in its one post-*Boerne* substantive review of Section 5 in *Lopez v. Monterey County.*[3] Accordingly, I start from the premise that the cases to date suggest a more exacting standard of review than Section 5 has received in the past, but probably not as exacting as the direct application of *Boerne* would suggest.

I would summarize the evidence as follows. There have been a declining number of objections by the Department of Justice since Section 5 was last extended. The number of objections has dropped to the point of being almost negligible in recent years. Those objections that have been interposed are likely to concern issues of vote dilution (a diminution in the ability of a minority community to elect a candidate of choice to office) rather than the sort of ballot access concerns that were the initial concern of the Act. Moreover, objections at the statewide level are increasingly rare and now concern almost exclusively vote dilution issues. In addition, there is evidence in the record of continued racial bloc voting that compounds concerns about minority vote dilution. This evidence shows widespread patterns of polarized voting in covered jurisdictions, but is incomplete for two reasons. First, most of the evidence is drawn from litigated cases, which are likely to present a non-random data set from which to draw evidence as to voting patterns

[1] 521 U.S. 507 (1997).
[2] 538 U.S. 721 (2003).
[3] 525 U.S. 255 (1999).

throughout the covered jurisdictions. Second, the only comparable study of voting patterns in non-covered jurisdictions also focuses on litigated cases and does not suffice for a robust comparison of the extent to which racially polarized voting is a distinct feature of the covered jurisdictions as opposed to being a concern of national scope. Finally, the evidence seems clear that election officials in covered jurisdictions are aware of their obligations under Section 5, that they take those obligations into consideration when making decisions affecting the electoral process, and that they do on occasion alter their planned course of conduct upon request by DOJ for more information. This evidence indicates that Section 5 may serve as a deterrent to some practices with an adverse effect on minority voters, or that at the very least it reinforces the need to be attentive to the interests of minority voters. The magnitude of that deterrent effect cannot be quantified from the record.

I believe that the constitutionality of a renewed Section 5 could well turn on the extent to which the Act shows sufficient flexibility to correspond to what the record indicates is the current state of affairs. The evidence shows that there may still be causes for concern, particularly in those areas where recourse to political protest or litigation may be most difficult to muster. Nonetheless, the paucity of objections, as recounted in Senator Cornyn's questions to the witnesses, calls into serious constitutional question the extraordinary reach of Section 5. In my view, the more the Act reflects the transitions in American society since 1965, the more likely is it to be constitutional.

Accordingly, I believe that the record may be sufficient for a revised Section 5, but may not be sufficient for a simple 25 year extension of the Act in its current form. In my prior testimony, I suggested a series of reforms that might make the Act better conform to the evidence. First, I think that an improved bailout process would lend to the Act the sort of transitional character that played some role in the Court's decision in the Michigan affirmative action case, *Grutter v. Bollinger*.[4] An eased bailout process would present the Court with a statutory scheme that is aimed at preventing backsliding by recalcitrant jurisdictions while allowing those who had demonstrated compliance with the Act to remove themselves from administrative oversight. Second, I suggested that the unit of coverage be changed from the states as a whole to individual counties, towns and other political subjurisdictions. Again, the idea is to bring the regulatory scheme into conformity with what the record reveals are increasingly localized problems. Third, I suggested an expansion of coverage to jurisdictions that have been found in violation of Section 2 of the Voting Rights Act or that had been found to have violated other voting rights, such as by harassment or intimidation of voters. This would relieve pressure on the original coverage formula by which to this day the majority of covered jurisdictions are covered by virtue of events in 1964. Fourth, I suggested removing from Section 5 review all statewide redistricting efforts. I will return to this point subsequently to address the specific question from Senator Sessions. But here again the idea is to reserve the extraordinary remedial scheme of Section 5 for those jurisdictions and those practices that are unlikely to be reached by less intrusive means. Finally, I suggested that coverage both be expanded to include jurisdictions found to have violated Section 2 of the Voting

[4] 539 U.S. 306 (2003).

Rights Act and that the role of Section 5 coverage increasingly gravitate to a different administrative model, one based on the information disclosure functions of the SEC.

2. The relationship between removing statewide redistricting from Section 5 coverage and the likelihood of the Act being found constitutional.

This question is posed by Senator Sessions and follows from the above discussion of the relation between an extension of Section 5 and review under the *City of Boerne* congruence and proportionality standard.

Even in its initial review of the Voting Rights Act, the Supreme Court explained that "[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects."[5] The Court upheld the extraordinary features of Section 5, in part, because of the perceived need to shift the burden of time and inertia to the victims rather than the perpetrators of racial exclusion in voting. At the time, case-by-case adjudication of voter registration reforms had proved cumbersome, ineffectual, and unable to bring the retrograde practices effectively before courts.

It is difficult to argue, in my view, that statewide redistricting has the capacity to slip beneath the radar screen and evade meaningful court review. It is important to note that Section 5 does not exist in isolation with regard to statewide redistricting practices. There is also review under Section 2 of the Act, under the Constitution directly, and under the still unclear standards governing partisan gerrymanders. There are motivated and well-resourced parties willing to do legal battle over every aspect of statewide redistricting for both state legislatures and Congress. If anything, our recent experience shows that the excesses of battle over redistricting advantage may even have led to unlawful acts.

Under these circumstances, there is some burden of showing why redistricting practices in the covered jurisdictions should be subject to DOJ oversight, while those in non-covered jurisdictions are not. In light of the limited evidentiary record concerning statewide redistricting efforts and in light of the zero probability that redistricting practices having an adverse effect on minority voters will go unchallenged, the continued role of Section 5 in this area becomes more constitutionally suspect.

Although perhaps not a matter of constitutional concern, I would further note that it is precisely in the statewide redistricting context that the concerns over partisan influence on DOJ preclearance review have surfaced. This again calls into question the proper functioning of Section 5 in this area.

[5] South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

3. Alterations of the bailout provisions.

Senator Sessions asked what alterations of the bailout provisions might be implemented.

Previously, I discussed moving the unit of coverage for Section 5 from the statewide level to the level of the local jurisdiction. In part, such a change in the coverage formula would facilitate efforts by local jurisdictions to bailout of coverage. While such a bailout is currently available, the fact that local jurisdictions are covered as part of broader, statewide coverage may be one reason that there have been so few attempts to end Section 5 coverage.

More significant, both in terms of practical effect and in terms of assisting the constitutional prospects of an extension of Section 5, would be creating an internal "sunset" review under the Act. There are many forms this could take, but I will propose one as an illustration. Congress could require DOJ to conduct an audit of compliance by each covered jurisdiction. A fixed time period would then be assigned for shifting the burden to DOJ to either stipulate to the termination of covered jurisdiction status or to bring a declaratory judgment action to establish the continued need for coverage. Thus, for example, for any jurisdiction that had not had any objections filed, any successful claims under the Voting Rights Act, any DOJ requests for further information on a proposed change that was then withdrawn or altered, or any successful claim of voter intimidation or harassment, a five year period would trigger the need to establish continued coverage through a DOJ declaratory judgment action. For a jurisdiction that had altered a proposed changed practice as a result of an objection, the period for the sunset review could be extended to seven years.

The practical effect of such a bailout system would be that in five or seven years, the jurisdictions that were still covered would be those that were unable to extricate themselves from the preclearance requirement in a process that allowed relatively liberal exit. To my mind, that would also relieve constitutional pressure on a blanket extension of Section 5.

4. The length of the extension.

As I noted in my earlier testimony, the continued use of a trigger that is increasingly remote in time places pressure on the congruence between the perceived harm and the expansiveness of Section 5. The proposals I have outlined above are all directed to increase the connection between the Act and the likelihood that the covered jurisdictions are contemporaneously engaged in prohibited conduct. I think an improved bailout provision would accomplish this most directly. A shortened time frame for the extension would also have this effect.

5. The continued use of the 1964 elections as the trigger.

Senator Cornyn poses the question of removing the 1964 elections from the coverage formula.

I have not done an analysis of how many jurisdictions would still be covered if the 1964 elections were carved out of the coverage formula. My impression is that it would be very few. I am not sure, however, that tinkering with the coverage dates is necessarily the best way to make the Act more current.

This Committee has already heard testimony that the coverage formula was an instrumental tool to extend the Act's reach to the jurisdictions that were considered the malefactors in denying voting rights to black citizens. The trigger turned on both the use of prohibited devices to suppress registration and evidence of low levels of voter registration and turnout. Without the connection to the historic experience of jurisdictions that were outliers on the national stage and that actively used devices such as literacy tests and poll taxes to impede minority voting, the coverage formula does not have independent significance.

As I noted in my previous testimony, the remoteness in time between the1964 coverage trigger and the proposed next end date of Section 5 is a source of constitutional concern. Rather than pick new dates and risk introducing some arbitrariness into coverage, I think the Congress would be better off accepting the coverage formula for the present and then easing both the bailout provisions and the possibility of new jurisdictions being covered as a result of actual contemporaneous misconduct.

6. Georgia v. Ashcroft.

Senator Cornyn asks what the practical effect of overruling *Georgia v. Ashcroft* would be in terms of the statutory protection of minority influence districts.

It is not altogether clear what the statutory override of *Georgia v. Ashcroft* would entail. The statutory amendment is clearly intended at preserving concentrations of minority voters and using the prior levels as necessary criteria in defining retrogression under the framework of *Beer v. United States.*[6] There is little to indicate how this would apply in the absence of a direct ability to elect. The House Report (at page 71) quotes with approval testimony that "[m]inority influence is nothing more than a guise for diluting minority voting strength." This would appear to give little statutory protection outside the ability to elect. On the other hand, the strict application of *Beer* could result in any diminution in minority concentrations being unlawful. I think the record is unclear on this issue.

Moreover, the facts of *Georgia v. Ashcroft* make the new statutory standard more difficult to interpret. The districts that DOJ objected to in Georgia all featured a reduction in the concentration of black voters. Subsequently, black representatives were

[6] 425 U.S. 130 (1976).

elected to office from slightly altered districts, though presumably on a shakier, more of an "influence" coalition basis than would have been the case with a greater concentration of minority voters. The House Report endorses the claim that, "if left unaddressed, the *Georgia* standard 'threatens the Nation's commitment to representative democracy . . . .' The Committee agrees." Report at 71-72 (footnote omitted). This is a disturbingly broad claim. But it is difficult to see how the creation of influence districts both threatens representative democracy and is the subject of protection under the proposed amendments to the Act.

Senate Judiciary Committee
Reauthorization of Section 5 of the Voting Rights Act

Responses to Additional Committee Questions
Laughlin McDonald
Director, ACLU Voting Rights Project
Atlanta, Georgia

June 9, 2006

My responses to the additional questions submitted by members of the committee following the hearing on May 9, 2006, are set out below.

Questions from Sen. Specter

Evidence of Discrimination in Voting

The report submitted to the House Judiciary Committee by the ACLU Voting Rights Project, "The Case for Extending and Amending the Voting Rights Act: Voting Rights Litigation, 1982-2006," (and subsequently entered into the record by the Senate Judiciary Committee), as well as the written testimony I submitted on May 9, 2006, contain substantial evidence that racial discrimination still exists in the covered jurisdictions.

Section 5 Objections

There have been more than 1,000 objections under Section 5 by the Department of Justice since 1982, encompassing an even greater number of voting changes in the covered jurisdictions. A few examples from the cases discussed in the ACLU's report will suffice to illustrate the continuing importance of Section 5.

The City of Albany, Georgia: 2002-2003

Following the 2000 census, the City of Albany, Georgia, adopted a new redistricting plan for its mayor and commission to replace an existing malapportioned plan, but it was rejected by the Department of Justice under Section 5. The department noted that while the black population had steadily increased in Ward 4 over the past two decades, subsequent redistrictings had decreased the black population "in order to forestall the creation of a majority black district." The letter of objection concluded it was "implicit" that "the proposed plan was designed with the purpose to limit and retrogress the increased black voting strength in Ward 4, as well as in the city as a whole."[1] A subsequent court ordered plan remedied the vote dilution in Ward 4.[2] But in the absence of Section 5, elections would have gone forward under a plan in which purposeful discrimination was "implicit," and which could only have been challenged in time consuming vote dilution litigation under Section 2, in which the minority plaintiffs would have borne the burden of proof and expense.

Charleston County, South Carolina: 2003-2004

[1]J. Michael Wiggins, Acting Assistant Attorney General, to Al Grieshaber Jr., September 23, 2002.
[2]Wright v. City of Albany, Georgia, 306 F. Supp. 2d 1228 (M.D. Ga. 2003).

In 2003, South Carolina enacted legislation adopting the identical method of elections for the board of trustees of the Charleston County School District that had earlier, in a case involving the county council, been found to dilute minority voting strength in violation of Section 2.[3] Under the pre-existing system, school board elections were non-partisan, multi-seat contests decided by plurality vote, which allowed minority voters the opportunity to "bullet vote," or concentrate their votes on one or two candidates and elect them to office. That possibility would have been effectively eliminated under the proposed new partisan system.

In denying preclearance to the county's submission, the Department of Justice concluded "[t]he proposed change would significantly impair the present ability of minority voters to elect candidates of choice to the school board and to participate fully in the political process." The department noted further that:

> every black member of the Charleston County delegation voted against the proposed change, some specifically citing the retrogressive nature of the change. Our investigation also reveals that the retrogressive nature of this change is not only recognized by black members of the delegation, but is recognized by

[3]United States v. Charleston County and Moultrie v. Charleston County Council, 316 F. Supp. 2d 268 (D. S.C. 2003), aff'd 365 F.3d 341 (4th Cir. 2004), cert. den'd, 125 S. Ct. 606 (2004).

> other citizens in Charleston County, both elected and unelected.[4]

Section 5 thus prevented the state from implementing a new and retrogressive voting practice, one which everyone understood was adopted to dilute black voting strength and insure white control of the school board.

Georgia Redistricting: 1982-1983

[4]R. Alexander Acosta, Assistant Attorney General, to C. Havird Jones, Jr., February 26, 2004.

A three-judge court in the District of Columbia denied preclearance to Georgia's infamous 1980 congressional redistricting plan finding that it was adopted with "a discriminatory purpose in violation of Section 5."[5] The state had increased the black population in the Fifth District over the benchmark plan, but kept it as a district with a majority of white registered voters. The remaining nine congressional districts were all solidly majority white. As Joe Mack Wilson, the chief architect of redistricting in the house told his colleagues on numerous occasions, "I don't want to draw nigger districts."[6] The decision of the district court was affirmed by the Supreme Court.[7]

Other Examples

Numerous other Section 5 objections are discussed in detail in the ACLU's report. The objections in Florida include state restrictions on registration and voting (1998).

The objections in Georgia include: Adel, annexations (1982); Augusta, high school diploma requirement for holding office & annexations (1987); Augusta, date of referendum (1988); Augusta, consolidation (1989); Bibb County, special election (1988); Butler, majority vote requirement (1992); Clay County, candidate high school diploma requirement (1993); College Park, redistricting

[5]Busbee v. Smith, 549 F. Supp. 494, 517 (D. D.C. 1982).
[6]Id. at 501.
[7]Busbee v. Smith, 549 U.S. 1166 (1983).

(1983); East Dublin, numbered posts and majority vote requirement (1991); Glynn County, consolidation (1982 & 1984); Griffin, redistricting (1985); Hinesville, majority vote requirement (1991); Jesup, redistricting and numbered posts and majority vote requirement (1986); Kingsland, numbered posts (1983); La Grange, redistricting (1993 & 1994); Lamar County, redistricting (1986); Lumber City, numbered posts and majority vote requirement (1988 & 1989); Lyons, redistricting (1985); Macon, deannexation (1987); Marion County, redistricting (2002); Millen, relocation of polling place (1995); Newnan, redistricting (1984); Newton, numbered posts (1997); Putnam County, redistricting (2002); Randolph County, redistricting (1993); Rome, staggered terms (1987); Sumter County, redistricting (1982); Tignall, numbered posts, staggered terms, and majority vote requirement (2000); Waynesboro, majority vote requirement (1994); Wrens, majority vote requirement (1986); and Wrightsville, relocation of polling place (1992).

Objections in Louisiana include: state photo ID requirement (1994); and St. Francisville, redistricting (1993).

Objections in Mississippi include: statewide dual registration (1997); and Perry County, redistricting (1991).

Objections in North Carolina include: Ahoskie, annexations (1989); Edgecomb County, residency districts (1984); Laurinburg, annexations (1994); Martin County, residency districts (1986); Mt. Olive, redistricting (1994); and Rocky Mount, annexations (1984).

The objections in South Carolina include: state legislative redistricting (1994); Batesburg, majority vote requirement (1986); Batesburg-Leesville, majority vote requirement (1993); Clinton, annexations (2002); Edgefield County, redistricting (1984); Edgefield County school district, redistricting (1987); Elloree, staggered terms and majority vote requirement (1984); Hemingway, annexations (1994); Johnston, redistricting (1992 & 1993); Orangeburg, redistricting (1985 & 1992); Sumter County, annexations (1985 & 1986); and Sumter County, redistricting (2002).

Racial Bloc Voting

One of the surest indicators of the continuing divisiveness of race is the presence of racial bloc voting. A few examples from the ACLU's report will suffice.

South Carolina: 1984-2004

The three-judge court in Burton v. Sheheen, decided in 1992, relied upon the stipulation of the parties "that since 1984 there is evidence of racially polarized voting in South Carolina."[8] A subsequent three-judge court in Smith v. Beasley, decided in 1996, found that "[i]n South Carolina, voting has been, and still is, polarized by race. This voting pattern is general throughout the state."[9] In Colleton County Council v. McConnell, decided in 2002, the three-judge court made similar findings: "[v]oting in South Carolina continues to be racially polarized to a very high degree

[8]Burton v. Sheheen, 793 F. Supp. 1329, 1357-58 (D. S.C. 1992).

in all regions of the state and in both primary and general elections."[10] In 2004, the court of appeals affirmed the finding of a district court in South Carolina "that voting in Charleston County Council elections is severely and characteristically polarized along racial lines."[11]

Indian Country: 1986-2004

[9]Smith v. Beasley, 946 F. Supp. 1174, 1202 (D.S.C. 1996).
[10]Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 641 (D.S.C. 2002).
[11]Moultrie v. Charleston County Council, 365 F.3d at 350.

In invalidating South Dakota's 2001 legislative redistricting plan as diluting Indian voting strength in the area of the Pine Ridge and Rosebud Sioux Indian Reservations, the court found "'legally significant' white bloc voting."[12]

The court struck down at-large elections in Blaine County, Montana, finding that racially polarized voting "made it impossible for an American Indian to succeed in an at-large election."[13] In invalidating at-large elections in Big Horn County, the court made similar findings that "there is racial bloc voting," and "there is evidence that race is a factor in the minds of voters in making voting decisions."[14]

On May 5, 2006, the court of appeals for the Eighth Circuit reversed a decision of the district court dismissing a vote dilution challenge to elections for the City of Martin, South Dakota, concluding that "plaintiffs proved by a preponderance of the evidence that the white majority usually defeated the Indian-preferred candidate in Martin aldermanic elections."[15] The court

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[12]Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1017 (D.S.D. 2004).
[13]United States v. Blaine County, Montana, 363 F.3d 897, 914 (9th Cir. 2004), cert. den'd, Blaine County v. United States, 125 S. Ct. 1824 (2005).
[14]Windy Boy v. County of Big Horn, 647 F. Supp. 1002, 1013 D. Mont. 1986).
[15]Cottier v. City of Martin, 445 F.3d 1113, 1122 (8th Cir. 2006).

also noted the history of ongoing intentional discrimination against Native Americans in Martin:

> For more than a decade Martin has been the focus of racial tension between Native-Americas and whites. In the mid-1990s, protests were held to end a racially offensive homecoming tradition that depicted Native-Americans in a demeaning, stereotypical fashion. Concurrently, the United States Department sued and later entered into a consent decree with the local bank requiring an end to 'redlining' loan practices and policies that adversely affected Native-Americans, and censuring the bank because it did not employ any Native-Americans. Most recently, resolution specialists from the Justice Department attempted to mediate an end to claims of racial discrimination by the local sheriff against Native-Americans.[16]

Significantly, Martin is the county seat of Bennett County, located between Shannon and Todd Counties, both of which are covered by Section 5. The history of purposeful discrimination against Indians in South Dakota is set out in detail in the recent opinion of the district court invalidating 2000 legislative redistricting as diluting Indian voting strength.[17]

Georgia: 2002

The District Court for the District of Columbia, in a Section 5 preclearance action involving Georgia's legislative redistricting plan, found there were areas of the state where "white voters

[16]Id. at 1115-16.
[17]Bone Shirt v. Hazletine, 200 F. Supp. 2d 1150 (D. S.D. 2002). The decision is discussed in detail in the ACLU's report previously

consistently vote against the preferred candidates of African Americans."[18]

Other Examples

The ACLU's report is replete with other findings by courts, and the Department of Justice in Section 5 objection letters, of continuing racial bloc voting, e.g., in Alabama (Chambers County, 1976); Colorado (Montezuma County, 1998); Connecticut (Bridgeport, 1993); Florida (DeSoto County, 1994; Escambia County, 1982; Glades County, 2004; and Fort Pierce, 1993); Georgia (Adel, 1982; Augusta, 1989; Baldwin County, 1983; Bleckley County, 1991; Charlton County, 1971; Clarke County, 1991; College Park, 1983; Cook County, 1982; Dooly County, 1980; Glynn County, 1982; Griffin, 1981; Hinesville, 1991; Jefferson County, 1986; Jesup, 1986; Kingsland, 1983; LaGrange, 1993; Lamar County, 1986; Long County, 1976; Lumber City, 1988; Lyons, 1985; Marion County, 2000; Newnan, 1984; Putnam County, 2002; Randolph County, 1993; Rome, 1987; Spalding County, 1981; Statesboro, 1980; Sumter County, 1983; Tignall, 2000; Wilkes County, 1978; Waynesboro, 1994; and Wrens, 1986); Maryland (Worcester County, 1994); North Carolina (Ahoskie, 1989; Edgecombe County, 1984; Laurinburg, 1994; Martin County, 1986; Mt. Olive, 1994; Rocky Mount, 1984; Sampson County, 1988; Wayne County, 1986); South Carolina (Batesburg, 1986; Batesburg-Leesville, 1993;

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filed with this committee.
[18]Georgia v. Ashcroft, 195 F. Supp. 2d 25, 31 (D. D.C. 2002).

Clinton, 2002; Edgefield County, 1986; Elloree, 1984; Johnston, 1992; Laurens County, 1987; Mullins, 1988; Orangeburg, 1992; and Sumter County, 1984); Tennessee (Hamilton County, 1994; West Tennessee, 1993); Virginia (Blackstone, 1986; Brunswick County, 1992); Louisiana (St. Francisville, 1993); Mississippi, 1987; and Nebraska (Thurston County, 1995).

Hostility to Minority Political Participation

The temptation to manipulate the law in ways that will disadvantage minority voters is as great and irresistible today as it was in 1982. Removal of the federal oversight that Section 5 provides would doubtlessly see a significant erosion in minority voting rights. The brief filed in the Supreme Court by the state of Georgia in Georgia v. Ashcroft[19] provides a vivid, present day example of the willingness of one of the states covered by Section 5 to manipulate the law to diminish the protections afforded racial minorities.

One of the state's principle arguments was that the retrogression standard of Section 5 should be abolished in favor of a coin toss, or an "equal opportunity" to elect, standard based on Section 2 of the Voting Rights,[20] which it defined as "a 50-50 chance of electing a candidate of choice."[21] The Supreme Court

[19]539 U.S. 461 (2003).
[20]Section 2 protects the equal right of minorities "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973.
[21]Georgia v. Ashcroft, 195 F.Supp.2d at 66.

rejected the state's invitation to rewrite Section 5 and held that "[w]e refuse to equate a §2 vote dilution inquiry with the §5 retrogression standard. . . . Instead of showing that the Senate plan is nondilutive under §2, Georgia must prove that its plan is nonretrogressive under §5."[22]

The state argued further that "the point of equal opportunity is 44.3% BVAP."[23] The adoption of Georgia's standard for an equal opportunity would have permitted the state to abolish all of its majority black districts.

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[22]Georgia v. Ashcroft, 539 U.S. at 478-79.
[23]Georgia v. Ashcroft, 195 F.Supp.2d at 66. See also Brief of Appellant State of Georgia, p. 16 (blacks have "an equal chance of winning an open-seat election where the BVAP was 44%").

Georgia is not the only covered state to make such arguments. The governor of South Carolina argued in a post-2000 census case involving court ordered redistricting in South Carolina that a BVAP as low as 45.58% was the "point of equal opportunity," and was all the Voting Rights Act required in the way of protecting the rights of minority voters.[24] The three-judge court rejected that argument and concluded that "a majority-minority or very near majority-minority voting age population in each district remains a minimum requirement" in order to the satisfy the requirements of the Voting Rights Act.[25] The court further noted that both the governor and legislature "have proposed plans that are primarily driven by policy choices designed to effect their particular partisan goals."[26] Minority voters were at risk of being "packed" or "cracked" to advance the causes of opposing political parties, and reduced to the status of second class voters who did not have an equal opportunity to elect candidates of their choice.

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[24]Colleton County Council v. McConnell, 201 F.Supp.2d at 643.
[25]Id.
[26]Id. at 641.

Majority-minority districts have been central to equal political participation by minority voters. Throughout the 1970s and 1980s, only about 1% of majority white districts in the South elected a black to a state legislature. Blacks who were elected were overwhelmingly from majority black districts.[27] As late as 1988, no black had been elected from a majority white district in Alabama, Arkansas, Louisiana, Mississippi, or South Carolina.[28] The number of blacks elected to state legislatures increased after the 1990 redistricting, but again the gain resulted from an increase in the number of majority black districts.[29]

The pattern of blacks winning almost exclusively from majority black legislative districts is particularly evident in Georgia. Under the 1992 legislative plan, as under the 1982 plan, black electoral success was confined essentially to the majority black districts. Of the 40 blacks elected to the house and senate under the 1992 plan, all but one was elected from a majority black district. Whites, on the other hand, not only won all but one of

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[27]Lisa Handley and Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations," in Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990, Chandler Davidson and Bernard Grofman, eds. (Princeton; Princeton University Press, 1994), 336-37.
[28]Id. at 346.
[29]David A. Bositis, Redistricting and Representation: The Creation of Majority-Minority Districts and the Evolving Party System in the South (Washington, DC: Joint Center for Political and Economic Studies, 1995), p. 46.

the majority white districts, but also won 14 (26%) of the majority black districts.[30]

[30]Members of the Georgia General Assembly, Senate and House of Representatives, Second Session of 1993-94 Term (1994); Johnson v. Miller, Civ. No. 194-008 (S.D.Ga.), trial transcript, Vol. 4, p. 237, Stipulations Nos. 61-63, Joint Ex. 11.

The same pattern of polarized voting has continued under the 2002 plan. Of the ten blacks elected to the state senate, all were elected from majority black districts (54% to 66% black population). Of the 38 blacks elected to the state house, 34 were elected from majority black districts. Of the three who were elected from majority white districts, two (Keith Heard and Carl Von Epps) were incumbents. The third black (Alisha Thomas) was elected from a three-seat district (HD 33).[31]

Some of the witnesses before this committee have pointed to the election of blacks to statewide judgship as evidence that Section 5 is no longer needed in Georgia. Judicial elections in Georgia are unique in that they are subject to considerable control by the bar and by the political leadership of the state. Candidates are frequently "preselected" through appointment by the governor to vacant positions upon the recommendation of a judicial nominating committee dominated by the bar. The chosen candidate then runs in the ensuing election with all the advantages of incumbency. Judicial elections are also nonpartisan, low-key, low-interest contests in which the voters, if they vote for judicial

[31]Members of the General Assembly of Georgia, First Session of 2003-2004 Term.

candidates at all, tend to ratify the choices that have previously been made.[32]

[32]For a discussion of recent judicial elections in Georgia, see Laughlin McDonald, A Voting Rights Odyssey: Black Enfranchisement in Georgia (Cambridge; Cambridge U. Press, 2003) 193-95.

Given the continuing levels of white bloc voting identified by the three-judge court in Georgia v. Ashcroft,[33] white candidates are prohibitive favorites to win in most majority white legislative districts in Georgia, and indeed throughout the South. Abolishing majority black districts, or providing black voters an opportunity to elect candidates of their choice only in districts with reduced black populations that provide a 50-50 chance of losing, would have caused a significant reduction in the number of black office holders. The state's advocacy of such positions, and its attempt to implement them, are compelling reasons Section 5 should be extended.

Georgia further demonstrated its disregard for minority voting rights by arguing in Georgia v. Ashcroft that minorities should be excluded from the preclearance process. According to the state, "[n]ot a word in the Voting Rights Act hints that private citizens possess a right to intervene and arrogate to themselves the enormous responsibilities and power of the Attorney General."[34] The state's argument was audacious at the least, for it was directly contrary to decisions of the Court recognizing a private cause of action to enforce Section 5,[35] as well as subsequent acts of

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[33]195 F.Supp.2d at 69.
[34]Brief of Appellant State of Georgia, p. 41.
[35]See Allen v. State Board of Elections, 393 U.S. 544, 557 (1969) ("[i]t is consistent with the broad purpose of the Act to allow individual citizens standing to insure that his city or county government complies with the § 5 approval requirements"); Perkins v. Matthews, 400 U.S. 379, 383 n.3 (1971); Lopez v. Monterey

Congress making the right of a private cause of action to enforce the Voting Rights Act explicit.[36] The Supreme Court rejected the state's argument, holding that "[p]rivate parties may intervene in §5 actions."[37]

One member of the senate committee noted that Thurbert Baker, the Attorney General of Georgia, and whose name appears on the state's brief, is black, suggesting that to criticize the state's brief was somehow to accuse Baker of racism. Baker, however, was not the counsel of record for the state. But even if he were, that would not shield the state's brief from the charge that it was antithetical to the rights of black voters.

County, Calif., 519 U.S. 9, 20 (1996).

[36]See H.R. Rep. No. 397, 91st Cong., 2d Sess. 8 (1970)("private persons have authority to challenge the enforcement of changed voting practices and procedures"); 42 U.S.C. § 1973a; S.Rep. No. 94-295, 94th Cong., 1st Sess. 40 (1975); S.Rep. No. 417, 97th Cong., 2d Sess. 30 (1982); H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 32 (1981).

[37]539 U.S. at 477.

Notably, the black civil rights leadership of the state, including NAACP, Southern Christian Leadership Conference, RAINBOW/PUSH, Concerned Black Clergy, Georgia Association of Black Elected Officials, Georgia Coalition of Black Women, and Georgia Coalition for the Peoples' Agenda, filed an amicus brief in the Supreme Court urging it to affirm the decision of the lower court rejecting three of the districts in the state's senate redistricting plan.[38] They also asked the Court to reject the state's arguments for repeal of the retrogression standard, the use of a coin toss standard for minority voters, the abolition of majority-minority districts, and the exclusion of blacks from the Section 5 preclearance process.

[38]Brief Amicus Curiae of Georgia Coalition for the Peoples' Agenda in Support of Appellees.

Most tellingly, black members of the legislature who had voted for the state's plan gave their full support to the filing of the amicus brief and said that it was the correct position for the civil rights community to take. "We fully supported the filing of the amicus brief by the civil rights groups," said Representative Tyrone Brooks. "We voted for the state's plan for political reasons, but we were appalled by the arguments the state made in its brief in Georgia v. Ashcroft. There is no question that abolishing the majority black districts would turn the clock back. The preservation of the majority black districts is critical to minority office holding and minority political participation. As its president, I can speak for the Georgia Association of Black Elected Officials and say that we strongly disagreed with the state's arguments in the Supreme Court."[39] Representative Bob Holmes, one of the longest serving black members of the legislature, concurred that the black caucus would never have agreed to the abolition of majority black districts. "No one would have gone for that," he said. "There would not have been a black vote for that."[40]

Randolph County, Georgia

[39]Author's interview with Tyrone Brooks, September 5, 2003.
[40]Author's interview with Robert Holmes, September 5, 2003.

Since the ACLU filed its litigation report with the committee, it has brought yet another action to enforce Section 5 on behalf of minority voters in Randolph County, Georgia.[41] The facts of the case, and Randolph County's prior history of discrimination in voting, are discussed in detail in my prior written statement before this committee, and need not be repeated. Suffice it to say, the actions of county officials in moving a black incumbent and his family out of his majority black district and into a majority white district when neither his residence nor the district lines were changed, are covered by Section 5. That is demonstrably true where the change was made in derogation of the intent and action of the state legislature, the representations made by the county to the Department of Justice, the preclearance decision of the Department of Justice, the prior decision of the county registrar, the decisions of the state courts, and the administrative determination of the Department of Justice that the change was covered by Section 5.

It is worthy of note that the county, echoing a similar argument made by the state in Georgia v. Ashcroft, filed a motion to dismiss the complaint on the ground that the black plaintiffs lacked standing to enforce Section 5. The argument was pressed despite decisions of the Supreme Court that minority plaintiffs have standing to enforce Section 5, and despite the repeated

[41]Jenkins v. Ray, No. 4:06-CV-43 (CDL) (M.D.Ga.).

authorization by Congress of a private right of action to enforce the provisions of the Voting Rights Act.

After a hearing on May 31, 2006, the three-judge granted plaintiffs' motion for summary judgment, and enjoined defendants "from further use of the changes at issue absent preclearance under Section 5."[42] Had Section 5 not been in effect, minority voters in Randolph County would have been deprived of an opportunity to vote for an incumbent who had represented their interests in the past.

South Dakota ID

[42]Id., Order of June 5, 2006, p. 5.

Following the 2002 elections in South Dakota, which saw a surge in Indian political activity, the legislature passed laws that placed additional requirements for voting, including requiring photo identification at the polls. State Representative Tom Van Norman, a member of the Cheyenne River Sioux Tribe, said the legislation targeted and retaliated against new Indian voters because they were a big factor in a close senatorial race. During legislative debate on another bill which would have made it easier for Indians to vote, an opponent of the measure said, "I, in my heart, feel that this bill . . . will encourage those who we don't particularly want to have in the system." Alluding to Indian voters, he said "I'm not sure we want that sort of person in the polling place."[43]

Other Examples

[43]Bone Shirt v. Hazeltine, 200 F. Supp. 2d at 1026.

Other examples of discrimination against minority voters discussed in this report include: discriminatory annexations and deannexations;[44] challenges by white voters or elected officials to majority minority districts;[45] pairing black incumbents in redistricting plans;[46] refusing to draw majority minority districts;[47] refusing to appoint blacks to public office;[48] maintaining a racially exclusive sole commissioner form of county government;[49] refusing to designate satellite voter registration sites in the minority community;[50] refusing to accept "bundled" mail-in voter registration forms;[51] refusing to allow registration at county offices;[52] refusing to comply with Section 5 or Section 5 objections;[53] transferring duties to an appointed administrator

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[44]Adel, Ga., 1982; Ahoskie, N.C., 1989; Augusta, Ga., 1987; Clinton, S.C., 2002; College Park, Ga., 1979; Emporia, Va. 1987; Foley, Ala., 1989 & 1993; Hemingway, S.C., 1994; Laurinburg, N.C., 1994; Macon, Ga., 1987; Rocky Mount, N.C. , 1984; Sumter County, S.C., 1985 & 1986.
[45]Cocoa, Fla., 1994; Ga., congressional, house, and senate redistricting, 1990; Georgetown County, S.C., 1983; La., congressional redistricting, 1994; Mont., legislative redistricting, 2003; N.C., congressional redistricting, 1991-2001; Perry County, Miss. , 1993; Putnam County, Ga., 1997; S.C., house and senate redistricting, 1996; S.C. congressional redistricting, 1996 & 1998; St. Francisville, La., 1995; Telfair County, Ga., 1986; Union County, S.C., 2002; Va., congressional redistricting, 1995; S.D. redistricting, 1996).
[46]West Palm Beach, Fla., 1990.
[47]Bossier Parish, La., 1992; Ga., congressional redistricting, 1982.
[48]Ben Hill County, Ga., 1988; Johnson County, Ga., 1983.
[49]Bleckley County, Ga., 1985; Wheeler County, Ga., 1993.
[50]Columbus/Muscogee County, Ga., 1984.
[51]Ga., 2004.
[52]Fulton County, Ga., 1986.
[53]Ga., judicial elections, 1989; Charlton County, Ga., 1985; Ga., soil and water conservation elections, 2004; Douglasville, Ga.,

following the election of blacks to office;[54] white opposition to restoring elections to a majority black town;[55] requiring candidates for office to have a high school diploma or its equivalent;[56] prohibiting "for sale" and other yard signs in a predominantly white municipality;[57] disqualifying black elected officials from holding office or participating in decision making;[58] relocating polling places distant from the black community;[59] refusing to hold elections following a Section 5 objection;[60] maintaining an all white self-perpetuating board of education;[61] challenges to the constitutionality of the NVRA;[62] failure to provide bilingual ballots and assistance in voting;[63] county governance by state legislative delegation;[64] challenges to the constitutionality of the Voting Rights Act;[65] packing minority voters to dilute their influence;[66] and using discriminatory punch card voting systems.[67]

1996; Greene County, Ga., 1985; Rochelle, Ga., 1984; La., 1995; S.D. , 1976-2002.
[54]Kingston, Ga., 1987.
[55]Keysville, Ga., 1990.
[56]Clay County, Ga., 1993; Augusta, Ga., 1987.
[57]Avondale Estates, Ga., 2000.
[58]Sumter County, Ga., 1998; Thomaston, Ga., 1986; Beaufort County, S.C., 1983.
[59]Millen, Ga., 1995; Wrightsville, Ga., 1992.
[60]Butler, Ga. 1995.
[61]Thomaston, Ga., 1981.
[62]La., 1995; Va., 1995; S.C., 1995.
[63]Michigan, Buena Vista and Clyde Townships, 1992; Bennett County, S.D., 2002.
[64]S.C., 1999 .
[65]Sumter County, S.C., 1982; Blaine County, Mont., 2005.
[66]Buffalo County, S.D., 2003; S.D., legislative redistricting, 2002.
[67]Ga., 2001; Fla., 2001; Calif., 2001; Ill., 2001; Oh. 2002.

The Continued Need for Section 5Much progress has been made in minority voting rights and office holding in recent times, but it has been made in large measure because of the existence of Section 5 and the other provisions of the Voting Rights Act. One of the principal conclusions of Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990, was that the increase in minority office holding was the result of "the Voting Rights Act of 1965 and its 1982 amendments. Quite simply, had there been no federal intervention in the redistricting process in the South, it is unlikely that most southern states would have ceased their practice of diluting the black vote."[68] The fact that Section 5 has been so successful is one of the arguments in favor of its extension in 2007, not its demise.

The persistent, widespread patterns of racial bloc voting found by the courts underscore the need for extension of Section 5, as do the continuing, well documented efforts of elected officials to dilute minority voting strength and deter minority political participation. That is apparent from the findings of violations of Section 2 of the Voting Rights Act in cases discussed in the ACLU's report, as well as the decisions of jurisdictions not to contest Section 2 claims and enter into consent decrees.

The Constitutionality of Section 5

[68]Handley & Grofman, "The Impact of the Voting Rights Act on Minority Representation" (1994), 336.

As I pointed out in my written statement, the City of Boerne line of cases repeatedly cited the Voting Rights Act, including Section 5, as an example of congressional legislation that was constitutional. It is also worthy of note that the Supreme Court in 1999 relied upon City of Boerne in rejecting a challenge to the constitutionality of Section 5 made by the State of California. The state argued that "§ 5 could not withstand constitutional scrutiny if it were interpreted to apply to voting measures enacted by States that have not been designated as historical wrongdoers in the voting rights sphere."[69] The Court disagreed. Citing Boerne, it held:

[69]Lopez v. Monterey County, 525 U.S. 266, 282 (1999).

> [l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.[70]

Two subsequent decisions, moreover, indicate that the Court would not apply the strict congruence and proportionality standard of the Boerne line of cases where Congress has legislated to prevent discrimination on the basis of race or to protect a fundamental right, such as voting. In Nevada Department of Human Resources v. Hibbs, the Court affirmed the constitutionality of the family leave provisions of the Family and Maternal Leave Act, noting that "state gender discrimination . . . triggers a heightened level of scrutiny,"[71] as opposed to the rational basis level of scrutiny that applied in other cases. Because of this difference, "it was easier for Congress to show a pattern of state constitutional violations" in Hibbs. Then, in Tennessee v. Lane the Court held that Title II of the Americans With Disabilities Act, as applied to the fundamental right of access to the courts, "constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment."[72] According to the

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[70]Id. at 282-83.
[71]538 U.S. 721, 736 (2003).
[72]541 U.S. 509, 531 (2004).

Court, "the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent."[73]

[73]Id. at 523.

If there are jurisdictions that no longer need to be covered by Section 5, that is not an argument for finding Section 5 unconstitutional. Instead, such jurisdictions can bailout from coverage under Section 4(a) of the Act.[74] To bailout, a jurisdiction must essentially show that it has had a clean voting rights record during the preceding ten years, and that it has engaged in constructive efforts to promote full voter participation.

The sunset provision of any extension of Section 5, as well as its limited geographic application, would further argue for its congruence and proportionality. Boerne, for example, held that while legislation implementing the Fourteenth Amendment did not require "termination dates" or "geographic restrictions . . . limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate."[75]

In sum, none of the recent federalism decisions of the Court casts doubt on the constitutionality of Section 5. To the extent that they discuss legislation enacted by Congress pursuant to the enforcement provisions of the Fourteenth and Fifteenth Amendments to redress the problem of racial discrimination in voting, they do so to affirm its constitutionality. Nonetheless, to insulate the extension of Section 5 from constitutional challenge, Congress needs to establish a record of ongoing discrimination and racial

[74] 42 U.S.C. §§ 1973a & b.

polarization in the covered jurisdictions, which it is in fact doing.

Questions from Sen. Kennedy

Reduction in Section 5 Objections

[75]Boerne, 521 U.S. at 533.

The reduction in the percentage of Section 5 submissions to which the Justice Department has objected in recent years does not suggest that there is no longer a need for Section 5. First, Section 5 has a strong deterrent effect. A recent example of that involves congressional redistricting in Georgia carried out by Republicans in 2005 once they gained control of the house, senate, and governor's office. The legislature passed resolutions that any redistricting had to be done in conformity with Section 5 and avoid retrogression. And the plan the legislature adopted in 2005 did exactly that.[76] It neither fragmented nor packed minority voters, but maintained the racial status quo.

One can fairly conclude the legislature was determined it would not have a Section 5 retrogression dispute on its hands after it passed the 2005 plan. Thus, even in the absence of an objection from DOJ, Section 5 played an important role in the redistricting process. Given the positions the state took in the brief it filed in the Supreme Court in Georgia v. Ashcroft (2003), I'm not confident the state would have avoided retrogression in the absence of Section 5.

Second, some of the changes that were precleared by the Department of Justice should have been objected to. In 2005 the Georgia legislature, in a vote sharply divided on racial and partisan lines, passed a new voter identification bill which had

[76]HB 499 (2005).

the dubious distinction of being the most restrictive in the United States. To vote in person - but not by absentee ballot - a voter would have to present one of six specified forms of photo ID. Those without such an ID would have to purchase one for $20. Not only are there laws on the books that make voter fraud a crime, but there was no evidence of fraudulent in-person voting to justify the stringent photo ID requirement. The new requirement would also have an adverse impact upon minorities, the elderly, the disabled, and the poor.

Representative Sue Burmeister, one of the sponsors of the photo ID bill, was quoted in a memo released by the Department of Justice as saying if black people in her district "are not paid to vote, they don't go to the polls."[77] Further expressing her disdain for minority voters, she said if fewer blacks vote as a result of the photo ID bill it is only because it would end voter fraud. Despite the evidence of its discriminatory purpose and effect, the Department of Justice precleared the state's photo ID law.

A challenge to the photo ID law was subsequently filed by a coalition of groups, including the ACLU. On October 18, 2005, the federal court enjoined its use on the grounds that it was in the

[77]The Oxford Press, "Georgia voter ID memo stirs tension," November 18, 2005.

nature of a poll tax, as well as a likely violation of the equal protection clause.[78]

The absence of an objection to Georgia's photo ID law doesn't show a lack of need for Section 5. What it shows is the need for better Section 5 enforcement by the Department of Justice. Third, Bossier II has had the effect of allowing preclearance of changes that would no doubt have been objected to under the preexisting standard. An unpublished version of a forthcoming article (one of whose authors, Peyton McCrary, is a current employee of the Voting Section of the Department of Justice) on Section 5 objections, was entered into the record of the recent house hearings. The "principal finding" of the study was:

[78]Common Cause/Georgia v. Billups, 406 F.Supp.2d 1326 (N.D. Ga.).

> by the 1990s, the purpose prong of Section 5 had become the dominate legal basis for objections. Almost half (45 percent) of all objections were based on purpose alone. If we include objections based both on purpose and retrogressive effect, and those based both on purpose and Section 2, the Department's finding of discriminatory purpose was present in 78 percent of all decisions to interpose objections in the decade preceding *Bossier II*.[79]

The report further concluded that "a purpose finding was present in an astonishing 89 percent of all redistricting objections in that decade."[80] The decline in objections over the past decade simply underscores the need to restore Section 5 to its pre-Bossier II status.

Shannon and Todd Counties, South Dakota

[79]McCrary, Seaman & Valelly "The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act (Nov. 1, 2005), p. 79, reprinted in Voting Rights Act: Section 5-Preclearance and Standards: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 109th Cong. 96-181 (2005) (Serial No. 109-69).
[80]Id.

What has occurred in South Dakota between 1976 and the present day is instructive of what may happen if Section 5 is not renewed. William Janklow, the Attorney General of South Dakota, was outraged over the extension of Section 5 and the bilingual election requirement to his state. In a formal opinion addressed to the secretary of state, he derided the 1975 law as a "facial absurdity." Borrowing the States' Rights rhetoric of southern politicians who opposed the modern civil right movement, he condemned the Voting Rights Act as an unconstitutional federal encroachment that rendered state power "almost meaningless." He quoted with approval Justice Hugo Black's famous dissent in South Carolina v. Katzenbach that Section 5 treated covered jurisdictions as "little more than conquered provinces."[81] Janklow expressed the hope that Congress would soon repeal "the Voting Rights Act currently plaguing South Dakota." In the meantime, he advised the secretary of state not to comply with the preclearance requirement. "I see no need," he said, "to proceed with undue speed to subject our State's laws to a 'one-man veto' by the United States Attorney General."[82]

Although the 1975 amendments were never in fact repealed, state officials followed Janklow's advice and essentially ignored the preclearance requirement. From the date of its official coverage in 1976 until 2002, South Dakota enacted more than 600

[81] 383 U.S. 301, 328 (1966).

statutes and regulations having an effect on elections or voting in Shannon and Todd Counties, but submitted fewer than ten for preclearance.

[82]1977 S.D. Op. Atty. Gen. 175; 1977 WL 36011 (S.D.A.G.).

The Department of Justice was surely aware of the failure of the state to comply with the preclearance requirement. It had, for example, sued the state in 1978 and 1979 for its failure to submit for preclearance reapportionment and county reorganization laws affecting the covered counties.[83] But after that, the department turned a blind eye to the state's failure to comply with Section 5.

[83]United States v. Tripp County, South Dakota, Civ. No. 78-3045 (D. S.D. Feb. 6, 1979) (ordering state to submit reapportionment plan for preclearance); United States v. South Dakota, Civ. No. 79-3039 (D.S.D. May 20, 1980) (enjoining implementation of law revising system of organized and unorganized counties absent preclearance).

Legislative redistricting in South Dakota in 2001 is a prime example both of the failure of the Department of Justice to object to discriminatory voting changes, as well as the willingness of the state to dilute Indian voting strength. The 2001 plan divided the state into thirty-five legislative districts, each of which elected one senator and two members of the house of representatives.[84] The boundaries of the district that included Shannon and Todd Counties, District 27, were altered only slightly under the 2001 plan, but the demographic composition of the district was substantially changed. Indians were 87 percent of the population of District 27 under the 1991 plan, and the district was one of the most underpopulated in the state. Under the 2001 plan, Indians were 90 percent of the population, while the district was one of the most overpopulated in the state. As was apparent, Indians were more "packed," or over concentrated, in the new District 27 than under the 1991 plan. Had Indians been "unpacked," they could have been a majority in a house district in adjacent District 26.

Indeed, James Bradford, an Indian representative from District 27, proposed an amendment reconfiguring Districts 26 and 27 that would have retained District 27 as majority Indian and divided

[84]S.D.C.L. § 2-2-34. No doubt due to the litigation involving the 1996 plan, the legislature continued the exception of using two subdistricts in District 28, one of which included the Cheyenne River Sioux Reservation and a portion of the Standing Rock Indian Reservation.

District 26 into two house districts, one of which, District 26A, would have had an Indian majority. Bradford's amendment was voted down fifty-one to sixteen. Elsie Meeks, a tribal member at Pine Ridge and the first Indian to serve on the U.S. Commission on Civil Rights, said the plan "segregates Indians," and denied them equal voting power.[85]

Despite the fact that it affected Todd and Shannon Counties, the state refused to submit the 2001 plan for preclearance. Alfred Bone Shirt and three other Indian residents from Districts 26 and 27, with the assistance of the ACLU, sued the state in December 2001 for its failure to submit its redistricting plan for preclearance. The plaintiffs also claimed the plan unnecessarily packed Indian voters in violation of Section 2 and deprived them of an equal opportunity to elect candidates of their choice.

[85]Bone Shirt, 336 F.Supp.2d at 985.

A three-judge court was convened to hear the plaintiffs' Section 5 claim. The state argued that since district lines had not been significantly changed insofar as they affected Shannon and Todd Counties, there was no need to comply with Section 5. The three-judge court disagreed. It held "demographic shifts render the new District 27 a change 'in voting' for the voters of Shannon and Todd counties that must be precleared under § 5."[86] The state submitted the plan to the Attorney General who precleared it, apparently concluding the additional packing of Indians in District 27 did not have a retrogressive effect.

The district court, sitting as a single-judge court, heard plaintiffs' Section 2 claim and in a detailed 144 page opinion invalidated the state's 2001 legislative plan as diluting Indian voting strength. The court found the plaintiffs had established the three Gingles factors. The court found there was "substantial evidence that South Dakota officially excluded Indians from voting and holding office." Indians in recent times have encountered numerous difficulties in obtaining registration cards from their county auditors, whose behavior "ranged from unhelpful to hostile." Indians involved in voter registration drives have regularly been accused of engaging in voter fraud by local officials, and while the accusations have proved to be unfounded they have "intimidated Indian voters." According to Prof. Dan McCool, the director of the

[86]Bone Shirt v. Hazeltine, 200 F.Supp.2d at 1154.

American West Center at the University of Utah and an expert witness for the plaintiffs, the accusations of voter fraud were "part of an effort to create a racially hostile and polarized atmosphere. It's based on negative stereotypes, and I think it's a symbol of just how polarized politics are in the state in regard to Indians and non-Indians."[87]

[87]Bone Shirt, 336 F.Supp.2d at 1019, 1025-26.

As for the other 600 odd unsubmitted voting changes, Elaine Quick Bear Quiver and several other members of the Oglala and Rosebud Sioux Tribes in Shannon and Todd Counties, and again represented by the ACLU, brought suit against the state in August 2002, to force it to comply with Section 5. Following negotiations among the parties, the court entered a consent order in December 2002, in which it immediately enjoined implementation of proposed numbered seat and majority vote requirements absent preclearance, and directed the state to develop a comprehensive plan "that will promptly bring the State into full compliance with its obligations under Section 5."[88] The state made its first submission in April 2003, and thus began a process that is expected to take up to three years to complete.

[88]Quick Bear Quiver v. Hazeltine, Civ. No. 02-5069 (D. S.D. December 27, 2002), slip op. at 3.

Despite the decision of the federal court, South Dakota has continued to refuse to comply with Section 5. In 2005, tribal members filed suit against Charles Mix County alleging that the three districts for the county commission were malapportioned and had been drawn to dilute Indian voting strength. The total deviation among the districts was 19%, and almost certainly unconstitutional, while each had a majority white voting age population, despite the fact that Indians were 30% of the population of the county and a compact majority Indian district court easily be drawn. South Dakota law prohibited the county from redistricting until 2012.[89]

In an effort to avoid court supervised redistricting following a finding of a one person, one vote or Voting Rights Act violation, the county requested the state legislature to pass legislation establishing a process for emergency redistricting. The legislature complied and passed a bill, which the governor promptly signed, allowing a county to redistrict, with the permission of the governor and secretary of state, at any time it became "aware" of facts that called into question whether its districts complied with federal or state law.[90] Despite the fact that the new law applied to every county in the state, including Shannon and Todd, and was thus required to be precleared under Section 5 as well as the consent decree in the Quick Bear Quiver case, Charles Mix County

[89]SDCL 7-8-10.

immediately sought permission from the governor to draw a new plan. The plaintiffs in Quick Bear Quiver then filed a motion for a preliminary injunction before the three-judge court to prohibit the county from proceeding with redistricting absent compliance with Section 5. The court granted the motion.

[90]House Bill 1265.

In a strongly worded opinion, the court noted that state officials in South Dakota "for over 25 years . . . have intended to violate and have violated the preclearance requirements," and that the new bill "gives the appearance of a rushed attempt to circumvent the VRA."[91] Implementation of the new emergency redistricting bill was enjoined until the state complied with Section 5.

There is little that has happened in South Dakota since its coverage after the 1975 amendments that suggests preclearance is no longer needed in that state. Indeed, recent events strongly support the extension of Section 5 throughout South Dakota and Indian Country.[92]

Questions from Sen. Schumer

Bossier II

[91]Quick Bear Quiver v. Nelson, 387 F.Supp.2d 1027, 1031, 1034 (D. S.D. 2005).
[92]That evidence is discussed in more detail in the ACLU's litigation report and the forthcoming book chapter, "Expanding Coverage of Section 5 in Indian Country," both of which have been filed with this committee.

I support clarifying that a voting change motivated by any racially discriminatory purpose cannot be precleared under Section 5 of the Voting Rights Act. Had the Bossier II standard been in effect in 1982, the District of Columbia court would have been required to preclear Georgia's congressional redistricting plan, which was found by the court to be the product of purposeful discrimination. The state had increased the black population in the Fifth District over the benchmark plan, but kept it as a district with a majority of white registered voters. The remaining nine congressional districts were all solidly majority white. As Joe Mack Wilson, the chief architect of redistricting in the house told his colleagues on numerous occasions, "I don't want to draw nigger districts."[93] He explained to one fellow house member, "I'm not going to draw a honky Republican district and I'm not going to draw a nigger district if I can help it."[94]

Since the redrawn Fifth District did not make black voters worse off than they had been under the preexisting plan, and even though it was the product of intentional discrimination, the purpose was not technically retrogressive and so, under Bossier II, the plan would have been unobjectionable. Such a result would be a parody of what the Voting Rights Act stands for.

The City of Augusta, Georgia, pursued a vigorous annexation campaign during the 1980s to promote municipal growth. However,

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[93]Busbee v. Smith, 549 F. Supp. at 501.

the annexations were conducted on what the Department of Justice described as "a racial quota system requiring that each time a black residential area is annexed into the city, a corresponding number of white residents must be annexed in order to avoid increasing the city's black population percentage."[95] In objecting to eight of the annexations in 1987 on discriminatory purpose grounds, the Department concluded that the city's annexation policy "centers, to a significant extent, on race, and that such policy has an invidious impact on black citizens."[96] Since the annexations were designed to maintain the racial status quo, had Bossier II been in effect they would have been unobjectionable under the purpose prong of Section 5.

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[94]Id., Deposition of Bettye Lowe, p. 36.
[95]Wm. Bradford Reynolds to Charles A. DeVaney, July 27, 1987
[96]Id.

In 1987, Bladen County, North Carolina, replaced its at-large system of county commission elections with a plan containing five single member districts, two of which were majority black, and two at-large seats. The Department of Justice acknowledged that the plan was not retrogressive compared to the preexisting all at-large system, but noted an objection because "it appears the responsible public officials desired to adopt a plan which would maintain white political control to the maximum extent possible and thereby minimize the opportunity for effective political participation by black citizens."[97] Again, had Bossier II been in effect the plan would have been unobjectionable under the purpose prong of Section 5.

Another example further illustrates the flaw inherent in Bossier II. In 1985, the Department of Justice objected to a supervisor redistricting plan in Sunflower County, Mississippi, not on the ground that it was retrogressive but because it "was devised consciously to assure that the black population percentage of any district would not increase appreciably."[98] The objection would have been precluded under Bossier II.

Bossier II is inconsistent with Congress's original intent in enacting Section 5. As the four dissenters in Bossier II concluded:

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[97]Wm. Bradford Reynolds to W. Leslie Johnson, November 2, 1987.
[98]Wm. Bradford Williams to Tommy McWilliams, June 7, 1985.

> the full legislative history shows beyond any doubt just what the unqualified text of § 5 provides. The statute contains no reservation in favor of customary abridgment grown familiar after years of relentless discrimination, and the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles.[99]

As noted above, Bossier II has significantly limited the ability of the Department of Justice to object to discriminatory voting changes under Section 5. By the 1990s, the purpose prong of Section 5 had become the dominate legal basis for objections. Almost half of all objections were based on purpose alone. If we include objections based both on purpose and retrogressive effect, and those based both on purpose and Section 2, the Department's finding of discriminatory purpose was present in 78% of all decisions to interpose objections in the decade preceding Bossier II.[100] The decline in objections in recent years simply underscores the need to restore Section 5 to its pre-Bossier II status.

I believe restoring the pre-Bossier II standard to Section 5 would be constitutional. If the prohibition of voting changes that have a retrogressive effect is constitutional as a means of enforcing the Fourteenth and Fifteenth Amendments, then surely a

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[99]Id. at 366.
[100]McCrary, et al., "The End of Preclearance As We Knew It," p. 79.

prohibition of voting changes that are purposefully discriminatory would be equally, or more, constitutional.

Georgia v. Ashcroft

I support the proposed bill clarifying that the purpose of Section 5 of the Voting Rights Act is to protect the ability of minority citizens to elect their preferred candidates of choice. First, Georgia v. Ashcroft introduced new, difficult to apply, and contradictory standards. According to the Court, the ability to elect is "important" and "integral," but a court must now also consider the ability to "influence" and elect "sympathetic" representatives. The Court took a standard that focused on the ability to elect candidates of choice, that was understood and applied, and turned it into something subjective, abstract, and impressionistic. As the dissent noted, "[t]he Court's 'influence' is simply not functional in the political and judicial worlds."[101]

Second, the danger of the Court's opinion is that it may allow states to turn black and other minority voters into second class voters, who can "influence" the election of white candidates but cannot elect candidates of their own race. That is a result that Section 5 was enacted to avoid.

Georgia v. Ashcroft was decided in 2003, after most of the redistricting following the 2000 census had been completed, but at least one case decided prior to Ashcroft applied an "influence"

[101]Georgia v. Ashcroft, 539 U.S. at 495.

theory to the serious detriment of minority voters. In 1993, a three-judge court made extensive findings of past and continuing discrimination and extreme racial bloc voting in Rural West Tennessee, but refused to require a majority black senate district in that part of the state because of the existence of three "influence" districts in which blacks were 31% to 33% of the voting age population.[102]

The court acknowledged that as a factual matter blacks did not have the equal opportunity to elect candidates of their choice under the existing senate plan, but it was also of the view that white elected officials were often responsive to the needs of blacks and that "adding an additional majority-minority district in western Tennessee would actually reduce the influence of black voters in the Tennessee Senate." It found "most probative" for this proposition the testimony of a white senator, Stephen Cohen, from west Tennessee concerning passage of a bill to make the birthday of Martin Luther King, Jr. a state holiday.

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102. The court's findings are at RWTAAAC v. McWherter, 836 F. Supp. 447, 457, 459, 460-61, 463, 466 (W.D. Tenn. 1993). The court's subsequent refusal to order a remedial plan is at RWTAAAC v. McWherter, 877 F. Supp. 1096 (W.D. Tenn. 1995). The litigation is also discussed in detail in the ACLU's report.

According to Senator Cohen, the bill passed the state senate by only one vote (17 to 16), with Senator Cohen and another white senator from west Tennessee voting with the majority. Senator Cohen concluded, and the district court found, that the creation of an additional black senate district would cause the election of "at least one more conservative white senator" who "would have been inclined to vote against the Martin Luther King holiday" ensuring that the measure would not have passed.[103] Senator Cohen and the court, however, were mistaken.

[103]Id., 887 F. Supp. 1096, 1106 (W.D. Tenn. 1995).

According to the Senate Journal, only eight senators voted against the Martin Luther King, Jr. bill, with 18 "Ayes" and six "Present, not voting."[104] The bill would have passed without Senator Cohen's vote. What the court's "influence" theory in fact accomplished was to deprive African American voters in Rural West Tennessee of the opportunity to elect a candidate of their choice to the state senate.

The inherent fallacy of the notion that influence can be a substitute for the ability to elect is apparent from the Shaw v. Reno[105] line of cases, which were brought by whites who were redistricted into majority black districts. Rather than relish the fact that they could "play a substantial, if not decisive, role in the electoral process," and perhaps could achieve "greater overall representation . . . by increasing the number of representatives sympathetic to the[ir] interest," white voters argued that placing them in "influence" districts, i.e., majority black districts, was unconstitutional, and the Supreme Court agreed.[106] In addition, if "influence" were all that it is said to be, whites would be clamoring to be a minority in as many districts as possible. Most white voters would reject such a suggestion out of hand.

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[104]Tennessee Senate Journal, May 24, 1984, p. 2831.
[105]509 U.S. 630 (1993).
[106]See, e.g., Johnson v. Miller, 515 U.S. 900 (1995). Far from being segregated, as the white plaintiffs maintained, the challenged districts were among the most integrated districts in the nation.

Georgia v. Ashcroft is inconsistent with Congress's original intent in enacting Section 5. As the dissent pointed out:

> The history of § 5 demonstrates that it addresses changes in state law intended to perpetuate the exclusion of minority voters from the exercise of political power. When this Court held that a State must show that any change in voting procedure is free of retrogression it meant that changes must not leave minority voters with less chance to be effective in electing preferred candidates than they were before the change. '[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'[107]

S. 2703 would restore Congress's original intent in enacting Section 5, and would adequately restore the pre-Georgia v. Ashcroft standard. And for the reasons discussed above, such an amendment should pass constitutional muster under the City of Boerne line of cases, since they cite the Voting Rights Act and Section 5 in its pre-Georgia v. Ashcroft iteration as proper acts of Congress to enforce the Fourteenth and Fifteenth Amendments. In addition, the record compiled by Congress of continuing discrimination and polarization in the political process demonstrates that Section 5 is both "congruent" and "proportional" within the meaning of the Boerne cases.

Section 5 Does not Require, nor Has It Caused, "Packing"

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[107] 539 U.S. at 494 (Souter, J., dissenting) (quoting Beer v. United States, 426 U.S. 130, 141 (1976)).

The Voting Rights Act has not had the unintended consequence of packing black voters in increasingly concentrated minority districts. To the contrary, the majority black districts drawn after the 2000 census, and precleared under Section 5, were among the most racially integrated districts in the nation.

To give an example, following the 2000 census Georgia adopted redistricting plans for its house and senate that reduced the concentrations of black population in the majority black districts. As appears from the table below, the state's proposed senate plan contained 13 districts with a majority black population and/or voting age population (VAP).[108] The black voting age population in 12 of the districts was reduced compared to the preexisting benchmark plan.

[108]The figures set out in the table are those of the state.

MAJORITY BLACK DISTRICTS IN BENCHMARK AND PROPOSED SENATE PLAN

BLACK DISTRICTS	EXISTING PLAN	PROPOSED PLAN
2 (Savannah)	64.76% 60.58%BVAP	54.99% 50.31%BVAP
10 (Ellenwood)	73.5% 70.66%BVAP	64.87% 64.14%BVAP
12 (Albany)	59.31% 55.43%BVAP	53.51% 50.66%BVAP
15 (Columbus)	64.32% 62.05%BVAP	53.74% 50.87%BVAP
22 (Augusta)	66.84% 63.51%BVAP	54.71% 51.51%BVAP
26 (Macon)	66.62% 62.45%BVAP	54.88% 50.8%BVAP
*34 (Morrow)	36.4% 33.96%BVAP	52.94% 50.54%BVAP
35 (Atlanta)	77.68% 76.02%BVAP	62.71% 60.69%BVAP
36 (Atlanta)	65.3% 60.36%BVAP	61.9% 56.94%BVAP
38 (Atlanta)	78.06% 76.61%BVAP	63.59% 60.29%BVAP
39 (Atlanta)	58.65% 54.73%BVAP	60.01% 56.54%BVAP
43 (Decatur)	89.63% 88.91%BVAP	64.88% 62.63%BVAP
44 (Jonesboro)	52.8% 49.62%	38.23% 34.71%
55 (Clarkston)	73.73% 72.4%BVAP	61.85% 60.64%BVAP

*New district created in proposed plan.

The state's proposed house plan also reduced the black population in a number of house districts compared to the benchmark plan.[109]

[109]Georgia v. Ashcroft, 195 F.Supp.2d at 95.

Despite the reductions in black population, the District Court for the District of Columbia objected to only three of the state's senate districts, but the objections were subsequently rendered moot when a local federal court invalidated the plans for failure to comply with one person, one vote, and adopted court ordered redistricting plans. But as the opinion of the District of Columbia court makes clear, "the mere fact that BVAP decreases in certain districts is not enough to deny preclearance to a plan under Section 5."[110]

Clearly, there is no merit to the argument that Section 5 or the current bill is a "ratchet" that creates increasingly packed black districts. If there is a "ratcheting" process at work in Section 5, it is one that reduces packing, and it would be unaffected by the Georgia v. Ashcroft fix.

Expert Witness Fees Should Be Recoverable

The Voting Rights Act provides that the prevailing party may recover "a reasonable attorney's fee as part of the costs."[111] However, the Supreme Court has ruled that prevailing parties in civil rights cases cannot recover expert witness fees as part of their costs unless specifically authorized by Congress.[112] Congress has already made express provision for recovery of expert witness

[110]Id. at 84.
[111]42 U.S.C. § 1973*l*(e).
[112]West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 102 (1991).

fees in 34 statutes in 10 different titles of the U.S. Code,[113] but there is no similar congressional authorization for the recovery of reasonable expert witness fees in cases brought under the Voting Rights Act. That is an omission that should be remedied.

[113]Id. at 89.

In the wake of Supreme Court decisions denying the recovery of expert witness fees in successful Title VII employment discrimination actions, Congress amended the statute in 1991 to make explicit that it "authorizes courts to award prevailing parties reasonable expert witness fees and other pre-trial as well as trial litigation expenses as part of attorney's fees."[114] The constitutionality of the amendment of Title VII has never been called into question by the courts.

[114]H.R. Rep. No. 102-40(I), 102 Cong., 1st Sess. 616 (1991).

Congress has provided that prevailing plaintiffs in civil right actions are entitled to recover costs and attorneys fees "to ensure 'effective access to the judicial process' for persons with civil rights grievances."[115] Congress also sought to promote private enforcement of our nation's civil rights laws while at the same time discouraging noncompliance by potential defendants.[116] A private plaintiff who brings a civil rights action "does so not for himself alone, but also as a 'private attorney general' vindicating a policy that Congress considered of the highest priority."[117] Congress understood that without the ability to recover fees, "few aggrieved parties would be in a position to advance the public interest."[118] It therefore decided to shift the full cost of enforcement onto the defendants. "If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."[119] Consistent with the underlying purpose of the fees statutes, expert witness fees should be included as recoverable costs in cases brought under the Voting Rights Act.

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[115]Hensley v. Eckerhart, 461 U.S. 424, 429 (1984) (quoting H.R. Rep. No. 94-1558, at 1 (1976)).
[116]See S. Rep. No. 94-1011, at 5 (1976), 1976 USCCAN 5908, 5913.
[117] Id. at 3, 1976 USCCAN at 5910 (quoting Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968)).
[118]Id.
[119]Id. at 2, 1976 USCCAN at 5910.

Voting cases are among the most difficult cases tried in federal court. According to a study published by the Federal Judicial Center, voting rights cases impose almost four times the judicial workload of the average case.[120] Indeed, voting cases are more work intensive than all but five of the sixty-three types of cases that come before the federal district courts.[121]

Voting cases are difficult in large measure because of the expert testimony that is required to prove the three Gingles factors and vote dilution under the "totality of circumstances" analysis. A typical Section 2 case requires at a minimum a demographer to draw plans to prove geographic compactness, and a statistician to prove political cohesion and legally significant white bloc voting. In addition, a typical case may require the services of a political scientist, a historian, an anthropologist, or other specialist depending on the particular facts of a given case. Experts are required to prepare reports and testify at trial, and charge hourly rates in the $100 to $250 an hour range that reflect their time spent. The cost of experts can run into the tens of thousands of dollars.

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[120]Patricia Lombard and Carol Kafka, 2003-2004 District Court Case-Weighting Study (2005) (assigning voting cases a case weight of 3.96 relative to the average case).
[121]Id.

In a recent vote dilution case brought on behalf of plaintiffs in Charleston County, South Carolina, the ACLU had non-recoverable expert witness expenses in the amount of $29,150.00.[122] In another case challenging the use of punch card voting in Ohio as violating the constitution and Section 2 of the Voting Rights Act, the plaintiffs incurred non-recoverable expert witness costs in excess of $64,000.[123]

[122]Moultrie v. Charleston County Council.
[123]Stewart v. Blackwell, 356 F.Supp.2d 781 (N.D.Ohio 2004), rev'd in part, vac'd in part, 444 F.3d 843 (6th Cir. 2006).

While the Department of Justice has an important role to enforce the Voting Rights Act, the vast majority of voting rights law suits have been brought by private lawyers and civil rights groups. The inability to recover expert fees has a chilling effect on voting rights litigation because it requires lawyers and non-profit organizations to front tens of thousands of dollars in expert witness fees that can never be recovered, even if the plaintiffs are successful on their claims. As Congress noted in amending Title VII in 1991, "[e]xpert's costs, if not shifted, can operate as a significant disincentive to would-be enforcers."[124] It also greatly undermines the purpose of fee awards in civil rights cases, which is to ensure that victims of discrimination can maintain access to the courts. For all these reasons, Congress should amend the attorney's fee provision of the Voting Rights Act to permit the recovery of expert fees and expenses, and provide in the legislative history that the amendment is applicable to pending cases.

Congress should also make clear, consistent with the underlying purpose of the fee shifting statutes to promote enforcement of the nation's civil rights laws, that prevailing defendants are entitled to recover costs <u>only</u> if an unsuccessful civil rights action was "vexatious, frivolous, or brought to harass

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[124]H.R. Rep. No. 102-40(I) at 616.

or embarrass the defendant."[125] The Supreme Court has held that a court's "discretion should be sparingly exercised" in awarding costs against a civil rights plaintiff where the congressional scheme is to encourage persons aggrieved on racial grounds to seek relief in federal court.[126]

American Community Survey

I support the amendment of Section 203 to reflect the fact that after 2010, the American Community Survey (ACS) will replace the long form census, and that coverage under Section 203 will be determined based on the ACS on a rolling five year average.

Since the ACS is an annual survey, utilizing it to determine Section 203 coverage every five years will enable language minority populations to secure coverage more quickly and accurately. However, because of the design of the ACS, the calculations have to be done every five years because single-year data isn't comprehensive enough._ That is because the ACS doesn't survey every jurisdiction, every year, but rather is designed to encompass every political subdivision cumulatively over a five year period.

I don't see how utilizing the ACS would jeopardize the constitutionality of Section 203. Arguably, it ought to strengthen

[125]Hensley v. Eckerhart, 461 U.S. 424, 429 n. 2 (1983).
[126]Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 4092 (1968). See also, Farmer v. Arabian American Oil Co., 379 U.S. 227, 235 (1964) (Rule 54 should not be administered in such a way as "to discourage litigants from bringing lawsuits").

it on the grounds that the ACS represents a modernization of data gathering methods. And since it is more frequent, jurisdictions would be covered, or dropped from coverage, in a manner more directly attuned to need. Hence, once could argue that using the ACS increases the "proportionality and congruence" of Section 203.

Questions from Sen. Cornyn

The ACLU's experience since the last extension of Section 5 in 1982, indicates that minorities in the covered jurisdictions have faced more problems in participating fully in the electoral process than minorities in non-covered jurisdictions. For example, the ACLU initiated or participated in 292 lawsuits to enforce voting rights in 31 states from 1982 to 2005, as well as 11 administrative actions which usually involved direct communications with elected officials and government entities. Of the total 303 voting rights enforcement actions, 237 (78%) were initiated in Section 5 covered jurisdictions: 141 legal cases plus 10 non-litigation enforcement actions in Georgia; 40 cases in South Carolina; 15 cases in Virginia; 9 cases in Alabama; 8 cases in North Carolina; 4 cases in Louisiana; 3 cases in Mississippi; 3 cases in Texas; 2 cases in South Dakota; 1 case in Michigan; and 1 case in Florida. The remaining 65 cases were filed in non-covered jurisdictions: Florida (15); North Carolina (9); South Dakota (5); Montana (6); Tennessee (3); Maryland (4); Kansas (2); Missouri (2); Minnesota (2); Washington (2); Rhode Island (2); Arkansas (2); California (1);

Colorado (1); Connecticut (1); Illinois (1); Ohio (1); Wyoming (1); Pennsylvania (1); New York (1); New Mexico (1); New Jersey (1); Nebraska (1). While it is apparent that voting rights problems exist in non-covered jurisdictions, the great majority of actions we have taken since 1982 have been in jurisdictions covered by Section 5.

I would not support changing the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972, because it would remove virtually all of the covered jurisdictions from Section 5 coverage, jurisdictions which the litigation and objection record demonstrate need continued coverage. By the same token, adding the Presidential election of 2000 and/or 2004 would not result in the coverage of a significant number of jurisdictions, if indeed any.

I would not be opposed in theory to adding jurisdictions to Section 5 coverage which have been subject to Section 2 litigation during the last five years if there had been a decision on the merits or a settlement agreement that resulted in a change in the challenged system or practice. I would be concerned, however, that modifying the Section 5 trigger would likely lead to other amendments that would significantly weaken the preclearance process. For that reason, I would prefer to see a straight 25 year reauthorization of the statute. I would not support removing the year 1964 from the coverage formula. First, it would likely remove

a number of the covered jurisdictions from Section 5 preclearance. Second, the City of Boerne cases, as discussed in more detail above, all cite the Voting Rights Act, including Section 5, as examples of the proper exercise of Congressional authority to enforce the Fourteenth and Fifteenth Amendments.

Third, after the extension of Section 5 in 1982, Sumter County, South Carolina, challenged the constitutionality of the statute. It contended that the 1982 extension was unconstitutional because the coverage formula was outdated. The county pointed out that as of May 28, 1982, more than half of the age eligible population in South Carolina and Sumter County was registered, facts which it said "distinguish the 1982 extension as applied to them from the circumstances relied upon in South Carolina v. Katzenbach, supra, to uphold the 1965 Act."[127] The three-judge court rejected the argument, holding that Section 5 "had a much larger purpose than to increase voter registration in a county like Sumter to more than 50 percent."[128] In support of its conclusion, the court noted that "Congress held hearings, produced extensive reports, and held lengthy debates before deciding to extend the Act in 1982."[129] The reasoning of the court in the Saluda County case,

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[127]County Council of Sumter County, S.C. v. United States, 555 F. Supp. 694, 707 (D.D.C. 1983).
[128]Id.
[129]Id. at 707 n.13.

and the extensive record being compiled by Congress of continuing discrimination, support the existing Section 5 trigger.

I do not believe the evidence in support of the extension of Section 5 is mostly anecdotal. As set out above, there is extensive, comprehensive evidence of Section 5 non-compliance, voting rights violations, and racial polarization that strongly supports the extension of Section 5.

The Department of Justice has objected to fewer voting changes in recent years, but that does not mean Section 5 no longer plays an important role. First, Section 5 has a strong deterrent effect. Second, some of the challenges that were precleared should have drawn objections. Third, Bossier II has significantly limited the scope of Section 5 by requiring an objection on purpose grounds to rest upon a finding of retrogressive purpose.

I would not endorse replacing the existing bailout with a "percentage of objections" test, since it does not take into account other important factors, such as Section 2 litigation, findings of violations, racial bloc voting, and continuing polarization. If jurisdictions have not received Section 5 objections, and in fact have clean voting rights records, the Voting Rights Act provides a ready method of escaping coverage.

If Section 5 were amended to remedy Georgia v. Ashcroft, I don't think that districts with low numbers of minority voters would ordinarily be protected by the non-retrogression standard,

provided the overall plan was not retrogressive. Thus, if a plan protected the equal right of minority voters to elect candidates of their choice, the fact that the minority population in any given district with a low number of minority voters was reduced should not trigger a Section 5 objection. The proposed amendment would simply restore the pre-Georgia v. Ashcroft understanding that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[130]

One unresolved issue that has existed both before and after Georgia v. Ashcroft is whether "coalition" districts are protected by Sections 2 and 5. A coalition district is one in which a minority, while not a majority, can nonetheless form a coalition with another minority, or sufficient white cross-over voters, to elect candidates of its choice. The Supreme Court has assumed, but without deciding, that the failure to draw coalition districts can be challenged under Section 2.[131] The lower courts are split on this issue, and it remains unresolved.

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[130]Beer v. United States, 426 U.S. 130, 141 (1976).
[131]E.g., Voinovich v. Quilter, 507 U.S. 146, 154 (1993).

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June 9, 2006

The Honorable Arlen Specter, Chairman
Attention: Barr Huefner, Hearing Clerk
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Specter:

I would like to thank you for the opportunity to offer my testimony during the May 9, 2006, Senate Judiciary Committee Hearing on the expiring provisions of the Voting Rights Act and legal issues relating to reauthorization. During that hearing, you asked the witnesses to respond in writing to two particular questions. Please find attached my responses to those questions. It is my understanding that these responses will be included in the permanent record of the Hearing. I am grateful to you and the other members of the Judiciary Committee for sponsoring these important Hearings and for the opportunity to respond to your additional inquiries.

Warmest Regards,

Theodore M. Shaw

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The NAACP Legal Defense and Educational Fund, Inc. (LDF) is not a part of the National Association for the Advancement of Colored People (NAACP) although LDF was founded by the NAACP and shares its commitment to equal rights. Since 1957, LDF has been a completely separate organization. Contributions are deductible for U.S. income tax purposes.

Response of Theodore Shaw, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc. to Questions from Senator Arlen Specter
June 9, 2006

Description of the "best evidence" of Discriminatory Practices that Exist in the Covered Jurisdictions up to the Present Time

It is difficult to weigh the relative importance of deprivations or dilutions of the fundamental right to vote. Indeed, in many ways it was the history of inventive discriminatory voting tactics that gave rise to Section 5 in 1965. Inherent in the legislative history of Section 5 is the recognition that many different tactics can and do have the same undesirable result. It is also the case, however, that a more detailed understanding of the realities on the ground can serve to illuminate the nature of discriminatory practices and their harmful effects. This evidence serves to put a human face on the statistics, and I believe, add something of value to the record. Viewed in this light, I welcome the opportunity to share with both the Chairman and the Committee some recent experiences of the NAACP Legal Defense & Educational Fund, Inc. ("LDF") that may help to fill out the record.

LDF has played an important role in protecting the voting rights of African Americans in Louisiana, where LDF has litigated the major voting rights cases that continue to define and shape the state's political landscape.[1] In combination with our organization's efforts, and those of others including local attorneys and activists, Section 5 of the Voting Rights Act ("VRA") has helped to significantly increase overall African-American registration and civic participation rates in the Louisiana.[2]

As you will recall Chairman Specter from your experience in the VRA renewal in 1982, Section 5 has played a crucial role in Louisiana, and elsewhere in covered jurisdictions. Since that time, the Department of Justice has interposed 96 objections to proposed voting changes in Louisiana -- more than in the period between 1965 and 1982. Objections have been interposed in more than half the State's parishes, and many for similar violations that state or local officials have insisted in pursuing. Although the vast majority of these objections were to redistricting plans, they also include objections to proposed changes to voter registration requirements, election schedules, voting procedures, polling places, method of election, and structure of elected bodies. Despite this progress, and the role that Section 5 has played in barring retrogressive voting changes of all kinds, the record is replete with examples of persisting discrimination throughout the state. Here, I highlight the most recent 2001 state redistricting plan for the

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[1] *See Major v. Treen* (Section 2 challenge to 1981 reapportionment of Congressional districts alleging that the reapportionment plan was designed and had the effect of diluting minority voting strength by dispersing an African-American population majority in a parish into two Congressional districts); *Chisom v. Roemer* (suit challenging at-large system of election for State Supreme Court); *LA House of Representatives v. Ashcroft* (Section 5 declaratory judgment action challenging the decennial redistricting plan for the Louisiana State House of Representatives that sought to eliminate a majority Black district in Orleans Parish).

[2] *See* Debo P. Adegbile, *Voting Rights in Louisiana, 1982-2006* (2006).

Louisiana House of Representatives, which provides important recent evidence of the persistence of discrimination by the state. No Louisiana House of Representatives redistricting plan since the VRA was passed has been precleared as initially submitted. The most recent example could very easily escape notice because the Section 5 declaratory judgment action was settled in favor of minority voters before trial.

Louisiana House of Representatives, et al. v Ashcroft (Civ. No. 02-62 D.D.C.)

In 2001, the Louisiana State Legislature sought judicial preclearance of its statewide redistricting plan for the Louisiana House of Representatives from a three-judge panel in the District Court for the District of Columbia. The proposed plan eliminated a majority Black district in Orleans Parish that provided African-American voters the opportunity to elect candidates of their choice. The state took the position that it eliminated the district because white voters in Orleans Parish were entitled to "proportional representation," after a period significant population growth among African-Americans in Orleans Parish during the prior decade, in both real numbers and as a percentage of the parish. This was a fairly remarkable claim as an assertion of an unrecognized Section 5 defense that effectively concedes that the state intentionally committed the underlying retrogression violation. Although the plaintiffs eventually abandoned this theory of proportional representation, it is worth noting that the state sought to selectively apply its theory of representation to white voters alone, and only within Orleans Parish. Under former Attorney General John Ashcroft, the Department of Justice opposed a declaratory judgment on the grounds that the state could not meet its burden of showing that the plan was adopted without retrogressive purpose or effect.

The court found that the state "blatantly violate[ed] important procedural rules" in its conduct during the case, and specifically condemned the state for "subvert[ing] what had been an orderly process for narrowing the issues in th[e] case". The three-judge court also noted the state's "radical mid-course revision in the [legal] theory."[3] Fact-finding during the summary briefing phase of the litigation provided evidence of significant levels of racially polarized voting, as well as strong evidence of retrogressive purpose and effect in the adoption of the plan.[4] Additionally, the defendants, including LDF, who served as counsel on behalf of a biracial coalition of voters, and the Louisiana Legislative Black Caucus, provided evidence that the Speaker Pro Tempore removed long-standing language from the state's redistricting guidelines that dealt with the state's requirements and obligations under the VRA. This discovery was made only after a court order compelling production was issued after plaintiffs refused to produce relevant evidence.

Louisiana did not propose the creation of a new district elsewhere in the state that would have offset the resulting loss in minority electoral opportunity in Orleans Parish. In addition, defendants identified other alternative plans that could have been drawn that would have respected the State's concerns with respect to one-person one-vote

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[3] A copy of the Court's order is appended as Appendix E to Debo P. Adegbile, *Voting Rights in Louisiana, 1982-2006* (2006).

[4] Adegbile, at 16.

requirements, and taken account of certain of the state's allegedly important traditional redistricting principles.

Ultimately, the litigation resulted in an eve of trial settlement that restored the opportunity district in Orleans Parish. The 2001 redistricting plan for the Louisiana House of Representatives is perhaps one of the most egregious statewide redistricting plans to emerge from the last decennial redistricting cycle in that the pre-settlement plan was enacted with both retrogressive purpose and effect though case ended before a final judicial determination. The case shows how a statewide enactment can be used to weaken minority voting strength in a minority political hub with little regard for the near This case also illustrates the inadequacy of focusing solely on objection statistics in gauging the effectiveness of Section 5. The settlement reached means that there is no firm objection statistic or declaratory judgment ruling that resulted from the litigation.[5]

The Impact of the *City of Boerne* Ruling

Some witnesses who oppose renewal of the VRA have questioned Congress's power to reauthorize the expiring provisions in light of the Supreme Court's recent ruling in *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). The key questions raised by the Court's ruling concern Congressional authority to extend the expiring provisions; whether Section 5 is congruent and proportional to the harm it seeks to remedy; and the adequacy of the record that needs to be developed to support reauthorization. Opponents argue that the drafted bill is vulnerable to a constitutional challenge in light of the *Boerne* ruling. We agree that a renewed Section 5 will be challenged in Court but also believe that it should be upheld based upon the record now before Congress.

The *Boerne* line of cases must be and has been very carefully evaluated by both Houses of Congress during the VRA renewal hearings, however those decisions do not impede Congress's ability to renew the VRA on the record now before it. First, Section 5 of the VRA has withstood constitutional challenges on several prior occasions.[6] Moreover, two years after announcing its decision in *Boerne*, the Court reaffirmed the constitutionality of Section 5 in *Lopez v. Monterey*, 525 U.S. 266 (1999)[7]. In *Lopez*, the Court recognized the federalism costs associated with Section 5 holding that the "Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment

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[5] It is also important to stress that LDF spent over $30,000.00 on expert witnesses that was unreimbursable under existing law.

[6] *See South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); *City of Rome v. United States*, 446 U.S. 156, 180 (1980)(rejecting a Section 5 constitutional challenge); *Lopez v. Monterrey*, 525 U.S. 266 (1999)(same); *County Council of Sumter County, S.C. v. United States*, 555 F. Supp. 694, 707 (D.D.C. 1983).

[7] It is also noteworthy that Court's decision in *Lopez* upholding Section 5 against constitutional challenge came less than two weeks after it found the congressional record at issue in the case of *Fla Prepaid Postsecondary Educ. Expense Bd. V. Coll. Sav.* Bank, 527 U.S. 627 (1999), wanting. In *Prepaid*, the Court struck down a Congressional enactment on the grounds that it exceeded Congress's section 5 powers under the 14th Amendment, and did not respond to a history of "widespread and persisting constitutional deprivation" as required under *Boerne* and its progeny. *Id.* at 628.

permits this intrusion, however, and our holding today adds nothing of constitutional moment to the burdens the Act imposes."[8] Indeed, Congress has the constitutional authority to enact remedial or prophylactic legislation that seeks to prevent unconstitutional actions such as the denial or abridgement of the right to vote on account of race or color.[9]

Second, although the *Boerne* ruling places greater limitations on Congressional enforcement powers under § 5 of the Fourteenth Amendment, and likely §2 of the Fifteenth Amendment,[10] Congress is still authorized to act after careful assessment and documentation of a problem of constitutional magnitude.[11] The legislation at issue in *Boerne* was deemed problematic because the legislative record lacked any recent and contemporary examples of modern instances of discrimination and also because the history of persecution described in the hearings all occurred more than 40 years ago.[12] Here, Congress has developed a strong record that is replete with examples of both historical and contemporary forms of discrimination in the covered jurisdictions. This record compares favorably with the record compiled during the 1982 renewal effort.

Third, the *Boerne* Court recognized that the VRA was enacted to protect the right to vote against racial discrimination and noted that Congressional power was at its "zenith" when enacting remedial legislation that reaches individuals in classes afforded a heightened level of constitutional scrutiny, such as those defined by race or gender."[13] It would implicate serious separation of powers and *stare decisis* concerns for the Court to curtail a renewed Section 5 given that the statute seeks to protect a civil right that is fundamental and has been recognized to be "preservative of all rights."[14]

Finally, the renewed Section 5 satisfies the congruence and proportionality test articulated by the *Boerne* Court. Opponents have expressed concerns putative because the renewed bill does not revise the coverage formula, which identifies those jurisdictions subject to the special requirements of the VRA. Close analysis of the broader statutory framework, however, reveals that there are safeguards inherent in the VRA to ensure that the list of covered jurisdictions is appropriately revised and amended. The bailout mechanism outlined in Section 4(a) and the bail-in mechanism outlined in Section 3(c) of the Act work to ensure that the scope of Section 5 is appropriately expanded or restricted. These provisions were successfully modified and liberalized during the 1982 reauthorization of the Act. Section 4(a) establishes a bailout process that serves as an incentive for compliance and is both reasonable and achievable for those jurisdictions that enjoy full minority participation in the electoral process. The evidence demonstrates that all of the jurisdictions that have attempted to opt out from coverage under Section 5

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[8] *See Lopez v. Monterrey,* at 285.
[9] *See* U.S. Const. 14th Amendment, § 5; 15th Amendment, § 2.
[10] *See Lopez v. Monterey*, 525 U.S. at 282-283 (*citing City of Boer*ne, 521 U.S. at 518)
[11] *Lopez* at 530-532; *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62 (2000); *Bd. of Treasurers of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001).
[12] *Boerne,* 521 U.S. 507 (1997).
[13] *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. at 735; *see also Tennessee v. Lane*, 541 U.S. at 529.
[14] *Yick Wo v. Hopkins,* 118 U.S. 356 at 370.

have been able to do so. Section 3(c) of the Act, the "bail-in" mechanism, allows a court to order a jurisdiction that is not covered by the trigger formula, to submit its voting changes in accordance within the requirements of Section 5.[15] Together, these two features of the VRA provide a mechanism for jurisdictions and courts to expand or reduce the scope and reach of Section 5.

For the reasons described above, I believe that: (1) Congress has carefully considered the implications of the *Boerne* line of cases on the VRA renewal bill; (2) is well within the scope of its authority and power to renew the expiring provisions of Section 5, and (3) that the proposed bill rests upon a record that justifies Congressional use, once again, of it's Civil War Amendment enforcement powers to ensure that discrimination in voting is eradicated.

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[15] *See Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990), *aff'd*, 498 U.S. 1019 (1991); *Sanchez v. Anaya*, Civ. No. 82-0067M (D.N.M. 1984) (three-judge panel authorizing preclearance of redistricting plans over a ten year period); Written Testimony of Pamela Karlan, Senate Committee on the Judiciary (May 16, 2006).

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June 9, 2006

The Honorable Arlen Specter, Chairman
Attention: Barr Huefner, Hearing Clerk
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Specter:

Thank you for the opportunity to offer my testimony during the May 9, 2006, Senate Judiciary Committee Hearing on the expiring provisions of the Voting Rights Act and legal issues relating to reauthorization. I have received your May 19, 2006, letter requesting responses to questions from Senators Kennedy, Leahy, Cornyn and Schumer. I am pleased to have the opportunity to amplify certain points made in both my oral and written testimony. It is my understanding that the following responses will be included in the permanent record of the Hearing. I hope that my responses adequately address your specific concerns.

I am grateful to you and the other members of the Judiciary Committee for sponsoring these important Hearings and for the opportunity to respond to your additional inquiries.

Warmest Regards,

Theodore M. Shaw

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Response of Theodore Shaw, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc. to Written Questions from Senator John Cornyn
June 9, 2006

1. *What empirical data can you cite that indicates the ability of minorities in the covered jurisdictions to participate fully in the electoral process is substantially different from minorities outside the covered jurisdictions? Please be specific with respect to covered jurisdictions v. non-covered jurisdictions?*

This question apparently assumes that the relevant constitutional inquiry associated with the forseeable legal challenges to Sections 4 and 5 of the Voting Rights Act ("VRA")[1] involves a detailed comparison between impediments to voting in covered and non-covered jurisdictions. That assumption, however, is unwarranted in light of Supreme Court's interpretations of the provision both pre and post-*City of Boerne v. Flores,* 521 U.S.507 (1997).

I divide my response into two parts representing the Court's interpretations before and after *Boerne* to illustrate that the Court has not approached the constitutional inquiry in the way that the question suggests in either period. Accordingly, there is no reason to believe that the Court will do so following renewal of the present bill.

Prior to *Boerne,* constitutional challenges to the structure and scope of Section 5 reached the Court on 2 occasions -- once following initial passage of the VRA, and then again following the 1975 renewal. In its first opportunity to address the constitutionality of the trigger -- the Congressional method of including some jurisdictions and excluding others -- the Court in *South Carolina v. Katzenbach,* reasoned that the Section 4 trigger was reasonably targeted to require preclearance of voting changes in jurisdictions with some of the most serious histories of voting violations under the Fourteenth and Fifteenth Amendments.[2] In reaching this conclusion, the Court reasoned that "[l]egislation need not deal with all phases of a problem in the same, way as long as the distinctions drawn have some basis in practical experience."[3] In *City of Rome v. U.S.,* 446 U.S. 156 (1980), the Court reaffirmed its holdings in *Katzenbach,* citing with approval the *Katzenbach* court's reasoning that "[i]n response to its determination that 'sterner and more elaborate measures' were necessary, Congress adopted the Act, a 'complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant[.]'"[4]

Although *Boerne* requires that Congress carefully establish a record to justify legislation under the enforcement provisions of the Civil War Amendments, there is nothing in the decision that suggests that a new constitutional test exists that requires a state-by-state comparative analysis. Indeed, in the context of this VRA renewal, which

[1] 42 U.S.C. § 1973b
[2] 383 U.S. 301 (1966).
[3] *Id.* at 331.
[4] *City of Rome,* 446 U.S. 156 at 174, 183(1980) (quoting *Katzenbach,* 383 U.S. at 309, 315).

presents a detailed historical record that begins with the Congressional findings from 1965, and continues through the record presently being developed regarding the experience since 1982, *Boerne's* "congruence and proportionality" inquiry focuses on whether Sections 4 and 5 continue to be an appropriate invocation of Congressional enforcement powers. While Congress is free to make a policy determination to alter coverage, the constitutional inquiry requires that Congress establish an adequate record for the policy decision that it makes. It is entirely appropriate for Congress, having previously determined that the serious problems of constitutional magnitude exist in certain parts of the country, to focus its attention on those jurisdictions to determine (1) whether or not those problems have been eradicated, and, (2) to the extent progress has been made, what role Section 5's prophylactic protections have played in it. At this point Congress has been engaged in this process for many months and, in LDF's view, appropriately focused on the history of discrimination that gave rise to the coverage formula, and the evidence of persisting forms of discrimination to evaluate which jurisdictions remain subject to the special requirements of Section 5 of the VRA.

Although one of the major flaws of the *Boerne* line of cases is the resulting lack of very clearly discernible decisional rules, at least three considerations support the interpretation that Congress continues to have the power to renew Section 5 for covered jurisdictions: (1) *Boerne* and its progeny consistently point to the VRA as the exemplar of appropriate use of congressional Civil War Amendment enforcement powers; (2) recent *Boerne*-line decisions make it clear that Congress is at the height of its power when it acts to protect a fundamental right such as the right to vote from continuing threats of invidious discrimination; and (3) the only post-*Boerne* constitutional challenge to Section 5 of the VRA to reach the Supreme Court cited *Boerne,* and then swiftly reaffirmed the reasoning of *Katzenbach* and *City of Rome,* and upheld preclearance for "jurisdictions properly designated for coverage".[5] Nothing in *Lopez* suggests that the constitutional inquiry following *Boerne* requires a comprehensive state-by-state comparative analysis. Because Congressional power to renew Section 5 is not tied to a comparison of voting discrimination between the covered and non-covered jurisdictions, LDF has not undertaken such an analysis, nor are we aware of any comprehensive study that makes this comparison at the level of detail that would make it particularly probative.[6]

Of course, the effect of Section 5 cannot be assessed in jurisdictions outside of coverage but it is my strong sense that even when one looks at the intensity and

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[5] *Lopez v. Monterey County,* 525 U.S. 226 (1999).

[6] It is worthy of mention that Section 5 coverage is not fixed under the existing statute but rather contains a way out and a way in. Under the bailout provision in Section 4(a), jurisdictions that can establish a clean record of compliance with the VRA and statutory principles of equality in voting can bailout from the preclearance obligations. In addition, where a court finds intentional discrimination in voting it has the authority under Section 3(c) to order that the jurisdiction submit future voting changes for preclearance. Both of the mechanisms have been used since the time of the 1982 renewal. *See The Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Oversight Hearing Before the H. Subcomm. on the Constitution, Comm. on the Judiciary* (Oct. 20, 2005) (statement of Gerald Hebert, Esq.) [hereinafter Hebert testimony]; *Jeffers v. Clinton,* 740 F.Supp. 585, 586 (E.D. Ark. 1990), *aff'd,* 498 U.S. 1019 (1991). See response to the next question for a more detailed discussion of these provisions.

pervasiveness of polarized voting patterns, and as importantly, jurisdictions' efforts to structure electoral competition with an awareness of the polarized voting patterns,[7] there are differences that continue as modern effects of the history that justified the coverage formula in 1965. In addition, while the data and analyses in this area would be, at best, an imperfect indicator, by examining litigation patterns outside the context of Section 5 some inferences can be drawn.

Some witnesses who have testified during hearings have suggested that the coverage formula is no longer viable because of an unfounded belief that the extent of evidence of discrimination in covered jurisdictions as a whole is comparable to that in non-covered jurisdictions. These witnesses or studies tend to offer a comparison by analyzing the raw number of successful Section 2 lawsuits that result in published opinions in covered versus non-covered states. However, this type of analysis, which for very practical reasons of data availability examines only readily available opinions, does not account for the vast number of Section 2 lawsuits that are resolved through pre-trial settlement or those suits that are dismissed because the jurisdiction adopted a remedial plan. For instance, the University of Michigan recently completed a survey of formal judicial findings in Section 2 litigation resulting in published decisions.[8] Because of the limited data pool, the report identifies only three successful Section 2 suits in Georgia since 1982. A closer examination reveals that there have been a total of 69 successful Section 2 suits in Georgia, with most victories resulting from settlements or other pre-trial resolution of the claims.[9] This evidence is in the congressional record.[10] Because of the data limitation, the Michigan Report identifies only 66 successful suits resulting in published opinions in the nine fully covered states since 1982. In fact, there have been 653 successful claims overall that provided relief to plaintiffs in various forms. In light of this data, one could posit that plaintiffs in covered jurisdiction have been 13 times more successful with Section 2 claims than those in non-covered jurisdictions.[11] Indeed, evidence of this high success rate in Section 2 suits in the covered jurisdictions bolsters

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[7] For examples of such efforts in Texas and elsewhere, *see The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 4-5 (2006) (post-hearing written responses by Theodore S. Arrington, Ph.D., Professor and Chair of the Political Science Department at the University of North Carolina at Charlotte) (describing the distinction between racial polarization in covered and non-covered jurisdictions and finding that it is more intense in covered jurisdictions and is also exploited to a greater degree in those jurisdictions); Letter from US Department of Justice, Civil Rights Division, Voting Section to Galveston County (Section 5 Objection Letter) (Mar. 17, 1992) (objecting to a redistricting plan in Galveston County, TX that fractured African-American and Latino voters and provided no opportunity districts among the eight districts in the plan, even though African Americans and Latinos comprised 31% of the county's population).

[8] ELLEN KATZ ET AL., DOCUMENTING DISCRIMINATION IN VOTING: JUDICIAL FINDINGS UNDER SECTION 2 OF THE VOTING RIGHTS ACT SINCE 1982 (Dec. 2005) [hereinafter, "The Michigan Report"]. The Michigan study itself notes the limitation of its dataset. *See id.* at 8 ("This study identified 322 lawsuits, encompassing 750 decisions that addressed Section 2 claims since 1982. These lawsuits, of course, represent only a portion of the Section 2 claims filed or decided since 1982.")

[9] Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005, National Commission on the Voting Rights Act (February 2006) at Table 5.

[10] *Id.* (Submitted to the House Subcommittee on the Constitution on March 8, 2006.

[11] Of course, this number does not account for the unpublished successful resolutions in non-covered jurisdictions but that information, to our knowledge, is not in the Congressional record, and we have reason to believe, is not comparable to the number of settlements in covered jurisdictions.

the record that has been developed around the continuing need for special oversight in these particular areas.

In this way, the record of Section 2 cases can be compared to Section 5 submission withdrawals following more information requests: these suits have a similar impact of preventing discriminatory practices from taking effect (or, in this case, persisting), but they are often overlooked. Section 2 prohibits jurisdictions from enacting laws, practices, or procedures that have the purpose or effect of "deny or abridging the right to vote." Although the functional analysis used to determine whether a Section 2 violation has occurred differs from that used to make a preclearance determination under Section 5, Section 2 cases can be instructive nonetheless, as successful cases indicate when and where minority voter's experience impairment of the opportunity to participate equally in the political process.

Even the evidence outlined in this report, subject to the limitations I described above, demonstrates that, since 1982, plaintiffs brought more successful Section 2 claims in covered jurisdictions than in non-covered jurisdictions. These figures, however, do not tell the whole story because this study was limited to reported decisions, and a great many Section 2 cases, and in some covered jurisdictions the majority, are resolved without any decision being reported. Moreover, the statistics do not account for the fact that the existence of Section 5 itself functions as a deterrent to both retrogression and broader forms of voting discrimination in the covered jurisdictions. Although the analysis of Section 2 cases nationwide is not the central inquiry for the reasons I have described above, data regarding Section 2 litigation inside covered jurisdictions suggests that the preclearance requirement of Section 5 and its accompanying role of federal oversight, have helped to chill some voting discrimination in the covered jurisdictions but also supports the need to continue Section 5's protections in the covered jurisdictions.

2. *Currently, the Voting Rights Act identifies those jurisdictions subject to additional oversight by looking at voter turnout in the Presidential elections of 1964, 1968, and 1972. Reauthorization of the Act in its current form would preserve those dates as the "triggers".*

   a) *Would you support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972? Why or why not?*

   b) *Would you support adding the Presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to section 2 litigation say, in the last 5 years, to this formula in order to pick up jurisdictions that have begun discriminating since the 1970s? Why or why not?*

Initially, the Section 5 trigger was a legislative proxy designed to reach many but not all of the jurisdictions with serious violations of the fundamental right to vote. In three previous renewals, as in the present renewal process, Congress has found that the eradication of discrimination in voting which is the purpose of the VRA, is a gradual process that requires vigilance, and is aided dramatically by the VRA's protections.

Although the trigger is an important aspect of the overall VRA structure, the constitutional inquiry, as I have set out in a slightly different context in my response to your first question, is whether the record of voting discrimination within the covered jurisdictions justifies continuing federal oversight. LDF's assessment of the record that has already been established, even as it continues to be augmented, is that the record justifies renewal because: (1) it sets out a level of continuing voting discrimination in covered jurisdictions that continues the historical pattern, and (2) it shows that § 5 deterrence and prophylactic oversight has been the engine of improvements that are fairly recent and, in many instances, tenuous.

In addition, the current structure of the VRA contemplates that change may be necessary with respect to those jurisdictions subject to the requirements of Section 5. These statutory safeguards allow for change and revision making it unnecessary to use turnout data from recent presidential elections or data gleaned from jurisdictions that have been subject to Section 2 litigation[12] to determine which jurisdictions should be picked up or dropped from the preclearance requirements of Section 5.

The bail-in mechanism outlined in Section 3(c) and the bailout mechanism outlined in Section 4(a) of the Act work to ensure that the scope of Section 5 is appropriately expanded or contracted. These provisions were successfully modified and liberalized during the 1982 reauthorization of the Act. Section 4(a) establishes a bailout process that is both reasonable and achievable for those jurisdictions that enjoy full minority participation in the electoral process.[13] The evidence demonstrates that all jurisdictions that have attempted to bail-out from coverage under § 5 have been able to do so. Section 3(c) of the Act, the "bail-in" mechanism or so-called "pocket trigger," allows a court to order a jurisdiction that is not covered by the trigger formula, to submit its voting changes in accordance within the requirements of Section 5.[14] This provision would thus apply to those political subdivisions subject to Section 2 litigation should a court make the appropriate judicial findings. Together, these two features of the Act provide a mechanism for jurisdictions and courts to expand or reduce the scope and reach

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[12] We note that reliance on data from jurisdictions that have been "subject to Section 2 litigation" may not be particularly instructive. Indeed, some of the litigation that falls into this category may included matters that were dismissed, withdrawn or determined to be without merit. In that regard, some of these matters may not reveal anything about continuing forms of vote discrimination in non-covered jurisdictions.

[13] Hebert testimony, *supra* note 6 (describing "several advantages that [local jurisdictions] derive from the current bailout formula" including being "afforded a public opportunity to prove it has fair, non-discriminatory practices[,] . . . [being] less costly than making §5 preclearance submissions indefinitely[,] . . . [and] once bailout is achieved . . . [being] afforded more flexibility and efficiency in making routine changes, such as moving a polling place.)

[14] For example, where a court held "that the State of Arkansas has committed a number of constitutional violations of the voting rights of black citizens," and in particular had "systematically and deliberately enacted new majority-vote requirements for municipal offices, in an effort to frustrate black political success in elections traditionally requiring only a plurality to win," the court imposed the preclearance requirement on the state. *Jeffers v. Clinton*, 740 F. Supp. 585, 586 (E.D. Ark. 1990), *aff'd*, U.S. 1019 (1991). *See also Sanchez v. Anaya*, Civ. No. 82-0067M (D.N.M. 1984) (three-judge panel authorizing preclearance of redistricting plans over a ten year period); *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary* (May 16, 2006) (written testimony of Pamela Karlan, Professor, Stanford Law School),

of Section 5. In addition, these provisions demonstrate that there are sound statutory mechanisms in place to ensure that the list of covered jurisdictions is appropriately revised and updated.

Turnout data for presidential elections in the 1960s and 1970s were not used alone to determine which jurisdictions had high levels of discrimination in voting. In determining which jurisdiction would be covered under Section 5 of the Act, Congress also looked to those jurisdictions that simultaneously "engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the rights to vote on account of race or color." These data point to jurisdictions that have long histories of discrimination and are relevant to developing a record that illustrates what gave rise to the designation of covered jurisdictions. In 1982, Congress did not deem it necessary to update the coverage formula as many forms of recent and contemporary discrimination persisted in the covered jurisdictions. That assessment was vindicated when the Supreme Court rejected a constitutional challenge to Section 5 as recently as 1999.[15] Likewise, Congress today possesses the same authority to identify persisting discrimination in the covered jurisdictions.

Finally, the history of the revisions to the trigger has been that new trigger dates have at times been added to cover jurisdictions with significant voting discrimination. For example, widespread documented voting discrimination against persons of Spanish Heritage in Arizona and Texas led to the addition of those states to Section 5 coverage in 1975. As a policy matter Congress has the power to revisit the trigger but LDF supports the presently pending bill in its existing form for the reasons described above, and additionally, because as far as LDF is aware, while the record as to covered jurisdictions is nearly complete, the record has not been similarly developed for non-covered jurisdictions in a way that would justify Section 5 expansion..

3. *In* City of Boerne v. Flores, *the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the 14th and 15th amendments. In striking down the Religious Freedom Restoration Act, the Court observed, "RFRA's legislative record lacks examples of modern instance of generally applicable laws passed because of religious bigotry."*

   Given this statement, would you support removing- at a minimum- the year 1964 from the coverage formula?

To the extent that the above question fairly characterizes the "rules" that *Boerne* and its progeny have set out[16] the query about removing the 1964 aspect of the trigger

[15] *Lopez v. Monterey County*, 525 U.S. 226 (1999).

[16] While historical evidence, standing on its own, may not be adequate to warrant prophylactic Congressional activity, it can be part of a larger body of evidence to support Congressional action in reference to the Civil War Amendments. *See Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 730-735 (2003) (reviewing both "the long and extensive history of sex discrimination . . . [and] the persistence of such unconstitutional discrimination by the States" in concluding that this record "is weighty enough to justify the enactment of prophylactic § 5 legislation" by Congress); *Tenn. v. Lane*, 541 U.S. 509, 528 (2004) (upholding Title II of the ADA as a congruent and proportional response to a "long history" of

still does not follow. As I have described, *Boerne* and its progeny look to a historical pattern of discrimination to justify the use of Congressional enforcement powers. The proposed revision of Section 5 is unnecessary given Congress's sweeping power and authority under the Fourteenth and Fifteenth Amendments to pass "firm [legislation] to rid the country of racial discrimination in voting."[17] Indeed, the Supreme Court has recognized that the Voting Rights Act, in its present form, is the exemplar of Congress's enforcement power under the Civil War Amendments. Congress has the constitutional authority to enact legislation that prevents the denial or abridgement of the right to vote on account of race, color, or previous condition of servitude today as it did in 1965.[18]

The legislation at issue in *Boerne* was deemed problematic because the legislative record lacked <u>any</u> recent and contemporary examples of modern instances of discrimination and also because the history of persecution described in the hearings <u>all</u> occurred more than 40 years ago.[19] Thus, the *Boerne* ruling does not call for outright exclusion of historical data, such as the 1964 presidential election turn-out figures that help develop the coverage formula, so long as this data is sufficiently complimented by recent and contemporary evidence of continued voting discrimination.[20] For example, the experience in Louisiana since the time of the 1982 renewal is set out in detail in report regarding recent and persisting voting discrimination in the State of Louisiana.[21] Although Louisiana, alone, does not make the case for renewal of the expiring provisions, the evidence is fairly stark.[22] Indeed, the Department of Justice has interposed 96 objections to proposed voting changes in Louisiana since 1982. Although the vast majority of these objections were to redistricting plans, they also include objections to proposed changes to voter registration requirements, election schedules, voting procedures, polling places, method of election, and structures of elected bodies. Most recently, in 2001, the Louisiana State Legislature unsuccessfully sought judicial preclearance of its statewide redistricting plan for the Louisiana House of Representatives from a three-judge panel in the District Court for the District of Columbia. The proposed plan eliminated a majority Black district in Orleans Parish that provided African-American voters the opportunity to elect candidates of their choice. Ultimately, the litigation resulted in an eve of trial settlement that restored the opportunity district in Orleans Parish. The 2001 redistricting plan for the Louisiana House of Representatives is

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discrimination, and citing the "sheer volume of evidence" of both that "long history" and the fact that discrimination "has persisted despite several legislative efforts to remedy the problem.")

[17] *Katzenbach* at 315 (emphasis added).

[18] *See* U.S. Const. 14th Amendment, § 5; 15th Amendment, § 2.

[19] *Boerne* 521 U.S. 507 (1997).

[20] Moreover, in *Lopez v. Monterey Cty.*, the only case involving a post-*Boerne* challenge to § 5, the Supreme Court upheld the constitutionality of the § 5 preclearance provisions in the context of the substantial "federalism costs" of preclearance. 525 U.S. 266, at 269.

[21] Debo P. Adegbile, Voting Rights in Louisiana, 1982-2006 (report submitted to the H. Comm. on the Judiciary on Mar. 8, 2006).

[22] The Leadership Conference on Civil Rights has carefully set out the experience in most of the covered jurisdictions since 1982 in the House record. The ACLU has submitted into the record a report of over 800 cases since 1982, The National Committee on the Voting Rights Act has submitted a detailed report, and several reprorts on the impact of Section 203 have been made a part of the record. In addition to these reports, detailed testimony from citizens, practitioners, academics, supporters, and detractors is in the record.

perhaps one of the most egregious statewide redistricting plans to emerge from the last decennial redistricting cycle in that the pre-settlement plan presented compelling evidence that initial plan was enacted with both retrogressive purpose and effect.

Moreover, there is a difference of constitutional moment when Congress legislates under the 14th and 15th Amendments *de novo*, as was the case in *Boerne*, in contrast to extending, for a limited period, the most successful civil rights legislation ever enacted at the nexus of fundamental rights and protection against racial and language minorities. In *Boerne*, the Court recognized that the VRA was enacted to protect the right to vote against racial discrimination and noted that Congressional power was at its "zenith" when enacting remedial legislation that reaches individuals in classes afforded a heightened level of constitutional scrutiny, such as those defined by race or gender, "it is easier".[23] Given the fact that *Boerne* calls for historical evidence that is appropriately complimented by recent examples of discrimination and given that the Court touted Section 5 as model legislation exemplifying Congressional power under the Civil War Amendments, the removal of the 1964 presidential election from the coverage formula is both unnecessary and unwarranted.

4. *While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions- yet, for the period 1996 through 2005, the Department of Justice reviewed 54,090 Section 5 submissions and objected to 72, or .153 percent. What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only one objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?*

Objection rates alone neither address the efficacy nor continued utility of Section 5. Excluded from those statistics noted above are Section 5 matters that were denied preclearance in the District Court for the District of Columbia (D.C.); those matters that were settled while pending before the D.C. District Court[24]; and voting changes that were

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[23] *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. at 735; *see also Tennessee v. Lane*, 541 U.S. at 529.

[24] In *Louisiana House of Reps. v. Ashcroft*, the Department of Justice, under former Assistant Attorney General John Ashcroft, along with individual African American voters in Louisiana who were represented by the NAACP Legal Defense and Educational Fund, and the Louisiana Legislative Black Caucus, opposed Louisiana's suit seeking a judicial preclearance determination from the District Court of the District of Columbia. The suit, which concerned the statewide redistricting plan for the Louisiana House of Representatives, sought to eliminate a majority Black district in Orleans Parish that provided minority voters an opportunity to elect candidates of choice. Ultimately, the litigation resulted in an eve of trial settlement that restored the opportunity district after the D.C. District Court issued a strong ruling condemning the Louisiana House of Representatives for a mid-course revision in its litigation theory and tactics. In my view, this is one of the most egregious statewide redistricting plans to emerge from the last decennial redistricting cycle in the pre-settlement was enacted with both retrogressive purpose and effect.

This case illustrates the limited utility of focusing solely on objection statistics in gauging the effectiveness of Section 5. Because this case was settled on the eve of trial, there is no firm objection statistic or declaratory judgment ruling to which can be referred. However, this matter illustrates one of the

withdrawn, altered or abandoned after the Department of Justice made formal requests for more information by mail[25] or informal requests for more information by telephonic inquiry. This activity provides a more comprehensive understanding of the overall impact and deterrent effect of Section 5.

In addition, this question focuses on the time frame between 1996 and 2005. Indeed, there is a notable decrease in the number of objections during the latter part of this time period. However, this decrease may be explained by several phenomena: (1) the *Bossier II* ruling that restricted the Justice Department from objecting to voting changes enacted with discriminatory purpose; (2) the natural reduction in voting changes submitted in the middle of a decade following the decennial redistricting cycle that generally occurs during the first 2 years of the decade; (3) the consistent deterrent effect of Section 5, among other things. I will explain each of these phenomena separately.

First, prior to the Bossier II ruling[26], in over 30 years of enforcement of the Voting Rights Act the United States Department of Justice ("DOJ") had consistently read § 5 to require covered jurisdictions to show that their voting changes were enacted without an unconstitutionally discriminatory purpose.[27] The DOJ had never limited its purpose analysis to a search for "retrogressive intent." Instead, guidelines indicated that "the Attorney General [] consider[s] whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution."[28] A recent empirical study revealed that discriminatory purpose served as the basis for 43 percent of all objections made in the administrative preclearance process prior to the *Bossier II* ruling.[29] The proposed legislation would restore § 5 to the pre-*Bossier II* standard and allow the DOJ to continue making preclearance determinations in a manner that is consistent with both constitutional prohibitions against discriminatory voting practices and the original legislative intent underlying the 1965 enactment of the VRA. Once that standard is restored, both judicial and administrative preclearance determinations will increase markedly.

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most egregious attempts on the part of a state to adopt a retrogressive plan that would have worsened the position of minority voters.

[25] *See generally* Luis Ricardo Fraga & Maria Lizet Ocampo, More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act (June 7, 2006) (unpublished essay, submitted to Senate Judiciary Committee on June 9, 2006) (assessing the deterrent effect of Section 5 through an examination of the issuance of more information requests (MIRs) from the Justice Department).

[26] *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier* II).

[27] *See Katzenbach*, 383 U.S at 328(1966) (Section 5 was intended to prevent covered jurisdictions from "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination"; Court explained that Congress enacted the extraordinary preclearance mechanism in Section 5 because it had reason to suppose that covered jurisdictions might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself).

[28] 28 C.F.R. § 51.55(a).

[29] *See* Peyton McCrary, Christopher Seaman, and Richard Valelly, *The End of Preclearance as We Knew It: How the Supreme Court transformed Section 5 of the Voting Rights Act* (unpublished manuscript) (2005).

Second, following the release of the Census at the beginning of the decade, jurisdictions tend to adopt new redistricting plans and entertain other voting changes to accompany those plans. During the mid-1990s, prior to the *Georgia* and *Bossier* rulings, there was also a documented reduction in the number of objections issued by the Justice Department.[30] Thus, a reduction in the number of objections should be expected during the periods in the middle of the decade during which there is less voting change activity, and should have little impact on any assessment of the merits of and continued need for Section 5.

Finally, the low number of objections does not account for the general deterrent effect of Section 5 in the covered jurisdictions. Although the phenomena described above explain the recent decrease in the overall number of submissions and resulting objections, Section 5 has always had a deterrent effect on retrogressive and discriminatory voting practices in covered jurisdictions. Professors Luis Ricardo Fraga and Maria Lizet Ocampo recently completed an extensive study of the letters issued by the Justice Department requesting more information (MIRs) about pending Section 5 submissions. Requests for more information provide an objective way to measure the deterrent effect of the Section 5 review process. Although MIRs are among the mechanisms used by the DOJ to facilitate the administrative review process and develop greater understanding of a pending change, these letters can also signal to a submitting jurisdiction that DOJ has concerns regarding the potentially retrogressive effect or purpose of a particular proposed change. Indeed, in many instances, jurisdictions that received an MIR withdrew the proposed change, submitted a superseding change, or made no timely response, which effectively terminates a pending submission. Fraga and Ocampo conclude that MIRS enhanced the deterrent effect of Section 5 by 51%.[31] In addition, there are presumably many discriminatory voting changes that were never proposed in the first place because of Section 5 preclearance.

Congress should not measure the utility and need for Section 5 through objection rates alone as these rates have decreased in recent years given the impact of two major Supreme Court rulings and the natural reduction in the number of submitted changes in the middle of a decade. In addition, Section 5 has had a well-documented deterrent effect within covered jurisdictions that is not reflected in these statistics. Moreover, objection statistics also do not account for those jurisdictions that unsuccessfully seek judicial preclearance in the D.C. District Court or those jurisdictions that alter a particular voting change as a result of a pre-litigation settlement or in response to a request for more information issued by the Justice Department.

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[30] *See* Fraga & Ocampo, *supra* note 25, at 15, Figure 1 (Objections and MIR Outcomes by Year).

[31] *Id.* at 3. Specifically, this study "reveal[ed] that 13,697 MIRs and 3,120 follow up requests were sent to jurisdictions from 1982 to 2005. A total of 1,162 changes that received an MIR led to withdrawals, superseding changes, or no responses. This is separate from and in addition to the 2,282 changes that were ob jected to by the DOJ during the same 23-year period." *Id.*

5. *In light of the lack of clear differentiation between covered jurisdictions and non-covered jurisdictions, would you support re-authorization for a term of 5 years instead of 25? Why or why not? 10 years? Why or why not?*

In 1965, Congress enacted the Voting Rights Act to help protect the constitutional rights of Americans to vote free from racial discrimination. Although civil rights groups, advocates and citizens have all hoped that we would quickly resolve and eliminate the issues and problems that impede access to the ballot box, the evidence shows that voting discrimination persists. Indeed, we have not yet eliminated the entrenched discrimination in voting that gave rise to the VRA. Indeed, Congress's own experience with the renewal of Section 5 reflects a pattern of lengthening the period of coverage as experienced revealed the level of entrenchment and intractability of voting discrimination. Congress should therefore renew the expiring provisions for 25 years. Although Congress is granted broad latitude when acting pursuant to its sweeping enforcement powers to remedy racial discrimination,[32] recent precedents show that Congress must conduct hearings and gather evidence that is appropriate in quantity, relevance, and focus.[33] Indeed, no other civil right has commanded more attention, resources, hearing and oversight from Congress than the right to vote. Given this extensive expenditure of Congressional resources, as evidenced by multiple hearings and voluminous record, and Congress's own experience drawn from previous renewals, a 25-year term allows for meaningful change to be measured and makes the possibility for real eradication of voting discrimination an achievable possibility when Congress revisits these issues again.

A 25 year extension of Section 5 ensures that we will have no less than two decennial redistricting cycles to help make an informed assessment about the need to renew Section 5 when this provision come before Congress again. As described above, jurisdictions tend not to adopt a significant number of voting changes during the middle of a decade. For that reason, the decennial redistricting cycles have historically been tremendously active periods for jurisdictions. The number of submitted voting changes spikes during these periods as do the corresponding number of objections issued by DOJ.[34]

Moreover, the 25-year time period also allows for no less than four senatorial election cycles. These unique moments in the political calendar tend to be marked by heightened levels of racially polarized voting. Further, experience dictates that jurisdictions will sometimes adopt eleventh-hour voting changes during these highly contentious moments in the electoral process, whether they be for political advantage or racial disadvantage. For these reasons, a 25-year extension is reasonable and will ensure that we capture a sufficient variation in the type of voting changes made following the release of the Census, and following key federal election cycles.

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[32] *See Nevada Dep't of Human Resources v. Hibbs*, 38 U.S. 721, 735 (2003).

[33] *See also Kimel v. Fl. Bd. of Regents*, 528 U.S. 62 (2000). Although the Supreme Court has not clearly established the requisite quantum of evidence, or exactly what form such evidence must take, compare *Treasurers of the Univ. of Alabama v. Garrett*, 531 U.S. 356 with *Nevada Dep't of Human Resources v. Hibbs*, 38 U.S. 721 at 730; *Tennessee v. Lane*, 541 U.S. at 558.

[34] *See* Fraga & Ocampo, *supra* note 25 at 12, Table 1 and 15, Figure 1.

Additionally, the proposed legislation will restore Section 5 to its former vitality by addressing the impact of the Supreme Court's rulings in *Bossier II* and more recently in *Georgia v. Ashcroft*. Thus, a 25 year time period will allow a meaningful opportunity for a restored Section 5 to ferret out the impermissible backsliding and discrimination that resurfaced in the political process following these rulings.

Finally, it is worth noting that both Congress and the Supreme Court played an important role in the struggle to desegregate our nation's public schools. The NAACP Legal Defense and Educational Fund also played a central role in this effort litigating some of the seminal cases in this area. Over the last few decades, many schools have been successfully desegregated while remaining under the watchful eye of federal courts. Unfortunately, our federal system has turned its back on integrated education and we are now witnessing the resegregation of public schools throughout the country. Numerous public schools are pushing for a declaration that they have achieved unitary status and are seeking to end the very consent decrees that helped them integrate. Indeed, when the federal government steps out of the process, our civil rights are placed in a vulnerable position. History dictates that no civil right is more important than the right to vote. For these reasons, a 25 year extension of Section 5 is both reasonable and necessary to ensure protection of the most fundamental civil right: the right to vote.

6. *Putting aside the constitutional question with regard to overturning* Georgia v. Ashcroft, *would it be your view that even districts that are "influence districts", with relatively low number of minority voters, should be protected by the plan? Why or why not?*

The *Georgia* Court offers an extremely intangible definition of an influence district. The Court identified an "influence district" as one "where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process."[35] In the view of LDF, and that of many others who have testified during these hearings, it is difficult to identify when the number of "influence districts" would suffice to replace a viable opportunity district. The proposed legislation appropriately restores the key feature of § 5 retrogression analysis which has long looked to ensure that voting changes do not eliminate or reduce those districts that provide minority voters a tangible opportunity to elect candidates of their choice.

The retrogressive effect of a proposed voting change has historically been measured by examining the minority community's ability to elect candidates of choice under the benchmark and proposed plans. For example, an examination of the retrogressive effect of a proposed redistricting plan would require identification of the number of viable opportunity districts in the benchmark plan to ensure that this number is not reduced under the proposed plan. The proposed legislation appropriately restores the tangible "opportunity to elect" standard and does not allow jurisdictions to cloak

[35] *Georgia v. Ashcroft*, 539 U.S. 461, at 482 (2003).

intentional discrimination under the intangible framework set forth by *Georgia v. Ashcroft*.[36]

Indeed, there are instances in which opportunity or coalition districts with relatively low numbers of minority voters, close to or below 50 percent, may provide an opportunity to elect. Changes that have eliminated the opportunity in such districts have drawn objections and should continue to do so even should the *Georgia* ruling be revised by the proposed legislation. For example, in April 2005, the Justice Department determined that the redistricting plan for the Town of Delhi, Louisiana, was not entitled to preclearance.[37] According to the 2000 Census, the Town of Delhi has 2,247 persons of voting age, of whom 1,153 (51.3%) are black. Under the benchmark plan, African Americans had the ability to elect candidates of choice in four of the town's five wards. However, the proposed plan eliminated that ability in one ward where the town sought to reduce the black voting age population from 48.4 to 37.9 percent. The Department's careful analysis revealed that this reduction eliminated the ability of African American voters to elect candidates of choice and objected to the change. I highlight this as a contemporary example of a district that has a Black voting age population below 50 percent that yet provides minority voters an opportunity to elect. The proposed legislation will appropriately bar covered jurisdictions from undermining the benchmark while protecting minority voters from unconstitutional retrenchment in political gains. Further, the bill will make it more practical for the D.C. District Court to adjudicate, and the DOJ to administer, the retrogression provisions of § 5.

With respect to the putative constitutional question, the proposed modification is statutory and not constitutional in nature. The change would return the standard to what it had been for over 25 years. It is my view that the proposed legislation does not overturn the *Georgia v. Ashcroft* ruling in its entirety. Rather, the legislation would restore, as a minimum standard, the more readily verifiable and tangible "ability to elect" principle that has long been the fundamental feature of § 5 analysis, while leaving open, for further consideration, the additional aspects of participation in the political process catalogued in the *Georgia v. Ashcroft* opinion and invited by your question.

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[36] *Id.*

[37] *See* Letter from US Department of Justice, Civil Rights Division, Voting Section to Town of Delhi, Richland Parish, Louisiana (Section 5 Objection Letter) (April 25, 2005).

Response of Theodore Shaw, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc. to Written Questions of Senator Patrick Leahy
June 9, 2006

1. *Mr. Shaw, the extensive record established in 11 hearings in the House of Representatives includes the testimony of over 50 practitioners, elected officials, advocates, and academics, state by state reports detailing discrimination in Section 5 and 203 covered jurisdictions since 1982, the Voting Rights Project's 800 page report, and the National Commission reports. The hearings in the Senate Judiciary Committee will include the testimony of more than 30 additional witnesses and the balance of the state reports which will provide additional evidence of recurring discrimination in covered jurisdiction and evidence of the deterrent effect of Section 5. Based on this record, do you believe Congress has the power under the 14th and 15th Amendments to reauthorize the expiring provisions of the VRA. Please explain.*

The expiring provisions of the Voting Rights Act ("VRA") aim to remedy a constitutionally grave harm to citizens who live in states that are characterized by both historical and contemporary evidence of persistent racial discrimination. It is well settled that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[1] Further, in *City of Boerne v. Flores,* the Supreme Court observed that when Congress enacted the Voting Rights Act to protect the right to vote against racial discrimination, Congressional powers were at their "zenith." Moreover, the Court has recognized that Congress must be given "wide latitude" with respect to prophylactic legislation designed to remedy or prevent unconstitutional actions.[2] Given these broad powers where fundamental rights are at issue, I believe that both Supreme Court precedent and the extensive record that has been built support Congress's authority to renew the expiring provisions of the VRA as these provisions aim to prevent the denial or abridgement of the right to vote on account of race or color.[3]

Although the Supreme Court has not identified a clear threshold of evidence that must be developed to support federal legislation[4], recent precedents suggest that the extensive body of evidence that has been compiled in Congress is appropriate in quantity,

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[1] *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).
[1] *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

[2] *Id.* at 519.
[3] *See* U.S. Const. 14th Amendment, § 5; 15th Amendment, § 2.
[4] *Compare Treasurers of the Univ. of Alabama v. Garrett*, 531 U.S. 356 *with Nevada Dep't of Human Resources v. Hibbs,* 38 U.S. 721

relevance, and focus.[5] In some *Boerne* cases, the Court has focused on the detail of evidence in the record.[6] However, in the case of protected categories subject to heightened scrutiny (*i.e.*, race and gender), the Court has upheld legislation based upon a record that was deemed sufficient to identify the existence of discriminatory practices without clearly identifying a particular threshold or quantum of evidence.[7]

Here, Congress is faced with a renewal of a statute that has the purpose of eradicating racial discrimination in voting under the Fourteenth and Fifteenth Amendments to the Constitution. Congress is granted broad latitude in deciding the appropriate means to remedy past violations and prevent future violations pursuant to its enforcement authority under the Fifteenth Amendment.[8] Further, Congress's unique fact-finding ability makes it well situated to compile evidence about a constitutional problem and identify the appropriate legislative solution. Moreover, because the issue of voting discrimination relates to issues of political fairness and access, and has been weighed by Congress on five other occasions in as many decades it is very well-positioned to understand the complexity of these issues and implement an effective prophylactic remedy. Congress did not begin this renewal process with a clean slate but rather with an awareness of a historical pattern of voting discrimination that nevertheless had to reassessed.

Indeed, the only post-*Boerne* constitutional challenge to Section 5 of the VRA to reach the Supreme Court cited *Boerne,* reaffirmed the reasoning of *Katzenbach* and *City of Rome,* and upheld preclearance for "jurisdictions properly designated for coverage".[9] Nothing in the *Lopez v. Monterrey* ruling suggests that the constitutional inquiry following *Boerne* requires a comprehensive state-by-state comparative analysis. Moreover, Congress has developed an extensive and comprehensive record that details evidence of continuing voting discrimination in covered jurisdictions and supports the continuing need for Section 5. This record enables Congress to renew the expiring provisions of the Act pursuant to its broad enforcement powers under the 14th and 15th Amendment.

2. *You have testified that in light of evidence of continued discrimination in the covered jurisdiction, the deterrent effect of Section 5 justifies its renewal. Yet, others have argued that Section 5 has been so successful that it is no longer needed. Can a successful deterrent <u>still</u> be a success if it is no longer operational? Won't softening or removing this successful deterrent risk the emergence of new abuses?*

The Section 5 review process has proven to be an effective deterrent on retrogressive and discriminatory voting practices in the covered jurisdictions.[10]

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[5] *See e.g. Tennessee v. Lane*, 541 U.S. at 558, *Nevada Dep't of Human Resources v. Hibbs*, 38 U.S. at 730.
[6] *Kimel v. Fl. Bd. of Regents,* 528 U.S. 62 (2000); *Bd. of Treasurers of the Univ. of Alabama v. Garrett,* 531 U.S. 356 (2001).
[7] *Hibbs*, 38 U.S. at 735 (noting "important shortcomings of *some* state policies") (emphasis added).
[8] *Id.* at 735 (2003).
[9] *Lopez v. Monterey County,* 525 U.S. 226 (1999).
[2]

Numerous witnesses have testified about this clear deterrent effect.[11] Eliminating Section 5 would lead to reemergence of more widespread retrogression within the covered jurisdictions.

Professors Luis Ricardo Fraga and Maria Lizet Ocampo recently completed an extensive study of the letters issued by the Justice Department requesting more information (MIRs) about pending Section 5 submissions. MIRs provide an objective way to measure the deterrent effect of the Section 5 review process. Although MIRs are among the mechanisms used by the DOJ to facilitate the administrative review process and develop greater understanding of a pending change, these letters can also signal to a submitting jurisdiction that DOJ has concerns regarding the potentially retrogressive effect or purpose of a particular proposed change. Indeed, in many instances, jurisdictions that received an MIR withdrew the proposed change, submitted a superseding change, or made no timely response, which effectively terminates a pending submission. Fraga and Ocampo conclude that MIRS enhanced the deterrent effect of Section 5 by 51%.[12]

If Section 5 were allowed to expire, there is little doubt that advances made in covered jurisdictions would be undermined. Some have offered the phrase, "Bull Connor is dead," to suggest that the political process has been rid of individuals determined to bar African Americans and other minorities from exercising the right to vote. I would take a different view. Indeed, the record is replete with examples of continued discrimination in the covered jurisdictions, and in some cases evidence that indicates that jurisdictions have tried to reimpose previously discredited practices. For example, since 1982, the Department of Justice has interposed 96 objections to proposed voting changes in Louisiana. Although the vast majority of these objections were to redistricting plans, they also include objections to proposed changes to voter registration requirements, election schedules, voting procedures, polling places, method of election, and structure of elected bodies. Some of these objections, including those interposed to Point Coupee Parish redistricting plans during each of the last three decades, make clear the continued

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[10] *See, e.g.*, RICHARD L. ENGSTROM ET AL., LOUISIANA, IN QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990, at 103, 110 (Chandler Davidson & Bernard Grofman eds., 1994) (discussing the deterrent effect of Section 5 and providing an analysis of how Section 5 was designed to "bring the force of the federal government to bear" on voting discrimination).

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[11] See e.g. *The Voting Rights Act: The Continuing Need for Section 5, Oversight Hearing Before the H. Subcomm. on the Constitution, Comm. on the Judiciary* (Oct. 25, 2005) (statement of Laughlin McDonald)(noting that in 2005, the Georgia legislature redrew its congressional districts, but before doing so it adopted resolutions providing that it must comply with the non-retrogression standard of Section 5); . *The Voting Rights Act: The Continuing Need for Section 5, Oversight Hearing Before the H. Subcomm. on the Constitution, Comm. on the Judiciary* (Oct. 25, 2005) (statement of Nina Perales)(noting that the deterrent effect of Section 5 stops many discriminatory election changes before they are enacted by covered jurisdictions).

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[12] *Id.* at 4. Specifically, this study revealed that 13,697 MIRs and 3,120 follow up requests were sent to jurisdictions from 1982 to 2005. A total of 1,162 changes that received an MIR led to withdrawals, superseding changes, or no responses. This is separate from and in addition to the 2,282 changes that were objected to by the DOJ during the same 23-year period.

intransigence and resistance among elected officials throughout the state. Most recently, Louisiana unsuccessfully sought judicial preclearance of its statewide redistricting plan for the State House of Representatives. All of these proposed voting changes would likely have gone into effect and placed minority voters in a worse position but for the deterrent effect of the Section 5 review process.

Finally, it is worth noting that both Congress and the Supreme Court played an important role in the struggle to desegregate our nation's public schools. The NAACP Legal Defense and Educational Fund, Inc. also played a central role in this effort litigating some of the seminal cases in this area. Over the last few decades, many schools have been successfully desegregated while remaining under the watchful eye of federal courts. Unfortunately, our federal system has largely turned its back on integrated education and we are now witnessing the resegregation of public schools throughout the country. Numerous public schools are pushing for a declaration that they have achieved unitary status and are seeking to end the very consent decrees that helped them integrate. In recent years, many school districts have returned to federal court seeking a declaration that they have achieved unitary status. The result, more often than not, has been that once a decree is lifted, the system is likely to resegregate itself. History and experience dictate that when there is no federal oversight, civil rights crises reemerge. It would make no sense to deny that substantial improvements in voter access, participation and effectiveness have been made, just as it would be equally misguided to ignore the role that Section 5 has played in the process. For these reasons, a 25 year extension of Section 5 is both reasonable and necessary to ensure protection of the most fundamental civil right: the right to vote.

3. *The bill introduced in the House and the Senate includes a correction to the Supreme Court's decision in* Reno v. Bossier Parish School Bd. ("Bossier II") *by making clear that a voting rule change motivated by any discriminatory purpose violates Section 5. Without this fix, is it possible for jurisdictions covered by Section 5 to pass changes to voting rules with the clear intent to discriminate against minorities? Isn't such a result inconsistent with the purposes of the Voting Rights Act to eliminate discriminatory tactics that undermine the guarantees of the 15th Amendment?*

The Senate Report accompanying the 1982 reenactment of the VRA indicate that Congress intended the Act "to create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally."[13] From the time of the 1982 reenactment of § 5 until the Supreme Court's decision in *Bossier II*, the Supreme Court consistently held that § 5 should be interpreted so as to enforce the constitutional prohibitions against voting changes enacted with racially discriminatory purpose.[14] Similarly, prior to *Bossier II*, in over 30 years of enforcement of the Voting

[13] S. Rep. No. 417 at 5.

[14] *See, e.g., City of Pleasant Grove*, 479 U.S. 463; (reiterating that a covered jurisdiction has the burden to prove "the absence of discriminatory purpose" on its part); *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 159 (1983)(a reapportionment plan is unconstitutional if it is adopted with an

Rights Act the United States Department of Justice ("DOJ") had consistently read § 5 to require covered jurisdictions to show that their voting changes were enacted without an unconstitutionally discriminatory purpose.[15] As a result of *Bossier II,* both courts and the DOJ are required to preclear changes enacted with discriminatory intent so long as the changes lack retrogressive purpose or effect. This result is inconsistent with both Congressional intent and the guarantees of the Fifteenth Amendment

Once that standard is restored, both the judicial and administrative preclearance processes will appropriately bar discriminatory voting changes and return to long-standing Supreme Court guideposts for evaluating discrimination. Indeed, in the earlier *Bossier Parish* case, *United States v. Bossier Parish School Board*, 520 U.S. 471 (1998), the Supreme Court confirmed that *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), outlines the appropriate analytical framework for weighing circumstantial evidence and determining whether invidious discriminatory purpose infected the adoption of a particular voting change. Numerous cases arising under § 5 have approved of or adapted this standard to help ferret out discriminatory intent in the § 5 process.[16] The DOJ, adopting an analytical approach that mirrors that of the courts in this context, had successfully employed the *Arlington Heights* test to ferret out those voting changes infected with discriminatory purpose. The DOJ's past and present use of the *Arlington Heights* framework to identify those instances in which discriminatory purpose infects a proposed voting change makes clear that there is an objective and workable standard, sanctioned by the Supreme Court, to ferret out those changes enacted with an unconstitutional discriminatory purpose.

The proposed legislation will restore an important safeguard of Section 5 that has long stood as one of the federal government's principal weapons in its arsenal against unconstitutional racial discrimination in voting. The *Arlington Heights* framework has provided, and would continue to provide under the pending bill, the contours around which both courts and the DOJ can effectively analyze and detect unconstitutional

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invidious discriminatory purpose constituting a denial of equal protection, and if racial purpose has been a motivating factor in the decision, the state has unconstitutionally denied black citizens equal protection); *City of Rome v. United States*, 446 U.S. 169, 176-179 (1980)(by describing in § 5 the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless both discriminatory purpose and effect are absent.); *City of Richmond v. United States*, 422 U.S. 358, 378-79 (1975) (annexations animated by discriminatory purpose have no credentials whatsoever for actions generally lawful may become unlawful when done to accomplish an unlawful end).
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[15] *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (Section 5 was intended to prevent covered jurisdictions from "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination"; Court explained that Congress enacted the extraordinary preclearance mechanism in Section 5 because it had reason to suppose that covered jurisdictions might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.).

[16] *See, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 117 S. Ct. 1491 (1997) (applying the *Arlington Heights* test to assess whether a voting system was enacted for a discriminatory purpose); *City of Pleasant Grove v. U.S.*, 479 U.S. 462, 478 (1987) (approving use of *Arlington Heights* as tool to prove purposeful discrimination in the voting context); *U.J.O. of Williamsburgh v. Carey*, 430 U.S. 144 (1977) (noting that the *Arlington Heights* factors are probative evidence of purposeful discrimination).
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discriminatory purpose consistent with the guarantees of the Fifteenth Amendment. Indeed, a law that permits intentional discrimination to receive the approval of the Civil Rights Division of DOJ is calling out for clarification.

Response of Theodore Shaw, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc. to Written Questions of Senator Edward M. Kennedy June 9, 2006

1. *When Section 5 was reauthorized in 1982, Congress amended the bailout provision to make it easier to end coverage of jurisdictions that can show they no longer discriminated. In fact, the Senate committee report on the 1982 Act stated that the bailout criteria were changed to "recognize[e] and reward[] their good conduct, rather than require them to await an expiration date which is fixed regardless of the actual record." The report also stated that "the goal of the bailout ... is to give covered jurisdictions an incentive to eliminate practices denying or abridging opportunities for minorities to participate in the political process." In your view, do the bailout provisions adequately prevent Section 5 from applying too broadly, so that it applies only where it is truly needed?*

Section 4(a) of the Voting Rights Act establishes a reasonable and achievable bailout process[5] that allows those jurisdictions that enjoy full minority participation in the electoral process to terminate their covered status under the Act. The evidence demonstrates that, since 1982, all of the jurisdictions that have applied to bailout from coverage under Section 5 have been able to do so. All of these jurisdictions received substantial assistance during the initial phases of the process and consent of the Justice Department.[6] Unlike the time period leading up to the 1982 reauthorization that resulted in liberalization of the bailout process, there is no evidence in the record that demonstrates that jurisdictions have encountered difficulty with the bailout process or that indicates that jurisdictions have tried, without success, to bail out from coverage under the Act.[7]

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[1] *Katzenbach* at 315 (emphasis added).

[2] *See* U.S. Const. 14th Amendment, § 5; 15th Amendment, § 2.

[3] 521 U.S. 507, at 518 (1997).

[4] *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. at 735; *see also Tennessee v. Lane*, 541 U.S. at 529.

[5] To demonstrate compliance with the Voting Rights Act for the ten-year period immediately preceding the filing of the bailout action, section 4(a)(1) outlines the "positive steps" requirements that a 'State or political subdivision must demonstrate including: (i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process; (ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under this Act; and (iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

[6] As a check on continued compliance, the current version of the bailout provision grants the District Court of the District of Columbia jurisdiction over a voting rights case for a specified period of time once the declaratory judgment has been entered. During this ten year probationary period, the Attorney General can move to reopen the case because of alleged voting rights infractions.

[7] On May 9, 2006, Professor Samuel Issacharoff indicated in his submitted written testimony that the "current bailout provision appears unduly onerous and not sufficiently geared to actual legal violations." However, Prof. Issacharoff did not offer any evidence that would support this claim. My review of the

To date, eleven jurisdictions in the State of Virginia have successfully availed themselves of the bailout process. Gerald Hebert, legal counsel for all jurisdictions that have bailed out since the 1982 Amendments, characterizes the process as both "straightforward and easy."[8] Despite clear evidence that the bailout process provides an adequate mechanism for jurisdictions to remove themselves from the requirements of Section 5, there are some administrative steps that the Justice Department might take to educate jurisdictions about the eligibility requirements and criteria. For example, Principal Deputy Assistant Attorney General Rena J. Comisac testified on May 4, 2006, about the extensive steps taken by the Justice Department to inform certain covered jurisdiction about the requirements of Section 203 of the Act. Specifically, the Justice Department mailed formal notice and detailed information about Section 203 to hundreds of jurisdictions across the United States and initiated face-to-face meetings with State and local election officials to explain the law and answer questions.[9] For example, if the DOJ were to include guidance about the bailout process and requirements with preclearance letters, where appropriate, to educate jurisdictions and make similar information clearly available under an appropriate heading on its website for those jurisdictions unfamiliar with the bailout statute and rules, there would likely be an increase in the number of jurisdictions that seek bailout over the course of the next 25 years as compliance improves.

The evidence in the record demonstrates that the bailout process is reasonable and that the 1982 Amendments sufficiently readjusted the requirements of the bailout mechanism. Moreover, the evidence shows that the Justice Department has generally provided assistance to those jurisdictions that have sought bail out and routinely offered joint consent to an entry of judgment granting bailout as permitted under the Act. Given these facts, I believe that the bailout provisions adequately prevent Section 5 from applying too broadly by providing eligible jurisdictions an effective and accessible tool to terminate their covered status.

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record indicates that there is virtually no evidence in the record that jurisdictions have encountered difficulty satisfying the bailout requirements. *See An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Related to Reauthorization, Sen. Jud. Comm.* (statement of Samuel Issacharoff) (May 9, 2006).

[8] *See The Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Oversight Hearing Before the H. Subcomm. on the Constitution, Comm. on the Judiciary* (Oct. 20, 2005) (statement of Gerald Hebert, Esq.)

[9] *See The Voting Rights Act Reauthorization and Amendments Act of 2006, Oversight Hearing Before the H. Subcomm. on the Constitution, Comm. on the Judiciary* (statement of Principal Deputy Assistant Attorney General Rena J. Comisac) (May 4, 2006) at 2.

Response of Theodore Shaw, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc. to Written Questions of Senator Charles D. Schumer June 9, 2006

1. The proposed reauthorization bill, S. 2703, addresses the Supreme Court's decision in Reno v. Bossier Parish School Board, 528 U.S. 320 (2000) (Bossier Parish II) by clarifying that a voting rule change motivated by any discriminatory purpose cannot be precleared under Section 5 of the Voting Rights Act.

a. Do you support this change? Why or why not?
b. In your view, is the Supreme Court's decision in Bossier II consistent with Congress's original intent in enacting Section 5?

From the time of the 1982 reenactment of § 5 until the Supreme Court's decision in *Bossier II*, the Supreme Court consistently held that § 5 should be interpreted so as to enforce the constitutional prohibitions against voting changes enacted with racially discriminatory purpose.[1] I support the language in the proposed bill that restores Section 5 to its prior force while returning it to a status consistent with long-standing Supreme Court precedent. The drafted bill will help ensure that the preclearance process ferrets out not only those voting changes that are retrogressive in effect or purpose, but all changes enacted with a constitutionally prohibited purpose.

The Senate Report accompanying the 1982 reenactment of the VRA indicates that Congress' intent in creating the Act was "to create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally."[2] In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court explained that Congress enacted the extraordinary preclearance mechanism in Section 5 because "it had reason to suppose that these states [which are subject to Section 5] might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself."[3] To the extent that the *Bossier II* decision eliminated the ability to detect, ferret out, and block discriminatory purpose during the Section 5 review process, the ruling is inconsistent both with Congress' original intent and with common sense. For example, it

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[1] *See, e.g., City of Pleasant Grove*, 479 U.S. 463; (reiterating that a covered jurisdiction has the burden to prove "the absence of discriminatory purpose" on its part); *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 159 (1983)(a reapportionment plan is unconstitutional if it is adopted with an invidious discriminatory purpose constituting a denial of equal protection, and if racial purpose has been a motivating factor in the decision, the state has unconstitutionally denied black citizens equal protection); *City of Rome v. United States*, 446 U.S. 169, 176-179 (1980)(by describing in § 5 the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless both discriminatory purpose and effect are absent.); *City of Richmond v. United States*, 422 U.S. 358, 378-79 (1975) (annexations animated by discriminatory purpose have no credentials whatsoever for actions generally lawful may become unlawful when done to accomplish an unlawful end).
[2] S. Rep. No. 417 at 5.
[3] 383 U.S. at 335 (emphasis added). Before it enacted Section 5, Congress found that certain jurisdictions, whose laws had been invalidated in court, would simply switch to another discriminatory statute or device. H. Rep. No. 439, 89th Cong. 1st Sess. (1965), *reprinted in* 1969 U.S.C.C.A.N. 2441.

creates a situation where jurisdictions that have more successfully resisted racial equality may, in certain circumstances have greater latitude to persist in illegal exclusionary tactics. *Bossier II* must be addressed in the way the pending bill contemplates to restore rationality to the statutory framework.

> *c. Please provide two or three examples of voting changes that could not have been precleared before Bossier II but were required to be precleared after Bossier II.*

Given the clear effect of the *Bossier II* ruling on the Section 5 statutory framework, little attention has been paid to evidence of discriminatory purpose in the Section 5 review process. Moreover, the DOJ is in the best position to know what evidence has been presented to support preclearance of the many submissions that it receives. Indeed, the underlying submissions are not readily available, and are not published on any website of similar public database. As a result, it is difficult to specifically ascertain how many voting changes likely would have drawn objections were Section 5 not significantly restricted in scope as a result of the *Bossier II* ruling. I will describe, however, a recent voting change that was precleared by the Department of Justice on May 1, 2006, that was accompanied by strong evidence of discriminatory purpose underlying the change.

Most recently, the NAACP Legal Defense & Educational Fund, Inc. (LDF) submitted a Comment Letter to the Attorney General urging that the Department of Justice (DOJ) interpose an objection to a proposed change to the method of electing and configuration of the Rockingham County Board of Education in North Carolina.[4] LDF's investigation into this matter yielded evidence that suggested the proposed change was adopted with discriminatory purpose. Specifically, we learned that the proposed change was enacted despite strong opposition from a majority of the school board members and protest from a significant number of minority residents in the county. We also learned that the proposed change was advanced by a group of white residents in the county, Citizens About School Elections (CASE), who are fundamentally opposed to the desegregation of certain schools within the county. Community contacts in the county indicated that CASE members fought to change the school board's configuration and method of election in order to diminish minority voting strength.[5] Despite significant

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[4] *See* attached Comment Letter from Theodore Shaw to John Tanner, Chief Voting Section (April 2005).

[5] Under the current statutory framework, Section 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose." *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 341 (2000). Thus, the Court's reconception of the Section 5 standard permits preclearance of proposed changes "no matter how unconstitutional [they] may be" so long as they are deemed non-retrogressive. *Id.* at 336. Although discriminatory purpose alone is insufficient evidence to deny preclearance under the current statutory framework, we highlighted this evidence in our Comment Letter because it suggested that the justification proffered by the state for the proposed change, as well as the state's description of the anticipated effect that the change will have on minority voters, are unreliable and thus, did not help the state satisfy its burden of showing that the change was not retrogressive in purpose or effect.

evidence of discriminatory purpose underlying the change, the DOJ precleared the change on May 1, 2006.

Utilizing the framework set forth in *Arlington Heights* for discerning discriminatory motive, LDF examined the motivation behind the proposed voting change by conducting a sensitive "inquiry into such circumstantial and direct evidence as may be available."[6] In *Arlington Heights*, the Supreme Court indicated that the "important starting point" for assessing discriminatory intent ... is "the impact of the official action whether it 'bears more heavily on one race than another.'"[7] Other considerations relevant to the purpose inquiry include, among other things, "the historical background of the [jurisdiction's] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative or administrative history, especially. . . [any] contemporary statements by members of the decision-making body."[8]

The sequence of events leading up to the adoption of the proposed change illustrated, in part, the discriminatory intent underlying H.B. 1034. Members of CASE who were incensed regarding the school board's 2002 school attendance area redistricting efforts pushed the proposed change. Specifically, CASE members were bitterly opposed to the board's last redistricting plan that resulted in an increase in the number of African-American students at certain predominantly white schools in the county. Moreover, CASE members were upset that African Americans from a housing complex in Reidsville were drawn into the predominantly white school districts of Wentworth and Huntsville. CASE members sought to change both the configuration of the districts and method of election to reduce minority electoral opportunity and wrestle control from sitting school board members. At a public hearing regarding the school board's redistricting plan, CASE members openly shared their racially driven concerns about the impact that these Black students would have on test scores and the overall quality of the school. More importantly, CASE members expressed their hostility towards the idea of racial mixing.

School Board Chairman Wayne Kirkman indicated that CASE members in Rockingham County openly discussed strategies to reduce minority voting strength and eliminate minority school board members. CASE members first proposed the idea of changing the method of election by reducing the number of single-member districts and

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[6] *Village of Arlington Heights v. Met. Housing Dev. Corp.*, 429 U.S. 252 at 266 (1977). In determining "whether invidious discriminatory purpose was a motivating factor," courts have looked to the Arlington Heights framework, at least in part, to evaluate purpose in the § 5 context. *See Pleasant Grove v. United States*, 479 U.S. 462, 469-470 (1987) (considering city's history in rejecting annexation of black neighborhood and its departure from normal procedures when calculating costs of annexation alternatives); *Busbee v. Smith*, 549 F. Supp. 494, 516-517 (D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983) (referring to *Arlington Heights* test); *Port Arthur v. United States*, 517 F. Supp. 987, 1019, *aff'd*, 459 U.S. 159 (1982) (same).

[7] *Arlington Heights*, 429 U.S., at 266 (*citing Washington v. Davis*, 426 U.S. 229 (1976)).

[8] *Id.* at 268.

replacing them with at-large seats in 2002. At a public hearing on the issue, a number of Black voters expressed concern about the likely impact that the change would have on minority voting strength. The school board unanimously rejected the idea following that hearing. Subsequently, CASE members sought to throw support and resources behind selected African-American candidates in order to help develop the record necessary for the proposed change to survive scrutiny under Section 5. Realizing that the school board was opposed to the change, CASE members turned to the Rockingham County Commission for assistance. A local news article described the Commission's meeting leading up to the adoption of a resolution supporting the CASE proposal as an "ambush" and noted that the resolution was passed with "no-comment, no-discussion [and] no-question."[9]

There are noteworthy departures from normal procedure in the process leading up to the adoption of the proposed change. For example, the state legislature adopted the change despite an April 25, 2005 resolution from the Rockingham County Board of Education memorializing its opposition to "any alteration to its electoral districts" and stating that "such efforts will dilute the minority representation and fail to adequately assure fair representation for each citizen of Rockingham County."[10] Further, the state legislature adopted the proposed change despite the fact that North Carolina General Statute 115C-37(i) contemplates that school districts shall only be revised following the federal census of population each 10 years. The school board adopted its decennial redistricting plan shortly after the release of the 2000 census and this plan was precleared by the Justice Department on June 25, 2002.

Finally, the legislative history leading up to adoption of the change also provides evidence of the discriminatory purpose underlying the proposed change. Here, Session Law 2005-307 was initially introduced and failed to obtain a sufficient number of votes to pass. However, the bill was reintroduced as part of a different bill that concerned a study regarding the implementation of success centers in New Hanover County school system. Ultimately, all African-American Senators in the General Assembly voted against the bill.

For these reasons, we believe that this particular voting change would have drawn and should have an objection had the change been evaluated under the pre-*Bossier II* statutory framework. The circumstantial evidence of discriminatory purpose underlying this change was readily apparent. We believe that the under the circumstances described above, the Attorney General could have interposed an objection to this voting change had it been made prior to *Bossier II.*

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[9] *See* Attachment to Letter from Theodore Shaw.
[10] *Id.*

d. What impact has Bossier II had on minority voting rights and the ability of the Department of Justice to object to discriminatory voting changes under Section 5?

Prior to *Bossier II*, in over 30 years of enforcement of the Voting Rights Act the United States Department of Justice ("DOJ") had consistently read § 5 to require covered jurisdictions to show that their voting changes were enacted without an unconstitutionally discriminatory purpose.[11] During the pre-*Bossier II* era, DOJ conducted its purpose analysis in accordance with its guidelines which state that "the Attorney General [] consider[s] whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution."[12] However, the *Bossier II* ruling has had a significant impact on the effectiveness of the Section 5 preclerance process resulting in fewer objections. Since the *Bossier II* ruling, there has been a substantial decline in the number of objections issued by DOJ. A recent empirical study determined that between 2000 and 2004, the DOJ interposed a mere 41 objections compared with 250 objections during a comparable period one decade earlier.[13]

The proposed bill would restore § 5 to the pre-*Bossier II* standard and allow the DOJ to continue making preclearance determinations in a manner that is consistent with both constitutional prohibitions against discriminatory voting practices and the original legislative intent underlying the 1965 enactment of the VRA. Once that standard is restored, the administrative preclearance process will appropriately turn to, and rely upon, the Supreme Court guideposts for evaluating discrimination. Indeed, in the earlier *Bossier Parish* case, *United States v. Bossier Parish School Board*, 520 U.S. 471 (1998), the Supreme Court confirmed that *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), provides the appropriate analytical framework for weighing circumstantial evidence and determining whether invidious discriminatory purpose infected the adoption of a particular voting change. The *Arlington Heights* framework requires careful consideration of whether the "the impact of the official action" "bears more heavily on one race than another," the historical background of the jurisdiction's decision, the sequence of events leading to the challenged action, legislative history and departures from normal procedural sequences and contemporary statements

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[11] *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (Section 5 was intended to prevent covered jurisdictions from "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination"; Court explained that Congress enacted the extraordinary preclearance mechanism in Section 5 because it had reason to suppose that covered jurisdictions might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.).

[12] 28 C.F.R. § 51.55(a).

[13] See Peyton McCrary, et al. Peyton McCrary. See also The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act (Nov. 1, 2005) (unpublished manuscript), reprinted in Voting Rights Act: Section 5-Preclearance and Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 96-181 (2005)(Serial No. 109-69).

by members of the decision making body.[14] Numerous cases arising under § 5 have approved of or adapted this standard to detect discriminatory intent in the § 5 process.[15]

e. Would restoring the pre-Bossier II standard to Section 5 be constitutional?

Restoring the pre-*Bossier II* standard as contemplated would be constitutional. The Supreme Court's precedent interpreting Congress's purpose for enacting Section 5 reveals that the overarching goal of the law was to prevent covered jurisdictions from switching from overt prohibitions on the right to vote to more subtle methods that impair minority voting strength.[16] Restoration of the standard is statutory and not constitutional in nature.

The similarity of the terms in Section 5 of the Voting Rights Act with Section 1 of the Fifteenth Amendment also is evidence of its inherent pre-*Bossier II* constitutionality.[17] Section 5 expressly prohibits enactment of voting changes unless the jurisdiction shows that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[18] Section 1 of the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." "This use of constitutional language indicates that one purpose forbidden by the statute is a purpose to act unconstitutionally."[19] Indeed, in *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), the Court explained that Section 5 "suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment."[20]

Moreover, in a number of cases that pre-date the *Bossier II* ruling, the Supreme Court specifically held that a jurisdiction seeking preclearance for a voting change must prove a lack of discriminatory purpose, even if the change has no retrogressive effect. For example, in *City of Pleasant Grove v. United States*, 479 U.S. 462 (1986), the Court rejected the argument that a city's annexation of land with white voters that was not

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[14] *Arlington Heights*, 429 U.S. at 266-68.

[15] *See, e.g., Reno v. Bossier Parish Sch. Bd.*, 117 S. Ct. 1491 (1997) (applying the *Arlington Heights* test to assess whether a voting system was enacted for a discriminatory purpose); *City of Pleasant Grove v. U.S.*, 479 U.S. 462, 478 (1987) (approving use of *Arlington Heights* as tool to prove purposeful discrimination in the voting context); *U.J.O. of Williamsburgh v. Carey*, 430 U.S. 144 (1977) (noting that the *Arlington Heights* factors are probative evidence of purposeful discrimination).

[16] *See, e.g., Allen v. State Board of Elections*, 393 U.S. 544, 569 (1969); *Georgia v. United States*, 411 U.S. 526, 534 (1973) (same); and *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (Section 5 was intended to prevent covered jurisdictions from "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination").

[17] 117 S. Ct. at 1505.

[18] 42 U.S.C. 1973c

[19] 117 S. Ct. at 1505.

[20] *Katzenbach,* at 334 (emphasis added).

accompanied by an annexation of land with blacks is entitled to preclearance under Section 5 since the city had no blacks and, therefore, the annexation did not have any retrogressive effect on black voting strength.[21] The majority explained that Section 5 forbids a voting change with a discriminatory purpose even if it does not worsen the voting strength of blacks. "[I]t may be asked how it could be forbidden by Section 5 to have the purpose and intent of achieving only what is a perfectly legal result under that section and why we need remand for further proceedings with respect to purpose alone. The answer is plain, and we need not labor it. An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under [Section 5].... An annexation proved to be of this kind and not proved to have a justifiable basis is forbidden by Section 5, whatever its actual effect may have been or may be."[22]

2. The proposed bill also addresses the Supreme Court's decision Georgia v. Ashcroft, 539 U.S. 461 (2003), by clarifying that the purpose of Section 5 of the Voting Rights Act is to protect the ability of minority citizens to elect their preferred candidates of choice.

a. Do you support this change? Why or why not?

The proposed bill appropriately restores, as a minimum standard, the more easily verifiable and tangible "ability to elect" principle that has long been the fundamental feature of § 5 analysis. This restorative standard will be one that is administrable by both courts and the Department of Justice, and will help bar covered jurisdictions from enacting changes that have the purpose or effect of minimizing minority voting strength thus eroding the status of minority electoral opportunity.

b. In your view, is the Supreme Court's decision in Georgia v. Ashcroft consistent with Congress's original intent in enacting Section 5?

Recognizing the persistent and undeterred circumvention of the Civil War Amendments by some states, Congress reacted decisively in 1965 and committed itself irreversibly to what the Supreme Court has recognized as the "firm intention to *rid* the country of racial discrimination in voting" by enacting the Voting Rights Act ("VRA").[23] A decision that permits, even if it does not require, a jurisdiction to hide behind a novel theory to achieve an old discriminatory goal of vote dilution is inconsistent with Congress's intention when the VRA was enacted and renewed.

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[21] *City of Pleasant Grove*, at 471.

[22] *Id.* at 471 n. 11, *quoting City of Richmond v. United States*, 422 U.S. 358, 378-379 (1975).

[23] *Katzenbach*, at 315 (emphasis added).

c. Does the bill, as drafted, adequately restore the pre-Georgia v. Ashcroft standard?

The proposed legislation would appropriately and adequately restore the pre-Georgia v. Ashcroft standard by putting back in place the cornerstone of § 5 retrogression analysis which has long looked to ensure that voting changes do not disturb pre-existing levels of minority voting strength. The level of the minority community's voting strength under benchmark and proposed plans has historically been measured by objectively examining and quantifying the minority community's ability to elect candidates of choice. Thus, the proposed legislation restores the tangible "ability to elect" standard and does not allow jurisdictions to cloak intentional discrimination under the intangible framework set forth by *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

d. What are the problems, both substantively and logistically, with allowing covered jurisdictions to substitute "influence districts" for districts which preserve minority voters' ability to elect their preferred candidates of choice?

In stark contrast to the "ability to elect" standard that has long been the cornerstone of Section 5 retrogression determinations in both the administrative and judicial preclearance processes, measuring "influence" is inherently amorphous. The "influence" standard is both difficult to define and measure as made clear during the recent testimony of Assistant Attorney General Wan Kim. Even assuming that one could meaningfully measure influence, it is unclear how courts or the Department of Justice would determine how much influence must be gained in order to justify the elimination of a district that provides minority voters a clear opportunity to elect. This level of indeterminacy would undermine the effectiveness of Section 5 enforcement.

Moreover, aspects of the Court's opinion in Georgia that make the existence of leadership positions held by minority incumbents a part of the retrogression analysis add to the indeterminacy of the influence standard. Indeed, reductions in the percentage of minority voters in those benchmark districts held by minority legislators who may have attained positions of "legislative leadership, influence and power" put those very legislators and their potential successors at risk of not being reelected. Moreover, the Court does not explain how to enforce the expectation that those minority legislators occupying positions of powers will continue to hold on to those leadership positions moving forward.

Finally, the evidence presented during these hearings confirms that historical patterns of racial segregation continue to shape many communities and racial bloc voting persists. As a result, in many communities within covered jurisdictions, minority voters would be unable to elect candidates of their choice if Section 5 did not act as a check to bar jurisdictions from intentionally dispersing and fragmenting districts. The proposed bill will address the dangers resulting from the *Georgia v. Ashcroft* ruling and restore the primacy of the ability to elect standard that protects hard-won gains from disappearing.

e. What would be the consequences for minority voters in covered jurisdictions if the bill did not address Georgia v. Ashcroft in the way that it currently does?

If the drafted bill did not address the impact of Georgia v. Ashcroft, the statutory framework would allow jurisdictions to eliminate or fracture majority minority districts that provide minority voters an opportunity to elect candidates of their choice where the jurisdiction is able to point to the creation of new "influence districts." Indeed, Assistant Attorney General Wan Kim testified that the standard for determining what constitutes an "influence district" and for measuring retrogression following *Georgia v. Ashcroft* was difficult to determine in the administrative context.[24] The proposed legislation appropriately restores the cornerstone of Section 5 retrogression analysis, which has long looked to ensure that voting changes do not disturb pre-existing levels of minority voting strength in viable opportunity districts.

f. Some law professors argue that restoring Section 5 to its pre-Georgia v. Ashcroft standard would make it harder for the bill to pass constitutional muster under the City of Boerne v. Flores line of cases. Do you agree? What are the best arguments in defense of this change?

Most of the concerns within academic circles have been driven by interpretive readings of the Supreme Court's recent ruling in *City of Boerne* and its progeny which places greater limitations on the enforcement powers of Congress under § 5 of the Fourteenth Amendment, and likely §2 of the Fifteenth Amendment, and announced the new doctrine of "congruence and proportionality" which appears to place some limits on Congressional power under these Amendments by requiring careful legislative record development.[25] Although the *Boerne* ruling and its progeny appear to emphasize the need for Congress to be more deliberate in its exercise of authority under the Reconstruction Amendments, these cases do not establish any clear limitations on Congressional power to enact prophylactic legislation in the context of race.[26]

In *Boerne*, the Court recognized that the VRA was enacted to protect the right to vote against racial discrimination and noted that Congressional power was at its "zenith" when enacting remedial legislation that reaches individuals in classes afforded a heightened level of constitutional scrutiny, such as those defined by race or gender, "it is

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[24] *See Modern Enforcement of the Voting Rights Act, Sen. Comm. on the Judiciary*, 109 Cong. (May 10, 2006) (statement of Assistant Attorney General Wan Kim, U.S. Department of Justice, Civil Rights Division).

[25] See *Lopez v. Monterey*, 525 U.S. at 282-283 (*citing City of Boerne*, 521 U.S. at 518).

[26] *See Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Tennessee v. Lane*, 124 S.Ct. 1978 (2004)(suggesting that where Congress acts to remedy problems in areas traditionally subject to higher judicial scrutiny, the sweep of its power is greater).

easier".[27] Moreover, the Supreme Court has recognized that the Voting Rights Act, in its present form, is the exemplar of Congress's enforcement power under the Civil War Amendments. Congress has the constitutional authority to enact legislation that prevents the denial or abridgement of the right to vote on account of race, color, or previous condition of servitude today as it did in 1965.[28] Finally, in *Lopez v. Monterey*, 525 U.S. 266 (1999), the post-*Boerne* Court recognized that the "Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however, and our holding today adds nothing of constitutional moment to the burdens the Act imposes."

Others have expressed concern regarding the inclusion of the 1964 and 1968 presidential turnout figures that are currently incorporated into the coverage formula and suggest that reliance on such data makes Section 5 vulnerable to a legal challenge given the *Boerne* ruling.[29] However, the legislation at issue in *Boerne* was deemed problematic because the legislative record lacked <u>any</u> recent and contemporary examples of modern instances of discrimination and also because the history of persecution described in the hearings <u>all</u> occurred more than 40 years ago.[30] Thus, the *Boerne* ruling does not call for outright exclusion of historical data, such as the 1964 presidential election turn-out figures that help develop the coverage formula, so long as this data is sufficiently complimented by recent and contemporary evidence of continued voting discrimination.[31]

The current structure of the VRA contemplates that change may be necessary with respect to those jurisdictions subject to the requirements of Section 5. These statutory safeguards allow for change and revision to determine which jurisdictions should be picked up or dropped from the preclearance requirements of Section 5. The bailout mechanism outlined in Section 4(a) and the bail-in mechanism outlined in Section 3(c) of the Act work to ensure that the scope of Section 5 is appropriately expanded or restricted. These provisions were successfully modified and liberalized during the 1982 reauthorization of the Act. Section 4(a) establishes a bailout process that is both

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[27] *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. at 735; *see also Tennessee v. Lane*, 541 U.S. at 529.

[28] *See* U.S. Const. 14th Amendment, § 5; 15th Amendment, § 2.

[29] Also, it is important to note that turnout data for presidential elections in the 1960s and 1970s were not used alone to determine which jurisdictions had high levels of discrimination in voting. In determining which jurisdiction would be covered under Section 5 of the Act, Congress also looked to those jurisdictions that simultaneously "engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the rights to vote on account of race or color." These data point to jurisdictions that have long histories of discrimination and are relevant to developing a record that illustrates what gave rise to the designation of covered jurisdictions.

[30] *Boerne,* 521 U.S. 507 (1997).

[31] Moreover, in *Lopez v. Monterey Cty.*, the only case involving a post-*Boerne* challenge to § 5, the Supreme Court upheld the constitutionality of the § 5 preclearance provisions in the context of the substantial "federalism costs" of preclearance. 525 U.S. 266, at 269.

reasonable and achievable for those jurisdictions that enjoy full minority participation in the electoral process. The evidence demonstrates that virtually all jurisdictions that have sought to opt out from coverage under Section 5 have been able to do so. Section 3(c) of the Act, the "bail-in" mechanism, allows a court to order a jurisdiction, that is not covered by the trigger formula, to submit its voting changes in accordance within the requirements of Section 5.[32] Together, these two features of the Act provide a mechanism for jurisdictions and courts to expand or reduce the scope and reach of Section 5. In addition, these provisions demonstrate that there are sound statutory mechanisms in place to ensure that the list of covered jurisdictions is appropriately revised and updated.

Finally, nothing in the bill purports to disturb the *Shaw v. Reno* line of cases nor is the ability to elect a command to pack districts. Indeed, one of the advantages of the ability to elect standard is that it inherently takes account of changing levels of polarized voting and can thus take account of changing circumstances.

> *g. Others have suggested that the pre-Georgia v. Ashcroft standard requires covered jurisdictions to pack minority voters into fewer districts. Do you agree that the bill, as drafted, requires packing? Under the current bill, could districts that are not majority-minority still be considered districts in which minority voters have the ability to elect their preferred candidates of choice? If so, please give an example.*

The pre-*Georgia v. Ashcroft* standard does not require jurisdictions to pack minority voters into fewer districts. Packing is the practice referred to when jurisdictions devise redistricting plans that concentrate minority voters "into districts where they constitute an excessive majority."[33] This practice has historically been used as a tool to dilute African American voting strength and undermine the overall effectiveness of minority votes. It is also a practice that has been challenged under both Sections 2 and 5.[34] The existence of these statutory safeguards illustrates that there is a mechanism in place to challenge jurisdictions that choose to impermissibly pack minority voters. Moreover, the Department of Justice has long looked to "the extent to which minorities are overconcentrated in one or more districts" in determining whether a plan should be denied preclearance.[35] The drafted bill will prevent jurisdictions from undermining the benchmark by barring covered jurisdictions from eliminating those districts that provide minority voters an opportunity to elect candidates of choice. Should a jurisdiction devise

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[32] See *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990), *aff'd*, 498 U.S. 1019 (1991); *Sanchez v. Anaya*, Civ. No. 82-0067M (D.N.M. 1984) (three-judge panel authorizing preclearance of redistricting plans over a ten year period); Written Testimony of Pamela Karlan, Senate Committee on the Judiciary (May 16, 2006)

[33] *See Voinovich v. Quilter*, 507 U.S. 146, (1993) quoting *Gingles*, 478 U.S. 30, 46 n. 11, (1986). But also, note that redistricting plans that crack, fragment or fracture minority voters may results in dilution of minority voting strength by "[d]ividing the minority group among various districts so that it is a majority in none[.]"

[34] *Id.*

[35] *See* 28 C.F.R. 51.59; *see also* 28 C.F.R. 51.56-58.

a plan that lacks retrogressive effect but nonetheless packs minority voters into fewer districts, such plans could still be denied preclearance if there is evidence of a retrogressive purpose underlying the change. Moreover, plans that pack voters have always been and will continue to be vulnerable under Section 2 of the Act.

Indeed, there are instances in which opportunity or coalition districts that are not majority minority may provide an opportunity to elect. Changes that have eliminated the opportunity in such districts have drawn objections and should continue to do so even should the *Georgia* ruling be revised by the drafted legislation. For example, in April 2005, the Justice Department determined that the redistricting plan for the Town of Delhi, Louisiana, was not entitled to preclearance.[36] According to the 2000 Census, the Town of Delhi has 2,247 persons of voting age, of whom 1,153 (51.3%) are black. Under the benchmark plan, African Americans had the ability to elect candidates of choice in four of the town's five wards. However, the proposed plan eliminated that ability in one ward where the town sought to reduce the black voting age population from 48.4 to 37.9 percent. The Department's careful analysis revealed that this reduction eliminated the ability of African American voters to elect candidates of choice and objected to the change. I highlight this as a recent example of a district that has a Black voting age population below 50 percent in which minority voters have the ability to elect. The proposed legislation will appropriately bar covered jurisdictions from undermining the benchmark while protecting minority voters from unconstitutional retrenchment in political gains. Further, the bill will make it more practical for the D.C. District Court to adjudicate, and the DOJ to administer, the retrogression provisions of § 5.

3. The proposed bill would amend Section 14 of the Voting Rights Act to allow prevailing parties to recover "reasonable expert fees" and "other reasonable litigation expenses" in addition to reasonable attorneys' fees.

a. Do you support this change? Why or why not?

I stand in strong support of the proposed amendment to Section 14 of the VRA as this will help facilitate the efforts of private litigants, non-profit organizations and other entities seeking to enforce the provisions of the VRA. Given the unique and complex nature of litigation brought under the Act, litigants must bear significant expense associated with the retention of a wide array of experts including historians, statisticians, social scientists, and demographers, among others. Indeed, "it is virtually impossible to prove a Voting Rights Act violation without expending thousands of dollars for expert witness testimony."[37]

In his recent testimony before the House Judiciary Committee's Subcommittee on the Constitution, Debo P. Adegbile, Associate Director of Litigation for the NAACP

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[36] *See Department of Justice Objection Letter*, Town of Delhi, Richland Parish, Louisiana (April 25, 2005).
[37] Joaquin R. Avila & Brenda Wright, "The Necessity for Reimbursement of Expert Witness Fees and Expenses in Voting Rights Cases" (Excerpt included in materials provided by the American Civil Liberties Union and the Center of American at a Voting Rights Briefing on Oct. 14, 2005).

Legal Defense and Education Fund, testified that during a recent Section 5 declaratory judgment matter concerning the 2001 redistricting plan for the Louisiana House of Representatives, (*Louisiana House, et al. v. Ashcroft*), over $33,000.00 were spent on just one of its experts.[38] Further, in 1990, the Mexican American Legal Defense Fund's application for recovery of $152,942.45 spent on experts in the case of *Garza v. Los Angeles County Board of Supervisors* was denied.[39] "Because MALDEF was forced to absorb the costs for experts in Garza, it had fewer funds available for additional litigation and found it necessary to declare a moratorium on the filing of new litigation for the remaining quarter of its 1991-92 fiscal year.[40] Because prevailing parties are unable to recover reasonable expenses, many worthwhile cases go untried because of the excessive costs inherent in making the case. In the end, justice is what suffers. Worthwhile cases are not pursued because of past litigation that drained all available funds, or a reasonable fear that the potential costs incurred in pursuing future litigation would cripple the representative organization. It goes without saying that if non-profit organizations and private practice attorneys cannot bear to shoulder these costs, the affected individuals are not capable either.

b. Please explain the importance of expert testimony in voting rights litigation.

The very tough standards established by the Supreme Court for voting rights cases require that expert services be used, and judicial opinions often reflect the crucial role played by expert witnesses."[41] Typically, suit brought under Sections 2, 5 or 203 of the Act require expert statistical analysis of election returns and precinct population data, often through several different statistical techniques that may require hundreds of hours of expert time. In addition, plaintiffs may also need additional experts to establish other factors relevant under the totality of the circumstances, an expert historian to document a history of racial discrimination in the jurisdiction and/or a social scientist to analyze Census data and testify on continuing socioeconomic disparities between whites and minorities."[42] Often, the issues inherent in these cases only become clear once experts have been able to provide the appropriate historical and legal context necessary for a complete evaluation of the questions and proposals presented.

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[38] *A Bill to Reauthorize and Amend the Voting Rights Act of 1965: Hearing on H.R. 9 Before the House Judiciary Committee Subcommittee on the Constitution*, 109 Cong. (2006) (statement of Debo P. Adegbile, Associate Director of Litigation, NAACP Legal Defense and Educational Fund).

[39] 756 F.Supp. 1298 (C.D. Cal.) *aff'd* 918 F.2d 763 (9th Cir. 1990).

[40] T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning,* West Virginia University Hospitals, Inc v. Casey, *and Due Process of Statutory Interpretation*, VAND. L. REV. 687, 711 (1992).

[41] *Id.* at 707-708.

[42] AVILA & WRIGHT, *supra* note 1. See generally, Wendy K. Tam Cho & Albert H. Yoon, *Strange Bedfellows: Politics, Courts, and Statistics: Statistical Expert Testimony in Voting Rights Cases*, 10 CORNELL J.L. & PUB. POL'Y 237 (2001)(discussing the shortcomings of judges in that their legal training and professional experience does not necessarily well-equip them to grasp the technical complexities of voting rights cases without the assistance of expert testimony.)

c. What are the costs associated with expert testimony and what impact do they have on victims of voting discrimination?

When retaining an expert to provide testimony, there are generally costs associated with commissioning necessary written reports, providing transportation and accommodations for the witness when appropriate, and an hourly rate to compensate the expert for their time when called to testify. In addition, many experts generally charge an hourly fee to compensate for time used to prepare work product, deliberate, produce reports and prepare for court appearances. These costs are fairly sizeable in most voting rights matters given the protracted nature of the litigation. In his dissent in *West Virginia University Hospitals, Inc. v. Casey*, Justice Thurgood Marshall asserted that refusing recovery for expert witness fees in civil rights cases serves "to deny victims of discrimination a means for redress by creating an economic market in which attorneys cannot afford to represent them and take their cases to court."[43]

d. Are you familiar with the provision of expert witness fees in other civil rights statutes and if so, are there any constitutional issues that we should be aware of?

Other civil rights statutes that provide for expert witness fees include 42 U.S.C.A. § 1988 (Proceedings in vindication of civil rights). Section c of this statute provides that "[i]n any action or proceeding to enforce a provision of sections 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee."[44] At present we are unaware of any constitutional issues relating to these provisions.

4. The proposed bill would amend Section 203 to reflect the fact that after 2010, the American Community Survey (ACS), which will be administered annually, will replace the long form census. The bill provides that, consistent with this change, coverage under Section 203 shall be determined based upon information compiled by the ACS on a rolling five-year average.

a. Do you support this change? Why or why not?
b. In your view, does this change bolster or weaken the constitutionality of Section 203?

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[43] *West Virginia Univ. Hospitals, Inc. v. Casey,* 499 U.S. 83, 103 (Marshall, J., dissenting) (quoting *Hidle v. Geneva Cty.* Bd. of Ed. 681 F.Supp. 752, 758-59 (M.D.Ala. 1988).

[44] 42 U.S.C.A. § 1988 (1991). Section b of this statute (b) indicates that expenses may be recoverable in "any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.]".

The NAACP Legal Defense and Educational Fund, Inc., strongly supports the proposed amendments to Section 203 as these provisions help ensure that citizens who are limited in their ability to speak English can receive the language assistance they need to participate equally and meaningfully in the political process. Section 203 plays an important role in removing barriers to voting for many new citizens and first-time voters. Further, this provision of the VRA has helps ensure that many minority language citizens are ale to register to vote and cast their ballots.

With respect to the proposal to replace the long form census with the American Community Survey, I respectfully defer comment to the other witnesses who have offered written and verbal testimony about Section 203, and other experts in the area.

LDF NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
1444 Eye Street, NW, 10th Floor • Washington, DC 20005 • 202.682.1300 • Fax 202.682.1312 • www.naacpldf.org

COMMENT UNDER SECTION 5 OF THE VOTING RIGHTS ACT

John Tanner, Esq.
Chief, Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Re: Section 5 Submission No. 2006-3029 (Submission by the State of North Carolina Regarding Proposed Changes to the Size and Method of Election of the Rockingham County Board of Education)

Dear Mr. Tanner:

Introduction

The NAACP Legal Defense & Educational Fund, Inc. (LDF) urges the Attorney General to object to the pending Section 5 submission of the State of North Carolina's Session Law 2005-307 (H.B. 1034) which provides for a change in the method of election, creation of five at-large seats and reduction in the number of single-member districts for the Rockingham County Board of Education in North Carolina (Submission No. 2006-0329). The state has failed to meet its burden of showing that the proposed change will not have a retrogressive effect on minority voters.[1] Moreover, there is evidence that suggests that the proposed change was adopted with discriminatory purpose, and the Department should request further information from the state on that question before making a preclearance decision.

Our investigation into this matter indicates not only that the proposed change was enacted despite strong opposition from a majority of the school board members and protest from a significant number of minority residents in the county, but also that the proposed change was pushed by a group of white residents in the county, Citizens About School Elections (CASE), who are fundamentally opposed to the desegregation of certain schools within the county. It is our understanding that CASE members have fought to change the school board's configuration and method of election in order to diminish minority voting strength. Although discriminatory purpose alone is insufficient evidence to deny preclearance under the current statutory framework,[2] this evidence suggests that

[1] Georgia v. United States, 539 U.S. 461 (2003); Pleasant Grove v. United States, 47 U.S. 462 (1987) (submitting official bears the burden of proof).

[2] Under the current statutory framework, Section 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose." Reno v. Bossier Parish School Bd., 528 U.S. 320, 341 (2000). Thus, the Court's reconception of the Section 5 standard permits preclearance of

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The NAACP Legal Defense and Educational Fund, Inc. (LDF) is not a part of the National Association for the Advancement of Colored People (NAACP) although LDF was founded by the NAACP and shares its commitment to equal rights. Since 1957, LDF has been a completely separate organization. Contributions are deductible for U.S. income tax purposes.

the justification proffered by the state for the proposed change, as well as the state's description of the anticipated effect that the change will have on minority voters, are unreliable and thus, do not help the state satisfy its burden of showing that the change will not have a retrogressive effect.

As you know, the Rockingham County Board of Education is currently comprised of eight single-member districts. Only one of these districts, District 1, contains a majority of African-American voters. This district is currently represented by long-term Board member Herman Hines. According to the state's submission, the Black population percentage of this district will be reduced from 53.43% in the current plan to 51.17% under the proposed plan. The state seeks to create a mixed system by enlarging the current size of the Board to include five at-large seats and reducing the number of single-member districts by two. The reduction in single-member districts places minority voters in a worse position as the Black population percentage of District 1 is reduced to a level that may well make it significantly more difficult for minority voters to elect candidates of their choice. Reductions of this magnitude from a higher starting benchmark than is involved here would perhaps be of less concern, but under the circumstances in Rockingham County, the state has the burden of presenting an appropriate analysis of voting patterns to demonstrate that the reduction proposed will not adversely affect the ability of minority voters to elect candidates of choice. The Department should require such a showing before making its preclearance decision.

The addition of five at-large seats makes the retrogressive effect clear. As we discuss below, there is little likelihood that minority voters will be able to elect candidates of their choice to these at-large seats in spite of some recent election results. Thus, the addition of at-large seats further reduces the overall level of minority voting strength on the Board.

History of Black Electoral Success

While there are a few examples of Black electoral success in at-large or majority white districts in Rockingham County, these examples do not alleviate concerns regarding the retrogressive effect of the proposed change. Many of the recent instances of Black electoral success are aberrational. For example, the recent electoral success of Tim Scales, elected from majority white school district 8, is atypical. Scales is an unusual Black candidate in that he has an extremely high level of name-recognition within the community that falls within his district. Scales himself notes that his recent electoral success is directly attributable to his work as manager of several local Winn Dixie supermarkets and as a former little league coach for a number of residents, who are now of voting age, within his district. Prior to Scales, no African American has ever won an election in this particular school district. Because Scales's district would be significantly altered and expanded under the proposed plan to include a number of new areas, there is no guarantee that he would continue to enjoy the unusual benefit of broad

---

320, 341 (2000). Thus, the Court's reconception of the Section 5 standard permits preclearance of proposed changes "no matter how unconstitutional [they] may be" so long as they are deemed non-retrogressive. *Id.* at 336.

name-recognition that helped him secure the seat. We highlight this specifically to show that neither Scales nor any candidate of choice within the African-American community would necessarily enjoy success in the enlarged district under the proposed plan and thus, the special circumstances surrounding Scales's election in the benchmark plan do not help the state satisfy its burden.

The state offers a selective description of Black electoral patterns over the last several years highlighting those instances where Blacks have held at-large positions or seats in majority white districts. Specifically, the state notes that one of the five current county commissioners, whom are elected at-large, is African American. In addition, the state points to the current District Attorney, Belinda Foster, as another example of an African American elected at-large. The state notes that Foster was elected in 1994, 1998 and 2002. However, Ms. Foster ran uncontested during 2 of those 3 elections. Thus, Ms. Foster's success in an at-large position is largely the result of special circumstances, and therefore less probative of black electoral success.[3] Furthermore, Ms. Foster is currently embroiled in a hotly contested election with a white opponent. It is our understanding that this is a racially heated contest, that the election will likely be polarized along racial lines and that the results from this contest will likely produce evidence of the type of racial bloc voting that generally occurs in Rockingham County.

The state fails to mention the defeat of African-American candidates in elections held at-large and in majority white districts. For example, Elrethea Perkins Neal ran for District 5 of the school board in 1998 and was soundly defeated by a white opponent. In addition, Neal ran unsuccessfully for the County Commission in both 2002 and 2004. Neal's lack of success, despite strong support from the African-American community, illustrates usual racial bloc voting patterns and the difficulty that minority voters are likely to face in efforts to elect candidates of choice in the majority-white districts or at-large seats under the state's proposed plan.

Our investigation indicated, and independent inquiry by the Justice Department should confirm, that CASE members strategically backed and/or financed the candidacies of some African Americans, including current County Commissioner Harold Bass and current School Board member Bell, to help show that Blacks can be elected in majority-white areas. Thus, many of the examples of Black electoral success highlighted in the state's submission may be largely attributable to purposeful action of CASE members intended to develop a record that would support preclearance of proposed changes that would actually reduce Black voting strength. For example, current school board member Amanda Joann Bell lost the 2002 school board election in District 2 against the white incumbent. However, our understanding is that she won the seat after receiving unusual support from CASE members who strategically backed her candidacy in 2004. School Board Chairman Wayne Kirkman, who is white, indicates that CASE members backed Bell in order to defeat her predecessor, Reida Drum, who had vocally opposed changing the method of election and size of the board. Also, by backing Bell, CASE members

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[3] *See* Thornburg v. Gingles at 106 S. Ct. at 2772 n. 29; 590 F. Supp. at 369-70 (noting that the absence of an opponent might constitute a special circumstance that would explain apparent black electoral success).

sought to develop a record surrounding the proposed change that they believed would enable it to survive Section 5 scrutiny.

It is well-recognized that the elections of minority candidates during the pendency of litigation or other action under the Voting Rights Act have little probative value.[4] In crafting this rule, courts have reasoned that "the possibility exists that the majority citizens might evade the requirements of the Voting Rights Act by manipulating the election of 'safe' minority candidates and that pending [or prospective] action under the Act "might" work "a one-time advantage for black candidates in the form of unusual organized political support by white leaders" seeking to evade the requirements of the Act.[5] The circumstances surrounding the recent election of current County Board Chairman Harold Bass and school board member Amanda Bell appear to fit squarely within the rule's rationale. Thus, references to these particular successes do not help the state meet its burden under Section 5. At a minimum, the Department should request further information from the state with regard to CASE's role before reaching a preclearance decision.

Discriminatory Purpose

Assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a "sensitive inquiry into such circumstantial and direct evidence as may be available."[6] The "important starting point" for assessing discriminatory intent under Arlington Heights is "the impact of the official action whether it 'bears more heavily on one race than another.'"[7] Other considerations relevant to the purpose inquiry include, among other things, "the historical background of the [jurisdiction's] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative or administrative history, especially . . . [any] contemporary statements by members of the decisionmaking body."[8]

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[4] *See* Davis v. Chiles, 139 F.3d 1414, 1417 n.2 (11th Cir. 1998) (assigning "little probative value" to the post-trial appointment and reelection of a black judge in Florida's Second Judicial Circuit, which includes Liberty County, and the "recent" election of a black judge who faced a white opponent in Leon County, Florida).

[5] Thornburg v. Gingles, 478 U.S. at 75-76 (quoting Sen. Report at 29 and Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1973) (en banc), *aff'd sub nom.*, East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam)). *See also* NAACP v. Gadsden County Sch. Bd., 691 F.2d 978, 983 (11th Cir.1982) ("[P]oliticians might find it politically expedient to have a 'token' black school board member.") (emphasis added).

[6] Village of Arlington Heights v. Met. Housing Dev. Corp., 429 U.S. 252 at 266 (1977). In determining "whether invidious discriminatory purpose was a motivating factor," courts have looked to the Arlington Heights framework, at least in part, to evaluate purpose in the § 5 context. *See* Pleasant Grove v. United States, 479 U.S. 462, 469-470 (1987) (considering city's history in rejecting annexation of black neighborhood and its departure from normal procedures when calculating costs of annexation alternatives); Busbee v. Smith, 549 F. Supp. 494, 516-517 (D.C. 1982), aff'd mem., 459 U.S. 1166 (1983) (referring to Arlington Heights test); Port Arthur v. United States, 517 F. Supp. 987, 1019, aff'd, 459 U.S. 159 (1982) (same).

[7] Arlington Heights, 429 U.S., at 266 (citing Washington v. Davis, 426 U.S. 229 (1976)).

[8] Id. at 268.

The sequence of events leading up to the adoption of the proposed change illustrates, in part, the discriminatory intent underlying H.B. 1034. We understand that the proposed change was pushed by members of CASE who were incensed regarding the school board's 2002 school attendance area redistricting efforts. Specifically, CASE members were bitterly opposed to the board's redistricting plan that resulted in an increase in the number of African-American students at certain predominantly white schools in the county. Moreover, CASE members were upset that African Americans from a housing complex in Reidsville were drawn into the predominantly white school districts of Wentworth and Huntsville. CASE members sought to change both the configuration of the districts and method of election to reduce minority electoral opportunity and wrestle control from school board members. At a public hearing regarding the school board's redistricting plan, CASE members openly shared their racially driven concerns about the impact that these Black students would have on test scores and the overall quality of the school. More importantly, CASE members expressed their hostility towards the idea of racial mixing.

CASE, whose members reside largely in the Town of Bethany, appear to have determined to push the proposed changes as a way to sustain greater power, control and influence over the school board at the expense of current levels of minority voting strength. School Board Chairman Wayne Kirkman indicates that CASE members in Rockingham County openly discussed strategies to reduce minority voting strength and eliminate minority school board members.

CASE members first proposed the idea of changing the method of election by reducing the number of single-member districts and replacing them with at-large seats in 2002. At a public hearing on the issue, a number of Black voters expressed concern about the likely impact that the change would have on minority voting strength. The school board unanimously rejected the idea following that hearing. Subsequently, CASE members sought to throw support and resources behind selected African-American candidates in order to help develop the record necessary for the proposed change to survive scrutiny under Section 5. Realizing that the school board was opposed to the change, CASE members turned to the Rockingham County Commission for assistance. A local news article described the Commission's meeting leading up to the adoption of a resolution supporting the CASE proposal as an "ambush" and noted that the resolution was passed with "no-comment, no-discussion [and] no-question." See Attachment B.

There are noteworthy departures from normal procedure in the process leading up to the adoption of the proposed change. For example, the state legislature adopted the change despite an April 25, 2005 resolution from the Rockingham County Board of Education memorializing its opposition to "any alteration to its electoral districts" and stating that "such efforts will dilute the minority representation and fail to adequately assure fair representation for each citizen of Rockingham County." See Attachment A. Further, the state legislature adopted the proposed change despite the fact that North Carolina General Statute 115C-37(i) contemplates that school districts shall only be revised following the federal census of population each 10 years. The school board

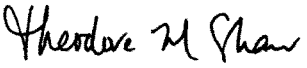
adopted its decennial redistricting plan shortly after the release of the 2000 census and this plan was precleared by the Justice Department on June 25, 2002.

Finally, the legislative history leading up to adoption of the change also provides evidence of the discriminatory purpose underlying the proposed change. Here, Session Law 2005-307 was initially introduced and failed to obtain a sufficient number of votes to pass. However, the bill was reintroduced as part of a different bill that concerned a study regarding the implementation of success centers in New Hanover County school system. Ultimately, all African-American Senators in the General Assembly voted against the bill.

Conclusion

For the reasons outlined above, we submit that the state has failed to meet its burden of showing that the proposed change will not have a retrogressive effect on minority voters. Further, evidence that the change was adopted with discriminatory purpose suggests that both the justification proffered for the proposed change and the state's description of the anticipated effect that the change will have on minority voters are unreliable. Thus, these statements do not help the state satisfy its burden of showing that the change will not have a retrogressive effect. Moreover, the proposed change will reduce the Black population percentage of District 1 to a level that may place minority voters in a worse position than at present in terms of their ability to elect candidates of choice; at a minimum, the state has failed to meet its burden of demonstrating that the change will not have this result. Finally, we note the prevailing view that at-large elections have historically had deleterious effects on black representation.[9] Since passage of the Voting Rights Act in 1965, significant strides have been made in minority representation following litigation brought under the Act to challenge the discriminatory effect of at-large elections. Thus, we urge the Attorney General to interpose an objection to the proposed change or, alternatively, request additional relevant information, if any exists, that will help the state meet its burden of showing that the change lacks retrogressive effect.

Very truly yours,



Theodore M. Shaw
Director-Counsel and President
NAACP Legal Defense and
Educational Fund, Inc.

[9] *See* Bernard Grofman & Chandler Davidson, The Effect of Municipal Election Structure on Black Representation in Eight Southern States, in Quiet Revolution at 319; Pamela S. Karlan, Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigations, 24 Harv. C.R.-C.L. L. Rev. 173, 185 (1989) (indicating that at-large plans historically have been the favored method of diluting the black vote). *See* also Dillard v. Crenshaw County, 640 F.Supp. 1357, 1360 (discussing Alabama's intentional switching between district and at-large elections as a response to the perceived threat of Black voting strength).

NORTH CAROLINA
ROCKINGHAM COUNTY

RESOLUTION OF THE ROCKINGHAM COUNTY BOARD OF EDUCATION
REGARDING THE METHOD OF ELECTION OF THE BOARD OF EDUCATION

WHEREAS, the consolidate Rockingham County Board of Education was formed after a resolution of the Rockingham County Board of Commissioners on June 8th, 1992, following which electoral districts were established after review by the United States Department of Justice to assure compliance with Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c: and

WHEREAS, the districts created by the act of the Commissioners are the districts currently in place after adjustment following the 2000 United States Census; and

WHEREAS, N.C.G.S. 115C-37(i) provides that school board districts shall be revised only following the federal census of population each 10 years and the 2000 data was used to redraw the lines and was pre-cleared by the U.S. Department of Justice on June 25, 2002; and

WHEREAS, there is no current census data with which to accurately determine the demographic make-up of citizens of Rockingham County and the last census data showed significant shifts in the populations of several districts; and

WHEREAS, the Rockingham County Board of Education does not believe that the citizens of Rockingham County, and particularly the minority citizens of Rockingham County, will be fairly represented if the eight districts currently in place are altered so as to reduce the number of districts from which board members are elected: and

WHEREAS, the majority of Rockingham County Board of Education does not support efforts to alter the electoral districts at this time:

NOW, THEREFORE, IT IS HEREBY RESOLVED that the Rockingham County Board of Education does not support any alteration to its electoral districts and believes that such efforts will dilute the minority representation and fail to adequately assure fair representation for each citizen of Rockingham County.

This the 25th day of April 2005.

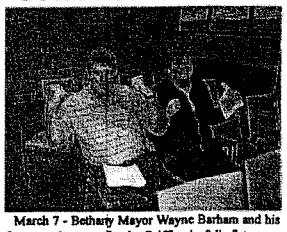
K. Wayne Kirkman
K. Wayne Kirkman, Chair

ATTEST:
Secretary

EXHIBIT

ATTACHMENT A

COMMISSIONERS APPROVE SCHOOL BOARD ELECTION REFORM



March 7 - Bethany Mayor Wayne Barham and his former arch-enemy Sandra Griffin gleefully fist-pump the air in celebration of a vote by the Neely County Commissioners. Barham and Griffin set aside their animosity towards each other to join in a common fight against the Neely County School Board. They achieved their first real taste of victory over an uncooperative and combative Board of Education when the Commissioners unanimously approved a resolution in support of changing the eight-district system of electing Neely County School Board members

In the years before they realized they had a common foe, Mayor Barham opposed moving Bethany students to Wentworth while Griffin feared Neely County Middle School would not be built if Bethany students were not bused to Wentworth to attend the school.

Neely County Middle School was eventually built and the charter Bethany Community Middle School was established by the Bethany community over the vehement objections of the School Board. The charter school allows Bethany middle grade students to attend school in their community rather than spending up to four hours per day on a bus traveling to Wentworth. Although it is publicly funded, the Bethany Community Middle School is operated by its own board and it does not answer to the school system bureaucracy at the Harrington Hilton in Eden.

Mayor Barham and Griffin, along with a small but determined cadre of Neely County citizens, organized themselves to lobby Commissioners and local representatives in the State Legislature. The group calls itself Citizens About School Elections, as in "get on their CASE."

CASE's mission is to change the Neely County School Board system so that all citizens can vote for a majority of the Board. Neely County School Board members are currently elected in eight separate districts. Each district elects its own member to the board. The eight-district system was established when the county's four school systems were merged in 1993.

CASE has suggested a system which elects three School Board members at-large with four members elected in districts. This would allow every voter to cast a ballot for four of seven board members. The 4-3 system would also eliminate the tie votes that can occur on an eight-member board. CASE believes a combination of at-large and district members would cause the School Board members to be less "territorial" and more sensitive to needs of the Neely County School System as a whole.

Except in the case of School Board member Celeste DePriest, members are required to live in the districts in which they are elected. Due to her marital problems, the Neely County Elections Board granted DePriest a special exemption which allowed her to live in one district while serving as a School Board member for another district.

As of this report, Ms. DePriest is experiencing problems with paying her rent in a timely manner. DePriest recently lost her job as director of the non-profit Best Friends organization. No doubt this has contributed to her rent problems. Her landlord has filed court papers for a "summary ejectment." If Celeste gets the boot, there is no telling where she might end up living and what kind of special exemption the Board of Elections might be called upon to grant. Editor's note: The Neely County court has ordered School Board member Celeste DPriest to vacate the residence at 637 Church St in Eden for failure to pay rent. DePriest has until March 19 to move. After that date the house will be padlocked by the Sheriff and DePriest and her belongings will be put out on the street.

Celeste currently has job feelers out as far as the Forsyth County School System where former Neely County School Superintendent George "The Puppetmaster" Fleetwood holds an executive position. Celeste was a staunch supporter of the mechanical Fleetwood during his tenure with the Neely County School System. We believe "The Puppetmaster" owes Ms. DePriest a favor or two

With any luck, Fleetwood will find a suitable position for Ms. DePriest and whisk her away to Forsyth County. Although her meeting attendance record and her inability to work and play well with others on the Neely County School Board might be viewed negatively by some, we believe Celeste DePriest would be a wonderful asset to the Forsyth County School System, especially if it means she might move to Forsyth County.

During her service as a Neely County School Board member, Ms. DePriest has done her part to stop publication of the Neely Chronicle. It is only fair that we return the favor by noting she is suffering some of the problems that she so hoped to cause us. We're not proud of it, but we have to confess there's a little twinkle in our eyes and a small bounce in our step that wasn't there before.

Anyways, we digress. After many, many months of pressing the issue (someone said it was 7 years), CASE scored big when the Commissioners finally approved asking the state Legislature to change the way the Neely County School Board is elected. The question came before the Commissioners on at least three occasions, but it was never put to an official vote. The School Board has fought it every step of the way, including making childish threats to pass a resolution asking the state Legislature to change the way Neely County Commissioners are elected.

School Board members Celeste DePriest and Tim Scales and former board member Reida Drum put up the strongest opposition to reforming the district system. They paid School Board Attorney Jill Wilson $150 per hour to insist that the United States Department of Justice (DOJ) will never approve changing the way Neely County School Board members are elected.

The DOJ approved the eight-district system in part to ensure Herman Hines is always elected to the School Board no matter how poorly he represents his district or how much harm he causes the school system. Tim Scales has threatened to scream discrimination if any election reform is attempted. Scales insists he has an inside track with the DOJ and he can derail any reform with a simple phone call to Washington, D.C.

There is no explanation for Reida Drum's repeated flip-flops on the issue. According to Mayor Barham, Amanda Bell, who replaced Drum on the Board, supports School Board election reform. CASE members credit themselves with Drum's defeat.

Despite all their bluster over the years, not a single School Board member was present when the Commissioners passed their resolution of support for CASE's goal. Mayor Barham indicated the low-key, no-comment, no-discussion, no-questions passage of the resolution was preferable to having a mass of CASE supporters tangling with School Board members in front of the Commissioners. An ambush also prevented the NAACP from protesting the resolution's passage. During a public hearing last year, NAACP leaders expressed concerns about losing minority representation on the School Board if the eight-district system is eliminated.

To address the NAACP's concerns, the resolution asks the Legislature to be mindful of the need for some minority School Board members when a new election system is approved. The resolution is non-specific about what a new system might be, but it does indicate that there should be an odd number of board members and every voter should be able to cast ballots for the majority of the Board. The details of how to achieve the basics is left up to the Legislators to resolve.

The removal of Pappy Hoover and Barbie Eggleston from the Board of Commissioners was no doubt instrumental in the sudden passage of the resolution after so many months of delays. Before becoming County Commissioners, Pappy and Barbie were Neely County School Board members. Their allegiance was always to their former board rather than with the need for any type of School Board election reform.

When the Neely County School Board learns it has been bushwhacked by the new Board of

See BUSHWHACKED on page 25

ATTACHMENT B

The Neely Chronicle, April 2006 at 16.
(local newspaper in Rockingham Cty, NC)

SUBMISSIONS FOR THE RECORD

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

Legislative Hearing on a Bill To Reauthorize and Amend the Voting Rights Act of 1965

9 May 2006

STATEMENT OF CHANDLER DAVIDSON

PROFESSOR EMERITUS

RICE UNIVERSITY

HOUSTON, TEXAS

Mr. Chairman, Mr. Vice Chairman, and distinguished members of this Committee: Thank you for inviting me to testify before you today. I am deeply honored to have this opportunity to talk briefly about the Voting Rights Act.

I.

This Act was the climax of the period described by the late historian C. Vann Woodward as "the Second Reconstruction." Like the first Reconstruction following the Civil War, its primary purpose was to secure the citizenship rights of African Americans, including the most fundamental of these, the right to vote freely and have one's vote fairly counted.

Central to both Reconstructions was the Fifteenth Amendment, which states, simply:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Ratified in 1870, the amendment's principle quickly came under attack, and by the beginning of the Twentieth Century, after a brief period in which black males were able not only to vote but to elect fellow blacks to office in significant numbers, the franchise was taken from them throughout the South and in many northern venues as well. This was accomplished in significant measure through fraud, threat, intimidation, and many kinds of violence. One step removed from these activities were the subterfuges of the poll tax, grandfather clause, white primary, understanding tests, felon disfranchisement laws, and literacy tests—all

administered by white officials acting under color of law. Blacks and, to a significant extent, poor whites, were the victims. The Fifteenth Amendment as a guarantor of black voting rights was in effect a dead letter in the South.

A terrible tragedy had thus occurred—one unique in the annals of modern democracies. Richard M. Valelly, in his prize-winning history, *The Two Reconstructions: The Struggle for Black Enfranchisement*, describes it as follows:

> *No* major social group in Western history, other than African Americans, ever entered the electorate of an established democracy and then was extruded by nominally democratic means such as constitutional conventions and ballot referenda, forcing that group to start all over again.[1]

Valelly does not ignore the checkered histories of democracy in a number of western nations since 1789, including France, "which experienced several [disfranchisements] during the nineteenth century." However, such events in other nations "occurred when the type of regime changed, not under formally democratic conditions. . . . Once previously excluded social groups came into any established democratic system, they stayed in," he observes.[2] In short, "the United States is among the last of the advanced democracies to still be at the business of fully including all of its citizens in its electoral politics."[3]

In spite of the brutal and unprecedented dismantling of the First Reconstruction led by southern white supremacists, African Americans began almost immediately to try to regain their rights. A key organization in this effort was the

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[1] Richard M. Valelly, *The Two Reconstructions: The Struggle for Black Enfranchisement* (Chicago: The University of Chicago Press, 2004), pp. 1-2. Emphasis in the original.
[2] *Ibid.*, 2.
[3] *Ibid.*, p. 249.

National Association for the Advancement of Colored People, founded in 1909 by a group of multiracial activists. Late in the World War II period it successfully challenged Texas' all-white Democratic primary, a mechanism by which blacks, and sometimes Latinos, were excluded from the only election in that one-party state that was meaningful. The case was argued before the Supreme Court by Thurgood Marshall of the NAACP Legal Defense Fund, who would later ascend to the Court himself. To the guardians of southern white supremacy, the end of the white primary was seen as a dire challenge to their regime, and, as the civil rights movement in the post-war era gained momentum, in part as a result of the anger of black soldiers returning from a war to guarantee democracy in Europe and Japan only to find themselves excluded from democracy in America, the battle for the Second Reconstruction was joined.

This period in American history, part of our recent past, has been ably chronicled by numerous writers, and its heroes have been placed among the pantheon of America's heroes and martyrs. I am sure that some in this room today have read the compelling saga of the life and times of the Rev. Martin Luther King, Jr., by Taylor Branch. The last volume in the trilogy, *At Canaan's Edge*, was published earlier this year.[4] In it, Branch describes the riveting events forty-one years ago in Selma, Alabama, which provided the catalyst for the Voting Rights Act.

Three civil rights acts had been passed between 1957 and 1964. None, however, was sufficient to overcome southern resistance to black enfranchisement, which resistance was manifested most particularly in the use of literacy tests administered by whites in discriminatory ways. As late as 1962, somewhat less than one-third of the fifty states employed literacy tests. They were described at the time by political scientists as being "used to bar Negroes from voting in six southern states and to exclude

[4] New York: Simon & Schuster, 2006.

Orientals in several western states."[5] Even New York had a literacy test that discriminated against Puerto Ricans—a barrier that would soon be eradicated by Section 3(e) of the new Act.

The long struggle for black voting rights during the Twentieth Century crested on the Edmund Pettus Bridge in Selma, when peaceful demonstrators were savagely attacked by law enforcement officers on March 7, 1965. This event, which came to be known in the annals of the civil rights movement as Bloody Sunday, was filmed by news photographers and immediately telecast around the world. It shocked the conscience of America, and at the behest of President Lyndon Johnson, a bipartisan Congress passed the Voting Rights Act a few months later.

There was deep symbolism in the fact that Johnson chose the President's Room in the nation's capitol as the site for the signing. One hundred four years earlier, in 1861, Abraham Lincoln, in the same room, had signed the first Confiscation Act, by which the Union had taken control of all slaves whom the Confederacy had coerced into service. Lincoln's action was the first legal step toward full emancipation of slaves. After signing the Act, Johnson met in the Cabinet Room with several African-American leaders, including the Rev. King and Rosa Parks. An aide to Johnson later recalled: "There was a religiosity about the meeting, which was warm with emotion—a final celebration of an act so long desired and so long in achieving."[6] After the ceremony Dr. King said the new Act "would go a long way toward removing all the obstacles to the right to vote." A

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[5] Jack C. Plano and Milton Greenberg, *The American Political Dictionary* (New York and other cities: Holt, Rinehart and Winston, 1962), pp. 100-01.
[6] Stephen B. Oates, *Let The Trumpet Sound: The Life of Martin Luther King, Jr.* (New York: Harper & Row, 1982), p. 370.

few years later, at the end of his presidency, Johnson pointed to the Act as his greatest accomplishment.[7]

II.

The Act's purpose was to enforce, finally, the Fifteenth Amendment, primarily honored in the breach for ninety-five years. It consisted of two parts: a permanent one applying nationwide, and a non-permanent one, consisting of several features that were set to expire in 1970. Both parts were soon found constitutional by the Supreme Court. Congress renewed and expanded the nonpermanent features in 1970, 1975, and 1982, the last time for 25 years.[8]

The Act has been interpreted by the courts and by Congress as targeting both major forms of racial vote discrimination: disfranchisement and vote dilution. The first is exemplified by literacy tests administered unfairly by whites. The second consists of procedures in predominantly white jurisdictions which, combined with racially polarized voting, prevent minority voters from electing their preferred candidates, even when the minority voters in question are fully enfranchised. Vote dilution, which had been widely used by whites in the Nineteenth Century when black males could vote, began to be used once more in the mid-Twentieth Century, particularly after the

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[7] Nick Kotz, *Judgment Days: Lyndon Baines Johnson, Martin Luther King Jr., and the Laws That Changed America* (Boston & New York: Houghton Mifflin Company, 2005), pp. 269-70; Steven F. Lawson, *In Pursuit of Power: Southern Blacks and Electoral Politics, 1965-1982* (New York: Columbia University Press, 1985), p. 4.

[8] The coverage trigger for a language assistance provision, Section 203, was changed in 1992 and renewed for fifteen years.

abolition of the white primary, as increasing numbers of blacks began to be able to exercise the franchise.[9]

The major permanent feature of the Act is Section 2, which applies nationally. As amended by Congress in 1982, it prohibits any voting qualification or practice that results in denial or abridgement of voting rights on the basis of a citizen's race, color, or membership in one of four language-minority groups: speakers of Spanish or of Native American, Native Alaskan, and Asian languages.

Section 5, the most widely known of the Act's non-permanent features, requires the states and political subdivisions covered according to a formula, or "trigger," in Section 4—which is also non-permanent—to submit all proposed electoral changes for preclearance either to the Attorney General or the U.S. District Court for the District of Columbia, to ensure, as the statute puts it, that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[10]

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[9] See, for example, the situation in North Carolina in these years, described in William R. Keech and Michael P. Sistrom, "North Carolina," in Chandler Davidson and Bernard Grofman (eds.), *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton, N.J.: Princeton University Press), pp. 158-60. Chapters on other states in this book also describe the rise of vote dilution in the post-War years.

[10] Recent Supreme Court decisions have sharply restricted the meaning of a Section 5 violation: *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) (Bossier II); and *Georgia v. Ashcroft,* 539 U.S. 461 (2003). The former decision allows intentional racial discrimination in redistricting, so long as it doesn't make the situation worse than before. The latter decision changes the definition of racial discrimination in redistricting, such that minority voters, under certain circumstances, no longer have a fair opportunity to elect candidates of their choice,

Currently, the jurisdictions subject to Section 5 preclearance include eight states in their entirety, mostly in the South, and parts of eight others. Among the latter are Virginia, which is almost entirely covered, aside from a small number of independent cities and counties which have "bailed out" from the requirements of Section 5 by meeting the requirements specified in the Act for bail-out; and North Carolina, forty of whose 100 counties are covered.

Another temporary provision of the Act is contained in Sections 6-9 and 13, which enables the Attorney General or U.S. courts to send federal examiners and observers to certain jurisdictions when racial discrimination in voting appears likely on the basis of information obtained from those jurisdictions.

Yet another temporary provision concerns the needs of citizens who are not proficient in English. In 1975, when Congress amended the Act for the second time, it concluded that "through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the election process." The language-minority groups specifically mentioned were "persons who are American Indian, Asian American, Alaska Natives, or of Spanish heritage." Under different coverage formulas, Section 4(f)4 and Section 203 require language assistance for these citizens, including "registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process," to enable them to vote without hindrance.

III.

It is now forty-one years since passage of the Act. From one perspective, this is a rather long period of time.

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but only to elect candidates whose views they have a chance to influence.

On the other hand, that period constitutes the *longest uninterrupted stretch of time in the history of our republic in which blacks nationwide have been able to vote with relative freedom*. From this perspective, black voters have barely got their sea legs on the American ship of state.

There is no question that they and their allies among other groups have made good use of the tools the Act has provided in combating vote discrimination. The statute has had a major impact in incorporating racial and language minorities into the polity. Perhaps the most striking evidence of this fact is the extraordinary increase in black elected officials in the South. In 1970, there were 565. In 2000, there were 5,579.[11] Nonetheless, race is still a major fault line in American politics, and problems of racial discrimination in voting are widespread, if diminished. It is therefore useful to take stock of the extent to which this discrimination still persists.

Research by the National Commission on the Voting Rights Act, a group created by the non-profit organization, Lawyers' Committee for Civil Rights Under Law, focused on the extent to which these temporary features were employed by the government or by private citizens to combat racial or language discrimination since 1982, when the Act was last renewed by Congress. Composed of a politically and ethnically diverse group of men and women, including former elected and appointed public officials, scholars, lawyers, and leaders, the Commission held ten hearings across the nation in 2005, at which more than 100 witneses spoke. It also gathered information through the Freedom of Information Act from the Justice Department and surveyed a wide range of data and reports on minority voting rights. The findings were reported in February 2006 in the document, *Protecting Minority Voters: The Voting Rights Act at Work: 1982-*

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[11] David A. Bositis, "Impact of the 'Core' Voting Rights Act on Voting and Officeholding," in Richard M. Valelly (ed.), *The Voting Rights Act: Securing the Ballot* (Washington, D.C.: CQ Press, 2006), p. 121.

2005.[12] Among the Commission's findings are the following facts:

- The Justice Department sent 626 letters objecting to one or more proposed discriminatory election changes in Section 5 jurisdictions, and there would have been even more if some jurisdictions—after receiving requests from the Department for more information on some submitted changes—had not withdrawn them. There were at least 225 withdrawals of one or more proposed changes since 1982, although not all of them were because the jurisdictions believed the changes would be objected to.

- Instead of submitting proposed election-related changes to the Justice Department, jurisdictions may submit them to the U.S. District Court for the District of Columbia. This seldom happened, but in the period since 1982, this court refused to approve 25 such proposals.

- Under the Act, the Justice Department, or private citizens, may file "enforcement actions" to ensure that Section 5 is properly obeyed. For example, if a covered jurisdiction attempts to implement a voting change that has not received preclearance, the Department, either alone or in concert with private parties, may file suit under Section 5. The Commission identified 105 successful enforcement suits in nine states. There were probably others in at least some of the remaining seven Section 5-covered states.

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[12] Both the report and a summary of the hearings are available at http://www.votingrightsact.org.

- The Justice Department sent several thousand federal observers in 622 separate Election Day "coverages" when it had reason to expect racial discrimination. These observers have the ability to enter polling places and to observe votes being counted, and not only did they report instances of discrimination, their presence probably discouraged many more such instances. In Mississippi alone there were 250 coverages since 1982 where observers were dispatched to election sites, involving more than 3,000 federal observers. Significantly, Louisiana, Mississippi, Alabama, Georgia, and South Carolina—five of the six states originally covered by Section 5—accounted for almost two-thirds—66 percent—of all 622 coverages since 1982.

- The language-assistance provisions also allow the government to file enforcement actions to ensure that language minorities are given proper assistance. There have been 19 such actions since 1982. While few in number, these suits have played an important role in changing the way voting officials do business in the jurisdictions where they have been filed. Some—Boston and Dade County, Florida, for example—are quite large, and Justice Department intervention (even short of filing a suit) can have a major effect on the ability of many citizens who are not proficient in English to vote easily.

In addition to measuring the impact of the non-permanent features of the Act, the Commission attempted to ascertain how many Section 2 lawsuits were filed in the post-1982 period which resulted in a favorable outcome for

minority plaintiffs. Each such case would indicate that minority vote discrimination had been occurring. A nationwide study conducted at the University of Michigan Law School by Professor Ellen Katz and her students identified 117 *reported* suits between 1982 and 2005.[13] Most of them targeted one or another form of minority vote dilution. In the same period, research by the National Commission's staff revealed 653 successful Section 2 suits, reported *and unreported,* in nine Section 5 states alone. This suggests that the total number of reported and unreported Section 2 cases which were resolved in a manner favorable to minority plaintiffs is significantly greater nationally. Moreover, several of these successful lawsuits each targeted more than one jurisdiction's election procedures, so the number of successful suits understates the number of discriminatory election procedures that were actually changed thanks to Section 2.

IV.

In summary, the findings of the National Commission on the Voting Rights Act point to a worrisome continuation of racially inspired vote discrimination. These findings are corroborated by other careful studies.[14] In my opinion, as a

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[13] A "reported" case is one that is mentioned in the electronic federal courts databases, Westlaw and LexisNexis. However, many "unreported" cases are also filed and/or resolved.

[14] One of the most comprehensive of these studies is Laughlin McDonald and Daniel Levitas, *The Case for Extending and Amending the Voting Rights Act. Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union*, http://www.votingrights.org (March 2006). See also Ellen Katz, with Margaret Aisenbrey, Anna Baldwin, Emma Cheuse, and Anna Weisbrodt, *Documenting Discrimination in Voting: Judicial Findings Under Section 2*

scholar who has written extensively on the Act and its effects for more than thirty years, the non-permanent features of this monumental legislation should be renewed.

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of the Voting Rights Act Since 1982. Final Report of the Voting Rights Initiative, University of Michigan Law School (December 2005) http://sitemaker.umich.edu/votingrights/files/finalreport.pdf; and Debo Adegbile, *Voting Rights in Louisiana: 1982-2006. A Report of RenewTheVoteVRA.org* (2006). http://www.civilrights.org/issues/voting/LAVRA.pdf.

Senate Judiciary Committee
Legislative Hearing on "An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization"
May 9, 2006

STATEMENT OF RICHARD L. HASEN

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Chairman Specter, Ranking Member Leahy, and Senators on the Judiciary Committee:

Thank you very much for the opportunity to appear before you today to testify about Senate Bill 2703, concerning reauthorization of the expiring provisions of the Voting Rights Act. I come before you as a strong supporter of the Voting Rights Act who believes that the expiring provisions of the Act should be renewed in some form—but also as someone who, after studying this issue for a number of years, has deep concerns about the constitutionality of the proposed amendments. I believe the Act has been an unqualified success in remarkably increasing minority voter registration and turnout, increasing the number of African-American and Latino elected officials, and the ability of minority voters to effectively exercise their right to elect representatives of their choice. But I urge this Committee to spend the time to craft a bill that will both pass constitutional muster in the Supreme Court and do the important work of continuing to protect minority voting rights in this country.

The constitutional issue—which I have explored in a law review article that I have submitted to the committee— is this: in recent years the Supreme Court has held that Congress has limited power to enact civil rights laws regulating the states. Beginning with the 1997 case, *City of Boerne v. Flores*, the Court has held that Congress must produce *a strong evidentiary record* of *intentional state discrimination* to justify laws that burden the states. In addition, whatever burden is placed on the states must be *congruent and proportional* to the extent of the violations.

Beginning in 1965, Congress imposed the strong preclearance remedy on those jurisdictions with what the Supreme Court called a "pervasive," "flagrant," and

"unremitting" history of discrimination in voting on the basis of race. In *South Carolina v. Katzenbach* the Court upheld section 5 of the Act as a permissible exercise of congressional power.

What has changed since 1965? Both the law and the facts. On the law, the Court—in my view wrongly—has placed a much higher burden on Congress to justify laws aimed at protecting civil rights. On the facts, we have an evidentiary problem: because the Act has been so effective it will be hard to produce enough evidence of *intentional discrimination by the states* so as to justify the extraordinary preclearance remedy for another 25 years.

I'm afraid that much of the evidence referenced in the bill's findings won't be enough for the Supreme Court. For example, the findings point to Department of Justice objections to preclearance requests by covered states. As you can see from Figure 3 in my article, in recent years objections have been rare. In the most recent 1998-2002 period, DOJ objected to a meager 0.05% of preclearance requests. Updating these data, DOJ interposed just *two* objections overall in 2004 and *one* objection in 2005. The problem with using objections as evidence of intentional state discrimination is unfortunately even worse than it appears. In the 1990s, DOJ adopted a policy of objecting to certain state actions that were perfectly constitutional—a policy the Supreme Court later rejected.

The House Judiciary Committee has put together a voluminous record to support renewal of section 5. Although I have not yet reviewed that entire record, my impression from what I have reviewed is that the record documents isolated instances of intentional state discrimination in voting; the vast majority of evidence relates to conduct that does

not show constitutional misconduct by the state. Moreover, the House record seems to show that the problems that continue to exist occur *across the nation*: the Court may insist on evidence that the covered jurisdictions present *greater problems* than the rest of the nation to justify the geographically selective preclearance remedy.

I have heard the argument that the Court will give a pass on Congress's requirement to produce evidence because section 5 has been such a good deterrent. I hope that this theory is right, but I am not confident that the new Supreme Court would be inclined to agree on this point. The problem with such a theory is that it would justify preclearance for an undetermined amount of time into the future.

In addition to the problem of producing enough evidence of intentional state discrimination, there is the tailoring issue. The current Act uses a formula for coverage based on the jurisdiction's voter registration or turnout and its prior use of a discriminatory test or device for voting, such as a literacy test. The proposed amendments would not update this formula in any way. The Act relies on data from the *1964, 1968, or 1972* elections. Those turnout figures—and particularly turnout in minority communities—bear little resemblance to turnout figures today.

I recognize that this is politically difficult, but *Congress should update the coverage formula* based on data indicating where intentional state discrimination in voting on the basis of race is *now* a problem or likely to be one in the *near future*.

Here are three additional steps that Congress should carefully consider to bolster the constitutional case:

First, Congress should take steps to *make it easier for covered jurisdictions to bail out* from coverage under section 5 upon a showing that the jurisdiction has taken

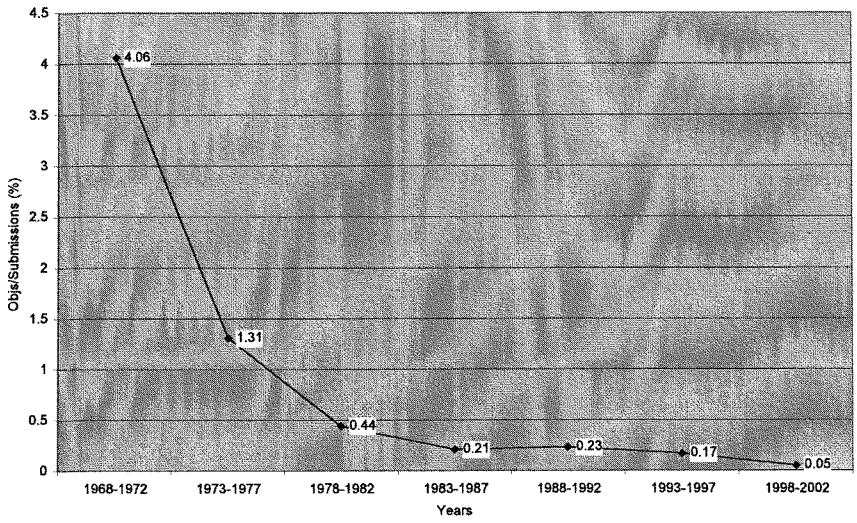
steps to fully enfranchise and include minority voters. The current draft does not touch bail out, and few jurisdictions have bailed out in recent years.

Second, *Congress should impose a shorter time limit, perhaps 7-10 years*, for extension. The bill includes a 25 year extension, and the Court may believe it is beyond congruent and proportional to require, for example, the state of South Carolina to preclear every voting change, no matter how minor, through 2031.

Third, Congress should more carefully reverse only certain aspects of *Georgia v. Ashcroft*. *Georgia v. Ashcroft* makes it easier for covered jurisdictions to obtain preclearance, meaning that the burden on covered jurisdictions is eased (and therefore the law looks more "congruent and proportional"). Reversing the case as a whole, as this bill apparently could do—though the language in this respect is very poorly drafted—could weaken the constitutional case for the bill. I would suggest tweaking, rather than reversing, the *Ashcroft* standard.

Besides these changes there *are* ways to strengthen the bill to assure that the renewed provisions of the Act remain a crucial element in assuring political equality and the right to vote for all Americans regardless of race. At the top of my list, given recent troubling allegations of partisan manipulation of the preclearance provisions, is for Congress to reverse the Supreme Court's holding in *Morriss v. Gressette* (1977). This reversal would allow appeals of DOJ decisions to grant preclearance in controversial and politically charged cases such as those involving Texas redistricting and the Georgia voter identification law. Thank you for the opportunity to present these views.

Figure 3: Objections as a Percentage of Preclearance Submissions Over Time



Testimony of Professor Samuel Issacharoff, NYU School of Law

On the Reauthorization of Section 5 of the Voting Rights Act

May 9, 2006

For forty years, the Voting Rights Act has served as the exemplar of this Nation's commitment to redressing injustices visited upon racial and ethnic minorities. The fact that such a statute was necessary nearly a century after the passage of the Fifteenth Amendment is a painful reminder of a shameful legacy.

The reauthorization of key provisions of the Voting Rights Act is an occasion to reassess the state of minority voting rights. This reassessment must be done with caution and a degree of rigor for two quite distinct reasons.

First, the state of minority voting rights and the need for Section 5 today reflects the impact of the Voting Rights Act itself, the most successful of any civil rights statute ever passed by this Congress. The Act targeted the exclusion of black citizens from the franchise, and its dramatic effectiveness is hard to overstate. Take, for example, the coverage formula of Section 5 of the Act, which used voter turnout levels to determine which jurisdictions were subject to its preclearance requirements. Had the coverage formula been applied to the 1968 presidential election rather than the 1964 presidential election, not one of the originally covered states would have fallen under the preclearance regime. The combination of the Act's ban on voter disqualification mechanisms and the federal commitment to the registration and protection of African American voters broke the lockhold of intransigent racial exclusion in the covered states. Forty years hence, the legions of black voters and the established presence of minority elected officials is the historic legacy of the Act. While the number of objections to proposed changes from covered jurisdictions has declined to the single digits in any given year, this Congress should be hesitant in altering such a dramatically successful civil rights statute. Even in the absence of significant numbers of objections, Section 5 in all likelihood continues to serve as a reminder in covered jurisdictions that any untoward conduct will be subject to review. One should tread cautiously with this heroic legacy.

But there is a second reason for caution and rigor. In cases such as *City of Boerne v. Flores,*[1] the Supreme Court confined the reach of Congress' remedial authority under the Fourteenth and Fifteenth Amendments – its ability to reach beyond the direct commands of those Amendments – by demanding from Congress some evidence of "congruence and proportionality" between its remedial legislation and the constitutional aims that Congress seeks to advance. The Court has given Congress wide berth in addressing manifest injustices in the core areas of the Fourteenth and Fifteenth Amendments.[2] But it is far from clear that the injustices that justified Section 5 in 1965 can justify its unqualified reenactment today. The very effectiveness of the Voting Rights Act, and the

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[1] 521 U.S. 507 (1997).

[2] *See generally* Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003).

immediacy of its impact in 1965, is a source of constitutional vulnerability today. The bulk of the coverage under Section 5 is triggered by voter turnout figures from 1964, a date that seems remote in 2007, and risks appearing constitutionally antiquated by the proposed next expiration date of 2032. By 2032, the youngest eligible voter from 1964 will be 86 years old.

Potential constitutional scrutiny is not the sole source of concern over the continued operation of Section 5. The Act has four key features that reflect the historic understanding of the source of minority exclusion from the franchise, and that raise serious questions about its reach and efficacy today.

1. *The Act is geographically specific.* The original coverage formula was designed to pick up the core Southern states that had been bastions of Jim Crow. Subsequent coverage was extended to finding areas of language-minority concentrations that might replicate the voter exclusion practices of the original Southern jurisdictions. A key assumption, well understood and documented in 1965, was that the areas to which the Act's preclearance requirements would apply were outliers on the national stage. When the Court confronted the constitutionality of Section 5 for the first time, it could readily accept that "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."[3] Faced with what were clearly understood to be "flagrant" practices, the Court accepted the Act's geographic markers. The clear record of geographic demarcation no longer exists. As the Court has recognized from its initial encounter with the Act, "[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects."[4]
2. *The Act targets change.* The structure of the Voting Rights Act was centered on the suspension of antivoter devices through Section 4 (most notably literacy tests), and then a prohibition under Section 5 from bringing back the disfavored practices. Section 5 does not carry its own prohibitions but instead serves as a ratchet preventing backsliding toward retrograde practices. Many of the practices that have garnered most attention recently, such as felon disenfranchisement or voter intimidation at the polls, are not subject to the Section 4 suspension clause and, so long as they are pursuant to formal practices already in place, do not trigger Section 5 scrutiny. The unrivaled effectiveness of Section 5 in its initial stages resulted from the congruence between its administrative structures and the perceived harms. A prohibition on change well fit the Act's central aim of removing the manifest barriers to the minority franchise. It is not clear that the prohibition on change affecting access to the ballot well captures the Act's purposes today. For example, one study by a former Department of Justice attorney found that in the six-year period beginning in 1997, only six of the forty-

[3] South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).
[4] *Id.* at 308.

two DOJ objections lodged during that time concerned minority voters' access to the ballot, an average of one per year.[5]

3. *The sole method of redress is administrative with preclearance authority held by the Department of Justice.* The preclearance provision is unique in the amount of authority placed in the Department of Justice, whose internal decisionmaking is essentially unreviewable.[6] The assumption was that DOJ was the only actor with sufficient disinterest from local pressures to act fully in conformity with the aims of enhancing minority voting rights. The targeted jurisdictions, by contrast, were characterized by local politics organized around minority exclusion and holding no prospect for redress. Typically, the covered jurisdictions were under exclusive one-party control, had few if any minority elected officials, and had isolated and impoverished minority communities that were without access to legal resources and subject to forms of legal and extralegal exclusion and intimidation. The result was a political lock-up without avenues of change. It was also a world in which there were unlikely to be significant untoward or partisan pressures on DOJ. The lack of bipartisan competition in most of the covered jurisdictions meant that there was little capacity to affect national political balances through misuse of Section 5 preclearance authority. Unfortunately, the emergence of real bipartisan competition in covered jurisdictions has brought with it concerns of preclearance objections motivated by political gain, particularly in the highly contested area of redistricting.

4. *The Act targeted exclusion and did not directly address the issue of minority vote dilution.* Section 4 and Section 5 of the Act were mainly directed in 1965 to the elimination of outright obstacles to the exercise of the franchise. The scope of Section 5 was extended without much difficulty to the question of municipal annexations and other boundary issues that defined who could and could not vote, actions that readily mapped onto the Supreme Court's landmark decision in *Gomillion v. Lightfoot.*[7] Almost immediately, however, and largely as a result of the dramatic effectiveness of the Act, Section 5 attention was drawn to practices bearing not on the *exercise* of the franchise but on the *effectiveness* of the minority franchise. With *Allen v. Board of Elections,*[8] Section 5 was applied to the question whether at-large versus districted elections offered minority voters a meaningful opportunity to elect candidates of their choice. But the retrogression standard of review under Section 5 has proven difficult to apply to these sorts of challenges. Particularly after the 1982 Amendments to Section 2, at-large and multimember districts were largely disbanded as dilutive of minority voting strength. Once the contested issue became not whether there would be districted elections, but the precise contours of district lines, the nonretrogression standard of Section 5 fit poorly. The attempt of DOJ to enforce a contested view of maximization of minority voting strength through concentrated majority-minority

[5] Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?,* 81 Denver U.. L. Rev. 225, 253 (2003).
[6] *See* Morris v. Gressette, 432 U.S. 491, 507 (1977).
[7] 364 U.S. 339 (1960).
[8] 393 U.S. 544 (1969).

districts prompted constitutional concern during the 1990s[9] and gave rise to the Court's divided reassessment of the objectives of the Act in *Georgia v. Ashcroft.*[10]

The differences between the initial concerns and regulatory framework of Section 5 and the key voting rights issues of today place great pressure on the constitutionality of the Act as well as its effectiveness. In an earlier academic article, which I append to this testimony, I raised the question whether Section 5 of the Voting Rights Act had, in effect, largely called into question the reason for its own existence as a result of its record of success.[11] I will not repeat the main arguments here.

Instead, I wish to address five separate suggestions for tailoring the Act to the world of 2006 rather than 1965. The hope is not only that the Act may be more effective in addressing the voting issues that are within its scope, but also that it will be more likely to withstand constitutional challenge.

The proposed areas of change would be:

1. *Move the unit of coverage from the states to political subdivisions.* Under this proposal, all political subdivisions currently covered as part of a covered state would continue to be covered, subject to bailout provisions discussed below. This corresponds to the focus of enforcement actions of DOJ. For example, between 2000 and 2005 there were a total of only 40 objections total under DOJ preclearance; 37 of them were directed to political subdivisions of the states and only three to the states as such. It is also at the local level that the conditions of lack of political competition and isolation of minority communities are most likely still to obtain. By contrast, the states currently covered by Section 5 typically have sizeable delegations of minority elected officials who are well positioned to ensure that voting measures antithetical to minority voter interests are not passed through inadvertence or malevolence, and are certainly well positioned to ensure that such measures are not the product of stealth legislation. Any legislation at the statewide level deemed antithetical to minority voting interests will be met not only with certain political objections, but nearly as certainly with substantive litigation under either Section 2 of the Act or under the Constitution.
2. *Liberalize the bailout provisions.* Currently only a handful of counties in Virginia have been able to remove themselves from Section 5 coverage. Part of this results from the fact that Virginia as a whole is not a covered jurisdiction so that counties are responsible for their own conduct. A liberalized bailout provision – one that allowed counties or municipalities that have not engaged in objectionable conduct for some fixed number of years to escape the administrative burden and the costs associated with Section 5 preclearance – would alleviate some of the constitutional pressure on the most suspect of the Act's current features: the

[9] *See, e.g.,* Miller v. Johnson, 515 U.S. 900 (1995).
[10] 539 U.S. 461 (2003).
[11] *See* Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success,* 104 Colum. L. Rev. 1710 (2004).

extension of the original coverage formula. Bailout need not entail fullscale deregulation, however, as the next proposal suggests. But the current bailout provision appears unduly onerous and not sufficiently geared to actual legal violations.

3. *Create an intermediate regulatory status less onerous than preclearance.* Preclearance operates on a model of regulation analogous to that of the Food and Drug Administration, which requires anticipatory regulatory approval on the assumption that the consequences of error are too costly to bear. That is in contrast to the more typical regulatory mechanism administered by the Securities and Exchange Commission, which requires disclosure of critical information prior to the issuance of securities, but leaves enforcement to subsequent processes, public and private. The law might be revised to allow jurisdictions that had not had a Section 5 objection or a successful Section 2 lawsuit in a defined period of time, say 5 years, to be removed from preclearance requirements, yet still required to disclose on a DOJ-maintained website all changes that would have been covered under Section 5 and the reasons for their having been taken. That would allow for a suit by DOJ or by private parties claiming either that the changes violated Section 2 or that the disclosures were false. Violation of either the substantive protections of Section 2 or the truth-in-reporting provisions of the administrative disclosure requirements would both invalidate the proposed change and potentially reinstate plenary Section 5 coverage.

4. *Expand the jurisdictional reach of this Section 5 disclosure regime.* An administrative disclosure regime modeled on the SEC would render the administrative burdens of Section 5 coverage far less onerous. The reach of this administrative review could be expanded to any jurisdiction that has lost a Section 2 lawsuit in the past five years or to any jurisdiction found to have engaged in harassment of minority voters. This new "coverage formula," which turns on factors that are both more current and more functionally relevant than 1964 voter turnout, would take further constitutional pressure off of the anachronistic coverage formula of the current Act. It would also bring the geographic scope of Section 5 into conformity with the nationwide scope of Section 2.

5. *Remove statewide redistricting from Section 5 overview.* The current bill expresses a congressional repudiation of *Georgia v. Ashcroft*, and calls for more rigorous Section 5 review of redistricting, but gives no clear indication of how that is to be done. There are two key problems with the use of standard Section 5 analysis to statewide redistricting.

    a. First, it is noteworthy that no Justice of the Supreme Court in *Ashcroft* was willing to endorse the fixed non-retrogression standard associated with *Beer v. United States.*[12] That is because the mechanical application of the *Beer* standard operates as a one-way ratchet, and results in majority-minority districts of increasing concentration over time. It is far from clear that minority voters are well served by being packed in increasingly concentrated minority districts. It would be a terrible irony if the

[12] 425 U.S. 130 (1976).

mechanical enforcement of the Voting Rights Act were to become an obstacle to political integration and the expansion of minority voter influence through coalitional districts in which candidates supported by minority voters had a meaningful opportunity to elect candidates of choice to office in collaboration with white voters. The prospect of interracial politics was not even a gleam in the eye of the founding generation of the Voting Rights Act in 1965. It is unimaginable that their legacy would emerge as a barrier to political integration.

b. Second, because statewide redistricting has become a major partisan battleground in many of the Section 5 covered jurisdictions, the intervention of the DOJ in this particular context has been rife with accusations of partisan motivation. The visibility of redistricting and the clear partisan temptations for DOJ oversight (now that there is vigorous partisan competition in the covered jurisdictions) make this an area that can be more wisely entrusted to enforcement through Section 2 of the Act or under the various constitutional provisions implicated in the redistricting process.

In sum, I believe that Section 5 of the Voting Rights Act can be extended in a way that more closely addresses the concerns of minority voters today. In so doing, this Congress may not only make the Act more effective, it may also better protect it from constitutional scrutiny.

STATEMENT OF SENATOR PATRICK LEAHY
RANKING MEMBER, COMMITTEE ON THE JUDICIARY
HEARING ON THE EXPIRING PROVISIONS OF THE VOTING RIGHTS ACT
MAY 9, 2006

I am pleased to join the Chairman in welcoming everyone to our Committee's second hearing on extension of the expiring provisions of the Voting Rights Act. Last Wednesday we joined in introducing a bipartisan bill cosponsored by the Republican and Democratic leaders of the Senate, a number of Republicans and Democrats serving on this Committee and more than two dozen cosponsors in all. The same bill was introduced on Tuesday in the House by Chairman Sensenbrenner and Representative Conyers and the Republican and Democratic leadership in the House. Those actions demonstrate the widespread support that exists for renewing and revitalizing the Act's expiring provisions. As several of us noted last week at an historic bipartisan, bicameral event on the Capitol steps, there have been too few occasions in the last six years in which Republicans and Democrats in the House and Senate have joined together in this way on behalf of the country.

There is not much time remaining in the legislative calendar this year. If we are to achieve our goal of reauthorizing the expiring provisions this year we need to focus on this important matter and our hearings this week and next. We all want to create the best record we can. It is my hope, which I have urged upon the Chairman, that we are in position to report our bill before the end of the month.

Today we welcome the testimony of two civil rights practitioners with a combined history of over 60 years litigating voting rights cases. Ted Shaw has a distinguished career as a litigator and professor. He is the Director and President of the NAACP Legal Defense and Educational Fund, Inc., founded in 1940 under the leadership of Thurgood Marshall. He has also taught at Columbia and the University of Michigan law schools. Laughlin McDonald has been the Director of the ACLU's Voting Rights Project for the past 34 years as well as teaching at the University of North Carolina Law School. We appreciate having experienced practitioners testifying.

We will also hear from a distinguished historian, Professor Chandler Davidson of Rice University. Professor Davidson's books on this topic have taught the nation about the insidious discriminatory tactics that deprived many Americans of the right to vote prior to the passage of the Voting Rights Act in 1965. The fight for equal voting rights dated back almost 100 years, to the ratification of the 15th Amendment in 1870, the last of the post-Civil War Reconstruction amendments. It took passage and implementation of the Voting Rights Act of 1965, however, for people of all races in many parts of our country to gain the effective exercise of rights guaranteed 95 years earlier by the Constitution.

The pre-clearance provisions included in the Act were one of the primary reasons progress was made where earlier attempts had failed. Section 5 requires certain covered jurisdictions with a history of discrimination to "pre-clear" all voting changes with either the Justice Department or the U.S. District Court for the District of Columbia. In doing

so, Section 5 combats the practices in these jurisdictions of shifting from one invalidated discriminatory tactic to another, which had undermined earlier efforts to enforce 15th Amendment guarantees.

As part of the second reauthorization of the Voting Rights Act 1975, Congress added Section 203, which requires bilingual voting assistance for certain language minority groups. Section 203 has been a key factor in expanding the inclusiveness of democracy to all American citizens and has led to extraordinary gains in representation and participation made by Asian Americans and Hispanic Americans. Like Section 5, Section 203 is set to expire. It is imperative that all citizens be able to exercise their rights as citizens, particularly a right as fundamental as the right to vote. Renewing the expiring language provisions of the Voting Rights Act will continue to make that a reality.

We reauthorized and amended parts of the original act in 1970, 1975, 1982 and 1992 because of continuing discrimination and an evolving need for remedial action to protect the rights of American voters. This Congress has the opportunity to reinvigorate the Act, strengthening and improving its remedies. The Voting Rights Act Reauthorization and Amendments Act of 2006 does so by clarifying certain parts of Section 5 to restore the original meaning and interpretation and thereby give our courts clear guidance.

Regrettably, the effectiveness of Section 5 has been undermined by two recent Supreme Court decisions. In our bipartisan bill we have proposed legislative language to clarify congressional intent and thereby make clear that a voting rule change motivated by any discriminatory purpose violates Section 5. That restores the original meaning and purpose of the Voting Rights Act, to protect the right to vote and to have those votes count by ensuring minority community's ability to elect their preferred candidates of choice.

The Voting Rights Act of 1965 is one of the most important laws Congress has ever passed. It is helping usher the country from a history of discrimination into an era of greater democracy in which there is greater inclusion of all Americans in decisions about our Nation's future. Our democracy and our nation are better and richer for it. While I look forward to the day when it is no longer needed, I believe that our work here is not yet completed. We need to make sure that the gains we are making are not lost.

I look forward to the testimony of our witnesses here today and thank them for traveling from all corners of the country to be with us today on short notice.

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Senate Judiciary Committee
Reauthorization of Section 5 of the Voting Rights Act
May 9, 2006

Testimony of Laughlin McDonald
Director, ACLU Voting Rights Project
Atlanta, Georgia

On behalf of the ACLU, I want to express my support for the bill pending before the committee to extend Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, for an additional 25 years. The comprehensive record compiled by Congress of continuing discrimination in voting and the prevalence of racial polarization in the political process demonstrate that the extension of Section 5 would be a proper exercise of congressional authority to enforce the racial fairness provisions of the Fourteenth and Fifteenth Amendments.

The ACLU also supports the other provisions of the bill, including the language assistance provisions of Section 203, but since this hearing focuses specifically on Section 5, I will confine my remarks to that issue.

Prior Challenges to the Constitutionality of Section 5

The constitutionality of Section 5 has been challenged in the past, but the challenges have been consistently rejected. As soon as Section 5 was enacted in 1965, South Carolina, along with Alabama, Georgia, Louisiana, Mississippi, and Virginia,

challenged it as unconstitutional. The Supreme Court rejected the challenge in South Carolina v. Katzenbach, citing the "unremitting and ingenious defiance of the Constitution" in certain sections of the country, the failure of the case-by-case method to end discrimination, and the repeated attempts by local jurisdictions to evade the law by enacting new and different discriminatory voting procedures.[1] The Court acknowledged that Section 5 was an "uncommon exercise of Congressional power," but found that Congress's enactment was justified by the exceptional history of voting discrimination in the effected jurisdictions.[2] In doing so the Court applied a broad test for congressional power to enforce the constitution, i.e., "[w]hatever legislation is appropriate . . . to secure to all persons the enjoyment of perfect equality of civil rights and equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."[3]

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1. 383 U.S. 301, 308 (1966). Although the 1957, 1960, and 1964 Civil Rights Act contained provisions prohibiting discrimination in voting, they depended on time consuming litigation for enforcement. As Attorney General Katzenbach explained in his testimony before Congress in support of Section 5, "existing law is inadequate. Litigation on a case-by-case basis simply cannot do the job." Hearings on S. 1563 before the Senate Comm. on the Judiciary, 89th Cong., 1sr Sess., pt. 1, 14 (1965).
2. Id. at 334.
3. Id. at 327 (quoting Ex parte Virginia, 100 U.S. 339, 345-46 (1880)).

Congress extended Section 5 again in 1970 and 1975, and once again its constitutionality was challenged. The City of Rome, Georgia, argued that Section 5 violated principles of federalism, or states' rights, and that even if the preclearance requirements were constitutional when enacted in 1965, "they had outlived their usefulness by 1975."[4] The Court rejected the federalism argument, noting that the Fourteenth and Fifteenth Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." As for the argument that Section 5 had outlived its usefulness, the Court concluded that "Congress' considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable."[5]

After the extension of Section 5 in 1982, Sumter County, South Carolina, filed yet another challenge to the constitutionality of the statute. It contended that the 1982 extension was unconstitutional because the trigger, or coverage

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4. City of Rome v. United States, 446 U.S. 156, 180 (1980).
5. Id. at 179, 182. While the 1970 and 1975 amendments added jurisdictions by using subsequent presidential elections (1968 and 1972), the previously covered jurisdictions were not released from coverage under the original formula based on the 1964 presidential election.

formula, was outdated.[6] The county pointed out that as of May 28, 1982, more than half of the age eligible population in South Carolina and Sumter County was registered, facts which it said "distinguish the 1982 extension as applied to them from the circumstances relied upon in *South Carolina v. Katzenbach, supra,* to uphold the 1965 Act."[7] The three-judge court rejected the argument, noting that Section 5 "had a much larger purpose than to increase voter registration in a county like Sumter to more than 50 percent."[8] In support of its conclusion, the court noted that "Congress held hearings, produced extensive reports, and held lengthy debates before deciding to extend the Act in 1982."[9]

Section 5 and the City of Boerne

Opponents have launched new arguments and challenges against the Voting Rights Act in light of a series of Supreme Court decisions beginning with City of Boerne v. Flores, decided in 1997.[10] In City of Boerne, the Court invalidated the Religious Freedom Restoration Act of 1993 (RFRA) because of an absence of

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6. Section 5 covers states, or political subdivisions, in which less than half of eligible persons were registered or voted in either the 1964, 1968, or 1972 presidential elections, and which used a test or device for voting. 42 U.S.C. § 1973b(b).

7. County Council of Sumter County, S.C. v. United States, 555 F. Supp. 694, 707 (D.D.C. 1983).

8. Id.

9. Id. at 707 n.13.

10. 521 U.S. 507.

"congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." The Court defined "congruence and proportionality" as an agreement "between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented."[11] However, the Court repeatedly cited the Voting Rights Act as an example of congressional legislation that was constitutional.

The Court in Boerne cited the Act's suspension of literacy tests as an appropriate measure enacted under the Fifteenth Amendment "to combat racial discrimination in voting." It held that the seven year extension of Section 5 and the nationwide ban on literacy tests were "within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States," and that Section 5 was an "appropriate" measure "'adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against'." Congress acted in light of the "evil" of "racial discrimination [in voting] which in varying degrees manifests itself in every part of the country." The legislative record disclosed "95 years of pervasive voting discrimination," and "modern instances of

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11. Id. at 520, 530.

generally applicable laws passed because of [racial] bigotry." By contrast, the legislative history of RFRA, in the view of the Court, contained no such evidence, leading it to conclude that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[12]

It is especially worthy of note that the Supreme Court relied upon City of Boerne in rejecting a challenge to the constitutionality of Section 5 made by the State of California. The state argued that "§ 5 could not withstand constitutional scrutiny if it were interpreted to apply to voting measures enacted by States that have not been designated as historical wrongdoers in the voting rights sphere."[13] The Court disagreed. Citing Boerne, it held:

> [l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself constitutional and intrudes into legislative spheres of autonomy previously reserved to the States.[14]

The Court, reaffirming its ruling in South Carolina v. Katzenbach, further held that "once a jurisdiction has been

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[12]. Id. at 520, 526, 530, 532.

[13]. Lopez v. Monterey County, 525 U.S. 266, 282 (1999).

[14]. Id. at 282-83.

designated, the Act may guard against both discriminatory animus and the potentially harmful effect of neutral laws in that jurisdiction."[15]

After the decision in City of Boerne, the Court in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, invalidated the Patent Remedy Act,[16] allowing suits against a state because "Congress identified no pattern of patent infringement by the States, let alone a pattern of unconstitutional violations."[17] But as in City of Boerne, the Court in Florida Prepaid expressly and repeatedly noted the constitutionality "of Congress' various voting rights measures" passed pursuant to the Fourteenth and Fifteenth Amendments, which it described as tailored to "remedying or preventing" discrimination based upon race.[18]

Kimel v. Florida Board of Regents,[19] another federalism or states' rights decision, invalidated the provisions of the Age Discrimination in Employment Act of 1967 (ADEA), that subjected states to suit for money damages for age discrimination. But nothing in the opinion suggests that any provision of the Voting

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[15]. Id. at 283.
[16]. 35 U.S.C. 271(h) & 296(a).
[17]. 527 U.S. 627, 640 (1999).
[18]. Id. at 639 and n.5.
[19]. 528 U.S. 62 (2000).

Rights Act is unconstitutional. First, the Court held that classifications based upon age were unlike those based upon race, and that "age is not a suspect classification under the Equal Protection Clause." Second, the Court held that states may discriminate on the basis of age if the classification is rationally related to a legitimate state interest." Classifications based on race, however, are constitutional only if they are narrowly tailored to further a compelling governmental interest. Age classifications, unlike racial classifications, are "presumptively rational." Against this backdrop, the Court concluded that ADEA was not "responsive to, or designed to prevent, unconstitutional behavior."[20] In addition, according to the Court, in the legislative history of ADEA "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."[21]

In United States v. Morrison, another of the post-Boerne cases, the Court invalidated a section of the Violence Against Women Act of 1994 which provided penalties against private individuals who had committed criminal acts motivated by gender bias. The Court concluded that the disputed provision could not

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[20]. Id. at 83-4, 86.
[21]. Id. at 89.

be upheld as a proper exercise of congressional power under § 5 of the Fourteenth Amendment because "it is directed not at any State or state actor, but at individuals."[22] Section 5, by contrast, is by its express terms directed at states and state actors, i.e., at "any State or political subdivision." Moreover, the Court cited as examples of the proper exercise of congressional power under the Fourteenth and Fifteenth Amendments the various voting rights laws found to be constitutional in Katzenbach v. Morgan (prohibition on English literacy tests for voting)[23] and South Carolina v. Katzenbach.

In still another case, Board of Trustees of the University of Alabama v. Garrett, the Court invalidated a portion of Title I of the Americans with Disabilities Act of 1990 (ADA) allowing state employees to recover money damages by reason of the state's failure to comply with the statute. The Court concluded that there was no evidence of a "pattern of unconstitutional discrimination on which § 5 [of the Fourteenth Amendment] legislation must be based."[24] However, the Court was careful to underscore the constitutionality of the Voting Rights Act and singled it out as a preeminent example of appropriate legislation

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[22]. 529 U.S. 598, 626 (2000).
23. 384 U.S. 641 (1966).
24. 531 U.S. 356, 370 (2001).

enacted to enforce the race discrimination provisions of the Civil War Amendments in the area of voting.[25]

Two subsequent decisions, moreover, indicate that the Court would not apply the strict congruence and proportionality standard of the Boerne line of cases where Congress has legislated to prevent discrimination on the basis of race or to protect a fundamental right, such as voting. In Nevada Department of Human Resources v. Hibbs, the Court affirmed the constitutionality of the family leave provisions of the Family and Maternal Leave Act, noting that "state gender discrimination . . . triggers a heightened level of scrutiny,"[26] as opposed to the rational basis level of scrutiny that applies to age discrimination, as was the case in Garrett. Because of this difference, "it was easier for Congress to show a pattern of state constitutional violations" in Hibbs. The Court also cited with approval various decisions of the Court which rejected challenges to provisions of the Voting Rights Act "as valid exercises of Congress' § 5 power [under the Fourteenth Amendment]."[27]

Finally, in Tennessee v. Lane the Court held that Title II

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25. Id. at 373.
26. 538 U.S. 721, 736 (2003).
27. Id. at 736, 738.

of the Americans With Disabilities Act, as applied to the fundamental right of access to the courts, "constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment."[28] According to the Court, "the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent."[29]

In sum, none of the recent federalism decisions of the Court casts doubt on the constitutionality of Section 5. To the extent that they discuss legislation enacted by Congress pursuant to the enforcement provisions of the Fourteenth and Fifteenth Amendments to redress the problem of racial discrimination in voting, they do so to affirm its constitutionality.

The Bailout

If there are jurisdictions that no longer need to be covered by Section 5, that is not an argument for allowing the statute to lapse. Instead, such jurisdictions can bailout from coverage under Section 4(a) of the Act.[30] To bailout, a jurisdiction must essentially show that it has had a clean voting rights record during the preceding ten years, and that it has engaged in constructive efforts to promote full voter participation.

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28. 541 U.S. 509, 531 (2004).
29. Id. at 523.
30. 42 U.S.C. §§ 1973a & b.

The ability to bailout should, moreover, refute the arguments that Section 5 is not congruent and proportional within the meaning of the Boerne line of cases. If a jurisdiction should not, or need not, be covered by Section 5, the statute provides a ready means of escape. Indeed, in enacting a new bailout in 1982, Congress expected that prior to the expiration of Section 2 in 2007 "most jurisdictions, and hopes that all of them, will have demonstrated compliance and will have utilized the new bailout procedures earlier."[31]

The sunset provision of any extension of Section 5, as well as its limited geographic application, would further argue for its congruence and proportionality. Boerne, for example, held that while legislation implementing the Fourteenth Amendment did not require "termination dates" or "geographic restrictions . . . limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate."[32]

Blaine County, Montana

A recent challenge to the constitutionality of the Voting

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31. S.Rep. No. 97-417, 97th Cong., 2d Sess. 60 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 239. Relatively few jurisdictions have in fact bailed out. Three jurisdictions, however, Fairfax City, Frederick County, and Shenandoah County in Virginia, did so with the consent of the Attorney General, indicating that the process is not difficult or burdensome for jurisdictions with clean voting rights records.

32. Boerne, 521 U.S. at 533.

Rights Act was made by Blaine County, Montana, in a suit brought by the United States alleging that the at-large method of electing the county commission diluted Indian voting strength in violation of Section 2. The county contended that Section 2 as applied in Indian Country was now unconstitutional in light of the Boerne line of cases.

In rejecting Blaine County's argument, and in affirming the finding of vote dilution by the district court, the court of appeals held the Boerne "line of authority strengthens the case for section 2's constitutionality." It noted that "in the Supreme Court's congruence-and-proportionality opinions, the VRA stands out as the prime example of a congruent and proportionate response to well documented violations of the Fourteenth and Fifteenth Amendments," that when Boerne "first announced the congruence-and-proportionality doctrine . . . it twice pointed to the VRA as the model for appropriate prophylactic legislation," and, citing Hibbs, Garrett, Morrison, and Florida Prepaid, that "the Court's subsequent congruence-and-proportionality cases have continued to rely on the Voting Rights Act as the baseline for congruent and proportionate legislation."[33] The Supreme Court's subsequent decision in Lane that the appropriateness of a remedy

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33. United States v. Blaine County, Montana, 363 F.3d 897, 904-05 (9th Cir. 2004).

depends on the gravity of the harm it seeks to prevent further supports the conclusion of the appellate court. Notably, Blaine County filed a petition for a writ of certiorari asking the Supreme Court to review its claim that Section 2 as applied in Indian Country was unconstitutional, but the Court denied the petition.[34]

Although the decision in Blaine County rejected a constitutional challenge to Section 2, its logic is applicable to challenges to Section 5.

The Case for Extension

The case for extension of Section 5 has been documented in reports filed by various organization and testimony at hearings conducted by the House and Senate. I won't repeat what is contained in the report previously filed by the Voting Rights Project of the ACLU, "The Case for Extending and Amending the Voting Rights Act: Voting Rights Litigation, 1982-2006." I would, however, like to update it by bringing to the committee's attention two recent developments in the courts that were not

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34. Blaine County, Montana v. United States, 125 S. Ct. 1824 (2005). Despite the rejection of the challenge to Section 2 in Blaine County, defendants in Fremont County, Wyoming, have raised an identical challenge to a Section 2 vote dilution lawsuit brought by the ACLU on behalf of tribal members on the Wind River Indian Reservation. Large v. Fremont County, Wyoming, No. 05-CV-270J (D. Wyo.).

covered in the report.

On May 5, 2006, the court of appeal for the Eighth Circuit reversed a decision of the district court dismissing a vote dilution challenge to elections for the City of Martin, South Dakota, concluding that "plaintiffs proved by a preponderance of the evidence that the white majority usually defeated the Indian-preferred candidate in Martin aldermanic elections."[35] The court also noted the history of ongoing intentional discrimination against Native Americans in Martin:

> For more than a decade Martin has been the focus of racial tension between Native-Americas and whites. In the mid-1990s, protests were held to end a racially offensive homecoming tradition that depicted Native-Americans in a demeaning, stereotypical fashion. Concurrently, the United States Department sued and later entered into a consent decree with the local bank requiring an end to 'redlining' loan practices and policies that adversely affected Native-Americans, and censuring the bank because it did not employ any Native-Americans. Most recently, resolution specialists from the Justice Department attempted to mediate an end to claims of racial discrimination by the local sheriff against Native-Americans.[36]

Significantly, Martin is the county seat of Bennett County, located between Shannon and Todd Counties, both of which are

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[35]. Cottier v. City of Martin, ___ F.3d ___, 2006 WL 1193028 *7 (C.A. 8 (S.D.)).

[36]. Id. at *1.

covered by Section 5. The history of purposeful discrimination against Indians in South Dakota is set out in detail in the recent opinion of the district court invalidating 2000 legislative redistricting as diluting Indian voting strength.[37] As the decision of the Eighth Circuit in the City of Martin case makes plain, problems of vote dilution and racial discrimination are ongoing in South Dakota and support the continuation of Section 5.

The second recent case involves Randolph County, Georgia. The general assembly enacted legislation following the 2000 census redrawing the five single member districts for the Randolph County Board of Education to comply with one person, one vote.[38] The redistricting plan was submitted to the Department of Justice for preclearance under Section 5 on June 28, 2002.[39] In subsequent correspondence with the department, the Georgia Attorney General's office submitted a letter from state Representative Gerald Green and state Senator Michael Meyer von Bremen, whose legislative districts include Randolph County, in which the legislators affirmatively represented that Henry L.

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[37]. Bone Shirt v. Hazletine, 200 F. Supp. 2d 1150 (D. S.D. 2002). The decision is discussed in detail in the ACLU's report previously filed with this committee.

[38]. Act No. 477 (H.B. 1654).

[39]. Larry B. Mims, attorney for Randolph County Board of Education, to Joseph D. Rich, Voting Section, June 28, 2002.

Cook, the Chairman of the Randolph County Board of Education and the incumbent in "old" District Five, remained a resident of "new" District Five.[40] Cook is African American, and District Five, both old and new, is majority black. According to the letter from Greene and von Bremen, "[t]he understanding I had and have to this day is that he [Cook] is in fact in his district." The Department of Justice, based on the representations in the submission, precleared the new redistricting plan on September 30, 2002.[41]

Registration cards were issued by the county registrar assigning voters to their districts under the new plan. One of those to whom a new registration card was issued was Cook, a resident of "old" District Five. Consistent with the county's representations to the Department of Justice, a new registration card was issued to Cook on August 1, 2002, listing him as a resident and registered voter in new District Five.[42]

In October 2002, Cook filed a declaration of candidacy seeking reelection to the Board of Education from District 5.

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[40]. Dennis R. Dunn, Deputy Attorney General, to James Walsh, Voting Section, August 9, 2002, with attached letter from Green and von Bremen.

[41]. Joseph D. Rich, Voting Section, to Governor Roy E. Barnes, et al., September 30, 2002.

[42]. In Re: Henry L. Cook, Candidate for the Board of Education for the County of Randolph (Randolph County, Ga., Oct. 28, 2002), para. 14.

Prior to the election, Lee Norris Jordan, an opposing candidate from District 5, filed a challenge to the qualifications of Cook claiming that Cook was not a resident of District Five.

A hearing was conducted on the challenge by Judge Gary C. McCorvey, Chief Judge of the Superior Courts of the Tifton Judicial Circuit, siting by designation as Superintendent of Elections of Randolph County. Re. Greene testified at the hearing that he "attempted to make sure that no incumbent was legislated out of his (the incumbent's) district," and that it was his understanding that Cook remained a resident of "new" District Five.[43] Jordan's challenge to Cook's residence was rejected on the merits. Judge McCorvey concluded that Cook resided "within the boundaries of such 'new' district five as contemplated by the Laws and Constitutions of both the State of Georgia and the United States of America."[44]

Jordan appealed to the superior court but the appeal was dismissed on the ground that his delay in filing the appeal until after the election rendered the appeal moot. The Supreme Court in a unanimous opinion affirmed the judgment of the superior court.[45]

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[43]. Id., para. 10.
[44]. Id., para. 22.
[45]. Jordan v. Cook, 277 Ga. 155, 587 S.E.2d 52 (2003).

Prior to the next election for the Board of Education scheduled for July 2006, however, the county registrar issued a new registration card to Cook assigning him to District Four, which is majority white. The actions of the registrar in adopting a new redistricting plan for the Board of Education and reassigning previously registered voters--and in this case an incumbent board member--to a new district in derogation of the intent and action of the state legislature, the representations made by the county to the Department of Justice, the preclearance decision of the Department of Justice, the prior decision of the county registrar, and the decisions of the state courts, were changes in voting within the meaning of Section 5, but they were never submitted for preclearance.

Black residents of Randolph County, represented by the ACLU, filed suit in federal court on April 17, 2006, seeking an injunction against implementation of the new voting changes absent compliance with Section 5.[46] Two days later, on April 19, 2006, the Department of Justice sent a "please submit" letter to the county attorney for Randolph County indicating that the voting changes at issue were covered by Section 5 but had not been precleared. According to the letter, "the effective change

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[46]. Jenkins v. Ray, Civ. No. 4:06-CV-43 (CDL) (M.D. Ga.).

to the precleared redistricting plans through the enforcement of the plans' boundaries and the change to Mr. Cook's registration status," must be submitted for preclearance, and that the changes are "legally unenforceable without Section 5 preclearance."[47] The letter pointed out that "[i]t was the understanding of the Attorney General, based on representations from county officials, that Mr. Cook resided in district 5 under the redistricting plans submitted for preclearance in 2002."

The district court, sitting as a single-judge court, held a hearing on April 21, 2007, and granted plaintiffs' motion for a temporary restraining order directing "that the qualifying period for District 5 of the Randolph County Board of Education shall begin as scheduled on April 24, 2006 and shall remain open until further order of the Court." The case is set for trial before a three-judge court on May 31, 2006.

The past and continuing history of intentional discrimination against black voters in Randolph County underscores the need for continuation of Section 5. In 1954, Randolph County registrars challenged the qualifications of 525 black voters in the county, approximately 70% of the total number of black registered voters. Approximately 225 of those

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[47]. John Tanner, Voting Section, to Tommy Coleman, attorney for Randolph County, April 19, 2006.

challenged appeared and were examined, of whom 175 were found by the registrars to be disqualified from voting. Twenty-two of those who were disqualified filed suit in federal court, which found the removal of blacks from the voter lists by county registration officials "constituted an illegal discrimination against them on account of their race and color."[48] The court ordered them restored to the voter rolls, and that each plaintiff collect damages from the registrars in the amount of $40.

In 1993, the Department of Justice objected to a proposed redistricting plan for the Randolph County Commission on the grounds that it unnecessarily fragmented the black population in one of the previously majority black districts. According to the objection:

> There appears to be a pattern of racially polarized voting and substantially lower levels of participation by black voters relative to white voters in Randolph County elections. In this context, the identified fragmentation of black population concentrations has the effect of limiting the opportunity for black voters to elect candidates of their choice.[49]

In the same letter, the Attorney General also objected to an educational requirement (diploma or GED) for school board members

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[48]. Thornton v. Martin, 1 R.R.L.Rptr. 213, 215 (M.D. Ga. 1956).

[49]. James P. Turner, Acting Assistant Attorney General, to Jesse Bowles, III, June 28, 1993.

on the grounds that it would have a racially discriminatory, regressive effect:

> where the pronounced disparate impact of the proposed educational requirement appears to have been well-known, your submission does not provide an adequate non-racial justification for this requirement.

The implementation of the changes at issue in the present litigation shows that minority voting rights are still in jeopardy in Randolph County. The reassignment of a black incumbent from the majority black district in which he was elected to a majority white district would deprive minority voters of the opportunity of voting for a candidate whom they had previously approved, and would undoubtedly deprive those voters of effective representation on the Board of Education.

While the Boerne line of cases consistently cited the provisions of the Voting Rights Act as proper exercises of congressional authority to enforce the Fourteenth and Fifteenth Amendment, the extensive record compiled by Congress - the hearings, reports, and debates - establishes the continuing need for Section 5.

The Deterrent Effect of Section 5

Aside from blocking discriminatory voting changes, Section 5 has a strong deterrent effect. A recent example of that involves congressional redistricting in Georgia carried out by

Republicans in 2005 once they gained control of the house, senate, and governor's office. The legislature passed resolutions that any redistricting had to be done in conformity with Section 5 and avoid retrogression. And the plan that the legislature adopted in 2005 did exactly that.[50]

The black percentages in the majority black districts (John Lewis, Cynthia McKinney), as well as the black percentages in the majority white coalition districts that had elected blacks (David Scott, Sanford Bishop) were kept at almost exactly the same levels as under the plan that had been passed by the Democrats in 2002. I think one can fairly conclude that the legislature was determined that it would not have a Section 5 retrogression dispute on its hands after it passed the 2005 plan. Thus, even in the absence of an objection from DOJ, Section 5 obviously played an important role in the redistricting process.

I'm not sure what the state would have done in the absence of Section 5. In the brief it filed in the Supreme Court in Georgia v. Ashcroft (2003), involving preclearance of three of the state's senate districts, the state argued that the retrogression standard of Section 5 should be abolished, and that all of the majority black districts in the state could be

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[50]. HB 499 (2005).

abolished under the new standard for preclearance which it proposed.[51]

The state also argued that minorities should never be allowed to participate in the preclearance process. Thus, the very group for whose protection Section 5 was enacted would have no say on how a proposed change might impact the minority community.

There is nothing in the history of redistricting in the state, past or present, to suggest that in the absence of Section 5 the party or faction in control would refrain from manipulating black voters and diminishing their political power for partisan purposes. Those who say that Section 5 has outlived its usefulness ignore, among other things, the undeniable deterrent effect that the statute has.

Section 5's Impact on Court Ordered Remedies

Section 5 also continues to have a decided, and beneficial, impact on court ordered remedies. In its opinion in Colleton County Council (2003) implementing legislative and congressional redistricting in South Carolina, the three-judge court held that it must comply with Sections 2 and 5 of the Voting Rights Act. Accordingly, it rejected plans that had been proposed by the

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[51]. 539 U.S. 461 (2003), Brief of Appellant State of Georgia.

governor and the legislature because they were "primarily driven by policy choices designed to effect their particular partisan goals."[52] Those choices included protecting incumbents and assigning the minority population to maximize the parties' respective political opportunities.[53] The plan implemented by the court increased the number of majority black house districts from 25 to 29, maintained the existing nine majority black senate districts, and maintained the Sixth Congressional District as majority black. Notably, none of the parties to the litigation appealed.

A three-judge court in Georgia in Larios v. Cox (2004) similarly applied Section 5 in implementing a court ordered legislative plan following the failure of the state to enact a plan on its own. The court appointed a special master to prepare a plan, which initially paired nearly half of all black house members (18 of 39), including long term incumbents and chairs of important house committees. The Legislative Black Caucus moved to intervene and filed a brief arguing that the proposed plan would be retrogressive in violation of Section 5, and would also violate the racial fairness standard of Section 2. The three-

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52. Colleton County Council v. McConnell, 201 F.Supp.2d 618, 628 (D.S.C. 2002).
53. Id. at 659.

judge court, in agreement with the objections raised by the Black Caucus, instructed the special master to redraw the plan to avoid, where possible, the paring of incumbents. The special master did so, and the plan as finally adopted by the court cured the pairing of minority incumbents, except in an area near Savannah where the paring was unavoidable.[54]

Both Colleton County Council and Larios v. Cox demonstrate the critical role that Section 5 plays in court ordered redistricting. In the absence of Section 5, the courts in the South Carolina and Georgia cases may well have adopted plans that subordinated minority voting rights to partisan goals or paired black incumbents, thus depriving the black community of many of its elected officials. The continuing importance of Section 5 is apparent.

Continued Racial Bloc Voting

One of the most sobering facts to emerge from the record compiled by Congress is the continuing presence of racially polarized voting. While much progress has been made in minority registration and office holding, the persistence of racial bloc voting shows that race remains dynamic in the political process, particularly in the covered jurisdictions.

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54. Larios v. Cox, 314 F.Supp.2d 1357 (N.D. Ga. 2004).

The issue of polarization voting is covered in detail in the ACLU's report, but I will mention one judicial finding that is particularly revealing. A three-judge court in South Carolina in 2002 concluded that racially polarized voting:

> has seen little change in the last decade. Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary and general elections. Statewide, black citizens generally are a highly politically cohesive group and whites engage in significant white bloc-voting.[55]

Judicial findings of this sort underscore the continued need for Section 5.

The Bossier II Fix

The House and Senate bills properly provide that a voting practice adopted with any discriminatory purpose should be denied preclearance. Bossier Parish, Louisiana, adopted a redistricting plan for its 12 member school board in 1992. The parish was 20% black, but all of the districts were majority white, despite the fact that a plan could be drawn containing two majority black districts. No black person had ever been elected to the school board, and it was undisputed that the plan adopted by the parish split black communities purposefully to avoid creating a majority black district.

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[55]. Colleton County Council, 201 F.Supp.2d at 641.

One board member said he favored black representation on the board, but "a number of other board members opposed the idea." Another board member said "the Board was hostile to the creation of a majority-black district." In objecting to the plan, the Attorney General concluded she was "not free to adopt a plan that unnecessarily limits the opportunity for minority voters to elect their candidates of choice."[56]

The District of Columbia court, however, precleared the parish's plan. It held the 1992 plan was no worse than the preexisting plan, in that neither contained any majority black districts, and thus there was no "retrogressive intent."[57] The Supreme Court affirmed in a decision known as Bossier II.[58] It held "in light of our longstanding interpretation of the 'effect' prong of § 5 in its application to vote dilution claims, the language of § 5 leads to the conclusion that the 'purpose' prong of § 5 covers only retrogressive dilution."[59] Thus, an admittedly discriminatory plan that was the product of

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56. This history is set out in Reno v. Bossier Parish School Bd., 528 U.S. 320, 324, 348 (2000) ("Bossier II").

57. Reno v. Bossier Parish School Bd., 7 F. Supp. 2d 29, 31-2 (D. D.C. 1998).

58. In Reno v. Bossier Parish School Bd., 520 U.S. 471 (1997), known as "Bossier I," the Court ruled that a voting practice could not be denied preclearance under Section 5 merely because it violated the results standard of Section 2, that a retrogressive effect was required.

59. Bossier II, 528 U.S. at 328.

intentional discrimination and had an undeniable discriminatory effect, was nonetheless granted preclearance under Section 5.

The dissenters (Justices Souter, Stevens, Ginsburg and Breyer) concluded that:

> the full legislative history shows beyond any doubt just what the unqualified text of § 5 provides. The statute contains no reservation in favor of customary abridgment grown familiar after years of relentless discrimination, and the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles.[60]

Had the Bossier II standard been in effect in 1982, the District of Columbia court would have been required to preclear Georgia's congressional redistricting plan, which was found by the court to be the product of purposeful discrimination. In that instance, the state had increased the black population in the Fifth District over the benchmark plan, but kept it as a district with a majority of white registered voters. The remaining nine congressional districts were all solidly majority white. As Joe Mack Wilson, the chief architect of redistricting in the house told his colleagues on numerous occasions, "I don't want to draw nigger districts."[61] He explained to one fellow house member, "I'm not going to draw a honky Republican district

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60. Id. at 366.
61. Busbee v. Smith, 549 F. Supp. 494, 501 (D. D.C. 1982).

and I'm not going to draw a nigger district if I can help it."[62]

Since the redrawn Fifth District did not make black voters worse off than they had been under the preexisting plan, and even though it was the product of intentional discrimination, the purpose was not technically retrogressive and so, under Bossier II, the plan would have been unobjectionable. Such a result would be a parody of what the Voting Rights Act stands for. The House and Senate bills provide a necessary remedy for the Bossier II decision.

The Georgia v. Ashcroft Fix

The House and Senate bills properly provide that voting practices that diminish the ability of minority voters to elect their preferred candidates of choice should be denied preclearance. In Georgia v. Ashcroft,[63] the Supreme Court vacated the decision of a three-judge court denying preclearance to three state senate districts contained in Georgia's 2000 redistricting plan because, in its view, the district court "did not engage in the correct retrogression analysis because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts."[64]

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62. Id., Deposition of Bettye Lowe, p. 36.
63. 539 U.S. 461 (2003).
64. Id. at 490.

Although blacks were a majority of the voting age population in all three districts, the district court held the state failed to carry its burden of proof that the reductions in black voting age population from the benchmark plan would not "decrease minority voters' opportunities to elect candidates of choice."[65] The Supreme Court held that while this factor "is an important one in the § 5 retrogression inquiry," and "remains an integral feature in any § 5 analysis," it "cannot be dispositive or exclusive."[66] The Court held other factors, which in its view the three-judge court should have considered, included: "whether a new plan adds or subtracts 'influence districts'--where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process;" and whether a plan achieves "greater overall representation of a minority group by increasing the number of representatives sympathetic to the interest of minority voters."[67]

The Supreme Court opined that "Georgia likely met its burden of showing nonretrogression," but concluded: "We leave it for the District Court to determine whether Georgia has indeed met its

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65. Georgia v. Ashcroft, 195 F. Supp. 2d 25, 89 (D. D.C. 2002).
66. Id., 539 U.S. at 480, 484, 486.
67. Id. at 482-83.

burden of proof."[68] But before the district court could reconsider and decide the case on remand, a local three-judge court invalidated the senate plan on one person, one vote grounds,[69] and implemented a court ordered plan.[70] As a consequence, the preclearance of the three senate districts at issue in Georgia v. Ashcroft was rendered moot.

The dissent in Georgia v. Ashcroft (Justices Souter, Stevens, Ginsburg and Breyer) argued Section 5 had always meant "that changes must not leave minority voters with less chance to be effective in electing preferred candidates than they were before the change."[71] The dissenters also argued that the majority's "new understanding" of Section 5 failed "to identify or measure the degree of influence necessary to avoid the retrogression the Court nominally retains as the § 5 touchstone."[72]

The majority opinion introduced new, difficult to apply, and contradictory standards. According to the Court, the ability to elect is "important" and "integral," but a court must now also consider the ability to "influence" and elect "sympathetic"

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68. Id. at 487, 489.
69. Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), aff'd 124 S. Ct. 2806 (2004).
70. Larios v. Cox, 314 F. Supp. 2d 1357 (N.D. Ga. 2004).
71. Id. at 494.
72. Id. at 495.

representatives. The Court took a standard that focused on the ability to elect candidates of choice, that was understood and applied, and turned it into something subjective, abstract, and impressionistic. The danger of the Court's opinion is that it may allow states to turn black and other minority voters into second class voters, who can "influence" the election of white candidates but cannot elect candidates of their choice or of their own race. That is a result Section 5 was enacted expressly to avoid.

Georgia v. Ashcroft was decided in 2003, after most of the redistricting following the 2000 census had been completed, but at least one case decided prior to Ashcroft applied an "influence" theory to the serious detriment of minority voters. In 1993, a three-judge court made extensive findings of past and continuing discrimination and extreme racial bloc voting in Rural West Tennessee, but refused to require a majority black senate district in that part of the state because of the existence of three "influence" districts in which blacks were 31% to 33% of the voting age population.[73]

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73. The court's findings are at RWTAAAC v. McWherter, 836 F. Supp. 447, 457, 459, 460-61, 463, 466 (W.D. Tenn. 1993). The court's subsequent refusal to order a remedial plan is at RWTAAAC v. McWherter, 877 F. Supp. 1096 (W.D. Tenn. 1995). The litigation is also discussed in detail in the ACLU's report.

The court acknowledged that as a factual matter blacks did not have the equal opportunity to elect candidates of their choice under the existing senate plan, but it was also of the view that white elected officials were often responsive to the needs of blacks and that "adding an additional majority-minority district in western Tennessee would actually reduce the influence of black voters in the Tennessee Senate." It found "most probative" for this proposition the testimony of a white senator, Stephen Cohen, from west Tennessee concerning passage of a bill to make the birthday of Martin Luther King, Jr. a state holiday.

According to Senator Cohen, the bill passed the state senate by only one vote (17 to 16), with Senator Cohen and another white senator from west Tennessee voting with the majority. Senator Cohen concluded, and the district court found, that the creation of an additional black senate district would cause the election of "at least one more conservative white senator" who "would have been inclined to vote against the Martin Luther King holiday" ensuring that the measure would not have passed.[74] Senator Cohen and the court, however, were mistaken.

According to the Senate Journal, only eight senators voted against the Martin Luther King, Jr. bill, with 18 "Ayes" and six

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74. Id., 887 F. Supp. 1096, 1106 (W.D.Tenn. 1995).

"Present, not voting."[75] The bill would have passed without Senator Cohen's vote. What the court's "influence" theory in fact accomplished was to deprive African American voters in Rural West Tennessee of the opportunity to elect a candidate of their choice to the state senate.

The inherent fallacy of the notion that influence can be a substitute for the ability to elect is apparent from the Shaw v. Reno[76] line of cases, which were brought by whites who were redistricted into majority black districts. Rather than relish the fact that they could "play a substantial, if not decisive, role in the electoral process," and perhaps could achieve "greater overall representation . . . by increasing the number of representatives sympathetic to the[ir] interest," white voters argued that placing them in "influence" districts, i.e., majority black districts, was unconstitutional, and the Supreme Court agreed.[77] In addition, if "influence" were all that it is said to be, whites would be clamoring to be a minority in as many districts as possible. Most white voters would reject such a suggestion out of hand.

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75. Tennessee Senate Journal, May 24, 1984, p. 2831.
76. 509 U.S. 630 (1993).
77. See, e.g., Johnson v. Miller, 515 U.S. 900 (1995). Far from being segregated, as the white plaintiffs maintained, the challenged districts were among the most integrated districts in the nation.

Conclusion

The Supreme Court has called the right to vote "a fundamental political right, because preservative of all rights."[78] The House and Senate bills will help ensure that the fundamental right to vote remains a reality.

[78]. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

Testimony of Theodore M. Shaw
Director-Counsel and President of the NAACP Legal Defense and Educational Fund, Inc.

Before the United States Senate Judiciary Committee

Legislative Hearing on "An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization"

Dirksen Senate Office Building Room 226
Tuesday, May 9, 2006
9:30 a.m.

Section 5 Was Designed to Address Deeply Entrenched Racial Discrimination in Voting

This country's long and difficult struggle to eliminate persistent racial discrimination in voting is well documented. *See e.g. South Carolina v. Katzenbach*, 383 U.S. 301, 310-314 (1966). Despite the enactment of the Fifteenth Amendment and the Enforcement Act of 1870, actions with an "unremitting and ingenious defiance of the constitution" denied the right to vote to African Americans. *Id.* at 309, 311. In fact, despite efforts from all branches of the federal government to eradicate the persistent problem, many states continued this pattern of racial discrimination in voting in the face of the Fifteenth Amendment for over one hundred years. Traditional legal remedies that provided a case-by-case assessment of racial discrimination did not effectively block or deter continued discrimination among states with a persistent history of vote denial because of race. *Id.* at 314. Recognizing the persistent and undeterred circumvention of the Civil War Amendments by some states, Congress reacted decisively in 1965 and committed itself irreversibly to what the Supreme Court has recognized as the "firm intention to *rid* the country of racial discrimination in voting" by enacting the Voting Rights Act ("VRA"). *Id.* at 315 (emphasis added). The expiring enforcement provisions of the VRA have allowed millions of Americans to realize their constitutional right to vote free from racial discrimination. We have not yet eliminated the entrenched discrimination in voting that gave rise to the VRA, and should therefore renew the expiring provisions.

The Voting Rights Act is the Exemplar of Congress's Civil War Amendment Enforcement Power

Congress has the constitutional authority to enact legislation that prevents the denial or abridgement of the right to vote on account of race, color, or previous condition of servitude today as it did in 1965. *See* U.S. Const. 14th Amendment, § 5; 15th Amendment, § 2. It is well settled that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

Arguments by covered jurisdictions inviting the Supreme Court to restrict the power granted to Congress through the Civil War Amendments and circumvent the application of laws designed to remedy racial discrimination in states with a history of discrimination are not new to the Voting Rights Act. *See South Carolina v. Katzenbach*, 383 US. 301 (1966) (upholding several provisions of the VRA against constitutional attack); *City of Rome v. U.S.*, 446 U.S. 156 (1980) (rejecting a § 5 constitutional challenge); and *Lopez v. Monterey*, 525 U.S. 266 (1999) (same). Indeed, these efforts have followed the persistent voting discrimination to which the VRA addresses itself.

This Congress should not retreat from reauthorizing the expiring provisions of the VRA because of what some have called a "New Federalism Revolution." On several occasions, the Supreme Court has addressed concerns of federalism and the application of the VRA and found that "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.' Those Amendments were *specifically designed as an expansion of federal power*

and an intrusion on state sovereignty. Applying this principle, ...Congress had the authority to regulate state and local voting through the provisions of the Voting Rights Act." *City of Rome,* 446 U.S. at 180 (emphasis added).

The VRA is "appropriate legislation." It is a carefully considered Act drafted to remedy a constitutionally grave harm to citizens who live in states with a history and continued evidence of persistent racial discrimination. In providing this protection in covered jurisdictions, Congress has consistently been acutely aware of the balance of federal power in intruding on state sovereignty. The Voting Rights Act always embodied respect for federalism principles even as it imposed its substantial remedies. Indeed, § 5 has always been limited as to scope, duration, and geographic reach. Section 4 incorporates the ability to bail-out from coverage as part of a system of incentives for compliance that is serious but achievable. The built-in periodic reassessments of progress and evaluation of further necessity is unique and well suited to the goal: of eradicating racial discrimination in voting, while also recognizing that its federalism costs require periodic review. *See South Carolina v. Katzenbach*, 383 US. at 315. "Limitations of this kind tend to ensure Congress' means are appropriate to ends legitimate under [the Fourteenth and Fifteenth Amendment]." *See City of Boerne*, 521 U.S. at 533.

Congruence and Proportionality

The "congruence and proportionality" judicial standard enunciated in *City of Boerne*, analyzes whether the "means" are appropriate to "legitimate ends." *See Id.* at 520. *Boerne* and its progeny began to place greater limitations on the enforcement powers of Congress under § 5 of the Fourteenth Amendment, and likely §2 of the Fifteenth Amendment, *see Lopez v.*

Monterey, 525 U.S. at 282-283 (citing *City of Boerne*, 521 U.S. at 518) by requiring that Congress act only after careful assessment and documentation of a problem of constitutional magnitude. *Id.* at 530-532; *Kimel v. Fl. Bd. of Regents,* 528 U.S. 62 (2000); *Bd. of Treasurers of the Univ. of Alabama v. Garrett,* 531 U.S. 356 (2001).

As recent Supreme Court precedents suggest, however, *Boerne* does not condemn all remedial legislation, especially when a Congressional enactment is related to fundamental constitutional rights. *See Lopez v. Monterey*, 525 U.S. 266 (1999) (upholding § 5 of the Voting Rights Act against federalism challenge in factual circumstances presenting clear federalism costs); *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (upholding the FMLA against a *Boerne* challenge); *Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding Title II of the ADA against a *Boerne* challenge).

Consequently, while it is important for this Congress to take the *Boerne* cases into account in its deliberations and decision making, the limits of the *Boerne* doctrine must also be recognized: (1) the metes and bounds of the doctrine developed from *Boerne* through *Lane* and *U.S. v. Georgia*, do not provide crystal-clear legislative and decisional rules for Congress to follow; (2) Congress should not lightly assume that *Boerne* will be extended to reverse rulings from *Katzenbach* to *Lopez*, since in those decisions and in *Boerne* itself the Court recognized that when it enacted the VRA to protect the right to vote against racial discrimination, Congress's powers were at their "zenith"; and (3) when enacting remedial legislation that reaches individuals in classes afforded a heightened level of constitutional scrutiny, such as those defined by race or gender, "it is easier" for Congress to develop an adequate supportive record. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. at 735; *see also Tennessee v. Lane*, 541 U.S. at 529. This

is consistent with the Court's recognition of the permitted intrusion into state sovereignty intended under the Fifteenth Amendment. *Lopez v. Monterey* at 285. Even under the *Boerne* decision it remains the case that the "appropriateness of the remedial measures must be considered in light of the evil presented ...." *Boerne,* 521 U.S. at 530 (*citing Katzenbach,* 383 U.S. at 308).

In the face of some uncertainty, it stands to reason that *Lopez v. Monterey Cty.*, the only case involving a post-*Boerne* challenge to § 5 is the most instructive case on the appropriate analysis of § 5 of the Voting Rights Act under *Boerne* and its progeny. 525 U.S. 266 (1999). In *Lopez*, the Supreme Court upheld the constitutionality of the § 5 preclearance provisions in the context of the substantial "federalism costs" of preclearance. *Id.* at 269. The Court again noted that *Boerne* recognized Congress's considerable enforcement power even if, in the process, Congress prohibits conduct that "is not itself constitutional and intrudes into legislative spheres of autonomy previously reserved to the states." *Id.* at 282-283; *see also Tennessee v. Lane*, 541 U.S. at 520. This prophylactic dimension of Congress's enforcement powers was previously explained by Congress in the 1982 renewal of the Voting Rights Act. *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986).

Boerne's Evidentiary Standard

"As a general matter, it is for Congress to determine the method by which it will reach a decision" to enact remedial legislation. *City of Boerne*, 521 U.S. at 532. The method Congress ultimately uses to reach a decision is granted broader latitude when Congress acts pursuant to the enforcement power provisions to remedy racial discrimination. *See Nevada Dep't of Human*

Resources v. Hibbs, 38 U.S. 721, 735 (2003). The Supreme Court has focused on the detail of evidence in the record in some cases. *Kimel v. Fl. Bd. of Regents,* 528 U.S. 62 (2000); *Bd of Treasurers of the Univ. of Alabama v. Garrett,* 531 U.S. 356 (2001). However, in the case of protected categories subject to heightened scrutiny (*i.e.*, race and gender), the Court has upheld legislation based upon a record sufficient to identify the existence of discriminatory practices without requiring a threshold quantum of evidence from different jurisdictions. *Hibbs*, 58 U.S. at 735 (noting "important shortcomings of *some* state policies") (emphasis added).

Although the Supreme Court has not clearly established the requisite quantum of evidence, or exactly what form such evidence must take, *compare Treasurers of the Univ. of Alabama v. Garrett*, 531 U.S. 356 *with Nevada Dep't of Human Resources v. Hibbs,* 38 U.S. 721, recent precedents show that the body of evidence before Congress is appropriate in quantity, relevance, and focus. *See e.g. Tennessee v. Lane*, 541 U.S. at 558, *Nevada Dep't of Human Resources v. Hibbs*, 38 U.S. at 730. "Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionality appointed to decide.'" *Boerne* at 531-532. Here, the purpose of the Voting Rights Act is to eradicate racial discrimination in voting under the Fifteenth Amendment to the Constitution. This body is well within the scope of its power in deciding the appropriate means to remedy past violations and prevent future violations of the Fifteenth Amendment. Indeed, a fair reading of the Constitution supports the proposition that Congress's unique fact-finding expertise make it not only better situated to study a problem as fact finder but also better situated to assess what evidence most fully illuminates the dimensions of a constitutional problem.

After Boerne the Principal Constitutional Question Attending the VRA Renewal Is Whether Evidence of Continuing Discrimination Exists In Covered Jurisdictions

There is great deal of attention on the § 4 trigger which causes some to focus solely upon the legislative formula (use of a test or device plus turnout or registration below 50%) that was employed to determine the geographic scope of § 5 preclearance. The triggering formula, however, was a legislative proxy employed by Congress to reach many but by no means all of the jurisdictions that had serious histories of voting discrimination. The trigger has been upheld against constitutional challenge by the Supreme Court, *see Katzenbach,* and subsequent cases have not disturbed the ruling. *See Lopez*, 525 U.S. 266 (1999). The question that Congress must answer to its satisfaction is not what the trigger is or has been, but rather whether the record of discrimination compiled demonstrates that the problems of unlawful discrimination in voting persist in the covered jurisdictions. Although *Katzenbach,* and the authorities relied upon therein, stand for the proposition that Congress–in its discretion–need not address all facets of a problem at once or in precisely the same way, it must show the persistence of a pattern of discrimination sufficient to justify the continued use of its enforcement powers under the Civil War Amendments.

Moreover, in contrast to some of the statutes that have fallen under *Boerne* and its progeny, Congress is not now faced with new legislation designed to remedy a problem without established historical and jurisprudential precedent. The history and pattern of discrimination that Congress has examined in previous renewals is itself relevant to its decision as are the successes that § 5 has yielded where earlier legislative efforts failed.

The Efficacy of § 5 Justifies Renewal

The VRA was drafted to *rid* the country of racial discrimination – not simply to *reduce* racial discrimination in voting to what some view as a tolerable level. *See South Carolina v. Katzenbach*, 383 U.S. at 315 (emphasis added). This Congress need not draw the conclusion that improvements in the area of racial discrimination in voting, facilitated by § 5 and other VRA provisions provide the basis for weakening the effect of the Act in the face of continuing discrimination in voting. (*See e.g. LCCR Voting Rights in Louisiana: 1982-2006,* submitted to the House Judiciary Subcommittee on the Constitution, describing the State's modern experience with discrimination under the VRA, prepared by NAACP LDF).

Congress's retreat from enforcement of the Fifteenth Amendment in the 1870s led to a century of persistent discrimination that was not addressed in any meaningful sense until 1965. As we evaluate the improvements in political access enabled by the VRA, we cannot justify a retreat from the remedial and prophylactic VRA when there is still demonstrable evidence of racial discrimination. The record before Congress evidences continued discrimination in voting in the covered jurisdictions. The above-cited report is but one example of that evidence.

The record made in the House of Representatives includes substantial documentation of the persistence of intentional discrimination by state and local officials in § 5-covered jurisdictions. In the various State reports, in testimony at Subcommittee hearings, in the report of the National Commission on the Voting Rights Act, and in other materials that are a part of the record there are descriptions of both court rulings and § 5 objection letters that find discriminatory "purpose" as well as "effect" in voting changes under review.

There is also evidence of dilutive redistricting plans. As the Supreme Court has

recognized, the redistricting process has, since the mid-1980s and unquestionably since the 1990 Census, been permeated with information about racial composition of census divisions and election districts that are the standard building blocks for districting plans, so that legislative bodies are always aware of the racial impact of the plans they are drawing. Retrogressive and dilutive results of modern redistrictings are evidence of purposeful discrimination, just as in an earlier era — when such detailed, easily manipulable, information was less common — the "uncouth twenty-eight-sided figure" defining the redrawn boundaries of Tuskegee, Alabama so as "to remove from the city all save only four or five of its 400 [previous] Negro voters while not removing a single white voter or resident" was conclusive evidence of unconstitutional discrimination. *Gomilllion v. Lightfoot*, 364 U.S. 339 (1961).

Therefore, the suggestion that intentionally discriminatory conduct has disappeared from the voting arena in covered jurisdictions to such an extent that § 5 protections are no longer necessary, rests upon some unrealistically narrow definition of what constitutes "intentional discrimination." As Professor Hasen puts it: "Bull Connor is dead." But make no mistake about whether future generations have learned to act intentionally to achieve discriminatory and retrogressive results without openly admitting their purposes — because, in the words of the late Justice Harry Blackmun, "it is no longer fashionable to be a racist."

The Attorney General's Pre-Bossier II Standards for Detecting Discriminatory Purpose

Under well-established Supreme Court precedent, the discriminatory effect of a voting change sheds light on the purpose for which it is enacted. *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) [hereinafter Bossier *II]*. Moreover, in the circumstances presented by the

current renewal, where Congress is evaluating the necessity for continued and remedial prophylactic legislation, its long experience with the persistence and adaptability of voting discrimination places discriminatory voting effects relevant to Congress's inquiry. As the Senate Report accompanying the 1982 reenactment of the VRA explained, Congress intended the Act "to create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally." S. Rep. No. 417 at 5.

From the time of the 1982 reenactment of § 5 until the Supreme Court's decision in *Bossier II*, the Supreme Court consistently held that § 5 should be interpreted so as to enforce the constitutional prohibitions against voting changes enacted with racially discriminatory purpose.1/ Similarly, prior to *Bossier II*, in over 30 years of enforcement of the Voting Rights Act the United States Department of Justice ("DOJ") had consistently read § 5 to require covered jurisdictions to show that their voting changes were enacted without an unconstitutionally discriminatory purpose.2/ The DOJ had never limited its purpose analysis to a search for

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1/ See, e.g., *City of Pleasant Grove*, 479 U.S. 463; (reiterating that a covered jurisdiction has the burden to prove "the absence of discriminatory purpose" on its part); *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 159 (1983)(a reapportionment plan is unconstitutional if it is adopted with an invidious discriminatory purpose constituting a denial of equal protection, and if racial purpose has been a motivating factor in the decision, the state has unconstitutionally denied black citizens equal protection); *City of Rome v. United States*, 446 U.S. 169, 176-179 (1980)(by describing in § 5 the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless both discriminatory purpose and effect are absent.); *City of Richmond v. United States*, 422 U.S. 358, 378-79 (1975) (annexations animated by discriminatory purpose have no credentials whatsoever for actions generally lawful may become unlawful when done to accomplish an unlawful end).

2/ *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (Section 5 was intended to prevent covered jurisdictions from "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination"; Court explained that Congress enacted the extraordinary preclearance mechanism in Section 5 because it had reason to suppose that covered jurisdictions might try similar maneuvers in the future in order to evade the remedies for voting discrimination

"retrogressive intent." Instead, guidelines indicated that "the Attorney General [] consider[s] whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution." 28 C.F.R. § 51.55(a).

Senate Bill 2703 would restore § 5 to the pre-*Bossier II* standard and allow the DOJ to continue making preclearance determinations in a manner that is consistent with both constitutional prohibitions against discriminatory voting practices and the original legislative intent underlying the 1965 enactment of the VRA. Once that standard is restored, both judicial and administrative preclearance determinations will appropriately turn to, and rely upon, the Supreme Court guideposts for evaluating discrimination. Indeed, in the earlier *Bossier Parish* case, *United States v. Bossier Parish School Board*, 520 U.S. 471 (1998), the Supreme Court confirmed that *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), provides the appropriate analytical framework for weighing circumstantial evidence and determining whether invidious discriminatory purpose infected the adoption of a particular voting change. The *Arlington Heights* framework requires careful consideration of whether the "the impact of the official action" "bears more heavily on one race than another," the historical background of the jurisdiction's decision, the sequence of events leading to the challenged action, legislative history and departures from normal procedural sequences and contemporary statements by members of the decision making body. *Arlington Heights*, 429 U.S. at 266-68. Numerous cases arising under § 5 have approved of or adapted this standard to help ferret out

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contained in the Act itself.).

discriminatory intent in the § 5 process.3/

The DOJ, adopting an analytical approach that mirrors that of the courts in this context, has successfully employed the *Arlington Heights* test to ferret out those voting changes infected with discriminatory purpose. With respect to redistricting submissions, in conducting an analysis under *Arlington Heights* factors, the DOJ has traditionally analyzed the following factors (28 C.F.R. § 51.59):

> (a) the extent to which malapportioned districts deny or abridge the right to vote of minority citizens;
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> (b) the extent to which minority voting strength is diminished or reduced by the proposed redistricting;
>
> (c) the extent to which groups of concentrated minority voters are fragmented among different districts;
>
> (d) the extent to which minority voters are packed or over-concentrated into one or more districts;
>
> (e) whether or not alternative plans were considered that satisfy the jurisdiction's legitimate redistricting goals and governmental interests;
>
> (f) the extent to which the redistricting plan departs from objective redistricting criteria, and ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards natural or artificial boundaries; and
>
> (g) the extent to which the plan is inconsistent with the redistricting goals defined by the jurisdiction.
> (28 C.F.R. § 51.60).

Most recently, in April 2005, the DOJ utilized the *Arlington Heights* framework in

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3/ See, e.g., *Reno v. Bossier Parish Sch. Bd.*, 117 S. Ct. 1491 (1997) (applying the *Arlington Heights* test to assess whether a voting system was enacted for a discriminatory purpose); *City of Pleasant Grove v. U.S.*, 479 U.S. 462, 478 (1987) (approving use of *Arlington Heights* as tool to prove purposeful discrimination in the voting context); *U.J.O. of Williamsburgh v. Carey*, 430 U.S. 144 (1977) (noting that the *Arlington Heights* factors are probative evidence of purposeful discrimination).

determining that the redistricting plan for the Town of Delhi, Louisiana, was not entitled to preclearance. Employing the analytical framework of *Arlington Heights*, the DOJ denied preclearance after determining that the plan was motivated by an intent to retrogress. The DOJ determined that town officials sought to worsen the position of minority voters by looking first to the historical background of the City's decision, which revealed that the plan was adopted despite steadily increasing growth in the Town's Black population. In addition, the DOJ noted that: the redistricting was not driven by any constitutional or statistical necessity; that the board rejected a less-retrogressive alternative plan that complied with traditional redistricting principles; that the resulting retrogression was avoidable; and that the plan was adopted despite the counsel of the Town's demographer who noted the retrogressive effect of the plan.

The DOJ's past and present use of the *Arlington Heights* framework to identify those instances in which discriminatory purpose infects a proposed voting change makes clear that there is an objective and workable standard, sanctioned by the Supreme Court, to ferret out those changes enacted with an unconstitutional discriminatory purpose. The proposed legislation will restore the muscle of § 5 which has long stood as one of the federal government's principal weapons in its arsenal against unconstitutional racial discrimination in voting. The *Arlington Heights* framework has provided, and would continue to provide under the pending bill, the contours around which both courts and the DOJ can analyze and detect unconstitutional discriminatory purpose.

The Necessity of Restoring the "Ability to Elect" Standard in Response to Georgia v. Ashcroft

Moreover, the proposed legislation would appropriately restore the cornerstone of § 5

retrogression analysis which has long looked to ensure that voting changes do not disturb pre-existing levels of minority voting strength. The level of the minority community's voting strength under benchmark and proposed plans has historically been measured by objectively examining and quantifying the minority community's ability to elect candidates of choice. Thus, the proposed legislation restores the tangible "opportunity to elect" standard and does not allow jurisdictions to cloak intentional discrimination under the intangible framework set forth by *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

This particular aspect of the bill will prevent jurisdictions from undermining the benchmark while protecting minority voters from unconstitutional retrenchment in political gains. Further, the bill will make it more practical for D.C. District Court to adjudicate, and the DOJ to administer, the retrogression provisions of § 5. Finally, the proposed legislation should not be viewed as overturning the *Georgia v. Ashcroft* ruling in its entirety. It would restore, as a minimum standard, the objectively-verifiable and tangible "ability to elect" principle that has long been the fundamental feature of § 5 analysis, while leaving open, to further consideration, the additional aspects of participation in the political process catalogued in the *Georgia v. Ashcroft* opinion.

Congress has the constitutionally derived power to renew the expiring provisions of the VRA, and the record illustrates that is the wisest course. The NAACP Legal Defense and Educational Fund, Inc. supports renewal and restoration of the expiring provisions of the Voting Rights Act and urges passage of the pending bill in the present form.

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